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West Virginia v. Environmental Protection Agency. The Agency's Climate Authority

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D I A L O G U E

WEST VIRGINIA V. ENVIRONMENTAL PROTECTION AGENCY: THE AGENCY'S CLIMATE AUTHORITY

SUMMARY

On February 28, 2022, the U.S. Supreme Court heard oral arguments for the landmark *West Virginia v. EPA* case, involving the scope of powers delegated to the U.S. Environmental Protection Agency (EPA) through the Clean Air Act. The Court's decision will affect administrative law, and could have major consequences for environmental law, particularly the Agency's power to regulate greenhouse gas emissions and take action on climate change. On March 1, the Environmental Law Institute hosted a panel of leading experts to discuss the case, the arguments, and what form the decision may take. Below, we present a transcript of that discussion, which has been edited for style, clarity, and space considerations.

Michael Gerrard (moderator) is the Andrew Sabin Professor of Professional Practice at the Columbia Law School.

Joanne Spalding is the Acting Legal Director and Chief Climate Counsel at the Sierra Club.

Jill Tauber is Vice President of Litigation for Climate and Energy at Earthjustice.

Keith Matthews is Of Counsel at Wiley Rein LLP.

Michael Gerrard: In 2015, the U.S. Environmental Protection Agency (EPA) issued a set of regulations called the Clean Power Plan.¹ It was designed to reduce greenhouse gas emissions from electric power plants mostly by reducing the use of coal. This reduction is essential if we're going to meet our climate targets. The Clean Power Plan required each state to come up with a plan to reduce these emissions. That would usually involve not only making the power plants themselves more efficient, but also changing the mix of fuels used, procuring renewable energy, allowing emissions trading, and other actions.

The Clean Power Plan was immediately met with a barrage of litigation. The main argument was that in various ways EPA was exceeding the authority that the U.S. Congress had given it under the Clean Air Act in issuing the regulations. The cases went to the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit,² which refused to stay the rules, and the D.C. Circuit set up a briefing schedule. But in February 2016, before the briefs were due, the U.S. Supreme Court surprised just about everyone and

issued a stay that blocked the plan so long as the litigation was proceeding.³ This was by a vote of 5 to 4, and no explanatory opinion was issued.

The D.C. Circuit heard the argument in September 2016, but then in November, Donald Trump was elected president. He had promised during his campaign to repeal the Clean Power Plan, and after he took office, EPA did repeal the Clean Power Plan and issued a new set of regulations called the Affordable Clean Energy Rule.⁴ The challenge to the Clean Power Plan became moot and the D.C. Circuit never issued a decision on that case.

The Affordable Clean Energy Rule was also challenged in court and on January 19, 2021, the day before President Trump left office, the D.C. Circuit issued a decision in the case *American Lung Ass'n v. Environmental Protection Agency*.⁵ The court ruled that the Affordable Clean Energy Rule and the repeal of the Clean Power Plan were invalid because EPA under President Trump was relying on an overly narrow construction of the relevant Clean Air Act provision.

After President Joe Biden took office, EPA indicated that it was not going to reinstate the Clean Power Plan. Instead, it was going to come up with a new set of measures to reduce power plant emissions. While EPA was at work developing the new measures, the Supreme Court surprised everyone again by agreeing to review the January 19 decision from the D.C. Circuit. The Supreme Court accepted four of the petitions for certiorari that had been filed. Those were from the state of West Virginia, the state

1. Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80 Fed. Reg. 64662 (Oct. 23, 2015).
2. *West Virginia v. EPA*, Nos. 15-1363 et al. (D.C. Cir. Oct. 29, 2015).

3. *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016).
4. Repeal of the Clean Power Plan, 84 Fed. Reg. 32520 (July 8, 2019).
5. No. 19-1140 (D.C. Cir. Jan. 19, 2021).

of North Dakota, Westmoreland Mining Holdings, and the North American Coal Corporation. These cases were consolidated, and the Supreme Court heard arguments on February 28, 2022.⁶

Let me now introduce our panelists. Joanne Spalding is Sierra Club's acting legal director and chief climate counsel. She oversees the Sierra Club's litigation campaigns nationwide, including managing the organization's federal and state climate litigation and regulatory work. She's lead counsel for the Sierra Club in all litigation arising from the Clean Power Plan and the Affordable Clean Energy Rule.

Jill Tauber is the vice president of litigation for climate and energy at Earthjustice. She leads the organization's litigation and legal advocacy to achieve 100% clean energy and to curb climate change. Prior to joining Earthjustice in August 2013, Jill was a senior attorney at the Southern Environmental Law Center, where she led the organization's energy-efficiency practice across the Southeast.

Keith Matthews has practiced environmental law for more than 25 years. He has practiced in the private sector and for more than 13 years was staff attorney and assistant general counsel at the Office of General Counsel of EPA, first in the Air and Radiation Law Office (ARLO) and then in the Pesticides and Toxic Substances Law Office. He has also served for four years as director of the Biopesticides and Pollution Prevention Division in EPA's Office of Pesticide Programs, and is of counsel with Wiley Rein LLP.

I'm going to pose a series of questions and invite the panelists to respond. We'll try to leave time for questions from the audience.

Here's my first question. Elizabeth Prelogar, the solicitor general, represented EPA. She argued that the Supreme Court should not have taken the case at all because there is no regulation pending. The Affordable Clean Energy Rule is gone, and the Clean Power Plan has not been reinstated. And those rules have not yet been replaced, so there's nothing to review. All the Supreme Court could do is issue an advisory opinion, which they're not supposed to do. That was the argument from EPA. There was quite a bit of discussion about whether the D.C. Circuit had revived the Clean Power Plan. Joanne and Jill, what do you make of the arguments on this issue and the questions that the justices have asked about those?

Joanne Spalding: I think that the solicitor general's argument is right on target. The D.C. Circuit opinion did not revive the Clean Power Plan because the litigants did not ask for it to do that. In fact, the petitioners challenging the Affordable Clean Energy Rule and the Clean Power Plan repeal explicitly said in their briefs: We do not want you to reinstate the Clean Power Plan. It wouldn't be appropriate at this point. The deadlines have passed. The emission targets are no longer relevant because the industry had already achieved the 2030 goals back in 2019.

In these circumstances, citing *Small Refiner Lead Phase-Down Task Force v. EPA*,⁷ the petitioners argued that the better course is to vacate the unlawful replacement rule and to remand to EPA without reinstating the Clean Power Plan. The D.C. Circuit opinion needs to be read in light of that. It doesn't explicitly say anything about reinstating the Clean Power Plan. In addition to that, and I think Jill could talk about this as well, the Clean Power Plan is not self-executing. So, even if it were in place, it would require further rulemaking.

