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Climate Regulation and Litigation: Context, Status, Horizon

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Overview

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- How we got here: *Massachusetts* and everything after
- Trump Administration dereg → Biden Administration re-reg
- *West Virginia* et al.: Clean Power Plan (finally) comes to SCOTUS
- Stray thoughts and big pictures
- Any questions?

How we got here: *Massachusetts* and everything after (I)

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- ***Massachusetts v. EPA***, 549 U.S. 497 (2007)
  - 5-4. Stevens, joined by Kennedy, Souter, Ginsburg, and Breyer. Dissents from Scalia & Roberts, each joined by the other and by Thomas and Alito.
  - Reviewed EPA's denial of petition to make "endangerment finding" under CAA 202 for GHG from light auto fleet
  - CO2/GHG is an "air pollutant" within the general definition of that term at CAA 302(g) and its specific usage at CAA 202
  - SCOTUS rejected EPA's other reasons for not granting the petition, saying they were policy matters for Congress
  - Bottom line: EITHER grant the petition OR deny based on science/record or the statute (as we've just interpreted it)

- ***AEP v. Connecticut***, 564 U.S. 410 (2011)
  - 8-0. Ginsburg writes for a unanimous court (Alito recused).
  - Whether there is a federal common-law tort for climate damage is a hard question—BUT:
  - Any such tort, if it did exist in the abstract, is displaced by CAA, and specifically 111

How we got here: *Massachusetts* and everything after (II)

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- ***Utility Air Regulatory Group v. EPA (UARG)***, 573 U.S. 302 (2014)
  - After EPA regulated GHG from cars, New Source Review triggered for GHG. Court holds EPA's "tailoring rule" erred in (as they saw it) purporting to rewrite statutory NSR thresholds to be much higher for GHG (to avoid extending program to potentially millions of sources).
  - Instead, GHG NSR only for so-called "anyway" sources to which NSR already applies d/t *non*-GHG emissions
  - Bookend to *Mass*. GHG *are* in the Act—but still must carefully consider applicability of individual programs.
    - "*Massachusetts* does not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under other parts of the Act where their inclusion would be inconsistent with the statutory scheme."
  - Contains language re: the "major questions" doctrine (cleaned up and emphases added):

    EPA's interpretation is also unreasonable because it would bring about an **enormous and transformative expansion** in EPA's regulatory authority **without clear congressional authorization**. When an agency claims to discover in a **long-extant statute** an **unheralded power** to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. **We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.**
- ***West Virginia v. EPA*** (lead case, No. 20-1530), certiorari granted Oct. 29, 2021 (CPP)

How we got here: *Massachusetts* and everything after (III)

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One post-2016 sub-SCOTUS case worth noting (out of many possible candidates):

Mexichem Fluor, Inc. v. EPA, 866 F.3d 451 (D.C. Cir. 2017)

- 2-1. Kavanaugh, joined by Brown, over Wilkins dissent.
- Title VI (stratospheric ozone protection). EPA, for the first time, switched certain substances from list of acceptable substitutes for ozone-depleting substances (ODS) to list of unacceptable substances.
- Court rejects arbitrary and capricious challenge to heavy reliance on global warming potential, BUT:
- Holds that the verb "replace" in the statute is unambiguously something that can only happen once, so EPA can't compel parties that have already switched from ODS to these substances to switch again
- Citing *UARG*: Neither "EPA's well-intentioned policy objectives" nor "Congress' failure to enact general climate change legislation" authorize EPA to regulate where it is not otherwise authorized.
    - "Under the Constitution, congressional inaction does not license an agency to take matters into its own hands, even to solve a pressing policy issue such as climate change."
    - NB: The author of these words now sits on the high court that will consider the Clean Power Plan (more on that later)

