CLIENT ALERT

Judicial Branch Continues to Scrutinize the Executive Branch's Deregulatory Agenda

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President Trump's desire to roll back regulations of his predecessor is once again proving easier to announce than to implement. On October 4, 2017, the Northern District of California declared unlawful an attempt by the U.S. Bureau of Land Management (BLM, an agency within the Department of the Interior) to relieve the oil and gas industry of the need to comply with certain requirements of a BLM regulation concerning methane venting, flaring, and leaks by the January 2018 deadline. *California v. BLM*, No. 17-3804, 2017 WL 4416409 (N.D. Cal. Oct. 4, 2017). BLM relied on a seldom-litigated provision of the Administrative Procedure Act (APA) that allows agencies in certain circumstances to stay the effective dates of newly promulgated rules that are the subject of pending litigation. States and environmental groups challenged the stay, saying it was illegal under the circumstances, and the federal court agreed. The decision showcases how litigation is being used to impede the Trump Administration's deregulatory agenda, as discussed in an earlier alert.

Background

In November 2016, BLM promulgated a regulation to reduce the waste of natural gas that occurs during oil and gas production and reform how oil and gas producers pay royalties on the wasted gas. 81 Fed. Reg. 83,008 (Flaring Rule). The regulation was challenged in federal court by certain state and industry plaintiffs, and that litigation was ongoing when the regulation took effect on January 17, 2017. Among other things, however, the regulation gave oil and gas producers until January 17, 2018, to come into compliance with certain aspects of the regulation. The difference between the January 2017 "effective" date and the January 2018 "compliance" date is important because the APA allows an agency, where "justice so requires," to "postpone the *effective date* of an action taken by it, pending judicial review." 5 U.S.C. § 705.

On June 15, 2017 – five months after the Flaring Rule took effect, but now operating under the auspices of a new Administration and Interior Secretary, and implementing a March 28, 2017 executive order of President Trump instructing agencies to review all regulations that could burden the domestic production of energy – BLM published a Federal Register notice invoking Section 705 to stay the January 2018 compliance date pending resolution of the litigation challenging the rule. BLM reasoned that Section 705's reference to "effective date" was broad enough to encompass regulatory compliance deadlines that accrue after the regulation as a whole has already taken effect.

A different set of states, along with certain environmental groups, objected to BLM's action to stay the Flaring Rule's January 2018 compliance dates, and filed their own lawsuit in the Northern District of California (*California v. Brown*). The merits of the Flaring Rule were not at issue in *California v. Brown*; the only question was whether BLM was authorized by Section 705 to stay the Flaring Rule's January 2018 compliance dates.

The Court's Decision

The District Court for the Northern District of California agreed with the plaintiffs that BLM's action staying the Flaring Rule's compliance dates was unlawful. Before addressing that central question, however, the court determined that it was not a question for which BLM's interpretation of its authority was entitled to deference. That was because the question presented concerned the meaning of the APA, a generally applicable statute, and not a more specific statutory authority for which BLM was delegated discretion by Congress to interpret and implement.

Having decided BLM was not entitled to deference, the court had no difficulty deciding that the phrase "effective date" as used in the APA does not extend to "compliance" dates. Citing the court's own precedent explaining the difference between the two, the court ruled that by construing the reference to "effective date" in the APA to encompass a subsequent "compliance date" would "collapse[] the clear statutory distinction between the two periods before and after a rule takes effect."

The court also ruled that BLM violated the notice-and-comment requirements of the APA that kick in when an agency promulgates, revises, or retracts a rule. The court held that, in extending the compliance deadline after the rule was already in effect, BLM essentially modified a rule without providing the public with an opportunity to comment. BLM argued that it did not have to provide notice and comment because Section 705 does not require it, but because the court held that BLM improperly invoked Section 705 in the first place, that was not a winning argument. The fact that BLM issued a notice of proposed rulemaking to reconsider the Flaring Rule, but only after it had already invoked Section 705 to postpone the January 2018 compliance dates, only served to bolster the court's resolve on this point. The court viewed this as BLM "tacitly conceding that the Postponement Notice was improper."

Finally, the parties argued whether agencies are required to justify postponements of effective dates under the same four-factor test applicable to judicial stays and preliminary injunctions (*i.e.*, (i) likelihood of success on the merits; (ii) irreparable harm absent a stay; (iii) the public's interest; and (iv) the balance of the equities). BLM contended that it was not required to do so because Section 705 makes no reference to those factors, and applies simply where an agency determines that "justice so requires." The plaintiffs argued otherwise, citing authority from the federal district court in the District of Columbia in support of the view that an agency must justify a postponement under Section 705 by reference to those factors. The court avoided addressing the question, however, inasmuch as it decided Section 705 was not properly invoked for other reasons.

Conclusion

Whether one supports or objects to efforts to roll back extant regulations, litigants must be mindful of the tools available to federal agencies to do so. As discussed in prior alerts and webinars, the judicial branch is carefully scrutinizing these efforts, in several instances deciding that the executive branch overstepped. Section 705, for its part, has an important but limited application during pending litigation challenging regulations, but this case proves it is not a panacea for an unpopular regulation.

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