Published on *The National Law Review* https://natlawreview.com

Stay in your lane! Wyoming Federal Court Finds BLM Venting and Flaring Rule Intrudes on EPA Authority

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On October 8, 2020, Wyoming federal district court Judge Skavdahl struck down the Bureau of Land Management's (BLM) "Waste Prevention Rule," otherwise known as the "Venting and Flaring Rule," which had been promulgated on November 18, 2016, in the closing months of President Obama's second term ("2016 Rule"). *See* Order on Pets. for Review of Final Agency Action, *Wyoming v. U.S. Dep't of Interior,* No. 2:16-CV-0285-SWS (D. Wyo. Oct. 8, 2020) (Order vacating 2016 Rule). The detailed fifty-seven-page decision concludes that in issuing the 2016 Rule, BLM exceeded its statutory authority and acted arbitrarily. The core of the court's holding was that the **2016 Rule was grounded in air quality motivations, which was the purview of the Environmental Protection Agency (EPA) and, therefore, beyond BLM's statutory authority to promulgate**.

The *Wyoming* decision, which comes as the latest volley in a seemingly endless ping-pong match to determine the 2016 Rule's fate, **could have implications that transcend its immediate context** if other federal agencies consider actions that might impinge on the EPA's administration of the Clean Air Act (CAA) or other authorizing statutes.

Brief Background on the 2016 Rule and Litigation

The 2016 Rule aimed to **reduce methane emissions from oil and gas facilities on federal and tribal lands by regulating the venting and flaring of methane**, a byproduct of oil production activities. At a high level, the 2016 Rule prohibited venting except in limited situations, such as emergencies or where technically allowed flaring would be infeasible. The 2016 Rule required operators to capture a certain percentage of gas each month, while allowing specific volumes of flared gas. Under the pre-2016 regulations, BLM distinguished between gas that was avoidably or unavoidably lost, with royalties owed on avoidably lost gas only, and made unavoidable loss determinations on a case-by-case basis. The 2016 Rule kept the avoidable-unavoidable dichotomy but removed BLM's discretion, installing a list of twelve categories of unavoidable losses. The 2016 Rule also imposed reporting requirements for venting and flaring above specified thresholds.

Upon promulgation, a group led by Wyoming and Montana challenged the 2016 Rule in Wyoming

federal court (the "Wyoming litigation"). A short time later, President Trump took office. As with many of the regulations issued at the end of the Obama presidency, the new administration wanted time to assess the 2016 Rule's consistency with applicable statutes and its policies. Thus, on June 15, 2017, BLM announced that it was postponing certain of the 2016 Rule's compliance dates. Supporters of the 2016 Rule immediately challenged the delay, and, just four months later, a California federal court struck down BLM's move. Following that failed delay action—which had not been done through formal rulemaking—BLM issued the Suspension Rule, which was published on December 8, 2017. The Trump administration hoped that the Suspension Rule would fare better than the delay effort, given that BLM issued the Suspension Rule under formal rulemaking procedures. That rule would suspend or delay a large proportion of the 2016 Rule's provisions, but it did not substantively modify them. Further litigation ensued, and a California federal court enjoined enforcement of the Suspension Rule on February 22, 2018. That same day, BLM published its proposed Revision Rule, which would revise or rescind certain portions of the 2016 Rule. Meanwhile, Judge Skavdahl stayed the Wyoming litigation pending further rulemaking developments.

BLM issued the final Revision Rule in late September 2018. California and New Mexico challenged the Revision Rule in California federal court. As that litigation progressed, Judge Skavdahl again stayed the Wyoming litigation. On July 15, 2020, the California federal court vacated the Revised Rule, focusing on the rulemaking process and not the content of rule itself. That court stayed its vacatur of the Revised Rule until October 13, 2020, however, to give the parties in the Wyoming litigation time to thaw and reheat their frozen proceedings regarding the 2016 Rule. Six days later, Judge Skavdahl lifted the stay on the Wyoming litigation and set a briefing schedule. **After this anfractuous odyssey worthy of Homeric recounting, the parties were ready to argue the merits of the challenge—merits briefing concluded on September 4, 2020.**

October 8, 2020 Decision Vacating the 2016 Rule

One of the most interesting aspects of the *Wyoming* decision is that BLM filed a brief that did not defend the 2016 Rule against the state challenges—rather BLM conceded that:

(1) The 2016 Rule exceeded the authority delegated to BLM by Congress in the Mineral Leasing Act (MLA); and

(2) BLM acted arbitrarily and capriciously in failing to:

(a) fully assess the impact of the 2016 Rule on marginal wells;

(b) explain and identify support for the 2016 Rule's capture requirements; and

(c) separately consider the domestic costs and benefits of the 2016 Rule.

Given that BLM was intending to appeal vacatur of the Revision Rule to the Ninth Circuit, it would have been incongruous for BLM to defend the rule in the Wyoming District Court.

