

Earlier today, the D.C. Circuit Court of Appeals decided two cases that add to the legal difficulties the Trump EPA will face in court. The difficulties relate to two proposed EPA rules that attempt to hamstring future efforts to impose tighter restrictions on pollution. Both EPA rules rely on vague, general grants of rule-making authority from Congress. That just became more tenuous.

One of the EPA [proposals](#) is the so-called “science transparency rule,” which is perversely designed to limit EPA’s future ability to utilize well-regarded scientific studies. The [other proposal](#) will reduce the agency’s flexibility in conducting cost-benefit analysis of future regulation.

In attempting to find legal authority for these rules, EPA has looked to general grants of rule-making authority. One such law is the Federal Housekeeping Act. That law (which may not actually apply to EPA) provides: “[t]he head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.” The agency has also invoked similar grants of authority found in particular pollution laws, also often used for housekeeping purposes such as personnel or paperwork rules. For instance, section 301 of the Clean Air Act allows the head of EPA to “to prescribe such regulations as are necessary to carry out his functions” under that law.

There were already doubts about whether these housekeeping laws supported the Trump EPA proposals, especially the scientific transparency rule. (Sean Hecht and I previously blogged about this [here](#) and [here](#).) The two new D.C. Circuit cases smack down other efforts to stretch similar grants of rule-making authority. They will make it even harder to justify Trump’s EPA proposals.

Neither of the two new D.C. Circuit cases is environmental — [one](#) involves Medicaid and Medicare, and the [other](#) involves securities markets. So I won’t go into the rather complicated facts. Instead, I’ll just pull out some quotations from these cases:

- “A ‘necessary or appropriate’ provision in an agency’s authorizing statute does not necessarily empower the agency to pursue rulemaking that is not otherwise authorized.”
- “Rules are not adopted in search of regulatory problems to solve; they are adopted to correct problems with existing regulatory requirements that an

agency has delegated authority to address.”

- “In other words, the further a regulation strays from truly facilitating the ‘administration’ of the Secretary’s duties, the less likely it is to fall within the statutory grant of authority.”
- “Although the Secretary’s regulatory authority is broad, it does not allow him to move the goalposts to wherever he kicks the ball.”

The facts and legal settings of these cases obviously differ from the EPA situation. Still, it’s striking that two cases came down on the same day squashing similar efforts by other agencies. There was already a steep road for EPA to justify its efforts to handicap future regulation. The road just got a little steeper.