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Supreme Court Issues Opinion in West Virginia v. EPA

The Supreme Court rejected EPA's Obama-era Clean Power Plan in a decision that has significant implications both for future attempts by EPA to regulate CO_2 emissions and for other agencies attempting to promulgate rules that implicate "major questions."

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TAKEAWAYS

- The Supreme Court sided with a coalition of states and coal mining companies constraining EPA's ability to regulate CO2 emissions from power plants.
- The Supreme Court's deployment of the "major questions doctrine" could have far-reaching implications for agencies' authority to take actions that are politically and economically significant.
- The Court also announced a broad interpretation of standing, finding that the challengers could bring their suit notwithstanding EPA's announced nonenforcement of the Clean Power Plan and intent to engage in a rulemaking to replace it.

INTRODUCTION

On June 30, 2022, the Supreme Court issued its opinion in *West Virginia v. EPA*, invalidating the 2015 Obama-era Clean Power Plan (CPP). Chief Justice John Roberts delivered the opinion of the court, holding that Section 111(d) of the Clean Air Act does not authorize EPA to devise emissions caps based on "generation shifting"—the approach

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EPA took in the CPP wherein power plants would be required to transition from higher-emitting (e.g., coal) to lower-emitting (e.g., natural-gas) to then even lower-emitting (e.g., wind and solar) electricity production.

The Court's holding that the case was justiciable despite the Biden administration's stated intent to repeal the Clean Power Plan and engage in a new rulemaking, as well as its deployment of the "major questions doctrine," is likely to have far-reaching implications for legal challenges to all administrative agency actions.

DISCUSSION

West Virginia, along with 19 other states, utilities, and coal mining companies, challenged EPA's authority under section 111(d) of the Clean Air Act to issue the 2015 CPP. The Obama administration promulgated the CPP to establish limits on CO_2 emissions from power plants, creating a scheme geared toward shifting the generation of electricity from steam-generating units to natural gas-fired units, and from fossil-fuel fired units to renewable energy sources.

In 2019, the Trump administration repealed the CPP and issued a replacement rule, the Affordable Clean Energy (ACE) rule, which established emission guidelines for states to use when developing plans to limit CO_2 emissions at their coal-fired electric generating units. On January 19, 2021, the D.C. Circuit vacated the ACE rule and the CPP repeal. West Virginia and others appealed the D.C. Circuit's decision to the Supreme Court.

Standing For Parties Seeking to Challenge Agency Policy

The government took the position that the Court need not even consider the merits of the case because, since EPA had informed the D.C. Circuit that it intended to replace the CPP rather than enforce it, the petitioners were not injured by the CPP and therefore lacked standing to challenge it. Chief Justice Roberts rejected this argument, finding that EPA had conflated the doctrines of "standing" and "mootness," and after clarifying that "mootness" was the proper doctrine at issue in this case, that EPA had not met its burden of demonstrating mootness of the case by simply informing the D.C. Circuit of its decision to not enforce the CPP. Without the case mooted, West Virginia and others remained injured by the CPP and had adequate standing to sue.

The Court's finding of standing under these circumstances could broaden the scope of challenges to agency actions that fall into this gray area where an agency denounces a prior action without some requisite level of formality. This may afford standing to parties who are affected by *potential* enforcement of a rule, which some courts have previously deemed too speculative.

The Major Questions Doctrine: A New Force in Administrative Law

The cornerstone of the Court's decision was the "major questions doctrine," which dictates that an agency cannot undertake actions that carry vast political and economic significance absent clear and specific statutory language delegating that authority to the agency. The Court found that this was a major questions case because EPA's interpretation of section 111(d) of the Clean Air Act authorized EPA to force utility companies to shift electricity generation inputs. For example, under the CPP, EPA could mandate that a utility switch from coal to natural gas, or from natural gas to solar. The Court reasoned that the significant authority implicated by allowing EPA to force utilities to make this switch constituted a "major question."

With this framework in mind, the Court reviewed the statutory language EPA relied on from section 111(d) of the Clean Air Act and determined that it was not sufficiently specific or clear to grant EPA the authority to regulate power plant emissions in the manner contemplated by the CPP. The Court explained that, under its reading of the statute, section 111(d) allows EPA to set an emissions cap on sources based on the application of particular controls, but that "there is no control a coal plant operator can deploy to attain the emissions limits established by the [CPP]."

Consistent with other decisions announced by the Court this term, the Court articulated that Congress must be the first to act on issues falling within its authority. In closing, Chief Justice Roberts recognized that "[c]apping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible 'solution to the crisis of the day,'" but maintained that "[a] decision of such magnitude and consequence rests with Congress itself" absent clear delegation to an agency.

The Court's invocation of the major questions doctrine here could have significant implications for administrative law more generally, as it restricts the authority of agencies to undertake significant actions without express Congressional authorization. Future challenges to agency actions will likely center around the question of what exactly constitutes an extraordinary agency action that triggers scrutiny under the major questions doctrine. In a concurring opinion, Justice Neil Gorsuch provide several examples of major questions cases: the FDA attempting to ban tobacco, the Attorney General attempting to prosecute physicians who prescribed drugs for assisted suicide through the Controlled Substances Act, the CDC Covid-19 Eviction Moratorium, the OSHA private employer vaccine mandate, and, of course, the EPA regulating greenhouse gas emissions under the Clean Air Act. Parties seeking to challenge future administrative policies will likely look to draw analogies between these cases and the agency actions they seek to invalidate.

