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West Virginia v. EPA: The Supreme Court's Decision and Paths for Future Climate Regulation

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Introduction

On June 30, 2022, the U.S. Supreme Court issued a decision in the case [*West Virginia v. the Environmental Protection Agency*](#) (EPA), restricting the Agency's authority to regulate greenhouse gas emissions from power plants under the Clean Air Act. Decided 6-3 by the conservative majority, the Court's ruling will have significant long-term impacts on the federal government's ability to respond to the climate crisis, including President Biden's goal to reduce U.S. carbon emissions by 50% by 2035. Currently, the power sector [represents 25%](#) of total greenhouse gas emissions in the U.S. Its rapid decarbonization is pivotal to meeting the 2015 Paris Agreement's goal of restricting global warming to 1.5°C above pre-industrial temperatures.

The Clean Air Act: An Overview

The Clean Air Act requires the EPA to establish minimum national standards for air quality and requires states to adopt enforceable plans to achieve the standards. First passed in 1963, Congress established the law's basic structure in the Clean Air Act Amendments of 1970. Congress then made significant revisions to the Act in 1977 and 1990. Since then, air quality has vastly improved across the country. In some areas, ambient measures of pollutants have fallen more than 90%. Today, the [annual benefits](#) from cleaner air are estimated to include 370,000 avoided premature deaths, 189,000 fewer hospital admissions for cardiac and respiratory illnesses, and net economic benefits of up to \$3.8 trillion for the U.S. economy.

Specifically, the Clean Air Act directs the EPA to regulate both mobile and stationary sources of pollution.¹ At issue in *West Virginia v. EPA* was EPA's regulation of [stationary sources](#) of pollution, which include factories, refineries, and power plants. With the passage of the Clean Air Act, Congress gave EPA broad authority to regulate

¹ The EPA regulates emissions of air pollution from both mobile and stationary sources under the Clean Air Act. Stationary sources facilities such as factories and power plants, while mobile sources include cars, trucks, planes, trains, and ships.

any stationary source that "causes, or contributes significantly to, air pollution" and that "may reasonably be anticipated to endanger public health or welfare."²

Figure 1

Major components of
THE CLEAN AIR ACT

- **Title I: National Ambient Air Quality Standards (NAAQS)**
 - **New Source Performance Standards (NSPS)**
 - **NSR/Prevention of Significant Deterioration (PSD)**
 - **State Implementation Plans**
- **Title II: Mobile Sources and Clean Fuels**
- **Title III: Hazardous Air Pollutants (HAPs)**
 - **MACT/NESHAPs**
- **Title IV: Acid Deposition Control**
- **Title V: Operating Permits**
- **Title VI: Stratospheric Ozone Protection**

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The Clean Power Plan: An Overview

In 2015, the Obama Administration EPA issued the Carbon Pollution Standard for new power plants and the [Clean Power Plan](#) (CPP) for existing power plants under Sections 111(b) and (d) of the Clean Air Act. These rules established the first-ever national standards to address greenhouse gas emissions from power plants. Before the CPP, the EPA had regulated pollution from individual power plants but never embraced a system-wide approach. The CPP set flexible standards that allowed each state to design its own plan to transition toward a clean electricity system. Importantly, the CPP did not establish plant-specific performance standards. Instead, it provided guidance to states on the multiple ways that they could structure their plans and emissions limits. Under the CPP, the EPA determined that the "best system of emissions reduction" (BSER) for reducing greenhouse gas emissions from power plants consisted of three building blocks:

² 42 U.S.C. § 7411(b)(1)(A).

- (1) Reducing the carbon intensity of electricity generation by improving the heat rate of existing coal-fired power plants.
- (2) Shifting generation to lower-emitting natural gas plants from higher-emitting coal-fired power plants.
- (3) Shifting generation to renewable energy sources (e.g., wind and solar) from existing coal-fired power plants.

Under the CPP, states would have eight years to develop their strategies and coordinate with the power generating sector before enforceable carbon pollution standards were phased in, beginning in 2022. These enforceable standards would go into full effect by 2030. Moreover, each state had a different goal based on its own particular energy mix. According to EPA projections, the CPP would have cut national power sector emissions by [32% relative to 2005 levels](#) — equivalent to canceling out the annual emissions from more than 166 million cars, or 70% of the nation's passenger vehicles.

