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Locke Lord QuickStudy: Supreme Court Claims "Unprecedented" Administrative Reach to Strike Down Sector Based Curtailment of Power Plant GHG Emissions

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On June 30, 2022 the Supreme Court decided *West Virginia v. EPA*. [1] This case not only has environmental law implications, but also speaks directly to executive agency overreach in potentially many other contexts. On its face, the decision limited EPA's authority to reduce greenhouse gas (GHG) emissions from the electric power sector. In a 6-3 ruling, written by Chief Justice Roberts, the Court held that EPA exceeded its authority under Section 111(d) of the Clean Air Act ("CAA") to "compel the transfer of power generating capacity from existing sources"—chiefly, coal and natural gas power plants—"to wind and solar."[2] At issue was whether a regulation "restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the [best system of emissions reduction] within the meaning of Section 111."[3] Importantly, the ruling applied the "major questions doctrine" to limit EPA's authority, and that of other federal agencies, to make a "decision of vast economic and political significance" absent express congressional authorization.[4] The Court's ruling does, however, allow EPA other options to mitigate GHG emissions from fossil fuel-fired power plants. Below is a short summary of how and why this issue reached the Supreme Court, as well as key takeaways from the decision.

The Path to the Decision

West Virginia v. EPA has a long and complex history. Under the Obama Administration, EPA seized upon a seldom used provision of the CAA—Section 111(d)—as a basis for sweeping regulation of GHG emissions from existing power plants, especially coal-fired plants. Section 111(d) is a corollary to CAA Section 111(b). Section 111(b) requires EPA to establish "standards of performance" for new sources within designated categories. Section 111(d), on the other hand, provides that EPA can require states to develop plans to control emissions from *existing* sources once EPA has issued a standard for emissions for *new* sources.

State emissions reduction plans under Section 111(d) must be based on the standard of performance for the industry source at issue—what the CAA calls the "best system of continuous emission reduction" (BSER) (emphasis added). Thus, on their face, these statutory provisions seemingly require EPA to establish source-specific emissions standards for both new and ultimately existing air emissions sources. A key legal issue with the

Obama Administration's interpretation of EPA's Section 111(d) authority was the meaning and scope of the term "system," within the BSER concept. That is, was the "system" referenced in the BSER concept intended to address plant-specific source emission measures only, or could it also encompass industry-wide measures to shift the source of energy generation from fossil fuel plants to renewable energy sources too? Put another way, could EPA rely on this provision of the CAA to set emission limitations so stringently that it could force a societal change in how energy would be generated prospectively? An underlying approach embraced by the Obama Administration's EPA appeared to be that fossil fuel fired sources would either need to shut down or develop and invest in natural gas, wind, or solar energy generation projects if they wanted to remain as power generators.

The Obama Administration's Section 111(d) regulation was known as the Clean Power Plan (CPP).[5] In the CPP, EPA determined that the BSER for existing sources consisted of three "building blocks," or ways in which a regulated source could meet emissions limitations. They were: 1) implement practices to burn coal more efficiently at coal-fired plants; (2) substitute natural gas generation for coal-fired generation; and (3) increase the use of renewables. The CPP did not limit EPA to measures that could be implemented "inside the fenceline" at sources (*i.e.*, in the Court's words, "technology based standards focusing on the emissions performance of individual sources," at an individual plant). Rather, the CPP relied on Section 111(d) as a basis to set goals for each *state* to cut GHG emissions from its entire grid by 2030.

In 2016, the Supreme Court stayed the CPP's implementation, putting it on hold until all legal challenges to it were resolved.[6] But in 2019, the Trump Administration repealed the CPP and replaced it with the Affordable Clean Energy (ACE) rule[7], which gave states wide latitude in setting standards and gave power plants flexibility to comply with them. The Trump Administration contended that Section 111(d) only allowed EPA to implement the source-derived, inside the fenceline measures, rather than the industry-wide measures included in the CPP. Like its predecessor, the ACE rule never went into effect. In 2021, the D.C. Circuit Court of Appeals vacated both the Trump Administration's repeal of the CPP and the ACE Rule, though not before opining that Section 111(d) does not require the more restricted view of EPA's authority that the Trump Administration advanced.[8] On June 30, the Supreme Court reversed the D.C. Circuit's ruling.