Jill Tauber: That's exactly right. I thought the solicitor general had excellent answers on this point. And in terms of the Clean Power Plan not being self-executing, there was a discussion related to this during the argument, in particular with Justice Steven Breyer, on this point of what the D.C. Circuit did. What happens now? The reality is (1) the Clean Power Plan never took effect, that's clear, and (2) as the solicitor general pointed out, the deadlines that were in the original Clean Power Plan have passed. The emissions targets of the original plan have been met because of market forces, and the changing nature of the industry right now make it obsolete. And, of course, EPA has said it's committed to writing a new rule.

No litigant had asked them, in challenging the plan, to preserve it. So, we have moved on from the Clean Power Plan. This case is not about the Clean Power Plan. It would not be revived with the decision here. As Joanne said, it's really important to understand the nature of how §111(d) works. This is not a self-executing regulation that goes back into effect and sets the emission standards. States would have to come up with a plan in response to the guidance that EPA puts out. So, we're in a different place, a different space, and EPA is working now on new regulations.

Joanne Spalding: Not only is it not self-executing, but were EPA to begin to try to implement it, any action it would take, the petitioners would be able to challenge that action and they would be able to bring another lawsuit challenging the underlying Clean Power Plan.

That underlying litigation has been dismissed as moot, but they could use the after-arising grounds provision in the Clean Air Act. It's §307(d), and it includes the provision that, if there are grounds arising after the finalization of a rule at any point, then one could challenge that rule, based on what EPA is planning to implement.

A rule has never been in place. They are now putting it in place. That's an after-arising ground and we can challenge it. That's why there's an adequate legal remedy if for any reason the Clean Power Plan would be brought back into place. Any ruling by this Court on the Clean Power Plan or this case in general would be advisory.

Michael Gerrard: During the oral arguments, the solicitor general said that EPA would be issuing an advance notice or would be issuing a proposed rule by the end of this cal-

6. *West Virginia v. Environmental Protection Agency*, Nos. 20-1530 et al. (U.S. Feb. 28, 2022). A transcript of the oral arguments is available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1530_8ok0.pdf.

7. 705 F.2d 506 (D.C. Cir. 1983).

endar year and would be issuing the final rule a year later. But the Supreme Court we expect to rule this May or June. So, Keith, is there any procedural device by which EPA could move more quickly in a way that would clarify the status of the Clean Power Plan?

Keith Matthews: There's a potential option that might be available to EPA. Before I get into that, I'll make two points. The first point is that I think Jill and Joanne had excellent responses to the overall question in general. I think that everything they said is spot on. The second point is that I think the solicitor general was a bit optimistic in terms of her understanding of the rulemaking process. It's not often that you go from a proposal, to a closing comment period, to a final rule in a year or less. Particularly a rule that is very complex, and for which the Agency might in fact have a voluminous number of comments.

But being optimistic is not to say that's impossible. It's possible, but I would say not likely. Be that as it may, with respect to your question, I would suggest that there is a regulatory instrument. That if EPA finds itself in a position where for whatever reason the Clean Power Plan has arisen from the dead and now bears some semblance of existence and the Agency wanted to formally close it, it could use an administrative instrument called a direct final rule.

Direct final rules were pioneered by EPA. They were initially used in the context of a situation in which the Agency needs to promulgate a completely noncontroversial rule. The Agency doesn't expect any comments on this particular action. So, what the Agency would do is publish simultaneously a final rule that basically purports to implement the action within a certain time frame, and at the same time publish a proposed rule in which it would explain why it thinks the rule is noncontroversial and solicit comments.

What the final rule would say is: We publish this proposed rule simultaneously. We don't expect to get any comments. If we don't receive any comments, then we are going to go forward in this time frame. The time frame was set forth in the direct final rule and we'll implement the rule as it is written here. So, that's a very convenient way to get around what can quite frankly be an excruciatingly long time period before doing a rulemaking under the Administrative Procedure Act as it has evolved to this day.

In fact, I was instrumental in a number of instances where, rather than say the final rule will go final if we don't receive any comments, I actually had a couple of direct final rules where I basically specified what comments we were interested in. If we don't receive comments that specifically negate these conclusions, we're going to go forward.

That's a bit of an evolution of the direct final rule as it initially has been pioneered by EPA. I would say the Agency could do that here. If it shows that the Clean Power Plan somehow, as I say, rose from the dead and were there as a specter, the Agency can simply say: Listen, this is moot. This serves no purpose.

To the extent that we as a matter of administrative law need to formally revoke this or put it out of its misery, we're going to do so with this instrument. We'll take comment on it, but I would suggest that the comment should

be directed to specifically persuade the Agency that there is a reason to keep the Clean Power Plan in effect. If the comment doesn't do that effectively, the direct final rule goes forward.

Michael Gerrard: What would be the timing of that? Would it be a 30-day comment period and then EPA acts fairly quickly after that?

Keith Matthews: The Agency could do that. Quite frankly, I think given the expertise of the Office of Air and Radiation, they could probably write that in a month to a month and a half. Take a 30-day comment period and say it's going to be implemented in 15 to 30 days based upon the comments they receive or don't receive. They can actually act very quickly.

Joanne Spalding: I think EPA has not taken that step because it hasn't perceived it to be necessary. Because in the end, Keith, I think this goes to what you were saying—this would essentially be, to the extent that it is necessary to do this, we are just confirming that the Clean Power Plan is not in effect. It has never been in effect and this is just confirmation of that.

I do wonder the extent to which some of the justices might have frustration with EPA and think the Agency is somehow trying to deprive the Court of jurisdiction from hearing this case. I don't think that's a legitimate concern because I don't believe the Court has jurisdiction. It is an exercise of judicial activism to reach out and issue an advisory opinion in this context. But I have heard that concern.

Jill Tauber: I agree. I don't think EPA perceived the need to do that. Although it's an interesting idea, I think EPA's plan is clear from the argument of the solicitor general; they are working on the rule now, and they are going to have a notice of proposed rulemaking out by the end of the year.

The time frame the solicitor general gave was to expect a final rule a year after that. So, the Agency is working right now on it. There's no rule on the books. The Clean Power Plan is not in existence and they're doing what they need to do to get a §111(d) standard set. I think that that's where their focus and energy is and that's what they represented to the Court.

