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# Will the EPA Be Able to Tackle 'Big' Problems Following 'West Virginia' Decision?

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*Special to the Legal*

Much has been said about the U.S. Supreme Court's decision in *West Virginia v. EPA*, 142 S.Ct. 2587 (2022), since it came out earlier this year. In overly simple terms, this case was the effective tie-breaker in a years-long battle between the Obama and Trump administrations' respective plans for reducing greenhouse gas (GHG) emissions from electric generating facilities. Obama's Clean Power Plan (CPP) sought to reduce GHG emissions by requiring actions not only at affected facilities but also more broadly across the power sector, by forcing a generation shift away from coal-fired plants. The latter category of reductions are commonly referred to as "beyond the fence line." Trump's Affordable Clean Energy (ACE) rule, by comparison, would have stopped short of requiring any emission reductions that could not be achieved at the facility level.

Both regulations got held up in litigation and, remarkably, neither one ever took effect. Biden's EPA also stated that it had no plans to revive the CPP. Some were surprised, therefore, that the court agreed to hear West Virginia at all, with Justice Elena Kagan herself observing in her dissent that the court's "docket is discretionary, and because no one is now subject to the [CPP's] terms, there was no reason to reach out to decide this case." Even more surprising, however, was the legal theory the court relied upon in reaching its decision: that is, the major questions doctrine. Surely, legal scholars and practitioners will be unpacking *West Virginia* for years, parsing it for what it tells us (or does not tell us) about when and how to invoke the major questions doctrine, and more specifically, how the decision bears upon long-held tenants of administrative law like *Chevron* deference, among others. But in the nearer term, those involved in the practice of environmental law may be trying to wrap their heads around how *West Virginia* will affect the EPA's ability to do its job, and in turn, what that could mean for regulated industries.

In this context, we first consider whether the court intended to send a message regarding its stance on the future of federal environmental regulation by choosing *West Virginia* to invoke the major questions doctrine by name for the first time in a majority opinion, especially when the court applied the doctrine's same underpinnings in two recent cases challenging agency actions in response to COVID-19? Regardless of intent, is it reasonable to expect the court to hold *West Virginia* to its facts and refrain from applying the major questions label in future cases unless the issues on appeal implicate the national regulation of GHG emissions from the power industry? Or is it more reasonable to conclude that any EPA regulations that aim to address the most significant environmental issues risk the court's assignment of the major questions moniker and the increased scrutiny that attends it? If so, can the EPA effectively respond to today's complex environmental issues while working within the constraints of its regulatory authority as articulated by the court in *West Virginia*?

To evaluate these questions, we begin with a basic description of what the

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major questions doctrine is generally understood to mean, taking into account what we can glean from *West Virginia*. The major questions doctrine is the principle that agency discretion must be curtailed when an agency has stretched the boundaries of statutory interpretation to claim new authority to address important problems of the day that were not within the agency's jurisdiction previously according to the express language of the statute. This sounds logical enough, but if we look at how the major questions doctrine could take shape in the framework of environmental law, the doctrine seems poised to encroach upon territory that was previously accepted as belonging to the EPA. There are several reasons for this.

First, the major federal environmental statues are, frankly, old. To call out just a few, the current version of the Resource Conservation and Recovery Act is from 1984; the Clean Water Act is from 1987; the Clean Air Act is from 1990; and the Safe Drinking Water Act is from 1996. Therefore, they do not, nor could they, include the kind of express grant of statutory authority and/or congressional direction the *West Virginia* court said the major questions doctrine demands, because the particular issues the EPA seeks to address today were not known with any particularity (if they were known at all) when the statutes were last updated. Although this paradigm has survived a long time, resting on the general acceptance of the notion that Congress purposefully drafted the statutes broadly so the EPA would have the discretion to address the environmental problems of tomorrow, *West Virginia* could signal the majority of the court's desire for a paradigmatic shift.

Next, most environmental issues falling within the EPA's purview necessarily have the sorts of characteristics that the *West Virginia* court and others have consistently used to describe major questions. They are issues of vast economic and political significance that involve complex and difficult-to-foresee policy implications. Essentially, they are issues that courts recognize as really important, with the potential to have big impacts on the country. However, as the federal agency tasked with administering federal environmental laws, the EPA usually does not address relatively minor, narrowly applicable environmental issues that are more properly regulated at the state or local level. Instead, when the EPA undertakes a new rulemaking, as it did with the CPP, it does so because the circumstances the new regulation seeks to redress are too complex, technical or novel to be effectively covered by a preexisting set of standards. Historically, the EPA's technical expertise was considered necessary to determine the correct regulatory approach in the first instance. That proposition now seems less certain.

Looking ahead, we note that the *West Virginia* court did not completely ban the EPA from pursuing an energy-shifting approach as a means of climate regulation. Instead, it said that for the EPA to do so, Congress would need to amend the Clean Air Act to expressly grant the EPA the requisite authority. As noted above, Congress has not amended the Clean Air Act in more than 30 years. We will therefore need to watch how the court's *West Virginia* decision impacts the Biden administration's climate regulatory agenda more broadly, particularly given the EPA's ambitious goals to reduce GHG emissions from current levels. Notably, the EPA has already delayed its proposal for reducing GHG emissions from existing power plants, which was originally expected in July 2022. Last month, the EPA established a regulatory "docket to collect public input to guide the agency's efforts to reduce emissions of GHGs from new and existing fossil fuel-fired electric generating units." This is an atypical step distinct from any future opportunity for public comment on any future proposed rulemakings. A separate EPA action affecting the power sector (as well as nonelectric generating units) is expected to be promulgated in early 2023, although this action targets emissions of ozone precursors that significantly contribute to nonattainment of, or interfere with maintenance with, the 2015 National Ambient Air Quality Standard for ozone. It will be telling to see whether interested parties attempt to challenge the EPA's statutory authority to promulgate the rule on the basis that it involves a major question.

Of course, the full breadth of the major questions doctrine and its applicability to the EPA's various regulatory agendas may not stop with the Clean Air Act. Issues of environmental justice and, separately, those relating to PFAS and other related groups of chemicals are among the EPA's priority initiatives and regulatory objectives, and they too seem to lend themselves to possible challenges stemming from the court's recent interpretation of the major questions doctrine in *West Virginia*. At a minimum, agency uncertainty about how to react to the court's decision could delay various pending rulemakings, while the EPA wrestles with whether it can preempt a new wave of legal challenges to its regulatory authority to allow it to respond to today's inherently complex environmental issues. Thus, while only time can tell, the CPP will presumably not be the only EPA regulatory action to fail in the face of the major questions doctrine. In light of increasing pressure from the federal judiciary, and an imminent change in congressional composition, it remains to be seen where the EPA will go from here. •

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