LEGAL UPDATE

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Ground Floor, State Capitol Building Des Moines, Iowa 50319 515.281.3566

UNITED STATES SUPREME COURT DECISION — ENVIRONMENTAL PROTECTION AGENCY'S SCOPE OF AUTHORITY UNDER THE CLEAN AIR ACT

Purpose. *Legal updates are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update is intended to provide legislators, legislative staff, and other persons interested in legislative matters with summaries of recent meetings, court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although an update may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

West Virginia v. Environmental Protection Agency
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Factual and Procedural Background. The federal Clean Air Act (CAA) authorizes the U.S. Environmental Protection Agency (EPA) to regulate emissions from stationary sources of air pollution through three programs: the National Ambient Air Quality Standards (NAAQS) program under sections 108 through 110; the Hazardous Air Pollutants (HAP) program under section 112; and the New Source Performance Standards (NSPS) program under section 111. The NSPS program directs EPA to list categories of stationary sources that cause or contribute to air pollution that is reasonably anticipated to endanger public health or welfare. Section 111(b) requires EPA to promulgate federal standards of performance for new and modified sources in each category, with each standard of performance reflecting the degree of emission limitation achievable by applying the best system of emission reduction (BSER). In determining the BSER, EPA must take into account the cost of achieving reduction, nonair quality health and environmental impacts, and energy requirements. When EPA establishes standards for new and modified sources, section 111(d) requires the agency to also establish standards for the same pollutants from existing sources as long as those pollutants are not already covered under the NAAQS or HAP programs. The federal standards of performance are then implemented by the states.

In 2015, EPA promulgated two rules in order to address carbon dioxide emissions from power plants. The first rule regulated carbon dioxide emissions from new power plants. Because carbon dioxide is not regulated under the NAAQS or HAP programs, section 111(d) required EPA to promulgate a rule to address carbon dioxide emissions from existing power plants. The rule EPA adopted was known as the Clean Power Plan (CPP). The BSER for the CPP included three building blocks. The first building block consisted of heat rate improvements at coal-fired power plants. The second building block consisted of a shift of electricity production from coal-fired power plants to natural-gas-fired power plants in order to reduce carbon emissions. The third building block consisted of a shift of electricity production from both coal- and natural-gas-fired power plants to new low- or zero-carbon generating power plants.

After determining the BSER, EPA next determined the degree of achievable emission limitation. EPA considered how much more electricity natural gas and renewable sources could generate without creating undue costs or reducing the overall supply of electricity. EPA calculated emission performance rates for states to implement, which resulted in emissions ceilings so strict that an existing coal power plant could not comply without reducing electricity generation at the plant, building or investing in natural gas, wind, or solar electricity generation, or purchasing emissions allowances as part of a cap-and-trade system.

Upon promulgation of the CPP, numerous parties, including 27 states, entered a petition for review in the D.C. Circuit Court of Appeals. The circuit court declined to enter a stay of the rule but the petitioners sought relief from the U.S. Supreme Court, which entered a stay. The circuit court heard arguments on the merits en banc but held the litigation in abeyance upon request of the new presidential administration, which sought to reconsider the CPP. Eventually, the circuit court dismissed the petitions as moot.

In 2019, EPA repealed the CPP and replaced it with a new Affordable Clean Energy (ACE) rule, which essentially consisted of the first building block of the CPP. EPA determined that the generation-shifting building blocks in the CPP resulted from a novel interpretation of section 111 that would empower EPA to order the wholesale restructuring of any industrial sector based only on how EPA determines what is feasible or costly.

Upon promulgation of the ACE rule, multiple states and private parties filed petitions for review with the D.C. Circuit Court of Appeals to challenge the repeal of the CPP and the promulgation of the ACE rule. Multiple other states and private parties intervened to defend EPA's actions. The circuit court ruled that generation shifting could be included as a BSER under section 111 and that the major questions doctrine did not apply. One day before another change in the presidency, the circuit court vacated the ACE rule, vacated EPA's repeal of the CPP, and remanded to EPA for further consideration.

EPA filed a motion with the circuit court to partially stay the issuance of the CPP to ensure the rule would not immediately go back into effect and to consider implementing a new rule under section 111. The circuit court granted the stay. The states and other private parties defending the repeal of the CPP filed petitions for certiorari with the U.S. Supreme Court.

Issue. Whether section 111(d) of the CAA clearly grants EPA authority to implement the CPP.

