

C O M M E N T

CLEAN AIR ACT REGULATION AFTER WEST VIRGINIA AND THE INFLATION REDUCTION ACT

by Eric Laschever

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Ten months after the Biden Administration took office, I wrote in these pages urging the new Administration to use its rulemaking authority to establish a national ambient air quality standard (NAAQS) for carbon dioxide (CO₂) under the Clean Air Act (CAA).¹ My comment framed the case for a CO₂ NAAQS as a response to outgoing U.S. Environmental Protection Agency (EPA) Administrator Andrew Wheeler’s last-minute denial of the Center for Biological Diversity’s and 350.org’s 2009 petition to take this action. The new Administration had already summarily rescinded this denial, promising to consider the NAAQS petition more carefully.² The comment rebutted Administrator Wheeler’s legal and policy arguments and explored how a greenhouse gas (GHG) NAAQS would further the new Administration’s climate agenda.

On October 29, 2021—around the same time the comment appeared—the U.S. Supreme Court granted certiorari in *West Virginia v. Environmental Protection Agency*, a petition filed by several states and coal companies attacking EPA’s regulatory authority under the CAA. The Court’s holding in this case would determine EPA’s continued ability to use the CAA—including the NAAQS program—as a climate change tool. The Court saved its ruling until June 30, 2022, the last day of a drama-filled term.³

It is now possible to assess the viability of a CO₂ NAAQS and other regulatory tools in light of the opin-

ion in *West Virginia*⁴ and the emerging Supreme Court jurisprudence. After briefly summarizing the Court’s ruling, Part I of this Comment examines how its specific and more general analyses apply to NAAQS and other CAA provisions, concluding that NAAQS and several other regulatory options—particularly EPA’s proposed methane regulations—remain viable. Part II then explores the relevance of regulatory options in light of the newly enacted Inflation Reduction Act (IRA), adopted just a month and a half after the Court’s ruling. Part III concludes.

I. The Bad News: Implications of the Supreme Court’s *West Virginia* Holding

The *West Virginia* petitioners sought Supreme Court review of a U.S. Court of Appeals for the District of Columbia (D.C.) Circuit ruling⁵ that “struck down the Trump-era rule that effectively gutted” the Barack Obama Administration’s Clean Power Plan (CPP).⁶ A key element of the CPP was its use of CAA §111(d),⁷ which authorizes EPA to regulate existing emission sources. When applying §111(d), EPA develops the “best system of emission reduction” (BSER). EPA’s prior implementation of §111 defined BSER in terms of systems that could be applied to each emitting source, for example a power plant—so called inside the fence line systems.⁸

In the CPP, EPA structured the rule around the principle of forcing the energy sector broadly to move from coal-fired generation to other sources in a two-stage pro-

Author’s Note: *The views expressed here are the author’s own, not those of any of his affiliations or clients.*

1. Eric Laschever, *Rebutting Administrator Wheeler’s Denial of a NAAQS for Greenhouse Gases*, 51 ELR 10923 (Nov. 2021); 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.
2. Letter from Jane Nishida, Acting EPA Administrator, to Kassie Siegel, Senior Counsel, Center for Biological Diversity (Mar. 4, 2021).
3. Pamela King, *Supreme Court’s EPA Climate Ruling Expected Tomorrow*, E&E NEWS (June 29, 2022), <https://www.eenews.net/articles/supreme-courts-epa-climate-ruling-expected-tomorrow/>.

4. *West Virginia v. Environmental Prot. Agency*, No. 20-1530, 52 ELR 20077 (U.S. June 30, 2022).
5. *American Lung Ass’n v. Environmental Prot. Agency*, 985 F.3d 914, 51 ELR 20009 (D.C. Cir. 2021).
6. King, *supra* note 3.
7. 42 U.S.C. §7411(d).
8. For an explanation of the concept of “inside the fence line” regulations and its relevance to the CPP, see Brook Detterman et al., *D.C. Circuit Vacates Trump ACE Rule: What’s Next for Power Plant CO₂ Regulation?*, LEXOLOGY (Feb. 4, 2021), <https://www.lexology.com/library/detail.aspx?g=6ec42b38-9b47-4fcb-9fd6-430697fa3b8e>.

cess. The first stage would shift electricity production from existing coal-fired power plants to natural gas-fired plants. The second stage would shift production from both coal and natural gas to renewable sources. The plan included the option of a facility operator purchasing carbon credits as part of a cap-and-trade program to reduce emissions. The plan's result would implement a sectorwide shift in electricity production from coal to natural gas and then to renewables.⁹