The Ruling Limited Administrative Authority through the Major Questions Doctrine, but in Reality did not Significantly Restrict EPA's Authority to Regulate Greenhouse Gases through Other Parts of the Clean Air Act.

In *West Virginia v. EPA*, the Supreme Court explained that while EPA lacked authority to base emissions limits on energy generation shifting, as called for by the CPP, EPA retained authority to require power plants to adopt the BSER that "has been adequately demonstrated."[9] In other words, EPA may continue to regulate power plants, as it has in the past through technology-based source control measures. In ruling against EPA, the Court held that broad brush, industry-wide emissions limits (as opposed to technology-based source limitations) violated the "major questions doctrine"—the notion that if Congress intended to give an administrative agency the power to make "decisions of vast economic and political significance," it must say so clearly through legislation.[10] Here, the Court noted that emissions limits on existing power plants were "actually *stricter* than the [limitations] … imposed for *new* plants."[11] Moreover, in some instances the CPP imposed "numerical emissions ceilings so strict that no existing coal plant would have been able to achieve them without" either reducing its own production of electricity or building or investing in a new natural gas plant, wind farm, or solar energy facility.[12]

The Court reasoned that Congress did not assign EPA such "unprecedented power over American industry,"[13] because Section 111(d) of the Clean Air Act had been "designed as a gap filler and had rarely been used in the preceding decades."[14] Also significant was that, in 2009, Congress failed to pass the Waxman-Markey Climate Bill, legislation that envisioned the type of regulatory scheme that EPA tried to achieve through the CPP.[15] The Court elaborated why EPA's "extraordinary" regulation went too far:

- In arguing that Section 111(d) empowers EPA to substantially restructure the American energy market, EPA claimed to discover in a rarely used statutory provision an "'unheralded power' representing a 'transformative expansion in its regulatory authority.'"[16]
- Extraordinary grants of regulatory authority are rarely accomplished with "modest words," "vague terms," or "subtle devices."[17]
- Regulating the nationwide power grid was beyond EPA's expertise, just as the Court "would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration."[18]

In rejecting EPA's nearly unprecedented attempt to act without a clear Congressional mandate, the Court gave contours to the major questions doctrine. The Court's observations suggest that the "major questions doctrine" is applicable where the "history and the breadth of the authority that [the agency] has asserted" and the "economic and political significance of the decision" raise the question of whether Congress intended to confer that authority to an agency.[19] Touchstones to consider when asking if the doctrine applies include whether the agency has abruptly departed from past practice and ventured into a new area of regulation that will have vast economic and societal significance.[20] The CPP checked each of these boxes.[21]

The Path Ahead for EPA

Lost in many headlines about *West Virginia v. EPA* is that the decision makes clear EPA retains the "primary regulatory role in Section 111(d)" and "decides the amount of pollution reduction that must ultimately be achieved."[22] Indeed, the Court's analysis does not even foreclose the possibility of some "beyond the fenceline" regulation under 111(d). On this point, the majority explicitly limited the reach of its ruling: "We have no occasion to decide whether the statutory phrase 'system of emission reduction' refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER."[23]

While the CPP contained cap and trade elements, the decision suggests that an acceptable beyond the fenceline control might be, for instance, setting a standard based on the operation of a technology but allowing sources to trade with each other in a tailored manner to demonstrate compliance with that standard (*i.e.*, traditional cap-and-trade systems). What EPA and other federal agencies must do to survive major question scrutiny is design rules rooted in a traditional application of agencies' delegated statutory authority.

How will the decision affect the Biden Administration's goals for regulating greenhouse gas emissions from the power sector? As noted above, EPA's authority to implement on-site measures, like heat efficiency improvements at coal plants, should remain intact. Moreover, the wider use of carbon capture and storage (CCS) technologies

and the presence of the IRS Section 45Q tax credit for CCS, may inform EPA's approach to developing the BSER for the power sector going forward.

EPA also could try to tighten standards under other Clean Air Act programs—such as ozone, interstate air pollution, and hazardous air pollutants—as a way to indirectly regulate GHG emissions from the oil and gas industry. On July 29, the day before *West Virginia v. EPA* was decided, EPA announced that it could soon designate parts of the Permian Basin in "non-attainment" with the National Ambient Air Quality Standards (NAAQS) for ozone. If EPA were to take such a step, states including Texas and New Mexico would have to develop plans to reduce ozone, which would in turn require limits on drilling in America's most productive oil shale reserve.

