

INSIGHTS

Understanding West Virginia v. EPA, Part 2: The Impact

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In the second of a two part conversation about *West Virginia v. EPA*, Bracewell Environmental Law Monitor host [Daniel Pope](#) talks with Bracewell partners [Jeff Holmstead](#) and [Jeff Oldham](#) about the implications of the decision for federal agencies, the Biden administration and courts as they seek to apply this new Supreme Court precedent.

Jeff Holmstead is a partner in our [environment, lands and resources](#) group in our Washington, DC office. Jeff Oldham is a partner in our [litigation and appellate](#) practice in Houston and Austin.

Where does *West Virginia v. EPA* leave the Biden administration in terms of its range of motion to address climate change over the remaining years of President Biden's first term in office?

I don't think that this decision has a significant impact on EPA. Yes, on the SCC, yes on FERC. There is certainly an argument that if EPA can't decide what percentage of that electricity should come from coal, then it doesn't have authority to decide how much of our cars are electric versus something else. There are some complications with that argument, but I am sure that that will be raised. Otherwise, the things that I think EPA was planning to do were pretty straight-forward, such as regulate methane emissions from oil and gas operations. There may, however, be issues there in terms of technical and economic feasibility. I don't want to say that the administration can do whatever it wants, but it's certainly within its lane there and using traditional sort of approaches to regulation.

What impact will *West Virginia v. EPA* have on clients? How can clients wrap their heads around the significance of this ruling and rely on it in the future when they consider new agency actions that are going to be affecting them in their business?

Since the decision came out, I have had calls and emails from a number of clients saying, "Well, how does this help us in our case, and in our desire to challenge an EPA rule?" For the most part, we have had to say we think you have been wronged by the agency, but we think the arguments we have will not involve the major question doctrine. I do think certainly we will see it more often in cases. I have mentioned three: the tailpipe standards, the FERC rule and the SEC.

It will also be interesting to see how much it constrains agency behavior. We may ultimately not ever be able to point to things and say, "Oh, here's what it did or what it didn't do." But if

you're a general counsel at an agency or a commission, and you're trying to make sure that you don't spend a lot of time working on a rule that's not going to stand up in court, you're certainly going to have to pay attention to this and not simply try to come up with a plausible interpretation of your statute that lets you do what you might want to do, even though that is certainly extraordinary, at least for purposes of that agency.

What are your thoughts on whether Congress actually has the ability to act on a topic like this on any particular need that an agency like EPA might need? If anything?

There is no question about that, but I also think, and we have seen Congress, in recent days even, come together on certain bipartisan issues. One of the problems we have had with climate change legislation in DC is you have advocates who are very concerned about climate change, who have very ambitious ideas about legislation and have not been willing, in some cases that I can think of, to make compromises that in their view would have made the legislation not ambitious enough. I think one of the reasons is that I have been involved in conversations where they have basically said as long as we have Clean Air as a backstop, we know that EPA has authority to take care of the problem.

Want to learn more? Contact [Daniel Pope](#), [Jeff Holmstead](#) and [Jeff Oldham](#) with your questions.

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