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The transformation of modern administrative law

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Item Type	Article
Authors	Kalen, Sam
Publisher	UC Berkeley School of Law
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Download date	2026-07-16 17:47:14
Link to Item	http://hdl.handle.net/20.500.12424/175782

The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents

Sam Kalen*

This Article addresses administrative law principles that apply to interpretive rules and guidance documents. Agencies today often rely heavily on the development of such documents. With the widely-touted “ossification” of the rulemaking process and the need for agencies to adapt to new circumstances, new court decisions, and changing administrations, interpretive rules and guidance documents are increasingly necessary, particularly for agencies implementing environmental and natural resource programs. Yet, administrative law principles governing the treatment of such documents are too vague. The long-standing difficulty of distinguishing between legislative (substantive) rules and non-legislative rules, when coupled with the doctrines of finality, ripeness and deference to agency interpretations all converge to demonstrate the need for clarity to ensure that new administrations will enjoy sufficient flexibility to modify such documents and change course.

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*“We have evolved our administrative system. We have worked out a great variety of basic forms and doctrines which have determined its structure and its relation to the other organs of government. But its operation in some respects has not been clearly foreseen. It is to these aspects of the system that we must now direct our energies.”*¹

INTRODUCTION

Walt Disney’s movie “Chicken Little” reminds us that we should be cautious before proclaiming the end is near. But it also teaches that we should not ignore warning signs of a fragile sky. Thus when Justice Scalia warned a few years back that “[i]t is indeed a wonderful new world that the Court creates, one full of promise for administrative-law professors in need of tenure articles and, of course, for litigators,”² perhaps it was a signal that we should pause and reflect on whether something serious is happening or whether Justice Scalia was simply issuing another quixotic opinion. This Article suggests that, hyperbole aside, there is indeed something noteworthy looming on the horizon. But it is different than what Justice Scalia portends—he was concerned that the Court had created yet another nuance in administrative law by holding that *Chevron* deference would apply even if an agency’s interpretation of an ambiguous statutory provision is different than a prior interpretation upheld by a court. Allowing an executive agency the ability to proffer a new interpretation, he believed, would permit an Article III court’s decision to be subverted by a subsequent executive branch decision. But he missed the underlying point. The nascent world that threatens to emerge absent greater doctrinal clarity in the field of administrative law is one where interpretations increasingly occur in informal documents, and yet the continued flexibility that agencies enjoy when issuing policy or interpretive guidance documents—such as, agency manuals, memoranda, technical documents, policy statements, and even legal opinions—might be hindered by the actions of prior administrations. The extent that past or present presidential administrations can bind or limit the flexibility of future presidential administrations is an issue that affects us all.

1. Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1135 (1954).

2. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 1019 (2005) (Scalia, J., dissenting).

Every four years, the public presumably expects that the winning ticket will influence the development and implementation of policy. If Al Gore had been sworn in as President in January 2001, the American public could have anticipated that he would have acted more aggressively toward the threat of global climate change than his rival, George W. Bush. And those voting for President Bush most likely expected the slower course of action the nation has witnessed during the past eight years. With each new election cycle, the ability of the executive office to influence policy on any range of issues—such as climate change—will surface. And with each new election cycle, the executive will confront limits on its ability to change policy. Some measure of restraint on a new administration's ability to effect change may, indeed, be necessary to avoid pernicious efforts to change policy.³

Yet, we cannot make it so difficult for a new administration to change course that the policies developed by a former administration will remain embedded in the matrix of agencies' binding norms. Administrative agencies must enjoy flexibility, which includes the ability to issue an array of policy and interpretative guidance documents that direct the staff and inform the public of how that agency expects to perform its functions—presumably in a manner consistent with the then-current administration. The ability to issue such documents is critical; agencies could not function effectively if they had to engage in a notice-and-comment rulemaking under the Administrative Procedure Act (APA) each time they alerted their staff and the public about new policy choices, new guidance, or new interpretations. Notice-and-comment rulemaking is cumbersome, often described as ossified: it is both rigid and difficult to maneuver, making it difficult to achieve timely results. When available, therefore, agencies often employ other devices to address policy preferences: legal opinions from agency counsel; management policies; guidance documents; manuals; instruction memoranda; and regulatory

3. The media, for instance, has emphasized the efforts by the Office of the Vice President to influence the policies of the administrative agencies, particularly on energy and environmental matters. See generally CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007). For example, Henry Waxman, Chairman of the House Oversight and Government Reform Committee, reported that the White House overruled the Environmental Protection Agency's recommendation for a secondary air quality standard for ozone under the Clean Air Act. See Andrew Childers, *Waxman Memorandum Finds White House Overruled EPA's Secondary Ozone Standard*, 39 BNA ENV'T REP. 21, 990 (2008). Other stories discuss how the Administration influenced testimony and policies regarding global climate change matters. See, e.g., Juliet Eilperin & R. Jeffrey Smith, *EPA Won't Act on Emissions This Year; Instead of New Rules, More Comment Sought*, WASH. POST, July 11, 2008, at A-1 (discussing White House involvement in air matters); Leora Falk, *Former EPA Official Says Cheney Staff Asked for Parts of Senate Testimony to Be Deleted*, 39 BNA ENV'T REP. 28, 1381 (2008); *Climate Change: Former EPA Official Says Cheney Staff Asked for Parts of Senate Testimony to Be Deleted*, 131 BNA DAILY ENV'T. A-12, July 9, 2008. The scandal surrounding a high ranking former Department of the Interior official is but one of the more recent illustrations of how policymakers might overstep their role in the administrative process. See Office of Inspector General, Department of the Interior, Investigative Report of the Endangered Species Act and Conflict between Science and Policy Redacted, Dec. 10, 2008, available at http://wyden.senate.gov/newsroom/interior_ig_report.pdf.

guidance letters. Just as the need to issue such documents is critical, the ability to change or modify them with sufficient ease is equally critical; otherwise, the hands of a new administration can be tied by the artfulness of a prior administration.

Agencies' use of informal devices is so pervasive that the issue has not gone unnoticed in Congress. When the Republican Party held the majority, the House Committee on Government Reform expressed concern that the devices employed by agencies occasionally might be used as backdoor rulemaking attempts and that agencies should make clear that such documents are not legally binding on the public.⁴ Recently, toward the end of the Bush administration, the Office of Management and Budget and the President similarly announced reservations about the increased use of agency guidance—and arguably sought to curtail their use through the issuance of an OMB Bulletin and Executive Order No. 13422.⁵

Much of the concern about the use of agency guidance documents has been misdirected. These administrative tools are unquestionably needed in the modern era of increasing regulatory programs. Indeed, the ability to provide the public with easy access to information through the internet has transformed the way administrative agencies operate. The incisive issue, then, is not the use of these devices; rather, it is how courts and parties should treat them. Are they final agency actions subject to judicial review? Are they, in effect, "legislative" rules that must be promulgated in accordance with the APA's notice-and-comment rulemaking procedures? Are they binding and enforceable against the agency if the agency deviates from them? Or, if they contain an interpretation of an agency's regulation, can they be modified without going through notice-and-comment rulemaking? And finally, to the extent any such device contains an interpretation of a statute or regulation administered by the issuing agency, should a court afford deference to that interpretation, and will that same standard of deference apply when a new administration offers a different interpretation?

This Article posits that the failure of courts to articulate a coherent approach toward informal agency devices threatens to undermine the flexibility necessary for new administrations to alter policies of former administrations.

4. COMMITTEE ON GOVERNMENT REFORM, NON-BINDING LEGAL EFFECT OF AGENCY GUIDANCE DOCUMENTS, REPORT BY THE COMMITTEE ON GOVERNMENT REFORM, H.R. REP. NO. 106-1009 (2000).

5. In 2005, OMB issued a Proposed Bulletin for Good Guidance Practices, 70 Fed. Reg. 71,866 (Nov. 30, 2005). OMB finalized the Bulletin in January 2007, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), around the same time President Bush issued Executive Order No. 13422, 72 Fed. Reg. 2763 (Jan. 23, 2007) (providing for review by OMB's Office of Information and Regulatory Affairs of "significant guidance documents"). The *New York Times* in January 2007 portrayed this effort as an attempt by the White House to increase its control over executive branch agencies. Robert Pear, *Bush Directive Increases Sway on Regulation*, N.Y. TIMES, Jan. 30, 2007, at A-1, available at <http://www.nytimes.com/2007/01/30/washington/30rules.html?pagewanted=all#>.

This trend, if not checked, could lead to a paralysis in agency flexibility and an inability to effectively change course as new administrations come to power. In short, we could be on the precipice of a new era of administrative law. The subject of this Article is how we got here and how to avert this possibility.

In Part I, the Article briefly traces the development of the modern rulemaking process. It explains how agencies came to rely less on adjudication and more on rulemaking as the predominate mode of policy making. Now that we are several decades into this rulemaking phase of modern administrative law, several problems have emerged. With what is now commonly referred to as the ossification of the rulemaking process, the ability to engage in rulemaking has become cumbersome. In lieu of rulemaking, agencies are employing—perhaps with increasing frequency—informal tools to constrain their employees and inform the public. These tools, collectively referred to as guidance documents, are essential to the functioning of the modern executive agency.

Yet, will evolving principles of administrative law make it unduly difficult to change such guidance documents when new administrations come to power? If so, the ossification of the rulemaking process, when coupled with other fluid and potentially chilling principles of administrative law, may inhibit the flexibility of a new administration to effectuate change. Part II of the Article addresses how courts, and in particular the D.C. Circuit, have vacillated on their treatment of guidance documents. While concerned about their proliferation, courts are more recently appearing less inclined to conclude that such documents are impermissible attempts to avoid notice-and-comment rulemaking. And while the D.C. Circuit may signal to new administrations that their hands are not tied, its decisions provide little comfort absent revisiting some fundamental principles of finality, ripeness and the doctrine of deference. In Parts III and IV, the Article articulates the relationship of these various doctrines and how they each affect the flexibility of future administrations. Finally, in Part V, the Article suggests how all these doctrines, appropriately applied, could avoid vesting in one administration the ability to force a future administration into a notice-and-comment rulemaking process when it seeks to change course from its predecessor's guidance documents.

I. FROM AD HOC DECISION MAKING TO MODERN ADMINISTRATIVE LAW

As we embark on what could be called a new phase in the development of administrative law, a brief précis of how we arrived here is warranted. The Special Counsel to President Eisenhower once observed, “[T]he development of administrative agencies in this country has not proceeded according to any basic plan. No master blueprint has been responsible for their creation and growth. Each has been an ad hoc solution to meet a particular exigency.”⁶

6. David W. Kendall, *Some Observations About the Administrative Process*, 11 ADMIN. L. BULL. 62, 68 (1959).

Those words continue to resonate today, and perhaps through an appreciation of history and present circumstances, the course of administrative law will proceed more from the adoption of a purposeful and intellectually coherent structure than from an ad hoc response.

Although administrative and quasi-administrative agencies have existed for quite some time, indeed the roots of administrative law can be traced back to Federalist era in the 1780s,⁷ it was not until the early part of this century, first with the progressive era and then with the New Deal, that the modern regulatory state emerged with any prominence.⁸ Modern principles of administrative law generally emerged during the New Deal era, with the “burgeoning of the administrative process.”⁹ The next phase of administrative law involved the general acceptance of the administrative regulatory process within our constitutional and political structure, resulting in the passage of the Administrative Procedure Act of 1946.¹⁰

This led to a third phase involving a heightened focus on critical administrative law issues and proposals for making the administrative process function more efficiently, effectively, and fairly.¹¹ Commentators generally

7. See generally Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006) (chronicling the various ways that early Federalists delegated decision-making power to bodies created by Congress). In his classic study on the history of federal regulation, Robert Rabin focused first on the populist era of the late nineteenth century and then traced the conceptual approach to regulation thereafter. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986). The New Deal era, he posits, marked a “watershed in the development of the federal regulatory system.” *Id.* at 1192.

8. See generally Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) (explaining the shift from the common law approach toward rights to entitlements concept).

9. James M. Landis, *The Administrative Process—The Third Decade*, 13 ADMIN. L. REV. 17, 19 (1960) [hereinafter *Administrative Process*]. In a 1940 lecture, Landis bemoaned what he perceived was a weak administrative law bar. James M. Landis, *Crucial Issues in Administrative Law: The Walter-Logan Bill*, 53 HARV. L. REV. 1077, 1078–80 (1940). He further noted that Special Committee on Administrative Law of the American Bar Association had been created just seven years earlier. *Id.* at 1082 n.9. And, the seminal report that ultimately set the stage for the APA occurred in 1941. REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) (on file with author).

10. See Landis, *Administrative Process*, *supra* note 9, at 20. See generally George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258 (1978).

11. See Landis, *Administrative Process*, *supra* note 10, at 20–26. Many observers at that time feared that administrative law was in too much disarray. See TASK FORCE ON LEGAL SERVICES AND PROCEDURE, COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON LEGAL SERVICES AND PROCEDURE 9–10 (1955); COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, LEGAL SERVICES AND PROCEDURE: A REPORT TO THE CONGRESS 47 (1955). See generally Ralph F. Fuchs, *The Hoover Commission and Task Force Reports on Legal Services and Procedure*, 31 IND. L. J. 1 (1955). Judge Friendly opined, “[t]he administrative agencies are not wanting for attention, but the attention they are getting is not the attention they want.” Henry J. Friendly, *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429, 431 (1960) [hereinafter Friendly, *A Look*]. In his book on administrative agencies, Judge Friendly argued that agencies needed better definition of standards to avoid inconsistency and unfairness in otherwise ad hoc

promoted increased use of rulemaking over the more traditional use of agency adjudication—then commonly referred to as either the “common law” approach or ad hoc policy making.¹² In *Securities & Exchange Commission v. Chenery Corp. (Chenery II)*,¹³ the Supreme Court held that agencies could choose between establishing policies on a case-by-case basis—that is, on an ad hoc basis in an adjudicatory proceeding—or through a rulemaking process. The Court nevertheless offered words of caution, noting that the flexibility to proceed in an ad hoc fashion was necessary to address unanticipated situations, where the agency lacked sufficient experience such that it needed to proceed carefully and incrementally employ a case-by-case approach.¹⁴

decision-making. HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* (1962) [hereinafter FRIENDLY, *ADMINISTRATIVE AGENCIES*]. For an interesting review of Judge Friendly’s approach toward decision making, see Daniel Breen, *Avoiding “Wild Blue Yonders”: The Prudentialism of Henry J. Friendly and John Roberts*, 52 S.D. L. REV. 73 (2007). For a discussion of the creation of the Administrative Conference of the United States, see generally Note, *The Progress of Federal Agency Reorganization Under the Kennedy Administration*, 48 VA. L. REV. 300, 361–67 (1962).

12. See Ben C. Fisher, *Rule Making Activities in Federal Administrative Agencies*, 17 ADMIN. L. REV. 252 (1965); Ruth Smalley, *Report of the Committee on Agency Rule Making*, 12 ADMIN. L. BULL. 180, 181 (1960); see also Friendly, *A Look*, *supra* note 11, at 437; Louis J. Hector, *The New Critique of the Regulatory Agency*, 12 ADMIN. L. BULL. 12, 16 (1959); Carl McFarland, *Landis’ Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373, 433–36 (1961) (describing Landis’ Report critique of “common law” approach to policy-setting, as opposed to rulemaking). See also Merton C. Bernstein, *The NLRB’s Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970). The Administrative Conference of the United States responded to the 1971 Advisory Council on Executive Organization (“Ash Council”) by, *inter alia*, similarly encouraging greater reliance on rulemaking proceedings rather than adjudicatory proceedings for establishing policy. Administrative Conference of the United States, *Views of the Administrative Conference of the United States on the “Report on Selected Independent Regulatory Agencies” of the President’s Advisory Council on Executive Organization*, 57 VA. L. REV. 927, 928, 930 (1971). The 1971 Ash Council recommended establishing a super-Administrative Court, which would review select agency decisions. See generally Nathaniel L. Nathanson, *The Administrative Court Proposal*, 57 VA. L. REV. 996 (1971). This followed earlier proposals by the American Bar Association and the Hoover Commission. *Id.* at 1003.

13. *SEC v. Chenery Corp.*, (*Chenery II*), 332 U.S. 194 (1947). See generally Russell L. Weaver & Linda D. Jellum, *Chenery II and the Development of Federal Administrative Law*, 58 ADMIN. L. REV. 815, 816 (2006) (*Chenery II* “qualifies as our most underrated administrative law decision.”). In *Securities and Exchange Commission v. Chenery Corp. (Chenery I)*, 318 U.S. 80 (1943), the Court did not address the issue squarely, but it signaled the approach it would take in *Chenery II* in *American Power & Light Co. v. Securities and Exchange Commission*, 329 U.S. 90, 106 (1946) (“Nor is there any constitutional requirement that the legislative standards be translated by the Commission into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle. All that can be required is that the Commission’s actions conform to the statutory language and policy.”).

14. The case involved the Securities and Exchange Commission (SEC) review of a reorganization plan (and treatment of stock by management) for a public utility holding, pursuant to the Public Utility Holding Company Act of 1935. In *Chenery I*, 318 U.S. 80 (1943), the Court, in a 5-3 decision (Douglas, J., not participating), remanded the SEC’s decision. Writing for the majority, Justice Frankfurter held that the SEC incorrectly applied judicial principles to the treatment of the stock in the reorganization. He further observed:

[T]he difficulty remains that the considerations urged here in support of the Commission’s order were not those upon which its action was based. The Commission did not rely upon “its

Yet, echoing the apparent prevailing sentiment, the General Counsel to the Federal Communications Commission warned that the future of the administrative process could well rest on whether agencies choose wisely between the processes. “[I]n general, rule-making is a sounder way of proceeding than the case-by-case method or general declarations of policy and that, wherever appropriate, it should be employed.”¹⁵ This same theme pervades Peter Strauss’ 1974 classic inquiry into the Department of the Interior’s administration of the 1872 Mining Law.¹⁶ Such recommendations often encouraged more widespread use of interpretive rules and statements of

special administrative competence”; it formulated no judgment upon the requirements of the “public interest or the interest of investors or consumers” in the situation before it Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different. Whether and to what extent directors or officers should be prohibited from buying or selling stock of the corporation during its reorganization, presents problems of policy for the judgment of Congress or the body to which it has delegated power to deal with the matter.

