

Supreme Court Rejects EPA's Power on Climate Change Regulations

Alert

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By Dennis Lane, Aimee Guzman Davenport, Brittany Barrientos and Caleb Hall

The U.S. Supreme Court rejected the U.S. Environmental Protection Agency's (EPA) ability to regulate greenhouse gas emissions based on shifting from existing generation sources under Section 111(d) of the Clean Air Act (CAA). In a [6-3 opinion released Thursday, June 30, 2022](#), authored by Chief Justice John Roberts, the Court held in *West Virginia v. U.S. Environmental Protection Agency* that the states challenging EPA's authority retained standing and that the "major questions" doctrine limits EPA's power to curtail greenhouse gas emissions by requiring power plants to shift generation to lower emitted fuel sources. The Supreme Court released its decision despite there being no enacted or proposed EPA rule to challenge. In addition to immediately impacting EPA's approach to climate change regulation, the decision could call into question the authority of multiple federal agencies to undertake significant policy actions.

CHALLENGING EPA'S AUTHORITY

The appeal decided by the Supreme Court related to EPA's authority to address climate change through the Clean Power Plan (CPP) rule, which sought to control greenhouse gas emissions from existing coal-fired generation plants under the best system of emission reduction provisions in Section 111(d) of the CAA. Section 111(d) authorizes EPA to propose emissions standards for pollutants from existing sources after establishing the same pollutant standards for new sources under Section 111(b), provided that the pollutant in question is not already addressed by National Ambient Air Quality Standards or Hazardous Air Pollutant programs under the CAA. The CPP attempted to use this authority by providing operators of existing sources three building blocks for reducing greenhouse gas emissions: (1) Reduce emissions "inside the fence" by making heat rate improvements on generation units; (2) Replace coal-fired generation with low or zero emission generation, such as solar, wind or other low carbon sources; or (3) Purchase emission credits through a cap-and-trade program to meet the CPP's proposed emission limits. The third building

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block was commonly referred to as “outside the fence” regulation. The Court found that EPA exceeded its authority under Section 111(d) by attempting to require such generation shifting to reduce emissions.

The CPP became a final rule in 2015, and was immediately challenged and eventually stayed by the Supreme Court in 2016. In October 2017, EPA proposed to repeal the CPP, which had never gone into effect because of the stay. The repeal was finalized in June 2019. The repeal was also challenged by parties wanting to prevent the repeal and others (including West Virginia) defending it. EPA told the Supreme Court that it would not enforce the CPP and would instead propose a new rulemaking to govern greenhouse gas emissions by electric generating units. In January 2021, the D.C. Circuit Court of Appeals vacated EPA's repeal and held that the repeal “rested critically on a mistaken reading of the Clean Air Act”—that generation shifting cannot be a system of emission reduction under Section 111. West Virginia and its co-petitioners asked the Supreme Court to grant certiorari to address West Virginia's challenge to EPA's authority to regulate existing sources using the best system of emission reductions. The Supreme Court agreed to review the case, and found that EPA exceeded its authority under Section 111(d) by attempting to require such generation shifting as a means of reducing emissions.

WEST VIRGINIA V. EPA

West Virginia and other states challenged EPA's authority to regulate greenhouse gases under the “major questions” and “non-delegation” doctrines. The “major questions” doctrine posits that Congress should speak clearly when it assigns agencies decisions of vast economic or social impacts. The “non-delegation” doctrine holds that Congress may not delegate its legislative authority to executive agencies.

In this case, the Supreme Court extended the “major questions” doctrine to EPA's attempt to regulate greenhouse gas emissions through reliance on Section 111(d) of the CAA to require shifts in utility energy resources and impose billions of dollars in compliance costs. In particular, the Supreme Court focused on its view that Section 111(d) is a stop-gap measure that was not intended to permit such a broad restricting of the electric industry and EPA's lack of expertise in electricity resource management. The Supreme Court concluded that, without express Congressional authority, the “major questions” doctrine prohibits EPA from creating carbon emission caps that rely on generation shifting. Justices Gorsuch and Alito concurred separately to suggest possible grounds for deciding when the “major questions” issue can be invoked.

IMPACTS – ENVIRONMENTAL AND BEYOND

The immediate impact of *West Virginia v. U.S. Environmental Protection Agency* is unclear as the CPP is currently stayed and EPA had indicated that it would not seek to enforce it. In any event, the electric industry has on its own already exceeded all the emission reductions that would have been imposed by the CPP through a glide path of emission reductions through 2030. Currently, EPA is considering a new rulemaking proceeding to govern greenhouse gas emissions by the industry, and will have to take into account the Supreme Court's analysis and conclusions in whatever rule it proposes. While there may be

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some efforts to have Congress pass new legislation in light of this decision, it seems unlikely, in the current circumstances, that any such legislation would be enacted.

What is less apparent is the impact of the Court's express reliance on the "major questions" doctrine on future actions by EPA and other administrative agencies. The Supreme Court states that in "certain extraordinary cases" agencies must show clear congressional authorization for the proposed action. The Court did not raise or question the *Chevron* doctrine of deference to agency interpretations of ambiguous statutory provisions, but rather suggested that a major question issue supersedes agency deference when that agency has not been delegated authority to take action. As noted, Justice Gorsuch attempts to provide guidelines about when these extraordinary circumstances would arise, but this debate will most likely be subject to further controversy and litigation. Federal agencies may need to change previous approaches to rulemaking given the Supreme Court's ruling lest their proposed rules be challenged as being overbroad or unauthorized exercises of legislative authority. The Court's decision may also encourage states to create varying greenhouse gas emission policies without further federal direction.

CONTACTS

Brittany Barrientos

Aimee Guzman Davenport

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