Keith Matthews: A couple of points to follow up. I want to make clear that I wasn't suggesting that EPA either needs to do that or should do that. I was answering Michael's question.

The second thing I'll say is there is a bit of danger there because to my knowledge a direct final rule has never been challenged. As I said, EPA pioneered this. I think other agencies have used this. I think, as a matter of administrative law, that it meets all the requirements of the Administrative Procedure Act.

But it is a bit different from the normal rulemaking. I do think agencies need to be careful to not go out on a limb on this because you really don't want to be in a situation

where a court comes out and says: No. I don't know where you guys got this from. You shouldn't be doing this. Don't ever do it again. Because, quite frankly, in the context of a noncontroversial situation where the agency just wants to get something done quickly and cleanly, it actually is a very useful instrument. You don't want to overuse it and put it at risk.

Michael Gerrard: And if EPA were to do it, probably the first court we would hear talk about it would be the Supreme Court, who would be deciding in this case whether or not they thought that that was valid, whether they thought that was an effective action by EPA in closing the door on the Clean Power Plan.

It's entirely possible that the Supreme Court will get to the merits, that they'll conclude that they're not being asked to issue an advisory opinion, but they really want to rule. And of course, the merits are mostly about §111 of the Clean Air Act. A lot of that has to do with whether the measures called for in the Clean Power Plan fit within the best system of emissions reduction, which is what §111 is talking about.

I'd like to invite you to talk about what you heard in the oral argument on this issue, on the merits of §111, and what you think of it.

Joanne Spalding: It was interesting and heartening that nobody here is challenging the Court's ruling in *Massachusetts v. Environmental Protection Agency*,⁸ that EPA has the authority and obligation to regulate greenhouse gases under the Clean Air Act. And there was not a lot of discussion about the Court's decision in *American Electric Power Co. v. Connecticut*,⁹ in which the Court said that EPA is the expert agency: that it is the agency with the expertise to establish standards for greenhouse gas emissions from this source category, fossil fuel-fired power plants, under the Clean Air Act.

The question here was all about the way that EPA decides to set these standards and what it looks at. The statute instructs EPA to look at the best system of emissions reduction that has been adequately demonstrated. That calls for an inquiry into the source category, the kind of pollutant, and the nature of that pollutant. With this particular source category, this "inside the fence line versus outside the fence line" question and issue is whether EPA can only require reductions at the plant itself. Those reductions tend to be both emissions control technologies and improving efficiency. Or can it go beyond that and look to the source category as a whole and look at how you get reductions from this source category.

In this case, the electric sector is unique. There is no other source category that is integrated the way that power plants are. They are all part of a bigger system. They're all interconnected. So, reducing power generation at one plant requires an increase at another plant to meet the needs,

and vice versa. The question in this context is essentially whether EPA can look at this source category and see how it operates in the real world.

This is a global pollutant. Reductions in one place are essentially fungible both in terms of the product and the pollutant. That's what EPA did. I think it's really important because the petitioners in this case seem to think that once EPA does this, then the cat is out of the bag and it's going to apply to all these other source categories. It's not. This one is unique. I think that came across.

Some of the questioning by the Court that I thought was quite interesting included the observation that the stringency of that system of emission reduction and the performance standard that arises from it aren't necessarily related. As attorney for the power company respondents, Beth Brinkman, stated during oral arguments, the stringency is "orthogonal" to the question of whether it's inside the fence line or outside the fence line¹⁰—whether it's "to the source," or "at the source," or "for the source"—because you can have a very weak rule, as the Affordable Clean Energy Rule is, based on inside the fence line measures.

But you could also have a much more stringent rule, because EPA in the Affordable Clean Energy Rule essentially didn't even set a standard or indicate what a standard could be. They just provided lists of control measures, efficiency measures. They were not going to even look at really the two most effective measures, because they thought nobody is going to want to do those because they're too expensive and they're going to trigger other permitting requirements, which is completely beside the point, by the way. So, it's an incredibly weak rule. But you could also see a really weak rule that would be outside the fence line that would say we're just going to require a little bit of generation shifting. And the justices, at least some of the justices, really perceived that difference.

Michael Gerrard: Let me say a word for the people who haven't delved into §111. Section 111 requires EPA to designate certain source categories. The relevant one here is fossil fuel power plants. The major question is: is "system" referring to an individual power plant or is it referring to the grid of which individual power plants are a part? If you're talking about the system, it increases the scope of things that might be done to reduce the emissions.

Jill Tauber: I would add that the argument got into this right off the bat, with Justice Clarence Thomas asking whether the petitioners needed the "major questions doctrine" to prevail in this case. This was to attorney Lindsay See for petitioners. And the answer was no. Then, it was a dive right into the text. Some of this does come down to that understanding of "system," which is in the statute. What's not in the statute is "at the plant." So, there's a really strong plain language argument here.

8. 549 U.S. 497 (U.S. 2007).

9. 564 U.S. 410 (U.S. 2011).

10. See oral arguments in *West Virginia v. Environmental Protection Agency*, Nos. 201530 et al. (U.S. Feb. 28, 2022), at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1530_8ok0.pdf (page 129).

I was also struck by the exchange around this “inside and outside the fence line” distinction. I believe it was Justice Elena Kagan who said something to the effect of it’s not necessarily relational to a stronger, or weaker, or bigger, or smaller impact. I think that’s really important if you’re understanding the petitioners’ argument as being all about whether it’s inside or outside the fence line.

The other thing I would add is if you’re looking again at the text of the statute and in particular §111(a)(1), there were questions about what the guardrails are and what the limits are on that. That’s also clearly in the statute with respect to considering whether the system of emissions reduction is adequately demonstrated. There was a great discussion of the briefs and discussion at the argument about how this power generation thing works, how the grid works, and whether these different tools were contemplated by the Clean Power Plan.

At least as reflected in the best system of emissions reduction, is that happening? And the answer is yes. That’s part of the reason why we are 10 years ahead in accomplishing the emissions targets. But the statute also speaks to costs, reliability of the grid, all those factors that are in the statute to provide limits as to what can be included in the best system of emissions reduction. I thought that was a good exchange and argument.

Michael Gerrard: One thing that became clear in the argument is that several of the justices at least thought this was anything but a sharp distinction between inside the fence line and outside the fence line. Most of the prior discussion suggested it was a sharp dividing line. But it was pointed out, for example, that EPA could impose really severe limitations entirely within the fence line. They could tell the coal-fired power plants they had to shut down or they had to retrofit with carbon capture and sequestration, which would not be economically feasible under any calculation to retrofit. But it was quite interesting to see that previously envisioned sharp distinction kind of fall away.