Holding. The Court, in a 6-3 decision, reversed and remanded the circuit court's judgment. Congress did not clearly grant EPA authority to make major social and economic policy decisions under section 111(d) of the CAA.

Analysis. The Court invoked the major questions doctrine, which requires an administrative agency to identify a clear congressional authorization in order to exercise powers to implement major social or economic policy decisions typically reserved for Congress.

The Court noted that EPA has not previously used section 111 in a similar manner. Prior rules under section 111 included applying physical technology at plants and regulation of plants themselves, rather than regulation of the overall power system. The Court noted that when EPA requested funding for fiscal year 2016, the agency admitted that understanding trends in the energy sector required technical and policy expertise not traditionally needed in EPA regulatory development. The Court stated that Congress probably would not task EPA with making certain policy judgments and technical decisions if EPA did not already have comparative expertise. Congress does not grant comparative power to EPA anywhere else in the CAA and one would not expect to find such a grant of power in a seldom-used section of the CAA. Even though regulating air pollution falls under the authority of EPA, the CAA does not authorize the agency to regulate air pollution in a manner that requires making decisions that affect overarching economic and energy policy. The Court also noted that Congress on multiple occasions considered and rejected legislation that would have created programs similar to the CPP.

Finally, even though generation shifting can be considered a "system" under the plain-language definition of the word, the Court interpreted the word "system" independently of other uses of "system" elsewhere in the CAA because Congress explicitly authorized certain methods, such as cap-and-trade, to be considered a system. The Court also contrasted section 111 with other sections of the CAA by noting that the trading systems under those sections are designed to comply with caps determined by Congress; the Court did not find authority for EPA to establish caps under section 111 as the agency saw fit.

Concurrence. Justice Gorsuch wrote a concurring opinion to which Justice Alito joined. Justice Gorsuch provided background information on the history of the major questions doctrine and explained that courts invoke the doctrine to prevent executive officials from making policy decisions the legislative branch did not intend for the executive branch to make. Invoking the doctrine further ensures that an agency does not act outside its area of expertise.

Dissent. Justice Kagan wrote a dissenting opinion joined by Justice Breyer and Justice Sotomayor. Justice Kagan argued that the Court should not have invoked the major questions doctrine because the science of climate change is not subject to serious debate. The CAA charges EPA with regulating stationary sources that emit carbon dioxide

and other greenhouse gases and EPA acts as the nation's primary regulator of greenhouse gas emissions. The economic impact of the CPP would not be as significant as characterized in the majority opinion because power plants had already initiated generation shifting. Even if the CPP would have had major economic impacts, Congress intended for EPA to have regulatory flexibility and discretion to address any potentially harmful air pollutants.

Justice Kagan compared section 111 with other sections of the CAA and noted that unlike other sections relating to emissions reductions, section 111 does not restrict EPA to implementing emissions-reduction controls based on specific technologies or processes. Additionally, Congressional reports demonstrate that Congress intentionally did not restrict EPA to using technological methods. The majority opinion wrongfully invoked the major questions doctrine rather than using a common-sense reading of the CAA.

Justice Kagan argued that EPA does have the policy experts to implement policies on questions of greenhouse gas regulation. The delegation to EPA to implement policy that falls within the agency's area of expertise follows the nation's long history of delegation to executive branch agencies, even when such delegations are of social or economic significance. Justice Kagan noted that Congress is not full of policy experts, but agencies are. Congress is capable of determining how much legislative and administrative action is necessary to enact good policy. Courts should refrain from substituting their ideas on delegation and policymaking when Congress has already made decisions on those matters.

Impact on Iowa. Iowa was an intervening respondent in the litigation initiated upon the promulgation of the CPP, but was not a party to the litigation initiated upon the promulgation of the ACE rule. However, the Court's decision will eventually impact the state when EPA implements a new rule that is subject to the Court's limitations on EPA's regulatory authority. The Iowa Department of Natural Resources (DNR) is Iowa's agency in charge of adopting rules in order to comply with emissions limitations adopted by EPA for Iowa pursuant to section 111. Whenever EPA implements a new rule establishing emissions limitations for carbon dioxide from power plants, DNR will be tasked with regulating Iowa's power plants to ensure compliance with EPA's carbon dioxide emissions limitations for Iowa.

LSA Staff Contact: Joe Simpson, 515.725.2251 or Joe.Simpson@legis.iowa.gov