

Environmental Law

The newsletter of the Illinois State Bar Association's Section on Environmental Law

Editor's Note

BY WILLIAM J. ANAYA

First, after 22 years, Ray Reott relinquished his position as the editor of the Illinois State Bar Association's Environmental Law newsletter. I read every one. Ray's contribution to the Environmental Law Section has been immeasurable. His unmatched patience with authors, his editorial selection of timely and topical articles, and his keen editing eye made this publication a worthwhile and valuable read. Thank you, Ray Reott.

Next, this month we examine two cases – one issued by the United States Supreme Court in *West Virginia, et al. v. Environmental Protection Agency, et al.* 142 S. Ct. 2587 (2022), and the other by the Illinois Supreme Court in *Holm v. Kodat*, 2022 IL 127511 (2022). At first blush, neither has much in common with the other, except on closer review we notice that the courts are reluctant to announce new law, but are inclined now to encourage the

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U.S. Supreme Court Limits USEPA Authority in *West Virginia v. EPA*

BY MELISSA S. BROWN & MICHAEL P. MURPHY

On June 30, 2022, the Supreme Court issued an opinion addressing the United States Environmental Protection Agency's ("USEPA") authority to devise emissions caps for power plants based on a generation shifting approach. *West Virginia, et al. v. Environmental Protection Agency, et al.*, 142 S. Ct. 2587 (2022). Relying heavily on the major questions doctrine, the Court held that the generation shifting approach exceeded USEPA's authority under Section 111 of the Clean Air Act. While the decision

may have little impact on Illinois' current energy approach under the Climate and Equitable Jobs Act, the *West Virginia v. EPA* decision offers valuable insight into how courts may interpret environmental statutes and regulations moving forward.

Background

In 2015, USEPA promulgated a final rule governing emissions of carbon dioxide from existing electric utility generating units ("EGUs"). 80 Fed. Reg. 64,662 (Oct. 23, 2015). The set of

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legislative branch to declare public policy on controversial questions. In *West Virginia*, the United States Supreme Court refused to defer to the Agency's interpretation of the statute the Agency administers as described in *Chevron U.S.A., v. NRDC*, 467 U.S. 837 (1984). Instead, the United States Supreme Court adopted an analytical means of avoiding administrative deference when the court concludes that the proposed administrative interpretation involves what the court describes as a "Major Question." If a Major Question is involved, then, according to the United State Supreme Court, courts need not defer to Agency's interpretation of the statute it administers.

Some have criticized this method as intellectually dishonest, and a not-so-veiled strike against administrative rule. Others see it as a welcome future analysis of this Court.

Like the United States Supreme Court, in *West Virginia*, the Illinois Supreme Court schools us not only on substantive law in Illinois, but on the proper role of the judiciary. In this instance, there was no administrative interpretation at issue, but the Illinois Supreme Court did not encourage rule making by the Illinois Department of Natural Resources, but rather refused to expand the concept of "reasonable use" to support a public servitude over riparian rights in non-navigable waters. The case is a primer for real property lawyers and environmental lawyers who are considering the concepts of navigable waters, riparian rights and public servitudes.

The rules announced by these courts in each case are substantively interesting, but perhaps, more importantly, is the respective courts' approach to deciding questions before the courts.

In Illinois, the Climate and Equitable Jobs Act (CEJA) was signed into law and became effective on September 15, 2021. What is its future in the courts now?

EPA Launches New National Office Dedicated to Advancing Environmental Justice and Civil Rights

Finally, On September 24, 2022, US EPA announced the creation of a new "National Office" dedicated to advancing Environmental Justice and Civil Rights. See: <https://www.epa.gov/newsreleases/epa-launches-new-national-office-dedicated-advancing-environmental-justice-and-civil>. According to the press release, "the new office will dedicate more than 200 EPA staff in EPA headquarters and across 10 regions towards solving environmental challenges in communities that have been undeserved for far too long." According to EPA, the office will "oversee the implementation and delivery of \$3 billion climate and environmental justice block grant programs created by the Inflation Reduction Act, a critical component of the law's historic \$60 billion in investments in environmental justice."