In their petition, none of the petitioners argued that the Court should overturn *Massachusetts v. Environmental Protection Agency*,¹⁰ the 2007 ruling that EPA had authority to regulate GHGs as air pollutants under the CAA.¹¹ Rather, the petition asked the Court to clarify¹² and apply the “major questions doctrine” and determine that the U.S. Congress did not intend to grant EPA authority under §111(d) for the CPP.¹³

The petitioners' focus on “major questions” was unsurprising. The Donald Trump Administration's withdrawal of the CPP was based on its application of the principle and the Administration's conclusion that Congress did not authorize such a plan under §111(d).¹⁴ The circuit court, while unanimous in reversing the Trump Administration regulation, split over how to apply major questions.¹⁵ The following discussion of how *West Virginia* affects the viability of a GHG NAAQS highlights key points of the majority's ruling—including its clarification and application of the major questions doctrine.¹⁶

Although the Court used its case to unveil the new majority's major questions standard, it did so by narrowly framing its review specifically on §111(d). Although not part of the opinion and not precedent, the opinion's syllabus accurately captures this focus, noting “the only question before the Court is more narrow: whether the ‘best system of emission reduction’ identified by EPA in the

Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act.”¹⁷ This narrow focus should still allow EPA to regulate under other CAA sections, and even for other formulations of BSER under §111(d). Turning to NAAQS as a possible tool to regulate GHG, there are four specific reasons why *West Virginia* could be distinguished if EPA were to promulgate a CO₂ NAAQS and it was challenged.

First, the Supreme Court characterized §111(d) as an “ancillary” provision, rarely used by EPA during the decades of CAA implementation.¹⁸ In contrast, the Court recognized the NAAQS program as one of three main CAA regulatory programs.¹⁹

Second, the Court took pains to frame its §111(d) analysis in comparison to the NAAQS and hazardous air pollutant (HAP) programs. In so doing, the Court highlighted the NAAQS' state-centric implementation approach:

EPA establishes a NAAQS for each [pollutant reasonably anticipated to endanger health and public safety]. The NAAQS represents “the maximum airborne concentration of [the] pollutant that the public health can tolerate.” *American Trucking v. American Trucking Assns., Inc.*, 531 U.S. 457, 465 (2001); see §7409(b). *EPA, though, does not choose which sources must reduce their pollution and by how much to meet the ambient pollution target. Instead, Section 110 of the Act leaves that task in the first instance to the States, requiring each “to submit to [EPA] a plan designed to implement and maintain such standards within its boundaries.”* *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 65 (1975); §7410.²⁰

The majority opinion did not explicitly explain why it emphasizes the states' central decisionmaking role in the NAAQS program. However, it is consistent with the majority's general view that the states, rather than the federal government, should address major policy questions facing the nation.²¹

Justice Neil Gorsuch's concurring opinion, joined by Justice Samuel Alito, articulates this perspective on federalism and explicitly links it to the major questions doctrine:

To preserve the “proper balance between the States and the Federal Government” and enforce limits on Congress's Commerce Clause power, courts must “‘be certain of Congress's intent’” before finding that it “legislate[d] in areas traditionally regulated by the States.” But unsur-

9. See *West Virginia*, slip op. at 8-9, for this description of the CPP.

10. 549 U.S. 497, 37 ELR 20075 (2007).

11. King, *supra* note 3.

12. In explaining the need to clarify the doctrine, petitioners devote three pages of the petition to describing lower court confusion about the doctrine, including disagreements among the three-judge panel from the court below. Petition for Writ of Certiorari at 17-19, *West Virginia v. Environmental Prot. Agency*, 597 U.S. ____ (No. 20-1530) (Apr. 29, 2021).

13. *Id.* at 12; King, *supra* note 3.

14. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32524 (July 8, 2019).

15. *American Lung Ass'n v. Environmental Prot. Agency*, 985 F.3d 914, 959-60 (majority), 1000-03 (dissent regarding the major questions doctrine), 51 ELR 20009 (D.C. Cir. 2021).

