

US Supreme Court Limits EPA's Authority to Regulate Carbon Emissions from Existing Power Plants Under Section 111(d) of the Clean Air Act Under Major Questions Doctrine with Implications for Agency Rulemaking Generally

Overview

On June 30, 2022, the US Supreme Court held that the Obama-era Clean Power Plan (CPP) "[c]apping carbon dioxide emissions at a level that [would] force" energy generation shifting from coal to natural gas to renewables nationwide was not within the statutory authority that Section 111(d) of the Clean Air Act (CAA), codified as 42 U.S.C. § 7411(d), granted to EPA. *West Virginia v. Env't Prot. Agency*, 597 U. S. ____, 2022 U.S. LEXIS 3268, at *54 (2022). Applying the major questions doctrine, the court held that Congress must be express in granting EPA the authority to adopt the kind of transformational regulatory scheme that EPA tried to implement under Section 111(d).

Under the major questions doctrine, a court will not follow the general rule of deferring to an agency's interpretation of a statutory provision in certain "extraordinary cases" that involve "highly consequential power beyond what Congress could reasonably be understood to have granted." *Id.* at *39. This typically occurs when (1) there is an issue of deep economic or political significance; or (2) Congress did not clearly give an agency authority over an issue. The court found no reason to defer here. The effect of this decision is to limit US EPA's authority to regulate existing power plants under Section 111(d) to limitations within the fenceline of the electric generating unit (EGU). *See id.* at *43.

In her dissent, Justice Kagan criticized the majority for applying the major questions doctrine instead of deferring to agency judgment and expertise under the court's existing *Chevron* deference doctrine. *See id.* at *97 (J. Kagan, dissenting) ("a key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues – even significant ones – as and when they arise. That is what Congress did in enacting Section 111. The majority today overrides that legislative choice. In doing so, it deprives EPA of the power needed – and the power granted – to curb the emission of greenhouse gases"). Importantly, the majority did not overturn *Chevron* deference and Chief Justice Roberts emphasized that this decision is extremely narrow – it only applies to how EPA may interpret Section 111(d). *Id.* at *54. But, as Justice Kagan cautioned in her dissent, this decision also appears to create a new form of statutory interpretation that is far less deferential to agency expertise when major questions are at issue. *Id.* at *97 (J. Kagan, dissenting).

Ultimately, *West Virginia*, as Justice Kagan suggests, may not be limited to EPA's authority under the CAA, but an indicator of what is to come – challenges to EPA and other agencies' ability to promulgate rules based on the specifically drawn authority granted in the underlying statute. The more an agency pushes the boundaries of its express authority to promulgate a rule in a statute, the more likely it may be challenged under the major questions doctrine as in this case. Future litigation may very well constrain agencies' ability to create an expansive regulatory scheme without an express grant from Congress to do so. On the other hand, lower courts could be hesitant to apply the major questions doctrine without limitation, as many see the doctrine as granting too much power to the courts. As the Supreme Court concedes, it is meant to be applied in "extraordinary cases."

Background

The case involves the extent of EPA's authority under Section 111(d) of the Clean Air Act. Some background is necessary regarding Section 111 and two interrelated programs: the National Ambient Air Quality Standards Program under Sections 108 through 111 of the Clean Air Act and the Hazardous Air Pollutants Program under Section 112 of the Clean Air Act.

The New Source Performance Standards program of Section 111 of the Clean Air Act "directs EPA to list 'categories of stationary sources' that it determines 'cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" *Id.* at *16-17 (quoting § 7411(b)(1)(A)). For each category, EPA must promulgate a "standard of performance" for new sources. EPA decides the "best system of emission reduction" at each new source and sets a performance standard that "reflects the degree of emission limitation achievable through the application of the best system of emission reduction." *Id.* (quoting § 7411(a)(1)). EPA must consider cost and other non-air quality impacts of achieving the emission limitation. The court noted that, after EPA sets a new source performance standard, "the key" for new sources is to ensure that they do not emit an amount that exceeds what the performance standard sets as "achievable through the application of the best system of emission reduction" (BSER). *Id.* at *17-18. EPA's BSER determination is central to formulating Section 111 emissions guidelines.

After EPA sets new source performance standards, it must also address pollutants from existing sources under Section 111(d), but only if the NAAQS and the HAP Programs do not already regulate the pollutant.

EPA provides guidelines for BSEER at existing EGU sources, after which states “submit plans containing the emissions restriction that they intend to adopt and enforce” to prevent existing sources from exceeding EPA’s established “permissible level of pollution.” The court describes Section 111(d) as “a gap-filler” rarely used by EPA. *Id.* at *18.

Clean Power Plan

In October 2015, EPA promulgated two rules to limit CO₂ from power plants. The first established carbon emission limits for new power plants. Because EPA regulated carbon dioxide in these new EGU sources, EPA also needed to “address carbon emissions from existing coal and gas plants” under Section 111(d). The second became known as the CPP. The CPP set CO₂ BSEER guidelines for existing power plants in three “building blocks.” First, EPA included heat rate improvements within the fenceline. In the second and third building blocks, EPA relied on “generation shifting.” The second step involved shifting “electricity production from existing coal-fired power plants to natural-gas-fired plants.” Natural gas produces “less than half as much carbon dioxide” as coal-fired plants. The third step shifts generation again, but from fossil fuel power plants to low or zero-emission energy generation, like wind and solar. The CPP set up a cap and trade regime that allowed EGUs to comply by reducing generation, by shifting to cleaner power generation, or by purchasing emission credits. *Id.* at *21-23.

