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Legal Sidebar

Supreme Court Addresses Major Questions Doctrine and EPA's Regulation of Greenhouse Gas Emissions

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On June 30, 2022, the Supreme Court decided *West Virginia v. EPA*, a case with significant implications for U.S. environmental policy and, more broadly, for Congress's ability to delegate authority over significant policy decisions to executive agencies. The Court held that the U.S. Environmental Protection Agency (EPA) exceeded its authority under Section 111(d) of the Clean Air Act (CAA) in its 2015 emission guidelines for existing fossil fuel-fired power plants, which were based in part on "generation shifting," or shifting electricity generation from higher-emitting sources to lower-emitting ones. Under that decision, EPA retains the ability to regulate greenhouse gas (GHG) emissions from power plants and other sources, but it now faces more constraints in how it regulates those emissions. Additionally, the Court's articulation and application of the "major questions doctrine" could present further hurdles for EPA or other agencies that wish to implement novel regulatory programs to address climate change or other significant policy issues.

This Sidebar discusses the Court's decision, considers its implications for EPA's further regulation of GHG emissions and the federal regulatory process in general, and identifies considerations for Congress. Earlier CRS products discuss the statutory background and litigation history leading to *West Virginia v. EPA*, as well as the Court's major questions doctrine prior to this ruling and in other cases this Term.

Background

West Virginia v. EPA addresses the 2015 Clean Power Plan (CPP) and the 2019 Affordable Clean Energy Rule (ACE Rule), which replaced the CPP. EPA issued both rules under CAA Section 111. As part of the CAA's overall scheme to limit the emission of pollutants from stationary sources, Section 111(d) directs EPA to establish emission guidelines for states to set "standards of performance" for existing stationary sources in source categories that EPA has found cause or contribute significantly to "air pollution which may reasonably be anticipated to endanger public health or welfare." EPA sets emission standards under Section 111(d) based on the emissions reductions achievable through "application" of the best system of emission reduction (BSER).

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Much of the legal debate surrounding the CPP and the ACE Rule centers on the scope of EPA's authority to determine the BSER for existing power plants. In the CPP, EPA determined that the BSER was a combination of three "building blocks": (1) improving the heat rate (i.e., efficiency of energy generation) at coal-fired units, (2) shifting generation to lower-emitting natural gas units, and (3) shifting generation from fossil fuel units to renewable energy generation. EPA reasoned that the best "system" was one that applied to the "overall source category."

The Supreme Court stayed the implementation of the CPP before any court considered its merits, and the rule never took effect. In 2019, EPA adopted a narrower interpretation of its authority in the ACE Rule. EPA asserted that the "only permissible reading" of Section 111 limited the agency to identifying source-specific measures as the BSER—that is, control measures that could be applied at a specific source to reduce emissions from that source—and prohibited the agency from selecting as the BSER measures that apply to the source category as a whole or to entities entirely outside the regulated source category.

Various states and stakeholders challenged the ACE Rule and CPP repeal. On January 19, 2021, a three-judge panel of the D.C. Circuit vacated the ACE Rule and the CPP repeal in a split decision, though it later granted EPA's request not to reinstate the CPP until EPA considers a new rulemaking action. In *American Lung Association v. EPA*, the majority held that CAA Section 111 does not "constrain" EPA's authority in determining the BSER to control methods that "apply physically 'at' and 'to' the individual source." The majority specifically rejected EPA's argument that Congress would not have delegated to EPA a "major question" of economic and political significance without a clear statement of its intent to do so. Judge Walker, writing separately, disagreed with that conclusion, and argued that EPA's exercise of authority in the CPP raised "major questions" that were not clearly delegated by Congress to EPA. The Supreme Court granted certiorari.

The Supreme Court's Decision

The Supreme Court reversed and remanded the D.C. Circuit's decision in a 6-3 opinion authored by Chief Justice Roberts. Even though neither the CPP nor the ACE Rule was in effect, the majority held that the case was reviewable because the state petitioners were injured by the D.C. Circuit's judgment, which purported to bring the CPP back into effect, and because EPA's representation that it did not intend to enforce the CPP did not moot the case.

