



## Supreme Court Restricts EPA's GHG Power Sector Authority. So, How Will EPA Deal with Climate Change, Now?

On June 30, 2022, the United States Supreme Court addressed Section 111(d) of the Clean Air Act and reversed a D.C. Circuit Court ruling that had struck down the [Affordable Clean Energy Rule](#) (ACE rule) (84 Fed. Reg. 32520) promulgated by the Environmental Protection Agency (EPA) during the Trump administration. See the Supreme Court decision [here](#).

As a refresher, the Trump Administration's ACE rule had repealed the Obama Administration's [Clean Power Plan](#) (80 Fed. Reg. 64661), which addressed carbon dioxide emissions from existing coal- and natural-gas-fired power plants. The ACE rule replaced the Clean Power Plan by promulgating a different Section 111(d) regulation. In the preamble to the ACE rule, the EPA determined that the interpretive question raised by the Obama Clean Power Plan fell under the "major questions doctrine." Under that doctrine, a clear statement by Congress is necessary for a court to conclude that Congress intended to delegate authority "of this breadth to regulate a fundamental sector of the economy." (84 Fed. Reg., at 32529).

The main issue for the Supreme Court was a determination of what Congress must say in legislation, and how clearly must Congress say it, to properly give an agency authority to develop a regulatory program to protect clean air. The Court addressed the provision of the Obama Clean Power Plan giving states the right to issue their own regulations that could force a move from coal to "cleaner" natural gas and renewables. Addressing the possible impact of the Clean Power Plan on "larger economic forces" beyond the boundaries of electric power plants, the Court in its 6:3 decision ruled that state regulations of this type are not authorized by Section 111(d) of the Clean Air Act.

## **An Extraordinary Case – Did Congress Confer that Authority?**

In a rare display of the Court's willingness to address the economic and political significance of agency action, Chief Justice Roberts, writing for the majority, stated:

[O]ur precedent teaches that there are "extraordinary cases" that call for a different approach — cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority...

Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." But, it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.

Further re: Congressional intent:

Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." ... We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." ... Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there.

And, finally:

To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.

## **Can EPA Still Address Climate Change?**

The question is what will the Biden Administration do? No consensus there.

Jason Rylander, an attorney at the [Center for Biological Diversity's Climate Law Institute](#), [says](#) yes:

The case highlights the need for swift executive action on climate. President Biden has broad authority under an array of additional laws to reduce greenhouse gas pollution, restrict development of fossil fuels and accelerate a just, clean-energy transition. ...

In addition to emergency powers, the President's [Climate Action Plan](#) outlines the President's broad authority for climate action. Today's decision limiting the EPA's Clean Air Act authority for coal and gas-fired power plants makes it all the more urgent that Biden take all possible action under other laws to limit oil, gas, and coal which are responsible for 85% of greenhouse emissions.

Here's the statement issued by the [National Mining Association](#):

We are pleased to see the Court confirm that there are limits to the authority that administrative agencies have to unilaterally issue transformative rules, particularly those that impose deep and uneven economic impacts on every state and industry across the country. While many would have liked to label this as a case about climate, it is not; it is a case about the authority of government agencies and the economic impacts to the states and all Americans when that authority is abused. Climate change is real and must be addressed, but not by running roughshod over the boundaries established around delegated powers.

## **Keep a Watchful Eye**

No matter what parties on opposite sides of the issue think (as evidenced by the statements above), the Biden Administration is going forward with its climate change plans. Here's a portion of the [statement from President Biden](#):

I have directed my legal team to work with the Department of Justice and affected agencies to review this decision carefully and find ways that we can, under federal law, continue protecting Americans from harmful pollution, including pollution that causes climate change.

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