What Would a U.S. Supreme Court Confirmation of Judge Kavanaugh Mean for Environmental Regulation?

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Over the next several weeks, the U.S. Senate will consider President Trump's Republican nominee, Judge Brett Kavanaugh of the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), to fill the seat on the U.S. Supreme Court left open by Justice Anthony Kennedy. Judge Kavanaugh's experience as a judge, lawyer and legal scholar are considerable: service on the D.C. Circuit for more than 12 years, teaching positions at top U.S. law schools, a clerkship for Justice Kennedy, over five years of service in the White House and experience arguing before the U.S. Supreme Court. Judge Kavanaugh's nomination to the U.S. Supreme Court is supported by conservative groups who tout his qualifications and have long considered him to be a champion of conservative legal principles with the intellectual energy to shift the U.S. Supreme Court to the right.

Executive Summary

The trajectory of environmental law will likely be significantly affected by a Kavanaugh confirmation. Because Judge Kavanaugh is being considered to replace Justice Kennedy, who was often the swing vote in environmental decisions, Judge Kavanaugh's impact will be more profound than the confirmation of Justice Neil Gorsuch, who replaced the consistently conservative Justice Antonin Scalia in 2017. In fact, Justice Kennedy was in the majority in every single environmental case but one decided throughout his tenure on the U.S. Supreme Court, and his vote played a substantial role in the pro-environmentalist outcome of seminal cases such as *Massachusetts v. EPA* and *Rapanos v. United States*. Judge Kavanaugh's confirmation will likely tip the balance in environmental cases in a more conservative direction. This memo will discuss how the following key legal principles and themes reflected in Judge Kavanaugh's judicial opinions and other writings may shape environmental law if he is confirmed:

- Limited deference to administrative agency statutory interpretation: Judge Kavanaugh has criticized and sought to limit the doctrine known as *Chevron* deference, which provides that where Congress has been silent or ambiguous regarding an administrative agency's authority, courts must give deference to the agency's interpretation of the relevant statute. In his judicial opinions, Judge Kavanaugh has often rejected arguments that *Chevron* deference should apply, adopting his own interpretations of statutes over those of the U.S. Environmental Protection Agency ("EPA").
- Limiting administrative agency authority to enact significant regulations: Judge Kavanaugh has opined that "major rules," or rules with major political or economic significance, must have clear congressional authorization. This stance has led Judge Kavanaugh to question or reject the validity of environmental and other regulations, most notably the Obama Administration EPA's greenhouse gas ("GHG") emissions regulation, Clean Power Plan ("CPP").
- Sensitivity to the economic impact of regulations on business: Concerns about economic cost have been central to Judge Kavanaugh's environmental decisions regarding environmental matters. Judge Kavanaugh has shown a willingness to read cost consideration requirements into statutes where they are not explicitly provided for and to recognize the standing of businesses impacted by regulation to challenge them in court.
- Respect for precedent: Judge Kavanaugh has repeatedly noted that he is bound by precedent and has followed established case law even where he has disagreed with the prior ruling. Judge

Kavanaugh's respect for precedent suggests that he may be reluctant to vote to overturn U.S. Supreme Court precedent on environmental matters outright.

Judge Kavanaugh's views on administrative agency interpretation and authority in particular have led him to limit or invalidate EPA regulations addressing issues such as climate change, air pollution and hazardous waste on the basis that EPA acted unreasonably or without appropriate congressional delegation, and in one instance, when the case was appealed to the U.S. Supreme Court, placed him to the political right of Justice Kennedy and Chief Justice John Roberts. Given that federal environmental law has developed almost entirely through EPA rulemaking in recent years, Judge Kavanaugh's relatively restrictive view on the authority of administrative agencies to interpret statutes and make rules is likely to stymie the EPA's regulatory efforts in the future.

Key Themes in Judge Kavanaugh's Jurisprudence and Environmental Law

During his time on the bench and in legal practice, Judge Kavanaugh has expressed the following views on various doctrines or legal ideas, which may be relevant to legal challenges to environmental laws and regulations:

Limited "*Chevron* Deference" to EPA Statutory Interpretation

A doctrine critical to judicial review of agency rulemaking is *Chevron* deference (named after the 1984 U.S. Supreme Court decision, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*), which provides that where Congress has been silent or ambiguous regarding administrative agency power under certain statutes, courts must defer to such agencies' interpretation of those statutes. Federal agencies benefit from *Chevron* deference because it legitimizes agencies' rights to use their expertise to develop specific and impactful regulation stemming from the statutes that give agencies rulemaking authority. Similar to other conservative judges (including those on the U.S. Supreme Court), Judge Kavanaugh has criticized *Chevron* deference, arguing that *Chevron* has no basis in the U.S. Administrative Procedure Act and that it is "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."[1]

