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The Supreme Court Limits EPA's Authority to Regulate Greenhouse Gas Emissions

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On June 30, 2022, the Supreme Court of the United States issued an important environmental ruling in *West Virginia v. EPA,* holding that while the United States Environmental Protection Agency ("EPA") can regulate power plant emissions, it exceeded its statutory authority in promulgating rules that require a shift in power generation away from coal- and natural gas-fired power plants to renewable power sources.[1] While the decision itself is limited to EPA's reliance on Section 111(d) of the Clean Air Act ("CAA")[2] for its authority to promulgate the Obama-era Clean Power Plan ("CPP") rule,[3] the decision may have sweeping longer-term implications for regulatory agencies and the regulated community more generally, and throws into question whether President Biden's commitment to reducing greenhouse gas emissions by 50% below 2005 levels by 2030, achieving a carbon-free grid by 2035 and a carbon-free economy by 2050, is truly attainable.

Key Takeaways

- The decision limits, but does not eliminate, EPA's ability to regulate greenhouse gas emissions.
- The Court relied on the "major questions" doctrine, under which regulatory agencies must point to "clear congressional authorization" for the authority it claims.
- The decision will likely make it harder for regulatory agencies to rely on existing statutes to promulgate regulations that address issues not considered when the laws were enacted –e.g., climate change.
- Business interests may use the Court's reliance on the "major questions" doctrine as an opportunity to challenge other regulations by arguing that Congress was similarly not clear enough in delegating authority to whatever agency devised the regulation being challenged.

The Backdrop

In 2015, citing its authority under Section 111 of the CAA, EPA promulgated the CPP rule which, among other things, determined that the "best system of emission reduction" ("BSER") for existing coal and natural-gas power plants included "generation shifting" measures requiring an industry-wide shift in electricity production from coal- and natural gas-fired power plants to renewable power sources over a period of time.[4] Upon promulgation, the CPP rule was challenged in the D.C. Circuit and, before a decision was issued by the Court of Appeals, it was held in abeyance by the Supreme Court, ultimately preventing the CPP rule from taking effect. In 2019, after a change in administration, EPA determined that it had exceeded its statutory authority under Section 111(d) of the CAA when promulgating the CPP rule and promulgated a different Section 111(d) regulation known as the Affordable Clean Energy ("ACE") rule, which repealed the CPP rule.[5]

A number of States and private parties challenged EPA's repeal of the CPP rule and its replacement with the ACE rule. The cases were consolidated and, in January 2021, the Court of Appeals for the District of Columbia vacated EPA's repeal of the CPP rule and enactment of the ACE rule, and remanded to EPA for further consideration.[6] Meanwhile, several parties defending the repeal of the CPP filed petitions to appeal the Court of Appeals decision to the Supreme Court, which were granted and consolidated into *West Virginia v. EPA*.

The Supreme Court Decision

The central question before the Court was whether the BSER identified by EPA in the CPP rule – a shift in generation from coal and natural gas power plants to renewable power sources – was within the statutory authority granted to EPA in Section 111(d) of the CAA.[7] The Court, relying on the "major questions" doctrine, found the answer to the question was "no."[8] In a 6-3 decision delivered by Chief Justice Roberts, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, the Supreme Court held that Congress did not grant EPA the authority, in Section 111(d) of the CAA, to devise emissions caps based on the generation shifting approach the agency took in the CPP.

Under another Supreme Court precedent known as the "*Chevron* doctrine." federal courts must defer to a federal agency's reasonable interpretation of an ambiguous statute that it has been delegated to administer.[9] In *West Virginia v. EPA*, the Supreme Court did not expressly overturn the *Chevron* doctrine but instead appears to have carved out an exception to *Chevron's* applicability for "extraordinary cases." Under the "major questions" doctrine, where an agency's rulemaking has "vast economic and political significance" or "would bring about an enormous and transformative expansion in [the agency's] regulatory authority," the Court requires the agency to point to "clear congressional authorization" for the authority it claims.[10]

The Court found that EPA's CPP rule would bring about a transformative expansion of its regulatory authority under the Section 111 of the CAA and have vast economic and political significance and thus triggered application of the "major questions" doctrine.[11] In applying the doctrine, the Court found that the CAA did not contain the "clear congressional authorization" required for EPA to promulgate such a rule, noting that EPA instead was relying on "the vague language of an 'ancillary provision' of the [CAA]…that was designed to function as a gap filler" to create a regulatory program that Congress itself had declined to enact.[12] The Court did acknowledge that "[c]apping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible 'solution to the crisis of the day'"[13] but that "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[14]

Next Steps

The Supreme Court's decision spurred prompt reaction from the White House and the EPA. While expressing their respective disappointment in the decision, both President Biden and EPA Administrator Regan indicated that the current administration would work with States and cities to pursue lawful executive authority and congressional action to implement environmental standards that protect against climate change.

