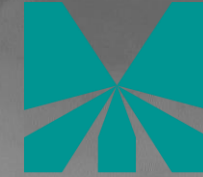


WEST VIRGINIA VS. EPA: ROUND TWO

Environmental Federation of Oklahoma | October 11-12, 2022



NMA

National
Mining
Association



WEST VIRGINIA VS. EPA

- “Extraordinary” Case - Major Questions Doctrine
- Congress did not authorize generation shifting

(Slip Opinion)

OCTOBER TERM, 2021

1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WEST VIRGINIA ET AL. v. ENVIRONMENTAL
PROTECTION AGENCY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 20–1530. Argued February 28, 2022—Decided June 30, 2022*

In 2015, the Environmental Protection Agency (EPA) promulgated the Clean Power Plan rule, which addressed carbon dioxide emissions from existing coal- and natural-gas-fired power plants. For authority, the Agency cited Section 111 of the Clean Air Act, which, although known as the *New Source Performance Standards* program, also authorizes regulation of certain pollutants from *existing* sources under Section 111(d). 42 U. S. C. §7411(d). Prior to the Clean Power Plan, EPA had used Section 111(d) only a handful of times since its enactment in 1970. Under that provision, although the States set the actual enforceable rules governing existing sources (such as power plants), EPA determines the emissions limit with which they will have to comply. The Agency derives that limit by determining the “best system of emission reduction . . . that has been adequately demonstrated,” or the BSER, for the kind of existing source at issue. §7411(a)(1). The limit then reflects the amount of pollution reduction “achievable through the application of” that system. *Ibid.*

In the Clean Power Plan, EPA determined that the BSER for existing coal and natural gas plants included three types of measures, which the Agency called “building blocks.” 80 Fed. Reg. 64667. The first building block was “heat rate improvements” at coal-fired plants—essentially practices such plants could undertake to burn coal

