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Rulemaking

Judicial Review

A fundamental principle of notice-and-comment rulemaking has been turned on its head by a decision of the U.S. Court of Appeals for the District of Columbia Circuit in March. The ruling in a Clean Air Act case would leave in force and effect final rule provisions that had never been proposed or even foreshadowed. The author discusses the implications in an administrative world where telepathy or prophetic vision may now be required.

Protection of Judicial Review Watered Down in D.C. Circuit

BY RICHARD G. STOLL

You may assume—as I always have—that our system of judicial review of federal agency rules serves to protect parties harmed by agencies' egregious procedural errors. You may therefore assume—as I always have—that a final regulation which bears no fair resemblance to the proposal that preceded it and is in no way a ''logical outgrowth'' of such proposal would be thrown out by a court in judicial review. Perhaps the most frequently cited case for this bedrock principle is *Shell Oil Co. v EPA*.[1]

At least under the Clean Air Act (CAA), and at least in the U.S. Court of Appeals for the District of Columbia Circuit, however, it looks like our assumptions are now wrong. This is the unfortunate result of the Court's recent decision in *Utility Air Regulatory Group (UARG) v. EPA*, D.C. Cir., No. 12-1166, 3/11/14[2].

Un-Proposed Final Rules: A Slam Dunk?

Let's start with a hypothetical rulemaking. Assume EPA proposes a CAA regulation to regulate cigar factory emissions. The proposed rule specifies each cigar factory must install a ''brown box'' emission control device. The capital cost of a brown box is approximately $2,000,000, and the annual operating costs are approximately $200,000. The proposed rule also specifies minor recordkeeping and reporting provisions EPA esti-

[1] *Shell Oil Co. v EPA*, 950 F.2d 741 (D.C. Cir. 1991)

[2] *Utility Air Regulatory Group (UARG) v. EPA* (2014 BL 66673, 744 F.3d 741, 78 ERC 1001 (D.C. Cir. 2014)). *See also* 48 DEN A-1, 3/12/14.

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mates will cost each factory approximately $20,000 annually.

The Cigar Institute (TCI), representing most U.S. cigar factories, is generally satisfied and files comments in support of the rule. The Sierra Club is also generally satisfied and files comments seeking only minor tweaks in the proposed rule's recordkeeping and reporting provisions that would not add significantly to the costs. No other party files written comments on the proposal, and there are no public hearings.

Now assume that after the public comment period has closed, EPA personnel decide the rule would work better if they added emission monitoring requirements for cigar factories that were not included in the proposed rule. Compliance with these requirements will require each cigar factory to install new equipment costing approximately $1,000,000 and to incur additional annual maintenance expenditures of approximately $100,000. So they add these new requirements to the final rule.[3]

After reading the final rule in the Federal Register, TCI is appropriately livid. EPA's preamble accompanying the proposed rule included absolutely no hint that EPA was considering any emission monitoring requirements, there were no written comments suggesting any alternatives, and no one from EPA had ever informed anyone at TCI (or anyone else outside the agency) that EPA was considering such requirements.

At this point, almost any reader who knows anything about administrative law and judicial review is likely thinking there is a simple remedy for TCI. The CAA provides in § 307(b) for direct judicial review of final EPA rules in the U.S. Court of Appeals for the D.C. Circuit. As discussed above, it is a cardinal principle of administrative law that an agency cannot include a provision in a final rule that was not first proposed, or at least reasonably foreshadowed, in the proposal.

The EPA final rule is a blatant violation of this cardinal principle. So almost any reader is now probably thinking: TCI can file a petition for judicial review of the final rule in the D.C. Circuit, and will have a slam dunk case to secure a judicial vacatur of the never-proposed emission monitoring requirements.

