Ever Played Ping Pong While Riding a Roller Coaster?

...and other musings on the current state of administrative law

Wyoming v. U.S. Dep't of Interior, No. 2:16-CV-0285 (D.Wyo. Oct. 8, 2020)

In October, Judge Scott W. Skavdahl writing for the United States District Court for the District of Wyoming overturned and vacated the Bureau of Land Management's ("BLM's") Obama-era waste prevention rule, better known as the "Venting and Flaring Rule" (the "2016 rule").

As a starting point, the case involved a challenge to BLM's efforts to update the way in which the waste of oil and gas resources on federal and Indian lands is managed under the Mineral Leasing Act ("MLA"). From 1980 to 2016, BLM accomplished this through Notice to Lessees 4A ("NTL 4A") which, at a high level, assessed royalties on "avoidably lost" gas while allowing venting or flaring on "unavoidably lost" gas. The 2016 rule maintained this general framework but added substantial detail to the avoidably lost/unavoidably lost determination and imposed new requirements on operators.

It was these new requirements that caused an uproar. From industry's perspective, by requiring control of emissions during certain aspects of the exploration and production process, BLM had gone too far, imposing air quality regulations under the guise of the Agency's MLA waste authority.[1] On the other hand, from the perspective of California, New Mexico, and a host of environmental groups, BLM had imposed sensible requirements squarely within BLM's statutory authority to prevent waste. To boil down a very complicated legal challenge, the litigation centered largely on the scope of BLM's statutory authority to control waste under the MLA.

Underlying the 2016 rule were weighty issues of federal climate change policy and questions as to which statutes or agencies should pursue these policies—BLM under its MLA waste authority or the Environmental Protection Agency ("EPA"), the states, and tribes under the Clean Air Act. Notably, President Obama's 2014 climate plan and methane reduction strategy targeted vented and flared gas from public lands and BLM cited the administration's climate policy as a principle reason for the rule.

The Trump Administration immediately embarked on multiple efforts to revise the 2016 rule, issuing temporary suspensions and eventually a revised rule in September 2018 (the "2018 rule"). The 2018 rule largely removed what industry believed were the unlawful air quality provisions. Industry fought to stay the Wyoming litigation over the 2016 rule while California, New Mexico, and environmental groups

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successfully challenged the Trump Administration's re-writes in the California courts. That initiative culminated in a federal court decision from the Northern District of California in July 2020 overturning the 2018 rule, which would place the 2016 rule back in effect after a ninety-day grace period. Queue up the stayed Wyoming litigation over the 2016 rule.

The October 2020 Wyoming vacatur of the 2016 rule came nearly four years after litigation commenced. As a federal judge once told me, the wheels of justice do actually move, it's just often hard to see. In this case, every district court that looked at the Obama or Trump rules found them unlawful. What that says about the judicial system, judicial appointments, venue, and the time it takes to litigate and resolve these cases are questions better left for another day. What is clear, however, is that all stakeholders—whether they be environmental organizations, the regulated community, or the BLM itself—have faced massive regulatory uncertainty in the interim. It is this "ping-ponging regulatory regime," as the Wyoming court termed it, that prompted Judge Skavdahl to observe:

> [T]hree and a half years later, after several turns and loopty-loops, it seems the roller coaster has returned to the station, though the Court doubts any of the parties will be exiting the ride just yet, as it is likely this Court's decision will not end this ride but simply serve as a lift hill transporting it to another level.

The court was referring to potential appeals in both the Ninth and Tenth Circuits and perhaps potential elevation to the United States Supreme Court given the significant

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legal questions circling this case. And although "when" and "how" this case resolves are interesting topics worthy of discussion, this case raises even more intriguing questions that point to the heart of our Constitutional scheme of governance.

In concluding the 57 page opinion, Judge Skavdahl quoted Justice Thomas's concurrence and observation in Michigan v. E.P.A., 576 U.S. 743, 762 (2015) (which, not coincidentally, is a Clean Air Act case): "[s]tatutory ambiguity thus becomes an implicit delegation of rule-making authority, and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress." The court followed up, eloquently framing the issue:

> The reality is that in an age of Congressional gridlock, expansive authority and policy are being carried out often through administrative agencies. Adding further concern to this problem is the constant change in policy, from one administration to the next, which in turn has embroiled the courts, involving issues ranging from immigration to environmental policy. Certainly this Court has and will continue to apply the law in determining the legal appropriateness of agency actions challenged before it, but the roller coaster is better kept in an amusement park.

The statement hints at concerns about the growing role and size of the administrative state, Constitutional separation of powers, and the scope of Congressional delegation of authority to unelected executive branch officials in the face of Congressional inaction. Although these questions are not new, they seem more ubiquitous and perhaps more divisive than ever before. And with a new administration poised to take office, it is difficult to see how there will not be another wide policy swing. In the realm of environmental policy, this extends beyond just this case and the regulation of methane and waste from the oil and gas sector. Implicated here too are issues such as regulating emissions from the electric generating sector (i.e., the Clean Power Plan and Affordable Clean Energy Rule), greenhouse gas standards for motor vehicles, and the perpetually confusing scope of federal regulation over navigable waters under the Clean Water Act.

The court's statement hints also at the role which Article III courts do or should play in refereeing seesawing policy battles across a polarized electorate. These policy battles range from immigration and environmental policy to healthcare, voting rights, redistricting, campaign finance, among many others. And in this respect, I sense some frustration with the reality that in the time it takes the courts to hear and decide the legality of nationwide rules, the pendulum has often shifted again, rendering the court decisions temporary, if not a nullity.

Drawing one lesson or finding a single solution to this paradigm is perhaps a fool's errand. Democracy is messy and this grinding state of affairs may be precisely what the founders intended. Or maybe there is truly a better way. Those are noteworthy and consequential questions beyond the capacity of this short article. One thing, however, is certain: on the horizon we can anticipate more ping pong matches waged on increasingly bigger, and faster-moving, roller coasters. ***WL***

(Endnotes)

1 Full disclosure – the author represents industry parties in the challenge to this rule. This article attempts to present an objective discussion on some of the prominent legal and political issues surrounding this case and I do my best to avoid taking any position on the more controversial topics, including most notably, issues related to federal or state climate change policy. And if that legal disclosure were not annoying enough, I am compelled to say this article represents my views only and not those of my clients.

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