Conclusion

West Virginia v. EPA demands serious attention several reasons. First, by squarely embracing and solidifying the "major questions" doctrine, the Court reaffirmed the principle that federal courts should hesitate before allowing administrative agencies without a clear delegation of congressional authority to undertake regulatory actions that extend beyond typical regulation, and which have vast economic and political significance. Second, the decision should leave intact EPA's authority to regulate GHG emissions in conventional ways, even under Section 111(d). Third, in crafting a new GHG rule for the power sector, the Biden EPA will be on firmest ground if it focuses on inside the fenceline controls, yet it still may seek to regulate GHGs indirectly as a "co-benefit" of other air pollution rules.

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[1] No. 20-1530, slip op. (June 30, 2022).

[2] *Id*. at 10.

[3] *Id*. at 16.

[4] *Id*. at 11.

[5] 80 Fed. Reg. 64661 (Oct. 23, 2015).

[6] *West Virginia v. EPA*, 577 U.S. 1126 (2016).

[7] 84 Fed. Reg. 32520 (July 8, 2019).

[8] *American Lung Assn. v. EPA*, 985 F. 3d. 914 (D.C. Cir. 2021).

[9] Slip op. at 6.

[10] *Id*. at 11.

[11] Slip op. at 10.

[12] *Id*. at 10. The dissent, authored by Justice Kagan, seems to endorse this position, suggesting that EPA could order a coal-fired power plant to be redeveloped as, or simply replaced by, a gas-fired plant stating: "Take, for example, the 'fuel-switching' regulation the majority mentions. Such a rule does just what you might think: It requires a plant to burn a different kind of fuel—say, natural gas instead of coal. So it too can significantly 'restructure[e] the Nation's overall mix of electricity generation.'" *Id*. at 24 (Kagan J., dissenting).

It is breathtaking to consider the implications of this reasoning. For example the Executive Branch (here, EPA), without Congressional input (just "a pen and a phone"), could by rule order a private enterprise (a coal plant) to shut down unless it constructed a new plant of an entirely different kind (a gas plant). This newly-constructed gas plant would be subject to different, equally-elaborate, permitting requirements, require different expertise to operate, and demand significant capital expenditures for its construction. If such unilateral agency action were lawful, as the dissenting justices appear to believe, agency action could be nearly unbridled.

[13] *Id*. at 24 (citation omitted).

[14] *Id*. at 20.

[15] *Id*. at 28.

[16] *Id*. at 20 (citation omitted).

[17] *Id*. at 18 (citation omitted).

[18] *Id*. at 26.

[19] *Id*. at 17.

[20] *Id*. Justice Gorsuch, writing in a separate concurrence, identified a non-exhaustive "list of triggers" for the major questions doctrine, including: (i) "when an agency claims the power to resolve a matter of great 'political significance' … or end an 'earnest and profound debate across the country.'"; (ii) "when it seeks to regulate 'a significant portion of the American economy' or require 'billions of dollars in spending' by private persons or entities"; and (iii) "when an agency seeks 'to intrude into an area that is the particular domain of state law.'" Slip op. at 11 (Gorsuch J., concurring) (cleaned up).

[21] Justice Kagan also remarked that *West Virginia v. EPA* "announces the arrival of the 'major questions doctrine.'" *Id*. at 13, 15 (Kagan, J., dissenting). This is somewhat of an overstatement. The doctrine has been applied, in some form or fashion, for decades. For instance, in 2014 the Court wielded the major questions doctrine to vacate EPA's "Tailoring Rule," which would have required CAA permits for millions of previously unregulated sources nationwide. And the Court applied the doctrine earlier this term, striking down OSHA's COVID private employer vaccine mandate and the vacating a stay of CDC's nationwide eviction moratorium. Expect opponents of the SEC's climate risk disclosure proposal to rely on *West Virginia v. EPA* to argue that requiring detailed and extensive disclosure of climate-related metrics and similar ESG-related information exceeds the SEC's authority.

[22] *Id*. at 6.

[23] *Id*. at 30.

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