With *West Virginia v. EPA*, US Supreme Court curtails the power of the administrative state – and it's not over yet

Blog post by Associate Ben Bassett, and Adviser Stephanie Grumet, 22 July 2022

In what has proved to be one of the most consequential terms in recent decades, the US Supreme Court capped its 2021-2022 term by issuing a decision in *West Virginia v. EPA*, a case centred around the US Environmental Protection Agency's (EPA) efforts to regulate greenhouse gas (GHG) emissions in the US power sector. The decision once again reflected the now-fully-formed conservative majority of the Court, as the 6-3 opinion ruled that the EPA's past attempts to regulate GHG emissions in the US power sector via the Obama administration's Clean Power Plan (CPP) exceeded the EPA's statutory authority under the Clean Air Act.

West Virginia v. EPA marks the first time the Supreme Court has formally invoked the "major questions" doctrine in a majority opinion -- a legal theory that stipulates federal agencies require explicit Congressional authorization when deciding an issue of "major national significance" and existing statutory language is vague or imprecise. The decision to introduce and apply the major questions doctrine in *West Virginia v. EPA* signals the Court's intent to rein in federal agencies and thwart attempts by federal agencies to regulate beyond their congressionally authorized statutes.

Thus *West Virginia v. EPA* marks a shot across the bow by the Court against US federal agencies' power. However, the case is more nuanced than some "the sky is falling" analyses put forth by progressives in the days since the decision was released. Importantly, while the decision limits how the EPA can regulate GHG emissions in the US power sector, it does not strip the agency of its authority to do so – which environmental advocates worried was a real possibility, particularly after recent opinions in cases such as Dobbs v. Jackson Women's Health Organization, which demonstrated the Court's willingness to overturn years of legal precedent, in that case surrounding abortion rights. The EPA can and almost certainly will in the remaining years of President Joe Biden's first term make another attempt to regulate GHG emissions in a way that can survive the inevitable legal challenge citing *West Virginia v. EPA* (we explore some of these options further later in this blog). Federal agencies may attempt to argue their actions do not carry "major national significance", for instance. With the Court's decision following years of anti-regulatory actions by President Donald Trump's administration and the Republican-controlled Congress, many federal agencies have adjusted their priorities to focus more on enforcement actions and guidance than complex, time-consuming rulemakings. ***West Virginia v. EPA* marks the beginning, not the end, of a new push and pull between the legislative and judicial branches of the US government.**

Introduction of the "major questions" doctrine sets a new precedent

US federal agencies are regularly tasked with interpreting statutory authority that is delegated to them by Congress. These judgments can be challenged in court, usually on the basis that the respective agency misinterpreted or exceeded its authority. However, until *West Virginia v. EPA*, the "major questions" doctrine - which enjoys support among conservative legal circles as it posits that Congress must expressly give an agency the regulatory authority to promulgate rules that will have major economic and political significance if existing statutes are vague - had not been specifically mentioned in a US Supreme Court majority opinion. The doctrine has been indirectly alluded to in recent opinions – in September 2021 for example, the Court struck down the Centres for Disease Control and Prevention's (CDC) second eviction moratorium that the CDC had extended due to the covid-19 pandemic on the grounds that the CDC did not have the authority to establish such a moratorium. That said, invoking the major questions doctrine in *West Virginia v. EPA* sets a new precedent and suggests that the future challenges to federal regulatory overreach could be successful given the Court's 6-3 conservative majority, which is likely to continue for several years as the conservative justices are aged 50 (Barrett) through 74 (Thomas).

SEC climate disclosure rule is likely the next major target

After the Court's opinion in *West Virginia v. EPA*, all eyes have turned to the fate of the Securities and Exchange Commission's (SEC) proposed climate disclosure rule, which is currently making its way through the federal rulemaking process. The climate rule would mandate publicly traded companies to include certain climate-related disclosures in registration statements and periodic reports. The SEC's efforts have already been met with significant opposition from Republicans in Congress who have decried the rule as an example of an agency overstepping its authority. However, supporters of the rule argue that mandating climate disclosures falls within the SEC's authority under the Securities Act of 1933, which grants the SEC to act as "necessary or appropriate in the public interest or for the protection of investors." At the core of this argument is the belief that the adverse effects of climate change are a risk to the public interest and, more importantly, to investors.