318 U.S. at 92. The Court added that conduct could only be outlawed if the agency to which Congress delegated the authority to prescribe standards did so, such as “acting under the rule-making power delegated to it.” *Id.* at 92. See generally Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952 (2007) (describing the role of *Chenery* and the principle that a court may review only the agency’s asserted reasons for its decision as a condition for affording *Chevron* deference). In *Chenery II*, although the Court indicated that the agency could act in an ad hoc manner, it nonetheless arguably cabined its language by noting that it did not mean to suggest in *Chenery I* that rulemaking was the only option. *Chenery II*, 332 U.S. at 201–02. It further noted that the SEC, unlike a court, has less reason not to act by rulemaking when formulating new standards of conduct. *Id.* at 202. While the majority disclaimed any rigid approach, it emphasized that “[t]he function of filing in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.” *Id.* Perhaps predictably, Justice Frankfurter joined Justice Jackson’s dissent in *Chenery II*, with Justice Jackson caustically and exasperatingly writing that “[t]he difference between the first and the latest decision of the Court is thus simply the difference between holding that administrative orders must have a basis in law and a holding that absence of a legal basis is no ground on which courts may annul them.” *Id.* at 212 (Jackson, J., dissenting). Whether in a particular case or in a rulemaking, Justice Jackson indicated the basis in law would come in a rulemaking. For a modern day commentary, see generally William D. Araiza, *Limits on Agency Discretion to Choose Between Rulemaking and Adjudication: Reconsidering Patel v. INS and Ford Motor Co. v. FTC*, 58 ADMIN. L. REV. 899 (2006). Cf. *Aeolus Systems, LLC v. United States*, 79 Fed. Cl. 1 (2007) (rejecting argument that agency had to proceed through rulemaking in lieu of adjudication); see also *Muniz v. Sabol*, 517 F.3d 29 (1st Cir. 2008) (permitting agency to address generic issues through rulemaking in lieu of individualized adjudication).

15. Warren E. Baker, *Policy by Rule or Ad Hoc Approach—Which Should it Be?*, 22 LAW & CONTEMP. PROBS. 658, 671 (1957).

16. Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in An Executive Department: Reflections on the Interior Department’s Administration of the Mining Law*, 74 COLUM. L. REV. 1231 (1974). See also David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

policy.¹⁷ By 1974, Judge Skelly Wright could justifiably proclaim that “[a]dministrative law has entered an age of rulemaking.”¹⁸

Now, several decades into this new age of rulemaking, agencies are finding the development of regulations increasingly more challenging. This is commonly referred to as the ossification of the rulemaking process.¹⁹ To begin with, agencies generally must comply with the traditional rulemaking requirements under section 553 of the APA,²⁰ or similar alternative requirements under a specific statute for particular programs.²¹ For informal rulemakings under section 553, federal agencies must provide interested parties notice in the Federal Register and an opportunity for comment, as well as provide a statement of basis and purpose to support any final rulemaking decision.²²

Congress then imposes additional, often-cumbersome, hurdles in a regulatory path, such as the requirement for an initial and final Regulatory Flexibility Analysis,²³ the sixty day congressional layover period for certain

17. See, e.g., Arthur Earl Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretive Rules and General Statements of Policy Under the A.P.A.*, 23 ADMIN. L. REV. 101 (1971); McFarland, *supra* note 12, at 435–36.

18. J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 375 (1974). See also William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 38–39 (1975) (“The increased use of rulemaking has changed the whole structure of administrative law. . . .”). Not surprisingly, the increased reliance on rulemaking prompted a heightened focus on the rulemaking process itself and the standard of judicial review. *Id.* See generally David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975). The Court decided *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) during this period, addressing the judicial role in reviewing agency actions. For an insightful article written a decade earlier about the role of judicial review and administrative discretion, see Ralph F. Fuchs, *Fairness and Effectiveness in Administrative Agency Organization and Procedures*, 36 IND. L.J. 1 (1960).

19. See generally William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000); R. Shep Melnick, *The Political Roots of the Judicial Dilemma*, 49 ADMIN. L. REV. 585 (1997); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61 (1997); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995) (hereinafter Pierce, *Deossify*). But cf. Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599 (1997) (responding to Pierce’s proposals for reshaping administrative law).

20. 5 U.S.C. § 553 (2006).

21. For example, the Clean Air Act contains its own rulemaking provisions. See 42 U.S.C. § 7607(d) (2006).

22. 5 U.S.C. § 553. “This requirement [to provide a statement of basis and purpose] is not meant to be particularly onerous. It is enough if the agency’s statement identifies the major policy issues raised in the rulemaking and coherently explains why the agency resolved the issues as it did.” *Nat’l Mining Ass’n v. Mine Safety & Health Admin.*, 512 F.3d 696, 700 (D.C. Cir. 2008) (citations omitted). See also *Nat’l Nutritional Foods Ass’n v. Weinberger*, 512 F.2d 688, 701 (2d Cir. 1975) (statement must only be sufficiently detailed to permit judicial review).

23. See 5 U.S.C. §§ 601 (2006); *Allied Local & Reg’l Mfrs. Caucus v. EPA*, 215 F.3d 61, 78–79 (D.C. Cir. 2000). Thomas O. Sargentich, *The Small Business Regulatory Enforcement Fairness Act*, 49 ADMIN. L. REV. 123 (1997). The Regulatory Flexibility Act generally requires the preparation of an

major final rules,²⁴ the Unfunded Mandates Reform Act of 1995,²⁵ the Paperwork Reduction Act,²⁶ the Data Quality Act,²⁷ and the Federal Advisory Committee Act.²⁸ Congress occasionally further encumbers a rulemaking proceeding by imposing specific requirements on an agency's exercise of discretion, such as the 1996 amendments to the Safe Drinking Water Act, which requires a fairly specific risk assessment process and cost-benefit analysis for certain activities.²⁹

Nor has the executive branch been silent. From the early establishment of the Office of Management and Budget (OMB),³⁰ to the preparation of budgets,

initial and then final regulatory flexibility analysis describing the impact of the rule on small entities (specifically defined), except when the agency head certifies that the rule will not have a significant economic effect on a substantial number of small entities. *See, e.g.,* Aeronautical Repair Station Ass'n, Inc. v. FAA, 494 F.3d 161, 174–178 (D.C. Cir. 2007) (discussing challenges under the Regulatory Flexibility Act).

24. Congressional Review Act, Pub. L. 104-121, 101 Stat. 847, 868-74, codified at 5 U.S.C. §§ 801-08, § 8-2(a). *See generally* Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95 (1997).

25. 2 U.S.C. § 1501 (2006), requiring that, prior to issuing either a proposed or final rule that may result in the aggregate expenditure of \$100 million or more (in any one year) to State, local, and tribal governments, or the private sector, executive branch agencies produce a written analysis of the estimated costs of compliance. *See generally* Daniel E. Troy, *The Unfunded Mandates Reform Act of 1995*, 49 ADMIN. L. REV. 139 (1997).

26. Pub. L. 104-13, 109 Stat. 163 (codified as amended in scattered sections of 44 U.S.C.). *See generally* Jeffrey S. Lubbers, *Paperwork Redux: The (Stronger) Paperwork Reduction Act of 1995*, 49 ADMIN. L. REV. 111 (1997).

27. 44 U.S.C. § 3516 (2006). *See generally* James W. Conrad, Jr., *The Information Quality Act—Antiregulatory Costs of Mythic Proportions?*, 12 KAN. J. L. & PUB. POL'Y 521 (2003).

28. 5 U.S.C. app. 2 § 2-16 (2006). Congress softened the Federal Advisory Committee Act (FACA) in 1995, by exempting from its sphere certain intergovernmental consultations. *See* Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1501-1571 (2006). *See generally* Thomas C. Beierle and Rebecca J. Long, *Chilling Collaboration: The Federal Advisory Committee Act and Stakeholder Involvement in Environmental Decisionmaking*, 29 ENVTL. L. REP. 10399 (1999); Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451 (1997). Although the Court avoided the underlying merits of the case, *Cheney v. United States Dist. Court for the Dist. of Columbia*, 542 U.S. 367 (2004) is likely the most prominent FACA lawsuit, where the plaintiffs alleged that the Vice President's National Energy Policy Development Group violated the law.

29. *See* 42 U.S.C. § 300g-1(b)(3) (2006); The Food Quality Protection Act of 1996, also requires specific requirements, mandating that EPA apply a variety of factors in determining whether the amounts of pesticide residues allowed in or on food are safe (e.g., tolerances). Pub. L. No. 107-140, 110 Stat. 1489 (codified in scattered sections of Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136-136y, and the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301-399a). *See generally* UNITED STATES GENERAL ACCOUNTING OFFICE, CHILDREN AND PESTICIDES: NEW APPROACH TO CONSIDERING RISK IS PARTLY IN PLACE (2000). *See also* Charles Tiefer, *Congressional Oversight of the Clinton Administration and Congressional Procedure*, 50 ADMIN. L. REV. 199 (1998); Thomas O. McGarity, *Politics by Other Means: Law, Science, and Policy in EPA's Implementation of the Food Quality Protection Act*, 53 ADMIN. L. REV. 103 (2001).

30. The OMB is institutionally skeptical of regulation, or at least environmental regulation. For critical analysis discussing OMB's involvement with environmental regulation, *see* William D. Araiza, *Judicial and Legislative Checks on Ex Parte OMB Influence Over Rulemaking*, 54 ADMIN. L. REV. 611 (2000); Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097 (2006); Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 330-34 (1991); Sidney A. Shapiro, *OMB and the Politicization*

and finally to issuing a variety of Executive Orders mandating consideration of certain issues in various types of rulemakings,³¹ the executive office affects—albeit often subtly—the numerous political and non-political federal employees who must decide whether or how to engage in a rulemaking effort. Occasionally White House involvement is motivated by ideological positions, such as Vice President Dan Quayle’s Council on Competitiveness, which reviewed regulatory agendas for their impact on business.³² At other times, the involvement is perhaps benign, but time-consuming, such as the Vice President Al Gore’s effort to re-draft regulations in plain English. While considerable debate surrounds the exact nature and efficacy of presidential involvement, few question that it occurs.³³ A recent example is the Bush White House’s directive

of Risk Assessment, 37 ENVTL. L. 1083 (2007). See also Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006) (arguing that OMB-centralized oversight may be appropriate for harmonization but not for controlling allegedly overzealous agency behavior).

31. See, e.g., Exec. Order No. 13,186, 66 Fed. Reg. 3853 (2001) (mandating consideration of impacts of agency action on migratory birds); Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (1999) (mandating consideration of federalism implications of agency actions); Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994) (mandating consideration of environmental justice impacts of agency actions). The Government Accountability Office, for instance, criticized EPA’s air quality rulemakings for not addressing more effectively environmental justice concerns. U.S. GOV’T ACCOUNTABILITY OFFICE, ENVIRONMENTAL JUSTICE: EPA SHOULD DEVOTE MORE ATTENTION TO ENVIRONMENTAL JUSTICE WHEN DEVELOPING CLEAN AIR RULES, REP. NO. GAO-05-289 (2005), available at <http://www.gao.gov/new.items/d05289.pdf>.

32. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 127 (2004). Vice President Quayle’s Council generated open criticism for its alleged interference with important rulemakings. See CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 176–77 (CQ PRESS 2003) (1994) (discussing the Council’s impact on a significant Clean Air Act rulemaking). White House review of rulemakings also intensifies during presidential transition periods, as these teams often review and delay potentially controversial rulemakings (or other actions) that may not be consistent with the philosophy of the new Administration. The day after his boss was sworn into office, the then-Assistant to the President and Chief of Staff Andrew H. Card, Jr., issued a memorandum effectively imposing a moratorium on many proposed regulations. See William M. Jack, Comment, *Taking Care That Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration’s Card Memorandum*, 54 ADMIN. L. REV. 1479 (2002). A similar moratorium has been issued for the end of the Administration in 2008. See Memorandum from Joshua B. Bolton, Chief of Staff, to the Heads of Executive Departments and Agencies, *The Administrator of the Office of Information and Regulatory Affairs: Issuance of Agency Regulations at the End of the Administration*, May 8, 2008 (on file with author). Immediately after President Obama’s administration entered the White House, a similar directive emerged regarding pending proposed rulemakings. See Memorandum from Rahm Emanuel, Assistant to the President and Chief of Staff, to the Heads of Executive Departments and Agencies, *Regulatory Review* (Jan. 20, 2009) (on file with author), available at <http://media.washingtonpost.com/wp-srv/politics/documents/emanuel-regulatory-review.pdf>.

33. See e.g., Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006). Bressman and Vandenbergh question existing scholarship advancing the presidential control model, suggesting that the presidential control model requires reworking because actual practice suggests that the White House’s involvement is more complex and less positive than advocates of the model recognize. Their article is instructive in its effort to examine actual practice (via a survey of former officials). They focus on EPA and the involvement of OMB and the Office of Information and Regulatory Affairs (OIRA), concluding that Executive Office influence often occurs at a level apart from OIRA. Indeed, such influence can

to the Environmental Protection Agency (EPA) that the agency not set a separate national ambient air quality seasonal standard for ozone under the Clean Air Act (CAA).³⁴

And finally, courts further contribute to the ossification of rulemaking. Once an agency surmounts the battery of regulatory hurdles, it often must then defend its action in court. This now means surviving a “hard look” into the administrative record and justification for the agency’s regulatory decision. Through the APA, Congress directed that reviewing courts explore whether the agency acted “arbitrarily or capriciously, abused its discretion, or otherwise acted contrary to law.”³⁵ Largely developed by the D.C. Circuit during the 1970s,³⁶ the “hard look” doctrine provides courts with the justification for ensuring an agency has examined “the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”³⁷ A reviewing court, moreover, will not

occur simply by the appointment of politically aligned superiors in an agency, or through interagency task forces, and sometimes even with the involvement of other departments, including the Department of Justice or through communications with the White House’s Council on Environmental Quality. General surveys (or questionnaires to former agency officials, as the authors used) will not portray a complete picture, without examining particular agency policies or “policy-laden” rulemaking efforts. For discussions of presidential control, see Colin S. Diver, *Presidential Powers*, 36 AM. U.L. REV. 519 (1987); Robert V. Percival, *Separation of Powers, the Presidency and the Environment*, 21 J. LAND RESOURCES & ENVTL. L. 25 (2001); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1 (1994); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161 (1995); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965 (1997).

34. Steven D. Cook, *White House Defends Intervention in EPA Decision on Ozone*, 39 BNA ENVT. REP. 12, 542 (2008).

35. See 5 U.S.C. § 706 (2006).

36. See Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599 (2002); see also Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L. J. 779 (2002); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

The regulatory scandals at EPA and the Interior Department during the Reagan and first Bush Administrations arguably only further solidified the increased scrutiny of environmental decision making. Cf. Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 363 (1991) (describing EPA’s “pathological cycle of regulatory failure, crisis, and controversy”). “By early 1983 the agency [EPA] was awash in public scandal amid charges that its rulemaking and enforcement had become corrupted by a pattern of secret negotiations with industry representatives, exclusion of public-interest voices from policy deliberations, and improper influence exerted from the upper reaches of the Executive Branch. By April most of the president’s appointees to leadership positions in the agency, including top administrator Anne Burford, had resigned under fire....” PETER C. YEAGER, *THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION* 2 (1991). See also George Cameron Coggins & Doris K. Nagle, *“Nothing Beside Remains”: The Legal Legacy of James G. Watt’s Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVT’L AFF. L. REV. 473 (1990).

37. *Motor Vehicles Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Of course, the development of the “hard look” doctrine occurred earlier, as chronicled by Judge Harold Leventhal,

sustain an agency's action on a basis or rationale other than as supplied by the agency in the administrative proceeding.³⁸ The hard look doctrine, whether rightfully so or not,³⁹ arguably discourages agencies from engaging in a rulemaking process that it ultimately might be required to do over.⁴⁰ Judge Kavanaugh, of the D.C. Circuit, recently observed that

in Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974).

In 1978, the Supreme Court limited courts' ability to fashion procedural requirements not contained within the APA. See *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978). For the development of hybrid rulemaking prior to *Vermont Yankee*, see Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974); Stephen F. Williams, "Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401 (1975). Cf. *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 349–350 (1st Cir. 2004) (APA requires only minimal procedural safeguards and court may not enlarge those minimum requirements). In *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006), the court explained that although it had earlier held that an opportunity for a public hearing under section 402 of the Clean Water Act permitting program meant an evidentiary hearing, that interpretation could be usurped by *Chevron* deference and *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), when the agency subsequently interpreted the language not to require an evidentiary hearing. See *infra* notes 297–315 and accompanying text (discussing *Brand X*).

38. *Motor Vehicles*, 463 U.S. at 50. See also *Macmillan Publ'g Co. v. NLRB*, 194 F.3d 165, 168 (D.C. Cir. 1999) (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)). In his entertaining style, Judge Friendly revisited the *Chenery* principle on agency justifications and concluded that it has an appropriate place in administrative law, provided that courts do not act too zealously in exercising their power of remand. Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L. R. 199 (1969). See Stack, *supra* note 14 (discussing the importance of *Chenery*).

39. Various reasons exist for favoring some hefty measure of judicial scrutiny of an agency action, perhaps as an institutional check against executive agency decisions that may have been rendered with insufficient thought, analysis or support—or potentially for "political," in lieu of congressionally sanctioned, reasons. Richard Pierce, for one, suggests that courts may be exercising too much power and operate beyond their competence when they review agency decisions. See Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61 (1997); Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988). Others disagree. See Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599 (1997); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997); Mark Seidenfeld, *Hard Look Review in a World of Techno-Bureaucratic Decisionmaking: A Reply to Professor McGarity*, 75 TEX. L. REV. 559 (1997); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990).

40. The level of scrutiny may dictate the result of a court's review. In *Defenders of Wildlife v. Kempthorne*, 2006 WL 2844232, *19 n.15 (D.D.C. Sept. 29, 2006), for instance, the court distinguished another decision that invalidated a set of regulations similar to those challenged in this case, by noting that the court there was "compelled to reach its conclusion . . . by Ninth Circuit precedent that is substantively different from the case law interpreting *Chevron* in this [D.C. Circuit] jurisdiction." For studies of agencies' success in surviving judicial scrutiny, see JONATHAN H. ADLER, REASON PUBLIC POLICY INSTITUTE, ENVIRONMENTAL PERFORMANCE AT THE BENCH: THE EPA'S RECORD IN FEDERAL COURT (2000); William S. Jordan, III, *Judges, Ideology, and Policy in the Administrative State: Lessons From a Decade of Hard Look Remands of EPA Rules*, 53 ADMIN. L. REV. 45, 94 (2001) (over tested period, EPA prevailed more often than not when court reached *Chevron* step two analysis).

