

Congress's Delegation of "Major Questions": The Supreme Court's Review of EPA's Authority to Regulate Greenhouse Gas Emissions May Have Broad Impacts

December 7, 2021

The U.S. Supreme Court's forthcoming ruling in *West Virginia v. EPA* will likely play a pivotal role in how the U.S. Environmental Protection Agency (EPA) regulates greenhouse gas (GHG) emissions under the Clean Air Act (CAA). On October 29, 2021, the Court agreed to review the scope of EPA's authority to regulate GHG emissions from existing coal-fired electric utility generating units, also known as power plants. Legal battles over EPA's authority to curb GHG emissions from power plants [started](#) before the agency's first rule, the Clean Power Plan (CPP), was finalized in August 2015.

The Supreme Court's ruling in *West Virginia v. EPA* could have ramifications beyond the environmental law context. The Court has been asked to address the extent that Congress may delegate to federal agencies the authority to regulate matters that have significant economic and political impacts. A decision to limit EPA's authority could spark challenges to other agency regulations and to legislation that delegates regulatory authority to the executive branch.

This Sidebar reviews the rulemaking and litigation history of EPA's regulation of GHG emissions from power plants, examines potential implications of the Supreme Court's ruling, and discusses legislative tools to address the legal issues raised in *West Virginia v. EPA*.

Background

EPA issued two rules limiting [GHG emissions from existing power plants](#)—the CPP and the Affordable Clean Energy Rule (ACE Rule)—under CAA Section 111(d).

CAA [Section 111](#) directs EPA to identify "air pollution which may reasonably be anticipated to endanger public health or welfare"—known as the "endangerment finding"—and to list categories of stationary sources that the EPA Administrator finds cause or contribute significantly to that pollution. Once EPA lists a source category, [Section 111\(b\)](#) requires EPA to establish "standards of performance" for new and modified sources (known as [new source performance standards](#) or NSPSs) within the listed category.

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LSB10666

After issuing NSPSs under CAA [Section 111\(b\)](#) for *new or modified* sources in that category, EPA establishes emission guidelines for states to set a “standard of performance” for *existing* sources under [Section 111\(d\)](#). Once EPA has set emission guidelines for existing sources, Section 111(d) requires states to develop plans that establish standards of performance for existing sources in their jurisdiction.

In 2015, EPA finalized [NSPSs for new or modified fossil fuel-fired power plants](#) under Section 111(b) and emission guidelines for *existing* power plants (the [CPP](#)) under Section 111(d).

In 2019, EPA repealed the CPP and, on the same day, issued the [ACE Rule](#) to replace it. See [this CRS Report](#) for more background.

EPA’s Legal Interpretation of the “Best System of Emission Reduction”

Much of the legal debate surrounding the CPP and the ACE Rule centers on the scope of EPA’s authority under CAA Section 111 to determine the “best system of emission reduction” (BSER) for existing power plants. [CAA Section 111\(a\)](#) requires standards of performance to reflect the emissions reductions achievable through “application” of the BSER. As explained in prior agency and court interpretations of Section 111(a), EPA identifies and evaluates the “[adequately demonstrated](#)” systems of emission reduction for a particular source category to determine which is the “best” and sets emission standards based on that best system, “taking into account” “cost . . . nonair quality health and environmental impact and energy requirements.” EPA also sets emission standards under Section 111(d) based on the selected BSER.

In the CPP, EPA took a broad view of its Section 111 authority to identify the BSER for fossil fuel-fired power plants. EPA [determined](#) that the BSER was a combination of [three so-called “building blocks”](#): (1) improving the heat rate (i.e., efficiency of energy generation) at coal-fired units, (2) shifting generation to lower-emitting natural gas units, and (3) shifting generation from fossil fuel units to renewable energy generation. EPA [reasoned](#) that the best “system” was one that applied to the “overall source category,” because of the “unique characteristics of CO₂ [carbon dioxide] pollution and the unique, interconnected and interdependent manner in which affected [power plants] and other generating sources operate within the electricity sector.”