> *"Under our precedents, this is a major questions case… In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." It located that newfound power in the vague language of an "ancillary provision" of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself."*

Both positions can be fairly persuasive. However, with the introduction of the "major questions" doctrine via *West Virginia v. EPA*, the likelihood that the courts strike down this climate disclosure rule has significantly increased. It is difficult to argue that the rule is not one of major economic and political significance. If one adheres to the "major questions" doctrine as a majority of the

current US Supreme Court justices do, the Securities Act of 1933 does not explicitly grant the SEC the ability to mandate publicly traded companies to disclose risks posed by climate change, meaning Congress must explicitly grant the agency that authority.

This doctrine could also be invoked to restrain the Federal Energy Regulatory Commission's (FERC) ability to examine environmental downstream climate impacts resulting from natural gas pipelines. FERC also issued a notice of proposed rulemaking in May of this year revising electric regional transmission planning and cost allocation requirements which will also need be rooted in traditional FERC rulemaking authorities to be durable in the face of the "major questions" doctrine. But it will not just be in the environmental arena where agencies could be constrained in its regulatory efforts. The Consumer Financial Protection Bureau (CFPB), an agency many Republicans do not even think should exist, could also be a prime target, especially as CFPB Director Rohit Chopra looks to aggressively expand his agency's mandate.

Despite new constraints, EPA is expected to unveil a suite of policies that impact the power sector

It is important to understand what the Court's ruling in *West Virginia v. EPA* does and does not do. In short, the Court's ruling limits the EPA's ability to regulate GHG emissions in the US power sector beyond the facility's physical footprint (also known as beyond the "fenceline"), a core attribute of the CPP. The CPP relied on a generation shifting approach, which would have imposed emissions caps and required the power sector to shift electricity production first from coal to natural gas, and then from natural gas to renewable energy. Doing so would have required facilities to seek emissions reductions beyond its fenceline, which is what the court invalidated. The Court determined that the Clean Air Act does not give the EPA the authority to implement a generation shifting regulatory regime, as it would have sweeping implications for the US power sector and the energy market more broadly. This constituted a question of major economic and political significance, and thus required explicit authorization from Congress – which to date, has not been given. However, the Court's opinion is relatively narrow in scope. The EPA's authority and ability to regulate GHG emissions, which stems from the Court's 2007 Massachusetts v. EPA decision, remains intact, and emissions can still be regulated from point sources at an individual power plant level. It also negates a rule – the CPP – that had not yet been successfully finalized and was unlikely to be revived by the Biden administration in the first place. This ruling only denies the EPA the ability to regulate GHG emissions from power plants via the CPP, meaning the agency cannot implement a system-wide generation shifting regulatory regime as the BSER for new and existing power sources. In many respects, *West Virginia v. EPA* has also cleared up legal ambiguities and provided the EPA with clearer guardrails around what is permissible for setting emissions reductions in the power sector.

> *"We also find it "highly unlikely that Congress would leave" to "agency discretion" the decision of how much coal-based generation there should be over the coming decades…The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself…Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act."*

So, how will the EPA adapt moving forward? Given the Supreme Court's new hypervigilance over agencies remaining within the congressionally delegated statutory lines, the use of another novel approach by the EPA is unlikely. Proposing a rule using tried-and-true approaches that can withstand the anticipated onslaught of litigation will be more effective than shooting for the moon. Timing could also constrain any efforts to go big. If the EPA cannot finalize a rule before the end of Biden's term, a possible Republican administration could use the Congressional Review Act to revoke newly-finalized rules – a tactic that was commonplace at the beginning of the Trump administration. With this backdrop in mind, traditional emissions reduction technologies granted under Section 111 of the Clean Air Act are the most likely to be utilized.

The EPA now has immediate two action items on its plate regarding power sector regulation after the Court's ruling. The first is re-issuing a proposal determining the BSER for fossil-fired units. The EPA has signalled that this proposal will come no later than spring 2023, with hopes of finalization by early 2024. Possible approaches could include:

- **Heat rate efficiency upgrades**: Increasing efficiency of power plants via heat rate efficiency upgrades is one option, however, the EPA has already opined in the CPP that setting BSER based on efficiency measures alone would not yield meaningful emissions reductions, as reductions of just a few percent are generally achievable. Efficiency upgrades would likely be used in tandem with approaches to set BSER, as it was in the CPP.

- **Carbon capture and storage (CCS)**: CCS is another possibility, although significant roadblocks remain to demonstrate that CCS is not only commercially available and adequately demonstrated but cost effective as well.

