

BEYOND SENSIBILITY: New Culture Threatens Regulatory Foundation

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Will the evolving federal and state environmental regulatory structure provide sufficient certainty for energy production given our U.S. climate-change goals?

A recent Texas electric forecasting study predicts “over the next 20 years, due to the free market alone, [the ERCOT region] can expect to see a cleaner grid that relies on Texas-produced natural gas, wind and utility-scale solar power at little additional cost to consumers.” But the report may not have adequately considered how common challenges to regulatory certainty in the permitting process for energy producing states have become. The fact is, like it or not, the environmental regulatory paradigm is evolving, with new decision-makers considering new priorities, and the legal landscape

for energy production will need to evolve as well.

Historically, the states have been delegated authority by the federal government to implement environmental standards and enforce them through the permitting process as partners with the Environmental Protection Agency. Thus, the process of environmental regulation relied on legally achievable thresholds, with the presumption public health and safety will be achieved when state-issued permit guidelines are followed and enforced.

Recently, federal regulators, buoyed by the belief energy-producing states like Texas are in “denial” of climate science, have developed a “one size fits all” White House Clean Power Plan. This new regulatory structure (for now delayed for review by the D.C. Circuit of the U.S. Court of Appeals) too often

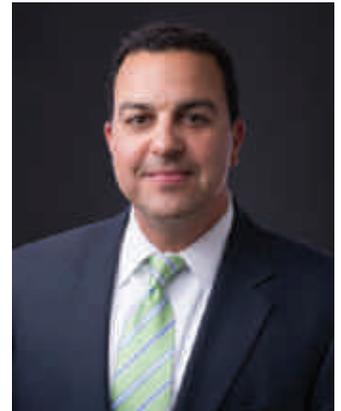
fails to consider variables in market forces and the regulatory process at the state level.

Moreover, the historically “accepted” environmental standards for energy production have shifted, and are increasingly challenged at all levels. Industry critics continue to focus on pollutants and emissions, but effects on wildlife and a desired democratization of advocacy now receive additional scrutiny. The perception of environmental injustice adds yet another dimension to the discussion.

There is no silver-bullet approach to energy production. For example, the U.S. Fish and Wildlife Services recently proposed a policy shift from five-year permits to 30-year permits for wind energy producers, and U.S. wind capacity could triple by 2030 under the Clean Power Plan. But even wind energy, while emission-free and not subject to fuel price risk, has been criticized by some for accidental bird kills or ruining scenic views. As a policy matter, how can we best accommodate a critical generation resource collectively reducing U.S. greenhouse gases, while giving these potential threats to wildlife and vistas due consideration?

Meanwhile, supporters of power generation infrastructure want regulatory focus on permit predictability and reliability concerns. But acquiescence to federal control will not easily yield adequate guidance for the certainty needed in energy-planning investments. And what happened to the concept of federalism, the principle the states are not merely regional representatives of the federal government, but are granted independent powers and responsibilities? If permits (whether federal, state, or local) are not attainable, financing of needed power production will not be either.

Can the U.S. achieve a collective balance to accommodate the numerous impediments to regulatory compromise? And how will the



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role of the Texas legal community evolve, if environmental decision-making continues to matriculate to our nation’s capitol? Will Texas lawyers be able to effectively advocate for their clients if our state regulatory bodies see their oversight roles diminish?

In our view, balancing energy production and consumption needs will continue to require a strong regulatory structure at the state level. Meeting the energy needs of an ever-growing Texas population requires a combination of strong, enforceable legal thresholds in the permitting process and increased public support for sustainable environmental limits. Texas’ environmental stewards should pursue regulatory certainty by relying on sound science, advanced technology, and common sense. **A**