In 2019, EPA adopted a narrower interpretation of its authority in the ACE Rule. EPA asserted that the “application” of the BSER as referenced in CAA Section 111(a) “[unambiguously limits the BSER to those systems](#)” that can be “applied” or “put into operation *at* a building, structure, facility, or installation.” EPA claimed its revised interpretation in the ACE Rule is the “[only permissible reading](#)” of EPA’s authority under Section 111: EPA must limit the BSER to source-specific measures and cannot select as the BSER measures that apply to the source category as a whole or to entities entirely outside the regulated source category. For the ACE Rule, EPA determined that the BSER was on-site [heat rate improvements](#) (i.e., [using less fuel per kilowatt-hour of electricity](#)) and operating and maintenance practices that reduce the CO₂ emissions that a coal-fired power plant releases per unit of electricity it generates.

Litigation History

EPA’s efforts to regulate GHG emissions from power plants under the CAA have faced numerous legal challenges. In 2015, various states and stakeholders [challenged](#), among other things, the scope of EPA’s authority under CAA Section 111 to issue the CPP. These petitioners focused much of their argument on EPA’s overall design of the CPP, alleging that EPA lacked authority under Section 111(d) to base emissions guidelines on a system of emission reductions that is not applied directly at the source, such as shifting generation away from fossil fuel units.

Several judicial and regulatory actions prevented EPA from implementing the CPP before it was repealed. Challengers of the CPP petitioned the Supreme Court to stay the implementation of the CPP. In a 5-4 decision, the Supreme Court [granted](#) the applications and stayed the CPP for the duration of the litigation. The *en banc* (full) D.C. Circuit [heard](#) oral argument in September 2016 but, before deciding the case, it granted EPA's request to pause the litigation in 2017 to allow the agency to review and reconsider the CPP as required under President Trump's [Executive Order 13783](#). In 2019, the D.C. Circuit dismissed the litigation as moot after EPA finalized the ACE Rule and the repeal of the CPP.

Various states and stakeholders [challenged](#) the ACE Rule and CPP repeal in the D.C. Circuit. Several legal issues raised in this litigation, including the scope of EPA's authority and its interpretation of the BSER under CAA Section 111, had also been [central](#) to the litigation challenging the CPP.

On January 19, 2021, a three-judge panel of the D.C. Circuit [vacated](#) the ACE Rule and the CPP repeal in a split decision. In *American Lung Association v. EPA*, the majority [held](#) that CAA Section 111 does not "constrain" EPA's authority in determining the BSER to control methods that "apply physically 'at' and 'to' the individual source." The majority [concluded](#) that the CAA's text, structure, purpose, and legislative history indicated that Congress conferred upon EPA "ample discretion" to determine the BSER.

The majority also [rejected](#) EPA's argument that Congress would not have delegated to EPA a "major question" of economic and political significance without a clear statement of its intent to do so. The majority [determined](#) that Congress and the courts have "long" recognized EPA's authority to regulation GHG emissions from power plants under Section 111, leaving "no question" of "*what* the EPA may regulate (greenhouse gas pollution), and *whom* it may target (power plants), and *how* (under Section 7411)." The majority also [determined](#) that Congress "expressly and indisputably" assigned and constrained EPA's role in determining the BSER.

The court's opinion also [addressed](#) other challenges to EPA's authority to regulate GHG emissions from power plants under CAA Section 111, which were previously [raised](#) in the CPP litigation. The court unanimously [rejected](#) the coal mine operators' argument that EPA failed to make the "endangerment finding" for regulating CO₂ emissions from power plants. The court [held](#) that EPA made this finding when promulgating the NSPSs for new or modified fossil fuel-fired power plants under Section 111(b) in 2015.

The majority also [rejected](#) the coal mine operators' argument that the CAA prohibits EPA from regulating CO₂ emissions from power plants under Section 111(d) because power plants are a source category regulated under Section 112 for mercury and other hazardous air pollutants (HAPs). The majority [held](#) that EPA "correctly and consistently" interpreted Section 111(d) to authorize EPA to regulate both GHG emissions under Section 111(d) and HAP emissions from the same sources under Section 112.

The court [vacated](#) the ACE Rule and the CPP repeal, but later [granted](#) EPA's request not to reinstate the CPP until EPA considers a new rulemaking action.