16. The Court's treatment of threshold questions such as whether the case was ripe or moot are interesting and important, but not relevant to the current inquiry. For a discussion of this issue and the opinion generally, see Shannon Osaka, *The Supreme Court's EPA Decision Could Have Been Much, Much Worse. The Decision Will Limit—But Not Prevent—The EPA's Regulation of Greenhouse Gas Emissions*, GRIST (June 30, 2022); David Freeman Engstrom & John E. Priddy, *West Virginia v. EPA and the Future of the Administrative State*, SLS BLOGS (July 6, 2022), <https://law.stanford.edu/2022/07/06/west-virginia-v-epa-and-the-future-of-the-administrative-state/>; *Supreme Court Ruling Limits EPA's Authority to Restrict Greenhouse Gases From Energy Production*, DUKE TODAY (July 1, 2022), <https://today.duke.edu/2022/07/supreme-court-ruling-limits-epa%E2%80%99s-authority-restrict-greenhouse-gases-energy-production>.

17. *West Virginia v. Environmental Prot. Agency*, No. 20-1530, slip op. syllabus at 6 (U.S. June 30, 2022).

18. *Id.* slip op. at 6. The Court supported this characterization, asserting “[i]t was thus only a slight overstatement for one of the architects of the 1990 amendments to the Clean Air Act to refer to Section 111(d) as an ‘obscure, never-used section of the law.’” *Id.* (citing *Hearings on S. 300 et al. Before the Subcommittee on Environmental Protection of the Senate Committee on Environment and Public Works*, 100th Cong. 13 (1987) (remarks of Sen. David Durenberger (R-Minn.)).

19. *Id.* at 2-3.

20. *Id.* at 29-30 (emphasis added).

21. See generally *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. June 24, 2022).

prisingly, the major questions doctrine and the federalism canon often travel together. When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States.²²

Taken together, the majority and concurring opinions signal that the Court is likely to closely examine the respective state and federal roles in future EPA regulatory efforts. As explained in my original comment, the NAAQS program is consistent with conservative calls for more state-led climate efforts.²³ As discussed in Part II below, the state role in developing implementation plans under NAAQS provides a strong coordinated framework within which states can use tools provided in the IRA to meet a CO₂ standard.

Third, the majority highlighted §111(d)'s lack of EPA authority to use market mechanisms such as cap and trade—an “integral” element of EPA's CPP strategy.²⁴ In doing so, the majority went to considerable lengths to distinguish this lack of authority under §111(d) from Congress' explicit authorization of market measures in the NAAQS and Acid Rain Programs:

[U]nlike Section 111, the Acid Rain and NAAQS programs contemplate trading systems as a means of complying with an already established emissions limit, set either directly by Congress (as with Acid Rain, see 42 U.S.C. §7651c) or by reference to the safe concentration of the pollutant in the ambient air (as with the NAAQS).²⁵

The Court emphasized this distinction, concluding:

It is one thing for Congress to authorize regulated sources to use trading to comply with a preset cap, or a cap that must be based on some scientific, objective criterion, *such as the NAAQS*. It is quite another to simply authorize EPA to set the cap itself wherever the Agency sees fit.²⁶

As discussed in my original comment, several states have adopted cap-and-trade programs²⁷; other states are in the process of doing so.²⁸ The NAAQS market mechanism provisions are particularly significant given the challenges Congress has had recently in enacting such programs.²⁹

Finally—and most importantly—the Supreme Court already recognizes that Congress understood that the NAAQS program would have far-ranging economic impacts, and nevertheless did not direct EPA to consider

those impacts in setting NAAQS.³⁰ This recognition could change the analysis of a CO₂ NAAQS under *West Virginia's* articulation of the major questions doctrine. Given the importance of this doctrine going forward, Justice Antonin Scalia's *American Trucking* opinion warrants additional attention.

In *American Trucking*, the American Trucking Associations and several other petitioners, including the states of Michigan, Ohio, and West Virginia and private companies, challenged NAAQS for particulate matter and ozone. Among other things, the petitioners argued that EPA should have considered the proposed NAAQS' economic effects. In considering this argument, the Court began with a textual analysis:

Section 109(b)(1) instructs the EPA to set primary ambient air quality standards “the attainment and maintenance of which . . . are requisite to protect the public health” with “an adequate margin of safety.” 42 U.S.C. §7409(b)(1). *Were it not for the hundreds of pages of briefing respondents have submitted on the issue, one would have thought it fairly clear that this text does not permit the EPA to consider costs in setting the standards.*³¹

The Court concluded this language “is absolute.”³²

After thoroughly reviewing the text, legislative history, and other factors, the Court rejected the economic consequence argument, concluding:

The text of §109(b), interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA. We therefore affirm the judgment of the Court of Appeals on this point.³³

In concluding that EPA could not consider economic impacts when setting a NAAQS, the Court considered the argument that a very stringent standard could result in “closing down whole industries . . . thereby impoverishing the workers and consumers dependent on those industries.”³⁴

This language mirrors the sectorwide impact at issue in *West Virginia*. Justice Scalia responded to this argument regarding widespread economic consequences: “*That is unquestionably true, and Congress was unquestionably aware of it.*”³⁵ Justice Scalia's bold conclusion on behalf of seven Justices, including Justice Clarence Thomas,³⁶ squarely addresses Chief Justice John Roberts' *West Virginia* hesi-

22. *West Virginia*, slip op. at 11 (Gorsuch, J., concurring) (citations omitted).