[t]he judicially created obstacle course can hinder Executive Branch agencies from rapidly and effectively responding to changing or emerging issues within their authority, such as . . . effectuating policy or philosophical changes in the Executive's approach to the subject matter at hand. The trend has not been good as a jurisprudential matter, and it continues to have significant practical consequences for the operation of the Federal Government and those affected by federal regulation and deregulation.⁴¹

Quite predictably, therefore, federal agencies lean toward interpretive rules and policy guidance whenever possible. The APA exempts from notice-and-comment rulemaking "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."⁴² Agencies also may dispense with the requirements for notice-and-comment when they have good cause,⁴³ and may under appropriate circumstances even issue interim final or direct final rules.⁴⁴ It appears that Congress now may encourage such abbreviated rulemakings, as it has done, for instance, in the Energy Independence and Security Act of 2007, where it calls for "accelerated"

41. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (dissenting in part).

42. 5 U.S.C. § 553(b)(3)(A) (2006). *Compare* *James V. Hurson Assocs. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000) ("that an otherwise procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it imposes a burden on regulated parties"), *with* *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749 (D.C. Cir. 2001) (no inherent power to correct technical mistakes in rulemaking, without going through another formal rulemaking process). *See also* *Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002) (a cut-off date policy for requesting documents under the Freedom of Information Act a procedural rule but otherwise held unreasonable).

43. 5 U.S.C. § 553(b)(3)(B) (2006). *See generally* Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113 (1984); Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317 (1989). In *Natural Res. Def. Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004), the Second Circuit rejected as "good cause" a problem regarding the effective date of a rulemaking of the agency's own making. But "good cause" may exist when conditions dictate immediate action. *See, e.g., Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1111 (9th Cir. 2006) (need for action prior to upcoming fishing season).

44. *See generally* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703 (1999); Ronald M. Levin, *More on Direct Final Rulemaking: Streamlining, Not Corner-Cutting*, 51 ADMIN. L. REV. 757 (1999); Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1 (1995); Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401 (1999). *Cf.* 60 Fed. Reg. 43,110 (Aug. 18, 1995) (Administrative Conference of the United States Recommendation 95-4, regarding procedures for noncontroversial and expedited rulemakings). For example, in the long-running debate over the scope of section 404 jurisdiction under the Clean Water Act, the United States Army Corps of Engineers responded to the decision in *American Mining Congress v. U.S. Army Corps of Eng'rs*, 951 F. Supp. 267 (D.D.C. 1997), *aff'd*, 145 F.3d 1399 (D.C. Cir. 1998) (*AMC I*), by issuing a direct-final rule on the jurisdictional scope of regulated activities involving "incidental fallback." 64 Fed. Reg. 25,119-23 (May 10, 1999); *see* *Am. Mining Congress v. U.S. Army Corps of Eng'rs*, 120 F. Supp. 2d 23 (D.D.C. 2000) (refusing to find that rule of May 10th violated injunction in *AMC I*). EPA now occasionally publishes direct final rules that it believes are not controversial, and provides an opportunity for public comment and ultimately withdrawal of the rule if the agency incorrectly anticipates the public's reaction. *See* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 115-18 (4th ed. 2006).

rulemakings and “direct final” rules if the agency does not receive any opposition.⁴⁵

Today, federal agencies could not function effectively without the ability to issue policy guidance and interpretive rules.⁴⁶ Interpretive rules, whether in the form of a manual or a legal opinion, serve the critical function of informing agency personnel of how to interpret or apply a statute or regulation. Absent such documents, agency personnel could interpret or apply a particular regulation or statute inconsistently in various regional or field offices.⁴⁷ Also,

45. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (codified as amended in scattered sections of 42 U.S.C.).

46. “Agencies cannot function effectively unless they clarify the law through interpretative rules and channel their discretion through policy statements.” Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 529 (1977). The use of agency devices other than notice-and-comment rulemakings is far from new. For a thoughtful discussion of this practice at the Internal Revenue Service, the Immigration and Naturalization Service, the Federal Communications Commission and the Federal Trade Commission, see *id.* See also Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 805 (2001). The Department of the Interior has employed guidance manuals for some time; the Army Corps of Engineers began issuing Regulatory Guidance Letters (RGLs) in 1981—albeit not publishing them in the Federal Register until a decade later. See Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N.D. L. REV. 873, 911 (1993). EPA too has provided “guidance” since the agency’s inception. See, e.g., State and Federal Administrative Orders Permitting a Delay in Compliance with State Implementation Plan Requirement, 44 Fed. Reg. 8311 (Feb. 9, 1979) (guidance memoranda and other documents regarding State Implementation Plan requirements); Clean Air Act Provisions, 44 Fed. Reg. 37679 (June 28, 1979) (policy memorandum on application of CAA sanctions). Early on under Title II of the CAA, for instance, EPA issued Manufacturer Guidance Letters and Advisory Circulars; absent such documents, the regulated community could not have certified their automobiles for sale due to the immediacy of the issues and the time required for a rulemaking proceeding. See, e.g., 63 Fed. Reg. 8197 (Feb. 18, 1998) (guidance on municipal settlement policy); 61 Fed. Reg. 55,298 (Oct. 25, 1996) (guidance on procedures for 106(b) petitions). EPA also publishes numerous technical and model documents. See, e.g., 60 Fed. Reg. 62,849 (Dec. 7, 1995) (model *de minimis* contributor consent decree and administrative order on consent); 60 Fed. Reg. 62,446 (Dec. 6, 1995) (model CERCLA past costs consent decree and administrative agreement). The Council on Environmental Quality even began its efforts under the National Environmental Policy Act by releasing “guidelines” in 1973, 38 Fed. Reg. 20,550 (Aug. 1, 1973) (guidelines, although published for notice and comment), followed by additional guidance documents as the “Forty Questions.” See THE NEPA LITIGATION GUIDE 303 (Karin P. Sheldon & Mark Squillace, eds., 1999).

47. It is for this reason, in part, that the Solicitor of the Department of the Interior issued “M-Opinions” on patenting of excess reserves and mill-sites under the 1872 Mining Law. Memorandum from John D. Leshy, Solicitor, U.S. Dep’t of the Interior to Director, Bureau of Land Mgmt., *Excess Reserves Under the Mining Law* (Mar. 22, 1996), available at <http://www.doi.gov/solicitor/opinions/M-36984,%20Excess%20Reserves%20Under%20the%20Mining%20Law-1996.pdf>; Memorandum from John D. Leshy, Solicitor, U.S. Dep’t of the Interior to Secretary, to Acting Director, Bureau of Land Mgmt., *Patenting of Mining Claims and Mill Sites in Wilderness Areas* (May 22, 1998), available at <http://www.doi.gov/solicitor/opinions/M-36994.pdf>; Memorandum from John D. Leshy, Solicitor, U.S. Dep’t of the Interior to Director, Bureau of Land Mgmt., *Entitlement to a Mineral Patent Under the Mining Law of 1872* (Nov. 12, 1997), available at <http://www.doi.gov/solicitor/opinions/M-36990.pdf>; Memorandum from John D. Leshy, Solicitor, U.S. Dep’t of the Interior to Director, Bureau of Land Mgmt., *Use of Mining Claims for Purposes Ancillary to Mineral Extraction* (Jan. 18, 2001), available at <http://www.doi.gov/solicitor/opinions/M-37004,%20Use%20of%20Mining%20Claims%20for%20Purposes%20to%20Mineral%20Extraction-2001.pdf>. The Solicitor reaffirmed that these “M” opinions are binding on the entire DOI. Solicitor, Department of the Interior to Assistant

agency personnel often need guidance on how to apply a particular statute or regulation in light of changing legal doctrines or the effect of a particular court decision.⁴⁸

The need for technical guidance is acutely important to environmental and natural resource agencies. The EPA arguably could not function without guidance documents, and it issues guidance covering virtually all of its programs, ranging from notice on pesticide registration labeling,⁴⁹ federally permitted releases of air pollutants under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁵⁰ compliance and enforcement under the various titles of the CAA,⁵¹ as well as on how to administer the Clean Water Act (CWA).⁵² The agency maintains an online

Secretary, Policy, Management and Budget Director, Office of Hearings and Appeals, *Binding Nature of Solicitor's M-Opinions on the Office of Hearings and Appeals* (Jan. 18, 2001), available at <http://www.doi.gov/solicitor/opinions/M-37003,%20Binding%20Nature%20of%20Solicitor's%20M-Opinions%20on%20the%20Office%20of%20Hearings%20and%20Appeals-2001.pdf>. One of these opinions, regarding the use of millsites, was subsequently overruled by a new Solicitor opinion concurred in by the Secretary, upon the change in Administration. U.S. Dep't of the Interior, Solicitor's Opinion, M-37010 (Oct. 7, 2003), available at <http://www.doi.gov/solicitor/opinions/M-37010.pdf>.

48. A classic example is the effort of the Corps and EPA to develop guidance on the scope of jurisdiction under the Clean Water Act, first as consequence of the Supreme Court's decision in *Solid Waste Agency of N. Cook County v. U.S. Corps of Eng'rs* (SWANCC), 531 U.S. 159 (2001), and then more recently due to the Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006). After SWANCC, the agencies developed guidance and floated an Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (Jan. 15, 2003). See James Murphy, *Hard to Navigate: Rapanos and the Future of Protecting Our Waters*, 22 NAT. RES. & ENVT. 3, 4 (2007). Then, after the Court's decision in *Rapanos*, the agencies again developed and sought comments on guidance regarding the scope of jurisdiction under section 404 of the Act. See EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after *Rapanos*, 72 Fed. Reg. 31,824 (June 8, 2007). And more recently the Corps issued a Regulatory Guidance Letter on Jurisdictional Determinations, No. 08-02 (June 26, 2008), available at <http://www.usace.army.mil/cw/cecwo/reg/rgls/rgl08-02.pdf>. Of course, in this circumstance, the necessity of some form of guidance (or rulemaking or Congressional action) is apparent—the Government Accountability Office has reported on the lack of consistency in implementation of the program among the various Corps district offices. See U.S. GOV'T ACCOUNTABILITY OFFICE, REP. NO. GAO-04-297, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION 17 (2004), available at <http://www.gao.gov/new.items/d04297.pdf>.

49. See, e.g., Pesticide Registration (PR) Notice 2001-X Draft: Spray and Dust Drift Label Statements for Pesticide Products, http://www.epa.gov/PR_Notices/prdraft-spraydrift801.htm (last visited Oct. 8, 2008).

50. See, e.g., Guidance on the CERCLA Section 101(10)(H) Federally Permitted Release Definition for Clean Air Act "Grandfathered" Sources, 67 Fed. Reg. 19,750 (Apr. 23, 2002).

51. See Clean Air Act Enforcement, <http://cfpub.epa.gov/compliance/resources/policies/civil/caa/> (last visited Oct. 8, 2008).

52. EPA, for instance, maintains a database of policy and guidance documents for its water quality standards program. See <http://www.epa.gov/waterscience/library/standards/policy.htm> (last visited Jan. 19, 2009). EPA first released its WATER QUALITY STANDARDS HANDBOOK in 1994, and in June of 2007 that handbook became available on line. See U.S. Envtl. Prot. Agency Website, Water Quality Standards Handbook, <http://www.epa.gov/waterscience/standards/handbook/> (last visited Oct. 8, 2008). See generally ENVIRONMENTAL LAW REPORTER, CLEAN WATER DESKBOOK 171-445 (Environmental Law Institute 1991) (1988) (compiling CWA guidance documents). The Clinton Administration announced in a policy statement, the Clean Water Action Plan, its approach toward enforcing and implementing the

database for its solid and hazardous waste program under the Resource Conservation and Recovery Act (RCRA), called RCRA Online, which includes a host of guidance and interpretive documents governing the program's administration.⁵³ The U.S. Army Corps of Engineers ("the Corps") administers its section 404 CWA wetlands program in accordance with a delineation manual that outlines the criteria for determining whether a particular area is a wetland,⁵⁴ and the Corps, in conjunction with the EPA, has issued guidance for establishing wetlands mitigation banks and for the use of in-lieu fees for mitigating wetlands losses.⁵⁵ The U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service have issued manuals providing guidance on how the agencies will engage in section 7 consultations under the Endangered Species Act (ESA) and process permits under section 10 of that statute.⁵⁶ Similarly, the USFWS and agencies within the Department of the Interior (DOI) use manuals and other guidance documents for managing federal lands.⁵⁷

The public benefits from such information, by being alerted to an agency's practice or current views.⁵⁸ After all, the original justification for such documents was to "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."⁵⁹ And the effect of advising the public prospectively of an agency's views through a guidance document is similar to that of a rulemaking; it avoids the idiosyncratic and less

CWA. See Barton H. Thompson, Jr., *Conservation Options: Toward A Greater Private Role*, 21 VA. ENVTL. L.J. 245, 264 n.47 (2002).

53. See U.S. Env'tl. Prot. Agency, RCRA Online, <http://www.epa.gov/rcraonline/> (last visited Oct. 8, 2008).

54. When APA challenges were brought against the 1989 WETLANDS DELINEATION MANUAL, the courts dismissed the cases on ripeness grounds. *Merlino v. United States*, 1991 WL 152378 (W.D. Wash. 1991); *Mulberry Hills Dev. Corp. v. United States*, 772 F. Supp. 1553 (D. Md. 1990).

55. See Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19594, 19595 (Apr. 10, 2008).

56. See U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING CONSULTATION AND CONFERENCE ACTIVITIES UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT (1998), available at <http://www.fws.gov/endangered/consultations/s7hndbk/s7hndbk.htm>; U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK (1996), available at <http://www.fws.gov/endangered/HCP/Hcpbook.htm>; Notice of Availability of Final Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 61 Fed. Reg. 63,854 (Dec. 2, 1996) (advising public of handbook); see also *infra* note 357 (discussing the use of guidance for the listing of species under the ESA). For many years, the National Park Service managed concessions operations in the national parks in accordance with a manual. See *Nat'l Park Concessions, Inc. v. Kennedy*, 1996 WL 560310, at *3, *51 (W.D. Tex. Sept. 26, 1996) (magistrate judge recommending that manual NPS-48 be subject to notice and comment rulemaking).

57. See generally Robert L. Fischman, *From Words to Action: The Impact and Legal Status of the 2006 National Wildlife Refuge System Management Policies*, 26 STAN. ENVTL. L. J. 77 (2007).

58. See generally MICHAEL ASIMOW, *ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES* (1973).

59. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).

predictable approach of agency policy making through a case-by-case adjudication.⁶⁰

II. MODERN ADMINISTRATIVE LAW AND AGENCY GUIDANCE DOCUMENTS

An agency may revisit an earlier interpretation or guidance document for several reasons. A guidance document may have been premised upon an interpretation of the law that has since been undermined by a subsequent court decision. New congressional acts may alter an agency's approach toward a particular program.⁶¹ Or, the agency simply might have gathered new information warranting a revision of earlier guidance. Even more importantly for our purposes, a new administration might arrive in Washington, D.C., with an entirely different agenda and approach toward implementing a host of programs.

Yet, how easy is it for an agency to issue or modify policy and guidance documents when, for instance, the reason is merely a change in policy direction by a new administration? The reality is that, today, the freedom agencies enjoy to issue or modify policy and interpretive guidance is uncertain.

Just how much flexibility future administrations will possess when implementing new policies and, if need be, to diverge from a prior statutory or regulatory interpretation contained in a guidance document, is likely to depend upon the convergence of several administrative law principles. These principles include: first, the factors courts employ when assessing whether a particular interpretive or other document is "final" or—even if final—"ripe" for purposes of judicial review; second, is how courts will identify whether a particular agency action constitutes a "legislative" or a "non-legislative" rule, with the former being subject to the notice-and-comment regulatory requirements; third, is the question of whether a private party can force adherence to a document; and, finally, there is the need to resolve the appropriate level of deference that courts will afford agency interpretations contained in documents developed other than through an APA-type notice-and-comment proceeding.

A. *When Is a Guidance Document a Legislative Rule that Is Final and Ripe for Judicial Review?*

The effort to distinguish between "legislative rules" and other documents that do not require an opportunity for notice-and-comment rulemaking has

60. See FRIENDLY, ADMINISTRATIVE AGENCIES, *supra* note 11, at 145 (urging greater use of policy documents and rulemakings in lieu of case-by-case adjudications).

61. In February 2008, for instance, the National Park Service rescinded a cruise ship management policy for Glacier Bay, Alaska—a policy which had been issued in 1990—because of its alleged incompatibility with a law that Congress passed in 1998. Rescind 1990 Cruise Ship Management Policy, Glacier Bay National Park & Preserve, Alaska, 73 Fed. Reg. 6736 (Feb. 5, 2008).

plagued the field of administrative law for too long.⁶² Legions of articles address one aspect or another of the problem.⁶³ Different courts imbue the analysis with their own spin. The Federal Circuit, for example, articulates the test simply as whether the agency has changed existing law or policy, or created new rights or obligations.⁶⁴ The Ninth Circuit, in one case, focused on

62. See, e.g., *Airport Comm'n of Forsyth County, North Carolina v. Civil Aeronautics Bd.*, 300 F.2d 185 (4th Cir. 1962). The lack of clear standards for distinguishing policy statements from legislative rules is not new. The Final Report of the Attorney General's Committee on Administrative Procedure, directed by Walter Gellhorn, recognized the distinction between interpretative rules and those that would be "legally binding." The latter "receive statutory force upon going into effect," while the former, the report continues,

do not receive statutory force and their validity is subject to challenge in any court proceeding in which their application may be in question

This distinction between statutory regulations and interpretative regulations is, however, blurred by the fact that the courts pay great deference to the interpretive regulations of administrative agencies, especially where these have been followed for a long time

Consequently the procedures by which these regulations are prescribed become important to private interests

REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) (on file with author).

63. E.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L. J. 1311 (1992); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381 (1985); Arthur Earl Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretive Rules and General Statements of Policy under the A.P.A.*, 23 ADMIN. L. REV. 101 (1971); William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023 (2004); William Funk, *When is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659 (2002); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893 (2004); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547 (2000); Peter L. Strauss, *surpa* note 33; Russell L. Weaver, *An APA Provision on Nonlegislative Rules?*, 56 ADMIN. L. REV. 1179 (2004).