One of the things that some of the justices seemed to be concerned about, and Jill alluded to this, is what the guardrails are. What are the outer limits of EPA’s permissible regulation here? That issue of course was important in the 2014 *Utility Air Regulatory Group* case,¹¹ which concerned a different program under the Clean Air Act, the new source review program.

In that case, EPA said that the numerical numbers requirement for what size of emission source requires a permit are way too low when it comes to carbon dioxide. If it’s tons per year, that may be okay for sulfur dioxide and other conventional air pollutants. But it’s way too small for carbon dioxide. If you regulate carbon dioxide sources that emit that little, you’re going to be regulating hundreds of thousands or maybe millions of sources.

EPA didn’t want to do that. So, EPA instead issued a tailoring rule—a rule that greatly increases the threshold so

that it could regulate many fewer sources. But the majority opinion by Justice Antonin Scalia said EPA wants to have the authority to regulate these hundreds of thousands of sources. That’s going way too far. And it said that the tailoring rule, this effort to reduce the number of sources regulated, exceeded the authority of EPA.

So this issue of what are the guardrails, how far can EPA go under the Clean Air Act, was something that some of the justices were interested in. Any comments on whether there are guardrails here, whether there are limitations on how far EPA can go, or whether that’s necessary? Or is it that what matters is how far EPA really wants to go or how far is EPA trying to go, as opposed to how far could it theoretically go?

Joanne Spalding: I think Jill started to set those out. First of all, the system of emission reduction has to be adequately demonstrated. I think the power companies’ briefs and the argument really conveyed to the Court this is what we do. There are also others. There’s an amicus brief from grid operators explaining this. One could tell that the Court, or at least most of the justices, had become familiar with how the system operates. That “adequately demonstrated” requirement is important.

The statute also requires EPA to take costs into consideration. I can’t remember which counsel pointed out that this is not a balancing. This is not the cost-benefit analysis that EPA does pursuant to an executive order that requires them to do a cost-benefit analysis. This is an analysis of the impact of the cost on the industry. So that is a guardrail, because EPA cannot impose a rule that would have such dramatic impact on the industry.

EPA can impose a rule that would shut down some plants. There’s precedent that explicitly says that, and Congress contemplated—you can look at the legislative history of the Clean Air Act—that sources would become obsolete, that new technologies would evolve, and that older polluting sources would eventually close. It’s a technology-forcing statute. So it’s fine for some sources to shut down, but it’s not fine for EPA to impose a standard that would be disruptive to the entire industry and more than the industry could bear in terms of costs.

Then there’s an energy requirement in the statute. EPA has to consider energy. So, they can’t threaten reliability. The statute explicitly tells EPA to look at the energy impacts of their decisions. Those are really serious and meaningful guardrails.

Jill Tauber: I don’t think we can say this enough. This is happening. You have to look at the power sector. I mean it’s striking to have the power sector arguing in favor of EPA authority here to provide this regulation. I think that reflects the reality of the industry right now, of what we’re seeing in the power-sector space. We are seeing a transition away from dirty resources. We are seeing a scaling up of renewables. That’s what’s happening.

By the way, I don’t think it’s lost on any of us that the timing of oral arguments in *West Virginia v. EPA* coincided with the release of the Intergovernmental Panel on

11. *Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U.S. 302 (U.S. 2014).

Climate Change (IPCC) report.¹² We have to transition. I think that a lot of the argument was in the abstract, in part because there is no regulation in place right now. That's sort of inherent in this and of course implicates all the justiciability questions. But we have a look at what's happening, which is this is an industry that is transitioning in the face of evolving technologies, in the face of plummeting costs of renewables. That's in the background and was effectively conveyed at oral argument.

Michael Gerrard: Jill mentioned *Massachusetts v. Environmental Protection Agency*. One of the concerns that some people had before the argument was that the Court might take this as an opportunity to undo parts of that seminal case, that said EPA does have the authority under the Clean Air Act to regulate greenhouse gases. In view of the very minor discussion of that case, are you now feeling better and less worried that the *Massachusetts* parts of it might be overturned?

Jill Tauber: It was briefly discussed during oral arguments. I think the discussion amounted to “are you challenging *Mass v. EPA*?” Answer, no. And are you challenging *American Electric Power*, maybe a little less, no. We're not challenging the idea that EPA can regulate greenhouse gas emissions from power plants—so those core holdings of course are the law. I felt good about it going in and there was not a lot of focus on that argument, I think for a good reason. Because it's so clearly the law and what EPA has authority to regulate.

Michael Gerrard: Of course, part of the *American Electric Power* case primarily was about saying that the federal common law of nuisance was displaced as to greenhouse gas emissions because EPA had the authority to regulate greenhouse gas emissions. This essentially confirmed the *Massachusetts* case. There was also a statement in the *American Electric Power* case that §111(d) was available to EPA to regulate sources. I didn't hear a clear affirmation from the petitioners that they still believe that that part of the *American Electric Power* decision is still valid. But we'll see how that comes out.

Joanne Spalding: I think the holding of *American Electric Power Co. v. Connecticut* depends on §111(d). That is the provision that addresses emissions from existing power plants. (Section 111(b) is the new source standards of performance.) That case was really explicitly about whether §111(d) displaces federal common law. It would not make any sense to read that case in any other way. And I think that the petitioners in this case conceded that.

It was a question of, well, just because EPA is the expert agency and it has this authority under §111(d), it doesn't have the authority to do this cap-and-trade program, this

broad program that is really regulating the electric sector and the grid, and not regulating pollutants. And now, that's really where their dispute fails. Of course, what EPA is doing is regulating pollutants. And from my perspective, I think that's what EPA would say and has said. I think that the concession about *American Electric Power Co. v. Connecticut*, that petitioners made at oral argument, is important because it is essentially an acknowledgement of the role of §111(d).

Michael Gerrard: And the big question is what is the scope of §111(d)? How far can EPA go? Did EPA go too far in the Clean Power Plan or was it more restricted?

Joanne, you mentioned cap and trade. There was some discussion of cap and trade in the oral arguments, but there had also been some commentary that some of the justices may have misinterpreted the role that cap and trade played with the Clean Power Plan and its relationship to prior legislative attempts. Such as the Waxman-Markey bill of 2009,¹³ which was a cap-and-trade bill but was never enacted. Any thoughts on that?

