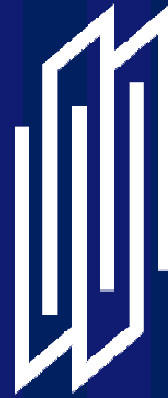


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Where Every Client is a Partnersm

**NACWA
Developments in Clean Water Law**

“Never Mind ...”: When Rules Change
November 7-9, 2007
Palm Springs, CA



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Change: The Only Constant *by*

William A. Anderson, II

November 8, 2007

Change: It Happens !

- » Legislation
- » Agency Rulemakings
- » Judicial Decisions
- » Agency Adjudications
- » Agency Interpretations
- » Agency Policies and Guidance



Legislation

“No man’s life, liberty or property is safe while the legislature is in session.”

1 Tucker 248 (N. Y.

Surr. 1866).

- » **Constitutional bounds:** *E.g., ex post facto* laws
- » The “rational relationship” test
- » Due process constraints
- » **Examples:** Clean Water Act
402(p) - Stormwater



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Agency Rulemaking

» Administrative Procedure Act

- › Notice and comment, 5 U.S.C. §553
- › Federal Register Act
- › Agency's organic law and procedural rules

» Judicial Review

- › Review may be channeled or limited by statute
- › Procedural regularity
- › “Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” (5 U.S.C. §706(2))
- › *Chevron* doctrine on deference
- › Generally no pre-enforcement review



Judicial Review

Prerequisites

- » Final Agency action
- » Standing: Statutory and Article III
- » Justiciability - “case or controversy”
- » Exhaustion, sometimes reconsideration
- » Mootness doctrine
- » Ripeness
- » Review triggers no automatic stay
- » Must have raised the issue before the agency



Judicial Decisions

The courts declare the law.

– *Marbury v. Madison*

- » Appellate process and standards
- » Binding and precedential effects
- » Examples: *City of Healdsburg*

Piney Branch Preservation Ass'n

Friends of the Earth v. EPA (daily TMDLs)



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Agency Adjudications

- » Proceedings for orders, APA §§ 556, 557
- » Formal rulemakings “on the record”
 - › EPA NPDES permit appeals
 - › Penalty assessments
 - › Administrative enforcement
- » “Substantial evidence” review



Agency Interpretations

- » May be interpretive rules,, APA § 551(4)
- » Not subject to notice and comment,, § 553(b)(A)
- » May be informal determinations,, memos,, GC opinions
- » Decisions on individual permits/applications



Agency Policy or Guidance

- » Not subject to ~~notice~~-and-comment rulemaking
- » Not published in the *Federal Register*
- » Subject to change without notice
- » Often issued in perpetual “Draft” form
- » Normally not subject to judicial review



Protection Against Change: New Legislation

- » **Support NACWA's efforts**
- » **Keep your own congressional and state delegations informed**
- » **Keep your users and stakeholders informed**
- » **Pray!**



Protections Against Change: Agency Rulemaking

- » Support NACWA's efforts
- » Participate in the rulemaking
 - › File data that support your position
 - › Offer constructive alternatives
 - › Raise all issues
- » Make a record for judicial review
- » Review your permits and applications



Protections Against Change: Changed Rules

- » **Judicial Review** – CWA § 509(b)
- » *E.g., Motor Vehicle Manu'rs Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)
 - › NHTSA rescinded passive restraint requirements for automobiles, and insurers sued
 - › **Held: rescission was arbitrary and capricious:**
“An agency’s view of what is in the public interest may change, either with or without a change in circumstances. But any agency changing its course must supply a reasoned analysis”
quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1971).



Protections Against Change: Judicial Decisions

- » Stay informed through NACWA
- » Support NACWA's efforts
 - › Beware issue preclusion
 - › Check your circuit
- » Check your permits and applications
 - › “Mend” your application, if needed
 - › Amend your permit, if necessary



Protections Against Change: Agency Adjudications

- » Stay informed through NACWA
- » Support NACWA's efforts
- » Review your permits
- » Review, possibly revise your permit applications
 - › Know your system
 - › Consider data needs



Protections Against Change: Agency Interpretation - Statute

» Judicial Review

» *Chevron* deference is qualified by factors in *United States v. Mead Corp.*:

“The fair measure of deference to an agency administering its own statute has been understood to vary with the circumstances, and courts have looked to the agency’s care, its *consistency*, formality, and relative expertness, and to the persuasiveness of the agency’s position”

533 U.S. 218, 229-30 (2001) (footnotes and citations omitted; emphasis added).



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Protections Against Change: Agency Interpretations - Rules

» A change in the agency's interpretation of a rule must be subject to notice and comment. See *Environmental Integrity Project v. EPA*, 425 F.3d 992 (D.C. Cir. 2005):

“When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.”

quoting *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.2d 1030, 1034 (D.C. Cir. 1999).



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Protections Against Change: Policy or Guidance

- » Stay informed
- » Support NACWA's efforts
- » Treat it as a rulemaking
- » Check and mend your permits and applications



Protections Against Change: Policy or Guidance

- » Stay informed
- » Support NACWA's efforts
- » Weigh in and support your views
- » “Guidance” may be a rule in disguise

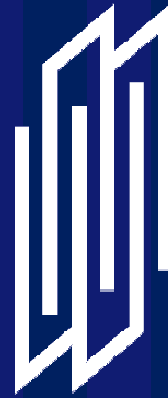
See Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000)(Guidance that “reads like a ukase” held a rule required notice and comment).



Change: The Constant Threat

- » Change is inevitable
- » NACWA is key to defensive strategy
- » Informed constituency is a key asset
- » Your participation is critical
- » Must manage permits and applications
- » Judicial review is a last resort





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