64.

"[S]ubstantive rules" [are] those that effect a change in existing law or policy or which affect individual rights and obligations. "Interpretive rules," on the other hand, clarify or explain existing law or regulation and are exempt from notice and comment under section 553(b)(A). . . . "[A]n interpretive statement simply indicates an agency's reading of a statute or a rule. It does not intend to create new rights or duties, but only reminds affected parties of existing duties."

Splane v. West, 216 F.3d 1058, 1063 (Fed. Cir. 2000) (quoting *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998), quoting *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993)). In *Splane*, the court concluded that a general counsel opinion was "interpretive" and therefore not subject to a notice and comment process. *Id.* at 1070. Conversely, in *Coalition for Common Sense in Government Procurement v. Secretary of Veterans Affairs*, the Federal Circuit held that a "Dear Manufacturer" letter, requiring that manufacturers refund the difference between a drug's wholesale commercial price and the associated federal ceiling price, was a substantive rule ripe for judicial review. 464 F.3d 1306, 1317–18 (Fed. Cir. 2006). The court reasoned that the "letter is substantive in nature because it changes existing law and affects individual obligations." *Id.* at 1317.

whether a particular agency document or interpretation was duly promulgated as if it were a rule, and as such would have the force and effect of law.⁶⁵

Quite frequently, courts deftly avoid the quagmire of having to distinguish between “legislative rules” and other documents that do not require an opportunity for notice-and-comment rulemaking by concluding that either there is no final agency action or the matter is not ripe for review.⁶⁶ For instance, the Tenth Circuit, in *Public Service Co. of Colorado v. EPA*, concluded that two EPA opinion letters were not final and subject to judicial review, because the impact of the letters was neither direct nor immediate.⁶⁷ The opinion letters described EPA’s opinion on what type of CAA permit would be required for the construction of a new power plant that would be integrated with and constructed near an existing plant.⁶⁸ The letters concluded that the two facilities would constitute a single source, and as such be treated as a major modification requiring a Prevention of Significant Deterioration permit.⁶⁹ In reaching its conclusion, the court focused on four factors: (1) EPA was not the actual permitting agency, but the state agency would determine what type of permit would be required; (2) the opinions did not mark the consummation of the agency’s decision-making process, which could not occur until action on any permit application; (3) there would be several layers of review before any EPA action; and (4) the opinions did not determine any rights or obligations, nor would any legal consequences flow (directly) from the opinions.⁷⁰ Similarly, in *San Diego v. Whitman*, the Ninth Circuit held that EPA’s letter to the City of San Diego, regarding the applicability of the Ocean Pollution Reduction Act of 1994 to the City’s wastewater treatment plant, was not a final agency action subject to judicial review.⁷¹ The court reasoned that the letter neither marked

65. *United States v. Fifty-Three Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982). *See also* *Moore v. Apfel*, 216 F.3d 864, 868 (9th Cir. 2000); *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1168 (9th Cir. 2000); *James v. U.S. Parole Comm’n*, 159 F.3d 1200, 1205–06 (9th Cir. 1998).

66. *See Ass’n of Am. Med. Colls. v. United States*, 217 F.3d 770, 780–85 (9th Cir. 2000) (not allowing pre-enforcement review of nationwide program for audits under the Medicare, where parties claimed that audit program contained new billing requirement standards not contained in the Act or regulations); *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1296 (D.C. Cir. 2000) (challenge to conclusion in preamble to a final rule not ripe, particularly where agency subsequently clarified that it was not a final decision); *Mobile Exploration & Producing U.S., Inc. v. Dep’t of the Interior*, 180 F.3d 1192, 1197–99 (9th Cir. 1999) (agency audit engagement letter effectively initiating a proceeding not a final agency action). *But see* *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000) (“In *Ciba-Geigy* we held that a letter from an agency official stating the agency’s position and threatening enforcement action unless the company complied constituted final agency action.”); *Arizona v. Shalala*, 121 F. Supp.2d 40, 50 (D. D.C. 2000) (court held that a guidance document was a reviewable final agency action), *rev’d on other grounds* 281 F.3d 248 (D.C. Cir. 2002).

67. 225 F.3d 1144, 1149 (10th Cir. 2000).

68. *Id.* at 1146, 1148.

69. *Id.* at 1146.

70. *Id.* at 1147–49. *See also* *Colorado Farm Bureau Fed’n v. U.S. Forest Service*, 220 F.3d 1171 (10th Cir. 2000) (no final, reviewable agency action where plaintiff challenged agency agreement and letter addressing a state plan to reintroduce the Canadian lynx into the state).

71. 242 F.3d 1097, 1102 (9th Cir. 2001).

the consummation of the agency's decision-making process nor imposed any immediate legal obligation on the City.⁷² And a district court refused to allow a challenge to a guidance document explaining an agency's position on the scope of its jurisdiction under section 404 of the CWA in light of a new court decision.⁷³ The court reasoned that the document was not "final" agency action.⁷⁴

B. *The D.C. Circuit Signals Concerns with Agency Guidance Documents*

The D.C. Circuit has struggled mightily—but arguably unsuccessfully—to address the dynamics of modern administrative law and what would appear to be an increasing number of issues presented by guidance documents. Several years ago, in order to determine whether an agency action constituted a policy statement or required following the notice-and-comment requirements of informal rulemaking, the D.C. Circuit employed an effects analysis test, examining several factors whose importance has shifted over time.⁷⁵ The court at one time emphasized that the principal inquiry should be whether the challenged statements were published in the Code of Federal Regulations—if not, then they were only policy statements.⁷⁶ But such a simple approach no

72. *Id.* at 1101.

73. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 2000 U.S. Dist. LEXIS 10131 (E.D. Va. Mar. 9, 2000), *aff'd*, 2001 U.S. App. LEXIS 646 (4th Cir. Jan. 17, 2001).

74. *Id.* at 2000 U.S. Dist. LEXIS *8–9. *But cf.* *Splane v. West*, 216 F.3d 1058 (Fed. Cir. 2000) (allowed challenge to agency general counsel opinion, reasoning that jurisdiction existed under 38 U.S.C. § 502 to review interpretive rules); *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp.2d 166 (D.D.C. 2000) (allowed challenge to policy statement, although concluding that notice-and-comment rulemaking not required).

75. See *Molycorp, Inc. v. EPA*, 197 F.3d 543 (D.C. Cir. 1999); *Louisiana Envtl. Action Network v. EPA*, 172 F.3d 65 (D.C. Cir. 1999) (discussing preamble language). Those factors are: (1) the agency's own characterization of its actions; (2) whether the document was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has a binding effect on private parties or the agency. *Louisiana Envtl. Action Network*, 172 F.3d at 69; see also *Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1418 (D.C. Cir. 1998) (dismissing petition for review of statements in a preamble to a proposed rule, concluding that no "final regulations" had been issued and the case was not yet ripe); *Am. Portland Cement Alliance v. EPA*, 101 F.3d 772, 776 (D.C. Cir. 1996); *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561 (D.C. Cir. 1984) (*en banc*). One court described the D.C. Circuit's test as a two-part inquiry for determining whether an agency action is a policy statement or a document that should have been issued as a substantive rule: "[p]olicy statements (1) must not impose any new rights or obligations, and (2) must 'genuinely leave the agency and its decision-makers free to exercise discretion'" and in weighing these criteria "the ultimate issue is the agency's intent to be bound." *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp.2d 166, 172 (D.D.C. 2000) (citations omitted). The D.C. Circuit early on applied a legal effects test. *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

76. See *Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1418 (D.C. Cir. 1998); *Am. Portland Cement Alliance v. EPA*, 101 F.3d 772, 776 (D.C. Cir. 1996). In *Pacific Gas & Electric v. Federal Power Commission*, the court indicated that documents not promulgated in accordance with the appropriate procedures generally are not substantive, enforceable rules. 506 F.2d 33 (D.C. Cir. 1974). Rather, such documents announce the "agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." *Id.* at 38.

longer governs. In *Alaska Professional Hunters Ass'n, Inc. v. FAA*, for instance, the D.C. Circuit focused on whether the agency changed a prior definitive interpretation of its regulations, and if so the court would require that the agency proceed through a notice-and-comment process.⁷⁷ Justice Breyer, writing for the entire Supreme Court in *Long Island Care at Home, Ltd. v. Coke*, appears to endorse this view.⁷⁸

Since 2000, the D.C. Circuit's decisions have become less predictable. In 2000, the court sent a strong message to agencies that increased reliance on guidance documents might prove problematic. It delivered this message in *Appalachian Power Co. v. EPA*, where the court held that it could review and vacate a CAA guidance document, because the agency had failed to follow APA notice-and-comment rulemaking.⁷⁹ One commentator at the time predicted that life after *Appalachian Power* could prove interesting, as the court suggested that a host of EPA guidance documents might succumb to the same fate.⁸⁰

Appalachian Power involved EPA's issuance of one of many guidance documents necessary to help inform the administration of the CAA. In 1992, EPA issued regulations requiring that certain air permits contain requirements for "periodic monitoring" of emissions.⁸¹ The regulations left a number of issues unresolved and created uncertainty about the insertion of periodic monitoring requirements in CAA permits. Released in 1998, EPA's "Periodic Monitoring Guidance" (PMG) document sought to address the ambiguities in

77. *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); see also *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). Cf. *City of Dania Beach v. FAA*, 485 F.3d 1181 (D.C. Cir. 2007) (letter a reviewable decision when agency announced a new interpretation); *Ass'n of Am. R.R.s v. Dep't of Transp.*, 198 F.3d 944, 949–50 (D.C. Cir. 1999) (informal technical bulletin upheld where party had not relied on any prior agency interpretation and no formal agency decisions to the contrary). See generally Jon Connolly, Note, *Alaska Hunters and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 COLUM. L. REV. 155 (2001) (critical of D.C. Circuit decision). Other courts also explore whether an interpretation changes a prior interpretation. See, e.g., *SBC Inc. v. Fed. Commc'ns Comm'n*, 414 F.3d 486, 501–02 (3d Cir. 2005).

To the extent that a change in a prior interpretation of a regulation is accomplished outside the APA rulemaking process, the doctrine of "fair notice" may apply. See *United States v. Chrysler Corp.*, 158 F.3d 1350, 1356 (D.C. Cir. 1998) ("an agency is hard pressed to show fair notice when the agency itself has taken action in the past that conflicts with its current interpretation of a regulation."); *Satellite Broadcasting Co., Inc. v. Fed. Commc'ns Comm'n*, 824 F.2d 1, 3 (D.C. Cir. 1987) ("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule."). This doctrine, however, arguably should have currency only when an interested party has legitimate due process protections.

78. 127 S. Ct. 2339, 2349 (2007) ("But as long as interpretive changes create no unfair surprise—and the Department's recourse to notice-and-comment rulemakings in an attempt to codify its new interpretation . . . makes any such surprise unlikely here—the change in interpretation alone presents no separate ground for disregarding" it).

79. 208 F.3d 1015, 1028 (D.C. Cir. 2000).

80. Richard G. Stoll, *Court Strikes Heavy Blow to "Rulemaking" Through Informal Guidance Documents*, 31 BNA ENV'T REP. 24, 1284 (2000).

81. *Appalachian Power*, 208 F.3d at 1017, 1025.

the 1992 regulations.⁸² Petitioners argued that EPA had impermissibly attempted to prescribe substantive rules through the guise of a guidance document, which had not been adopted in accordance with notice-and-comment rulemaking.⁸³ EPA responded by objecting to any challenge, claiming that the court lacked jurisdiction to hear the case because the guidance document was not a final rule.⁸⁴

Early in the opinion, Judge Randolph foreshadowed the tenor of the court's decision. Before discussing the merits, he observed:

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. 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. 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.⁸⁵

With that, it is not surprising that the court then held that it could review the document under CAA's procedures for allowing judicial review of "nationally applicable," "final action[s]" by the EPA.⁸⁶ The court dismissed EPA's contention that the document was not final because it was not binding.⁸⁷ It explained how documents such as the PMG could be binding in a practical sense and rejected EPA's suggestion to the contrary, noting that the challenged part of the guidance document consisted of the agency's settled position—one that would need to be followed in future circumstances.⁸⁸

But the court added that merely because something may be binding does not necessarily mean it is final.⁸⁹ The court identified two elements for finality: first, the action "must mark the consummation of the agency's decision-making process," and second, it must be one that determines "rights or obligations" from "which 'legal consequences will flow.'"⁹⁰ It found both elements present.

82. *Id.* at 1019.

83. *Id.* at 1023–1024.

84. *Id.* at 1020. EPA further raised ripeness as an issue, but the court summarily rejected the argument. *Id.* at 1023 n.18.

85. *Id.* at 1020.

86. *Id.* at 1021 n.10.

87. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

88. *Id.* at 1021–22.

89. If the "binding" nature of the action is not necessarily sufficient for finality, the court curiously added that an agency action could be final without being "binding." *Id.* at 1022 n.15. Of course, this might suggest that the court unnecessarily engaged in an analysis of the "binding" nature of the PMG to determine its jurisdiction.

90. *Id.* at 1022.

The document was not a draft and it contained mandatory commands.⁹¹ In rejecting boilerplate language in the document that it was not final and could not be relied upon to create any enforceable rights, the court noted that the “entire Guidance, from beginning to end—except the last paragraph—reads like a ukase. It commands, it requires, it orders, it dictates.”⁹²

Having established its jurisdiction, the court then examined whether the PMG altered EPA’s existing periodic monitoring rule or reflected a valid interpretation of the existing rule.⁹³ Believing that the guidance document “significantly broadened” EPA’s existing regulation, the court set aside the document as impermissible rulemaking contrary to the rulemaking requirements under the statute.⁹⁴ Conspicuously absent from any part of this opinion is any discussion about deference to EPA’s interpretation of its existing regulation.

The court’s entire reasoning masks some fundamental flaws. The court built its house of cards by manipulating what is meant by “binding.” It rejected a simple test that would rely upon whether the document was promulgated or should have been promulgated in accordance with the procedures laid down in the particular statute or the APA. It similarly rejected as unhelpful any test that would depend upon whether the document is characterized by the agency as a rule—because policy statements and interpretative rules may be “rules,” although neither require notice-and-comment rulemaking.⁹⁵ Rather, the court focused almost exclusively on whether the PMG was “binding” in a practical sense, concluding that it was—it represented a settled position which had “legal consequences.”⁹⁶ The court further suggested that, regardless of whether a document is “binding,” it might nonetheless constitute final agency action if it marks the end of a decision-making process and, not surprisingly, has legal consequences.⁹⁷ Yet, the analysis underlying both these inquiries effectively employs a “practical effect” test for determining whether to assign “legal consequences” to a particular document. And the apparent justification for why the document had a practical effect is that the court merely believed that states must follow the PMG.⁹⁸ But the application of a practical effect inquiry overlooks the fact that the court was reviewing an abstract challenge to the

91. *Id.* at 1022–24.

92. *Id.* at 1023. The court summarized its analysis by stating that “[t]he short of the matter is that the Guidance, insofar as relevant here, is final agency action, reflecting a settled agency position which has legal consequences both for State agencies administering their permit programs” as well as for private parties. *Id.*

93. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023–26 (D.C. Cir. 2000).

94. *Id.* at 1028.

95. *Id.* at 1021.

96. *Id.* at 1023.

97. *Id.* at 1022.

98. *See, e.g., id.* at 1022 (“State agencies must do so”); *id.* at 1023 (“[T]he entire Guidance, from beginning to end—except the last paragraph—reads like a ukase. It commands, it requires, it orders, it dictates.”).

document, and the record contained absolutely no information on (a) the practical effect; (b) whether it marked the consummation of an agency process; or (c) the legal consequences of not complying with the guidance in any particular case.

A couple decisions succeeding *Appalachian Power* suggested that the D.C. Circuit might begin to restrict an agency's ability to employ guidance documents in lieu of going through notice-and-comment rulemaking. In *Barrick Goldstrike Mines*, the court held that EPA's "Metal Mining Facilities" guidance was a final agency action subject to judicial review.⁹⁹ There, the Barrick gold mining company argued that EPA impermissibly extended the toxic release inventory program to mining activities without following rulemaking requirements.¹⁰⁰ Both EPA's rulemaking preamble and its guidance document interpreted the rule to apply to mining activities.¹⁰¹ Siding with the mining company, the court appears to have been influenced by EPA's oral argument, where the agency conceded that its position was "final," and that, if Barrick failed to follow EPA's guidance, it would be subject to an enforcement action.¹⁰² As such, the agency's purported guidance appeared binding and thus subject to judicial review.¹⁰³

In *CropLife America v. EPA*, the court similarly reviewed and then invalidated an EPA guidance document.¹⁰⁴ For many years, EPA had relied on data from human studies when making its regulatory decisions for approving pesticides under the Federal Food, Drug and Cosmetic Act and the Federal Insecticide, Fungicide and Rodenticide Act, but during 1998 it began to consider such data only on a case-by-case basis.¹⁰⁵ Then, in late 2001, EPA issued a press release with an accompanying directive, announcing that it would no longer allow the use of such data, pending review by the National Academy of Sciences of the ethical issues associated with using third-party human studies.¹⁰⁶ The *CropLife* court had "little trouble" concluding that the directive was "indeed a binding regulation."¹⁰⁷ The court reasoned that it was

99. *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45 (D.C. Cir. 2000).

100. "The company alleges that in applying the program [Emergency Planning and Community-Right-to-Know Act, 42 U.S.C. § 11023] to mining, EPA in fact revised the program; that its revision were substantive; that they were not made through rulemaking, as they should have been; and that the revisions were made instead through statements in 'rulemaking preambles' and in detailed directives issued in the form of 'guidance' and a letter." *Id.* at 47.

101. *Id.* at 47–48.

102. *See id.* 47–48.

103. *Id.* at 47–48. *See also* *Arizona v. Shalala*, 121 F. Supp. 2d 40 (D.D.C. 2000) (allowing challenge to an interpretive rule as final agency action), *rev'd on other grounds*, 281 F.3d 248 (D.C. Cir. 2002).

104. 329 F.3d 876 (D.C. Cir. 2003).

105. *Id.* at 879–80.

106. *Id.* at 880.

107. *Id.* at 881.

