

INSIGHTS

The Air Up There: SCOTUS Grants Cert in West Virginia v. EPA

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By: [Brittany M. Pemberton](#) and [Daniel J. Pope](#)

On this episode of the Environmental Law Monitor, host [Daniel Pope](#) is joined by [Brittany Pemberton](#) to discuss developments related to remissions reductions under the Clean Air Act. Brittany is an associate in our DC office. She advises energy, oil and gas, and industrial clients in environmental regulatory compliance and enforcement matters, including handling stationary source enforcement and compliance matters under the Clean Air Act (CAA) before the U.S. Environmental Protection Agency (EPA) and state agencies.

What has been going on with Section 111(d) of the Clean Air Act? What is the Supreme Court looking to review with this case?

In 2015, the Obama administration issued the first-ever regulations of greenhouse gas emissions for existing coal and natural gas-fired power plants. That is what is called the Clean Power Plan. That rule was quite interesting because it took a different approach to 111(d) than the EPA had done in the past by coming up with three building blocks that are different methods of emission reductions, heat rate improvements (something that could be done at the facility) and technological measures that actually improve efficiency. 111(d) is about the emissions reductions you can achieve through the best system of emission reductions.

The Supreme Court granted cert in October. What is the Supreme Court looking to review here? If the Trump rule is dead, why does the Supreme Court grant cert?

The Supreme Court took this case because the rule is dead. The Biden administration even asked the DC Circuit to stay its vacatur of the ACE rule in order to make sure there was no way that the Clean Power Plan would spring back into effect while all of this was being sorted out. So, the Clean Power Plan is not operating. It's not in effect. Nobody has to comply with that. The net result of all of this litigation and of the rollback and everything is that there aren't any greenhouse gas emission regulations for existing fossil fuel fired power plants. I think it's really clear that granting cert shows us that the Supreme Court is interested in trying to figure out what the boundaries are for Section 111(d) of the Clean Air Act.

What did the DC Circuit do in its decision on some of these topics you've just identified that are going to be significant for the Supreme Court?

One of the things that the opinion clearly says is that at each critical element of the agency's regulatory authority on going beyond the fence line on 111(d) has long been recognized by Congress and judicial precedent. There's no question that nationwide regulation of greenhouse gas emissions by power plants fall squarely within the EPA's wheelhouse that's Massachusetts versus EPA. Also, the AEP decision said that it's the agency's job to regulate power plant

emissions of greenhouse gases under Section 111. On top of that, the issuance of regulations addressing greenhouse gas pollution is mandatory because of long-standing endangerment findings, again, Massachusetts. There's no question here that EPA has made endangerment findings about greenhouse gas emissions, according to the DC Circuit anyway. That finding, even though it predates the Clean Power Plan, triggers a mandatory duty for EPA to regulate greenhouse gas pollution.

What do you think the timing is for the cert grant, at least for the current term? Is there any chance that this case gets pushed into 2022?

I don't think so. I think a late October grant is not too late to get it done. But we have even a longer lead time here. It looks like merits briefs are due actually in the next week or so, the opening briefs. Then the whole thing should be briefed up by about mid-February. So, the justices really could hear oral arguments starting the end of February if they wanted. That should give us plenty of time to get a decision in by June 30.

For questions about the ACE rule and the pending Supreme Court decision, please contact [Daniel Pope](#) or [Brittany Pemberton](#).

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