Until Recently, Telepathy Not Required

And any reader who has kept up with D.C. Circuit case law under the CAA (up until the recent *UARG* decision) might feel even more strongly about the slam dunk. The Court ruled two decades ago, in *Small Refiner Lead Phase-Down Task Force v. Gorsuch* (''*Small Refiner*''), that CAA rules should be subject to even more rigorous scrutiny regarding the adequacy of notice issue than standard Administrative Procedure Act (APA) scrutiny.[4]

Writing for the unanimous *Small Refiner* panel, Judge Patricia M. Wald described general APA judicial review principles as follows: ''Agency notice must describe the range of alternatives with reasonable specificity. Otherwise, interested parties will not know what to comment on. . . . .''[5]

She then stated this principle is ''doubly true'' under the CAA, because 1977 amendments to § 307 require EPA to issue a ''specific proposed rule as a focus for comments.''[6]

She added that with the 1977 CAA amendments, ''Congress intended agency notice under the Clean Air Act to be more, not less, extensive than under the APA.''[7] She underscored this point with a quote from the 1977 amendments' legislative history to the effect that the enhanced § 307 provisions will ''assure the opportunity for more extensive participation in the rulemaking process.''[8] Based on these principles, the unanimous D.C. Circuit panel in *Small Refiner* had little trouble in vacating two challenged provisions in the final rule they found had neither been proposed nor adequately foreshadowed.[9]

The D.C. Circuit has followed *Small Refiner* on these points frequently over the years. In fact, just five months ago (December 11, 2013), a unanimous panel of the D.C. Circuit vacated an EPA CAA rule provision, after discussing *Small Refiner*, because EPA had ''entirely failed'' to provide for notice and comment in its proposed rule.[10]

Another recent case is *Portland Cement Association v. EPA*, 665 F.3d 177 (D.C. Cir. 2011). There, a unanimous D.C. Circuit panel rejected EPA's counsel's arguments that EPA's final approach was sufficiently foreshadowed by its proposal. The Court found that language in the proposed preamble was ''too vague and noncommittal to trigger a response'' from affected parties. The Court stated that reviewing courts ''should be especially reluctant to require advocates for affected industries and groups to anticipate every contingency'' and that ''we do not require telepathy.''[11]

Telepathy (or Perhaps Prophecy) Now Required

But now comes the D.C. Circuit's March 11, 2014, *UARG* decision cited above, and any ''slam dunk'' thinking must screech to a halt. To set the stage, recall the well-established principle that a party cannot raise an argument in judicial review that was not first made to the agency during the written comment/public hearing process following the proposed rule. As a leading scholar has explained, this principle is part of the ''exhaustion'' doctrine that ''ensures that the agency action being challenged is the final agency position and that the agency has had the opportunity to bring its expertise to bear and to correct any errors it may have made at an earlier stage, thus potentially resolving disputes before they come to the court.''[12]

[3] This hypothetical is hardly far-fetched. As the case law discussed below shows, EPA (and other agencies) frequently include un-proposed provisions in final rules. This may occur more frequently in CAA rulemakings these days, where concerns over adequacy of notice may be trumped by the pressures of rushing a large number of final rules out the door under statutory and court-ordered deadlines.

[4] *Small Refiner Lead Phase-Down Task Force v. Gorsuch*, 705 F.2d 506, 18 ERC 1681, 18 ERC 2033 (D.C. Cir. 1983), Court Opinion (01/26/1983).

[5] *Id*. at 549.

[6] *Id*. (internal quotations omitted).

[7] *Id*. at 550.

[8] *Id*.

[9] *Id*. at 552.

[10] *Daimler Trucks v. EPA*, 737 F.3d 95, 103 (D.C. Cir. 2013).

[11] *Portland Cement Association v. EPA* (665 F.3d 177, 186 (D.C. Cir. 2011)).

[12] Lubbers, Jeffrey S., A Guide to Federal Agency Rulemaking, 5th Ed., (American Bar Assn. 2012), at 403-04.

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The CAA includes a provision explicitly incorporating the general ''exhaustion'' doctrine—§ 307(d)(7)(B). This provision states the rule as follows: ''Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.'' This is one of the provisions added by the 1977 CAA Amendments that the *Small Refiner* Court described as enhancing the public participation requirements available under the APA.