It is not clear specifically what next steps the current administration will take. One possibility is that EPA could promulgate new carbon dioxide emission regulations for existing power plants focused on technology-based standards for improving the performance of individual sources (e.g., through efficiency improvements, fuel-switching, and add-on controls) – which the Court acknowledged would have been more in line with EPA's past emission reduction measures under the CAA.[15]

Congress also could enact legislation expressly granting EPA the authority to do what EPA proposed to do in the CPP (i.e., regulate existing coal and gas-fired power plants using "generation shifting"). Additionally, States could adopt clean energy initiatives, including regulations limiting carbon dioxide emissions at existing power plants and, because EPA only sets the regulatory floor, those limitations may be more stringent than current federal standards.

Other Potential Impacts

Other potential impacts from the *West Virginia v. EPA* decision include:

- Biden's Climate Change Agenda. The likelihood of achieving President Biden's climate change agenda, which includes (i) a nation-wide 50% reduction in greenhouse gas pollution from 2005 levels by 2030, (ii) a carbon-free electricity grid by 2035, and (iii) a carbon-free U.S. economy by 2050, is now questionable. Not only does the *West Virginia v. EPA* decision directly limit EPA's ability to contribute to the carbon-free electricity grid by prohibiting EPA from requiring an industry-wide shift from fossil fuels to renewable energy sources, but any future EPA rulemaking to address climate change may be subject to the same "major questions" test and require EPA to demonstrate clear congressional authorization.
- Agency Rulemaking and Action. The Court's reliance on the "major questions" doctrine effectively makes it harder for regulatory agencies to rely on existing statutes to promulgate regulations that address issues not considered when the laws were enacted – e.g., climate change. In addition, business interests and the regulated community may use the "major questions" doctrine as an opportunity to challenge other regulations by arguing that Congress was similarly not clear enough in delegating authority to whichever agency devised the regulation being challenged, leading to additional regulatory uncertainty.

One such example could be the climate change disclosure rules proposed by the U.S. Securities Exchange Commission ("SEC").[16] Under the proposed rules, publicly-traded companies are required to disclose greenhouse gas emissions and certain other detailed information related to climate change.[17] Opponents have already submitted comments arguing that the proposed rules exceed the SEC's statutory authority. If challenged and reviewed under the "major questions" doctrine, the SEC may have difficulty demonstrating the clear congressional authorization required for promulgating those rules.

- Congressional Legislation. The decision also is likely to have an impact on future Congressional legislation, as Congress now will have to consider whether it is providing "clear congressional authorization" to agencies, as opposed to broad statutory authority that may not be sufficient to allow agencies to address future issues not contemplated at the time the legislation was enacted.
- State Action. The Supreme Court's decision does not impair the ability of individual States to enact climate change legislation. With increased scrutiny on federal regulations, States will need to continue to fill the gap by implementing their own climate change agendas.

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[1] *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587 (June 30, 2022).

[2] 42 U.S.C. § 7411(d).

[3] 80 Fed. Reg. 64662.

[4] Id.

[5] 84 Fed. Reg. 32520

[6] *See, American Lung Association v. Environmental Protection Agency*, 985 F.3d 914 (D.C. Cir. 2021).

[7] *West Virginia*, 142 S.Ct., at 2615-2616.

[8] Id. at 2616.

[9] *See*, *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.,* 467 U.S. 837 (June 25, 1984).

[10] *See, Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U.S. 302, 324 (June 23, 2014).

[11] *See, West Virginia*, 142 S.Ct., at 2610-2614.

[12] Id. at 2610 (quoting *Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (February 27, 2001)).

[13] Id. at 2616 (quoting *New York v. United States*, 505 U.S. 144, 187 (June 19, 1992)).

[14] Id. at 2616.

[15] Id. at 2610-2614.

[16] 87 Fed. Reg. 21334.

[17] Id.

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