The PIOGA Press

July 2022 • Issue 147

The Supreme Court narrows EPA's authority to regulate greenhouse gas emissions

By Kevin Garber, Varun Shekhar, Gina Falaschi and Marley Kimelman
Babst Calland

This article is an excerpt of The 2022 Babst Calland Report, which represents the legal perspective of Babst Calland's energy attorneys addressing the most current business and regulatory issues facing the energy industry. To view the full report, go to reports.babstcalland.com/energy2022-2.

On June 30, the United States Supreme Court held, in *West Virginia v. EPA*, that the U.S. Environmental Protection Agency may not force existing coal-fired power plants to shift their electricity generation to cleaner sources under Section 111(d) of the Clean Air Act, thereby narrowing EPA's authority to regulate greenhouse gas emissions from power plants.

West Virginia and a coalition of states, power companies and coal interests petitioned the Supreme Court to review the D.C. Circuit's 2021 invalidation of the Trump administration's 2019 Affordable Clean Energy rule, which had replaced the Obama administration's 2015 Clean Power Plan. Under the Clean Power Plan, EPA calculated rate-based (amount of carbon dioxide emitted per megawatt hour generated) and mass-based (total amount of carbon dioxide emitted per year) targets for each state through application of three "building blocks" that were deemed to constitute the "best system of emission reduction…adequately demonstrated" (BSER) under Section 111(d) of the Clean Air Act: (1) improvements to heat rates (a measure of heat input to power output efficiency) achieved at individual power generation facilities; (2) shifting power generation to natural gas-fired or combined cycle facilities; and (3) increased power generation from renewable and zero-emitting sources. The latter two "building blocks" constituted the Clean Power Plan's designed "generation shifting." EPA projected that this BSER would drive down electricity derived from coal-fired sources from 38 percent of the nation's overall generation in 2014 to 27 percent by 2030.

The Supreme Court held that EPA exceeded its authority under Section 111(d) of the Clean Air Act because Congress did not clearly authorize generation shifting regulations to constitute BSER under the statute. The court found EPA's program presented a "major questions" issue, the resolution of which is to be determined by determining whether Congress so "specifically and clearly" empowered regulatory agencies through legislation to make sweeping, economy-wide changes. Here, the court found 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 court stated that the statutory term "best system of emission reduction" did not give the agency the authority to require widespread generation shifting as a means to reduce CO2 emissions because "the word [system] is an empty vessel" and "[s]uch a vague statutory grant is not close to the sort of clear authorization required by our precedents." The court concluded that a "decision of such magnitude and consequence [i.e., the amount of coal-based generation] rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."

The decision has significant implications for the Biden administration's focus on climate change specifically and for administrative law generally. For example, it is very unlikely that EPA may adopt a federal carbon cap-and-trade program administratively without Congressional authorization.

The court's reasoning, while not necessarily binding, should also be persuasive in states that try to adopt wide-ranging climate change programs administratively based on state law, like the Pennsylvania Regional Greenhouse Gas Initiative, where state statutes do not provide such authority.