

What Do You Do When The Rules Change?

NACWA Developments in Clean Water Law Seminar

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Types of Changes

- **Legislation**
- **EPA Regulations**
- **EPA Guidance**
- **EPA Enforcement Policies**

What To Do When There Are Proposed Legislative Changes?

- Be vigilant – NACWA will follow legislative proposals and keep its members informed.
- Communicate – If a legislative proposal will have a particular effect on you, make sure the NACWA staff know it. And, if you are uniquely affected, you may also need to communicate with Congress directly.
- Hope for regular order – so that unvetted proposals do not pop up in conference reports before anyone is aware.

Example of Unintended Consequences

- Buy American provision of the Recovery Act.
- Under regular order, in the Transportation and Infrastructure Committee Buy American amendments were always accepted and then changed in conference to a notice requirement only. Not in the Recovery Act.

Limits To Congressional Authority

- The Constitution grants Congress broad authority. The Commerce Clause is most often cited by Congress as authority for legislation.
- But, Congress' authority is not unlimited, particularly when it comes to regulation of States.
- Congress may not order States to adopt a federal regulatory regime. *New York v. United States*, 505 U.S. 144 (1992) (requiring capacity for disposal of low level radioactive waste); *Printz v. United States*, 521 U.S. 898 (1997) (Brady Act requiring handgun regulation).

What To Do When There Are Proposed Rule or Policy Changes?

- Rule changes are governed by the Administrative Procedure Act.
- EPA must provide notice and opportunity for comment.

What is the Legal Standard For Changing a Regulation?

- A new administration may have a different perspective than the previous administration and may try to change previously adopted regulations.
- An agency may do so, but must have a “reasoned analysis” to support the change, *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual*, 463 U.S. 29 (1983).

Example: Clean Air Act Regulation of Sewage Sludge Incineration

- Sewage sludge incinerators are part of a treatment works and are extensively regulated under EPA's Part 503 regulations promulgated under the Clean Water Act.
- Since the early 1990s, EPA has consistently determined that SSIs also are subject to section 112 of the Clean Air Act, but are not major sources of hazardous air pollutants so regulation under section 112 is not required.

Clean Air Act Regulation of Sewage Sludge Incineration

- EPA now is reconsidering this determination and has suggested that it will regulate SSIs under section 129 of the Clean Air Act, which applies to smaller, area sources.
- What do you do?

Responding To Proposed Regulations

- Provide technical information to EPA to ensure that they have all the facts.
- Provide legal analyses demonstrating that their new position is contrary to law and could result in yet another legal defeat when judicial review takes place.
- Provide policy analyses demonstrating why human health and the environment is better protected under the existing regulatory regime.
- If all else fails, petition for review – relying on the information you have provided in the rulemaking administrative record.

What Process Must Be Followed To Create Guidance Documents?

- An agency may issue guidance that interprets an agency regulation. However, when the agency goes beyond interpretation, and imposes new requirements, that guidance becomes a regulation that must go through notice and comment.
- *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (Clean Air Act monitoring guidance); *General Electric Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002) (PCB risk assessment guidance).

What is the Legal Standard to Change Guidance Documents?

- Even if the original guidance document was not subject to notice and comment, an Agency may not change an established interpretation of law without going through notice and comment rulemaking.
- *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579 (D.C. Cir. 1997) (“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”); see also, *Alaska Professional Hunters Association, Inc. v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999) (FAA could not regulate guide pilots when the FAA Alaska regional office had previously told guides they were not subject to regulation as commercial pilots).

Examples of Policies in Flux

- Blending -- July 2009 draft guidance
- Guidance on establishing nutrient criteria.
- Stormwater policies.
- How to make Clean Water Act jurisdictional determinations – new NAS panel

EPA Enforcement Policies

- Can create substantive changes in policy.
- No notice and comment is provided.
- Program office may not even agree.
- You need to share information with each other and NACWA; elevate issues to more senior managers; involve the program office.

Example of Policy Changes Through Enforcement Means: SSO reporting

- Reporting basement backups – The EPA enforcement office has been telling state agencies that they must issue a notice of violation if a POTW fails to report basement backups.
- Some states are going along; others are balking because NPDES permits and EPA regulations do not require this reporting, unless the backup is due to the failure to comply with maintenance requirements (or reporting is required under state law).

Bottom Line – When The Rules Are Changing:

- You need to keep on top of the issues.
- You need to share information.
- You need to engage EPA and let them know your positions.
- Otherwise, change will come and it may not be change you can live with.