From Trump to Biden: Dereg and re-reg

- Presidential/international level:
  - Back in Paris
  - Social Cost re-centralized, lower discount rates, global benefits
  - Major executive orders initiate whole-of-government approach, direct integration of climate into virtually all federal functions, including financial regulation, procurement/contracting
    - Cf. 2013 Climate Action Plan, 2017 Energy Independence & Economic Growth EO
  - Environmental Justice, Climate Crisis: From global to local
- CEQ NEPA regulations: 2020 rule change; 2021 first-phase rollback proposal
  - Cumulative impacts
- SEC climate-risk disclosure proposals forthcoming

From Trump to Biden: Dereg and re-reg (II)

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- EPA CAA 111 oil and gas methane regulation:
  - Congress/POTUS use Congressional Review Act mechanism to vacate 2020 "policy rule." That rule:
    - Rescinded VOC and methane standards from midstream segment (pipelines). Big question: What's a source category?
    - Rescinded methane standards from what remained (upstream/wellhead). Big questions: Redundancy; GHG as gateway to 111(d) existing-source authority
    - Reinterpreted 111(b) to require EPA to make finding of significant contribution to harmful air pollution for *each* pollutant it regulates, not one-time-only when it first lists the source category. Big question: Does every drop count?
      - In separate action in final days, Trump Admin. set forth criteria for significance (while reaffirming that power plant GHG emissions *are* significant), but D.C. Circuit grants voluntary remand w/vacatur
  - 11/15/21: EPA proposes revamped new-source rules and, for the first time ever, existing-source rules. Comment period is currently open.
    - No regulatory text (supplemental proposal forthcoming)
    - Extension to existing sources means huge increase in number of sources to be covered
    - With some states unlikely to submit a plan, maybe even forbidden by state law, how will EPA use its federal-plan authority?

From Trump to Biden: Dereg and re-reg (III)

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- EPA CAA 202 car and light truck GHG standards/DOT mileage:
  - Safe, Affordable, Fuel-Efficient (SAFE) Vehicle Rule: 2 phases
    - Fall 2019: "SAFE Step One/One National Program"
      - DOT/NHTSA codifies regulation interpreting its statute to preempt state GHG standards, because they *are* in essence fuel-economy standards (which are expressly preempted under EPCA)
      - EPA partially revokes prior "California waiver". Reinterprets CAA 209 so that "compelling and extraordinary conditions" require a particularized state-specific nexus: yes for criteria, no for GHG
    - Spring 2020: "SAFE Step Two"/SAFE proper
      - Significantly reduces mileage/emissions "ramp rate" (though doesn't flatline, as proposed)
  - EPA and DOT have now *separately* (cf. *Mass.*) proposed to undo both stages/set steeper ramp
- EPA withdraws denial of petition for GHG NAAQS. Some fear "backdoor" approach through ozone.

West Virginia et al.: The Clean Power Plan (finally) comes to SCOTUS

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- Oct. 2015: EPA issues rules to control GHG emissions from fossil-fuel fired power plants: both new sources (under CAA 111(b)) and existing sources (CPP proper, under 111(d), mediated through state planning process similar to CAA 110 SIPs/FIPs).
- 111 requires EPA to identify the "best system of emission reduction" that is "adequately demonstrated"; performance standards are based on this "BSER"
- Traditionally, 111 rules feature BSERs that entail add-on controls, restrictions on fuel use, work practices, etc. – i.e., all things that can be done at the level of an individual regulated source
  - Arguable past deviation: some credit trading in Clean Air Mercury Rule (vacated for other reasons by D.C. Circuit in *New Jersey v. EPA*, 517 F.3d 574 (2008). Credits there to come from installation of scrubbers.)
- But CPP's BSER radically departed from this prior approach. Its first "building block" (for coal plants only) resembled this (heat-rate improvements), but the second and third "building blocks" were based on generation-shifting: incorporation at grid-wide level of a least-carbon-intensity dispatch principle in place of traditional least-cost, to shift aggregate generation from coal to gas and from fossil altogether to renewables. Standards could not practically be met by plants without massive reliance on credits from low- or no-carbon generation.