Judge Kavanaugh has often rejected arguments that a particular statute is sufficiently "ambiguous" to trigger *Chevron* deference, arguing that resolving statutory ambiguity is the role of the judge. As a result, Judge Kavanaugh has often ignored EPA interpretations of environmental statutes in favor of his own, which have tended to favor less stringent environmental regulation. For example, in *White Stallion Energy Ctr. LLC v. EPA*, the majority upheld the EPA's Mercury and Air Toxics Standards ("MATS"), a power plant air emissions rule based on the U.S. Clean Air Act ("CAA"). In doing so, the D.C. Circuit held that the CAA requirement that the emissions rule be "appropriate" was sufficiently ambiguous and that the EPA's rulemaking was therefore entitled to *Chevron* deference, notwithstanding the EPA's decision to not consider costs in determining whether to regulate the emissions. In dissent, Judge Kavanaugh concluded that while the term "appropriate" may be ambiguous "in isolation," given the statutory history and the common understanding of the word in regulatory parlance, the EPA's decision to not consider costs was not entitled to deference. Similarly, in his dissenting opinion in 2012 in *Grocery Mfrs. Ass'n v. EPA*, in which he opined that the EPA's approval of a blended fuel for certain vehicle models years under the renewable fuel program was not supported by the CAA, Judge Kavanaugh accused the EPA of trying to "weave ambiguity out of clarity in the statutory text" in interpreting the CAA to allow for approval of a fuel for some, but not all, model years.[2]

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[1] Judge Brett M. Kavanaugh, *Book Reviews: Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016).

[2] *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 191 (D.C. Cir. 2012).

Judge Kavanaugh's majority opinion in 2012 in *EME Homer City Generation, L.P. v. EPA* suggests that he may be less prone to defer to agency interpretation of statutes than Chief Justice John Roberts. In that case, the D.C. Circuit, with Judge Kavanaugh writing for the majority, vacated the EPA's Cross-State Air Pollution Rule, a complex rule regulating emissions crossing from upwind to downwind states, notwithstanding *Chevron* deference. In doing so, the D.C. Circuit held that certain details of the rule were inconsistent with the CAA and led to unreasonable results.[3] The U.S. Supreme Court, in a majority opinion written by Justice Ginsburg—and joined by Chief Justice John Roberts and Justice Kennedy—reversed Judge Kavanaugh, on the basis that the plain text of the statute clearly authorized the rule, writing that "[h]owever sensible (or not) the Court of Appeals' position, a reviewing court's 'task is to apply the text [of the statute], not to improve upon it.'"[4] In a similar vein, Judge Kavanaugh authored dissents in two D.C. Circuit cases in which he interpreted environmental statutes in a more industry-friendly manner than his other conservative colleagues: *Sierra Club v. EPA*, where he asserted that the text of the CAA unambiguously supported an EPA rule that relaxed Title V air permit standards, and *Howmet Corp. v. EPA*, where he interpreted the term "spent material" under the Resource Conservation and Recovery Act ("RCRA") in favor of a chemical company challenging EPA's understanding of the term.[5]

Limiting EPA's Authority to Issue "Major Rules"

Another way in which Judge Kavanaugh has sought to limit the scope of *Chevron* deference is through the "major rules doctrine." Judge Kavanaugh has opined that "major rules," or rules with major economic or political significance, are invalid without clear congressional authorization.[6] While Judge Kavanaugh laid out this doctrine most clearly in *United States Telecom Ass'n v. FCC*, in which he reasoned that the FCC's net neutrality rule was unlawful because Congress did not explicitly give the FCC authority to set ground rules for the broadband industry, he also invoked it in a number of environmental cases. Judge Kavanaugh referred to the major rules doctrine in oral argument in *State of West Virginia et al. v. EPA*, a 2016 D.C. Circuit case concerning the EPA's authority to impose emissions limitations on existing power plants under the CPP. Throughout oral argument, Judge Kavanaugh emphasized that the case had huge economic and political significance, and because "it's rooted in separation of powers that Congress . . . should be making the big policy decisions," the Court must "be sure they're clearly assigned the big policy decision to the Agency" in order to grant deference to the EPA's regulatory decision.[7]

Judge Kavanaugh applied similar reasoning in a dissent in *Coalition for Responsible Regulation, Inc. v. EPA*, a case involving a challenge to the Tailoring Rule, an EPA regulation applying permitting requirements to certain sources of GHG emissions under the CAA. Judge Kavanaugh opined that *Chevron* deference was not warranted as "there is literally no indication in the text or legislative record that Members of Congress ever contemplated—much less intended—such a dramatic expansion of the permitting requirement of the [CAA] Prevention of Significant Deterioration statute. Courts do not lightly conclude that Congress intended such major consequences absent some indication that Congress meant to do so."[8] Notably, Kavanaugh's reasoning was echoed by the U.S. Supreme Court on appeal from this decision.