For situations where a party wants to raise an argument on judicial review that it did not make during the rulemaking comment period, § 307(d)(7)(B) provides a procedure commonly referred to as an ''administrative petition for reconsideration.'' It provides that if a petitioner can demonstrate to EPA that it would have been ''impractical'' to have made a particular argument during the comment period, or if the grounds for the argument arose after the close of the comment period, EPA must conduct a ''proceeding'' to consider such a new argument provided it is of ''central relevance'' to the outcome of the rule.

The CAA establishes no deadlines for EPA to take action on such administrative reconsideration petitions. If EPA denies a request for reconsideration, or if upon the conclusion of a reconsideration process the petitioner is unhappy with the result, § 307(d)(7)(B) and the applicable case law provide that the petitioner may at that time seek judicial review. As explained further below, ''at that time'' will usually be many months or years—if ever—from the time a party files its petition.

In the March 11, 2014, *UARG* case, a group of electric utilities sought judicial review of several provisions of a final CAA rule for ''New Source Performance Standards'' (NSPS).[13] EPA had not proposed aspects of some of the challenged provisions, and UARG believed that EPA had not given any indication in the proposed rule or preamble that EPA was considering the approach it adopted in the final rule.[14] As it would have been ''impracticable'' to comment on these aspects of provisions that had not even been proposed, UARG filed an administrative petition for reconsideration with EPA under CAA § 307(d)(7)(B) at the same time it sought judicial review.

In its (still) pending administrative petition, UARG is seeking to convince EPA on substantive grounds that the provisions of the rule subject to the petition are inappropriate. But in its judicial review briefs, UARG not surprisingly argued that the Court should—based on the well-established doctrine and case law discussed above—vacate the provisions of the rule that UARG believed were neither proposed nor even foreshadowed.

In its arguments before the Court, EPA maintained that even if the contested provisions were not proposed, they had been sufficiently foreshadowed. But EPA also argued in the alternative, citing CAA § 307(d)(7)(B), that the Court could not entertain *any* challenges to the contested final rule provisions—*even the argument that the provisions had never been proposed or foreshadowed*—because UARG had not raised any objections to the un-proposed final rule provisions in its comments on the proposal.

[13] 77 *Fed. Reg.* 9304 (Feb. 16, 2012).

[14] The provisions at issue imposed monitoring and testing requirements UARG believed were unnecessary, inappropriate and unsupported by the record.

The Court agreed with EPA's alternative argument based on § 307(d)(7)(B). Thus the Court allowed the contested provisions to remain in full effect, ruling that any and all challenges to them—*even the challenge based on the utter lack of prior notice*—were not ''properly before us.''[15] Thus, even if UARG were correct that the rule provisions were never proposed nor even foreshadowed, the Court allowed those provisions to stay in effect because UARG had not objected to the unproposed rule provisions during the comment period on the proposed rule.

Applying this logic to the TCI hypothetical, the unproposed and un-foreshadowed final rule provisions costing each factory an additional $1,000,000 in capital costs would remain in effect because TCI failed to object to something that EPA had not done. TCI's failure to prophesy that EPA's final rule would contain these new provisions, and TCI's failure to be blessed with telepathy, would doom TCI's case on judicial review.

The Word "Procedure" Has to Mean This?

Under this D.C. Circuit approach,[16] a provision of a rule that had never been proposed would—even though blatantly illegal—remain fully in effect and enforceable, with all the potential civil and criminal penalties that may attach under the CAA. For this astounding result, the Court emphasized the word ''procedure'' in the sentence from § 307(d)(7)(B) quoted above, as follows: ''Only an objection to a rule or *procedure* which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.''[17]

But could Congress have meant in this sentence that the utter *lack* of a proposal (or foreshadowing) was a ''procedure'' such that a failure to prophesy and object to it would insulate a non-proposed final rule from judicial review? Such a result goes so deeply against the grain of long-established principles of judicial review, and produces such a dramatically harsh and absurd result, that is hard to fathom that Congress could have intended it.

And this result utterly fails to advance the purposes of the ''exhaustion'' doctrine that § 307(d)(7)(B) is intended to implement. How does leaving an un-proposed

[15] *UARG* at 11.