Joanne Spalding: I thought that was a very important point. There's throughout this litigation an effort by West Virginia, and the states aligned with it, and the coal industry private parties, to say what EPA is trying to do is something that Congress tried to do and didn't. Therefore, that somehow means that EPA doesn't have authority to do it. First of all, legislation that was never enacted should never be relied upon to interpret a statute that was enacted. That's pretty basic in terms of statutory interpretation.

But the point was made that they are also completely different kinds of provisions. Because this is just within the electric sector, it's just the sources that are subject to regulation under the Clean Air Act that would be subject to this standard. In that context, there are trading schemes that are in the Clean Air Act that Congress has included explicitly and blessed. So again, Brinkman's point representing the power companies was that because trading is in the statute, that's one of the systems that's adequately demonstrated.¹⁴ It doesn't have to be explicitly mentioned in §111(d) because it's on the menu. But it's fundamentally different than an economywide cap-and-trade program.

Michael Gerrard: Waxman-Markey would have established a mandatory economywide cap-and-trade program. The Clean Power Plan did not. It provided that trading was an option that could be used. It was an additional flexibility mechanism that would allow the power industry to reduce its overall costs in achieving the requirements. As was pointed out during oral argument, the text of §111(d)

12. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE WORKING GROUP II, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY (Feb. 2022), available at <https://www.ipcc.ch/report/ar6/wg2/>.

13. American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009) (commonly referred to as the Waxman-Markey Bill after its authors, Reps. Henry A. Waxman (D-Cal.) and Edward J. Markey (D-Mass.)).

14. See oral arguments in *West Virginia v. Environmental Protection Agency*, Nos. 201530 et al. (U.S. Feb. 28, 2022), at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1530_8ok0.pdf (page 104, lines 8-14).

says that states are to come up with plans like those of §110. Section 110 is the section that calls on states to prepare state implementation plans to achieve the national ambient air quality standards.

But §110 explicitly says that market-based mechanisms, such as cap and trade, are a permissible element of a state implementation plan under the section. So, there was also some discussion during oral argument about whether the reference in §111(d) to §110 was just about the procedural part, the part that each state has to come up with its own plan, or whether it also included the substantive part such as the allowance of market-based mechanisms.

I'm going to turn to the "major questions doctrine" in a minute. But before we get to that, was there anything else about the Clean Air Act that came up in oral argument that any of you would have a comment on?

Joanne Spalding: The one thing I would say is that what you just mentioned reminded me of the role of EPA versus the role of the states, for example in the context of §111(d). The Clean Air Act, as we know, is a cooperative federalism statute. So it has roles for the federal government and the state governments. What EPA does in this context with existing sources is, rather than set a performance standard that directly applies to the regulated sources, it sets a benchmark. It's essentially a benchmark that states then have to apply to the sources within that state.

Nothing about the Clean Power Plan (to the extent that it's even something that the Court should be considering), nothing in that took away the states' ability to do that. That is a fundamental feature of §111(d), that the states then apply the benchmark that EPA establishes.

There was this inconsistent position I think because under the Affordable Clean Energy Rule, EPA said you cannot go outside the fence line, and EPA is not doing that in setting the best system of emission reduction, and states and power companies cannot go outside the fence line in applying that. I actually think that is right, that there has to be symmetry. Because if EPA can't consider certain mechanisms that the states and power companies would use to comply, then they might be establishing a weaker rule than they otherwise would.

But what the power companies seem to be saying is oh, no, no. Even though the Affordable Clean Energy Rule said that, really states could fudge it in the implementation and enforcement. I think it is the fundamental inconsistency that draws attention to the disconnect between inside and outside the fence line.

Michael Gerrard: One thing that is very important for people to understand is that most of §111 is about new sources of air pollution. For the new sources of air pollution, EPA can impose direct standards. They can specify the technologies and the emission that the new sources can emit. But §111(d) is this little exception that applies to existing sources. And for the existing sources, EPA has a whole lot less direct authority. There are restrictions on what kinds of sources can be regulated under §111(d). And if you are one of those kinds of sources, as you've been say-

ing, it's up to the states to come up with the implementation method.

One of the arguments against the Clean Power Plan was that EPA was too prescriptive in what it told the states to do. That the states in reality had fewer options to achieve that, but still it is the states that were on the front line.

Keith, we have been talking generally about how the Court has been approaching the statute and the timing of this litigation and so forth. Do you have any observations on the effect that these issues would have on administrative law more generally, or on other agencies, or the way courts approach administrative actions?

Keith Matthews: I do. And before I start, I will say that I find this discussion to be very interesting and quite frankly very enjoyable. It takes me back many years to these sorts of very detailed discussions of the Clean Air Act that were being held in ARLO back at the beginning of my tenure in the Office of General Counsel.

When the Environmental Law Institute said they would like for me to be a part of this panel, I said, you do understand I'm not a Clean Air Act lawyer? I was in ARLO for some time but at that time, I was in fact the "R"—the radiation attorney. I counseled the Office of Radiation and Indoor Air on radiation protection standards that apply to nuclear waste disposal facilities.

But I was part of the law office and I sat in many times on very detailed discussions that were being held on very particular provisions of the Clean Air Act. My memory harkens back to listening to experts and to talking about this with people who know the Clean Air Act probably better than anybody else in the world. But I did move on from that, and I became a chemical regulation lawyer. From that standpoint, that's one reason why this case was of significant concern to me.

We just had oral argument. The Court hasn't issued an opinion. No one has any idea what the Court's opinion is going to be. It's all well and good to sit here and do Monday morning quarterbacking and try to figure out what the opinion is going to look at based upon what we've seen. But the Court hasn't even taken this into chambers yet, so it will be interesting to see how it comes out.

For someone such as myself, this whole concept that seems to have developed or be developing, one of the things I found interesting was that there was a fair amount of discussion about "major questions" during oral argument. But to my way of thinking, it doesn't seem as if this is really a fully fleshed out concept. There seem to be a fair number of questions. Well, what is the major question? Is this a major question? Or how do we get to a major question? Or is it a clear statement versus a major question? How does all of this play into the fabric of administrative law?

I will say this. My practice is based really at the edge of technological development. I work with companies that develop genetically engineered organisms that are regulated by agencies. Genetic engineering—say ag biotech—is the genetic engineering of agriculture, either plants or animals. There are far more genetically engineered plants that have been developed today, but animals are coming.

Insects are here. Nobody in their right mind thinks that this enterprise should be unregulated. Obviously, we need to have governmental oversight to ensure that they are safe, effective, and a useful deployment of this technology. But there's also the question when you look at it—from the ag biotech standpoint, you have EPA, the Food and Drug Administration, and the U.S. Department of Agriculture—do any of those agencies have explicit statutory authority to regulate genetically engineered organisms? I think that's an open question.

