



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

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On June 30, 2022, the Supreme Court issued a landmark decision in *West Virginia v. EPA*. In a 6-3 opinion written by Chief Justice Roberts, the Court held that Congress did not give EPA the authority under Section 111 of the Clean Air Act to set emission standards for existing power plants that prescribe the market share of certain types of power generation.

The Court reversed the D.C. Circuit ruling striking down the Trump-era Affordable Clean Energy (ACE) Rule, which repealed the Obama-era Clean Power Plan and replaced it with more limited regulations of CO₂ emissions from existing power plants.

The Court applied the “Major Questions Doctrine,” which applies a more skeptical review when an agency discovers in a “long-extant statute an unheralded power” representing a “transformative expansion in its regulatory authority” with substantial national impacts. Slip op. at 5. In such cases, the Court has held, a general delegation of authority may not be enough; rather, the agency’s action must be supported by clear statutory authorization.

Chief Justice Roberts drafted the majority opinion, which states:

Capping 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.” *New York v. United States*, 505 U. S. 144, 187 (1992). But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.

Slip op. at 31. A dissent, written by Justice Kagan, argues that with the decision the Court “appoints itself—instead of Congress or the expert agency—the decisionmaker on climate policy.” Slip op. at 33.

Next Steps

The Court reversed the D.C. Circuit decision and remanded the case for further proceedings consistent with the opinion. Given that the Court’s opinion reversed the decision by the D.C. Circuit regarding the ACE Rule, the question is whether that rule now springs back to life. At a minimum, EPA will need to address this question through an administrative process, e.g., a stay or a rulemaking, while the Agency continues work on a replacement rule for the CPP and the ACE Rule consistent with the Court’s opinion in *West Virginia*.

EPA is expected to issue its proposed rule under Clean Air Act section 111(d) in March 2023 and will likely finalize the regulation in 2024. *West Virginia* will force the Biden administration to approach its development of regulations to implement greenhouse gas controls for power plants more narrowly than the Clean Power Plan.

Importantly, if EPA is constrained in what the replacement for CPP and ACE can achieve with regard to GHG reductions, this may mean that the power sector will see the Agency targeting more stringent regulation of non-greenhouse gas pollutants—such as oxides of nitrogen (“NO_x”), particulate matter, and hazardous air pollutants—which could achieve climate mitigation co-benefits that the Agency cannot achieve through direct regulation.

More broadly, the Court’s specific use of the Major Questions Doctrine is a significant development in the field of administrative law. Greater use of this doctrine could greatly curtail agency abilities to use existing statutory authority in new ways if the regulations have substantial impacts. This limit on agency regulatory powers could extend not just to the environment but potentially to health care, telecommunications, the financial sector, and other arenas.

Background

In 2019, the Environmental Protection Agency (EPA) under the Trump administration repealed the Clean Power Plan (“CPP Repeal Rule”) and replaced it with a new rule, the Affordable Clean Energy Rule (“ACE Rule”).

The Clean Power Plan (CPP), a 2015 Obama-era rule regulating power plants' emissions of greenhouse gases, was an exercise of EPA's authority under Section 111 of the Clean Air Act. The CPP established State-specific performance rates and required States to promulgate emissions standards for existing fossil fuel-fired power plants, "individually, in the aggregate, or in combination with other measures undertaken by the [S]tate, represent the equivalent of" those performance rates." Pursuant to Section 111, EPA identified performance standards for the regulated power plants with reference to what the Agency determined to be the "best system of emission reduction" (BSER). In the case of the CPP, EPA determined the BSER by looking at the power sector itself as a kind of "system," in which the sector could achieve reductions by shifting generation from high-emitting plants to lower- or zero-emitting plants. This "generation-shifting" approach to determining the BSER was a departure from prior Section 111 rules, in which EPA determined the BSER by identifying an emissions control technology that could be applied to an individual regulated emission source.

In the CPP Repeal Rule, the Trump EPA determined that Section 111 is "clear and unambiguous in constraining the EPA to use only improvements at and to existing sources in its [BSER]" and that the CPP's "generation shifting" measures contravened that constraint. In place of the CPP, the EPA promulgated the ACE Rule, a new set of emission guidelines applying only to existing coal-fired steam plants and effectively requiring efficiency improvements.

In a 2-1 decision, the D.C. Circuit vacated the CPP Repeal Rule and the ACE Rule after holding that both rules were based on the EPA's misinterpretation of Section 111. According to the majority, "nothing in the text, structure, history, or purpose" of Section 111 compels the Trump EPA's narrower interpretation.

In February 2021, the Biden EPA moved to stay the Court of Appeals' mandate with respect to vacatur of the CPP Repeal Rule while the Agency pursued a new rulemaking on remand. The Biden administration made clear that it would not resurrect the CPP, but rather would develop a new rule. No party opposed EPA's motion, J.A. 256, and the court of appeals "withh[e]ld issuance of the mandate with respect to the vacatur of the [CPP] Repeal Rule until the EPA responds to the court's remand in a new rulemaking action." The court issued its mandate with respect to vacatur of the ACE Rule. Accordingly, although the court invalidated the CPP Repeal Rule, the court's partial stay of the mandate produced the same practical effect as if that Rule had been upheld: No Section 111 rule governing CO₂ emissions from existing power plants is currently in effect, and no regulation will occur until EPA completes a new rulemaking.

The State of West Virginia and others petitioned the U.S. Supreme Court for certiorari of the D.C. Circuit decision invalidating the CPP Rule and the ACE Rule. The petitioners' question on review was:

In 42 U.S.C. § 7411(d), an ancillary provision of the Clean Air Act, did Congress constitutionally authorize the Environmental Protection Agency to issue significant rules—including those capable of reshaping the nation's electricity grids and unilaterally decarbonizing virtually any sector of the economy—without any limits on what the agency can require so long as it considers cost, non-air impacts, and energy requirements?

Respondents, including EPA, characterized the issues before the Court as:

1. Whether petitioners have standing to invoke this Court's appellate jurisdiction.
2. Whether the Clean Air Act, 42 U.S.C. 7401 et seq., unambiguously limits the measures that the Environmental Protection Agency may consider in determining the "best system of emission reduction," 42 U.S.C. 7411(a)(1), for existing sources to measures that can be applied to and at the level of an individual regulated source.

Oral arguments were held on February 28, 2022.

FOR MORE INFORMATION

Van Ness Feldman closely monitors and counsels clients on greenhouse gas and clean air act regulatory and enforcement-related issues. If you would like to evaluate how the Supreme Court's decision may impact your business, please contact [Stephen Fotis](#), [Britt Fleming](#), [Kyle Danish](#), [A.J. Singletary](#), [Paul Libus](#) or any member of the firm's Environmental practices in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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