“aimed at and enforceable against the petitioners,” and reflected “an obvious change in established agency practice.”¹⁰⁸

When issued, *Appalachian*, *Barrick* and *CropLife* appeared troubling. They seemingly ignored, and possibly perpetuated, the long-standing confusion between interpretive and legislative rules, as well as obfuscated the need to ensure that an agency action is both “final” and “ripe” for judicial review. In *Appalachian Power*, the court purportedly followed this prescription, but effectively created a tautology: it concluded that the rule was tantamount to a legislative rule and, as such, “binding.”¹⁰⁹ Because it was binding, there would be legal consequences, and therefore it was subject to judicial review under the CAA.¹¹⁰

C. The D.C. Circuit Softens Stance on Guidance Documents

Since *Appalachian Power*, agencies have become increasingly savvy in their drafting of documents, and the D.C. Circuit has been less inclined to criticize their use. Three good examples are *Wilderness Society v. Norton*,¹¹¹ *Center for Auto Safety v. National Highway Traffic Safety Administration*,¹¹² and *Cement Kiln Recycling Coalition v. EPA*.¹¹³ The first case, *Wilderness Society*, involved the National Park Service’s (NPS) 2001 Management Policies

108. *Id.* The directive was binding because parties could no longer rely upon human studies. *Id.* at 883. Nor could it be classified as a policy statement; the court identified two tests that it had applied in the past for distinguishing policies from legislative rules: one test whose analysis focuses on the “effects” of the agency action, and another whose analysis focuses on the “agency’s expressed intentions.” *Id.* Both tests, the court added, nevertheless converge when examining whether the challenged action is binding on the agency or private parties. *Id.*

109. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000).

110. The Clean Air Act authorizes the D.C. Circuit to hear appeals from certain “rules” and “final action[s] taken.” 42 U.S.C. § 7607(b) (2006). The *Appalachian Power* court noted that it did not have to resolve two conflicting lines of cases interpreting whether a policy statement is a “rule,” 208 F.3d at 1021 n.13, ostensibly because it concluded that the policy guidance was a “final action taken.” The court reasoned that a *final action* is one that marks the “‘consummation’ of the agency’s decision-making process” and “by which ‘rights or obligations have been determined,’ for from which ‘legal consequences will flow’” *Id.* at 1022. The PMG satisfied these criteria, according to the court, because the decision-making process on the PMG had concluded and the PMG appeared to be binding—that is, it constituted a rule. *Id.* Elsewhere in its opinion, while the court notes that the case has been presented “in pure abstraction,” it nonetheless rejects the notion that the case is not ripe, concluding that nothing could impact the outcome. *Id.* at 1024. The court further adds that a challenge to a particular permit might escape review by the D.C. Circuit, the court entrusted with reviewing the validity of EPA’s action under the CAA. *Id.* at 1023 n.18.

111. 434 F.3d 584 (D.C. Cir. 2006).

112. 452 F.3d 798 (D.C. Cir. 2006).

113. 493 F.3d 207 (D.C. Cir. 2007). The court’s analysis mirrored its earlier opinions in *General Motors Corp. v. EPA*, 363 F.3d 442 (D.C. Cir. 2004), and *Independent Equipment Dealers Ass’n v. EPA*, 372 F.3d 420 (D.C. Cir. 2004). In *General Motors*, EPA issued a letter addressing whether certain solvents were solid wastes, under RCRA. 363 F.2d at 445. Although the letter reiterated an earlier interpretation by the agency, the petitioner nevertheless sought judicial review pursuant to RCRA’s judicial review provision. *Id.* at 447. The court held that the letter was not a final regulation reviewable under the statute. *Id.* at 453.

for wilderness areas.¹¹⁴ Concerned that the NPS was not identifying and managing wilderness areas in a manner required by statute and the agency's Management Policies, the Wilderness Society sued the NPS.¹¹⁵ Part of its argument was that the NPS had failed to develop management plans for certain parks, as required by the policies.¹¹⁶ NPS responded by arguing that the Management Policies were not rules enforceable against the agency, but rather provide only internal guidance.¹¹⁷ The court agreed, rejecting the argument that the Management Policies were binding.¹¹⁸ The court identified two approaches for determining whether an agency's action constitutes a binding norm: (1) the effects of the agency action; and (2) the agency's expressed intentions.¹¹⁹ Oddly, this second approach not only includes the agency's characterization of its action, but also whether the agency published the policy in the Federal Register or the CFRs and whether it has binding effects on either the agency or private parties.¹²⁰ Even though the document contained directives reminiscent of the words highlighted in *Appalachian Power*, the court nevertheless concluded that it was a non-binding guidance document.¹²¹ Several reasons apparently animated its conclusion. To begin with, the Management Policies contained only broad directives.¹²² Next, although noticed in the Federal Register, they were not published through notice-and-comment rulemaking.¹²³ The court observed that the failure to publish a document as if it was a rule is particularly noteworthy, as "the real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations."¹²⁴ This language potentially signals an important shift toward focusing on procedure as a surrogate for line-drawing. The court also found the agency's characterization of the document as simply a set of internal guidelines for the agency, which could be ignored if so instructed by a political appointee, as "telling."¹²⁵ And, almost *sub silentio*, the court abandoned the concern it expressed with guidance documents in *Appalachian Power*, when it concluded that any other result "would chill efforts by top agency officials to gain control over their bureaucratic charges through internal directives."¹²⁶

The next case, *Center for Auto Safety*, allowed the agency to use informal letters to alert the regulated community of a change in agency policy.¹²⁷ Since

114. *Wilderness Society*, 434 F.3d at 595.

115. *Id.* at 595.

116. *Id.*

117. *Wilderness Society v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006).

118. *Id.* at 596.

119. *Id.*

120. *Id.*

121. *See id.* at 596–97.

122. *Id.*

123. 434 F.3d 584, 595–96 (D.C. Cir. 2006).

124. *Id.* at 596.

125. *Id.*

126. *Id.*

127. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798 (D.C. Cir. 2006).

the mid-1980s, the National Highway Traffic and Safety Administration (NHTSA) had allowed auto manufacturers to voluntarily recall defective or non-complying cars in particular regions of the country when the manufacturer determined that the need for the recall was occasioned by climate conditions only affecting cars in that particular region.¹²⁸ In 1997 and 1998, NHTSA sent letters to the major manufacturers outlining concerns with this past practice, and establishing detailed guidelines that might allow companies to distinguish between locales when conducting recalls.¹²⁹ Several years later, the Center for Auto Safety complained to NHTSA about the agency's approach toward allowing regional recalls and, after about two years of engaging in a correspondence campaign with NHTSA, challenged NHTSA's letters as legislative rules that should have been issued with the opportunity for notice and comment.¹³⁰ On appeal from a dismissal by the district court, the D.C. Circuit affirmed.¹³¹

The court began its inquiry by asking whether the letters constituted either "final agency action" under the APA or a "*de facto* rule or binding norm" that required compliance with the APA's rulemaking procedures.¹³² But then it said, curiously, that these two inquiries are essentially the same. Although noting that it is "not always easy to distinguish"¹³³ between unreviewable agency actions and those that establish binding norms, the court articulated the following principles guiding the inquiry:

"In determining whether an agency has issued a binding norm or merely" an unreviewable "statement of policy, we are guided by two lines of inquiry." One line of analysis considers the effects of an agency's action, inquiring whether the agency has "(1) impose[d] any rights and obligations, or (2) genuinely [left] the agency and its decisionmakers free to exercise discretion." . . . The language used by an agency is an important consideration in such determinations. The second line of analysis looks to the agency's expressed intentions.

This entails a consideration of three factors: "(1) the [a]gency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency."¹³⁴

Applying these principles, the court concluded that NHTSA's letters were neither final agency action nor binding rules. Instead, the letters merely reflected the agency's view of its statutory obligations—and as such are

128. *Id.* at 802.

129. *Id.* at 803.

130. *Id.* at 804.

131. *Id.* at 811.

132. *Id.* at 806.

133. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 807 (D.C. Cir. 2006).

134. *Id.* at 806–07 (citations omitted).

“nothing more than a privileged viewpoint in the legal debate.”¹³⁵ They were not published in the CFR, and they only purported to be guidelines and read as such.¹³⁶ Moreover, the author of the letters lacked the statutory authority to issue any binding regulations or make any final determinations regarding regional recalls.¹³⁷ This all distinguished this case from *Appalachian Power Co.*, where the document there “read like a ‘ukase.’”¹³⁸ The court ended its analysis by rejecting the argument that the guidelines had practical if not legal consequences.¹³⁹ The court reasoned that whether that was true or not overlooked the Supreme Court’s language in *Bennett v. Spear*, requiring “legal consequences” before an agency action could be deemed final.¹⁴⁰

In the third case, *Cement Kiln Recycling Association*, the D.C. Circuit ostensibly softened its criticism of agency practice announced in *Appalachian Power*.¹⁴¹ EPA released a guidance document for conducting site-specific risk assessments at facilities that burn hazardous waste as fuel for their operations.¹⁴² Such assessments were deemed necessary to provide permitting authorities with sufficient information to impose conditions on the operation of facilities to protect human health and the environment.¹⁴³ The rule did not include any specific requirements for assessments, but rather provided a list of factors to use when conducting any specific inquiry.¹⁴⁴ As part of its challenge to the rule and guidance document, the Cement Kiln Recycling Coalition claimed that the guidance document constituted a de facto rule not issued through notice-and-comment rulemaking.¹⁴⁵ EPA primarily sought to persuade the court that neither the rule nor the guidance document was ripe for review—

135. *Id.* at 808. The court analogized to *AT&T Co. v. EEOC*, 270 F.3d 973 (D.C. Cir. 2001), involving a challenge to an agency’s legal interpretation of a company’s obligation under the Pregnancy Discrimination Act of 1979. *See id.* In *AT&T*, the agency’s compliance manual provided an interpretation of the Act (which adopted a Ninth Circuit’s interpretation of the Act in lieu of a contrary interpretation by the Seventh Circuit). *AT&T*, 270 F.3d at 974. Pursuant to a request by AT&T, the agency provided a letter of determination on the applicability of the Act to AT&T, reaffirming its adherence to the interpretation in the manual—and thus to the Ninth Circuit’s interpretation. *Id.* AT&T sought a declaratory judgment, although admitting that the letter itself was not a final agency action. *Id.* at 975. The court rejected AT&T’s suggestion that the principles of *Appalachian Power Co.* ought to apply, reasoning that neither the manual nor the letters inflicted any injury upon AT&T and the manual and letter would only be relevant in any subsequent action by the agency to the extent a court might find the analysis persuasive. *Id.* at 976. *Cf. City of Dania Beach v. FAA*, 485 F.3d 1181 (D.C. Cir. 2007) (FAA letter authorizing activity contained a new interpretation and, as such, held to be a reviewable final agency order).

136. *Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 452 F.3d 798, 809–10 (D.C. Cir. 2006).

137. *Id.* at 810.

138. *Id.* at 809.

139. *Id.* at 811.

140. *Id.*

141. *See Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207 (D.C. Cir. 2007).

142. *Id.* at 214.

143. *Id.* at 212–14.

144. *Id.* at 213–13.

145. *Id.* at 215–17, 226.

an odd strategy because the rule undoubtedly was ripe for review and RCRA mandated that petitions for review from rulemakings be filed within ninety days of the date of promulgation.¹⁴⁶ Only at the end of its brief, did EPA respond to the merits of the challenge, noting that the guidance was not intended to be binding, it was not published in either the Federal Register or the CFR, and no language in the document said it was binding.¹⁴⁷

After dispatching the claim that the case was not ripe, the court provided comfort to agencies that it would no longer engage in any speculation about the ultimate binding nature of guidance documents.¹⁴⁸ The court observed that whether something is a “legislative rule” or not depends upon whether the agency intends it to be binding and whether it is, in effect, binding.¹⁴⁹ The court applied its pre-*Appalachian Power* three part test from *Molycorp, Inc. v. EPA*,¹⁵⁰ which examines (1) the agency’s characterization of the document; (2) whether the document was published in the Federal Register or CFR; and (3) whether the document is binding on the agency or private parties.¹⁵¹ It arguably downplayed the second inquiry, noting that its method of publication merely illuminates whether the document has the force of law.¹⁵² But that factor, coupled with the agency’s insistence that it was not binding and the lack of any language in the document suggesting that it was binding, led the court to conclude that it was not a de facto rule on its face.¹⁵³ And, perhaps most importantly, in response to the Coalition’s claim that EPA had deliberately added caveats to the document in response to the decision in *Appalachian Power Co.*, the court observed that “[w]e can hardly fault EPA for responding to an opinion of this court. There is nothing improper about an agency changing its language in light of our decisions”¹⁵⁴

The unpredictable nature of the tests developed by the D.C. Circuit, and possibly that court’s emerging reticence toward treating an agency’s action as a de facto rulemaking, is perhaps best illustrated in *Ass’n of Irrigated Residents v. EPA*.¹⁵⁵ Community and local environmental groups were concerned about emissions from animal feeding operations (AFOs), where livestock is raised for

146. See 42 U.S.C. § 6976(a)(1) (2006). EPA emphasized that the case would become ripe only when the rule and guidance became employed in a particular case. Final Brief for Respondent, *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207 (D.C. Cir. 2007), 2007 WL 681995 (Feb. 28, 2007).

147. *Id.*

148. Because the D.C. Circuit exercised jurisdiction only over rulemakings, the court observed that it either lacked jurisdiction or the guidance document constituted a rulemaking and, if so, had to be vacated for lack of compliance with notice-and-comment requirements. *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 226 (D.C. Cir. 2007).

149. *Id.* at 226–28.

150. 197 F.3d 543 (D.C. Cir. 1999). See *supra* note 75 and accompanying text.

151. *Cement Kiln Recycling Coal.*, 493 F.3d at 226–27.

152. *Id.* at 227.

153. *Id.*

154. *Id.* at 228.

155. 494 F.3d 1027 (D.C. Cir. 2007).

consumption.¹⁵⁶ AFOs release several pollutants, including ammonia, nitrous oxide and methane, during the normal course of their operations, and sometimes in sufficient quantities to require that the facilities either report the emissions or submit to regulation. If released in sufficient quantities, these pollutants can pose significant public health concerns for nearby residents.¹⁵⁷ However, the fugitive nature of the emissions, coupled with the difficulty of establishing any monitoring system, tempered EPA's effort to enforce these environmental laws against the agricultural community.¹⁵⁸ A coalescence of interests ultimately led EPA to offer individual AFOs the ability to sign a generic form of a consent agreement, which would require the payment of a specified penalty and commit the AFO to a course of monitoring and resolve any potential or outstanding claims of violations of the CAA, CERCLA or the Emergency Planning and Community-Right-to-Know Act (EPCRA).¹⁵⁹

Petitioners challenged EPA's actions, including the three Federal Register Notices announcing the offer for the consent agreements and then eight separate orders approving various consent agreements.¹⁶⁰ Their primary argument tried to persuade the court that the three Federal Register notices

156. *Id.* at 1028. An AFO is a lot or facility where certain animals are confined and fed for at least 45 days a year and where "crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." Concentrated Animal Feeding Operations, 40 C.F.R. § 122.23(b)(1) (2007).

157. U.S. ENVTL. PROT. AGENCY, NON-WATER QUALITY IMPACT ESTIMATES FOR ANIMAL FEEDING OPERATIONS pt.1, at 1-5 (2002), available at http://www.epa.gov/npdes/pubs/cafo_nonwaterquality.pdf. The National Academy of Sciences notes that "stakes in this issue are large. More and more livestock are raised for at least part of their lives in AFOs in response to economic factors that encourage further concentration. The impacts on the air in surrounding areas have grown to a point where further actions to mitigate them appear likely." NATIONAL RESEARCH COUNCIL, THE SCIENTIFIC BASIS FOR ESTIMATING AIR EMISSIONS FROM ANIMAL FEEDING OPERATIONS: INTERIM REPORT 7 (2002) [hereinafter ESTIMATING AIR EMISSIONS].

158. The National Research Council's report observes that "[e]stimating emissions of gases, PM, and other substances from AFOs is technically difficult." *Id.* at 11.

159. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958 (Jan. 31, 2005). In late 2001, EPA commissioned a report from the National Academies, AIR EMISSIONS FROM ANIMAL FEEDING OPERATIONS: CURRENT KNOWLEDGE, FUTURE NEEDS (2003). Thereafter, EPA and the AFO industry crafted an acceptable compliance program. Petitioners' Opening Brief at 12, *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027 (D.C. Cir. 2007) (No. 05-1177) (2006 WL 3622127). See Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 40016 (July 12, 2005) (EPA discusses that it worked with stakeholders in drafting the consent agreements). EPA's January 31, 2005 Federal Register notice to the AFOs was only the first step in the process. While the agency began signing up farms, it also solicited public comment and subsequently issued another Federal Register notice on March 30, 2005, which re-opened the comment period in the earlier notice and extended the sign up period for the industry. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 16266 (Mar. 30, 2005). EPA subsequently further extended the sign-up period. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 40016 (July 12, 2005); Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 44631 (Aug. 3, 2005). Once participating farms signed up, EPA had to countersign the consent agreements and then submit them to the Environmental Appeals Board (EAB) for approval. Over 2,500 AFO owners executed the agreements, totaling approximately 14,000 facilities.

160. Petitioners' Opening Brief at 25, *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027 (D.C. Cir. 2007) (No. 05-1177) (2006 WL 3622127).

collectively constituted “a legislative rule disguised as an enforcement action.”¹⁶¹ Like any other legislative rule, they claimed, it operated prospectively and prescribed obligations, and it further constrained the agency’s enforcement discretion—all without following the requirements for a rulemaking or affording the public a meaningful opportunity to comment.¹⁶² They supplemented this argument by further asserting that EPA violated the CAA, CERCLA, ECPRA and the agency’s own regulations regarding enforcement actions, because neither the statutes nor regulations allowed any exemption for agricultural sources, and to be a valid enforcement action, EPA was required to allege individual facts that would establish violations of specific requirements.¹⁶³ They believed that the D.C. Circuit could exercise jurisdiction under both the CAA and CERCLA provisions, which provide, respectively, for direct review of regulations or final actions and direct review of any regulation.¹⁶⁴

The government raised several jurisdictional issues, including that the Federal Register notices were not reviewable final agency actions and that the orders constituted unreviewable enforcement decisions.¹⁶⁵ The Federal Register notices, according to EPA, were neither final agency actions nor rulemakings over which the court could exercise jurisdiction.¹⁶⁶ The agency argued that final agency action could occur only when a consent agreement has been approved.¹⁶⁷ EPA further posited that the consent agreements were part of an enforcement proceeding and, under *Heckler v. Chaney*, not judicially reviewable.¹⁶⁸

161. *Id.* Petitioners refer to challenging the “Agreement,” which they define as the three notices. *Id.* at 4.