[16] The D.C. Circuit cited two recent cases in other federal circuits in support of this approach: *Oklahoma v. EPA*, 723 F.3d 1201, 1214-15, 2013 BL 191593 (10th Cir. 2013), and *North Dakota v. EPA*, 730 F.3d 750, 770-71, 2013 BL 254118, 77 ERC 1137 (8th Cir. 2013). But in neither case were unproposed final rule provisions left to stand in force and effect, as they were in *UARG*. In *Oklahoma*, the petitioners were not complaining about EPA's failure to propose a final rule provision, but only about a ''costing methodology'' that EPA had not included in the record for public comments and used for the first time in the final rule. Moreover in *Oklahoma*, the Court found that the EPA proposal had adequately foreshadowed the costing methodology in any event. 723 F.3d at 1214. In *North Dakota*, EPA had initially proposed to disapprove a State Implementation Plan (SIP) provision, but then finally determined to approve it. Thus the effect was not—as it was in *UARG*—to leave a final rule in force and effect that had never been proposed. Moreover, the parties raising the notice issue had even sought to voluntarily dismiss their judicial review petition as it related to the SIP approval. 730 F.3d at 770.

[17] *UARG* at 11, emphasis by the Court.

rule provision in full force and effect help ensure that ''the agency has had the opportunity to bring its expertise to bear and to correct any errors it may have made at an earlier stage, thus potentially resolving disputes before they come to the court.'' This result doesn't help *correct* agency errors, it *preserves and protects* agency errors.

Many types of procedural steps could fairly be construed as covered by CAA § 307(d)(7)(B). For instance, EPA may have proposed a standard and included some data to support the standard in the record for public comment, then added additional relevant data after the close of the public comment period that it relied upon to support the final rule.[18] Or EPA may have placed cost estimates supporting a proposed rule in the docket for public comment then, after the close of the comment period, significantly altered those cost estimates based on newly obtained information. There are numerous additional examples of ''procedures'' that can fairly be contemplated within the meaning of § 307(d)(7)(B), all buttressing the point that Congress could hardly have considered the total failure to engage in a procedure to fall within the meaning when the result is as drastically unfair as the *UARG* result.

You may be wondering how the D.C. Circuit could have possibly reached this result in *UARG* in light of the *Small Refiner*, *Daimler* and *PCA* precedents discussed above, where the Court did not shy away from reviewing and vacating un-proposed final rule provisions that the petitioners had not (because they could not) objected to during the comment period. It appears that this is because in those cases, while EPA had tried to convince the Court that its proposal sufficiently foreshadowed the final rule, EPA had not made the alternative argument (as it did in *UARG*) that § 307(d)(7)(B) prevents the Court from even entertaining the issue when the petitioner failed to object to non-proposed provisions. With the result in *UARG*, EPA and the Department of Justice will presumably be primed to make this argument in future cases.

But Is the Result Really That Harsh?

At this point, you may be thinking I am exaggerating the potential harm to affected parties under the *UARG* precedent because the adversely affected party can eventually obtain judicial review of the contested provisions by initiating the § 307(d)(7)(B) administrative petition for reconsideration process described above. This is correct, but in many (if not most) cases, hardly helpful. The main problem: (a) the final rule provision that the Court refused to review can remain fully in effect and enforceable during the time such an administrative reconsideration process proceeds and (b) that can be a real long time.

Recall there is no deadline specified in § 307(d)(7)(B) for EPA to process reconsideration petitions. Unfortunately, the EPA CAA program office is inundated with tasks for which there are statutory and court-ordered deadlines, so handling such § 307(d)(7)(B) petitions can easily be a low priority for the staff. For just a couple of current examples (there are dozens if not hundreds), I filed a § 307(d)(7)(B) administrative petition on behalf of one client in October 2012, and EPA staff is still considering it. UARG filed its § 307(d)(7)(B) administrative petition mentioned above in April 2012, and EPA staff is still considering it. And the process may often be extended much longer if it leads (as it often may) to yet more notice and comment rulemaking before there is finally an opportunity to obtain judicial review.

