

Biden admin urges Supreme Court to reject challenge to EPA authority

BY MAXINE JOSELOW, NIINA H. FARAH | 08/06/2021 07:26 AM EDT



U.S. Attorney General Merrick Garland speaking at the Bureau of Alcohol, Tobacco and Firearms last month. The Biden administration yesterday asked the Supreme Court to reject a petition from Republican state attorneys general and a coal company about EPA's climate authority. | Jim Lo Scalzo/Pool via AP

ENERGYWIRE | The Biden administration yesterday called on the Supreme Court to reject petitions from Republican-led states and coal companies asking the justices to review EPA's authority to regulate greenhouse gases from power plants.

In a [brief](#) docketed late yesterday, Justice Department lawyers argued that accepting the petitions would be premature. They noted that President Biden's EPA has not yet crafted a new greenhouse gas rule for the power sector to replace the Obama-era Clean Power Plan or the Trump-era Affordable Clean Energy rule.

"[T]he question whether the Clean Power Plan was lawful has no continuing practical significance, since that Plan is no longer in effect and EPA does not intend to resurrect it," the DOJ lawyers wrote.

"EPA instead intends to issue a new Section 7411(d) rule after taking into account all relevant considerations, including changes to the electricity sector that have occurred during the last several years," they wrote, referring to the relevant section of the Clean Air Act.

The four petitions before the Supreme Court were led by West Virginia Attorney General Patrick Morrisey (R), North Dakota Attorney General Wayne Stenehjem (R), North American Coal Corp. and Westmoreland Mining Holdings LLC.

The petitioners had urged the justices to overturn a January decision by the U.S. Court of Appeals for the District of Columbia Circuit that scrapped President Trump's 2019 ACE rule (*Greenwire*, Jan. 19).

More broadly, the red states and coal companies had asked the justices to determine whether EPA had the authority to regulate planet-warming pollution from power plants in the first place.

In their brief yesterday, the DOJ lawyers contended that the proper time for the Supreme Court to consider the issue would be after the agency has finished the rulemaking process — not before.

"Any further judicial clarification of the scope of EPA's authority under Section 7411(d) would more appropriately occur at the conclusion of the upcoming rulemaking, when the courts can review a concrete and considered EPA rule, rather than speculate as to the regulatory approaches the agency might take," the government attorneys wrote.

The legal saga over EPA's carbon rules for power plants dates back to 2015, when President Obama unveiled the Clean Power Plan. The landmark rule sought to reduce greenhouse gas emissions from coal-fired power plants 32 percent below 2005 levels by 2030.

At the time, EPA determined that "generation shifting," or switching from coal to cleaner-burning natural gas or renewable energy, counted as a "best system of emission reduction" under Section 111 of the Clean Air Act.

But 24 Republican-led states sued over the Clean Power Plan, arguing that it represented regulatory overreach. The Supreme Court halted implementation of the rule before it could take effect nationwide.

After Trump took office, his administration finalized the ACE rule, which took a much narrower view of EPA's climate authority. The Trump EPA maintained that the "best system of emission reduction" consisted of changes made at individual power plants — an approach known as "inside the fence line."

But the D.C. Circuit tossed out the ACE rule on the final day of the Trump administration. Two members of the three-judge panel that decided the case roundly [rejected](#) the Trump EPA's reasoning and left the Biden administration a clean slate to craft a new rule.

The Biden EPA has said it does not intend to revive the ACE rule or the Clean Power Plan. It remains to be seen whether the Biden team will embrace aggressive regulatory strategies such as generation shifting.

"EPA's new rule has yet to be proposed, much less promulgated," the DOJ lawyers wrote in their brief. "Petitioners therefore can only speculate as to what the new rule might contain."

The government attorneys added that EPA could decide to take a more limited regulatory approach similar to the ACE rule, rendering the petitioners' concerns "moot."

In its [petition](#), however, North American Coal argued that the D.C. Circuit's ruling in the ACE litigation would open the door to EPA's issuing sweeping greenhouse gas regulations for "every building that emits [greenhouse] gases, including residential homes and every commercial facility."

The DOJ lawyers rejected that premise. They noted that EPA could not regulate carbon emissions from residential homes and commercial facilities unless it listed them as source categories under the Clean Air Act, which it has not done.

A changing electricity sector

Environmental groups, public-interest trade associations and electric utilities agreed with the Biden administration in friend of the court briefs.

A coalition of public-interest groups and trade associations noted that owners and operators of coal-fired power plants, which stand to be most affected by power-sector regulations, have not

voiced support for the petitioners.

"Not a single owner or operator of any electric power generation facility — that is, not a single regulated entity — has petitioned for certiorari," the groups wrote.

The coalition included the American Lung Association, Environmental Defense Fund, Natural Resources Defense Council and American Clean Power Association.

The groups also noted that the power sector has sought the type of emissions reduction measures that critics of the Obama-era rule had said were outside of the agency's authority.

Representatives from the power sector, including Consolidated Edison Inc. and the New York Power Authority, also urged the court to hold off on addressing EPA's authority to regulate greenhouse gases.

The Supreme Court does not consider rules that have not been implemented or that the agency hasn't yet adopted, the power sector representatives wrote in a separate brief.

"The Court's review at this juncture would risk a ruling untethered to actual circumstances," they wrote in their brief. "The dramatic changes occurring within the electricity sector will necessarily be considered by the agency when it reexamines the scope of its authority."

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