Judge Walker partly concurred and dissented from the court's opinion. He [argued](#) that EPA was required to repeal the CPP and that the ACE Rule was invalid because EPA has no authority to regulate fossil fuel-fired power plants under CAA Section 111. Judge Walker agreed with the coal mine operators that Section 111 excludes from its scope any power plants regulated under Section 112. He also [argued](#) that EPA's exercise of authority in the CPP raises concerns about how and at what cost EPA should regulate power plants—"major questions" that he claimed were not clearly delegated by Congress to EPA.

Supreme Court Review in *West Virginia v. EPA*

The Supreme Court granted and consolidated four petitions for certiorari, each seeking review of the D.C. Circuit's opinion in *American Lung Association*. The petitioners include a [coalition of 19 states](#), the [North American Coal Corporation](#), [Westmoreland Mining Holdings LLC](#), and [North Dakota](#). In *West Virginia v. EPA*, the petitioners question whether Congress authorized EPA to consider control measures that can be

implemented beyond the specific emission source when determining the BSER and setting emission standards under CAA Section 111(d). And if so, the petitioners ask, did Congress violate the Constitution in delegating such regulatory authority to EPA?

The implications of the Supreme Court's ruling in this case depend on the breadth of the Court's decision. The Supreme Court could decide the narrow question of whether CAA Section 111(d) compels EPA to limit the BSER to those control measures that can be applied directly to the source. The Court could define boundaries on what EPA may consider when determining the BSER for a category of emission sources. Even if the Court's ruling addressed only those questions, it would likely be considered a significant decision in environmental law.

The case also has the potential to be a landmark decision in administrative law more generally, with potential implications in a wide range of fields. The Supreme Court could use this case to address the major questions doctrine and the nondelegation doctrine, each of which affects the relationship between Congress and executive agencies.

First, the Supreme Court could use its ruling in *West Virginia v. EPA* to clarify the contours of the “major questions” doctrine as it applies to agency rulemaking authority. That doctrine is derived from a series of decisions that have limited executive agency authority on major economic and political policy issues. The Court has explained that “Congress could not have intended to delegate a decision of such economic and political significance to an agency” without a clear statement of its intention.

The major questions doctrine played a significant role in the Supreme Court's two previous split decisions reviewing EPA's authority to regulate GHG emissions under the CAA. The majority in the Court's 2007 decision in *Massachusetts v. EPA* held that EPA has the authority to regulate GHGs from motor vehicles because GHGs qualify as an “air pollutant” under the CAA's general definition. The majority rejected EPA's argument that it lacked authority to do so because Congress did not clearly delegate authority to impose GHG emission limits that would have great “economic and political repercussions.” In contrast, the Supreme Court found EPA's interpretation of its own authority to be “unreasonable” under the major questions doctrine in its 2014 ruling in *Utility Air Regulatory Group v. EPA* (*UARG*). In *UARG*, the question was whether the CAA compels EPA to require an air permit for a “major emitting facility” based the facility's potential to emit “any regulated air pollutant,” including GHGs. The Court held, among other things, that it would be unreasonable to interpret the CAA to require air permits for “tens of thousands” of new and modified stationary sources—an “enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.”

The Court has not yet resolved issues in applying the “major questions” doctrine, such as what agency actions are considered politically and economically significant to trigger the doctrine; what types of “clear” congressional statement or “substantial guidance” are sufficient to support an agency's authority to regulate matters that “affect the entire national economy”; and what level of deference, if any, a court should give to an agency's statutory interpretation when the doctrine applies to agency rulemaking. The petitioners' arguments in *West Virginia v. EPA* provide the Court a vehicle to elaborate further upon the doctrine, if it chooses.

Second, if the Supreme Court in *West Virginia v. EPA* rules that Congress delegated sufficiently broad authority in Section 111(d) to allow EPA to regulate power plants as a sector, the Court may also examine whether Congress's delegation of such authority was constitutional under the nondelegation doctrine. This doctrine is based on separation of powers principles and exists primarily to prevent Congress from abdicating its core legislative function as established under Article I of the Constitution. In limiting Congress's power to delegate, the nondelegation doctrine seeks to ensure that legislative decisions are made through a bicameral legislative process by the elected Members of Congress or governmental officials subject to constitutional accountability.