You may think that EPA might readily agree out of fairness to suspend or ''stay'' any rule provision that is subject to such an administrative petition if the Court refuses (as the *UARG* Court did) to even consider whether a final rule provision was issued after adequate notice. But EPA personnel might take the position (as they did in *UARG*) that the proposed rule preamble included a sufficient foreshadowing of the contested final rule provision. Over the years, the case law shows that EPA generally takes a much more sympathetic view on whether its own proposals include sufficient foreshadowing than the D.C. Circuit takes.[19]

And consider EPA's recent refusal to suspend or stay a rule provision that is in effect, even when that provision will be undergoing full reconsideration through a new notice and comment process *that EPA itself is initiating*. In 2013, EPA issued final CAA § 112 rules for industrial boilers, commonly known as the ''Boiler MACT'' rules.[20] The rules require major planning, engineering, and equipment purchases and installation by no later than January 2016. The rules are currently subject to D.C. Circuit petitions for review, and briefing on the merits was scheduled to begin in March 2014.[21]

Based on a 2013 D.C. Circuit decision criticizing EPA's rationale for its statistical methodology in another ''MACT''-related case, EPA has requested that the Court remand certain of the Boiler MACT standards (and suspend the current briefing). EPA is seeking the remand so it can conduct a full new round of notice and comment on those Boiler MACT standards, and in those new rulemakings more fully address the statistical methodology concerns the D.C. Circuit had raised in its 2013 decision.

The new round of Boiler MACT rulemaking (assuming the Court agrees to EPA's requested remand) will obviously take at least a year and probably longer. Thus the owners and operators of the industrial boilers subject to the standards will not know until sometime in mid-2015—at the very earliest—whether and to what extent the standards will be changed. Yet the rules currently in effect require full compliance with the standards by January 2016, and a great deal of lead time is necessary for the pre-compliance date steps as discussed above.

The boiler owner/operators would thus be placed in an untenable position if EPA undertakes a full new round of rulemaking on the rules, yet refuses to sus-

[18] This happens frequently, and in fact forms the basis of two § 307(d)(7)(B) administrative petitions I currently have on file with EPA. This is also one of the procedural defects at issue in *Small Refiner*, *supra*. There the Court ruled: ''This late docketing was highly improper.'' 705 F.2d at 540.

[19] The *Daimler* case discussed above shows how as recently as December 2013 the Court in a CAA case strongly rejected a series of arguments EPA counsel made in an attempt to show sufficient foreshadowing in a proposal. After dismissing EPA's counsel's various foreshadowing theories, the Court concluded that EPA had ''entirely failed'' to provide adequate notice and vacated the challenged provision. 737 F.3d at 103.

[20] 78 Fed. Reg. 7186 (Jan. 31, 2013).

[21] Numerous petitions for review filed by industrial and environmental advocacy parties are consolidated under the lead case *U.S. Sugar Corp. v. EPA* (No. 11-1108).

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pend or stay the effective date. Yet despite pleas from the affected parties, EPA is vigorously opposing any such suspension in its filings now pending in the Court.[22]

Even where EPA personnel might agree that suspending a final rule provision is the fair thing to do, potential procedural hurdles and the possibility of judicial reversals may make EPA decide it is not worth the effort (in addition to the great reluctance of wanting to add to an already overburdened work load). For a good example of the procedural disincentives for EPA to act, consider the saga of EPA's attempts to stay its earlier version of ''Boiler MACT'' and ''CISWI'' rules published in March 2011. The saga is set forth in detail in Judge Friedman's decision in *Sierra Club v. Jackson*.[23]

After EPA issued the final CAA rules in March 2011, EPA agreed with parties filing administrative petitions that the rules suffered significant substantive and procedural defects. EPA accordingly agreed to stay the rules' effectiveness so it could develop amended rules after another round of notice and comment (76 Fed. Reg. 28,662, May 18, 2011). Upon motion by the Sierra Club, however, Judge Friedman ruled that EPA could not issue such a stay unless it could provide a detailed rationale explaining why such a stay would meet the traditional ''four-part test'' that courts must use in deciding whether to stay an agency action.[24] Thus, EPA personnel could be naturally inclined not to even want to start down such a path.

Could Followup EPA Action Be Forced?

