

July 1, 2022

To: NACAA Climate Change Committee

CC: NACAA Members

From: Miles Keogh, NACAA Executive Director

RE: WV v. EPA FAQ

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### **What is this FAQ?**

I've prepared this Frequently Asked Questions (FAQ) as a resource to the NACAA Climate Change Committee, but please feel free to share it with anyone you think would find it useful. It's not legal analysis (I'm a utility economist, not a lawyer!) and it's not the official position of NACAA or any of its members. Yes, it probably oversimplifies things, but I'm hopeful that boiling this down to plain vernacular will help in providing a shortcut to explaining a complicated decision.

### **What was yesterday's decision?**

In a June 30, 2022 decision in *West Virginia v. EPA* (U.S. Supreme Court Case No. 20-1530) the U.S. Supreme Court limited the EPA's power to regulate greenhouse gas emissions from power plants under Section 111 of the Clean Air Act. A 6-3 decision written by Chief Justice John Roberts, (joined by Justices Alito, Thomas, Barrett and Kavanaugh, with a concurring decision by Justice Gorsuch,) found that EPA had exceeded the authority given to it by Congress when it promulgated its proposed Clean Power Plan rule in 2015. Justice Elena Kagan was joined in a dissent by Justices Breyer and Sotomayor.

The citations below break the decision into four sections: the Syllabus (a six page decision summary), the Decision (or Majority Decision, the official ruling by the court, written by Chief Justice Roberts), the Concurrence (the concurring opinion written by Justice Gorsuch) and the Dissent (the dissenting opinion written by Justice Kagan).

You'll find the decision online (including all four parts cited above) here:

[https://www.supremecourt.gov/opinions/21pdf/20-1530\\_n758.pdf](https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf)

### **How did we get here?**

Here's a brief timeline of things relevant to yesterday's decision:

- Between 2005 and 2010, Congress tried and failed to pass national legislation to address climate change, including a few versions that proposed market mechanisms and emissions trading.
- In 2007 the Supreme Court decided in *Massachusetts v. EPA* that EPA had authority (and an obligation) to regulate greenhouse gases under the Clean Air Act.

- In 2009 EPA issued an Endangerment Finding that “elevated concentrations of greenhouse gases (GHGs) in the atmosphere may reasonably be anticipated to endanger the public health and welfare of current and future U.S. generations”.
- In 2015 the EPA under President Obama issued a proposal called the Clean Power Plan. This proposed rule leveraged Section 111 of the Clean Air Act to require the power sector to reduce emissions using onsite technologies at coal plants, and generation shifting from coal to cleaner energy resources. The proposal was never made final, as it was stayed by the Supreme Court in 2016.
- In 2019, EPA under President Trump replaced the Clean Power Plan with the Affordable Clean Energy (ACE) Rule, which required states to evaluate technology improvements on a plant by plant basis to improve emissions at coal fired power plants. Included in the ACE rule was the rescinding of the Clean Power Plan.
- In January 2021, the US Court of Appeals for the DC Circuit invalidated the ACE rule, saying it didn’t use EPA’s full authority under the Clean Air Act to address GHG emissions.
- West Virginia and others sued to overturn the DC Circuit decision in April 2021, and the Supreme Court heard oral arguments in February and delivered their decision on June 30, 2022.

### **What happens next?**

Under the Supreme Court Decision, the DC Circuit decision is “reversed and remanded”. Presumably, there will need to be further action at the DC Circuit to align the decision with the Supreme Court’s ruling. Since neither the ACE Rule nor the Clean Power Plan was in effect, and the EPA under President Biden has announced its intentions of crafting a new rule (with a proposal expected in March 2023), no immediate regulatory changes occur.

### **Can EPA still regulate greenhouse gas emissions?**

Yes. The case that affirms that authority is from 2007, *Massachusetts v. EPA*, and the *West Virginia v. EPA* decision does not overturn that case, so EPA continues to have that legal obligation. The Syllabus and Decision don’t mention the case; only the Dissent makes reference to it.

### **What did the court say about limiting EPA’s options?**

“The only question before the court is whether the best system of emission reduction identified by the EPA in the Clean Power Plan was within the authority granted to the agency in Section 111 (d) of the Clean Air Act. For the reasons given, the answer is no.” (Syllabus p.6)

### **Does the case limit other state and local laws and programs?**

No. The case only speaks to a power sector program proposed under Section 111 of the Clean Air Act. State programs (authorized by state laws), local programs (driven by city and county decisions), multistate programs (like the Regional Greenhouse Gas Initiative) – even Federal programs undertaken outside of the Section 111 program subject to this decision – are unaffected by this ruling.

### **Was this a “Major Questions” Decision? What does that mean?**

The Decision penned by the court majority explicitly calls this a “Major Questions” decision. The Decision says that “EPA claimed to discover an unheralded power representing a transformative expansion of its regulatory authority...”(Syllabus p.4-5). The Majority Decision doesn’t define what the Major Questions doctrine is, but says the doctrine addresses the problem of “agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.” (Decision p.20). Justice Gorsuch writes in a concurring opinion that the doctrine applies when an agency “claims the power to resolve a matter of great political significance... or end an earnest and profound debate across the country” (quotations omitted, Concurrence p. 9); “when it seeks to regulate a significant portion of the American economy” (Concurrence p. 10), or when it intrudes on state law (Concurrence p.11). (For those of you wondering about the Nondelegation Doctrine, Gorsuch’s concurrence talks about it but does not apply it to the Decision, and it is not mentioned by the Majority Decision.)

### **Did this case eliminate “Chevron Deference” to agencies as a legal principle at the Supreme Court?**

Not explicitly, although the implications of the Decision look like they chip away at the deference shown to federal agencies by the courts. (Chevron Deference is an administrative law principle that compels federal courts to defer to a federal agency's interpretation of an ambiguous or unclear statute that Congress delegated to the agency to administer. The principle derives its name from the 1984 U.S. Supreme Court case *Chevron U.S.A., Inc. v. Natural Resources Defense Council*).

### **I thought there was no active EPA rule about power plants? Why did the Justices hear the case?**

In the Majority Decision, the Court ruled that it could hear the case because the repeal of the Clean Power Plan was embedded in the ACE Rule. Although DC Circuit decision overturning the ACE Rule stayed the part of its ruling requiring the Clean Power Plan to return to effect, in effect, the Majority Decision in this case ruled that even if EPA did not move forward with the Clean Power Plan, it hadn’t moved regulatorily to replace that rule and could still “impose limits predicated on generation shifting” (Decision at p.16). The Court moved to prevent that.

### **Is the ACE Rule back in effect?**

As a legal matter, probably. As a practical matter, EPA is going to move ahead with a new proposed rule. I don’t think clean air agencies need to start working on their ACE Rule compliance plans.

### **What options does EPA have going forward?**

That’s the big question. The Court Decision references approaches that impose “emission limits predicated on generation shifting” as causing injury to the parties that sued (Decision p.16). If EPA’s new proposal for limiting GHG emissions from power plants relies on Section 111 (d) authority, the proposal won’t be able to use approaches *predicated on generation shifting* as a basis. My bet is that this means EPA will propose a rule in March 2023 that is dependent on technologies that may be applied at

facilities themselves – carbon capture and storage (CCS) in particular (I know folks who don't agree, however - lively debate lies ahead!)

EPA has already engaged several times with NACAA over basic design approaches that may inform the development of its future rule. If you're a NACAA member, I hope you'll continue to participate in that conversation! (If you're not a NACAA member, we're happy to engage with you on the topic too.)

Wishing you well,

Miles

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