The majority proceeded to analyze EPA's interpretation of Section 111 under the "major questions doctrine." Prior to *West Virginia*, the Court had never referred to that doctrine by name in a majority opinion. In a handful of cases involving challenges to agency actions over the past three decades, however, the Court has rejected agency claims of regulatory authority under the major questions doctrine when (1) the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" and (2) Congress has not clearly empowered the agency to address that issue. In recent cases, the Court has signaled its heightened interest in applying the major questions doctrine to the review of agency actions.

West Virginia provided an opportunity for the Court to describe the major questions doctrine in more detail than in previous cases. The majority explained that, in general, courts interpret statutory language "in [its] context and with a view to [its] place in the overall statutory scheme." In cases where there is something extraordinary about the "history and breadth of the authority" an agency asserts or the "economic and political significance" of that assertion, courts should "hesitate before concluding that Congress meant to confer such authority." The majority explained that, because Congress rarely provides an extraordinary grant of regulatory authority through language that is modest, vague, subtle, or ambiguous, an agency "must point to 'clear congressional authorization'" for its action in order to demonstrate that Congress "in fact meant to confer the power the agency has asserted" in such cases.

The majority held that these principles applied to EPA's assertion of authority in the CPP. It described Section 111(d) as a "previously little-used backwater" and underscored that prior limits under Section 111 had been based on source-specific pollution control technology. According to the majority, the CPP fundamentally revised the statute. Because EPA's generation shifting-based approach implicates coal-fired plants' share of national electricity generation, the Court cautioned that EPA could extend its authority under Section 111(d) to force coal plants to cease generating power altogether.

The Court concluded that it was unlikely Congress would task EPA with "balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy," such as deciding the optimal mix of energy sources nationwide over time and identifying an acceptable level of energy price increases. In support of this conclusion, the Court pointed to factors including the description of EPA's expertise in a funding request and the fact that Congress considered and rejected legislation to create an emissions trading program or enact a carbon tax.

The Court clarified that it was not deciding whether the phrase *system of emission reduction* referred solely to source-specific pollution control measures and excluded all other actions from qualifying as the BSER. While the Court recognized that, "[a]s a matter of 'definitional possibilities,'" generation shifting could constitute a "'system' . . . capable of reducing emissions," it held that emissions trading systems are "not the kind of 'system of emission reduction' referred to in Section 111." The Court distinguished Section 111 from CAA programs that contemplate trading systems in order to comply with an *already established* emissions limit, and where Congress "went out of its way . . . to make absolutely clear" that cap-and-trade programs were authorized. Because the "vague statutory grant" of Section 111 was "not close to the sort of clear authorization required by [the Court's] precedents," the Court concluded that the BSER identified in the CPP was not within the authority granted to EPA in Section 111(d).

Justice Gorsuch wrote a concurring opinion, in which Justice Alito joined. Justice Gorsuch—who wrote a concurring opinion in another recent major questions case—would have rooted the major questions doctrine in separation of powers principles; he described the doctrine as the clear-statement rule for Article I's Vesting Clause. He also identified several circumstances in which courts should apply the major questions doctrine, which generally related to the economic or political significance of an agency's action or its relationship to state law.

Justice Gorsuch also argued that, to evaluate whether there is clear congressional authorization for a challenged agency action, courts should consider (1) the "legislative provisions on which the agency seeks to rely 'with a view to their place in the overall statutory scheme," (2) "the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address," (3) an agency's past interpretations of the relevant statue, and (4) whether there is a "mismatch between an agency's challenged action and its congressionally assigned mission and expertise."