Now, with respect to EPA, I think EPA probably has a very, very strong statutory basis in the pesticides context under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). FIFRA authorizes EPA to regulate any substance or mixture of substances that is intended to prevent, destroy, repel, or mitigate a pest, *or* that alters the physiology of a plant. So, if you are developing a genetically engineered organism that is intended to have an effect such that it prevents, repels, destroys, or mitigates a pest, or that it alters the physiology of a plant, I think you can say EPA has very strong statutory authority going forward. It didn't need any further direction from Congress to regulate these sorts of organisms. The same I think would be true with respect to, say, genetically engineered insects, if they are being engineered for a pesticidal purpose.

I'm not so concerned about how administrative law may evolve in that context with respect to EPA's regulation of ag biotech. But as you know, in your question, this is an issue that is writ far larger than just EPA, so I think that we have to be very careful. We as a society have to be very careful in going down the pathway of taking the position that Congress has to give an explicit delegation of authority for an agency to have regulatory authority over a particular commercial aspect or commercial enterprise, because technology waits for nothing.

It's fascinating to me just how rapidly technological development is occurring now. Take the *Eighth Day of Creation*.¹⁵ Going from Gregor Mendel to James Watson, Francis Crick, and Rosalind Franklin took 80 to 90 years. Well, you go from there to actual genetic transformation with transgenic organisms. That took 25 to 30 years. Now, we are in the age of genome editing. Who knows what's going to come after genome editing, but I will guarantee you it will be something.

The ability of humans to alter genetic structures is not going to stop with genome editing. At the end of the day, I worry that the administrative state is too ossified and moribund to effectively regulate developing technology with the advent of—we talked about it earlier—the Administrative Procedure Act. What agencies have to go through in order to promulgate regulations takes so long. There were times when I was at EPA where there were regulations that were being contemplated. It would occur to me that, by the time we get through with the required rulemaking procedures, the rule will be obsolete. This

technology will have moved on. Then, what do you do? Well, I guess you start another rulemaking. That's fine. But by the time we're ready to regulate what we now have before us, that's going to be obsolete as well. The new rulemaking is going to be obsolete.

Given the fact that the legislative state is something less than efficient now, it would occur to me that it's even more time-consuming and less effective to get legislative action than it is to get administrative action. I think that we have to be very careful about going into a world where we want to pull back the authority that regulatory agencies have to regulate at the far ends of technology when in fact health, safety, environmental parameters, and concerns are paramount.

We want to make sure that the technology that we're developing is a technology that benefits mankind and, looking at it from the FIFRA standpoint, does not have unreasonable adverse effects. Obviously, there are adverse effects to many sorts of advances, but we want to make sure that the benefits of technological development outweigh the potential adverse effects and potential detriments of it.

Michael Gerrard: Thank you for that. Of course, Congress has not passed a major new environmental law since 1990, but they amended the Toxic Substances Control Act in 2016. If Congress has to act very explicitly on new threats before administrative agencies can act, that's a real problem. We saw that arise just a few weeks ago in the Occupational Safety and Health Administration (OSHA) vaccine case.¹⁶

Let me invite Joanne and Jill to comment on the discussion about the “major questions doctrine.”

Jill Tauber: Whatever you think about the doctrine, one thing that was clear is that it's really hard to do an analysis when there's no rule in place. This is an abstract question. As it was presented and discussed, I thought that was a pretty effective and compelling point that the solicitor general made for the government.

It was quite striking. There were so many questions about what that doctrine is. Maybe just that precise question—what is it? What's the daylight between this and non-delegation? Again, how do we know? What is the “what”? That was the question by Justice Kagan as she described one piece of what she understands this doctrine to be. That sort of test though, is the agency outside of its lane?

I don't know that we saw a clear view emerging about the application of that doctrine to this rule in the abstract. I do think it gets into a bit of talking about the magnitude of the impact. That gets us to what we talked about earlier. The inside/outside the fence line distinction is not a proxy for major or not. That's not the way. That's not the reality of control measures that you can apply inside versus outside. It's not a non-major versus major question. There's just no

15. HORACE FREELAND JUDSON, *THE EIGHTH DAY OF CREATION: MAKERS OF THE REVOLUTION IN BIOLOGY* (1979).

16. *National Federation of Independent Business v. Department of Labor*, Nos. 21A244 & 21A247 (U.S. Jan. 13, 2022).

relationship there. And of course, that's sort of the major line of argument.

I'll flag one interesting part of the argument that I thought, with respect to major questions in particular, was a discussion between the Chief Justice and the solicitor general on what goes first, the order of analysis. Do you first assess whether there is an ambiguity in the statute? If there is, maybe the next step is what you do with that ambiguity. You determine whether there is a sweeping effect here or do you flip that order? I think that makes a big difference. That was explored at least in some level of detail in that exchange. That was interesting, but here I don't think major questions has a role. In this case, it did get a lot of time during argument though. Obviously, it is hard to say what the opinions will say on that.

Joanne Spalding: I found it interesting, too, that both advocates for petitioners said we don't need the "major questions doctrine" in order for you to decide this case in our favor. You can just look at the statute itself. I'm not really sure what we're doing with the "major questions doctrine." Their briefs started with long expositions of the "major questions doctrine." If you read those briefs, it's not clear that anyone has a clear understanding of or agrees with what the doctrine is and how it applies.

I think that was reflected in the discussion at oral argument. Jill went into detail about when do you apply it and to what do you apply it, and what kind of canon is it, is it constitutional, is it linguistic, and so on. Justice Amy Coney Barrett asked if it was a linguistic canon. And in terms of what you apply it to, what in general we see is that the source-specific inside/outside the fence line decision itself is not what the major question is. That's a statutory limit.

I don't know what the major question is. This isn't simply a matter of this particular exercise of agency power, but then what do you apply it to? Because, as they have already said, EPA has the authority to exercise regulatory power over this pollutant from these sources. I thought there was a lot of lack of clarity there.

