COMMENTARY

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When an Agency Changes Its Mind

May a regulatory agency change its mind? On July 29, a splintered U.S. Court of Appeals for the Ninth Circuit, sitting en banc, addressed that issue in *Organized Village of Kake v. U.S. Department of Agriculture*, 746 F.3d 970 (2014). This is a particularly relevant decision as we come to the end of the Obama administration. It is, however, not timely, addressing as it does a regulatory decision made by the outgoing Clinton administration in 2001 and reversed by the incoming Bush administration in 2003, and then no longer defended by the Obama administration.

The Clinton administration sought to protect "roadless values" in the national forests by limiting or prohibiting roads and other disruptive activities in inventoried roadless areas within the forests. Prior to adoption of the national rule, each national forest would protect roadless values in inventoried roadless areas through its forest plan. The dispute here was whether the Tongass National Forest in Alaska ought to be exempted from the national roadless rule and its roadless areas managed under the Tongass Forest Plan. The Clinton administration decided not to exempt the Tongass in 2001. The Bush administration decided the other way in 2003. Both decisions used the same administrative record.

The Village of Kake and others in favor of applying the national roadless rule to the Tongass sought review. The district court enjoined the exemption. The U.S. Forest Service declined to appeal; the state of Alaska, which had intervened in defense of the exemption, did appeal. The Ninth Circuit decided that the Forest Service had acted arbitrarily and capriciously by not giving good reasons for what the court characterized as a change in factual finding on the same administrative record. Accordingly, it affirmed the district court's order applying the national roadless rule to the Tongass.

Before delving into the details, consider why we here in Pennsylvania ought to pay attention. President Obama's administration has made aggressive use of regulations and other executive actions to implement controversial policies. Some of us may think that was a good thing, particularly in light of congressional gridlock. However, the one thing we know for sure is that we will have a new president in January 2017. A lot of what this one has done will be criticized during the upcoming campaign. It truly matters to our clients how much flexibility federal agencies have to change course in five calendar quarters.

By the same token, we are in the first year of a new administration in Pennsylvania. Pennsylvania typically does not allow pre-enforcement review of state regulations unless they fall into the exception set out in *Arsenal Coal v. Department of Environmental Resources*, 477 A.2d 1333 (Pa. 1984).

But the contours of that exception are unclear to say the least. A water discharger may not challenge a water quality standard until the Department of Environmental Protection translates that standard into a water quality-based effluent limitation and imposes it in a permit, as in *Neshaminy Water Resources Authority v. Department of Environmental Resources*, 513 A.3d 979 (Pa. 1986).

On the other hand, an air emitter may challenge the Pennsylvania Mercury Rule in advance of the DEP's imposition of an emissions limitation in a plan approval or permit under the Air Pollution Control Act, as in *PPL Generation v. Department of Environmental Protection*, 986 A.2d 48 (Pa. 2009). If review were available in Pennsylvania, it would not be governed by the federal Administrative Procedures Act, but *Village of Kake* might be instructive.

Moreover, *Village of Kake* offers some interesting lessons for the state should the United States stop defending federal regulations in the next administration that Pennsylvania supports.

National forests were established—mostly early in the last century—in an effort to preserve or to re-establish forest lands. According to the U.S. Environmental Protection Agency's website, in 1630 the area that is now the United States contained about a billion acres of forest land. By the turn of the 20th century, about a quarter of that had been lost. The national forests and other policies stabilized forest land at about its current area—751,000 acres—since then. Indeed, forest cover in the Northeast and Upper Midwest increased since 1900, while forest land in the West declined.

The national forests were not established as nature preserves. The idea was—and in most places still is—to allow multiple resource uses in the national forests, including timbering. Often in the East, and especially in Pennsylvania's Allegheny National Forest, the Forest Service only ever acquired the surface estate, and therefore the forest must be managed to accommodate the rights of private owners of the oil, gas and minerals to access their property, as discussed in *Minard Run Oil v. U.S. Forest Service*, 670 F.3d 236 (3d Cir. 2011).

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However, some areas of national forests have not been recently disturbed by construction of logging roads, access for oil and gas wells, recreational facilities or the like. These roadless areas offer large swaths of unfragmented forest. Fragmentation, in and of itself, reduces the resilience of local populations of plants or animals. In addition, disturbance of these areas may have other adverse environmental effects. On the other hand, if people cannot access a part of the forest, they cannot use it. From an economic perspective, they cannot access timber or minerals.

Alaska's Tongass National Forest is the nation's largest. Its timber resources are economically important to at least southeastern Alaska. Application of the roadless rule, rather than the Tongass Forest Plan, threatened hundreds of jobs.

In 2001, the Clinton administration determined that exempting the Tongass from the national roadless rule "would risk the loss of important roadless area values," in 66 Fed. Reg. 3244, 3254 (Jan. 12, 2001). After Alaska challenged that decision, the Bush administration agreed to propose to exempt the Tongass, to receive comments, and to make a further decision. When the time came to make that decision, the Forest Service determined that the comments raised no new issues and that the environmental impact statement supporting the 2001 record of decision would suffice to support the 2003 record of decision. However, based upon that same record, the Forest Service decided in 2003 that "application of the roadless rule to the Tongass is unnecessary to maintain the roadless values of these areas," in 68 Fed. Reg. 75,136, 75,137 (Dec. 30, 2003).

The Ninth Circuit reviewed this policy change under the Administrative Procedure Act and applied the four-part test of *Federal Communications Commission v. Fox Television Stations*, 556 U.S. 502 (2009). The agency must: (1) acknowledge that it is changing position; (2) show that the new policy is permissible under the governing statute; (3) "believe" that the new policy is better; and (4) provide "good reasons" for the new policy.

There was no question that the Forest Service met the first three parts of the *Fox* test. But the Ninth Circuit chose to treat the different weighing of the likely efficacy of the Tongass Forest Plan as compared with the roadless rule as a factual finding. The Forest Service could not explain why its factual finding changed without any change in the underlying record.

One might well argue that treating a finding about the relative ability of the Tongass Forest Plan and the roadless rule to protect roadless values as factual put the rabbit in the hat. That was, after all, the ultimate policy question: Could the Forest Service trust its local forest managers—likely in the face of litigation over the Tongass Forest Plan—to protect roadless values without application of the roadless rule? If that is a factual finding, one wonders what a policy determination would look like.

Thus, *Village of Kake* stands for the proposition that the outgoing administration can to some extent insulate its policy choices by calling them factual findings. It offers a roadmap for litigation of these issues at the federal level going forward.

As noted earlier, *Village of Kake* is also interesting because the Obama administration did not appeal from the district court's decision. Instead, Alaska appealed. The majority found that Alaska had standing to defend a rulemaking by a federal agency that the federal agency was no longer defending. As the states take sides in the upcoming litigation over the Clean Power Plan, the implications of that ruling warrant some study. •

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