On Friday, the D.C. Circuit issued a two-page opinion refusing to stay a regulation. The D.C. Circuit frequently denies stays, but this ruling was notable for three reasons: It allows an important climate change regulation to go into effect; it clarifies an important legal doctrine; and it has a good chance of being upheld on appeal – even though the Supreme Court overturned a previous regulation on the same subject.

The Biden Administration's regulation essentially requires coal-fired power plants to capture and permanently store their CO_2 emissions. The rule replaces an earlier Obama regulation that took a different approach to power plant emissions by requiring states to reduce their use of fossil fuels in favor of renewables. Adding insult to injury for the coal industry, the Obama regulation also required using less coal and more natural gas.

The Supreme Court struck down the Obama rule in a case called *West Virginia v. EPA*. Using what it called the Major Question Doctrine, it said that EPA had overstepped by adopting a bold, creative approach in the form of changing the fuel mix on the grid. That made the Obama rule quite different from any previous EPA rule, a major expansion in agency power.

So what's notable about the stay denial? First, the D.C. Circuit said that the Biden regulation did *not* present a "major question." The D.C. Circuit held that there was no major question because the Court was merely telling a pollution source how to clean up its pollution, something "that falls well within EPA's bailiwick." Lower courts have been all over the place in trying to define the doctrine, so maybe the Supreme Court will provide more guidance when it reviews the D.C. Circuit's ruling.

Second, the D.C. Circuit held that the parties challenging the Biden rule had failed to show "irreparable injury" from leaving the rule in effect. That's a threshold requirement for a stay. To begin with, the court said, "actual compliance deadlines do not commence until 2030 or 2032—years after this case will be resolved." Moreover, to the extent states or industry felt a need to engage in long term planning, a stay wouldn't help, since they would have to prepare for the possibility that the plan would be upheld anyway. Finally, the states argued that they would have to submit plans to comply with EPA's rule only two years from now, but it turns out that there are really no consequences for missing the deadline. In short, there was no reason why states and the industry couldn't wait a year or two for the litigation to play out.

All well and good, you may say, but won't the Supreme Court reverse the D.C. Circuit *post haste*? That's always possible, but there's an important reason to think the stay will stand up. The reason is that one of the judges who joined the D.C. Circuit's order was Neomi Rao. Judge Rao was regulatory czar under Trump, and as you might guess, she's no fan of EPA regulation. If she thought there was no basis for a stay, there's a good chance some key conservative votes at the Supreme Court will go the same way.

As a consolation prize to states and industry, the D.C. Circuit expedited the case so they – and we – won't have to wait so long for a ruling. That's all to the good.

In other words, Friday was a very good day for EPA.

Postscript: Late the same day that this was posted, West Virginia and other states filed emergency requests for stays in the Supreme Court, claiming that the new regulation was indistinguishable from the one struck down in the earlier Supreme Court case.