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**ENERGY & ENVIRONMENT**

## **Court paves path for Biden on power plant climate rule**

The incoming Biden administration is likely to use the court's ruling to justify returning to something resembling the Clean Power Plan.



A coal-fired power plant is silhouetted against the morning sun in Glenrock, Wyo. | J. David Ake, File/ AP Photo

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President-elect Joe Biden's EPA could have significant legal authority to regulate carbon dioxide from power plants after a federal court on Tuesday struck down one of the Trump administration's biggest climate change rule rollbacks.

The split-panel opinion from the U.S. Court of Appeals for the D.C. Circuit for the first time offers a binding judicial opinion on the statutory scope of EPA's regulatory powers on greenhouse gases.

Biden will launch his presidency on Wednesday with the most ambitious climate change plan ever sought by a White House, and the new ruling will make it easier for his administration to create rules that help drive the nation's power grid toward net-zero carbon dioxide emissions by 2035, a goal that Biden has laid out.

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Tuesday's ruling expressly rejected the Trump EPA's argument that the Clean Air Act clearly constrains EPA to only those improvements that can be made on-site at coal-fired power plants. Instead, the majority ruled that EPA can consider "beyond the fenceline" options such as generation-shifting, the strategy envisioned under the Obama administration's Clean Power Plan in which emissions reductions were driven in part by utilities moving away from coal in favor of less-polluting natural gas and renewables.

Green groups and opponents of Trump's environmental rule rollbacks quickly welcomed the court decision.

"It's fitting that, on the Trump administration's last full day in office, the D.C. Circuit forcefully struck down the signature item of its environmental agenda, which has brought enormous harm to the health of the American people, to the environment, and to the competitiveness of our economy," said Ricky Revesz, director of the NYU School of Law's Institute for Policy Integrity, which opposed the ACE rule.

Clare Lakewood, legal director of the Center for Biological Diversity's Climate Law Institute, said the decision "frees up the new Biden administration to begin working immediately on the science-based greenhouse pollution rules we desperately need to make up for lost time."

Biden has staffed himself well to act in the wake of Tuesday's ruling. Many of the key architects of the Obama Clean Power Plan are working on the transition or will soon take administration jobs. Gina McCarthy, the former EPA administrator, will be at the White House as national climate adviser; Janet McCabe, who ran EPA's air office, has been nominated for deputy administrator; and Joe Goffman, an adviser who wrote much of the CPP, is a member of the EPA transition team.

The court's ruling stopped short of endorsing any particular regulatory scheme, leaving some ambiguity still with which EPA will have to grapple as it crafts what will be its third attempt at writing a rule limiting carbon dioxide from power plants, the top stationary source of greenhouse gas.

But the court's opinion has undoubtedly eased the Biden administration's path toward a replacement regulation.

The Trump administration blasted the ruling, though it is unclear what can be done about it in the one day remaining in his term.

"We are disappointed that the panel majority rejected EPA's well-supported repeal of the Clean Power Plan and its regulation of GHGs from coal-fired power plants in the Affordable Clean Energy Rule," EPA spokesperson Molly Block said in a statement. "The decision risks injecting more uncertainty at a time when the nation needs regulatory stability. EPA is reviewing the decision and will explore all available litigation options."

The crux of the case revolved around a requirement under Section 111 of the Clean Air Act that EPA determine a "best system of emission reduction" for reducing pollution from a source category — in this case, carbon dioxide from existing power plants.

The Trump EPA argued that the law unambiguously required it to consider only improvements that could be made at the power plant level — such as its call for improvements that made coal plants run slightly more efficiently and thus emit slightly less pollution. The agency admitted it would directly achieve only a small fraction of the emissions reductions that would have been required under the Obama-era Clean Power Plan.

But the panel's majority, Judges Patricia Millett and Nina Pillard, both Obama appointees, wrote that EPA put all its eggs in a defective basket.

Nothing in the CAA Section 111 constrains EPA from even considering emissions reduction strategies such as generation shifting, they wrote. "The shortcomings of its

statutory interpretation are more than enough to doom the Agency's claim that Section [111] announces an unambiguous limit on the best system of emission reduction," the court wrote.

They added that Congress "reasonably" crafted that part of the law to give EPA "leeway" to apply its technical expertise to solve pollution problems. For greenhouse gases, which have global effect no matter where they are emitted, that may mean a different form of regulation than was applied to other types of pollutants that have only localized harms.

"Policy priorities may change from one administration to the next, but statutory text changes only when it is amended," the court wrote. "The EPA's tortured series of misreadings of Section [111] cannot unambiguously foreclose the authority Congress conferred. The EPA has ample discretion in carrying out its mandate. But it may not shirk its responsibility by imagining new limitations that the plain language of the statute does not clearly require."

Technically, the ruling stopped short of concluding whether the Affordable Clean Energy rule (Reg. 2060-AT67) was a defensible regulation. Had Trump been reelected, EPA could have attempted to re-issue the rule with new justifications for why generation-shifting was not an appropriate regulatory scheme.

But the incoming Biden administration is likely to use the court's ruling to justify returning to something resembling the Clean Power Plan.

The ruling will also stand as binding circuit precedent unless a company or industry that backs the Trump ACE rule can convince an en banc D.C. Circuit or the Supreme Court to review it — a less likely outcome since the Biden administration likely will not appeal. That will provide the Biden EPA with at least some level of legal certainty as it crafts a new rule.

The ruling also slapped down EPA's delayed compliance plan that gave states many years before having to act to reduce emissions.

"The EPA's weak grounds for routinizing additional compliance delays in the amended implementing regulations are overwhelmed by its total disregard of the added environmental and public health damage likely to result from slowing down the entire Section [111(d)] regulatory process," the court wrote.

The panel's third member, Judge Justin Walker, who joined the bench in September, also voted to strike down the ACE rule — but for very different reasons than Millett and Pillard.

Walker endorsed an argument floated by some conservatives and coal companies that EPA is entirely prohibited from regulating coal-fired power plants under Section 111 of the Clean Air Act because it already regulates mercury emissions from that category under Section 112.

That argument had been seen as a long-shot since 2016, when the full D.C. Circuit heard arguments over the Clean Power Plan and many judges appeared skeptical of that particular argument. The full court never ruled on the Obama rule before Trump took office, allowing EPA to repeal it and issue the ACE rule instead.

Millett and Pillard rejected this argument in their majority ruling, writing that when read as a whole, the Clean Air Act authorizes EPA to regulate power plants' greenhouse gases under Section 111 as well as its hazardous air pollutants under Section 112.

Since his legal reasoning dissents from that of Millett and Pillard, Walker's legal conclusions are not binding on EPA. But they likely will provide fodder for future legal challenges to whatever regulation the Biden EPA issues for power plant pollution.

Walker also noted that Section 111 does not contain "clear statement unambiguously authorizing the EPA to consider off-site solutions like generation shifting," a sign that the Biden EPA will have to be able to justify its future rulemaking should it adopt that strategy.

He further argued that EPA lacked authority to issue a generation-shifting rule like the Clean Power Plan because Congress has not clearly authorized something with such major economic or political significance. Millett and Pillard, however, rejected this argument, ruling that EPA's regulation of greenhouse gases is "not because of any agency overreach" but rather because of "Congress' charge that the EPA regulate air pollution nationwide."