CPP saga II
(stay, repeal, ACE rule)

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- D.C. Circuit denies motion for preliminary injunction
- Feb. 9, 2016: SCOTUS issues unprecedented stay. 5-4 party-line.

  CPP never goes into effect; state plans never come due.
- 2019: EPA repeals CPP, simultaneously replacing it with the Affordable Clean Energy (ACE) rule (coal plants only)
- EPA interprets 111 to *unambiguously* restrict its consideration of BSER to measures that can be carried out at individual sources
  - Looks to major questions and federalism to confirm, but doesn't rely on them
- BSER: a suite of "candidate technologies" to improve heat rate

CPP saga III (*Am. Lung*, cert grant, watch this space)

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- 1/19/21: *Am. Lung Ass'n v. EPA*, 985 F.3d 914 (D.C. Cir.). 2-1: Majority by Millett & Pillard, dissent by Walker.
  - Majority: EPA is wrong to interpret statute to unambiguously foreclose "outside the fenceline" BSER. Because EPA didn't identify any ambiguities, they don't get (and indeed didn't ask for) *Chevron* deference. And extension of certain deadlines in state planning process struck down; court cites "need for speed."
  - Dissent: Generation-shifting is a major policy requiring clear Congressional authorization, which is lacking.
- 2/22/21: Court grants DOJ/EPA's motion to withhold mandate on CPP repeal (while issuing it on ACE repeal). "Nothing to see here" stance to oppose cert: states don't have to do anything at the moment. Yes, we intend (and are obligated) to do a new rule, but who knows when that will be or what it will look like?
- 10/29/21: It doesn't work. SCOTUS grants certiorari in 4 petitions, brought by W.V., N.D., Westmoreland Mining & North Am. Coal Co.
- Misleadingly reported as "SCOTUS will consider EPA's authority to regulate greenhouse gases."
  - That's the WHAT, and *Massachusetts* basically settled it (*but see UARG*). This case will deal with the HOW.
- All petitions present some version of the "major questions" doctrine, and/or the "non/delegation doctrine."
  - Closely related concepts: major question is a principle of statutory interpretation re: Congressional *intent* to delegate major authority; delegation deals with limits of Congress's *ability* to delegate open-ended, legislative-style power to executive agencies.
- Briefing is underway (petitioners filed yesterday!). Argument expected late winter/early spring 2022; opinion could come at close of term in late June.
- 12/10/21: Spring 2022 Unified Regulatory Agenda: 7/22 for new proposal, 7/23 for final rule. "There are no EPA regulations on the books for greenhouse gases from existing fossil-fuel fired electric generating units. Previous regulations of this nature have either been vacated or repealed prior to implementation. Alternatives: There are no alternatives at this time."

Stray thoughts and big pictures

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- "GHG is different"
  - Didn't matter to *Massachusetts* majority
  - Both CPP and ACE departed in different ways from prior 111 regulation. CPP went out, ACE went in
    - *Cf. UARG*: Assuming *Mass.* stands, something's gotta give, either words ("pollutant") or numbers (tack a few zeroes on)
  - Ubiquitous and harmful: bad combination (e.g., lead)
  - What are we regulating: Source categories or the entire economy? The Three Little Pigs.
- The SCOTUS showdown is here on the approach of using prior regulatory authority in absence of major new legislation: we have lots of nails; is this really a hammer?
  - *Massachusetts* found sufficient "flexibility" to encompass GHG in 202. Will *West Virginia* find sufficient flex in 111 for the CPP?
- "The need for speed" *(Am. Lung)*. Convergence between ACE, CPP, and doing nothing.
  - Convergence as a Rorschach blot: Declare victory and go home, or double down?
- Climate tort
- Major questions: Front and center in COVID administrative litigation (eviction moratorium; vaccine mandates)
- With CPP/*West Virginia,* will *Chevron* come full circle? Remember: *Chevron* was a 111 case!

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