23. Laschever, *supra* note 1, at 10925-27.

24. *West Virginia*, slip op. at 27.

25. *Id.* at 29.

26. *Id.* at 30 (emphasis added).

27. Laschever, *supra* note 1, at 10926.

28. See, for example, Washington's Cap and Invest Program, Revised Code of Washington Chapter 70A, which establishes a market mechanism and allows Washington to join other cap-and-trade programs.

29. Maxine Joselow, *Why the Inflation Reduction Act Passed the Senate but Cap-and-Trade Didn't*, WASH. POST (Aug. 10, 2022), <https://www.washingtonpost.com/politics/2022/08/10/why-inflation-reduction-act-passed-senate-cap-and-trade-didnt/>.

30. *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457 (2001).

31. *Id.* at 465 (emphasis added).

32. *Id.* (citing DAVID P. CURRIE, AIR POLLUTION: FEDERAL LAW AND ANALYSIS 4-15 (1981)).

33. *Id.* at 471.

34. *Id.* at 566.

35. *Id.* (emphasis added).

36. This statement is in Part II of the opinion, which was joined by Chief Justice William Rehnquist and Justices John Paul Stevens, Sandra Day O'Connor, Anthony Kennedy, David Souter, Thomas, and Ruth Bader Ginsburg.

tation to conclude Congress meant to confer a specific authority in the CAA that had “economic and political significance.” In Justice Scalia’s words with regards to NAAQS, “Congress was unquestionably aware” of the economic and political significance of applying a NAAQS.³⁷

Despite these points that would distinguish a CO₂ NAAQS from the CPP, some practitioners have concluded that, because a CO₂ NAAQS would require a different approach than NAAQS for other pollutants, any such innovation from past practice would run afoul of *West Virginia*.³⁸ The NAAQS program, however, throughout its history is characterized by pollutant-specific “innovations” suited to that pollutant’s characteristics, including the standard’s averaging time, level, and form.³⁹ It is, therefore, not surprising that a GHG NAAQS would require a different approach from the standards EPA developed for other pollutants. In addition, the Court could have reached the same analytical result without highlighting the ways in which the NAAQS program did not have the same attributes that disqualified the CPP’s use of §111(d) in the Court’s eyes. For these reasons, the Joe Biden Administration should task the Clean Air Scientific Advisory Committee to do the necessary technical work needed to formulate a GHG NAAQS.

Beyond the NAAQS program, the Supreme Court left open other regulatory options. As noted above, the *West Virginia* majority distinguished the CPP’s particular use of the §111(d) program for existing facilities, which it rejected, from the HAP program. A petition to list GHGs under this program has been pending with EPA since 2019, and was also subject to Administrator Wheeler’s denial.⁴⁰ Several analyses have considered this option’s advantages and disadvantages, including its viability after *West Virginia*.⁴¹ The HAP program is not available for pollutants for which EPA has established a NAAQS.⁴² Given the need to choose, a NAAQS has several advantages, including its broad coverage; explicit reference to climate change; the state-centric implementation process and the *West Virginia*-specific reference to this aspect and NAAQS’ explicit authorization

of state cap-and-trade programs; and *American Trucking’s* previous recognition that a NAAQS would have widespread economic effects.

