FEDERAL JUDGE: AUTHORITY LACKING FOR REGULATION OF HYDRAULIC FRACKING

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Environment, Land and Natural Resources Alert

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The federal district court in the state of Wyoming recently enjoined the Bureau of Land Management ("BLM") from regulating hydraulic fracturing ("fracking"), effectively ending, at least for now, the federal government's plans to comprehensively regulate what it believes are potential environmental impacts of this activity on federal and Indian lands. The court's conclusion—that the agency has no authority to regulate activity because it was not expressly granted such power by Congress—is the latest example of a court using the well known "Chevron" doctrine that governs the scope and extent of a court's authority to review an agency's interpretation and application of a law. This Alert reviews the decision and identifies some of the broader issues that may be implicated relating to the exercise of federal agency authority.[1]

CASE SUMMARY

Background

In 2015, BLM issued final regulations governing a wide variety of activities associated with hydraulic fracturing, the process by which natural gas or oil is extracted from underground shale rock. 80 Fed. Reg. 16,128-16,222. Those regulations addressed wellbore construction, chemical disclosures, and water management. Many questioned the scope, extent and need for these regulations.[2] The states of Wyoming, Colorado, North Dakota, and Utah joined industry associations, including the Independent Petroleum Association of America and Western Energy Alliance to challenge the BLM's authority to regulate this activity. [3]

The Decision

On June 21, 2016, the U.S. District Court for the District of Wyoming permanently enjoined BLM from enforcing the regulations, concluding that Congress did not grant it the authority to do so under any of the statutes upon which it relied. BLM relied on four statutes to assert its authority to regulate potential environmental impacts of hydraulic fracturing on federal and Indian lands: the Mineral Leasing Act of 1920 ("MLA"), the Federal Land Policy and Management Act of 1976 ("FLPMA"), the Indian Mineral Leasing Act of 1398 ("IMLA"), and the Indian Mineral Development Act of 1982 ("IMDA"). It claimed that congressional silence on the matter of its regulatory authority over hydraulic fracturing meant that Congress actually permitted BLM to infer it had the power to do so. In finding against BLM, the court reviewed each statute, using the "Chevron" doctrine[4] to determine whether Congress had expressly addressed the issue of whether the BLM has the authority to regulate underground impacts of hydraulic fracturing. Under Chevron, the court first determines if Congress specifically addressed the issue before it. If so, then the agency's views are of no consequence; the court follows the

congressional mandate. If Congress has not spoken to the issue, then the court defers to the agency if its interpretation of the law is reasonable. In this case, the court determined that each of these statutes grant specific authorities to BLM and do not include the power to regulate the environmental impacts of hydraulic fracturing.

First, the Court found that BLM has no authority to regulate hydraulic fracturing under MLA because the main purpose of MLA as expressed by Congress is to incentivize oil and gas exploration through noncompetitive leasing, and any regulatory authority granted to BLM is limited to regulating oil and gas leases in the interest of conserving *surface* resources. Since the environmental impacts of underground activity are plainly not within the sphere of incentivizing exploration or surface resources, the court rejected this argument.

With respect to FLPMA, the court concluded that Congress expressly enacted FLMPA as a land planning statute that focuses on multiple uses of federal lands, and did not expressly include within that scope the regulation of the environmental impacts of those activities. The Court held that FLPMA's grant of authority to BLM is limited to preventing degradation of the land through the approval or denial of projects related to oil and gas discovery. Finally, the court found that IMLA and IMDA, combined, provide BLM general regulatory authority over oil and gas development on Indian lands and that regulatory authority incorporates the MLA regulations. Because the MLS regulations are limited to addressing surface impacts of hydraulic fracturing, the reach of IMLA and IMDA also are limited.

The court also looked to other sources to conclude that Congress *has* explicitly spoken to the issue of federal agency regulation of hydraulic fracturing, noting that Congress actually stripped an agency of such authority in 2005. Under the Safe Drinking Water Act of 1974 ("SWDA"), Congress explicitly created a regulatory program for the protection of underground sources of drinking water that required the Environmental Protection Agency ("EPA") to regulate hydraulic fracturing on federal, state, and tribal land. However, the court found that when Congress enacted the Energy Policy Act of 2005 ("2005 EP Policy Act"); it explicitly revoked EPA's authority to regulate hydraulic fracturing other than for injections involving diesel fuels. Since Congress had spoken directly to the "topic at hand," BLM overstepped its boundaries and committed executive branch overreach in issuing the regulations.

