



## **U.S. SUPREME COURT DECISION TO LIMIT EPA'S AUTHORITY TO REGULATE CARBON EMISSIONS REDUCTIONS FROM POWER PLANTS: OVERVIEW AND IMPLICATIONS**

### **Background**

On June 30, 2022, the U.S. Supreme Court ruled to limit the authority of the Environmental Protection Agency (EPA) in setting standards to reduce greenhouse gas (GHG) emissions for existing power plants in the West Virginia vs. the Environmental Protection Agency case. In its 6-3 ruling, the Supreme Court said that Congress, not the EPA, has the power to create a broad system of cap-and-trade regulations to limit carbon emissions from existing power plants. At issue was EPA's Clean Power Plan and Affordable Clean Energy Rule, which address the country's single-largest carbon emissions challenge – coal-fired power plants.

Writing for the court majority, Chief Justice John Roberts said that neither the EPA nor any other agency may adopt rules that are "transformational" to the economy – unless Congress has specifically authorized such a transformative rule to address a specific problem, like climate change. The decision is the first time a majority opinion explicitly cited the major questions doctrine to justify a ruling, which holds that with issues of major national significance, a regulatory agency must have clear statutory authorization from Congress to take certain actions, and not rely on its general agency authority.

### **Section 111 of the Clean Air Act**

Section 111 of the Clean Air Act (CAA) establishes mechanisms for controlling emissions of air pollutants from stationary sources. Section 111(b) establishes CO<sub>2</sub> emission limits for all new power plants. Section 111(d) establishes CO<sub>2</sub> emission rates for each state based on a best system of emission reduction (BSER). Section 111 gives EPA significant discretion to identify the facilities within a source category that should be regulated. EPA also has significant discretion to determine the appropriate level for the standards. Section 111(a)(1) provides that New Source Performance Standards (NSPS) are to reflect the degree of emission limitation achievable through the application of a BSER which (considering the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

### **The Clean Power Plan**

On August 3, 2015, EPA announced the Clean Power Plan (CPP), aiming to reduce carbon pollution from power plants. The plan set strict carbon limits for each state and encouraged the states to meet those limits by relying less on coal-fired power plants and more on alternative sources of energy – wind, solar, hydro-electric, and natural gas. The CPP followed the approach of the Clean Air Act, specifically Section 111(d) that authorizes EPA to regulate emissions of non-criteria, non-hazardous air pollutants from stationary sources through identification of the “best system of emission reduction” that is “adequately demonstrated.” The CPP set out to improve electric generating units' (EGUs) performance by moving them toward renewable fuels. It aimed to address the principal source of GHG emissions in the electricity generating field; coal-fired power plants. The CPP was projected to lower greenhouse gas (GHG) emissions from existing power plants 32 percent from 2005 levels by 2030. At issue in the most recent Supreme Court ruling is capping carbon emissions at a level that will force a nationwide transition away from coal as an electricity fuel source. Chief Justice John Roberts argues that “it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d).”

### **The Affordable Clean Energy Rule**

On June 19, 2019, EPA issued the Affordable Clean Energy rule (ACE) – replacing the prior administration’s Clean Power Plan. The ACE rule established emission guidelines for states to use when developing plans to limit carbon emissions at coal fired EGUs. EPA repealed the CPP and issued new implementing regulations for ACE and future rules under the Clean Air Act Section 111(d). The emissions standards were less stringent than the CPP; however, EPA estimated that ACE, combined with emission reductions expected from various other industry trends, will reduce CO2 emissions from the electric sector by as much as 35 percent below 2005 levels in 2030. The June 30, 2022, Supreme Court decision ruled that the Clean Air Act does not authorize anything other than direct regulation of coal-fired plants.

### **IMPACTS OF SUPREME COURT DECISION**

#### **EPA Regulatory Status**

EPA has authority under the Clean Air Act to monitor and regulate GHG emissions. The Supreme Court decision has not impacted this. The court’s decision focuses on Section 111 of the Clean Air Act. West Virginia argued that the EPA has the authority only to regulate pollution at stationary sources. The majority on the court sided with them, expressing concern about the EPA dictating which power plants were going to run and which weren’t as something outside of EPA’s core functions, stating that those energy dispatch decisions were better left to state utility regulators. EPA is currently evaluating additional opportunities to achieve GHG emission reductions from power plants under the Clean Air Act.

The EPA can still do other things to regulate emissions from stationary sources, such as imposing smokestack scrubber technologies, or requirements that individual power plants meet certain efficiency standards. Additionally, the EPA has other parts of the Clean Air Act to utilize such as Section 115 that was written to deal with international pollution. The EPA can regulate when domestic pollution is harming other countries. There are also several other ways the EPA can regulate pollutants including nitrogen oxide, sulfur dioxide, ozone, particulate matter, and the EPA regulates air toxics from coal-fired power plants that have considerable mercury emissions associated with them. The EPA could strengthen regulations on all these pollutants which could lead to reduction in use of coal-fired generating units.

The ruling has limited what EPA can do under the Clean Air Act without further, explicit instruction from Congress. But the EPA still has the ability to limit GHG emissions and could also propose new carbon regulations that take the Supreme Court’s analysis into account. Lastly, Congress could pass legislation on GHG emissions or other environmental issues and grant the agency that authority.

Finally, market forces alone caused the power industry to meet the CPP’s emissions target even though the CPP Rule was never entered into force. These market forces continue to lower the GHG intensity of power generation. The International Energy Agency (IEA) has reported that the expansion of renewable energy capacity in the United States is forecast to be 65 percent greater over the 2021 to 2026 period than the five years prior. The IEA attributes this to the economic attractiveness of wind and solar PV, increased ambition at the federal level, the extension of federal tax credits in December 2020, a growing market for corporate power purchase agreements, and growing support for offshore wind. The shift to cleaner energy sources is likely to continue regardless of the Supreme Court decision.

**Metropolitan Washington Region Impacts**

The Supreme Court decision does not impact state emission reduction programs or carbon trading programs such as the Regional Greenhouse Gas Initiative (RGGI), which the State of Maryland and the Commonwealth of Virginia participate in. Also, Renewable Energy Portfolio Standards (RPS) remain unaffected by the Supreme Court decision. Maryland has a 50 percent clean energy by 2030 requirement, the District of Columbia has a 100 percent clean energy by 2032 requirement, and Virginia has a 100 percent clean energy by 2045/50 requirement. Although, there are regulations in place that pertain to power plant emissions of nitrogen oxides (NO<sub>x</sub>), sulfur oxides (SO<sub>x</sub>), and mercury, currently, there are no regulations in place at the state level within the metropolitan Washington region that specifically regulate GHG emissions from power plants.