Turning to regulatory options that *West Virginia* does not mention, EPA is engaged in important climate change-related rulemaking. Most significantly, EPA is in the final stages of adopting a far-reaching methane regulation.⁴³ EPA estimates that the proposed rule would reduce 41 million tons of methane emissions from 2023 to 2035, “the equivalent of 920 million metric tons of carbon dioxide” (more than the 2019 CO₂ emissions from all U.S. passenger cars and commercial aircraft).⁴⁴

The proposed rule would produce these results through (1) “updated and broadened methane and VOC [volatile organic compound] emission reduction requirements for new, modified, and reconstructed oil and gas sources,” and (2) state-developed plans to limit methane emissions from “hundreds of thousands of existing sources nationwide.”⁴⁵

While a detailed analysis of the proposed regulation for adherence to *West Virginia’s* principles is beyond this Comment’s scope, the Clean Air Task Force observed that “[t]he standards EPA has proposed to date have been based on precisely the kinds of at-the-source technological controls in the category that the Court’s *West Virginia* opinion suggests are” within EPA’s CAA authority.⁴⁶ Jeffrey Holmstead, George W. Bush’s EPA assistant administrator for air and radiation, and his colleague Brittany Pemberton similarly concluded that the proposed methane rule is “right down the fairway of what’s been done in the past,” and “does not implicate the major questions doctrine.”⁴⁷ The proposed methane rule will work in tandem with methane-related provisions of the IRA, discussed in Part II. Significantly, the IRA explicitly directs EPA to finalize this rule, providing a “particularly conclusive defense to any Major

37. *Whitman*, 531 U.S. at 466.

38. Jeffrey R. Holmstead (EPA’s Office of Air and Radiation chief during the George W. Bush Administration) took this position in a seminar on *West Virginia* without addressing the more specific analysis of *West Virginia* above. See Jeffrey R. Holmstead & Brittany M. Pemberton, *After West Virginia, What’s Next at EPA*, BRACEWELL (Aug. 10, 2022), <https://bracewell.com/insights/after-west-virginia-what%E2%80%99s-next-epa>. A transcript of the presentation is available at the website and from the author.

39. For a table comparing the levels, forms, and averaging times for each NAAQS, see U.S. EPA, *NAAQS Table*, <https://www.epa.gov/criteria-air-pollutants/naqs-table> (last updated Apr. 5, 2022).

40. Andrew R. Wheeler, EPA Administrator, Denial of Petitions to Establish National Ambient Air Quality Standards for Greenhouse Gases, to Regulate Greenhouse Gases Under Clean Air Act Section 115, and to Regulate Greenhouse Gases as Hazardous Air Pollutants (Jan. 19, 2021).

41. For a brief argument that the Supreme Court would reject a CO₂ HAP because it would result in regulating “millions of sources,” see Holmstead & Pemberton, *supra* note 38; for a pre-*West Virginia* analysis concluding that EPA should only try a CO₂ HAP rule, see MARK BOND, SABIN CENTER FOR CLIMATE CHANGE LAW, CAN AND SHOULD GREENHOUSE GASES BE REGULATED AS HAZARDOUS AIR POLLUTANTS UNDER THE CLEAN AIR ACT SECT. 112? (2015), https://web.law.columbia.edu/sites/default/files/microsites/climate-change/bond_-_ghgs_regulated_as_haps.pdf.

42. 42 U.S.C. §7412(b)(2).

43. For a detailed discussion of the proposal, see News Release, U.S. EPA, U.S. to Sharply Cut Methane Pollution That Threatens the Climate and Public Health (Nov. 2, 2021), <https://www.epa.gov/newsreleases/us-sharply-cut-methane-pollution-threatens-climate-and-public-health>.

44. *Id.* According to EPA, the rule would produce significant health benefits generally and specifically for overburdened communities, and would generate significant economic benefits—\$48 to \$49 billion from 2023 to 2035. *Id.*

45. *Id.* Key features of the proposed rule include a comprehensive monitoring program for new and existing well sites and compressor stations; a compliance option that allows owners and operators to use advanced technology to find methane leaks faster and at lower costs; a zero-emissions standard for new and existing pneumatic controllers; standards at new and existing oil wells to eliminate gas venting and require capture and sale of gas where possible; proposed standards for new and existing sources, including storage tanks, pneumatic pumps, and compressors; and a requirement that states engage with overburdened and underserved communities and other stakeholders when developing state plans. *Id.*

46. Darin Schroeder, *EPA Still Has a Clear Pathway to Significantly Reduce Methane Emissions From Oil and Gas*, CLEAN AIR TASK FORCE (July 7, 2022), <https://www.catf.us/2022/07/epa-still-clear-pathway-significantly-reduce-methane-emissions-oil-gas/>; see Romany M. Webb, *The New Methane Emissions Charge: One (Limited but Important) Stick in the Inflation Reduction Act*, SABIN CTR. FOR CLIMATE CHANGE L.: CLIMATE L. BLOG (Aug. 23, 2022), <https://blogs.law.columbia.edu/climatechange/2022/08/23/the-new-methane-emissions-charge-one-limited-but-important-stick-in-the-inflation-reduction-act/>.