Seems that there is an easier way to achieve environmental justice, but keep an eye on this space for more. ■

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regulations, known as the Clean Power Plan, established final emission guidelines for states to use when developing plans to reduce greenhouse gas (“GHG”) emissions from existing fossil fuel-fired EGUs. *Id.* at 64,662, 64,707. The guidelines in the Clean Power Plan were based on USEPA’s determination of the “best system of emission reduction . . . adequately demonstrated” (“BSER”). Under section 111(d) of the Clean Air Act, states must adequately demonstrate to USEPA that they have established standards of performance that reflect the degree of emission limitation achievable through application of BSER, considering costs of achieving such reduction and non-air quality health and environmental impact and energy requirements. *Id.* As to the Clean Power Plan, USEPA determined that the BSER was the:

combination of emission rate improvements and limitations on overall emissions at affected EGUs that can be accomplished through the following three sets of measures or building blocks: (1) [i]mproving heat rate at affected coal-fired steam EGUs; (2) [s]ubstituting increased generation from lower-emitting existing natural gas combined cycle units for generation from higher-emitting affected steam generating units; or (3) [s]ubstituting increased generation from new zero-emitting [renewable energy] generating capacity for generation from affected fossil fuel-fired generating units.

Id. The Clean Power Plan, however, never went into effect. After its promulgation, several parties filed petitions for review and a stay of its implementation was granted. *West Virginia*, 142 S. Ct. at 2604; *West Virginia, et al. v. Env’t Prot. Agency, et al.*, 577 U.S. 1126, 136 S. Ct. 1000 (2016).

After a change in administration, USEPA repealed the Clean Power Plan in 2019. 84 Fed. Reg. 32,520 (July 8, 2019). Concluding that the Clean Power Plan exceeded the statutory authority of Section 111(d) of the Clean Air Act, USEPA reasoned that

generation shifting at the grid level should not have been considered as part of the BSER. *Id.* at 32,523. In the final rule that repealed the Clean Power Plan, USEPA also finalized a replacement rule: the Affordable Clean Energy Rule (“ACE Rule”). *Id.* at 32,520. Under the ACE Rule, USEPA determined that the BSER for emissions of carbon dioxide from existing coal-fired EGUs was heat rate improvement (“HRI”) in the form of a specific set of technologies and operating and maintenance practices that could be applied at designated existing coal-fired electric utility steam generating units. *Id.* at 32,532.

Several states and private parties filed petitions for review of the repeal of the Clean Power Plan and enactment of the ACE Rule. *West Virginia*, 142 S. Ct. at 2605. Other states and private parties intervened in the D.C. Circuit Court of Appeals to defend both actions. *Id.* The petitions were consolidated. The D.C. Circuit held that the reasoning for USEPA’s repeal of the Clean Power Plan, i.e., that generation shifting at the grid level exceeded the authority under Section 111 of the Clean Air Act, was in error and that the Clean Air Act could be read to encompass generation shifting. *Am. Lung Ass’n v. Env’t Prot. Agency*, 985 F.3d 914 (D.C. Cir.), rev’d and remanded sub nom. *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587 (2022). The D. C. Circuit vacated USEPA’s repeal of the Clean Power Plan and remanded to USEPA for further reconsideration. *Id.*

After a change in administration, USEPA moved for, and the D.C. Circuit granted, a partial stay of the issuance of its mandate regarding the Clean Power Plan in order to ensure that the Clean Power Plan would not immediately go into effect. *West Virginia*, 142 S. Ct. at 2606. The states and private parties defending the repeal of the Clean Power Plan filed petitions for certiorari, which were granted by the Supreme Court and consolidated into one case. *Id.*

Analysis

The Supreme Court explained that, under its precedents, this was a major questions case. *Id.* at 2610. The major questions

doctrine provides that federal administrative agencies cannot promulgate regulations that answer “major questions” without specific authority from Congress. *Id.* The Clean Power Plan represented a major shift from historical regulation of power plants because, prior to 2015, USEPA had always established emissions limits under Section 111 based on implementation of measures that would reduce emissions. *Id.* USEPA had never set emissions limits by suggesting a system that would reduce pollution by shifting emitting activity from “dirtier” to “cleaner” sources. *Id.* The Court also pointed to USEPA’s inaugural Section 111(d) rulemaking, in which USEPA stated that Congress intended a technology-based approach to regulation under Section 111(d). *Id.* at 2611. Further, USEPA itself had noted that it historically pointed to “more traditional air pollution control measures,” including efficiency improvements, fuel-switching, and add-on controls. *Id.*