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[3] *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 12 (D.C. Cir. 2012)

[4] *EPA v. Homer City Generation, L.P.*, 134 S.Ct. 1584, 1600 (2014).

[5] http://www.scotusblog.com/2018/07/kavanaugh-and-the-environment/

[6] *See United States Telecom Ass'n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017).

[7] *See* Transcript of Oral Argument at 62, *State of West Virginia et al. v. EPA* (2016) (No. 15-1363).

[8] *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, at *69 (D.C. Cir. Dec. 20, 2012).

Sensitivity to Economic Cost of Regulations and Impacts on Businesses

A consistent thread in Judge Kavanaugh's opinions on environmental regulations is a concern regarding the cost they impose on businesses and employees. This sensitivity ties directly into his views regarding *Chevron* deference—according to Judge Kavanaugh, Congress, rather than the EPA, is better suited to taking such costs into account. As he noted at oral argument in *State of West Virginia et al. v. EPA*, "EPA [. . .] has to single-mindedly focus on the emissions reductions, but there are people [who] lose their jobs, lose their livelihoods, whole communities are going to be left behind, parts of whole states are going to be left behind, and that's why for a big question like this Congress can do things like job training programs, and community college assistance, and welfare assistance, and drug programs for the people who are out of work[.]"[9] Concerns regarding economic cost were central to his decision in *White Stallion* (discussed above), where he concluded that consideration of costs was inherent in the statutory term "appropriate," notwithstanding the fact that, as the majority opinion noted, other provisions of the CAA "mentioned costs explicitly where [Congress] intended EPA to consider them."[10]

Concerns regarding impacts on business are also reflected in Judge Kavanaugh's opinions relating to the standing requirement articulated in Article III of the U.S. Constitution. While Judge Kavanaugh's views on standing appear to be middle of the road, his judicial history shows a pattern of finding standing for parties asserting economic harm resulting from regulation even if the regulation doesn't directly govern their operations. In *Energy Future Coalition v. EPA*, Judge Kavanaugh found that biofuel manufacturers had standing to sue under an EPA regulation directed at vehicle manufacturers that prohibited the use of biofuel as a test fuel.[11] Citing to *Lujan v. Defenders of Wildlife*, Judge Kavanaugh held that as the biofuel manufacturers are "'an object of the action (or forgone action) at issue,' so 'there is ordinarily little question' that they have standing under *Lujan*."[12] After establishing the possibility of the petitioners having standing to challenge the regulation, Judge Kavanaugh proceeded to systematically analyze the requirements for standing, finding that there is injury in fact based on the regulatory impediment to using petitioners' fuel as a test fuel, and causation and redressability, based on the regulation denying petitioners an "opportunity to compete in the marketplace."[13] Judge Kavanaugh expressed a similar willingness to find standing in his dissent in *Grocery Manufacturers Association v. EPA*, in which food manufacturers (among others) challenged the EPA's waiver permitting the introduction of a fuel containing a higher percentage of ethanol on the basis that the regulation would raise their costs because it would cause corn prices to increase. In his dissent, Judge Kavanaugh argued that the price increase was a sufficient injury to justify standing.[14]

Respect for Precedent

Notwithstanding Judge Kavanaugh's strong views and the active role he has taken in interpreting statutes, he has frequently expressed respect for case law precedent. For example, in a 2013 case called *Ctr. for Biological Diversity v. EPA*, Judge Kavanaugh stated that while he disagreed with the EPA's broad interpretation of its authority to regulate under the statute at issue, EPA's interpretation had already been upheld by the D.C. Circuit in a previous case. Judge Kavanaugh wrote, "[a]lthough I

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[9] *See* Transcript of Oral Argument at 63, *State of West Virginia et al. v. EPA* (2016) (No. 15-1363).

[10] *White Stallion Energy Ctr. LLC v. EPA*, 748 F.3d 1222, 1237 (D.C.Cir. 20154).

[11] *Energy Future Coalition, et. al. v. EPA*, 793 F.3d 141, 144 (D.C.Cir. 2015).

