

EPA IGNORES COURT MANDATES TO REVOKE UNLAWFULLY ISSUED RULES

by
Richard G. Stoll

In the past year, the U.S. Court of Appeals for the D.C. Circuit has issued a number of opinions that disapproved of the Environmental Protection Agency's (EPA) failure to use the Administrative Procedure Act (APA) rulemaking process. *See* Richard G. Stoll, *Court Forces EPA to Comply With Due Process Standards*, 15 LEGAL BACKGROUNDER 46 (Wash. Lgl. Fndt.), Sept. 8, 2000. The D.C. Circuit — which has exclusive jurisdiction to review most significant EPA actions — had vacated documents the EPA had released as informal “guidance” because the guidance should have been issued as a rule. *Appalachian Power Company v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000); *Barrick Goldstrike Mines v. Browner*, 215 F.3d 45 (D.C. Cir. 2000).

This LEGAL OPINION LETTER presents the inverse situation. Just as the EPA may fail to issue a rule that should as a matter of law be issued, it may also fail to revoke a rule that should as a matter of law be revoked. The D.C. Circuit may decide a rule is invalid for substantive and/or procedural reasons and may accordingly vacate the rule. If the court vacates the rule, as a matter of law it should no longer be in force or effect. But the EPA can be slow to recognize such a court ruling. Sometimes for many months, the EPA leaves the rule on the books as if it were valid and enforceable.

For instance, in April, 2000, the D.C. Circuit decided *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000). At issue were EPA rules defining “solid waste” under the Resource Conservation and Recovery Act (RCRA). The industry petitioners argued certain types of covered materials and activities could not be subject to RCRA jurisdiction and urged the Court to vacate those portions of the rules. The court agreed and vacated certain language in the rules. 208 F.3d at 1060. And in June, 2000, the D.C. Circuit decided *American Petroleum Institute (API) v. EPA*, 216 F.3d 50 (D.C. Cir. 2000). The industry petitioners argued other types of covered materials and activities could not be subject to RCRA jurisdiction. The court agreed and vacated additional portions of the EPA's rules. 216 F.3d at 58.

It is now 14 months after *Battery Recyclers* and 12 months after *API*. The EPA, however, has taken no action to delete the illegal provisions from its rules. To anyone who turns to EPA rules in the Code of Federal Regulations, the Web, or commercial compilations of the EPA's rules, the offending provisions still appear fully effective. Even in its semi-annual “regulatory agenda” of May 14, 2001, in which the EPA lists plans for scores of amendments to RCRA rules, there is no mention of plans to comply with these decisions.

It should be emphasized the vacated portions of the rules hardly constitute esoteric *minutiae* with little

Richard G. Stoll practices environmental and administrative law with the D.C. office of Foley & Lardner. He has written and spoken extensively on federal rulemaking and judicial review topics.

real-world impact. Especially in the case of the rules vacated in *Battery Recyclers*, some of the most fundamental premises of EPA claims to RCRA jurisdiction have been declared invalid.

One might argue that the EPA's non-responsiveness to judicial decisions is not that significant. If a rule has been vacated by a court of competent jurisdiction, so the argument would go, the EPA cannot enforce it in any event. So what is the harm in letting a judicially-vacated rule languish on the books?

The answer has both legal and practical dimensions. Under the APA, the Code of Federal Regulations (C.F.R.) is supposed to stand as the official compilation of current, legally effective federal agency rules. Under 5 U.S.C. § 552(a)(1), each federal agency is to "currently" publish in the Federal Register, "for the guidance of the public," all substantive rules of general applicability that are "authorized by law." See especially § 552(a)(1)(D). Once codified in the C.F.R., the rules as published in the codification stand as "prima facie evidence" of the fact they "are in effect." 44 U.S.C. § 1510(e). For the EPA to let judicially-vacated rules remain on the books for months or years is certainly not consistent with these statutory provisions, as the EPA is not keeping the public informed "currently" as to which rules "are in effect."

As a practical matter, it is easy to see how regulated parties and the interested public could be confused and misled by this inaction. Many EPA rules affect tens of thousands of individuals or entities throughout the nation. These parties cannot be presumed to read D.C. Circuit opinions, and/or to maintain their own personal catalogues of which rules are vacated by various opinions.

This may be an especially acute problem in many state environmental programs for which state agencies routinely copy or incorporate by reference federal regulations. For instance, a state agency might (as many do) decide to update its state hazardous waste regulations in 2001 by copying or incorporating by reference the EPA's definition of solid waste. If a state agency did this right now, it would copy or incorporate provisions that have been held illegal as a matter of federal law. As many states have statutes prohibiting state agencies from adopting regulations more stringent than federal rules, this can cause all sorts of practical and legal complications at the state level.

Granted, EPA personnel are busy and overworked, but that does not justify the current situation. The EPA need invest little time or resources in taking the necessary legal action. Where words of a rule must be deleted to comply with a court mandate, "good cause" exists to revoke the offending language in an immediately final rule without first having to propose it for public comment. 5 U.S.C. § 553(b)(B). Moreover, the EPA need spend little time or effort explaining the basis for the revocation — as long as the EPA makes clear it is taking the action to comply with a court decision and cites the court decision, little more need be said. The EPA recently revoked certain rules that had been vacated by the D.C. Circuit eleven months earlier. The Federal Register notice shows the revocation process can be short, simple, and direct. 66 Fed. Reg. 24270 (May 14, 2001).

Also granted, the appropriate response to a judicial vacatur may not always be so simple as deleting a few words. It could be, for instance, that as a result of a court's opinion, the EPA should not only delete certain provisions but also propose new language to replace the offending language. Even in this situation, however, the EPA could easily and quickly place the public on notice as to the correct state of the law by publishing a C.F.R. "NOTE" or "COMMENT" immediately after the offending regulatory language. (EPA regulations often use such "NOTES" and "COMMENTS" for other purposes. See 40 C.F.R. § 261.33 for examples of "COMMENTS"; 40 C.F.R. § 262.82 for examples of "NOTES".)

The "NOTE" could simply state that the above-cited regulatory language was vacated by a court — citing the name and date of the opinion — and furthermore state that the EPA is working on a response to the court's opinion. At least in this mode the public would not be misled, as they are now, into thinking that words appearing in the C.F.R. are legally valid and enforceable when they are not.