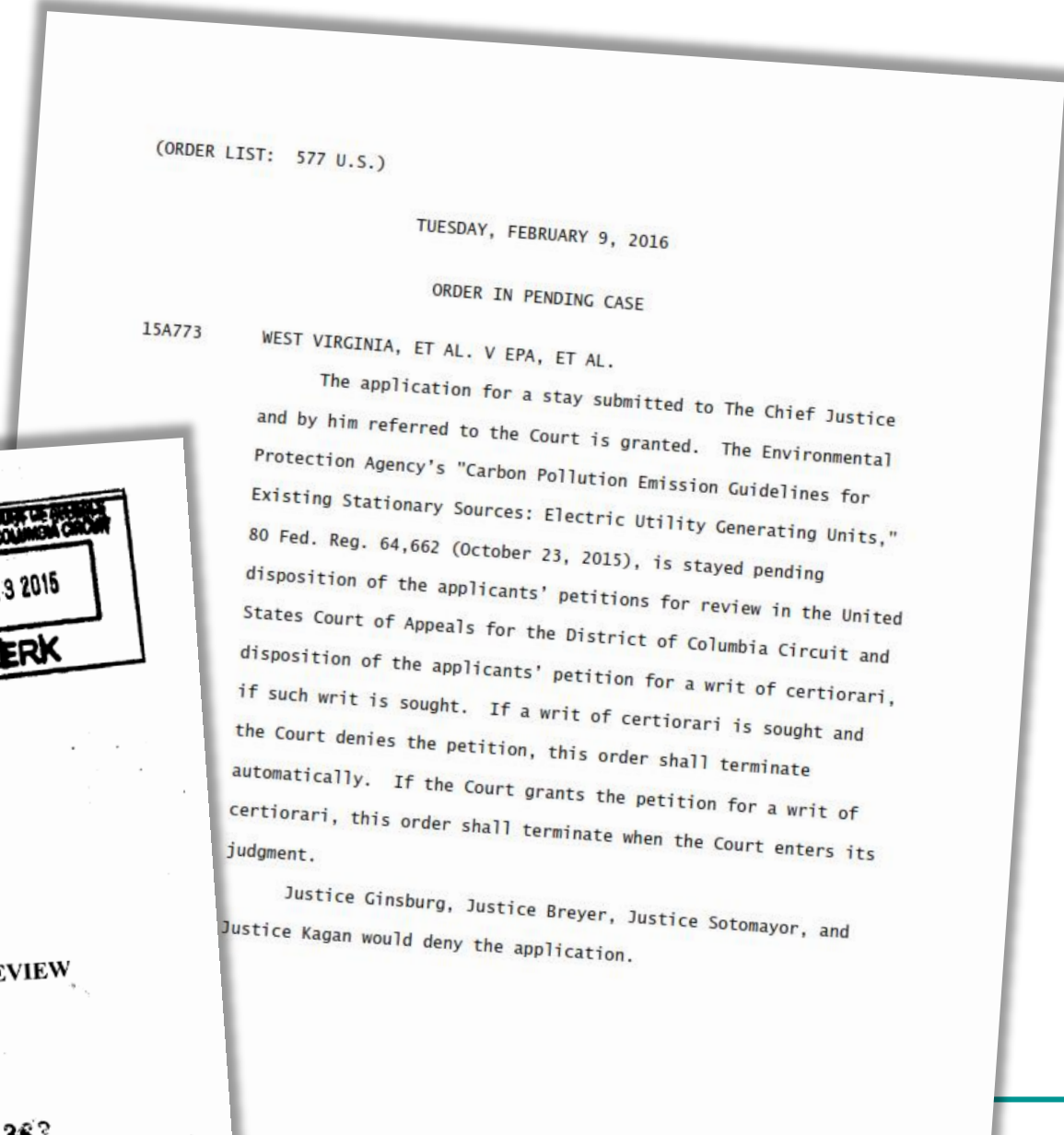
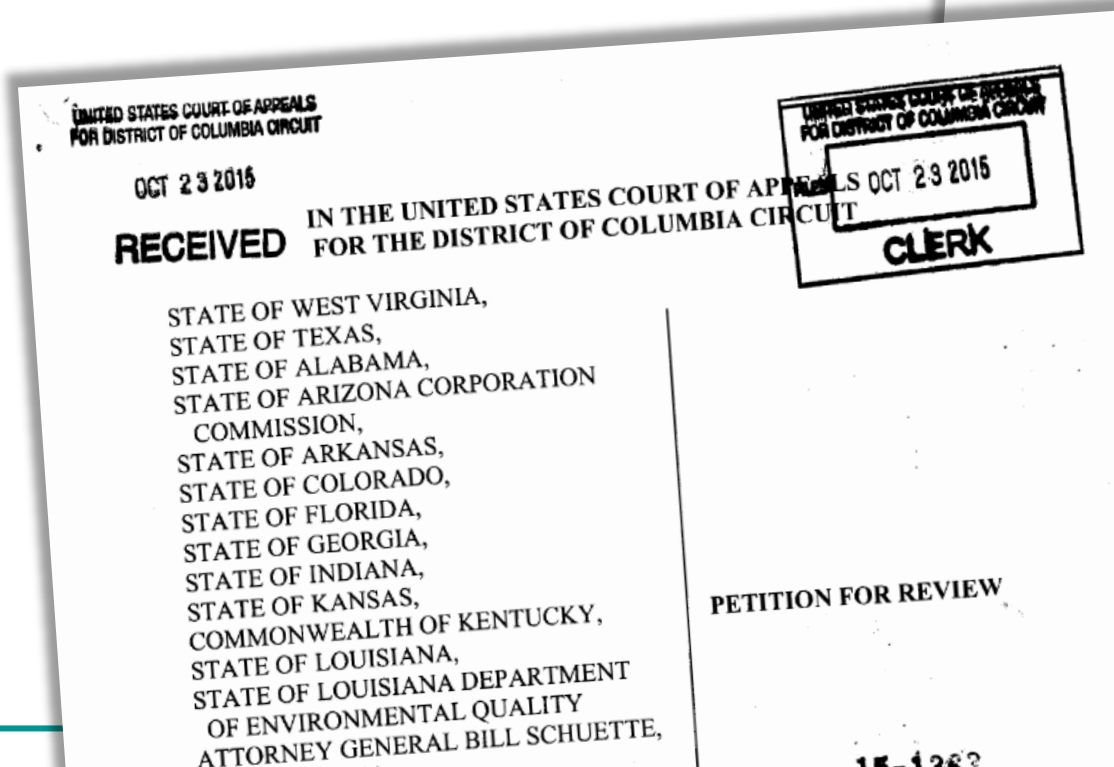
TIMELINE

Congressional Actions and Court Review of EPA Regulations

2005	2009	2015	2016	2019	2021	2022
SENATE 38-60 Failed Climate Stewardship Act 2005	HOUSE 219-212 Passage of American Clean Energy and Security Act of 2009 SENATE No action	EPA Final Clean Power Plan for existing utilities	US SUPREME COURT Stay of Clean Power Plan	EPA Final Clean Power Plan replacement – Affordable Clean Energy Rule	DC CIRCUIT Jan 19 – Vacatur and remand of the repeal of the Clean Power Plan and the Affordable Clean Energy Rule US SUPREME COURT October – Petitions accepted for review	US SUPREME COURT June – WV v. EPA decision CONGRESS & PRESIDENT August – Passage and Enactment of Inflation Reduction Act