[12] *Id.* quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

[13] *Id.*

[14] *Grocery Mfrs. Ass'n* at 181.

respectfully think the case was wrongly decided on this issue, that's water over the dam in this Court. We are bound to apply that precedent."[15] Judge Kavanaugh has noted that he is "bound by precedent" in other opinions he wrote for the D.C. Circuit.[16]

However, Judge Kavanaugh is unlikely to be bound by *Rapanos v. United States* because the U.S. Supreme Court case had no majority opinion. In *Rapanos*, Justice Kennedy, joined by no other Justices, advocated for the most expansive reading of the EPA's power to regulate "navigable waters" under the Clean Water Act. Judge Kavanaugh has cited *Rapanos*, and particularly Justice Roberts' concurrence in *Rapanos*, to support the proposition that "cases with no controlling opinion like *Rapanos* have to be interpreted on a 'case-by-case basis.'" [17] Judge Kavanaugh's track record with respect to interpreting environmental statutes would suggest he would not endorse Justice Kennedy's broad interpretation of the Clean Water Act in any case.

The New Balance of the U.S. Supreme Court; the Future of Environmental Regulation?

The New Conservative Majority. Judge Kavanaugh's confirmation to the U.S. Supreme Court would likely shift the Court in a more conservative direction and make the existence of a "swing vote," often taken by Justice Kennedy, less common. A conservative wing would have the majority of votes in any environmental case, as long as they vote together, and the power to shape the future of environmental law. While it may be incorrect to describe Judge Kavanaugh as an adversary to environmental regulation, his views on *Chevron* deference could significantly influence the outcome of future environmental cases. Although Judge Kavanaugh may not play an active role in overruling U.S. Supreme Court environmental law precedent, he is likely to have a role in constraining precedent. As a result, it may become more difficult for agencies, such as the EPA, to expand their regulatory power.

The Future of Federal Climate Change Regulation. Of particular interest is the impact Judge Kavanaugh may have on the legacy of *Massachusetts v. EPA* and the EPA's authority to regulate GHG emissions. Given Justice Kennedy's role as the swing vote in *Massachusetts v. EPA*, the landmark decision in which the U.S. Supreme Court held that the EPA has certain authority, and is required, to regulate GHG emissions under the CAA, it is tempting to view Judge Kavanaugh's potential elevation to the U.S. Supreme Court as a threat to that decision and EPA climate change regulations based on it. While such a result cannot be ruled out, Judge Kavanaugh has consistently referred to *Massachusetts v. EPA* as settled law and, never publicly criticized its reasoning, and has publicly recognized climate change as an important policy issue. Judge Kavanaugh's respect for precedent more generally suggests that he is unlikely to support overturning that decision.

Even if Judge Kavanaugh does not join his colleagues to overrule *Massachusetts v. EPA,* the practical result may be the same. As evidenced by the EPA's recent proposed replacement of the Clean Power Plan with the more modest Affordable Clean Energy Rule, the current administration is unlikely to promulgate broad-based climate change regulation under the CAA. However, a future administration may again attempt to aggressively regulate GHG emissions in a manner similar to the Clean Power Plan. Given Judge Kavanaugh's skepticism towards agency authority to enact "major rules" and to interpret statutes, any such regulation is likely to be closely scrutinized by the U.S. Supreme Court if he is

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[15] *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 415 (D.C. Cir. 2013).

[16] *See, e.g.*, *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Kavanaugh, J., concurring); *Valdes v. United States*, 475 F.3d 1319, 1332 (D.C. Cir. 2007); *Morley v. CIA*, No. 17-5114, at *20 (D.C. Cir. July 9, 2018) (Kavanaugh, J., dissenting); *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 435 (D.C. Cir. 2017).

[17] *United States v. Duvall*, 740 F.3d 604 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

confirmed. Significant federal regulation of GHG emissions may therefore be on hold for the foreseeable future absent a shift in balance on the U.S. Supreme Court or legislation by Congress.

Impacts on Business. If Judge Kavanaugh is confirmed as a Justice on the U.S. Supreme Court there may be an easing of regulatory burdens on industries subject to extensive environmental regulation as the U.S. Supreme Court may take a more assertive role in restricting or overturning significant environmental rules. More importantly in the long term, however, a U.S. Supreme Court that reflects Judge Kavanaugh's views may result in greater regulatory certainty as authority is shifted from the EPA to Congress and the courts thereby constraining the EPA's ability to address environmental issues through rulemaking. That said, a future Democrat-led administration and Democrat-controlled Congress may be able to effectively sidestep judicial barriers on agency rulemaking by enacting climate change or other environmental legislation. And of course, state laws and/or private or corporate action or initiatives can be expected to fill any gaps by the federal government.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.[18]

Loyti Cheng	**212 450 4022**	**loyti.cheng@davispolk.com**
Betty Moy Huber	**212 450 4764**	**betty.huber@davispolk.com**
David A. Zilberberg	**212 450 4688**	**david.zilberberg@davispolk.com**
Michael Comstock	**212 450 4374**	**michael.comstock@davispolk.com**
Hilary Smith	**212 450 3495**	**hilary.smith@davispolk.com**

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