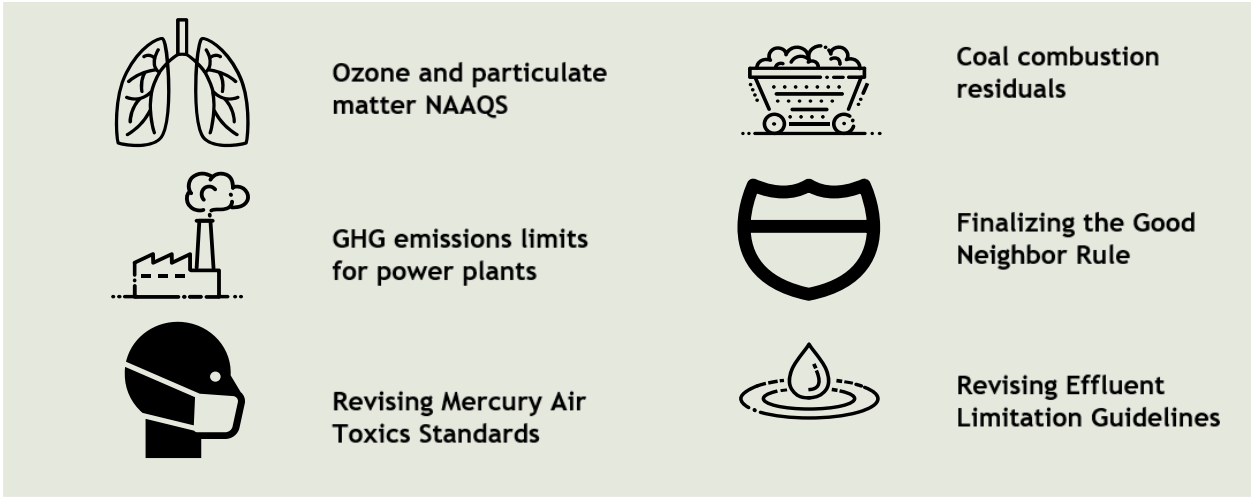
- **Natural gas co-firing standard**: Natural gas has roughly half the carbon intensity of coal, with recent studies suggesting that a plant-based co-firing performance standard of 20-40% natural gas could reduce a plant's emissions by 10-20%. The EPA could set a plant-based performance standard wherein every plant would need to meet the standard or develop a trading program to add flexibility and limit compliance costs. Environmental justice provisions would likely be superimposed to ensure that all impacted communities benefit. Most plants already use natural gas for various procedures within their plant, meaning retrofitting investments would be relatively small.

Any co-firing standard would further increase natural gas use in the power sector - a result that many environmentalists believe to be counterproductive. But the EPA has signalled its intent to

reduce emissions from oil- and gas-fired generators as well. An April 2022 EPA whitepaper outlines several examples of available and emerging technologies to reduce emissions from oil- and gas-fired generators such as increasing efficiency and integrating renewables, utilizing technologies that capture carbon dioxide through post-combustion devices, and co-firing with hydrogen or ammonia to reduce emissions. Not all of these methods can be shown to be adequately demonstrated, and as such may not be adopted as the BSER. That said, the whitepaper demonstrates the EPA is thinking critically about how to reduce emissions from fossil-fired electricity generators and will likely do so under Section 111 this year or next.

The second action item is a "regulatory blitz" the EPA is planning in 2023, with regulations on coal- and gas-fired power plants joined by air quality regulations targeting soot, smog, and mercury. The EPA's Spring 2022 agenda lists quite a few regulatory revisions teed up which would have incidental impacts on carbon emissions. These include tightening the National Ambient Air Quality Standards (NAAQS) for particulate matter (PM) and ozone; revising Mercury Air Toxics standards, controlling hazardous air pollutants (HAPs) from power plants; updating regulations covering the hazardous solid wastes at power plants known as Coal Combustion Residuals; finalizing its Good Neighbor Rule; and revising Effluent Limitation Guidelines which specify how certain waste streams, primarily from control technologies, are treated. The EPA has also indicated it would be reassessing its response to Maryland and New York's Section 126 petitions which ask EPA for assistance controlling upwind out-of-state sources of pollution that contribute to its in-state non-attainment areas. All these regulatory efforts are scheduled to be proposed by March 2023, with hopes of finalizing in 2024.

Upcoming regulations on the EPA agenda



Simply put, the cumulative impact of these regulations could bring about significant carbon reductions in the US power sector. While direct carbon emissions reduction requirements from coal-fired plants could be modest in the wake of *West Virginia v. EPA*, the totality of the EPA's planned regulations would certainly have material effects on fossil-fuel fired generators, paving a way for lower carbon generation sources to increase market share. If Democrats' efforts in Congress to pass clean energy tax credits through the budget reconciliation process this summer materialize, the

impacts of the EPA's regulatory efforts plus tax credits for new zero-carbon technologies could meaningfully accelerate the US energy transition.