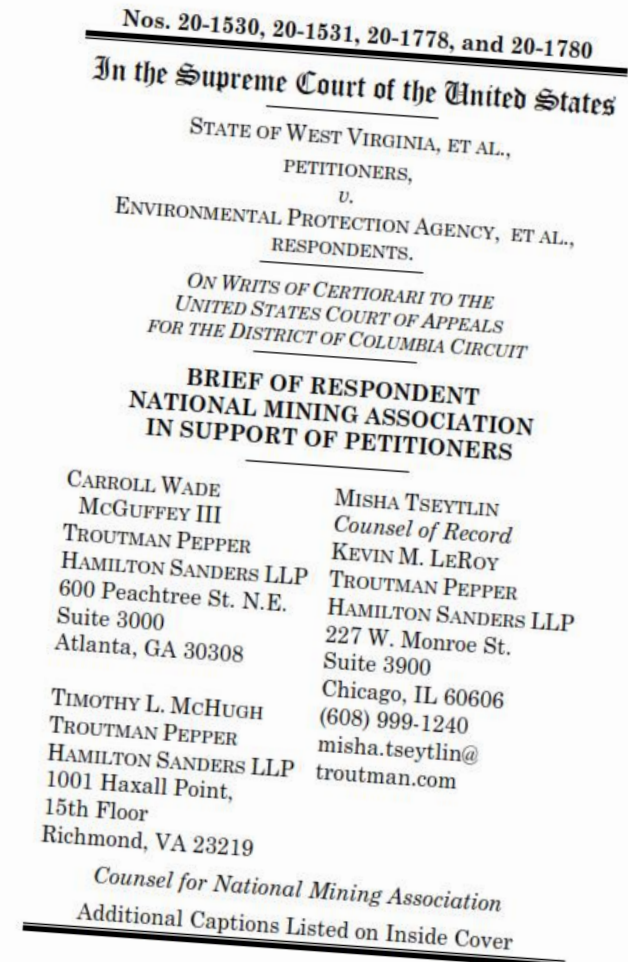
WEST VIRGINIA VS. EPA (2015)

- DC Circuit Court of Appeals Petition for Review (2015)
- U.S. Supreme Court Stay (2016)



NATIONAL MINING ASSOCIATION AMICUS

- The EPA's reliance on two sentences in Section 111(d) would transform nation's electric grid
- Request for Major Question Doctrine review



NMA – “TWO SENTENCES” IN 111(d)

- Clean Air Act 111d – The Administrator shall prescribe regulations which shall establish a procedure ... which each State shall submit to the Administrator a plan which establishes standards of performance for any existing source ... and provides for the implementation and enforcement of such standards of performance.
- Is the “Best System” unlimited discretion to reduce carbon-dioxide emissions from power plants by changing the resources used to generate electricity?

REGULATION OF POWER PLANT EMISSIONS (2015)

- New Source Performance Standards (Clean Air Act 111b)
- Clean Power Plan (Clean Air Act 111d)
- Best System for Emission Reductions?
 - Building Blocks:
 - Heat Rate Improvements – New Efficiencies
 - Generation Shifting

REGULATION OF POWER PLANT EMISSIONS (2019)

- Clean Power Plan (Clean Air Act 111d)
- Best System for Emission Reductions?
 - Source Efficiency Improvements

USE OF CLEAN AIR ACT 111(d)

- Obscure, never-used section of the law
- Modest words
- Vague terms
- Subtle devices
- Oblique or elliptical language

AND...

“The last place one would expect to find it is in the previously little-used backwater of Section 111(d).”



THE SUPREME COURT IS CLEARLY LISTENING...

“The rule (Clean Power Plan) was ‘not about pollution control’ so much as it was ‘an investment opportunity’ for States, especially investments in renewables and clean energy.”

- **Gina McCarthy, 2014**

“This is a rule that actually regulates toxic pollution emissions from primarily coal facilities, and we think we’re going to win because we did a great job on it...
...but even if we don’t, it was three years ago. Most of them are already in compliance, investments have been made...”

- **Gina McCarthy, 2015 regarding Michigan vs. EPA**



CONGRESS IS LISTENING TOO...

“We have identified different options for responding depending on what the Supreme Court tells us the nature and contours of what our authorities are.”