EPA’s justification for deciding that generation shifting would be BSEER was to “implement a sector-wide shift in electricity production” from fossil fuels to renewables. Because of the “integrated nature of the power grid,” if one generation facility begins to produce more electricity, then other generators would “instantaneously” reduce their electricity generation. If fossil fuel plants, mainly coal-power plants, (1) reduced their own energy production or (2) subsidized another plant’s production using cleaner power (natural gas, solar or wind), then this would lead to a shift towards generation of cleaner energy. *Id.* at *23-24.

After EPA decided generation shifting was the BSEER, EPA based the operational emissions limit on what would be a “reasonable amount of shift” at various milestones by balancing cost and power supply reduction with maximizing electricity generation through cleaner sources. EPA decided that by 2030, coal should provide 27% of national electricity generation, decreasing coal electricity generation by 11% from 2014. To reach this goal, EPA developed emission performance rates for states to implement that were so strict “no existing coal plant would have been able to achieve them without engaging in one of the three means of shifting generation.” EPA projected that these performance rates would cost billions of dollars, “require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of” energy sector jobs. The Department of Energy estimated similar numbers, adding that energy shifting “would reduce GDP by at least a trillion 2009 dollars by 2040.” *Id.* at *24-26.

Change in Administration and the CPP

Many industry groups and states challenged the CPP. The DC Circuit denied a stay of the rule, but the Supreme Court ultimately granted an unprecedented stay of the CPP during the pendency of the DC Circuit appeals. Shortly after the change of administration in 2017, the Trump-era EPA asked the DC Circuit to hold the CPP in abeyance while it reconsidered the rule and ultimately dismissed the challenges as moot. In 2019, EPA repealed the CPP after concluding that the CPP exceeded EPA’s statutory authority, explaining that Congress could not have considered energy shifting to be BSEER under Section 111(d). EPA explained that Section 111 limited BSEER to systems within the fenceline of generating facilities – e.g., “add-on controls” and “inherently lower-emitting processes/practices/designs.” The CPP’s generation-shifting scheme impermissibly operated at the grid level rather than at individual sources. The decision to repeal the CPP was coupled with the promulgation of the Affordable Clean Energy (ACE) rule, which determined that BSEER was akin to the first of the three building blocks in the CPP-heat rate improvements.

After EPA enacted the more modest ACE rule, multiple states and private parties again filed petitions for review of the repeal of CPP and the new ACE rule. The DC Circuit held that EPA’s foundation for repeal of CPP was misguided, as Section 111(d) did encompass generation shifting, and that the major questions doctrine did not apply. The court then vacated (1) EPA’s repeal of the CPP and (2) the new ACE rule, and remanded the decision back to EPA for further consideration. *Id.* at *29-30. West Virginia and other state attorneys general sought Supreme Court review of this DC Circuit decision.

Section 111(d)

Major Questions Doctrine

The Supreme Court reversed the DC Circuit to find that the major questions doctrine does indeed apply and that generation shifting is beyond EPA’s authority under Section 111(d) because EPA could not point to a clear delegation from Congress authorizing EPA to engage in such a politically and economically significant action. *Id.* at *35, 40. The court applies the major questions doctrine when agencies assert “highly consequential power beyond what Congress could reasonably be understood to have granted.” *Id.* at *39.

Here, the court explains that EPA incorrectly relied on Section 111(d) to justify requiring generation shifting because (1) EPA essentially claimed it discovered a new power under Section 111(d) that resulted in a “transformative expansion in [its] regulatory authority, (2) it found this authority in an ancillary, gap-filler provision of the CAA that has rarely been used, and (3) Congress “repeatedly declined to enact” this generation shifting regulatory program itself.” Before the CPP, EPA had always regulated under Section 111 within the fenceline, focusing on measures that individual facilities could enact to reduce emissions. EPA had never used a cap and trade system under Section 111 and never created a generation shifting program of the type in the CPP at all.

The court reasoned that Congress intended EPA to regulate pursuant to Section 111 using a “technology-based approach” at an individual plant level. The court determined that EPA using Section 111 to regulate at a system level (1) was unprecedented and (2) fundamentally changed the statute into a different type of regulatory scheme. *Id.* at *40-44. Ultimately, the court concludes that the question of “how much coal-based generation there should be over the coming decades” is a decision that Congress intended to retain authority over and would not have given to EPA in a gap-filler, little-used statutory provision like CAA 111(d). *Id.* at *47.

No “Clear Congressional Authorization”

The court also finds that “cap and trade” is not a “system” within the meaning of Section 111. *Id.* at *51. Under Section 111(a)(1), EPA has authority to engage in regulatory actions “reflecting ‘the application of the best system of emission reduction ... adequately demonstrated.’” *Id.* at *50 (quoting § 7411(a)(1)). The court reasoned that cap and trade is not a system because (1) it would require EPA to set a “numerical limit on emissions” rather than using cap and trade as a “means of complying with an already established emissions limit,” (2) Congress knew that cap and trade was a possibility when it authorized the CAA 1990 emissions trading programs but did not mention cap and trade could be used under Section 111, and (3) other sections of the CAA explicitly limit potential “components of a particular system.” *Id.* at *52-54. While the Acid Rain program effectively used a cap and trade system for criteria pollutants, this was written into the act by Congress. Expanding the use of cap and trade at the federal level will likely require another act of Congress.

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