The legal authority for CPP was based on the EPA's science-based "[Endangerment Finding](#)," which was issued in 2009 affirming that the buildup of heat-trapping greenhouse gasses in the atmosphere endangers public health and welfare. The EPA's Endangerment Finding was, in turn, based on the Supreme Court's landmark 2007 decision in [Massachusetts v. EPA](#), holding that greenhouse gasses are air pollutants covered by the Clean Air Act.³

West Virginia v. EPA: Explained

In 2015, West Virginia and a group of states [challenged](#) the CPP's "generation shifting" approach to power sector emissions reductions.⁴ At issue in *West Virginia v. EPA* was whether the EPA had the authority to regulate power plant emissions "beyond the fenceline" — meaning a system-wide approach versus plant-by-plant — under Section 111(d) of the Clean Air Act.⁵ In 2016, the Supreme Court issued an unprecedented [stay](#) — preventing the policy from going into effect — of the CPP while litigation was ongoing. This was the first time the Supreme Court ever issued a stay of a regulation before an initial review by a lower federal court. The litigation was put on hold when Trump came into office.

The Trump Administration EPA repealed the Clean Power Plan and replaced it with the Affordable Clean Energy (ACE) rule. Environmental groups and a coalition of states challenged the CPP repeal and ACE in the U.S. Court of Appeals for the D.C. Circuit, which invalidated those actions, holding that the Trump EPA misinterpreted the Clean Air Act. Coal companies and a coalition of states led by West Virginia sought review in the Supreme Court, which agreed to hear the case in 2021. The Supreme Court's decision to hear the case was especially controversial given that

³ *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007) ("[G]reenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant.'").

⁴ See docket for *West Virginia v. EPA*, 596 U.S. ____ (2022).

⁵ § 7411(d).

there was no EPA rule in place for the Court to review.⁶ To bring a lawsuit in federal court, plaintiffs must establish they have “[standing](#).” Standing requires that a party show that they have been injured, that the person or institution they are suing caused the injury, and that the courts can redress the injury.⁷ As the [New York Times](#) wrote, “it’s a case about a regulation that doesn’t exist.”

The Supreme Court's final decision eroded the EPA's authority to regulate greenhouse gas emissions, but did so by narrowly interpreting Section 111(d) of the Clean Air Act. In the majority's view, CPP's system-wide approach to reducing power plant pollution violated the Clean Air Act. According to the Supreme Court:

Prior to 2015, the "EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly...It had never devised a cap by looking to a 'system' that would reduce pollution simply by 'shifting' polluting activity 'from dirtier to cleaner sources.'"⁸

The Supreme Court also found it “highly unlikely” that Congress would leave to the EPA “the decision of how much coal-based generation there should be over the coming decades.”⁹ Unlike the CPP, the Court found that previous examples of EPA implementing cap-and-trade type systems were either expressly authorized by Congress (e.g., the acid rain program) or based on goals achievable by existing sources (e.g., the mercury rule).

While the Supreme Court's decision in *West Virginia v. EPA* sets a troubling precedent, it was not the [worst-case scenario](#). Specifically, the Court's decision *did not* eliminate EPA's authority to regulate greenhouse gas emissions under Section 111 or any other section of the Clean Air Act. Using direct pollution controls, the EPA can still regulate carbon pollution from power plants at the individual level. Similarly, the EPA can still regulate conventional pollutants from power plants as well as greenhouse gas emissions from mobile sources and other stationary sources, including methane emissions from oil and gas wells. The EPA can and must continue to regulate these emissions. President Biden also retains ample executive authority, including the power to declare a climate emergency to more quickly transition the U.S. away from fossil fuels and towards a 100% clean energy economy.

Major Questions Doctrine

In *West Virginia v. EPA*, the Supreme Court applied the so-called “[major questions doctrine](#),” a conservative legal theory asserting that federal agencies need explicit authorization from Congress to regulate issues of “major economic and political

⁶ The ACE rule's guidelines for emissions reduction ranges were non-mandatory and the EPA predicted that the ACE rule would reduce carbon dioxide emissions by less than 1% by 2035.

⁷ *Lujan v. Defenders of Wildlife* (90-1424), 504 U.S. 555 (1992).

⁸ *West Virginia v. EPA* at p. 21.