You might be thinking that adversely affected parties might be able to return to the Court to force EPA to act expeditiously in situations like these. That is theoretically possible, but of questionable help.

Case law in the D.C. Circuit allows ''mandamus'' petitions to be filed before that Court under the ''All Writs Act''[25] for matters in which the Court would have exclusive jurisdiction over the substantive dispute (as the D.C. Circuit does under the CAA). The leading case is *Telecommunications Research and Action Center (TRAC) v. FCC*.[26]

At issue in *TRAC* were allegations of ''unreasonable delay'' on the part of the FCC in concluding certain proceedings. The Court ruled that it had the authority to issue a mandamus order compelling the agency to conclude the proceedings by a specified deadline, but only where the agency's delay is ''egregious.''[27]

The Court set forth several factors for considering whether delay is ''egregious,''[28] and at least two of the factors would not be particularly helpful to would-be petitioners. One factor is whether Congress had established a deadline for the type of action at issue, and CAA § 307(d)(7)(B) provides no deadline for EPA to act on administrative petitions (although the CAA establishes countless deadlines for other types of EPA actions). Another is whether the agency has higher priority activities that it must undertake. Again, the fact that EPA's CAA staff already has numerous rulemakings in the pipeline with statutory or court-ordered deadlines is not helpful.

EPA can always be expected, when parties try to force it to act in Court, to vigorously press ''resource constraints and competing regulatory priorities'' themes, and to cite dozens of cases for the proposition that agencies have ''broad discretion to direct the timing'' of their regulatory actions. In fact, as recently as May 13, 2014, EPA secured yet another D.C. Circuit victory (3-0) squarely endorsing these principles.[29]

The Court cited EPA's ''budgetary and staff constraints'' along with ''45 mandatory rulemakings in progress or under review'' in upholding EPA's refusal to expedite a rulemaking. The Court relied upon longstanding precedent that the judicial standard of review for an agency's refusal to initiate a rulemaking (that is not subject to a statutory deadline) is ''extremely limited'' and ''highly deferential.''[30]

On the other hand, *TRAC* ruled that when considering a mandamus action, the Court should ''take into account the nature and extent of the interests prejudiced by the delay.''[31] Perhaps the Court would be moved by the nature of the prejudice to a party facing enforcement of a final rule that was never proposed, when the party could not obtain judicial review of the rule due to its failures of telepathy and/or prophecy.

Of course, the possibility that a party might be able to secure mandamus relief in such a situation does not render the *UARG* result any less harsh or unfair. Judicial review relating to provisions that were issued illegally would still be substantially delayed. And it is manifestly unfair that a party would even have to go to the time and expense of seeking such follow-up relief when the source of the problem is a blatantly illegal rule that is allowed to remain in effect by the *UARG* logic. One can only hope that in future D.C. Circuit CAA judicial review cases, the *UARG* result will turn out to be an unfollowed—and eventually forgotten—glitch.

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The opinions expressed here do not represent those of BNA, which welcomes other points of view.

[22] EPA's Reply and Opposition, Document #1487283, No. 11-1108 (April 7, 2014).

[23] *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 75 ERC 1462 (D.D.C. 2012).

[24] As Judge Friedman nicely abridged the four-part test: ''likelihood of success on the merits; irreparable harm; balance of equities; public interest.'' *Id.* at 29. I should note that I and many others strongly disagree with Judge Friedman's opinion on this issue, and it is the only opinion on this issue at this time. Nevertheless, EPA chose not to appeal the decision. Even if EPA might take a contrary position in a future case, the opinion provides yet another disincentive for EPA to take action to stay a rule under reconsideration.

[25] 28 U.S.C. § 1651(a).

[26] *Telecommunications Research and Action Center (TRAC) v. FCC* 750 F.2d 70 (D.C. Cir. 1984).

[27] *Id.* at 79.

[28] *Id.* at 80.

[29] *WildEarth Guardians v. EPA*, 2014 BL 132365, No. 13-1212 (D.C. Cir. May 13, 2014).

[30] *Id.* at 3, 12.

[31] *Op. Cit., TRAC.*