Judge Kavanaugh sides 89% of the time for less clean air and water - Summary of cases involving the Environmental Protection Agency

cross-reference to CRS case summaries here: https://fas.org/sgp/crs/misc/R45269.pdf with CRS page #s listed below.		List of 26 cases with written opinions, concurrences & dissents by Judge Kavanaugh involving Environmental Protection Agency	"X" indicates opinion reached substance; "Red" = side of less clean air/water; "green" = side of more clean air/water; "Grey" = procedurual outcome				Summary of Judge Kavanaugh's opinions and notes on judicial philosophy
			sided w/ public interest plaintiff		sided w/ industry plaintiff		
			yes	no	yes	no	
1	pg 18	American Road and Transportation Builders Association v EPA, 705 F.3d 453 (D.C. Cir. 2013)					**Majority opinion** - dismissed an industry lawsuit on procedural grounds (venue), noting the statute was clear that only "nationally applicable regulations" can be filed in the D.C. Circuit, so the California "State Implementation Plan" should be filed there; and time-barred
2	pg 46	Am. Trucking Ass'ns v. EPA, 600 F.3d 624 (D.C. Cir 2010)				X	**Majority opinion -** upheld the EPA's emissions limits for non-road engines on the grounds that the "Clean Air Act assigns California… and not the (EPA) the primary role in setting limits on emissions from in-use non-road engines" and that "EPA must approve" the California regulation unless EPA can show California failed to support its rule under three criteria, which he found EPA did not do. This case shows the tension between Judge Kavanaugh's tendency to side with industry and his judicial philosophy of contraining agencies' authority.
3	pg 6	Americans for Clean Energy v. Environmental Protection Agency, 864 F.3d 691 2017			X		**Majority Opinion** - sided with industry in vacating an EPA rule on renewable fuels because "EPA exceeded its authority under the 'inadequate domestic supply' provision when it interpreted the term 'supply' to allow it to consider demand-side constraints in the market for renewable fuels."
4	pg 75	Center for Biological Diversity v. EPA, 722 F.3d 401, 2013 WL 3481511 (2013)		X			**Dissent masquarading as concurrence -** he joins the majority on the grounds that controlling precedent dictates it and that EPA lacks the statutory authority to temporarily exempt biogenic CO2 (in this case from ethanol) from permitting programs because the Clean Air Act text is clear (in not distinguishing between sources of CO2), but writes a concurrence that reads more like a dissent to underscore his continued belief that EPA should have a limited ability to interpret the Clean Air Act, and arguing EPA "simply lacks statutory authority" to regulate greenhouse gases at all in the action it took, citing, and re-arguing his anti-environmental dissent Coalition for Responsible Regulation, 684 F.3d at 144 (2012) ("I have mixed feelings about this case…I believe, contrary to this Circuit's precedent, that the PSD statute does not cover carbon dioxide, whether biogenic or not."
5	pg 8	Ctr. for Regulatory Reasonableness v. U.S. Envtl. Protection Agency, 849 F.3d 453 (D.C. Cir. 2017)					**Majority opinion -** dismissed for lack of jurisdiction
6	pg 80	Coal. for Responsible Regulation Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012)			X		***Dissent -*** The CAA term "any air pollutant" does not mean what it says; instead, it *excludes* greenhouse gases *and every other air pollutant* except for just six pollutants that Judge Kavanaugh believes should be regulated under the section. He argued that to read the law as Congress wrote it would "impose significantly higher costs on businesses and individuals that are building new commercial or residential property."
7	pg 15	Communities for a Better Environment v. EPA, 748 F.3d 333 (D.C. Cir. 2014)		X			**Majority opinion -** EPA did not have to review and strengthen primary air quality standards for carbon monoxide.
8	pg 44	EME Homer City Generation, L.P. v. EPA, 696 F.3d 7 (D.C. Cir. 2012) rev'd EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584 (2014) remanded EME Homer City Generation, L.P v. EPA, 795 F.3d 118 (2015)			X		***Majority Opinion – reversed by Supreme Court*)**. EPA cannot impose reasonable and achievable pollution reduction obligations on upwind states whose pollution discharges contribute to dangerous air quality in downwind states. (After Supreme Court reversal, he again rejected this life-saving rule in state-by-state "as-applied" challenges).
9	pg 10	EME Homer City Generation, L.P v. EPA, 795 F.3d 118 (2015)			X		**Majority opinion -** on remand, again rejected this life-saving rule in state-by-state "as-applied" challenges
10	pg 11	Energy Future Coalition v. E.P.A., 793 F.3d 141 (D.C. Cir. 2015)		X			**Majority opinion -** upheld regulation requiring biofuels to be "commercially available" before being tested as replacements, which had the effect of impeding market access to petroleum based gasoline alternatives
11	pg 7	Envtl. Integrity Project v. Envtl. Protection Agency, 864 F.3d 648 (D.C. Cir. 2017)					**Majority opinion -** EPA was correct in denying FOIA request of environmental groups seeking to understand Clean Water Act rulemaking, making agency rule-making process more opaque and limiting public participation
12	pg 81	Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169 (D.C. Cir 2012)					**Dissent** - Manufacturers of processed foods had standing to challenge EPA's approval of certain ethanol-containing gasoline blends based on a mere likelihood of increased corn prices, even without quantification of the speculative economic injury.