162. *Id.*

163. *Id.*

164. The D.C. Circuit exercises jurisdiction under section 307 of the CAA (over “any other nationally applicable regulations promulgated, or final action taken, by the Administrator”), 42 U.S.C. § 7607(b)(1) (2006), § 113 of CERCLA (over “any regulation promulgated under this chapter”), 42 U.S.C. § 9613(a) (2006), and generally under the APA for alleged EPCRA violations as the “court of competent jurisdiction.” 5 U.S.C. § 703 (2006).

165. Brief for Respondent United States Environmental Protection Agency at 14–15, 26–44, *Ass’n of Irrigated Residents v. EPA*, 494 F.3d 1027 (D.C. Cir. 2007) (No. 05-1177) (2007 WL 432411).

166. *Id.* at 14–15, 26–44.

167. *Id.*

168. EPA asserted that “the agency action must create new rights or obligations that govern future behavior. The consent agreements do not create any new rights or obligations but resolve the respondents’ liability for potential violations of existing conditions.” *Id.* at 37. EPA dismissed petitioners’ two principal cases, *National Ass’n of Homebuilders v. U.S. Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir. 2005), and *Croplife America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003), arguing that the challenged agency action in the former case involved the creation of a future specific right, while the latter involved a binding change in agency policy. *Id.* at 37–38. EPA also argued that the consent agreements did not limit EPA’s discretion; rather, the agreements reflected EPA’s exercise of enforcement discretion and the agency retained its power to proceed against any AFO not signing an agreement or violating any agreement. EPA distinguished *Community Nutrition Institute v. Young*, 818 F.2d 943 (D.C. Cir. 1987), emphasizing that in *Young*, the agency had constrained its enforcement discretion—quite different than the Federal Register notices here. *Id.* at 40–41. EPA further

The D.C. Circuit panel, with Judge Rogers dissenting, rejected the claim that EPA's consent agreement program was judicially reviewable or required rulemaking procedures.¹⁶⁹ Writing for the court, Judge Sentelle began by determining whether the case involved an "enforcement" decision or a rulemaking. He wrote that "[o]ur analysis of this case begins and ends with . . . whether the Agreement constitutes a rulemaking subject to APA review, or an enforcement proceeding initiated at the agency's discretion and not reviewable by this court."¹⁷⁰ If the Agreement constituted an enforcement proceeding, then *Heckler v. Chaney*¹⁷¹ would suggest that the court lacked jurisdiction to review such actions. Conversely, if this was not an enforcement action, then EPA would have been required to proceed through notice-and-comment rulemaking. Judge Sentelle resolved this inquiry by concluding that precedent easily placed the case as one involving non-reviewable discretionary enforcement decisions.¹⁷²

First, he noted that the court already had applied *Chaney* to an instance where the agency had initiated and settled an enforcement action,¹⁷³ and that the facts involved here fell squarely within the court precedents.¹⁷⁴ Reasoning that EPA had opted for a "broader strategy" in lieu of individual enforcement actions, he observed:¹⁷⁵

distinguished *Alaska v. DOT*, 868 F.2d 441 (D.C. Cir. 1989), asserting that the agency had issued orders that revised existing regulations and established a bright-line test, while here "[n]either the Federal Register notices nor the consent agreements create such a bright-line test." *Id.*

The AFO industry, as interveners, primarily tried to persuade the court that EPA's decisions were reasonable, emphasizing the lack of scientific methodology for addressing air emissions from livestock and similar operations and the problem with attempting to address the issue through actions under section 114 of the CAA. Brief of Interveners for Respondents National Pork Producers Council and Roe Farm, Inc., *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027 (D.C. Cir. 2007) (No. 05-1177), 2007 WL 552103 (Feb. 16, 2007).

169. *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1033, 1037 (D.C. Cir. 2007).

170. *Id.* at 1030.

171. 470 U.S. 821 (1985).

172. *Ass'n of Irrigated Residents*, 494 F.3d at 1032–33.

173. *Id.* at 1031. The prior case, *Schering Corp. v. Heckler*, 779 F.2d 683 (D.C. Cir. 1985), involved a lawsuit brought by a drug manufacturer against the Food and Drug Administration (FDA), alleging that the FDA had improperly settled an enforcement proceeding against a rival drug manufacturer. The settlement there succeeded two district court actions involving the question of whether the drug manufacturer was selling a "new animal drug" without first having received FDA approval and the legal issue of whether genetically identical drugs fell within the FDA's statute—an issue left open in a 1983 Supreme Court decision. See *United States v. Generix Drug, Corp.*, 460 U.S. 453 (1983). The *Schering* settlement agreement required that the drug manufacturer submit a petition to the agency, requesting that the agency determine whether to classify the drug as a new animal drug under the statute. 779 F.2d at 685. About a month after that petition had been filed with the FDA, the competing drug manufacturer filed an action in district court challenging the settlement agreement. *Id.* The district court dismissed the case, reasoning that the "agency has merely postponed any decision with regard to enforcement until it has had an opportunity to determine" whether drug is subject to FDA's approval, the D.C. Circuit concluded that the case fell "squarely within the confines of *Chaney*." *Schering*, 779 F.2d at 685.

174. *Ass'n of Irrigated Residents*, 494 F.3d at 1031.

175. *Id.*

The Agreement is intended to save the time and cost of litigation while providing the agency with an opportunity to determine whether, and to what extent, AFOs are subject to the statutory requirements.¹⁷⁶

These considerations, he concluded, fell within EPA's "expertise and discretion."¹⁷⁷

Second, Judge Sentelle examined whether the relevant statutes themselves afforded EPA discretion. Parsing the language of the CAA, CERCLA and EPCRA, which all couch the agency's enforcement authority in "permissive" terms, he reasoned that no statutory language "rebut[s] the *Chaney* presumption that the Agreement, as a civil enforcement decision, is committed to the discretion of the agency."¹⁷⁸

Lastly, although having already ostensibly answered his initial question, Judge Sentelle addressed petitioners' argument that the consent agreement was a "rule" under the APA. This aspect of the opinion asked whether the agency's action, in the words of the APA, "prescribe[d] law."¹⁷⁹ It did not, he reasoned, because the agency's action neither "work[ed any] change in the agency's substantive interpretation or implementation of the Acts," nor cabined the agency's prosecutorial discretion to such a degree that it rose to the level of a substantive rule.¹⁸⁰

Judge Sentelle distinguished the two primary cases relied upon by petitioners, *National Ass'n of Homebuilders v. U.S. Army Corps of Engineers*¹⁸¹ and *Croplife America v. EPA*.¹⁸² While the Corps in

176. *Id.*

177. *Id.* at 1032.

178. *Id.* at 1033.

179. *Id.* Petitioners argued that the compliance agreement was a rule under the APA, because it operated prospectively, prescribed obligations, and constrained EPA's enforcement discretion. Petitioners' Opening Brief at 25, *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027 (D.C. Cir. 2007) (No. 05-1177), 2006 WL 3622127. They further noted that EPA's action constituted a rulemaking as it "seeks to resolve broad policy questions." Petitioners' Amended Reply Brief at 2, *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027 (D.C. Cir. 2007) (No. 05-1177), 2007 WL 917334. Indeed, petitioners expressed concern with the precedent that this case might establish and referred to what "[l]egal scholars have called this emerging trend by administrative agencies 'regulation by litigation.'" *Id.* at 15 (citations omitted).

180. *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1034 (D.C. Cir. 2007). He distinguished *Community Nutrition Institute v. Young*, 818 F.2d 943 (D.C. Cir. 1987) (*per curiam*), where the court held that the Food and Drug Administration's "announcement of action levels that specified when merchants would be subject to enforcement proceedings under the statute constituted a rule." *Id.*

181. 417 F.3d 1272 (D.C. Cir. 2005). *Homebuilders* involved a challenge to the U.S. Army Corps' issuance of certain nationwide permits, allowing qualified parties to avoid having to submit an individual permit application for regulated CWA section 404 activities. The court had little trouble concluding that the Corps' action was both final and subject to review—the Corps was defining who could proceed through a less rigorous process in lieu of an individual permit. *See id.* at 1284. In response to the claim that it had not complied with the Regulatory Flexibility Act, the Corps argued that its action, even if final, did not constitute a rulemaking, but instead operated as an adjudication. *Id.* The *Homebuilders* court held otherwise, noting that "'rules is rules,' no matter their gloss" and each of the nationwide permits "is a legal prescription of general and prospective applicability which the Corps has issued to implement" its congressionally delegated permitting authority. *Id.* at 1284–85.

182. 329 F.3d 876 (D.C. Cir. 2003).

Homebuilders had effectively adopted a program prospectively authorizing activities that otherwise would have been illegal, Judge Sentelle concluded that this was not the case in *Irritated Residents*.¹⁸³ He similarly distinguished *Croplife*, merely indicating that the court there was confronted with a binding agency document.¹⁸⁴

Judge Judith Rogers issued a lengthy dissent. She rejected the suggestion that the case involved an enforcement scheme or that it was a matter committed solely to the agency's discretion.¹⁸⁵ According to Judge Rogers, the initial notice in the Federal Register had all the trappings of a legislative rule: it was of general applicability; it would have future effect; and it would define the rights and obligations of the regulated community regarding compliance with the three environmental laws, thus effectively cabining the agency's enforcement authority.¹⁸⁶ Contrary to the majority view, she believed the case was similar to *Croplife*: the protocol in *Croplife* created a binding norm no different than the protocol here—a general approach governing the agency's responsibilities under the statutes toward this particular industry, and binding on both the agency and those who entered into the agreements (“most of the regulated AFO industry”).¹⁸⁷ In short, “EPA adopted a new generalized approach toward enforcing three environmental statutes in the future by means of an enforcement protocol unrelated to particularized findings of past or ongoing statutory violations and untethered to the enforcement regimes established by Congress”¹⁸⁸

Regardless of whether EPA lacked any choice but to proceed as it did with consent agreements, it seems reasonable to conclude that Judge Rogers' opinion persuasively describes why EPA's action constituted a rulemaking. To begin with, raising the shield of *Heckler v. Chaney* seems inapposite. *Chaney* is premised upon courts' inability to intrude into an agency's decisionmaking process on who or when to prosecute for violations of the law.¹⁸⁹ The *Chaney* Court evinced concern with reviewing an agency's decision to refrain from

183. *Ass'n of Irrigated Residents*, 494 F.3d at 1033–34.

184. *Id.* Mindful of *Chaney*'s cautionary footnote 4, where the Court intimated that judicial review might be available if the agency has “‘consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities,’” Judge Sentelle also added that nothing here suggested that EPA had adopted a policy of not enforcing the acts. *Id.* at 1035–36 (citing *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1984)). And he further rejected the argument that EPA lacked the authority under the relevant statutes to enter into the consent agreements. *Id.* at 1036–37.

185. *Id.* at 1037–46 (Rogers, J., dissenting).

186. *Id.* at 1039 (Rogers, J., dissenting).

187. *Id.*

188. *Id.* at 1040 (Rogers, J., dissenting).

189. *Heckler v. Chaney*, 470 U.S. 821, 831–33 (1984). Judge Sentelle, while focusing on footnote 4 of *Chaney*, avoided the Court's accompanying language emphasizing that the Court was establishing only a presumption of un-reviewability that could be rebutted when the agency's underlying statutory authority “provided guidelines for the agency to follow in exercising its enforcement powers.” *Id.* at 833.

initiating a proceeding against a particular party.¹⁹⁰ After all, the *Chaney* Court reasoned, what meaningful standard could a court employ to assess whether an agency acted appropriately in *not* taking any enforcement action?¹⁹¹

Whether or not one agrees with the reasoning in *Chaney*, those concerns were not readily apparent in *Irritated Residents*. The *Irritated Residents* petitioners sought review of certain *actions* by EPA (not the *inaction* of refraining from undertaking an enforcement action). It is unquestionable that an EPA enforcement decision holding someone liable under the CAA, the CWA or other environmental statutes is judicially reviewable. The law to apply when EPA prosecutes under its statutes is the scope of authority Congress delegated to the agency to prosecute administratively, as well as whether the agency decision to prosecute in a particular manner is arbitrary or capricious. Even the last part of Judge Sentelle's opinion ironically confirms this: there, he reviewed whether the consent agreements exceeded EPA's authority under the Acts—an argument he nevertheless rejected.¹⁹² But it illustrates that if this were a properly adopted "rule," a court could then examine whether it comported with the statutory mandates or if the agency otherwise acted arbitrarily or capriciously.

EPA's actions in *Ass'n of Irrigated Residents*, therefore, could easily be classified as constituting a final and reviewable agency rulemaking. Even Judge Sentelle's framing of the question would suggest as much, when he reasoned that the case involved either a rulemaking or an unreviewable enforcement proceeding.¹⁹³ But aside from Judge Sentelle's binary choice, it seems hard to describe what EPA did as anything other than a rulemaking. EPA did not engage in any individualized review of the facts of any AFO or initiate any enforcement proceeding or adjudication—it instead issued a notice in the Federal Register for the industry at large.¹⁹⁴ It adopted, according to Judge

190. The *Chaney* Court observed that, "[f]or us, this case turns on the important question of the extent to which determinations by the FDA *not to exercise*" enforcement authority is judicially reviewable. *Id.* at 828 (emphasis in original).

191. *Chaney's* deviation from the presumption in favor of judicial review under the APA can only be justified if the decision is understood as reflecting the inherent difficulty of determining what law to apply when the agency has not taken any action. Courts at the time of *Chaney* had not yet struggled with how to address those instances where inaction would constitute "action" under the APA. Although he generally criticizes the weak reasoning of the Court in *Chaney*, Cass Sunstein notes that the Court avoided more knotty issues, such as the failure of an agency to undertake a rulemaking. Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 675 (1985). See generally Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL L. J. 461 (2008); Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1 (2008).

192. *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1036 (D.C. Cir. 2007).

193. See *id.* at 1030.

194. EPA admitted "[w]hile [it] has the authority on a case-by-case basis to require AFOs to monitor their emissions and to come into compliance with applicable Federal laws, that process has proven to be difficult and time consuming . . ." Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958 (Jan. 31, 2005). The agency further suggested that it was not exercising enforcement authority when it added that it "believe[d] that the alternative to the Agreement suggested

Sentelle, a “broader strategy” or, in the words of the APA, a strategy that “prescribe[s] law or policy.”¹⁹⁵ While Judge Sentelle may have indicated that the policy does not prescribe “law,” it surely prescribes the agency’s policy of how it will approach compliance with the laws by the AFOs. In short, EPA’s “Air Compliance Agreement” is in form no different than if it had been called an “Air Compliance Program.” This type of prospective policy program, which establishes the rights and obligations of those who participate and sign the consent agreements, including EPA, is indistinguishable from a typical rulemaking. It even began in a manner similar to rulemakings, with a Federal Register notice. Any suggestion that a rulemaking proceeding would have been difficult seems specious.¹⁹⁶

III. ARE GUIDANCE DOCUMENTS FINAL AGENCY ACTIONS RIPE FOR REVIEW?

This all suggests that the likely “binding” effect of an agency document influences how courts answer the initial question of whether a document is subject to judicial review, which then appears to influence whether it should have been promulgated in accordance with the APA’s notice-and-comment rulemaking requirements.¹⁹⁷ As well it should. But the problem is that the concept of “binding” reflects a normative judgment. A document is only binding in a legal sense to the extent that a court will treat it as such.

by several commenters—using enforcement authority to order AFO to measure their emissions and to comply with all applicable environmental requirements would take much longer.”Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 40018 (July 12, 2005).

195. *Ass’n of Irrigated Residents*, 494 F.3d at 1030; 5 U.S.C. § 551(4) (2006).

196. For the most part, it was the *program* announced in the Federal Register notices containing the generic language of the consent agreements, not the ultimate individual agreements entered into by a vast majority of the industry, which petitioners attempted to challenge as a rulemaking. The agency even developed the compliance *program* as if it were a negotiated rulemaking, with stakeholder participation, circulation of drafts and even some measure of public comment. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 40016 (July 12, 2005). It established a nationwide monitoring protocol, with the ultimate goal of allowing the agency and industry to identify what farms to regulate. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958 (Jan. 31, 2005). This program, moreover, appears to have been precipitated when some states in their *rulemakings* under the CAA (the development of State Implementation Plans) had exempted these sources from regulation. As Judge Rogers lamented,

EPA’s new enforcement protocol will have significant and immediate negative consequences Ensuring accountability and informed decisionmaking means an agency needs to hear from those who are affected before it adopts an enforcement policy that eliminates enforcement of several statutes for years for a significant part of the AFO industry

Ass’n of Irrigated Residents, 494 F.3d at 1043–44.

197. A good example is *National Ass’n of Homebuilders v. Norton*, 415 F.3d 8 (D.C. Cir. 2005). There, the United States Fish and Wildlife Service noticed in the Federal Register the availability of protocols that private parties could use to determine the possible presence of a particular species protected under the ESA and, as such, the likely need for such parties to obtain a permit under the Act. *Id.* at 11–12. The plaintiff argued that the protocols amounted to a substantive rule and should have been adopted in accordance with the APA. *Id.* The court effectively examined whether the protocols were binding, and concluding that they were not, held that the protocols could not be judicially reviewed as final agency action. *Id.* at 13–17.

Admittedly, a document can be binding in a practical sense, as the court in *Appalachian Power* noted.¹⁹⁸ But this is true only to the extent that parties perceive or expect that the document can be used in a court to force a particular result. The suggestion that private parties might nonetheless feel compelled to adhere to particular guidance, even if they believe it is incorrect and not legally justified, overstates the matter. Parties who truly believe that a guidance document is illegal or is costly for them will challenge it. And their perception and expectation ultimately rests upon a prediction of how a court might treat a document in a legal sense. Given this circularity, is there an answer that will allow agencies to continue to develop policy or guidance documents and issue interpretive rules without going through APA notice-and-comment rulemaking?