I also thought that as for the whole question of whether EPA is doing this because Congress is so dysfunctional, I don't really think you need to go there. EPA is doing this because it has the authority to do it and the obligation to do it, in the statute that has been adopted, that Congress did enact, and that the Supreme Court already has interpreted. Should there be any doubt about that, we can look at EPA's methane regulations that apply to the oil and gas industry, which Congress recently disapproved in the context of the Congressional Review Act.¹⁷

Let me back up. The Trump Administration repealed the methane regulations for the oil and gas industry in a rule called the methane policy rule, and this Congress said no, and they repealed that methane policy rule. EPA had said they're not regulating greenhouse gases under §111, and Congress said, no, you need to. And that was under

§111(b). Congress said no because this is a predicate; first of all, you need to regulate just because the statute requires you to, and it's a predicate for existing source regulation. So, we have a very recent statement by Congress that this is all appropriate.

It's really unclear what this "major questions" discussion is all about and why it's necessary at all in this case. One more point. There was this discussion in the oral argument about looking at the regulatory action under review, asking if it is "surprising" that this Agency would do this thing. It's clearly not surprising, given all that history, that EPA would be regulating greenhouse gases from the largest stationary source category of greenhouse gases.

Keith Matthews: To build on what Joanne just said, EPA is doing this because Congress in 1990, 30 years ago, was not dysfunctional. Can anyone imagine a legislative accomplishment such as the Clean Air Act Amendment passing today? That's ludicrous. You can't even think about that. It's like, well, when will pigs fly? So, there was authority that was given to EPA in 1990 that under no circumstances could happen now.

Michael Gerrard: This was I think the question Justice Kagan was asking: are you surprised that the Agency is acting? The Supreme Court was surprised when the Food and Drug Administration tried to regulate tobacco. That was part of the *Williamson* case.¹⁸ I'm not sure that people should have been surprised when OSHA started regulating masks and vaccines, but in any event, they used the "major questions doctrine" there.

It was very interesting that Justice Thomas, his very first question of *See*, the lawyer for West Virginia, was do you need the "major questions doctrine" to win? And she absolutely said no. She thought that the case could be decided on the statute. But the amount of airtime that the "major questions doctrine" received during oral argument was very large. We'll see if the Court takes this as an opportunity to again use the "major questions doctrine" to more clearly define it because, as you said, there were several questions. What exactly is the doctrine? What does it mean? How does it relate to nondelegation? We'll see.

There was a lot of attention in advance of the argument to the "nondelegation doctrine"—the idea that the U.S. Constitution gives sole legislative power to Congress, that administrative agencies shouldn't have too much discretion at setting policy, and it would be exceeding the constitutional power of Congress for it to delegate too much discretionary policymaking authority to agencies.

Now, that's a doctrine that has only been used twice by the Supreme Court to invalidate a congressional action.¹⁹ Both of them were in 1935. But in some recent dissents and concurrences and so forth, several of the justices have

17. Pub. L. No. 117-23 (June 30, 2021).

18. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (1999).

19. *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (invalidating a law governing hot oil); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating a fair competition code system).

expressed interest in the “nondelegation doctrine.” There was a lot of concern that this case might be the opportunity for the Supreme Court to use that to swat back parts of the Clean Air Act itself, not just what EPA was doing.

But it was quite interesting that there was very little discussion of the “nondelegation doctrine” during oral argument. It was interesting that Justices Neil Gorsuch and Brett Kavanaugh said very little. They had very few questions. They were sort of seen as among those leading the charge on the “nondelegation doctrine.” Do you have any thoughts on the absence of nondelegation discussion during oral argument?

Joanne Spalding: I essentially agree with you, Michael, that it didn’t look like that was anything that the advocates were pushing strongly or that the Court was very interested in. There were a couple of questions. Solicitor General See said well, we’re looking at this as constitutional avoidance. You don’t need to go to nondelegation because, if Congress had delegated to EPA the authority to do the Clean Power Plan, that would implicate nondelegation. But they didn’t delegate that authority because there’s no clear statement as to that proposition.

Of course, our position is the opposite, that Congress did in fact delegate authority and it did so appropriately. But it didn’t seem like, given *Massachusetts v. EPA* and *American Electric Power Co. v. Connecticut*, that there was really any traction to the argument.

Jill Tauber: I agree with that. It struck me that it was largely discussed in the context of trying to explain the “major questions doctrine” here, and what that would look like by way of either comparison or how it could relate to that. But I didn’t hear much on its own for good reason. I think this is clearly constitutional and within EPA’s authority under the Clean Air Act, but I agree with your sense of it not really taking up much airtime.

Keith Matthews: I’ll just say that I hope everyone is right. Because in general, and just completely consistent with what I was saying earlier, I think that it would be very, very problematic if we have a situation where people believe that we have to hew, as the originalists might want, too closely to the original intent of people who put together a document in 1787. In the year 2022, I would posit that the world has changed a bit since then and that our system, how we look at things, and how we look at governance, needs to evolve as well. I’ll leave it at that.

Joanne Spalding: I want to point out that, based on what Keith just said about looking at the original intent, nondelegation was not a thing at the founding of this country. Profs. Julian Davis Mortensen and Nicholas Bagley did a really in-depth historical analysis of the nondelegation

issue.²⁰ I would really recommend that to folks who are interested in that issue.

Michael Gerrard: There is some debate among constitutional scholars about that issue. I think we may see that play out in some future litigation, but it doesn’t look like this is the occasion that they’re going to use.

We have an audience question: how does this action by the Supreme Court influence thinking about Congress simply enacting a carbon tax, which seems much less subject to legal challenge?

Jill Tauber: There is a lot that Congress can do. I would start with Build Back Better. I would start with the historic investment in climate and environmental justice that passed the House, but that unfortunately has not passed the Senate yet. I don’t view these as a zero-sum game. As between different branches of government, we need congressional action. There again, I would point to Build Back Better. We need EPA to continue to use its full authority and really meet its statutory obligation to cut pollution and protect our health.

Michael Gerrard: I absolutely agree with Jill that there’s a lot that Congress could do if it wanted to and could do it in an unambiguous way. That would clearly be within the power of Congress. A carbon tax is one of those. Politically, that doesn’t seem to be in the cards right now given our 50/50 split in the Senate. Congress could also resolve the ambiguity. If there is ambiguity in the Clean Air Act, there’s a lot that Congress could do. But Congress seems to be paralyzed along these lines.

Another question: if the Court finds standing in this case, what’s left of the Constitution’s Case or Controversy Clause?

Joanne Spalding: That’s a great question. I guess there’s an upside for environmental litigants. Because if there’s standing here, I don’t know how they’re going to tell us we don’t have standing in future cases. That’s a little bit of a flip answer, but I think there’s a lot to it.

