



The Supreme Court's Ruling on EPA's Clean Power Plan Limits the Power of Administrative Agencies

On June 30, 2022, in *West Virginia v. Environmental Protection Agency*, the United States Supreme Court ended EPA's "Clean Power Plan," an on-again off-again power plant greenhouse gas rule that had been volleyed between the Obama, Trump, and Biden administrations, and was the subject of prior court decisions. For the first time, the Supreme Court explicitly limited the power of administrative agencies to regulate issues of "economic and political significance" in "extraordinary cases" without "clear congressional authorization." The newly-named "major questions doctrine" prevents agencies from "asserting highly consequential power beyond what Congress could reasonably be understood to have granted." This doctrine applies to all administrative agencies, not just the EPA.

The Court ruled that the EPA exceeded its authority under Section 111(d) of the Clean Air Act when it established a carbon dioxide emissions rate limit for existing coal-fired and natural gas-fired power plants by relying on "generation shifting," or switching from coal to natural gas to renewable electricity, either directly or through cap-and-trade. When EPA promulgated the Clean Power Plan in 2015, the rule was projected to eliminate tens of thousands of jobs, force dozens of coal plants to shut down, impose billions of dollars in compliance costs, and reduce GDP by at least \$1 trillion dollars by 2040.

The Court faulted EPA for claiming to find new powers to dictate America's mix of electric generation assets in a decades-old and rarely used "gap-filler" provision of the Clean Air Act that is "ancillary" to the overall statute and had never before been used to force facilities to shut down. The Court scrutinized the rule more closely because Congress had repeatedly rejected bills to establish a CO₂ cap-and-trade program.

While this is the first time the Supreme Court has used the phrase "major questions doctrine," it has previously struck agency rules claiming broad powers without clear congressional authorization. For example, the Court held that the CDC's power to adopt disease control regulations did not authorize the CDC to freeze residential evictions, stopped the FDA from regulating or banning tobacco products as a pharmaceutical drug, ruled that the Department of Justice's general charge to protect the public interest did not let the DOJ rescind physician's medical licenses for prescribing assisted suicide drugs, and said that OSHA's workplace safety authority did not allow it to mandate COVID vaccines for 84 million Americans.

After *West Virginia v. EPA*, the EPA may still regulate power plant CO₂ emissions, but not through generation shifting. The EPA may also use cap-and-trade programs, but they must have a statutory

basis and the cap (i.e., the cumulative emissions limit) must be based on standards that are within EPA's authority to set.

The ruling is controversial because it opens the door to future appeals of agency regulations. Many parties challenging a wide variety of agency rules are likely to raise this doctrine. Environmental groups and others are concerned it will limit the federal government's ability to act on important issues, especially in today's polarized political climate when Congress rarely passes legislation. The Supreme Court majority says this is the point — the ruling is intended to protect Congress' power to legislate and to prevent the President from going around Congress by directing agencies to adopt rules. A concurring opinion by Justice Gorsuch acknowledges that “lawmaking under our Constitution can be difficult,” but that requiring a broad consensus for legislation ensures new laws enjoy wide social acceptance.

The ruling raises new legal questions because the Court did not defer to the agency's interpretation of an ambiguous statute, as it frequently does under the doctrine of “*Chevron* deference.” The Court said the major questions doctrine is distinct from its ordinary methods of statutory interpretation.

The major questions doctrine enshrines a limit on agency power. The scope of this limit on agency power will be further refined through future litigation, as the courts decide when to defer to administrative agencies, and which regulations are so economically and politically significant, extraordinary, or highly consequential that the rule cannot stand without clear congressional authorization to regulate.

Please contact [Chris Colclasure](mailto:ccolclasure@bwenergy.com) at ccolclasure@bwenergy.com for more information.