One answer is to have some generalized notion of how to treat agency policy statements, guidance documents or interpretive rules, when they have not been published in accordance with the APA's notice-and-comment rulemaking requirements. If courts recognize that all such documents do not create enforceable rights or obligations, and only serve to direct agency personnel and inform the public in advance of how the agency generally expects to exercise its discretion when acting, then there would be no need for following the APA notice-and-comment rulemaking requirements (although notice and comment might still be useful¹⁹⁹). It should make little difference what any particular document says or does, the present focus of some courts. Rote phrases, containing carefully crafted words, deliberately divvied out throughout a document, ought not to determine a document's fate.

It is an agency's actual use of a document in a specific circumstance that will allow a court to examine whether the agency's action is inconsistent with the law or otherwise arbitrary or capricious. Interpretations might be persuasive, or they might not be. An agency's decision to change its guidance or interpretation may reflect arbitrary or capricious behavior—or it may not. These are all legitimate questions for courts to consider in the context of reviewing the merits of an otherwise final and reviewable agency action or a case against a third party. There is, after all, no need for what would appear to be the equivalent of pre-enforcement review that is typically not available

198. See *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

199. As explained later, greater deference may apply when an agency acts pursuant to notice-and-comment rulemaking. See *infra* notes 274–360 and accompanying text. Mathew C. Stephenson aptly notes that the level of formality surrounding the process an agency uses to announce its views may affect the agency's judgment on its prospects before a reviewing court. Mathew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 546 (2006). An agency is likely to interpret a statute more aggressively when employing formal procedural tools, in large measure because “the level of actual deference to agency interpretative decisions will be higher when the agency proceeds formally” *Id.* at 552. See also Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2137–48 (2002); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1437–42 (2004).

anyway. Absent compelling circumstances, therefore, pre-enforcement review of such documents should not occur.

Following this type of approach may avoid odd decisions like *Animal Legal Defense Fund v. Veneman*, a decision subsequently vacated sua sponte by an en banc Ninth Circuit panel.²⁰⁰ There, the Department of Agriculture deliberately developed vague regulations governing standards for nonhuman primate conditions of confinement, and the agency subsequently began to develop draft policy guidance filling in the gaps.²⁰¹ When the agency abandoned the policy guidance, animal welfare organizations promoting the guidance challenged the agency's decision. They claimed that the failure to finalize the guidance amounted to a reviewable final agency action.²⁰² In addressing whether it could review the agency's decision to abandon finalizing the guidance, the court broke its analysis into whether the guidance, if finalized, would have been reviewable and whether the failure to finalize the guidance was itself reviewable.²⁰³ The court concluded that the policy, if finalized, would not have been a "legislative" rule requiring notice-and-comment rulemaking.²⁰⁴ The court nonetheless decided that it would have been a judicially reviewable "interpretative rule from which legal consequence flowed."²⁰⁵ The court buttressed its conclusion by observing that the agency had published the draft policy in the Federal Register and invited public comment. By reasoning that the draft policy would have legal consequences, if adopted, the court observed that the converse necessarily followed—the failure to adopt the policy had the legal consequence of allowing the status quo to remain.²⁰⁶ The court then allowed judicial review, employing as precedent cases reviewing an agency's decision to withdraw a proposed legislative rule.²⁰⁷ This analysis seems questionable: if the guidance would have had legal consequences, why should it have been treated as a non-legislative rule? And if it truly would have been an "interpretive" rule, then why should the case have been ripe for review?

The case demonstrates the need for greater clarity when addressing the character of the governmental action and whether an action is both final and ripe for review. When he was on the D.C. Circuit, Chief Justice Roberts began to recognize the need to distinguish between agency actions that are "final" and those that ought to be judicially reviewable. For example, in *Independent Equipment Dealers Ass'n*, a trade association had requested EPA's view on whether the association's interpretation of one aspect of EPA's CAA

200. 469 F.3d 826 (9th Cir. 2006), vacated en banc, 490 F.3d 725 (9th Cir. 2007).

201. *Id.* at 829–30.

202. *Id.* at 831–32.

203. *Id.* at 839–40.

204. *Id.* at 839.

205. *Id.* at 840.

206. *Id.* at 841–44.

207. *Id.*

regulations was correct.²⁰⁸ EPA responded soon thereafter in a letter, rejecting the association's interpretation.²⁰⁹ The association then challenged the response letter under the CAA, claiming that it should have proceeded through notice-and-comment rulemaking, because it allegedly changed the agency's interpretation of its regulation and, as such, was a legislative rule reviewable as a final action under the CAA.²¹⁰ Then-Judge Roberts avoided focusing on whether the letter constituted "final" agency action, and instead suggested that the inquiry should address whether EPA's action was reviewable.²¹¹ He concluded that it was not: it neither announced a new policy nor altered the regulations.²¹² It was simply informational and not binding, and to allow such a challenge would "muzzle any informal communications between agencies and their regulated communities—communications that are vital to the smooth operation of both government and business."²¹³ He drew support from the APA, as well, concluding that the letter was not an "agency action" because the letter did not "implement, interpret, or prescribe law or policy."²¹⁴

While then-Judge Roberts correctly identified the need to distinguish between finality and reviewability, and intuitively recognized that allowing challenges to such documents would be problematic, he fell slightly short when articulating why. The rationale ought not to be because the challenged action does not "implement, interpret, or prescribe law or policy." That would require an inquiry into the merits of whether, in fact, the challenged action does change the regulations, or prescribes some new law or policy. If the court must answer those questions first to determine whether to allow judicial review, then its reasoning becomes circular. Instead, the reason why such documents are not reviewable should be because they are not ripe for review.

This may require a more thorough understanding of the ripeness doctrine than we have seen from courts in the past, including clarifying the distinction between ripeness and finality. In *Abbott Laboratories v. Gardner*, the Court articulated the broad view that the doctrine of ripeness allows courts to avoid rendering premature judgments when presented with an abstract disagreement that might become better crystallized by subsequent agency actions.²¹⁵

208. *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 421(D.C. Cir 2004).

209. *Id.*

210. *Id.* at 425.

211. *Id.* at 426–28.

212. *Id.* at 428.

213. *Id.*

214. *Id.*

215. 387 U.S. 136, 148–49 (1967). The underpinning for the ripeness doctrine is not entirely clear, whether it flows from Article III or serves merely serves as a judicial gloss on "finality" under the APA. See *Poe v. Ullman*, 367 U.S. 497 (1961) (avoiding constitutional issue when not clear that enforcement of challenged statutes would occur); but cf. *U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548 (1973) (allowing pre-enforcement challenge when parties indicated that they wanted to engage in the otherwise prohibited conduct). As such, there are those who believe it should be abandoned as a part of any APA review. See John F. Duffy, *Administrative Common Law in Judicial*

Ripeness requires that a court “evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.”²¹⁶ The doctrine effectively cautions that pre-enforcement or application review of a particular “final” agency action is not necessarily appropriate unless the matter is fit for review and hardship will occur absent judicial intervention. Unfortunately, the doctrine encounters problems when its application becomes overshadowed by the already murky concept of finality.

In *National Parks Hospitality Ass’n v. Department of the Interior*, for instance, a trade association for concessioners in the national parks challenged a new rulemaking by the National Park Service.²¹⁷ The Court, focusing on the second element of the test (hardship to the parties without court intervention), held that the issue was not ripe because the challenged rulemaking merely reflected the agency’s interpretation of a statute that it did not administer, and as such did not create “adverse effects of a strictly legal kind.”²¹⁸ The Court further emphasized that the regulation did not affect the conduct of the regulated community.²¹⁹ And when addressing the fitness for review, the Court merely added a paragraph at the end of its opinion that the issue should “await a concrete dispute” and, as such, was not ripe for review.²²⁰

A similar inquiry into the legal effect of an agency decision persuaded the Supreme Court in *Bennett v. Spear* to focus on whether a particular agency decision was a final agency action under the APA.²²¹ In *Bennett*, a group of ranchers and irrigators challenged the USFWS’s issuance of a biological opinion under the ESA.²²² The Service opined that the operation of a Bureau of Reclamation project was likely to jeopardize the continued existence of the Lost River sucker and the short-nose sucker, and also that the project had to comply with certain measures to avoid an illegal “take” of either of the species.²²³ Although the case principally involved whether the ranchers and irrigators had standing to bring the action under the ESA citizen suit provision, the government argued that, regardless of their standing, there was no judicially

Review, 77 TEX. L. REV. 113, 162–75, 179 (1998) (suggesting that the doctrine of ripeness, like the doctrine of exhaustion, has no place in an APA case).

216. 387 U.S. at 148–49.

217. 538 U.S. 803, 808 (2003).

218. *Id.* at 809 (quoting *Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)).

219. *Id.* at 809–10.

220. *Id.* at 812. Concurring, Justice Stevens added that the matter was fit for review but that the failure of the party to allege a sufficient injury to establish standing is what led him to believe that the case was not ripe. *Id.* at 813–16 (Stevens, J., concurring). Justice Stevens notably observed that applying ripeness principles involved an “exercise of judgment.” *Id.* at 814 (Stevens, J., concurring). Meanwhile, Justices Breyer and O’Connor would have treated the case as ripe for review. To them, the matter involved a final and ripe agency action, although little is said in their opinion about “ripeness,” except that they believed that the case involved deciding the validity of an interpretive rule, which did not necessarily require any further factual development. *Id.* at 819–20 (Breyer, J., dissenting).

221. 520 U.S. 154, 177–78 (1997).

222. *Id.* at 159.

223. *Id.* at 159, 170.

reviewable final agency action.²²⁴ The biological opinion, it asserted, was merely an advisory document, and the only reviewable action was any final decision by the Bureau of Reclamation on how it would operate its project.²²⁵ The Court held that an inquiry into finality requires “[f]irst, the action must mark the ‘consummation’ of the agency’s decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which ‘rights or obligations have been determined,’ or from which legal consequences will flow.”²²⁶ The Court concluded that the biological opinion had direct and appreciable legal consequences, although quite narrow and pointed: in its view, the section of the biological opinion that addressed the take of the species carried with it immediate and important legal consequences, because absent compliance with certain measures to avoid take, the agency would be subject to the ESA’s sanctions.²²⁷ The Court, therefore, held that the biological opinion was final, implicitly assuming it was ripe for review.²²⁸

Even when an agency does something other than issue policies, guidance or interpretations, if an agency action is ripe for review, judicial review should be available.²²⁹ Otherwise, courts risk engaging in myopic inquiries that ignore actual decisions by the agencies, such as in *Fund for Animals, Inc. v. U.S. Bureau of Land Management*.²³⁰ In *Fund for Animals*, the D.C. Circuit rejected a challenge to BLM’s implementation of its program for managing wild horses and burros on the public lands.²³¹ Concerned that the number of wild horses and burros had grown too large, the agency developed a new strategy for addressing the burgeoning populations and requested increased funding from Congress to implement its strategy.²³² After receiving the funding, BLM began implementing its new strategy, prompting the Animal Legal Defense Fund and others (collectively “ALDF”) to attempt to enjoin the program.²³³

Shortly after ALDF filed the complaint, BLM issued an Instruction Memorandum (I-M), a short-term guidance document, outlining how the

224. *Id.* at 161.

225. See generally Sam Kalen, *Standing on its Last Legs: Bennett v. Spear and the Past and Future of Standing in Environmental Cases*, 13 J. LAND USE & ENVTL L. 1 (1997).

226. *Bennett v. Spear*, 520 U.S. at 177–78 (citations omitted). See also *Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 482 (2004) (finality marks the “consummation of the agency’s decision-making process, and must either determine ‘rights or obligations’ or occasion ‘legal consequences.’”) (citing *Bennett v. Spear*, 520 U.S. at 177–78 (1997)) (emphasis added).

227. *Bennett v. Spear*, 520 U.S. at 178; see also Kalen, *supra* note 225, at 40–41.

228. *Bennett v. Spear*, 520 U.S. at 178.

229. In *National Ass’n of Homebuilders v. U.S. Army Corps of Engineers*, 440 F.3d 459 (D.C. Cir. 2006), for instance, the court reversed a lower court decision that held that a challenge to a regulation was not ripe for review. See also *Nat’l Ass’n of Homebuilders v. U.S. Army Corps of Eng’rs.*, 417 F.3d 1272 (D.C. Cir. 2005) (holding that agency action constituted a rule and was final agency action, ripe for review on certain of the claims).

230. 460 F.3d 13 (D.C. Cir. 2006).

231. *Id.* at 23.

232. *Id.* at 16–17.

233. *Id.* at 17.

agency expected to implement the program over roughly the fiscal year.²³⁴ That short-term I-M expired before the court considered the matter, prompting the court to conclude that any claim focused on the I-M was moot, and as such the court's initial question was whether any "final agency action" existed that it could review.²³⁵ This led the court to focus solely on BLM's budget request to Congress. Concluding that the budget request could not be treated as a rule because it did not implement, interpret or prescribe any law or policy, the request was not a judicially reviewable final agency action.²³⁶

The court's decision is analytically unsound. The court undoubtedly was concerned that, should review be available for presidential budget requests, a flood of litigation would rise from the numerous programs identified in such requests. But that concern perhaps obscured the real issue here; ADLF was not concerned with the budget request, but rather with challenging the *program* being implemented. The budget request merely articulated the elements of BLM's actual program. And the court conceded that the budget proposal represented a programmatic agency action.²³⁷ Concurring in part and dissenting in part, Judge Griffith emphasized this point, noting that while budget requests are not reviewable, "this case is nothing more than a rather ordinary request for review of regulatory criteria promulgated by an agency in carrying out a congressional mandate."²³⁸ Judge Griffith, therefore, would have allowed review of the expired I-M—noting that the BLM appeared to be following the expired I-M, and if any question persists about whether or not the agency was following the I-M, the court, at the very least, should have allowed that issue to be explored.²³⁹

These cases are emblematic of the challenges courts confront when reviewing agency guidance documents, a challenge made all-too illusory when trying to address whether a document is final or binding, or binding and so final, or if binding, not only final but also a "legislative" rule that should have gone through notice-and-comment rulemaking. Courts need to appreciate that a guidance document can be "final" in some sense but not "binding," and that the document can be "final" and yet the case not ripe for review. This is because guidance documents may well *appear* to mark the agency's "consummation of its decision-making process," but may not actually do so because such documents by their very nature are always "tentative or interlocutory" until applied in a particular circumstance. And whether or how any such documents

234. *Id.*

235. The plaintiffs filed a supplemental complaint responding to the agency's instruction memorandum, but that claim became moot once the period for the memorandum had expired. *Id.* at 18. The court also held that ADLF's additional challenge to some site-specific agency actions undertaken in compliance with the program had become moot. *Id.* at 22–23.

236. *Id.* at 19–23.

237. See *id.* at 20 ("The budget request is a broad 'programmatic' statement"); *id.* at 21 ("The budget proposal represents the Bureau's latest plan . . .").

238. *Id.* at 23 (Griffith, J., concurring in part, dissenting in part).

239. *Id.*

will be applied in a particular circumstance is unknown until later—or, to say it differently, when the case becomes ripe.²⁴⁰ Cases such as *Irritated Residents* and *Fund for Animals* underscore the point, because in both instances the plaintiffs were challenging an agency's actual implementation of a program or policy.²⁴¹

IV. DEFERENCE TO AGENCY INTERPRETATIONS

If we accept that policy and guidance documents are just what they purport to be—informal documents designed to alert the agency staff and the interested public of the agency's views or expected approach to a particular issue—and ordinarily should not be susceptible to judicial review unless a party can demonstrate that the matter is ripe for review, then how those documents are used in a particular circumstance becomes pivotal. We cannot, for instance, initially say they generally are immune from review, and later conclude that they are “binding” and thus merit either judicial enforcement or some measure of deference. Yet this is precisely the problem posed by these informal documents.

A good example is the National Park Service's (NPS) Management Policies (MP), such as those involved in *The Wilderness Society v. Norton*.²⁴² Drafted primarily during the Clinton administration, these policies had last been revised in early 2001. When the Bush administration released drafts of new policies, the New York Times published stories about how a political appointee in the Department of the Interior had allegedly tried to influence their outcome; NPS director Fran Mainella even wrote a letter to the New York Times defending the NPS's actions and indicating that nothing improper had been done.²⁴³ In February 2006, Congress held an oversight hearing on the 2006 draft policies.²⁴⁴ A coalition of retired NPS employees claimed that the policies violated the law and were critically flawed.²⁴⁵ Notably, that coalition of former

240. Gwendolyn McKee posits that finality should focus principally on whether the agency action marks the conclusion of a decisionmaking process, and that any fuzziness between finality and ripeness should be separated to avoid unnecessarily flooding the courts. Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371, 407 (2008).

241. See *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027 (D.C. Cir. 2007); *Fund for Animals, Inc. v. U.S. Bureau of Land Management*, 460 F.3d 13 (D.C. Cir. 2006).

242. See *supra* notes 114–126 and accompanying text.

243. See Editorial, *Dirk Kempthorne Arrives*, N.Y. TIMES, June 13, 2006, at A22; Editorial, *Crossroad in the National Parks*, N.Y. TIMES, Feb. 27, 2006, at A18; Editorial, *The National Parks Under Siege*, N.Y. TIMES, Oct. 21, 2005, at A24; Felicity Barringer, *National Park Service Revises Policy on Disturbing Resources*, N.Y. TIMES, Oct. 19, 2005, at A16; Editorial, *Who Will Care for the National Parks?*, N.Y. TIMES, Sept. 5, 2005, at A20; Editorial, *Destroying the National Parks*, N.Y. TIMES, Aug. 29, 2005, at A14.

244. See National Park Service News Release, *NPS Director Testifies at Congressional House Hearing*, Feb. 15, 2006 (on file with author), available at <http://home.nps.gov/applications/release/Detail.cfm?ID=636> (last visited Jan. 23, 2009).

245. *NPS Retirees Reject “Hoffman Lite” Version of National Park Service Management Policies, Warn of Grave Dangers Still Posed by Rewrite*, available at <http://www.pnnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/10-26-2005/0004195754&EDATE=>.

