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The Supreme Court uses major questions doctrine to limit EPA's authority to regulate climate change

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On June 30, 2022, the Supreme Court in *West Virginia v. EPA* struck down the Clean Power Plan, concluding that the rule's mandate that power companies shift from coal to natural gas and renewables went beyond the authority delegated by Congress. In doing so, the Court applied the major questions doctrine to curtail EPA's authority to regulate power sector GHG emissions but did not eliminate it.

The Supreme Court's decision in *West Virginia v. EPA* is the latest in a series of decisions constraining broad rulemaking by federal regulatory agencies. The Court struck down the Clean Power Plan (CPP) – an Obama-era Environmental Protection Agency (EPA) regulation on greenhouse gas (GHG) emissions from the power sector – concluding that the CPP's mandate that power companies shift electricity generation from coal power to natural gas and renewables went beyond the authority delegated by Congress to EPA under the Clean Air Act (CAA). In doing so, the Court curtailed – but did not eliminate – EPA's authority to regulate GHG emissions from the power sector under the CAA. The Court's decision built on several recent rulings limiting the executive branch's authority to issue rules that constitute major questions.[1]

Background. Issued by EPA in August 2015, the CPP was the centerpiece of the Obama Administration's climate change strategy. The goal of the CPP was to reduce CO2 emissions from the power sector by thirty-two percent by 2030 relative to 2005 emissions. To accomplish this goal, the CPP, issued under Section 111(d) of the CAA, called on states to prepare plans that would employ three measures, or "building blocks," that, in combination, would reduce power sector emissions to meet the CPP's targets. These building blocks included (1) improving the efficiency of coal-fired power plants, (2) shifting electricity generation from coal-fired power plants to lower emitting existing natural gas combined cycle plants, and (3) shifting electricity generation from fossil fuel-fired power plants to new wind, solar and other renewable sources. The "generation shifting" called for by the second and third building blocks was novel: while traditional emissions control measures involve the implementation of some sort of technology at the source of the pollution, the CPP would regulate GHG emissions "beyond the fenceline" of an individual facility. EPA took the position that "generation shifting" was consistent with Section 111(d), which directs EPA to determine the "best system of emissions reduction," or "BSER" for a source in a regulated category (in this case, the power sector). According to EPA, because existing "within the fenceline" controls would not meaningfully reduce GHG emissions from coal-fired power plants, the "best system" of reducing GHG emissions necessarily required an overall shift in the fuel mix of the power sector.

The Court's ruling. By the time the CPP came before the Supreme Court, it was essentially a dead letter. Legal challenges and actions by the Trump Administration prevented the CPP from ever going into effect. Moreover, in the years following the issuance of the CPP, market forces and other factors moved the power sector toward the targets mandated by the CPP. Accordingly, while the Biden Administration was nominally defending the CPP, EPA planned on replacing it with a presumably more aggressive rule under Section 111(d).

In its opinion, the Court applied the two part analysis of the major questions doctrine to assess the validity of the CPP:

1. Does the "history and the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such

authority"?
2. If the answer to this question is "yes," the government "must point to clear congressional authorization for the power it claims."

With regard to the first point, the Court concluded that the CPP presented a major question. Citing a number of precedents – including the Court's rejection of OSHA's COVID-19 vaccine mandate and the CDC's eviction moratorium earlier this term – the Court looked to a number of factors in reaching this conclusion: (1) the breadth of the authority being asserted by EPA, namely, to dictate the "generation mix" of the power sector, (2) the lack of any prior EPA rules employing "beyond the fenceline" measures under Section 111(d), (3) the unlikelihood that Congress would have intended a legislative "backwater" such as Section 111(d) to be used as the basis for a rulemaking of this breadth, (4) EPA's lack of expertise with respect to energy policy, and (5) the fact that the CPP addresses an issue that is the subject of ongoing debate at the congressional level and that Congress has repeatedly considered and failed to enact legislation of similar nature and scope as the CPP, e.g., cap-and-trade programs or a carbon tax.

Having classified the case as involving a major question, the Court analyzed whether the EPA pointed to "clear congressional authorization" for the CPP. The Court concluded that EPA failed to do so. The statutory text asserted by EPA as providing the authorization for the "generation shifting" provisions of the CPP was the requirement under Section 111(d) of the CAA that EPA determine the "best system of emissions reduction." EPA asserted that the term "system" is broad enough to encompass shifting electricity generation from higher emissions sources to lower emitting ones. While the Court agreed that the word "system" was broad enough to cover generation shifting, that very breadth meant that the term was too vague to constitute the "clear congressional authorization" required by the major questions doctrine:

> [O]f course almost anything could constitute such a "system"; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents.

Justice Gorsuch's concurrence. Notably, Justice Roberts did not articulate a set of specific factors that courts should consider in determining whether a particular regulation constitutes a major question. Justice Gorsuch, in a concurring opinion joined by Justice Alito, did just that. Justice Gorsuch identified three situations where the major questions doctrine may apply:

1. when an agency claims the power to resolve a matter of great "political significance,"
2. when an agency seeks to regulate "a significant portion of the American economy," and
3. when an agency seeks to "intrud[e] into an area that is the particular domain of state law."

Justice Gorsuch concluded that each of these situations is present here, "making this a relatively easy case for the doctrine's application."

Key takeaways:

EPA's options to regulate power plant GHG emissions have narrowed. The primary impact of the decision is on EPA's ability to use Section 111(d) of the CAA to regulate power sector GHG emissions "beyond the fenceline" in the future. Although EPA has abandoned the CPP, it is currently developing a new proposed rule to regulate power sector GHG emissions under Section 111(d) slated to be issued in March 2023 according to its latest regulatory agenda. While the Court did not take the bolder step of either rejecting EPA's authority to regulate GHG under the CAA altogether or under Section 111(d) specifically, EPA will need to pay close heed to the Court's decision in any new Section 111(d) rulemaking. This likely means that a new rule will have to select a BSER that consists of traditional, "within the fenceline" measures similar to prior Section 111(d) regulations and avoid involving EPA in policy making outside of its traditional area of expertise. Some have suggested that EPA could choose a system of emissions reduction consisting of carbon capture and sequestration, a technology that has yet to be deployed on a wide scale and which was rejected by EPA in the CPP rulemaking based on its high relative cost. Whether such a rule will satisfy Section 111(d)'s requirements regarding cost effectiveness and technological feasibility is an open question.

The fate of other ambitious climate change regulation may be subject to the major questions doctrine. Other climate change related regulation, which may include the EPA's final and proposed vehicle emissions standards, the Securities and Exchange Commission's recently proposed climate risk disclosure rule and the Federal Energy Regulatory Commission's policies regarding accounting for climate change risks in considering natural gas projects, may be subject to challenge under the major questions doctrine as well. A forthcoming Davis Polk Client Update will provide a basic primer on the major questions doctrine and how it might impact other regulatory areas. [Read our update A basic primer on the major questions doctrine (July 14, 2022).]

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

David A. Zilberberg
+1 212 450 4688
david.zilberberg@davispolk.com

Timothy J. Sullivan
+1 212 450 4108
timothy.sullivan@davispolk.com

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