



Practical Impacts of *West Virginia v. EPA*

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Presented by: Donald K. Shandy
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Practical Impacts of *West Virginia v. EPA*

I. Major Questions Doctrine

- “Although nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of legislative power by transforming that power to an executive agency”

Supreme Court Justice Neil Gorsuch

❖ *Chevron* (1984)

❖ *Auer* (1996)



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II. Clean Power Plan (Obama Administration)

A. New Source Performance Standard

- § 111(d) – Existing Sources
- “Best System of Emission Reduction” (BSER)
- Historically, 111(d) required installation of emission controls on a particular emission source (*e.g.*, coal-fired power plant)



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II. Clean Power Plan (Obama Administration) (cont.)

B. CPP chose not to install controls on coal-fired units but rather required shifting from coal to natural gas and renewables (e.g. wind and solar)

- Goal – reduce coal generation to 27% by 2030
- Cost: \$\$\$ Billions



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III. Affordable Clean Energy Rule (“ACE”)

- Trump Administration response (2016)
- ACE focused 111(d) back on existing emission source upgrades
- Trump EPA argued CPP exceeded authority of 111(d)
- D.C. Circuit Court of Appeals said Trump Administration was incorrect and that “generation shifting” was appropriate under 111(d)



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IV. United States Supreme Court

- Holding upheld Trump Administration action repealing the CPP. Chief Justice Roberts (writing for the majority) adopted the Trump Administration reasoning that 111(d) does not allow for generation shifting methods to achieve emissions budgets



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V. Practical Implications of Supreme Court Ruling

A. Important in terms of how future regulations will be developed and applied

- Trims (but does not overrule) *Chevron* and *Auer* defense

B. The NSPS 111(d) approach is largely ineffective as a macro strategy

- It requires case by case actions (slow & cumbersome)
- Existing 111(d) sources only account for half of the GHG reductions needed to have a tangible impact



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V. Practical Implications of Supreme Court Ruling (cont.)

C. The Supreme Court did not restrict EPA to use 111(d) to control GHG emissions “inside the fence-line”

D. Other provisions of the federal Clean Air Act. (e.g., § 115 – International Air Pollution) Could be utilized to require all states to reduce GHG emissions

- EPA could initiate a State Implementation Plan (SIP) call

E. EPA could alter existing National Ambient Air Quality Standard (NAAQS)

- Supreme Court has previously approved “cap & trade” concept



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VI. How does *West Virginia v. EPA* impact legislative programs reflected in the recently adopted “Inflation Reduction Act”?

- Methane emissions in Oil & Natural Gas Industry
- Carbon Sequestration



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VII. Questions





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