

## West Virginia v. EPA Curtails Federal Climate Action

The U.S. Supreme Court's recent decision in *West Virginia v. Environmental Protection Agency (EPA)* curtailed the agency's authority to regulate emissions from power plants through rules shifting electricity generation from coal to more renewable sources. Invoking the major questions doctrine, the decision casts doubt on EPA's ability to promulgate future climate-related regulations without more explicit statutory authority if the regulations would have significant economic and political implications. Despite raising significant questions for future federal climate change regulations, other regulatory tools and market forces are driving a national shift toward more renewable power. The regulation at issue in the decision, the Obama Administration's Clean Power Plan aimed to shift the national share of coal-powered electricity to 27% by 2030. Although the rule never went into effect, the nation's electricity generation has already shifted beyond the rule's goal as renewable sources, like wind and solar, have become more competitive and states continue to regulate greenhouse gas emissions. The Court's decision curtails one federal climate tool, but power plants, manufacturers, and other facilities remain subject to other regulatory and market forces that will drive risks and opportunities.

### Background: Clean Air Act Section 111(d) and the Clean Power Plan

Section 111(d) of the Clean Air Act authorizes EPA to set a "standard of performance" for emissions sources such as power plants that reflects the "best system of emission reduction" (BSER) for the source category. Section 111 generally applies to new and modified sources of air pollutants, but Section 111(d) allows EPA to apply standards for new sources to existing sources if the relevant pollutant is not controlled by other Clean Air Act regulations. EPA has not frequently exercised its Section 111(d) authority. The agency has, however, used Section 111(d) to establish BSER limits to control specific pollutants from specific source categories where other regulations did not control the relevant emissions.

In 2015, the Obama administration EPA issued regulations pursuant to Section 111 to control carbon dioxide emissions from new and existing power plants after determining that carbon dioxide is an air pollutant that endangers public health by causing climate change. EPA's regulations for new fossil fuel power plants established technology-based BSER, including process efficiencies and carbon capture. For existing fossil fuel power plants, EPA identified the BSER in the Clean Power Plan.

The Clean Power Plan would control carbon dioxide emissions from existing power plants by requiring coal-fired plants to burn coal more efficiently, by shifting production from coal- to natural gas-fired plants, and by shifting production from fossil fuel plants to more renewable energy sources, mainly wind and solar projects. Operators of existing power plants could implement the Clean Power Plan's electricity generation shifting requirements by reducing production at a fossil fuel plant, by building or investing in new gas, wind, or solar projects and increasing power production from those projects, or by purchasing emissions allowances as part of a cap-and-trade system. At that time, EPA expected that the Clean Power Plan would result in a reduction in the national share of coal-powered electricity from 38% to 27% by 2030, and a corresponding increase in gas, wind, and solar generation. In fact, the nation's electricity generation has shifted away from coal much faster, despite the Clean Power Plan never taking effect. The Energy Information Administration [reports](#) that in 2021 only 22% of electricity was generated by coal.

## **Background: Stay of Clean Power Plan and the Affordable Clean Energy Rule**

After a challenge from dozens of states and other parties, the Supreme Court granted a stay of the Clean Power Plan in 2016. Before any court issued a decision on the merits of the regulations, the Trump administration EPA repealed the Clean Power Plan in 2019. The agency stated that the regulations exceeded its Section 111(d) authority and that EPA now interpreted BSER to be systems that could be put in place to control emissions at a facility and to not include electricity generation shifting. EPA determined that whether Section 111(d) authorizes generation-shifting measures falls under the major question doctrine and requires Congress to clearly and expressly assign such a significant decision with vast economic impacts to an administrative agency.

Accompanying repeal of the Clean Power Plan, the Trump Administration EPA promulgated the Affordable Clean Energy Rule under Section 111(d). The Affordable Clean Energy Rule adopted only one aspect of the Clean Power Plan—coal plant efficiency improvements. Again, dozens of states challenged EPA's repeal of the Clean Power Plan and the new Affordable Clean Energy Rule.

In a consolidated case, the U.S. Court of Appeals for the District of Columbia Circuit in January 2021 held that EPA erroneously determined that generation-shifting measures cannot be BSER under Section 111(d). The court also held that the major question doctrine did not apply, rejecting EPA's argument that a clear statement of congressional intent was required to delegate to EPA the authority to shift power generation toward sources with fewer carbon dioxide emissions. The court vacated EPA's repeal of the Clean Power Plan, vacated the Affordable Clean Energy Rule, and remanded to EPA.

One month after the D.C. Circuit decision, the Biden administration EPA moved for a partial stay to ensure that the Clean Power Plan would not go back into effect while the agency considered new emissions regulations for existing power plants.

