

# PUBLICATION

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## Supreme Court Invokes Major Questions Doctrine to Curb EPA's Ability to Regulate Carbon Emissions

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**On June 30, 2022, the Supreme Court held that the U. S. Environmental Protection Agency (EPA) does not have the authority under the Clean Air Act (CAA) to promulgate a program requiring power plants to shift away from coal to natural gas and renewables. In this Alert, we will review the Supreme Court's decision and the potential implications for ESG-related litigation for public companies in the future.**

In 2015, the EPA promulgated the Clean Power Plan (CPP) to target carbon dioxide emissions from existing coal- and natural-gas-fired plants. Citing its authority under Section 111(d) of the CAA, the EPA claimed it had the authority to find the best system of emission reduction (BSER) for the kind of existing source at issue, and use the BSER to determine the target rates and energy mix with which each state will have to comply. The EPA also determined how much generational shifting could be done and cited a "reasonable amount" based on how much more electricity would be produced by natural gas and renewable sources plants without causing undue cost or reducing the overall power supply. According to the Supreme Court's opinion, the EPA projected an 11 percent decrease in emissions, which is a performance rate so strict that no existing coal plant would have been able to achieve the emissions limitation. The Supreme Court stayed the CPP, which prevented the rule from taking effect. The rule was later repealed by the Trump Administration.

After a complicated procedural history, the case came before the Supreme Court on the issue of whether Congress had granted the EPA the authority under Section 111(d) of the CAA to devise state emissions caps based on the generation shifting approach taken in the CPP. The Court, invoking the Major Questions Doctrine, held that it did not.

### What is the Major Questions Doctrine?

Under the Major Questions Doctrine, never before cited by a majority opinion of the Supreme Court, there must be clear congressional authorization before administrative agencies make decisions of vast "economic and political significance." In other words, it requires a clear congressional statement from which an agency can draw the conclusion that Congress intended to delegate authority to regulate a fundamental sector of the economy.

Here, the Court found no such authorization in Section 111(d), describing it as vague, rarely used, and a "gap filler." In addition, the Court noted that Congress had "conspicuously and repeatedly" declined to enact the regulatory program itself. Finally, the Court looked at how Section 111(d) had been used historically, which was to set emission limitations based upon technology at a plant level, referred to as "inside the fence line," rather than on a state-by-state level.

### Impact on Climate Change

Moving forward, the Biden Administration will be limited in its ability to claim authority to require transformational generation shifting regulations for coal-fired power plants and will have to focus on BSER measures that can be achieved at the facility-level. The administration may focus on implementing on-site measures, regulations, and co-benefits for other power plant emission rules, and reductions from other sources that produce greenhouse gasses.

Importantly, Congress continues to retain the authority to act on climate change by enacting economy-wide emissions programs or drafting clearer legislation on the EPA's, and other agencies', authority. However, given the practically even split in both the House and the Senate, it is unlikely that either of these actions will be taken quickly.

### **Implication for ESG-Related Litigation**

The Supreme Court not only opened the door to additional challenges to federal agencies' regulatory authority, but also confirmed who would have standing to bring such challenges.

This is the Supreme Court's first opinion that explains and applies the Major Questions Doctrine as a limit on a federal agency's regulatory authority. It can be expected that this doctrine will develop further through additional challenges to various agencies' authorities. For example, the Securities and Exchange Commission (SEC) was set to propose final rules requiring public companies to include climate-related disclosures on their public annual reports. The SEC has already faced resistance to the proposed rules, and after this decision is likely to reevaluate whether it has the authority to promulgate the rules.

The Court also used this opinion to broaden the interpretation of standing. The EPA claimed the suit was moot after it announced it was not going to enforce the CPP. However, the Court still found that the plaintiffs had standing because of the EPA's insistence that Section 111(d) gave it authority to impose emissions limits through the use of generation shifting.

If you have any questions about this topic, reach out to [Wayne Cropp](#) or [Annie Kenville](#).

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