USEPA explained that the more traditional air pollution control measures would not result in sufficient emissions reductions to mitigate the effects of climate change. *Id.* at 2611. In order to achieve the necessary carbon dioxide reductions, USEPA looked to the generation shifting approach, which it characterized as a “broader, forward-thinking approach to the design” of the Section 111(d) regulations. *Id.* “Rather than focus on improving the performance of individual sources, it would ‘improve the overall power system by lowering the carbon intensity of power generation.’” *Id.* As to the potential broad effect of the Clean Power Plan, the Court explained that, “[u]nder its newly ‘discover[ed]’ authority, however, EPA can demand much greater reductions in emissions based on a very different kind of policy judgment: that it would be ‘best’ if coal made up a much smaller share of national electricity generation.” *Id.* at 2612.

Given the circumstances, the Court found that the precedent “counsels skepticism” toward USEPA’s position that Section 111 provides it authority to set carbon emissions limitations based on a generation shifting approach. *Id.* at 2614. In order to overcome

the skepticism, under the major questions doctrine, clear congressional authorization to regulate in that manner must exist. *Id.* The Court was not persuaded by USEPA's position that it has authority to regulate in that manner pursuant to its authority under the Clean Air Act to establish emissions limitations at a level reflecting the application of BSER. *Id.* at 2614-15.

Holding and Impacts

The Court held that it is not plausible that Congress gave USEPA the authority to adopt on its own a generation shifting scheme that would force a nationwide transition away from coal to generate electricity. *Id.* at 2616. "A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." *Id.* The Clean Power Plan exceeded the authority given to USEPA under Section 111(d) of the Clean Air Act. The Court reversed the judgment of the D.C. Circuit and remanded the cases. *Id.*

Moving forward, USEPA will likely be more cautious in proposing regulations under Section 111(d) and will likely include more detailed analyses and support for the derivation of authority for proposed rules. In the past, when statutes were ambiguous, courts have relied heavily on deference to the administrative agency, which has the technical expertise on the subject matter. In *West Virginia v. EPA*, however, the Court ruled that USEPA did not have authority to promulgate a specific set of rules where Congress did not expressly give it authority to do so, relying heavily on the major questions doctrine. Until Congress enacts authority for a generation shifting approach or something similar, USEPA will need to regulate GHGs from EGUs using traditional methods. Additionally, the major questions doctrine will likely have an increase in usage going forward in federal cases involving administrative agency actions.

Illinois

In Illinois, the Climate and Equitable Jobs Act (CEJA) was signed into law and became effective on September 15, 2021. CEJA is a comprehensive energy statute, which aims to eliminate carbon emissions from electricity generation, or "decarbonize",

by 2050. The shift away from carbon-based generation under CEJA is aggressive, which targets a transition to 40% of electricity being generated by renewable energy by 2030, 50% renewable energy by 2040, and 100% clean energy by 2050.

Pursuant to CEJA, private coal-fired and oil-fired EGUs must reach zero carbon emissions by January 1, 2030. Private natural gas-fired units must reach zero emissions by 2045, with CEJA prioritizing reductions by units with higher rates of emissions and those in and near environmental justice communities. In order to meet these requirements, most coal, oil, and natural gas-fired facilities that generate electricity will need to implement new technology and likely implement a gradual shutdown of generation units. The gradual phase out of coal-fired power plants and natural gas plants is subject to adjustments by several state agencies to try to ensure energy grid reliability.

CEJA governs power generation from private and municipal coal, oil, and natural gas-fired EGUs and sets a roadmap for shifting power generation away from these EGUs towards clean energy sources. While the overall approach is different from the Clean Power Plan, CEJA is, on a basic level, a generation shifting approach. However, the difference with CEJA is that the Illinois approach was promulgated via statute by Illinois General Assembly, not by an administrative agency rulemaking, which would require legislative authority for its actions. Importantly, the *West Virginia v. EPA* decision did not limit the authority of individual states to adopt clean energy initiatives. After the Supreme Court's decision, absent action by Congress, individual states, as opposed to USEPA, will need to take the lead in these initiatives, perhaps following Illinois' approach. ■

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