13	pg 79	Grocery Mfrs. Ass'n v EPA, 704 F.3d 1005 (D.C. Cir 2013)			X		**Dissent from denial of rehearing en banc -** Kavanaugh stated the dismissal for lack of standing was outcome-determinative because "EPA will lose if we reach the merits. The E15 waiver plainly violates the statutory text."
14	pg 41	Honeywell Intern., Inc. v EPA, 705 F.3d 470 (D.C. Cir. 2013)					**Majority opinion -** He notes that the court "must adhere to circuit precedent" while ruling againt one manufacturer in favor of another; also manufacturers suffered injury in fact that was concrete and particularized and fairly traceable;
15	pg 93	Howmet Corp. v. Envtl. Protection Agency, 614 F.3d 544 (D.C.Cir. 2010)			X		**Dissent -** in EPA enforcement case under RCRA, Kavanaugh argued EPA's interpretation of statute stretched its authority too far and "courts must not permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation."
16	pg 38	In re Murray Energy Corp., 788 F.3d 330 (D.C. Cir. 2015)					**Majority opinion -** Industry filed a legal challenge to the Clean Power Plan before there was a final agency action (final rule), so the case was "non-justiciable."
17	pg 33	Mexichem Fluor, Inc. v. EPA, 866 F.3d 451 (D.C. Cir. 2017)			X		***Majority Opinion -*** EPA's statutory authority to require manufacturers to "replace" ozone-depleting chemicals in their products is unambiguously limited to a one-time power, and EPA cannot require subsequent replacements no matter how harmful the initial replacements are discovered to be.
18	pg 66	Mexichem Specialty Resins, Inc. v. E.P.A., 787 F.3d 544 (D.C. Cir. 2015)			X		**Dissent -** argues industry has likelihood of success on the merits and EPA rule imposing wasterwater pollution limits should be stayed
19	pg 62	Mingo Logan Coal Co. v. EPA, 829 F.3d 710 (D.C. Cir. 2016)			X		***Dissent –*** Arguing that EPA should have considered cost to coal companies when vetoing a permit that would have allowed those companies to dump mining wastes into waterways -- even though the legal provision does not mention costs, and such dumping is in direct conflict with the law's goal of protecting America's rivers and streams.
20	pg 14	National Association of Manufacturers v. EPA, 750 F.3d 921 (D.C. Cir. 2014).				X	**Majority opinion -** while Judge Kavanaugh ruled against an industry challenge to a CAA case involving particulate pollution, he did so arguing the agency did not have a high bar for explaining itself to the public or for asking for public comments. This case shows the tension between Judge Kavanaugh's tendency to side with industry and his judicial philosophy of constraining public participation in rule-making. The end result is to water down notice-and-comment rule-making which makes agency processes more opaque and undermines the ability to hold agencies accountablity.
21	pg 13	Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243 (D.C. Cir. 2014)					**Majority Opinion -** Judge Kavanaugh ruled that EPA-Army Corps of Engineers guidance document on agreeing to a process for Clean Water Act coordination was not a final agency action subject to judicial review.
22	pg 14	Natural Resources Defense Council v. EPA, 749 F.3d 1055 (D.C. Cir. 2014)		X			**Majority opinion -** Judge Kavanaugh ruled against the public interest plaintiffs ***on all three substantive claims*** including his finding that it was okay for EPA to promulgate a rule that weakened a prior more stringent air quality standard, that it was okay for EPA to consider cost-effectiveness when setting "beyond-the-floor" particulate matter standards, thus leading to a weaker rule causing more pollution; and it was okay for EPA to extend a compliance date on a stricter pollution standard. On the *one procedural* point Judge Kavanaugh sides with the conservation groups, it was to find that EPA exceeded its statutory authority in deciding "affirmative defenses" to citizen suits, because that is something "for the courts to decide" not the agency.
23	pg 99	Sierra Club v. EPA, 536 F.3d 673 (D.C. Cir. 2008)		X			**Dissent -**argued state and local authorities could not impose more stringent air-quality monitoring requirements
24	pg 74	Texas v. EPA, 726 F.3d 180 (D.C. Cir. 2013)			X		**dissent -** would have struck down EPA permitting requirements for large construction projects of major sources of greenhouse gases, such as factories.
25	pg 71	Util. Air Regulatory Grp. v. Envtl. Protection Agency, 744 F.3d 741 (D.C. Cir. 2014)					**Concur -** the majority opinion Judge Kavanaugh joined was simply focused on limiting judicial review of the industry claim because the industry group had failed to "make … objections during the public comment period."
26	pg 70	White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222 (D.C. Cir. 2014), rev'd sub nom. Mich. v. EPA, 135 S. Ct. 2699 (2015)			X		***Dissent -*** EPA is required to consider costs to industry in each step of its decision-making process for regulations, including whether to regulate a pollutant at all, even where the statute makes no mention of cost. Judge Kavanaugh further argues that agencies should be *forced to ignore* certain of the real world benefits of regulatory actions when weighing the costs and benefits.
			0	5	11	2	

By the Numbers: *Judge Kavanaugh sides 89% of the time for less clean air and water. In his 26 EPA cases, there are 18 cases in which he weighs in on EPA's regulations to prevent pollution and protect the public's clean air and water. In 16 of those cases, he sides with the outcome that results in less protection, and more pollution, and only two cases where he upholds a protection from being stuck down. In these 18 cases, public interest plaintiffs are 0-5 under Kavanaugh's legal theories, while industry plaintiffs have an 11-2 record.*