The Supreme Court has regularly upheld legislation that delegates authority to federal agencies. As developed by the courts, the nondelegation doctrine requires that Congress lay out an “[intelligible principle](#)” to guide and limit an agency’s discretion. The Court has [held](#) that a delegation is “constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.” In practice, this is a lenient standard. The Supreme Court has only used the nondelegation doctrine to invalidate a delegation of authority to other branches of government twice in 1935, and has rejected every nondelegation challenge thereafter, including in a [case](#) regarding EPA’s authority to set national air quality standards under the CAA.

The Supreme Court’s 2019 decision in *Gundy v. United States*, however, signaled a potential shift in the Court’s approach to reviewing delegations to governmental entities. Although a divided Court [upheld](#) the delegation at issue, Justice Alito’s [conurrence](#) with the judgment indicated a willingness to reconsider the “intelligible principle” standard. Also, Justice Gorsuch’s [dissent](#), joined by Chief Justice Roberts and Justice Thomas, argued for a more robust review of the authority Congress delegates to another branch of government. Justice Kavanaugh, who did not participate in the *Gundy* decision, has [stated](#) that Justice Gorsuch’s nondelegation analysis in his *Gundy* dissent “may warrant further consideration in future cases.” These views of individual Justices suggest that the Court could further examine its approach to the nondelegation doctrine in *West Virginia v. EPA*.

The Supreme Court has [granted](#) EPA’s request for an extension to file its brief until January 18, 2022 but has not yet scheduled oral argument in *West Virginia v. EPA*. A ruling is expected by the end of the Court’s 2021-2022 term. Terms [usually end](#) in late June or early July.

Considerations for Congress

West Virginia v. EPA will be the third Supreme Court case in the last fifteen years reviewing the scope of EPA’s authority to regulate GHG emissions under the CAA. Congress could consider proposing legislation to clarify the scope of EPA’s authority under Section 111 in considering air pollution control measures when determining the BSER. Congress could also address the question whether the CAA prohibits EPA from imposing emission standards on power plants under CAA Section 111(d) because their HAP emissions are regulated under Section 112—a question the D.C. Circuit considered, but that the Supreme Court did not agree to review.

Congress could also conduct oversight over EPA’s rulemaking process to address GHG emissions from power plants. It does not appear that EPA plans to wait for the Supreme Court to rule in *West Virginia v. EPA* before moving forward. Following the grant of certiorari, EPA officials [indicated](#) that they intend to “continue to advance new standards to ensure that all Americans are protected from the power plant pollution that harms public health and our economy.” The agency has not announced a timeline for developing a new rule; nor has it indicated whether it intends to take an approach similar to the CPP.

Some of President Biden’s executive orders and announcements issued in early 2021 on the administration’s climate policy goals could shape how EPA regulates GHG emissions from power plants in any new rule. For instance, the Biden Administration included the ACE Rule and the CPP repeal in a [fact sheet](#) accompanying [Executive Order 13990](#) that identified specific actions that agencies were directed to review. International commitments, including from the 26th session of the Conference of the Parties for the United Nations Framework Convention on Climate Change ([COP26](#)), may also affect regulatory obligations to the extent emissions reductions the United States pledges to make are implemented by imposing requirements on domestic power plants.

More broadly, the Supreme Court’s decision in *West Virginia v. EPA* could have far-reaching effects on agency rulemaking authority and Congress’s efforts to delegate such authority to implement legislation. The “major questions” and nondelegation doctrines are judicial tools used to reinforce the separation of powers between the legislative and executive branches when interpreting statutes delegating authority to

agencies. The Court's ruling could guide agencies on interpreting their rulemaking authority and Congress on limits on delegating such authority to agencies.

Members of Congress could consider participating in the litigation by submitting an *amici curiae* brief expressing its views on these legal issues. Some Members of Congress filed *amici curiae* briefs in the [CPP](#) and in the [ACE Rule](#) litigation.

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