- Joe Goffman, 2022



2

HEARING ON THE NOMINATION OF JOSEPH GOFFMAN TO BE ASSISTANT
ADMINISTRATOR FOR THE OFFICE OF AIR AND RADIATION AT THE
ENVIRONMENTAL PROTECTION AGENCY

Wednesday, May 25, 2022

United States Senate
Committee on Environment and Public Works
Washington, D.C.

The committee, met, pursuant to notice, at 10:03 a.m. in
room 406, Dirksen Senate Office Building, the Honorable Thomas
R. Carper [chairman of the committee] presiding.

Present: Senators Carper, Capito, Cardin, Whitehouse,
Markey, Kelly, Padilla, Inhofe, Cramer, Lummis, Boozman,
Sullivan, Ernst.

INFLATION REDUCTION ACT

- In new and existing programs greenhouse gas is explicitly defined but struck provision on economy wide carbon emissions

ERN22410 5DM
689
S.L.C.

1 Administrator of the Environmental Protection Agency for
2 fiscal year 2022, out of any money in the Treasury not
3 otherwise appropriated, \$25,000,000, to remain available
4 until September 30, 2031, for grants and other activities
5 authorized under subsections (a) through (e) of section
6 103 and section 105 of the Clean Air Act (42 U.S.C.
7 7403(a)–(e), 7405).

8 (g) OTHER ACTIVITIES.—In addition to amounts oth-
9 erwise available, there is appropriated to the Adminis-
10 trator of the Environmental Protection Agency for fiscal
11 year 2022, out of any money in the Treasury not otherwise
12 appropriated, \$45,000,000, to remain available until Sep-
13 tember 30, 2031, to carry out, with respect to greenhouse
14 gases, sections 111, 115, 165, 177, 202, 211, 213, and
15 231 of the Clean Air Act (42 U.S.C. 7411, 7415, 7475,
16 7507, 7521, 7545, 7547, and 7571).

17 (h) GREENHOUSE GAS AND ZERO-EMISSION STANDARDS.—

ERN22410 5DM
S.L.C.

AMENDMENT NO. _____ Calendar No. _____
Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—117th Cong., 1st Sess.

H. R. 5376

To provide for reconciliation pursuant to title II of S. Con.
Res. 14.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended
to be proposed by _____

Viz:

1 Strike all after the enacting clause and insert the fol-
2 lowing:

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Inflation Reduction
5 Act of 2022”.

6 **TITLE I—COMMITTEE ON**
7 **FINANCE**
8 **Subtitle A—Deficit Reduction**

9 **SEC. 10001. AMENDMENT OF 1986 CODE.**

10 Except as otherwise expressly provided, whenever in
11 this subtitle an amendment or repeal is expressed in terms
12 of an amendment to, or repeal of, a section or other

“EVERY TOOL IN THE TOOL BOX”

“The decision does constrain what we do. But let me be clear. It doesn't take us out of the game. We still will be able to regulate climate pollution....

And we're going to use all of the tools in our toolbox to do so.”

- EPA Administrator Michael Regan, 2022



WHAT TOOLS MIGHT THOSE BE?



HAPPENING NOW

- Coal Ash Closure Decisions
- Particulate Matter National Ambient Air Quality Standards reconsideration
- Interstate Transport Rule Proposal



FUTURE ACTIONS

- Regional Haze SIPs / FIPs
- Effluent Limitation Guidelines Proposal
- CPP / ACE Replacement Rule



RELIABILITY

North American Electric Reliability Corporation (NERC) Warns of Reliability Crisis

“There’s clear, objective, conclusive data indicating that the pace of our great transformation is a bit out of sync with the underlying realities and the physics of the system.”

John Moura, Director of Reliability Assessment and Performance Analysis, NERC



FERC Examines Threat of Adverse Weather to Grid Reliability

“The problem is federal and state policies which, by mandate or subsidy, spur the development of *weather dependent* generation resources at the expense of the dispatchable resources needed for system stability and resource adequacy...That question of the weather’s effect on reliability is a subject that doubtless merits study and planning, but misguided government policies are the root cause of the alarming reliability issues facing the nation, not the weather.”

FERC Commissioner James Danly Concurrence – NMA Filed Comments on FERC Notices of Proposed Rulemaking Regarding Threat of Adverse Weather to Grid Reliability

Regional Transmission Operators Warn of Grid Reliability

“Implementation of the [Federal Implementation Plan Addressing Regional Ozone Transport] Rule has the potential to pose distinct reliability challenges that must be addressed.”

Joint Comments of the Electric Reliability Council of Texas, Midcontinent Independent System Operator, PJM Interconnected, and the Southwest Power Pool in Docket No. EPA-HQ-OAR-2021-0668, June 21, 2022



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