Justice Kagan, joined by Justices Breyer and Sotomayor, dissented. Justice Kagan criticized the majority's approach to the major questions doctrine as a "magically appear[ing] get-out-of-text free card[ ]" and articulated different parameters for the major questions doctrine. She argued for a more limited application of the doctrine when, after considering "the fit between the power claimed, the agency claiming it, and the broader statutory design," there is a "mismatch between the agency's usual portfolio and a given assertion of power." Justice Kagan contended that neither the CAA nor other statutes conflicted with EPA's reading of Section 111, arguing in particular that a textualist reading of the term *system* in Section 111(d) appears to grant EPA broad authority to choose the BSER. Describing generation shifting as a well-established "tool in the pollution-control toolbox," and emphasizing the significance of Section 111(d) as a "backstop or catch-all provision" to reach otherwise unregulated pollution, she would have concluded that Section 111's broad delegation of authority permitted the generation shifting provided in the CPP.

Implications for EPA Authority

In one sense, the Court in *West Virginia* addressed a relatively narrow question. It struck down only the CPP's identification of generation shifting as a "building block" in regulating existing coal-fired power plants pursuant to CAA Section 111(d). That holding affects *how* EPA regulates those plants, not *whether* it may regulate them under Section 111(d) or at all. In 2007, the Court held in *Massachusetts v. EPA* that EPA had the authority to regulate GHGs from motor vehicles because GHGs qualify as an "air pollutant" under the CAA's general definition. The Court did not revisit that ruling in *West Virginia*. The Court's ruling does not bar EPA from regulating power plant GHG emissions under the CAA and does not address EPA's regulation of GHG emissions from other sources. Such regulation includes emissions from the oil and natural gas industry, for which EPA issued a proposed Section 111 rule in November 2021, and emissions from mobile sources, for which EPA has issued several proposed or final rules. Additionally, EPA retains the ability under *West Virginia* to regulate other air pollutants—such as ozone, particulate matter, sulfur oxides, or nitrogen oxides—where such regulation would have a co-benefit of reducing GHG emissions.

Although EPA can regulate GHG emissions from coal-fired power plants pursuant to Section 111(d), the Court's decision limits the tools it may use to do so, and it leaves unanswered many questions about the details of the agency's regulatory options. The Court did not identify which categories of pollution-control measures could constitute a "system of emission reduction" and therefore form the basis of Section 111(d) regulations. In addition, the Court did not hold that a "system of emission reduction" is limited to source-specific controls. Reading the decision narrowly, the Court held that EPA may not issue regulations under Section 111(d) that *both* are premised on generation shifting *and* would dictate the nationwide mix of energy sources. That distinction may leave EPA with meaningful authority under Section 111(d) to issue a different rule "that may end up causing an incidental loss in coal's market share." However, the Court did not clearly delineate the line between such permissible regulation and "simply announcing what the market share of coal, natural gas, wind, and solar must be."

Some advocates have urged EPA to regulate GHG emissions under other statutes, such as the Toxic Substances Control Act. The Court's skepticism toward what it perceived to be a novel application of CAA Section 111 suggests that EPA may again face a high degree of judicial skepticism if it seeks to address GHG emissions under statutes that it has not previously used for that purpose, however.

The Court's decision in *West Virginia* does not affect the ability of states to allow regulated sources to participate in emissions trading programs as a means for complying with the plans developed under Section 111(d). The issues presented to the Court for review in *West Virginia* related only to EPA's emission guidelines for existing sources under Section 111(d), and the Court did not consider state plans or actions taken by sources. Furthermore, when EPA issues emission guidelines pursuant to Section 111, it does not mandate that regulated sources use a specific method for achieving emission reductions. Rather, it determines an appropriate standard based on the BSER, and states then choose how to implement those guidelines. As a result, even if EPA issues Section 111(d) emission guidelines, and states then develop standards of performance based on a BSER that is limited to source-specific pollution control measures, a regulated source could still use a compliance technique such as emissions trading to comply with those standards, so long as the relevant state allows it.

Shortly before the Court issued its decision, EPA indicated that it intends to propose a Section 111(d) rule governing GHG emissions from existing coal-fired power plants in March 2023. Following the decision, EPA stated that it would "move forward with lawfully setting and implementing environmental standards that meet our obligation to protect all people and all communities from environmental harm."