47. Holmstead & Pemberton, *supra* note 38.

Questions Doctrine legal challenge.”⁴⁸ White House Climate Spokesman Ali Zaidi has stated recently that EPA will issue the final rule this fall.⁴⁹

In November 2021, EPA issued a proposed rule in response to President Biden’s Executive Order, which proposes the following three distinct CAA actions to “significantly reduce emissions of greenhouse gases (GHGs) and other harmful air pollutants from the Crude Oil and Natural Gas source category”⁵⁰:

- A revised new source performance standard for GHGs and VOCs for the Crude Oil and Natural Gas source category;
- Emission guidelines under the CAA, for states to follow in developing, submitting, and implementing state plans to establish performance standards to limit GHGs from existing sources in the Crude Oil and Natural Gas source category; and
- Several related actions addressing the June 30, 2021, congressional joint resolution, under the Congressional Review Act, disapproving the Trump-era oil and natural gas emission standards

The Biden Administration purportedly is considering two other climate change regulations for adoption in the first quarter of 2023—a new §111(d) rule for existing power plants that identifies a “best system of emission reduction” that does not impose a federal generation-shifting requirement, and a §111(b) rule addressing carbon pollution from new power plants.⁵¹ Earthjustice, which is tracking these efforts, urges prompt adoption of these measures and identifies the following eight other regulations that, if tightened, would yield health and climate-related benefits:

- A stricter Mercury and Air Toxics Standard rule limiting mercury, arsenic, and other toxic compounds from coal plants;
- A stronger fine particulate matter NAAQS to further reduce lung disease and asthma;
- A stronger ozone NAAQS to reduce smog, lung disease, and warming;

48. *The Inflation Reduction Act’s Implications for Biden’s Climate and Environmental Justice Priorities*, HARV. ENV’T & ENERGY L. PROGRAM (Aug. 12, 2022), <https://eelp.law.harvard.edu/2022/08/ira-implications-for-climate-ej-priorities/>.

49. Asma Khalid et al., *White House Climate Official Ali Zaidi on Biden’s Climate Law—And What’s Next*, NPR POL. PODCAST (Sept. 1, 2022), <https://www.npr.org/2022/08/30/1120140355/white-house-climate-official-ali-zaidi-on-bidens-climate-law-and-whats-next>.

50. Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 86 Fed. Reg. 63110 (Nov. 15, 2021).

51. Earthjustice & Evergreen Action, *What Does West Virginia v. EPA Mean for Climate Action?*, EARTHJUSTICE (July 6, 2022), <https://earthjustice.org/blog/2022-july/what-does-west-virginia-v-epa-mean-for-climate-action>.

- A new rule that reduces nitrogen oxide and smog emissions that cross state borders;
- National safety regulations for a coal ash rule that regulates the disposal of toxic coal ash from coal-fired power plants;
- A regional haze rule requiring states and the federal government to collaborate to improve visibility in national parks and wilderness areas;
- A strong startup, shutdown, and malfunction rule that reduces power plant emissions during startup, shutdown, and malfunctions; and
- Effluent limitation guidelines that limit water pollution from power plants into surface waters and wastewater treatment plants.⁵²

According to Earthjustice, this regulatory agenda, if implemented, “would reduce the carbon pollution that drives climate change.”⁵³

II. The Good News: The IRA

While *West Virginia*’s bad news was still sinking in, President Biden signed the IRA,⁵⁴ which includes a commitment to spend \$369 billion on clean energy and GHG reduction.⁵⁵ At the signing, the president touted the IRA as the largest investment ever to battle climate change.⁵⁶ Whether the IRA is the world’s largest climate change investment, the claim that it is the United States’ largest seems clear.⁵⁷ It constitutes the “good” news in the “there’s good news and bad news” adage.

How does this good news relate to the regulatory options outlined in Part I? This part answers that question, concluding that regulations such as a GHG NAAQS would buttress the IRA’s incentives for addressing climate change with a legally enforceable framework within which states could use the many tools provided in the IRA.

52. *Id.*

53. *Id.*

54. Pub. L. No. 117-169 (2022).

55. Matt Hamblen, *President Signs IRA as Greatest Act Ever to Combat Climate Crisis*, FIERCE ELECS. (Aug. 16, 2022), <https://www.fierceelectronics.com/sensors/president-signs-ira-greatest-act-ever-combat-climate-crisis>.

