

Judicial Review of Agency Guidance Documents

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Overview

- » Setting the Stage
- » Jurisdictional Hurdles
- » Is It A Rule?
- » Obtaining A Ruling on Substance

Setting The Stage

» *Appalachian Power Co v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) –

- “The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like.”

Setting The Stage

- » “Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations.”
- » “One guidance document may yield another and then another and so on.”

Setting The Stage

- » “Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities.”
- » “Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.”

Setting The Stage

- » “With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site.”
- » “An agency operating in this way gains a large advantage. It can issue or amend its real rules . . . quickly and inexpensively without following any statutorily prescribed procedures.”

Setting The Stage

- » “The agency may also think there is another advantage-immunizing its lawmaking from judicial review.”
- » *Appalachian Power Co v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000)

Jurisdictional Hurdles

- » Standing
- » Finality
- » Ripeness

Standing

- » Not typically an issue for challenges by the regulated community.
- » Other interest groups face more rigorous challenges to standing from time to time –
 - *NRDC v. EPA* (D.C. Cir. No. 10-1056) (July 1, 2011) (holding that challenged CAA guidance document injured NRDC members and that such injury would be redressable by vacating the guidance).

Finality

- » Two part test: (1) consummation of agency decision-making process; and (2) rights, obligations, or legal consequences.
- » *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000)
 - Guidance was final agency action in that it reflected a settled agency position with legal consequences for guidance's audience (state agencies and regulated entities).

Finality

- » *Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207 (D.C. Cir. 2007)
 - Challenged guidance document was not final and not reviewable because it was not binding on its face nor was the agency applying it in a binding manner.

- » *NAHB v. U.S. Army Corps of Engineers*, 2000 WL 433072 (E.D. Va. 2000), *aff'd* 1 Fed. Appx. 243 (4th Cir. 2001)
 - Challenged guidance document was not final and not ripe for review.

Ripeness

- » Two part test: (1) fitness of the issues for review (purely legal issues, concrete setting, final action); and (2) hardship to the parties in withholding review.
- » Seeks to avoid premature adjudication so that –
 - Courts are not entangled in abstract disagreements over policy; and
 - Agencies do not have judicial interference before decisions are finalized and are felt in a concrete way by those challenging the action.
- » *General Electric Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002) (challenge to agency guidance document was ripe).

Is It A Rule?

- » Does it carry the force and effect of law and substantively alter an existing regulatory scheme, or is it an APA exception:
- » Policy Statements –
 - *Catawba County v. EPA*, 571 F. 3d 20 (D.C. Cir. 2009) (EPA had not applied guidance document in a binding manner, nor was the document binding on its face)
 - *Chai v. Carroll*, 48 F.3d 1331, (4th Cir. 1995) (challenged interim rule was a statement of policy that did not establish a binding norm)

Is It A Rule?

» Policy Statements –

- *CropLife America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003) (agency press release was not a policy statement but a binding position and should not have been issued without notice and comment)
- *Center for Auto Safety v. NHTSA*, 452 F.3d 798 (D.C. Cir. 2006) (policy guidelines did not constitute binding rules)

Is It A Rule?

» Interpretive Statements –

- *American Mining Congress v. MSHA*, 995 F.2d 1106 (D.C. Cir. 1993) (agency program policy letters lacked legal effect and were interpretive, not substantive, rules and not subject to notice and comment requirements)
- *United States v. Ellen*, 961 F.2d 462 (4th Cir. 1992) (agency guidance manual was technical interpretive guide and not binding law)

» Procedural Rules –

- *JEM Broadcasting Co. v. FCC*, 22 F.3d 320 (D.C. Cir. 1994) (licensing processing rules were procedural and not required to go through notice and comment; they contained no substantive value judgments by the agency)

Obtaining A Ruling on the Substance

- » *NRDC v. EPA*, (D.C. Cir. No. 10-1056) (July 1, 2011)
 - Court weighs “prejudging the notice and comment process” against exacerbating the delay that is injuring NRDC’s members.
 - Issue that clearly violates plain language of statute is appropriate for judicial resolution; issue that is ambiguous and/or not clearly precluded by law is not.

Questions?

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