Justice Elena Kagan, who filed the dissenting opinion in the case, argued that Chief Justice Roberts' has created a new two-step approach to evaluating agency actions. First, a

reviewing court must decide if the action is "extraordinary," then the Court must find clear congressional authorization for action before upholding the agency's action. Justice Kagan expressed concern that both steps place a greater burden on the agency than the traditional tools federal courts use to review agency actions and federal statutes, making it harder for agencies to promulgate rules in regulations that serve the public interest.

Looking Ahead to Future Agency and Congressional Action

The Court's ruling in *West Virginia v. EPA* leaves the future of environmental regulation in an uncertain state. President Biden aims for the United States to reach net-zero emissions no later than 2050, but EPA's contribution to this effort is now curbed absent new statutory authority from Congress. EPA, however, is no stranger to legal challenges forcing creative thinking as to its regulatory agenda, and we will certainly see further actions by EPA attempting to target the greenhouse gas emissions that prompted the CPP.

In response to the Court's decision, the White House commented that it "risks damaging our nation's ability to keep our air clean and combat climate change," but that the Administration "will continue using lawful executive authority, including the EPA's legally-upheld authorities, to keep our air clean." The White House specifically noted that the Administration would "work with states and cities to pass and uphold laws that protect their citizens," and that it "will keep pushing for additional Congressional action." Such Congressional action may include industry tax incentives or research and development grants, which are typically considered less burdensome to industry as compared to command-and-control programs.

EPA Administrator Michael Regan and White House National Climate Advisor Gina McCarthy likewise expressed commitment to finding "creative" ways to work toward the Administration's climate goals. Regan suggested that the Agency intended to work directly with the power industry in developing workable regulations under EPA's remaining authority.

CONCLUSION

The Supreme Court's monumental ruling will constrain EPA's ability to regulate carbon emissions from the power sector by agency rulemaking, and the Court's assertion of the major questions doctrine will have a lasting impact on the administrative state.

Trump ESA Rules Vacated

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The Endangered Species Act (ESA) regulations promulgated by the Trump administration (Trump ESA Rules) were challenged by environmental groups. While that challenge was pending, the Biden administration announced that those regulations would be revised. On July 5, the U.S. District Court for the Northern District of California vacated the Trump ESA regulations, not on the merits of the regulations but because they are in the process of being rewritten. This decision disregards the Biden administration's request that the regulations remain in effect to preserve consistency and order during the revision process. Instead, the pre-Trump regulations (which were issued in the mid-1980s) have been reinstated and are now in effect until the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) (collectively, the Services) finalize new regulations.

The Trump ESA Rules included:

1. The "Listing Rule" that modified how the Services add, remove, and reclassify endangered or threatened species and the criteria for designating listed species' critical habitat;
2. The "Blanket Rule Repeal," which eliminated the USFWS' former policy of automatically extending to threatened species the protections against "take" that Section 9 automatically affords to endangered species; and
3. The "Interagency Consultation Rule" that changed how the Services work with federal agencies to prevent proposed agency actions that could harm listed species or their critical habitat.

The Trump ESA Rules were challenged by environmental groups and other parties, alleging that the Services violated the Administrative Procedure Act (APA) and the National Environmental Policy Act (NEPA) in implementing the rules.

On January 19, 2021, the plaintiffs moved for summary judgment. The following day, however, President Biden signed Executive Order 13990, which directed the Services to evaluate and, where appropriate, revise or rescind regulations that had been enacted during the previous four years. Pursuant to that executive order, the Services announced their intention to revise the Listing Rule and Interagency Cooperation Rule and rescind the

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Blanket 4(d) Rule Repeal and re-instate protections for threatened species. Following these announcements, the parties agreed to a stay of the ongoing litigation.

However, in October 2021, the court lifted the stay, and the plaintiffs re-noticed their motions for summary judgement. In response, the Services filed a motion to remand the rules without vacatur, and plaintiffs opposed, asking that the court remand with vacatur or deny the Services' motion altogether so the matter can be adjudicated on the merits. According to the court, because no party alleged that the Services' request for remand was frivolous or in bad faith, the court considered the extent to which it may vacate the Trump ESA Rules without fully adjudicating the merits of plaintiffs' claims.

In considering whether to vacate agency action concurrently with remand, the court explained that it considers two factors: the seriousness of the agency's errors and "the disruptive consequences of an interim change that may itself be changed." The court concluded that vacating the Trump ESA Rules would not be "disruptive" as it would not cause confusion among the public, other agencies, and stakeholders, or impede the efficiency of ESA implementation by abruptly altering the applicable regulatory framework and creating uncertainty about which standards to apply. Moreover, the court considered that the Services' announcements that they are in the process of proposing new ESA rules.

An appeal to the Ninth Circuit is expected to be filed by the several states and industry groups that participated in the District Court proceeding. The District Court recently relied on a similar analysis to vacate and remand the Trump-era Clean Water Act Section 401 Rule (Certification Rule). However, on April 6, the Supreme Court (without providing a fulsome opinion for further analysis) overturned the District Court's vacatur of the Certification Rule, pending the outcome of the litigation in the Ninth Circuit. The effect of the Supreme Court's decision reinstated the Certification Rule, at least temporarily.

While it is unclear whether the fate of the 2019 ESA Rules will follow a similar path as the Certification Rule, it serves as a recent example of how the Supreme Court may disfavor the District Court's approach of overturning fully promulgated rules without first addressing the merits.