56. *Id.* The IRA adds significantly to climate-related investments in the Infrastructure Investment and Jobs Act (IIJA), the bipartisan legislation that included smaller and more traditional clean energy investments. For a survey of IIJA climate investments, see Moran Higman, *The Infrastructure Investment and Jobs Act Will Do More to Reach 2050 Climate Targets Than Those of 2030*, CTR. FOR STRATEGIC & INT’L STUD. (Aug. 18, 2021), <https://www.csis.org/analysis/infrastructure-investment-and-jobs-act-will-do-more-reach-2050-climate-targets-those-2030>.

57. James M. Auslander et al., *Inflation Reduction Act Signed Into Law, Committing \$370 Billion to Action on Climate and Energy*, BEVERIDGE & DIAMOND (Aug. 16, 2022), <https://www.bdlaw.com/publications/inflation-reduction-act-signed-into-law-committing-370-billion-to-action-on-climate-and-energy/>; Chris Chyung et al., *How States and Cities Can Benefit From Climate Investments in the Inflation Reduction Act*, CTR. FOR AM. PROGRESS (Aug. 25, 2022), <https://www.americanprogress.org/article/how-states-and-cities-can-benefit-from-climate-investments-in-the-inflation-reduction-act/>.

While a detailed IRA review is beyond this Comment's scope,⁵⁸ the Act's broad outlines are useful in envisioning how its tools would work with the NAAQS program or other regulations.

The IRA, according to one analysis⁵⁹:

- Significantly expands wind energy offshore leasing, while requiring oil and gas leases to be offered over large tracts of the outer continental shelf as a condition of making wind leases available;
- Reduces GHG emissions, such as hydrofluorocarbon (HFC) refrigerants, and emissions of CAA "criteria" pollutants;
- Substantially supports EPA's existing efforts to address methane emissions, including the proposed regulations discussed in Part I, and also establishes new fees on owners of oil and gas infrastructure if methane emitted from that infrastructure exceeds specified thresholds;
- Includes programs to reduce GHGs from agriculture, promoting soils- and forestry-based carbon sequestration, and improving farms' and forests' climate resiliency;
- Expands federal support for biofuels, sustainable fuels, hydrogen as a fuel, and sustainable aviation fuels; and
- Supports decarbonizing GHG-intensive industries through energy efficiency, transition to low-carbon inputs, and using materials that capture carbon during manufacturing.

The IRA also significantly revises or expands existing tax credits for renewable energy production, carbon capture and sequestration, and advanced manufacturing.⁶⁰ It also creates new tax credits for alternative aviation fuels and clean hydrogen. Beginning in 2026, the IRA replaces existing credits with new credits for any technology that produces carbon-free energy. This system remains effective until the electricity sector reduces its national GHG emissions to 25% of 2022 levels.⁶¹ These investments are projected to reduce U.S. GHG emissions by 32% to 42% below 2005 levels by 2030 (relative to 30% under current policy).⁶² Assuming the IRA enables the United States to reduce emissions 40% by 2030, the Biden Administra-

tion's Paris commitment to reduce emissions even further to 50% by 2030 is within reach.⁶³

Given these projections, how would additional regulations—including a NAAQS—complement the IRA in further reducing U.S. emissions? A detailed analysis by the Harvard Environmental and Energy Law Program staff helps answer this question.⁶⁴ As noted in Part I, the IRA explicitly creates links with methane regulation, using the regulations to create a context within which various stakeholders are more likely to use IRA incentives. Other regulations if adopted would similarly ensure robust use of IRA incentives.

Regarding methane, the Harvard analysis identifies how the IRA's methane provisions would support EPA's proposed methane rule discussed in Part I. These IRA provisions include a charge on methane until more stringent regulations go into effect. The analysis notes that because the charge starts in 2024, "oil and gas companies will want their states to submit plans that EPA approves under section 111(d) as soon as possible; and industry may oppose any future rollback of the final rule to avoid having the charge apply."⁶⁵

The Act's financial incentives complement the methane rule. These include \$850 million for methane mitigation and monitoring; \$700 million for reducing emissions from marginal wells; \$20 million for monitoring methane emissions; and \$117.5 million for monitoring grants. As Part I notes, analysts ranging from progressive think-tanks to more conservative practitioners have noted the proposed methane rules appear to be safe from challenge under *West Virginia*.

