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SUPREME COURT:**FERC ruling seen as boon for Clean Power Plan**

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The Supreme Court's recent move to uphold a federal energy conservation rule bodes well for the Obama administration's Clean Power Plan, environmental lawyers say.

With U.S. EPA's rule to cut power plants' greenhouse gas emissions already mired in lawsuits and widely expected to wind up in the Supreme Court, lawyers on both sides are scouring the justices' recent environmental decisions for clues about how they'll handle the case.

Some supporters of the EPA rule hailed the high court's recent opinion upholding the Federal Energy Regulatory Commission's rule as a promising sign that the courts will deem EPA had authority to issue the contentious power plant regulation.



"This was a big environmental win for FERC and also for the environmental community," Harvard Law School professor Richard Lazarus, a well-known environmental attorney, said today at an environmental law event in Washington, D.C.

The opinion in the FERC case "shows that you can address climate in a way very consistent with EPA's Clean Power Plan," he added.

In its 6-2 decision last month, the justices revived FERC's contentious "demand-response" rule that had been thrown out by a lower court. Challengers argued that FERC had overstepped its regulatory authority, but the majority opinion authored by Justice Elena Kagan found that FERC indeed had that authority, with "room to spare"

([Greenwire](#), Jan. 25).

"Here we have an instance where the court takes very capacious language and they allow a federal agency to address a problem which no one would have ever thought Congress was thinking about at the time that language was written," Lazarus said today at the event hosted by the American Law Institute and the Environmental Law Institute.

In the legal challenges to the Clean Power Plan -- now before the U.S. Court of Appeals for the District of Columbia Circuit -- "this is the language which EPA supporters are going to go to," he added.

Many other backers of the EPA rule were similarly encouraged by the FERC case's majority opinion, which was notably endorsed by Republican appointees Chief Justice John Roberts and Justice Anthony Kennedy.

Vickie Patton, general counsel of the Environmental Defense Fund, said the FERC opinion is an important one that serves as "a wake-up call about the court incorporating 21st-century America into its jurisprudence."

The court found the FERC rule "is not an agency overreach," Patton said yesterday at the environmental law event. Rather, she said, the court reasoned, "This is an agency being responsive to the market, to the world around it. That's what it's doing; that's what we want agencies to do. It's precisely what ... the EPA is doing."

'Wishful thinking'?

Clean Power Plan opponents disagree and point to other recent Supreme Court decisions as backing for their arguments.

Tom Lorenzen, of Crowell & Moring, said that while the FERC opinion "looks like it does support the idea of broad federal authority to regulate the grid -- including demand for electricity," it's "very particular to the Federal Power Act," the law governing interstate power markets.

"It certainly says that FERC can do this under the Federal Power Act, but it doesn't speak at all to what authority EPA has under the Clean Air Act," added Lorenzen, a former Justice Department lawyer representing power cooperatives challenging the Clean Power Plan in court.

Scott Segal, an attorney at Bracewell who represents utilities, said "reading too much into the decision on the environmental side of the ledger may just be wishful thinking on the part of [Clean Power Plan] advocates."

Segal added that the justices' reasoning in the FERC case should give "no comfort at all" to backers of the power plant rule. He also said the distinction between the Federal Power Act and the Clean Air Act is important.

"In construing the Clean Air Act, on a variety of fronts, from expansive reads of authority to concerns over cost, the Supreme Court has indicated a degree of skepticism that ought to worry those supporting the [Clean Power Plan]," Segal said.

Opponents of the rule point to several other recent high court decisions that they say bolster their arguments against the climate regulation.

That includes the justices' decision in June to knock down EPA's landmark rule to cut mercury emissions from power plants ([Greenwire](#), June 29, 2015). There, the agency was reprimanded for failing to properly consider costs, but EPA is expected to soon reissue the rule after tweaking its cost considerations.

That decision rejecting EPA's rule "raises serious questions that should be of concern to the Clean Power Plan," Segal said. He also pointed to a 2014 case where the Supreme Court threw out part of EPA's air permitting program for greenhouse gas emissions ([Greenwire](#), June 23, 2014).

Lazarus noted today that foes of the Clean Power Plan will rely on opinions in the mercury case and the major health care case, *King v. Burwell*, that upheld the Obama administration's health care law but raised questions about how the high court will deal with agency expertise issues.

"Within this huge win for the administration was some more words of concern for EPA," Lazarus said today.

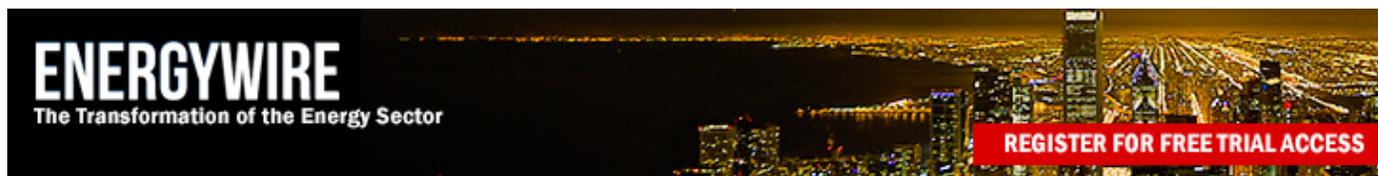
In that case, Roberts, in his opinion for the court, wrote that so-called *Chevron* deference typically granted to agencies didn't apply because the health care case is "extraordinary" and centers on a question of "deep 'economic and political significance.'"

The court may also find those terms apply to the high-stakes Clean Power Plan.

"In cases with really big stakes, [Roberts] suggests, there might be reason not to be so quick to defer to the agency," said Lazarus, who's representing two former EPA administrators backing the Clean Power Plan in the D.C. Circuit.

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