## **Supreme Court Decision in *West Virginia v. EPA***

With the Clean Power Plan not in effect and the Affordable Clean Energy Rule vacated, no Section 111(d) regulation for power plant carbon dioxide emissions was in force when the case arrived at the Supreme Court. The United States argued that the petitioners did not have standing, but the Court held that EPA's intent to not enforce the Clean Power Plan did not negate standing because the agency could at any time adopt regulations that included generation-shifting measures similar to the Clean Power Plan. Accordingly, the Court, with Chief Justice John Roberts writing for the majority, proceeded to decide EPA's authority to issue the Clean Power Plan's generation-shifting requirements.

The Court analyzed whether Congress intended in Section 111 to authorize a BSER for power plants that would "restructure[]" the national proportion of coal-fired electricity generation. Asserting that Congress rarely confers "extraordinary" regulatory authority over issues of vast economic and political significance through "oblique or elliptical language," the Court looked for "more than a merely plausible textual basis" for EPA's authority to shift electricity generation. The Court held that EPA's claimed authority to promulgate the Clean Power Plan under Section 111(d) falls under the major questions doctrine, a body of "significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."

Applying the major questions doctrine, the opinion examined the context of the regulation. The Court held that Section 111(d), as a rarely used "gap filler," did not authorize EPA to adopt a regulatory structure—an emissions cap-and-trade mechanism—that Congress had itself declined to adopt. Instead, Section 111(d) allows EPA to

establish a BSER that can be achieved through application of improved technology at an individual source. The Clean Power Plan, in contrast, sought to address the nation's power-generating system by reducing the share of coal-generated power and by requiring investments in more renewable sources.

The opinion also examined the Clean Power Plan in the context of the typical reach of EPA's regulatory authority, finding it unlikely that Congress intended EPA to have the discretion to determine the nation's energy mix and set a cap on coal-fired power. "The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself." Given the significance of the policy decisions inherent in the proposed regulation of energy sources, the major questions doctrine required EPA to cite clear congressional authorization for the Clean Power Plan. The Court determined that it could not.

Justice Elena Kagan authored the dissent, joined by justices Stephen Breyer and Sonia Sotomayor. The dissent asserted that the text of Section 111 authorizes EPA to select a generation-shifting mechanism as the BSER for power plants. The dissent also countered the majority's analysis of the context of the Clean Power Plan and would have held that EPA's mandate to reduce air pollution includes the authority to dictate the mix of energy sources that cause the pollution. Indeed, the dissent noted that all of EPA's regulations under Section 111 impose costs that affect the energy market. The dissent pointed to the importance of EPA's ability to regulate climate-impacting emissions, but the majority's opinion applying the major questions doctrine will require EPA to rely on something other than a generation-shifting cap-and-trade mechanism.

## **Major Questions for Future Federal Climate Regulations**

The Supreme Court's application of the major questions doctrine in *West Virginia v. EPA* limits possible federal tools for regulating greenhouse gas emissions from power plants and other sources. The opinion specifically curtails EPA's authority to intentionally shift electricity generation from coal to more renewable sources of energy and to establish a carbon cap-and-trade system without more explicit authority from Congress. More broadly, the decision casts doubt on EPA's future authority to act in the climate arena under its existing authority if the efforts would have significant economic and political implications.

The decision does not, however, restrict all of EPA's authority to regulate power plants in ways that could reduce greenhouse gas emissions and shift electricity generation. The Court made clear that Section 111's BSER applies to technologies that can be implemented at an individual source. That interpretation would likely allow EPA to consider plant-specific technologies such as carbon capture and storage or co-firing using other fuel sources, if the technologies satisfy other criteria in Section 111. EPA could also set stricter limits on other pollutants in ways that would reduce greenhouse gas emissions or make coal plants less economically competitive than other energy sources.

Although the decision draws attention to potential limits on federal climate action, states continue to regulate greenhouse gas emissions. The Regional Greenhouse Gas Initiative (RGGI) operates a cap-and-trade system for the power sector in 11 eastern states. California enacted an economy-wide emissions cap-and-trade system in 2013, and Washington enacted a similar system in 2021 that will go into effect next year. At least 24 states have established economy-wide greenhouse gas emissions targets either by statute or executive order. Many cities and local governments have also established targets to reduce electricity consumption or to achieve emissions reductions. Utilities, energy companies, manufacturing facilities, and businesses across all industries are subject to climate-related regulations from multiple levels of government, and the decision in *West Virginia v. EPA* may spur additional actions by nonfederal authorities.

Companies are also looking beyond regulation to opportunities in the market. Wind and solar projects are increasingly competitive with other energy sources. Carbon capture, storage, and sequestration technologies are

advancing amid a growing international market for carbon offsets. Government and private investments are encouraging innovations in hydrogen power.

Major questions remain about the direction and pace of federal climate regulation, but current regulatory tools at all levels of government and economics will continue to drive risks, innovations, and opportunities.

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