While the IRA does not explicitly mention a NAAQS or other regulations, the synergies between the incentives and regulations present with methane would also be possible under other regulations. Regarding NAAQS, the IRA makes billions of dollars available to states for their climate efforts.⁶⁶ These include funds for building and port electrification, energy-efficiency programs, heavy-duty electric vehicles and charging infrastructure, and states' climate plans and GHG reduction programs. The Harvard analysis observes that these programs "help to establish the basis for more ambitious federal regulation."⁶⁷ Other analysts posit that states will need to "stand up ambitious programs in their communities" to realize the IRA's potential.⁶⁸ As noted in my original comment, the NAAQS program is unique among CAA programs, because §109 explicitly defines subject pollutants as resulting from diverse mobile and stationary sources⁶⁹—the same diverse sources that the IRA state programs can address.

As discussed in Part I, the Biden Administration is working on power plant rules under §111. The Harvard analysis

58. For example, the IRA includes important environmental justice provisions. These are significant and transformative, but not our focus.

59. Auslander et al., *supra* note 57.

60. *Id.* These include extensions of investment tax credits, production tax credits, and tax credits for construction using labor paid prevailing wages and qualifying apprenticeship programs. *Id.*

61. *Id.*

62. JOHN LARSEN ET AL., RHODIUM GROUP, A TURNING POINT FOR US CLIMATE PROGRESS: ASSESSING THE CLIMATE AND CLEAN ENERGY PROVISIONS IN THE INFLATION REDUCTION ACT (2022).

63. *The Inflation Reduction Act's Implications for Biden's Climate and Environmental Justice Priorities*, *supra* note 48.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Chyung et al., *supra* note 57.

69. Laschever, *supra* note 1, at 10925.

concludes that the IRA may help EPA's §111 rulemaking by providing other options for selecting the BSER.⁷⁰ These options could include efficiency improvements, as well as carbon capture and co-firing with lower-carbon fuels resulting from the IRA. The Harvard analysis notes the IRA tax incentives for carbon capture and sequestration and use of hydrogen as a fuel, concluding these "will lower the costs for plants building those systems. While EPA will still need to evaluate the other statutory factors for both technologies, their reduced costs make it more feasible for EPA to define BSER reflecting those technology opportunities."⁷¹

The Harvard analysis also argued that the IRA's promotion of alternative energy sources, including renewable and nuclear energy, will help the transition from coal that the CPP sought to force.⁷² The analysis notes that EPA rulemakings can reflect in the baseline new investments companies are making, and will make in response to IRA incentives, and the regulations can complement those emissions reductions through pollution control measures.

In sum, the Biden Administration continues to have important regulatory opportunities that the IRA complements rather than replaces. As the Harvard analysis observes, the Act's "investments will change the baseline for rulemakings across several agencies as it brings down the cost of clean technologies so agencies can design rules that are both ambitious and legally durable."⁷³

III. Conclusion

The IRA restores some of the reason to hope U.S. policy will help reduce GHG emissions that the Supreme Court took away in *West Virginia*. This year is likely to end with

EPA adopting new and powerful methane regulations and some expenditure of funds from the Infrastructure Investment and Jobs Act (IIJA). In 2023, EPA will adopt more rules and grant more funds. The role a NAAQS may play in the future remains in EPA's hands.

While a NAAQS would create a powerful framework for state and federal coordination, as discussed above and in my original comment, its comprehensive nature makes it more complicated than some options EPA appears to have on its front burner. In addition, some options are mutually exclusive. As EPA revises its forecasts of U.S. GHG emissions to account for IIJA and IRA expenditures, it should look hard at the full range of options left open by *West Virginia*. This hard look should include the GHG reduction benefits, implementation time, and litigation risks for each regulatory option.

As these factors apply to a GHG NAAQS, its potential benefit remains high, while its implementation time would be longer than other options. Regarding litigation risks, the Court's *West Virginia* reasoning, which repeatedly distinguishes §111(d) from the NAAQS program with its state-led implementation and explicit cap-and-trade program, reads as an invitation to EPA to adopt a CO₂ NAAQS—an invitation made more attractive by the *American Trucking* holding's answer to the major questions doctrine.

That invitation—like Lucy's invitation to Charlie Brown to kick the football—could mask a future disappointing Supreme Court ruling. However, under the circumstances, the invitation is one that the Biden Administration should seriously evaluate as EPA and other agencies, states, and other stakeholders digest the IRA and its promise to reduce GHGs.

70. *The Inflation Reduction Act's Implications for Biden's Climate and Environmental Justice Priorities*, *supra* note 48.

71. *Id.*

72. *Id.*

73. *Id.*