THE ILLINOIS MANUFACTURER

FOURTH QUARTER 2022

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Ingersoll Machine Tools
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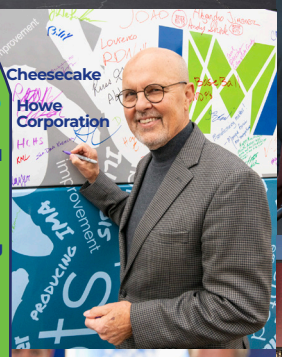
NIU Homecoming
Howe Corporation
Walmart Sterling
Phoenix Packaging
Hinsdale Central Athletic Events
CSL Behring
Morton Industries
Beer Nuts
Watchfire Signs
Knapheide
State Capitol
Macon Resources
Dometic Marine
North American Lighting
Mac Medical
iTape



2022 MAKERS ON THE MOVE

THE IMPACT OF WEST VIRGINIA V. EPA ON ILLINOIS

HEPLERBROOM

On June 30, 2022, the United States 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. Env't Prot. Agency, et al., 142 S. Ct. 2587 (2022). The Court held that the generation shifting approach exceeded USEPA's authority under Section 111 of the Clean Air Act. While the breadth of the impact of this decision has yet to be seen, the decision will likely have little impact on Illinois' current energy approach under the Climate and Equitable Jobs Act. Still, 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 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"). As to the Clean Power Plan, USEPA determined that the BSER included substituting increased generation from lower-emitting existing natural gas combined cycle units for generation from higher-emitting affected steam generating units or substituting 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. Id. at 32,532.

Petitions for review of the repeal of the Clean Power Plan and enactment of the ACE Rule were filed and several states and private parties intervened to defend both actions. West Virginia, 142 S. Ct. at 2605. The D.C. Circuit Court held that the Clean Air Act could be read to encompass generation shifting, vacating USEPA's repeal of the Clean Power Plan and remanding to USEPA for further reconsideration. 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).

After another 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 USEPA had never set emissions limits by suggesting a system that would reduce pollution by shifting emitting activity from "dirtier" to "cleaner" sources. Id. 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. at 2611. USEPA explained, however, 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.

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

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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. Other states may follow Illinois' approach of legislating specific emission reductions.

It is unlikely Congress will pass legislation in the near future increasing USEPA's regulatory authority in direct response to the Supreme Court's decision. Less than two months following the West Virginia v. EPA decision, however, Congress passed new legislation that takes a different approach. On August 16, 2022, the Inflation Reduction Act was signed into law. As opposed to legislating specific emission reductions, the legislation encourages the shift to clean energy through funding and tax credits for renewable energy, energy efficiency, clean vehicles, and clean fuels. Manufacturers, particularly those involved in the energy sector, should keep an eye out for emerging federal programs or regulations that may apply in conjunction with CEJA following the passage of the Inflation Reduction Act.◆