So, with only the Respondent-Intervenors environmental non-governmental organizations (ENGOs) and states defending the 2016 Rule, the challengers argued that the 2016 Rule was beyond the authority granted to BLM under the MLA to promulgate rules for the prevention of undue mineral waste; they also argued that BLM had acted arbitrarily and capriciously in promulgating the 2016 Rule. Specifically, the challengers averred that the Rule was a regulatory sleight-of-hand in which BLM sought to regulate air pollution—an area under EPA's exclusive control—disguising it as the

regulation of mineral waste. Judge Skavdahl (who was appointed by President Obama in 2011) agreed. Contrary to the Rule's stated purpose of waste prevention with ancillary benefits to air quality, the Judge Skavdahl found that "significant aspects of the rule" demonstrated that its primary purpose was "to regulate air emissions, particularly greenhouse gases." Order at 27. Analyzing the MLA and CAA side-by-side, Judge Skavdahl concluded that BLM's authority to prevent the undue waste of mineral resources did not permit BLM to enact rules justified primarily on ancillary benefits to air quality.

Judge Skavdahl reasoned that the relevant question was not whether BLM had the specific authority to regulate venting and flaring, but rather whether BLM had authority to regulate oil and gas production for the purpose of preventing waste. The answer to that question was a relatively straightforward "yes." **The issue, then, was whether BLM had promulgated the 2016 Rule for the prevention of waste or for the protection of air quality, a purpose for which the CAA empowered EPA, and EPA only, to regulate.** Looking at the text and structure of the CAA, Judge Skavdahl found areas of conflict between the 2016 Rule and EPA's charge. If a rule or regulation was going to be premised on the protection of air quality, promulgation of that rule or regulation would be in EPA's statutory job description, not BLM's.

As evidence of his keen ability to perceive what was actually happening in a case involving both complex statutes and complex industrial operations, **Judge Skavdahl found** that "BLM used its waste prevention authority as a more expedient means to accomplish the primary end goal of regulating methane emissions from *existing* oil and gas sources – outside of, and inconsistent with, the comprehensive scheme established by Congress under the CAA." Order at 31. He concluded that **BLM improperly "circumvented independent consideration" of Congress's direction to EPA to consider costs and other factors in establishing emission regulations.** Order at 31, n.23. The ability to regulate methane from existing oil and gas operations under the CAA is one of the most controversial aspects of EPA's statutory interpretations in CAA rules that are also subject to ongoing litigation. **A keystone of this decision is Judge Skavdahl's recognition that the BLM 2016 Rule would dispense with all of that debate and the detailed CAA procedures.** Despite the extensive coverage of this ruling, this keystone has gone largely unrecognized by commentators to date.

What Comes Next?

Notwithstanding the *Wyoming* vacatur, the fight over methane emission regulation is far from over. Regarding the 2016 Rule, Judge Skavdahl likened the litigation to a "roller coaster" that had taken "several turns and loopty-loops" before "return[ing] to the station" on the merits. Order at 10. Continuing the analogy, the judge stated that "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." *Id*. Indeed, the Environmental Defense Fund has stated on its website that it likely intends to appeal the decision, in the hopes of a more favorable reception by the Tenth Circuit or by a potential Biden administration.

Litigation over methane regulation also continues under the CAA. The Obama administration issued regulations for upstream and midstream oil and gas emissions in June 2016. In August 2020, the Trump administration promulgated revised methane rules to replace and amend those actions under CAA Section 111. Immediately upon publication, ENGOs challenged the new rules. Within just a few days, the D.C. Circuit administratively stayed one of the EPA rules—the rule that concluded the scope of the Obama Administration's action exceeded statutory authority. **On October 27, 2020, the D.C. Circuit Court of Appeals dissolved the temporary administrative stay and denied the**

motion for summary vacatur of the EPA rule. Order, *California, et al. v. EPA*, 20-1357 (D.C. Cir. Oct. 27, 2020). **As such, the Trump Administration's revised EPA methane rule will now be effect** while the parties proceed to brief the case on the merits. To expedite the case, **the court scheduled all briefing to be concluded by mid-February 2021.**

The fight over methane from oil and gas wells will clearly continue to play out in the courtroom and before the relevant agencies. If a change in administration occurs, Presidential candidate and former Vice President Joe Biden's environmental platform includes "[r]equiring aggressive methane pollution limits for new and existing oil and gas operations." *See* Biden/Harris, *The Biden Plan for a Clean Energy Revolution and Environmental Justice*, https://joebiden.com/climate/.

Beyond the immediate context of the 2016 Rule, Judge Skavdahl's vacatur could have broader implications for other federal agencies contemplating greenhouse gas regulation, as only EPA has the authority—expressly granted under the CAA—to regulate such emissions. Extrapolating from Judge Skavdahl's assessment of BLM's 2016 effort, an agency desiring to impose regulations that may have ancillary air quality benefits would have to supply an independent justification for those regulations congruent with that agency's statutory authority.

In concluding his decision, Judge Skavdahl made one final point regarding the "roller coaster" of particular note for administrative law in the United States:

This roller coaster ride is illustrative of a growing concern. As observed by Justice Thomas in his concurrence in *Michigan v. E.P.A.*, 576 U.S. 743 (2015), "[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." *Id.* at 762. 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.

Order at 57 (emphases added). **It seems Judge Skavdahl is concerned about the growth of the administrative state**—not only because of **separation of powers issues** (as Federal agencies attempt to use latent authority to advance policy outcomes on new issues like climate change) but also because of **the churning it creates as policy flips between administrations, and fundamentally hinders stable policy and well-functioning courts.**

John R. Bobka contributed to this article.

National Law Review, Volumess X, Number 303