Coal- and gas-fired power plants are a major source of U.S. carbon emissions. The Obama Administration devised a perfectly sensible, moderate policy to cut those emissions. The Trump Administration replaced it with a ridiculous token policy. The D.C. Circuit appeals court tossed that out. Now what?

It wouldn't be hard to redo the Obama policy based on all the changes in the power industry since Obama left office, which would result in much more rigorous emissions controls. The problem is that the ultra-conservative majority on the Supreme Court is likely to be very skeptical of the legal basis of any plan that, like Obama's, requires states to expand use of renewable energy.

Opponents of Obama's plan made two legal arguments, which both came up again in the litigation over the Trump rule. The first was that existing power plants were exempt from section 111(d) of the Clean Air Act, which was the legal basis of the Obama plan. The other argument was that section 111(d) merely allows restrictions on emissions from fossil fuel plants but can't require a change in a state's energy mix. The D.C. Circuit rejected both arguments in a carefully reasoned opinion, drawing a flamboyant dissent from an ultra-conservative Trump appointee. The dissenter's arguments might well find an appealing audience from the Supreme Court.

One option for the Biden Administration would be to switch to a different section of the Clean Air Act or at least use a different section as a supplement to section 111(d). There are several possibilities, none of which found favor with the Obama Administration. The one that is most under discussion today is section 115, which allows regulation of pollutants that impact foreign countries. That's definitely true of climate change. There are some possible pitfalls due to the details of section 115. The bigger concern is that section 115 has never been used before, so it's a completely untried approach. Perhaps it would be best used in tandem with section 111(d). The specific arguments that opponents used against the Obama regulation apply only to section 111(d) and don't apply in reference to section 115.

Another option is to give up the idea of mandating use of renewables and instead focus on ways of limiting emissions from existing power plants. As to coal-fired plants, there are some options that the Trump Administration rejected but that could result in real reductions. One would be to require co-firing of coal with natural gas or biomass (a renewable fuel). Requiring some existing gas-fired power plants to capture and sequester some of their carbon might also be a possibility. Sequestering all of the carbon is beyond the current state of the technology, but sequestering some of it might be doable. Requiring natural gas plants to use at least some gas from renewable sources or to co-fire with hydrogen might also be feasible alternatives. There are still possible legal challenges, but

they would be more limited than the attacks deployed against the Obama plan.

A final option is to combine all of these ideas. A regulation might invoke both section 111(d) and section 115 as the legal basis. It could also contains two different tiers. Tier 1 would consist of emissions control requirements at specific plants. Tier 2 could be based on also using more renewable energy. This approach maximizes the likelihood of something surviving the Supreme Court, even if not the whole regulation.

EPA has people who live and breathe the Clean Air Act. It wouldn’t be surprising if they come up with something different than what I’ve described. What EPA does will also depend somewhat on the Administration’s willingness to go big and take the risk of a damaging Supreme Court defeat. One way or another, however, it’s almost certain EPA will make this issue a priority. Emissions from power plants are simply too big a problem to ignore.