

EPA's efforts to regulate carbon emissions from powerplants have had a tortuous history, and we're about to go through another round, with a rule from a Democratic Administration being repealed and replaced by a Trump rule. The last time this happened, the Trump EPA said that its interpretation of the statute required an extraordinarily narrow substitute rule. Because of intervening legal changes, it won't find it as easy to make that argument this time. In the end, the Trump substitute rule will undoubtedly be weak but not as weak as last time.

Basically, in the last round, the Trump EPA said that it was absolutely forbidden from considering any emission reduction strategy outside an individual plant's perimeter, either in setting the standard or in providing compliance mechanisms. It also said that states would have to make a plant-by-plant determination of what combination of technologies was feasible. Those position will be harder to maintain.

One reason is that the Trump EPA could rely on the Chevron doctrine to support its interpretation of the statute last time. That won't be true this time, because *Chevron* has been overruled. Other reasons why Trump may be more constrained this time, ironically, from a case the Trump Administration won, *West Virginia v. EPA*, which struck down Obama's powerplant rule.

First, it's unlikely that the Trump EPA will be able to give the states so much control of setting standards for individual plants. In *West Virginia*, the Court rejected an argument by state governments that they were ultimately in charge of setting emission standards for individual plants. According to the Court, "the Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved. It does so by again determining, as when setting the new source rules, "the best system of emission reduction . . . that has been adequately demonstrated for [existing covered] facilities." The previous Trump regulation seems invalid under this standard since it left it to the states to make the final determination of best technology for each plant.

Second, after a careful analysis of the text of the statute, the D.C. Circuit had rejected the statutory arguments that the Trump Administration was relying on to justify such severe limits on the regulatory tools it adopted. While the Supreme Court rejected the Obama rule as a power grab, it carefully refrained from endorsing some of the legal positions taken by the Trump Administration. It expressly left open whether EPA is strictly limited pollution control measures within the fence-line of individual sources. It also refrained from ruling out use of emission trading mechanisms as an option for complying with the rules.

Trump may still be able to win on those statutory arguments, but there are at least some yellow caution lights blinking. In particular, the Court's careful dance around these issues suggests that at least one or more conservative Justice wasn't convinced of the Trump reading of the statute.

Just as the Trump EPA will have a harder time claiming that the statute requires it to issue a super-narrow rule, it will also have a hard time saying that the statute categorically invalidates the approach that Biden took, of using carbon capture and sequestration as the primary technology standard for coal-fired plants.

At oral argument about the Biden rule, D.C. Circuit judges were skeptical of the claim that it was the same kind of power grab as the Obama rule. They also seemed to think that carbon capture was a form of conventional pollution control, removing a pollutant (CO₂) from the smokestack.

That means that Trump will need much more heavily on factual disagreements about the availability of this technology. That's a legitimate issue, but it's also one that will require a very detailed and technical analysis of the evidence. All of that will slow down Trump's ability to repeal and replace the Biden rule.

Bottom line: We are likely to end up with a Trump rule that is much weaker than the Biden rule, but not as weak as EPA's effort in the first Trump Administration. And the process will take Trump longer this time, with a greater litigation risk. This matters because even a very weak rule may require significant investments in improving powerplant efficiency, which could result in some plant closures.