The Major Questions Doctrine and the Future of Agency Regulation

Beyond the Court's CAA holding, its reliance on the major questions doctrine could have broader implications. In particular, the decision suggests that the Court will closely review agency actions that address novel problems, rely on statutory provisions that are infrequently used (or use those provisions in a way that deviates from past practice), or could have significant economic or political repercussions.

Commentators have already begun to speculate about whether other climate change-focused regulations, such as those currently under consideration by the Securities and Exchange Commission and the Federal Energy Regulatory Commission, could meet one or more of those criteria. In general, the Court's major questions reasoning could give EPA and other agencies pause before regulating in areas that implicate major policy decisions, particularly through novel applications of statutory authority. Those agencies must now consider whether they can identify "clear congressional authorization," and not simply a general statutory delegation of authority, for the actions they propose.

West Virginia may also portend a shift in the process for judicial review of agency action. The Supreme Court and lower courts have frequently reviewed agency actions under the so-called *Chevron* framework, which directs courts to defer to an agency's reasonable interpretation of ambiguous language in a statute the agency administers. In several decisions this Term applying the major questions doctrine, the Court has made no reference to the *Chevron* framework. That silence leaves unanswered questions about how to determine which doctrine applies, or whether courts should undertake a major questions inquiry prior to or as part of their *Chevron* analysis.

While the majority in *West Virginia* discussed why the CPP raised major questions, it did not provide a clear test for when an agency action presents a major question that would invite closer review. The Supreme Court could refine the doctrine in future cases, but lower courts in the meantime may take differing approaches in how (and how frequently) they apply the major questions doctrine instead of other frameworks for reviewing agency action. Given the Court's increased skepticism of agency actions it deems to have raised major questions, entities challenging agency actions may increasingly invoke the major questions doctrine. Litigants and judges have already invoked the doctrine in other recent environmental lawsuits, including challenges to vehicle GHG emission standards, the scope of federal jurisdiction under the Clean Water Act, and federal agencies' use of estimates of the "social cost" of GHG emissions in their regulatory processes.

Considerations for Congress

The Court's focus on whether Congress clearly authorized EPA to implement the approach it adopted in the CPP indicates that congressional action—or its absence—will likely play an important role in future regulatory efforts to address climate change and other significant issues. In addition to considering the statutory language authorizing other CAA programs, the majority opinion pointed out that Congress "conspicuously and repeatedly declined to enact" a regulatory program similar to the CPP. (In dissent, Justice Kagan criticized the majority's consideration of Congress's failure to enact legislation, and underscored that Congress also introduced but did not enact bills that would have barred EPA from implementing the CPP.) While the Court looked beyond the statutory text in its analysis of Section 111, it did not specify what legislative acts could constitute clear congressional authorization.

To address the specific issues considered in *West Virginia*, Congress may clarify the scope of EPA's authority under Section 111 in determining the BSER. For example, Congress could amend the CAA to identify what measures would constitute a "system" of emission reduction or specify that EPA may (or may not) consider specific air pollution control measures, such as generation shifting, in determining the BSER. Congress could also identify a specific mix of electricity generation that it believes should be achieved and direct EPA to implement regulations to effectuate that mix.

Congress may also continue to consider other measures to reduce GHG emissions. For example, the Clean Competition Act (S. 4335) would impose a carbon border adjustment on certain carbon-intensive imported and exported goods. Some Members have also expressed support for clean energy tax incentives for renewable resources and to subsidize technologies such as clean hydrogen, advanced nuclear technology, and carbon capture.

The bigger question for Congress arising from *West Virginia* goes beyond the CAA and the regulation of GHGs. Where Congress can anticipate a major question, it can explicitly state the latitude it intends to grant to an administrative agency to address that question. Both Justice Gorsuch and Justice Kagan acknowledged that broad statutory delegations of authority have historically allowed administrative agencies to also address issues that Congress did *not* anticipate when it enacted a statute. The Court's decision in *West Virginia* leaves open the question of how, or even whether, Congress may grant agencies the authority to act when such unanticipated issues raise major questions.

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