⁹ *West Virginia v. EPA* at p. 25.

significance.”¹⁰ The majority opinion, authored by Chief Justice John Roberts, stated: “A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.”¹¹ While the Supreme Court refrained from reviving the [non-delegation doctrine](#) — a radical theory that Congress cannot delegate to the executive branch *any* of the powers the Constitution gives to Congress — its reliance on the major questions doctrine is nonetheless troubling. The major questions doctrine was most recently used to invalidate OSHA’s workplace vaccination rule and could endanger future environmental, labor, public health, and financial regulations.

The Future of Climate Regulation

As noted above, although the Supreme Court's decision eroded the EPA's authority to regulate greenhouse gas emissions, it did not eliminate it. Given such a narrow ruling, President Biden and the EPA must continue to regulate greenhouse gas emissions aggressively and must avoid the pitfall of [clipping its own wings](#). The worst mistake agencies can make is assuming that a hostile judiciary will scrutinize every regulation — after all, the Supreme Court only takes an average of [60 cases](#) per year. Even if the Supreme Court stepped up its use of the shadow docket to constrain agencies, the vast majority of regulations would go unreviewed. By acting aggressively, the EPA and other agencies can maximize their chances of making progress addressing the climate crisis.

Concerning specific regulations, the EPA retains authority to take the following actions to address the climate crisis:

- (1) Establish rules to directly regulate pollution from new [gas-fired power plants](#), the country's leading source of electricity, under Section 111(b) of the Clean Air Act. These "inside the fence" regulations would apply to the [200](#) new gas-fired power plants planned or in construction across the U.S.
- (2) Finalize a new rule determining a new "best system of emissions reduction" for existing power plants under Section 111(d) of the Clean Air Act. While such a system cannot *force* states to use generation shifting, EPA could still potentially provide states the option to *choose* generation shifting as a strategy to achieve EPA’s pollution reduction targets.
- (3) Update the National Ambient Air Quality Standards (NAAQS) for [ozone and particulate matter](#) (i.e., soot and PM2.5).
- (4) Establish a stronger [Mercury and Air Toxics Standard](#) (MATS) rule limiting mercury, arsenic, and other toxic pollution from coal plants.

¹⁰ See *e.g.*, the dissent of Chief Justice John Roberts in *City of Arlington v. FCC* 569 US 290, 4 (2013) ("the danger posed by the growing power of the administrative state cannot be dismissed.").

¹¹ See *also*, the concurrence of Associate Justice Gorsuch in *West Virginia v. EPA*, 596 U.S. ____ (2022), which defines a “major question” very broadly.

- (5) Establish new fuel economy standards for [light-duty vehicles](#) (i.e., CAFE standards) beginning in 2027 to accelerate the transition to 100% zero-emission vehicles.
- (6) Finalize the Nitrogen Oxide (NOx) emission standards for heavy-duty vehicles and the "[Clean Trucks Plan](#)."
- (7) Develop new Clean Air Act standards to regulate pollution from fossil-fuel [building appliances](#).
- (8) Promulgate a strong [Coal Ash](#) rule that creates national safety regulations for the disposal of toxic coal ash from coal-fired power plants.
- (9) Establish a [Regional Haze](#) rule that requires states and the federal government to collaborate to improve visibility in national parks and wilderness areas
- (10) Finalize a strong [Startup, Shutdown, and Malfunction](#) rule that closes loopholes allowing power plants to emit more pollution during startup, shutdown, and malfunctions.

In addition, the Department of the Interior should [swiftly and legally](#) phase out all new fossil fuel leasing on public lands and waters, deny the permit for ConocoPhillips' [Willow Project](#) in Alaska, and reissue a total coal leasing moratorium. Finally, the Department of Transportation should finalize its new greenhouse gas [Performance Management Rule](#) at the Federal Highway Administration (FHWA) as soon as possible. This rule will help ensure federal transportation infrastructure investments significantly reduce transportation-related greenhouse gas emissions.

Other Avenues for Climate Regulation

While the Supreme Court's decision in *West Virginia* precludes the EPA from employing a cap-and-trade style system under Section 111(d) of the Clean Air Act, there are several avenues that the EPA could take to circumvent this restriction.