Michael Gerrard: If concern that an agency might do something bad becomes the basis for standing, there are a lot of people who would have standing in that kind of instance. It may come down to the question of whether the Clean Power Plan will spring back to life as a result of the *American Lung Ass’n* case, due to the fact that the D.C. Circuit said that EPA was misinterpreting the statute when it repealed the Clean Power Plan.

Did that spring it back to life so that we can now challenge the Clean Power Plan even though, as you’ve all pointed out, the Clean Power Plan is in every perspective obsolete? The objectives have been met, the deadlines have

20. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021), <https://columbialawreview.org/content/delegation-at-the-founding/>.

passed. EPA doesn't want to put it back. But I think that they said it would have to be deemed to have sprung back in order for this really to be a case and controversy.

Joanne Spalding: Even if it somehow technically had sprung back to life, there's nothing imminent about the impact of it on any of the litigants in this case. Again, we have to take further regulatory action to actually somehow implement it. That would be subject to, as I said before, an after-arising grounds lawsuit challenging the Clean Power Plan itself.

Michael Gerrard: Another audience question. I was surprised by Justice Breyer's hostility to some of EPA's arguments on this question. Any reaction to that?

Jill Tauber: I don't know that I heard hostility. I would say there were discussions about what we were just talking about, the impact of the D.C. Circuit's decision and whether that somehow springs this back to life or not. There was a lot of active exchange there in an effort to understand fully what, if anything, is in place now. The answer is nothing. And there was a lot of back and forth to get there. That's the one exchange, thinking about Justice Breyer, that stuck out to me.

Michael Gerrard: Justice Breyer was asking a number of focused questions on the text of the Clean Air Act, but I wouldn't characterize it as hostility. He was just focusing on some of the words.

Another question. This morning, a student asked me if I thought the Court could issue a narrow ruling without crippling EPA. Do you see a narrow ruling? If so, along what lines?

Joanne Spalding: A narrow ruling would be to say no jurisdiction. I'm assuming that the student means a narrow ruling on the merits that would rule in favor of petitioners. For the Clean Power Plan, in establishing the best system of emission reduction, EPA looked at all sorts of ways to reduce emissions from power plants and landed on this "generation shifting" concept. It involves generation shifting among sources that are regulated in the Clean Air Act, under §111 of the Act. So, fossil fuel-fired power plants.

Then also, generation shifting to non-emitting generators. They're not sources. The most innovative thing that EPA did in this rulemaking was relying on these other producers of this product that are not polluting. That they don't emit any air pollution and so they are, therefore, not a source under the statute. I would imagine some sort of narrow ruling in which they should take another look at that aspect, probably.

Michael Gerrard: Over the next several months, while everyone is waiting for the Supreme Court to act on this decision, what else can and should EPA be doing on climate change?

Jill Tauber: On §111 power plants, I would say continue to work on the draft rule. It is looking at it as a clean slate. As stated, it's working right now on that notice of proposed rulemaking. We also have proposed methane regulations out for new and existing sources.²¹

Let me expand this beyond EPA. It's going to take a whole-of-government approach. We have a commitment to a whole-of-government approach and the government should not wait for a decision to come down for further action. There is plenty of work to do. And we're correctly focusing on EPA and focusing on the federal government, but let me say that states continue to lead the way on climate. As lawyers and advocates, we need to continue to push for climate progress at the local, state, regional, and federal and global levels.

The work doesn't stop. Our deadline is not a court deadline. It is not a statutory deadline. It is a planetary deadline. We've got until the end of the decade. The IPCC brought that into stark relief again to do all that we can do. So, the work continues while we wait for a decision.

Joanne Spalding: I agree with all that. I would flag also the motor vehicles regulations that EPA has issued and is continuing to work on, both light duty and heavy duty.²² There are also regulations on aircraft²³ and more on ships. We need to be decarbonizing throughout our economy. EPA has a role in that. Other federal agencies have a role in that and states have a role in that.

One of the things that we do as advocates is look state-by-state and power plant-by-power plant. Utility commissions, even in states that have traditionally relied heavily on coal-fired power plants, are finding that it's a heavy lift to keep these plants running. They are old. They're dirty. They emit all sorts of other pollutants. They are becoming obsolete and are already obsolete in many cases. In order to keep investing in these plants, ratepayers have to pay for that.

There is some really interesting information that came out in this past week leading up to the oral argument on West Virginia rates, which have skyrocketed over the past 10 to 15 years because they are trying to continue to keep these really dirty, expensive sources alive when their neighbors don't even want to do that. Kentucky and Virginia utility commissions are saying no, we don't want our ratepayers to have to invest in these plants. There is a lot that can be done at the state and local levels. Individuals who are looking at their electric bills can see these plants are no longer competitive and we need to be looking at other sources, clean sources, of electricity generation.

Keith Matthews: I would add that this is not inconsistent with what I was saying before about federal agencies and regulatory agencies having authority to regulate at the edge of technology and technological development. But also, it's

21. 86 Fed. Reg. 63110 (Nov. 15, 2021).

22. 86 Fed. Reg. 74434 (Dec. 30, 2021) (light-duty vehicles); 87 Fed. Reg. 17414 (Mar. 28, 2022).

23. 86 Fed. Reg. 2136 (Jan. 11, 2021).

not just regulatory action. I think that there's a substantial amount of progress that's being made in the private sector. The people are speaking. The people are basically saying that we want a society that is less based on fossil fuels. We want action and we're trying to foment action in the private sector to try to decarbonize the society. That's just as important.

Michael Gerrard: One of the most important things we need to do to fight the climate crisis is to build out a massive amount of renewable energy to replace the coal. Ultimately, to replace most of the natural gas to allow us to electrify our motor vehicle fleets and our buildings and so forth. This is mostly being done by the private sector. There

are some federal subsidies that are involved, but it's mostly private companies that are wanting to build the wind and solar. And when given the opportunity, we're finding now that they're stepping up at a massive pace.

Just a couple of days ago, there was an auction on offshore sites off Long Island for offshore wind.²⁴ It was a great and astonishing amount of money. There was tremendous interest by the private sector in building out the wind and the solar that we need, especially given both the increased demand and need for them and the plummeting cost. So none of this depends on the Clean Air Act. The motor vehicles depend on the Clean Air Act, but parts of the Clean Air Act that are not plagued by the ambiguities we see with §111(d). So, EPA is moving forward with those as well.

24. Valerie Volcovici, *U.S. Offshore Wind Auction Draws Record \$4.37 Billion in Bids*, REUTERS.COM, Feb. 28, 2022, at <https://www.reuters.com/business/energy/us-offshore-wind-auction-nears-4bln-third-day-bidding-2022-02-25/>.