IMPLICATIONS FOR THE REGULATION OF HYDRAULIC FRACTURING

The immediate impact of this decision on BLM's authority to regulate hydraulic fracturing is obvious—the program is enjoined and unless an appeal is successful, will not move forward. This will provide regulatory relief to the operators of approximately 100,000 producing oil and gas wells on over 32 million acres of federal lands under lease with BLM across the United States.[5] But even this direct and immediate impact raises questions:

- Will the decision be effective only in Wyoming (where the court sits), or will it be effective in the other states that joined as petitioners, or for that matter, nationally?
- Does the fact that the case was actually led by states rather than industry impact its vitality on appeal?[6]
- Will the state petitioners be open to some form of settlement whereby BLM agrees to a more limited version of the hydraulic fracturing rules rather that risking the uncertainties inherent in an appeal, which BLM already has indicated it plans to pursue?

- How will the upcoming election be impacted by this decision, both in terms of how the directly affected states' voters will lean, and in terms of potential legislation in a new Congress with a new President?

LARGER POTENTIAL IMPACTS FOR ADMINISTRATIVE REVIEW

This is not the first time that an agency has claimed to have regulatory authority in an area that Congress has not explicitly granted it. In 1996, the Food and Drug Administration ("FDA") attempted to regulate tobacco products under the Food, Drug, and Cosmetic Act despite no explicit authority in that law to do so. More recently, the EPA attempted to expand the definition of Emission Control Area ("ECA") to include the Great Lakes region despite questionable congressional authority to do so, thereby allowing the EPA to regulate emission standards for the largest marine vessels that traverse the lakes. In 2014, the Department of Homeland Security ("DHS") attempted to expand the Deferred Action for Childhood Arrivals Program ("DACA") to include millions more eligible persons in the wake of a failed attempt by Congress to enact immigration reform.

Citing the *Chevron* doctrine, courts ultimately struck down the attempts made by the FDA and DHS for acting in a regulatory sphere when Congress had not explicitly authorized the agencies to do so.[7] No one brought a legal challenge to the EPA's creation of domestic emissions control areas, even though comments raising those issues were filed with the agency.[8]

Congress has taken note of the deferential *Chevron* doctrine and how it is perceived by some as a means by which a court may allow an agency to regulate in areas that Congress may not have intended. In March of 2016, both the House and the Senate introduced the Separation of Powers Restoration Act of 2016 (S. 2434 and H.R. 4768), which would alter the *Chevron* analysis: instead of courts having to defer to agencies' expertise when congressional intent regarding the agency's authority is not clearly articulated in the statute, courts would perform a *de novo* review of all agency rulemaking decisions. Some might argue that decisions like *Wyoming* and *Texas* make legislative action to 'rein in' agencies unnecessary. Others may suggest that the position taken by the government at the district court level—that an agency's power may be inferred without express congressional direction—in order to achieve results that the agency believed Congress intended presents too great a risk of agency overreach.

CONCLUSION

It is relatively rare for a court to strike down an entire regulatory program based on lack of statutory authority to enact it. Doing so in an area directly impacting domestic energy production during an election year is even more noteworthy. The confluence of the appellate, legislative and election processes likely mean that this issue will remain a focal point for the oil and gas industry for at least the next year. Other industries could be impacted to the extent this decision impacts legislative efforts to alter the scope of review as articulated in *Chevron*. Companies with impacted interests should monitor related developments and seek opportunities to engage in ways that can affect the ultimate outcome, including in a new White House Administration in January 2017.

Notes:

[1] For more analysis on the chemical disclosure requirements of hydraulic fracturing, see K&L Gates' Global Government Solutions 2015 Annual Outlook, p. 66.

[2] The Western Energy Alliance called the proposed regulations redundant and sponsored an economic study that found the annual cost to industry of the proposed regulations to be more than $345 million. Western Energy Alliance, "What is Fracking?, December 21, 2015. <https://www.westernenergyalliance.org/why-western-oil-natural-gas/what-fracking>

[3] *Wyoming v. Dept. of Interior*, Case No. 2:15-cv-00041-SWS (D. Wyo. June 21, 2016).

[4] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[5] *See* BLM News Release, re: *BLM Releases Statistics on Oil and Gas Activity on Federal, Indian Lands*, (Apr. 11, 2016), available at http://www.blm.gov/wo/st/en/info/newsroom/2016/april/nr_04_11_2016.html.

[6] Not surprisingly, the government has already indicated its intent to appeal the decision.

[7] Food & Drug Admin. V. Brown Williamson, 529 U.S. 120 (2000); U.S. v. Texas, Case No. 15-40238 (5th Cir. Nov. 25, 2015)("*Texas*"). *See also* U.S. v. Radley, 659 F. Supp. 2d 803 (S.D.Tex. 2009)(holding that the Commodity Futures Trading Commission acted contrary to Congress's intent under the Commodity Exchange Act ("CEA") when it failed to include a certain trading scheme under a statutory exemption to the price fixing prohibition of the CEA).

[8] Great Lakes Maritime Task Force Comments on Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters Per Cylinder, 74 Fed. Reg. 166 (proposed August 28, 2009).

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