First, the EPA could use [Section 115 of the Clean Air Act](#), which governs international air pollution, to make a determination that U.S. greenhouse gas emissions endanger the public health and welfare of other countries. Importantly, Section 115 grants the EPA broad authority to address air pollution comprehensively as long as other countries provide the U.S. with reciprocal protections.¹² After making this determination, EPA could require every state to submit a State Implementation Plan (SIP) requiring emissions reductions. Like the [Cross-State Air Pollution Rule](#) (CSAPR), EPA could then establish a Federal Implementation Plan (FIP) imposing a generation shifting or cap-and-trade system on states that fail to submit an adequate SIP.¹³

¹² 42 U.S.C. § 7415. Section 115 is triggered when (1) EPA finds that emissions in the United States contribute to air pollution that endangers public health or welfare in another country (the "endangerment finding"), and (2) EPA determines that the other country provides "essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country" by Section 115 (the "reciprocity determination").

¹³ EPA v. EME Homer City Generation, 134 S.Ct. 1584 (2014).

Utilizing Section 115 of the Clean Air Act is especially advantageous because it could be implemented quickly and would only require a single rulemaking. It is also consistent with the legislative history of the 1977 Amendments to the Clean Air Act, in which Congress added “climate” to the definition of “effects on welfare” due to concerns about global cooling caused by sulfur dioxide emissions.¹⁴ Finally, this rulemaking would be based on a science-based goal adopted under the [United Nations Framework Convention on Climate Change](#) (UNFCCC), a treaty ratified by the Senate.

Alternatively, EPA could utilize [Sections 108-110](#) of the Clean Air Act to regulate greenhouse gas emissions as a “criteria” pollutant under the [National Ambient Air Quality Standards](#) (NAAQS) program.¹⁵ To date, the EPA has set national caps on six common pollutants: ozone, particulate matter, carbon monoxide, nitrogen oxides, sulfur dioxide, and lead. These national pollution caps are established by federal scientists using the best available scientific information to determine the effects of different levels of pollution on human health. Once the EPA established a national pollution cap for greenhouse gas emissions under the Clean Air Act — such as [350 parts per million](#) (ppm) for carbon dioxide — individual states would be required to develop their SIPs to achieve the prescribed pollution caps. Here again, EPA could impose a generation-shifting FIP on states that fail to submit an adequate SIP.¹⁶ The legal authority to regulate greenhouse gas emissions under EPA’s NAAQS program is bolstered by the Supreme Court’s 2014 decision in *EPA v. EME Homer City Generation*, which acknowledged that a cap-and-trade could be implemented and even imposed to achieve a NAAQS.¹⁷

Conclusion

Despite the Supreme Court’s ruling in *West Virginia v. EPA*, President Biden retains [significant authority](#) to regulate greenhouse gas emissions and aggressively address the climate crisis. As outlined above, the Biden Administration should continue its work to finalize critical regulations, including: rules to directly regulate pollution from new and existing gas-fired power plants; NAAQS standards for ozone and particulate matter; and new rules limiting mercury, arsenic, and other toxic pollution from coal plants. At the same time, the EPA should continue to explore other creative paths to circumvent the Supreme Court’s ruling, including invoking Section 115 of the Clean Air Act to address greenhouse gas pollution comprehensively and regulating greenhouse gas emissions as a “criteria” pollutant under the NAAQS program.

¹⁴ 42 U.S.C. § 7602(h).

¹⁵ § 7408-7410.

¹⁶ § 7410(c)(1). Under Section 110 of the Clean Air Act, if a State does not implement an acceptable control plan within three years, EPA must promulgate a FIP for the state within the next two years.

¹⁷ *EPA v. EME Homer City Generation*, 134 S.Ct. 1584 (2014).

Finally, it is also important to note the outsized impact of the Supreme Court's ruling on Congress. When Congress passes a law — such as the Clean Air Act — it often grants broad regulatory authority to federal agencies. Congress delegates this authority so agencies can use their expertise to “[fill in](#)” the technical details of a program created by statute. If the Supreme Court continues to invoke the major questions doctrine to strike down agency regulations, it may force Congress — which is responsible for establishing policy in a wide range of issue areas and does not have the same depth of expertise as federal agencies — to pass hyper-specific legislation. Ultimately, such a model would fundamentally limit agency power to address evolving problems according to general directions from Congress.

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