NPS retirees told Congress that the “NPS Management Policies have become recognized, even by the Courts, as the official interpretation of the legislation establishing the NPS and its mission.”²⁴⁶ Perhaps that statement alone illustrates the confusion surrounding the binding nature of policy or guidance documents

While the D.C. Circuit held in *Wilderness Society* that the 2001 MPs were not judicially enforceable,²⁴⁷ that does not necessarily dictate how such policies will be treated in other litigation.²⁴⁸ In *Southern Utah Wilderness Alliance (SUWA) v. National Park Service*, the district court held that the 2001 MPs were entitled to *Chevron* deference, because they were procedurally similar to formal regulations.²⁴⁹ More recently, relying on *SUWA v. NPS*, wilderness advocates challenged a Park Service management plan for the Colorado River through Grand Canyon National Park, arguing that, by affording these policies *Chevron* deference, the *SUWA v. NPS* court had indicated that the policies must be judicially enforceable—thus rejecting the analysis in *Wilderness Society*.²⁵⁰ The district court dismissed this argument, noting that the Ninth Circuit precedent would suggest that such policies have the force and effect of law only if they purport to prescribe substantive rules.²⁵¹ The court emphasized that the MPs did not affect individual rights and obligations, and that the failure of the NPS to publish the policies in the CFR evinced NPS’s intention not to announce enforceable substantive rules.²⁵² And it would be inappropriate to apply the entirely different question of deference, the court reasoned, to whether a policy has the force and effect of law.²⁵³

Ultimately, whether such documents are judicially reviewable or enforceable by third parties cannot be divorced from the level of deference

246. John W. “Bill” Wade, Chair, Executive Council, Coalition of National Park Service Retirees, Testimony Before the Subcommittee on National Parks, Committee on Resources, House of Representatives, Hearing on “The National Park Service 2006 Draft Management Policies and proposed changes to Director’s Order 21,” Feb. 15, 2006 (on file with author).

247. See *supra* notes 114–126 and accompanying text.

248. See *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 79 n.1 (D.D.C. 2006) (court rejected looking at alleged violations of the management policies as independent claims, following *Wilderness Society v. Norton*, 434 F.3d 584 (D.C. Cir. 2006)). In *Greater Yellowstone Coalition v. Kempthorne*, 577 F. Supp. 2d 183, 192–195 (D.C. Cir. 2008), the court treated the National Park Service’s management policies as the official interpretation of the agency’s underlying organic statute.

249. 387 F. Supp. 2d 1178 (D. Utah 2005). See also *Bassett, New Mexico LLC v. United States*, 55 Fed. Cl. 63 (Fed. Cl. 2002) (applying *Chevron* deference to agency management policy issued under the Federal Land Policy Management Act’s provision for adopting management plans).

250. *River Runners for Wilderness v. Martin*, No. CV-06-894-PCT-DGC, 2007 WL 4200677, at *5–6 (D. Ariz. Nov. 27, 2007), *appeal pending*. See *supra* notes 114–126 and accompanying text.

251. *River Runners for Wilderness*, 2007 WL 4200677, at *5–6. The court relied on *United States v. Fifty-Three Eclactus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982), where the court articulated a two-part test for determining whether a policy would have the force and effect of law: it “must be legislative in nature, affecting individual rights and obligations,” and “it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.” *Id.* at *5–9.

252. *Id.*

253. *Id.* at *7–8.

courts will afford these policies when resolving particular cases. Several Supreme Court decisions since 2000 involving deference to agency interpretations appear poised to avert the percolating problem of the reviewability and enforcement of agency guidance documents. These decisions are *Christensen*,²⁵⁴ *Mead*,²⁵⁵ *National Cable*,²⁵⁶ and *Oregon v. Gonzales*.²⁵⁷ Legions of articles have been written on the constitutional and practical legitimacy of the now well-recognized *Chevron* doctrine²⁵⁸: if a court determines “Congress has directly spoken to the precise question at issue,” then agencies must obey that command—albeit as articulated by the court. If, however, the statutory language is ambiguous, then the court will defer to an agency’s reasonable interpretation.²⁵⁹ Some, such as Cass Sunstein, suggest that the Court has now introduced a third element of the inquiry, avoiding *Chevron* if the matter involves a “fundamental issue . . . that goes to the heart of the regulatory scheme”²⁶⁰

254. *Christensen v. Harris County, Texas*, 529 U.S. 576 (2000).

255. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

256. *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005).

257. 546 U.S. 243 (2006).

258. See, e.g., Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990). See also Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921 (2006) (arguing that the *Chevron* doctrine is necessary in light of the status of the nondelegation doctrine). William Eskridge and Lauren Baer present an interesting empirical analysis illustrating that *Chevron* did not necessarily create a “revolution” in deference to administrative agencies before the Supreme Court; instead the Court has applied “a continuum of deference regimes.” William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1090 (2008). See also Krisin E. Hickman & Mathew D. Krueger, *In Search of the Modern Skidmore Standard*, 108 COLUM. L. REV. 1235 (2007).

259. *Barnhart v. Walton*, 535 U.S. 212, 217–18 (2002). Deference generally is only afforded to the agency charged with administering the relevant statutory program. See *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990) (congressional delegation of administrative authority is a precondition for *Chevron* deference); *California Trout, Inc. v. Fed. Energy Regulatory Commission*, 313 F.3d 1131, 1133–34 (9th Cir. 2002) (deference owed only to agency charged with administering program); *Dantran, Inc. v. U.S. Dep’t of Labor*, 246 F.3d 36, 48 (1st Cir. 2001) (deference owed agencies’ interpretation of statutes related to their expertise); *Am. Rivers v. Fed. Energy Regulatory Commission*, 129 F.3d 99, 107 (2d Cir. 1997); *Prof’l Reactor Operator Soc’y v. U.S. Nuclear Regulatory Comm’n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (not entitled to deference when outside area of expertise); see also *Nat’l Parks Hospitality Ass’n v. Dep’t of the Interior*, 538 U.S. 803, 819–20 (2003) (Breyer, J., dissenting). This same principle counsels against applying *Chevron* deference to an agency’s interpretation of a jurisdiction-conferring statute. See *Murphy Exploration & Prod. Co. v. U.S. Dep’t of the Interior*, 252 F.3d 473, 478 (D.C. Cir. 2001). Also, an agency may claim deference only if it believes that the statutory language is ambiguous; it may not argue for deference when asserting that the statutory language is clear. See *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002).

260. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 193 (2006). In particular, Sunstein focuses on three cases: *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687 (1995); and *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994). *Id.* at 236–42.

The oft-stated justification for affording deference is that whenever Congress has left a gap in a statute, it necessarily understood and expected that it was delegating to the agency the authority to exercise policy judgments, and that agencies are better suited than judges to choose between alternately acceptable policy choices.²⁶¹ If we accept that courts must afford some measure of deference to agency judgments, whether described in those terms or not,²⁶² the Supreme Court's decision in *Christensen* marks a critical juncture in the Court's treatment of informal agency guidance documents. In *Christensen*, the Court addressed whether the Fair Labor Standards Act prohibits an employer, whose employee is otherwise entitled to receive overtime, from requiring the employee to use compensatory time in lieu of receiving cash payments for that overtime.²⁶³ In reaching this conclusion, the Court addressed whether it should defer to a Department of Labor Opinion Letter which concluded that employers could compel the use of compensatory time only in those instances where the employee so agreed in advance.²⁶⁴ The United States and the petitioner argued that the opinion letter must be given deference under *Chevron*.²⁶⁵ The Court disagreed, noting that "interpretations contained in

261. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844, 865–66 (1984). The Court in *Smiley v. Citibank (S.D.), N.A.*, articulated the reason for deference as follows:

We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.

514 U.S. 735, 740–41 (1996). Cass Sunstein suggests that "[t]here is no reason to believe that in the face of statutory ambiguity, the meaning of federal law should be settled by the inclinations and predispositions of federal judges. The outcome should instead depend on the commitments and beliefs of the President and those who operate under him." Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2582 (2006). In an analogous vein to Sunstein's acceptance of agencies' law-interpreting power, Jack Goldsmith and John F. Manning proffer that the President's ability to fill in the details of ambiguous statutes rests upon what they call the President's "completion power." Jack Goldsmith and John F. Manning, *The President's Completion Power*, 115 YALE L. J. 2280 (2006). *Chevron* step two is where Kenneth Bamberger would allow agencies to employ normative cannons of interpretation, in the first instance, with courts invested with the power to review norm-impinging agency choices to determine whether the agency's choice promoted or retarded "institutional barriers to accurate norm application." Kenneth Bamberger, *Normative Cannons in The Review of Administrative Policymaking*, 118 YALE L. J. (forthcoming 2008).

262. This is not to suggest a void in critics of deference. Elizabeth V. Foote, for instance, argues that *Chevron* inappropriately undermines the appropriate standard of review articulated in either the agency's specific statutory program or the APA. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why it Matters*, 59 ADMIN. L. REV. 673 (2007).

263. *Christensen v. Harris County, Texas*, 529 U.S. 576, 582 (2000).

264. *Id.* at 586–87.

265. Petitioner actually argued that "[t]he courts must defer to all of the Secretary's 'fair and considered judgment on the matter in question,' even those which are set forth in a brief or opinion letter and not expressly contained in the Department's 'legislative' or 'interpretive' regulations." Petitioner's Brief at 33, *Christensen v. Harris County, Texas*, 529 U.S. 576 (2000) (No. 98-1167), 1999 WL 1204475 (citing *Auer v. Robbins*, 519 U.S. 452, 462 (1997)). In its amicus curiae brief supporting the petitioner, the United States similarly cited *Auer* for the principle that the Secretary's position was entitled to "substantial deference." Brief for the United States As Amicus Curiae Supporting Petitioners

policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”²⁶⁶ The Court, relying upon its 1944 opinion in *Skidmore v. Swift & Co.*,²⁶⁷ further noted that, although interpretations contained in *regulations* are entitled to deference, interpretations of statutory language contained in *other formats* only are “‘entitled to respect’” “to the extent that those interpretations have the ‘power to persuade.’”²⁶⁸ It also rejected, arguably in dicta, the argument that the agency’s opinion letter, interpreting the agency’s regulations, should be given deference under *Auer v. Robbins*.²⁶⁹ The Court opined that “*Auer* deference is warranted only when the language of the regulation is ambiguous;” otherwise an agency could create de facto a new regulation under the guise of interpreting existing regulations, which have the force and effect of law.²⁷⁰

The Court’s aside about affording *Auer* deference when an agency interprets its own ambiguous regulations (as opposed to statutes) presents an interesting paradox. To begin with, the suggestion that *Auer* deference remains viable appears troubling to some,²⁷¹ particularly since the Court cites to *Bowles v. Seminole Rock & Sand Co.*²⁷² along with its reference to *Auer*. In *Seminole Rock*, the Court articulated that an agency’s interpretation of its own ambiguous regulation would be “controlling” unless “plainly erroneous” or “inconsistent” with the underlying regulation.²⁷³ And Justice Scalia’s opinion for the Court in *Auer* simply reaffirmed the vitality of *Seminole Rock*.²⁷⁴ But *Christensen* arguably reflects the majority of the Court’s sensitivity to the academic

at 10, *Christensen v. Harris County, Texas*, 529 U.S. 576 (2000) (No. 98-1167), 1999 WL 1128266. The United States simply cited *Chevron* as a “see generally” after it cited *Auer* as its principle case. *Id.* at 15.

266. *Christensen*, 529 U.S. at 587.

267. 323 U.S. 134, 140 (1944).

268. *Christensen*, 529 U.S. at 587 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

269. *Id.* at 588; see *Auer v. Robbins*, 519 U.S. 452 (1997).

270. *Christensen v. Harris County, Texas*, 529 U.S. 576, 588 (2000). This issue prompted Justice Scalia (concurring in part) to respond that *Skidmore* deference is an “anachronism,” and that the Department’s opinion letter, to the extent it reflects the Department’s authoritative position, should be entitled to *Chevron* deference. *Id.* at 590 (Scalia, J., dissenting). Justice Stevens, dissenting, disagreed and noted that the opinion letter was entitled to *Skidmore* respect. *Id.* at 595 (Stevens, J., dissenting). Justice Breyer noted that Justice Scalia “may well be right” that the Department’s opinion letter warrants *Chevron* deference, but he disagreed with any suggestion that *Skidmore* deference is an anachronism. *Id.* at 596 (Breyer, J., dissenting). *Skidmore* deference, he added, is an appropriate add-on-or caveat to *Chevron*-style deference, particularly when there is doubt about whether Congress intended to delegate interpretive authority to the agency. *Id.* at 596–97 (Breyer, J., dissenting).

The Supreme Court in *Chevron* effectively rejected the *Skidmore* approach for review of agency interpretation of congressional directives—at least as those interpretations were pursuant to an administrative rulemaking proceeding. See generally David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 334–36 (2000). I do not subscribe to the view of those, like Mr. Hasen, who argue that Congress cannot be presumed to delegate interpretive power to administrative agencies when Congress has passed ambiguously worded legislation.

271. E.g., Robert A. Anthony & Michael Asimow, *The Court’s Deferences—A Foolish Inconsistency*, ADMIN. & REG. L. NEWS, Vol. 26, No. 1, Fall 2000, at 10.

272. 325 U.S. 410 (1945).

273. *Id.* at 414.

274. *Auer*, 519 U.S. at 461.

commentary criticizing *Seminole Rock*.²⁷⁵ That said, no other Justice joined Justice Scalia's dissent in *Christensen*, where he urged that *Seminole Rock* or *Auer* style deference should apply to agency interpretations of regulations.²⁷⁶ And the entire Court, as recently as 2007 in *Long Island Care at Home, Ltd. v. Coke*, appears to accept an agency's interpretation of its regulation as controlling unless it is *plainly* erroneous or inconsistent with the underlying regulation.²⁷⁷ This approach, however, encourages the drafting of ambiguous regulations, followed next by the development of guidance documents interpreting those regulations, which then would be entitled to *Auer* deference. But *Auer* deference might apply only in connection with the issuance of the first guidance document, because any subsequent guidance document altering the interpretation might require notice-and-comment rulemaking.²⁷⁸

Christensen soon became overshadowed by the Court's opinion in *United States v. Mead Corp.*, where the Court attempted once again to articulate its standard for affording deference to informal agency documents.²⁷⁹ In *Mead*, the Court addressed whether a United States Customs Service tariff classification ruling warranted judicial deference.²⁸⁰ Writing for an 8-1 majority, Justice Souter recounted the Court's many decisions touting the need for affording deference, whether acting under an express or implied delegation of authority from Congress—such as when a statute is ambiguous and the agency must fill the resulting gap.²⁸¹ Typical indicators of such delegation, according to the Court, are when Congress provides the agency with authority to promulgate rules or engage in adjudications.²⁸² These formal processes “tend[] to foster the fairness and deliberation that should underlie a pronouncement” that will have the force and effect of law.²⁸³ But the absence of these formal processes is not necessarily dispositive, Justice Souter added.²⁸⁴ With these standards in mind, the Court then proceeded to analyze whether

275. John F. Manning argues that *Seminole Rock* (or ultimately, *Auer*) deference undermines separation of power principles, and that “*Skidmore v. Swift & Co.* . . . establish[es] a nonbinding version of deference that accounts for an agency's expert judgment when the agency is *not* exercising delegated interpretive lawmaking power. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 686 (1996) (emphasis added); see *id.* at 618, 639, 669, 681. See also Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. ON REG. 1 (1990). Prior to *Christensen*, Richard Pierce, typically critical of unnecessary judicial intervention into rulemaking proceedings, deftly suggested that giving “binding effect” to interpretive rules or policy statements would not be an appropriate way to solve the rulemaking dilemma (the ossification of rulemakings) faced by agencies. Pierce, *Deossify*, *supra* note 19, at 85–86.

276. *Christensen v. Harris County, Texas*, 529 U.S. 576, 589–91 (2000) (Scalia, J., dissenting).

277. 127 S. Ct. 2339, 2349 (2007).

278. See *supra* notes 77–78 and accompanying text.

279. 533 U.S. 218 (2001).

280. *Id.* at 221.

281. *Id.* at 227–31.

282. *Id.* at 229.

283. *Id.* at 230.

284. *Id.* at 230–31.

Congress either ever “thought” the classifications would be entitled to deference or whether it “meant to delegate authority to Customs to issue classification rulings with the force of law.”²⁸⁵ Finding no such intent by Congress, the Court treated the classifications as if they were informal agency guidance documents of the type identified in *Christensen*, and as such possibly entitled to *Skidmore* deference.²⁸⁶

The Court’s decision in *Mead* openly recognized that this new era of administrative law needs guidance. Justice Souter’s opinion observed that agencies now act in “multifarious” ways, and the range of ways in which agencies act must be considered when determining the level of deference afforded their actions.²⁸⁷ He responded to Justice Scalia’s dissent, where Justice Scalia announced that he would bury *Skidmore* and either apply *Chevron* deference or not,²⁸⁸ by explaining that the Court has “tailor[ed] deference to [a] variety” of “indicators that Congress would expect *Chevron* deference.”²⁸⁹

The Court’s decision in *Mead*, no matter how well-intentioned, is nonetheless problematic. Instead of simply interring *Chevron* deference when an agency acts informally, the Court perpetuated the problem of how to articulate a rational reason for distinguishing among different types of informal agency actions. Justice Souter at one point focuses on whether Congress might have intended that the classification rulings have the force of law, while soon thereafter suggesting that the inquiry might focus on whether Congress intended to delegate authority to issue such rulings that have the force of law, and then later on whether Customs “ever set out with a lawmaking pretense in

285. *Id.* at 231–32. Justice Souter summarized the Court’s holding near the outset of his opinion:

We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

Id. at 226–27. Only a few years earlier, the Court had held that Customs regulations were entitled to *Chevron* deference. See *United States v. Haggard Apparel Co.*, 526 U.S. 380 (1999).

286. *Id.* at 234–35. The Court observed, but did not decide, “[t]here is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case . . .” *Id.* at 235.

287. *Id.* at 236.

288. Justice Scalia’s lengthy dissent warned that the Court’s decision might prove to be “one of the most significant opinions ever rendered by the Court dealing with the judicial review of administrative action,” and a “bad” one in his view. *Id.* at 261 (Scalia, J., dissenting). He premised one aspect of his analysis on a concern obviated by the Court’s subsequent decision in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005). Justice Scalia opined that “[w]hat a court says is the law after according *Skidmore* deference will be the law forever, beyond the power of the agency to change even through rulemaking.” *Id.* at 249–50. In *Brand X*, discussed *infra* notes 296–315 and accompanying text, the Court rejected that analysis.

289. *Id.* at 236–37.

mind when it undertook to make classifications like these.”²⁹⁰ Each of these inquiries could produce a different result. Not surprisingly, therefore, *Mead* has produced a wave of critical commentary.²⁹¹ In her cogent account of the impact of *Mead* on the lower courts and the need for greater coherence, Lisa Bressman perhaps best summarizes the present quagmire when she stated that “[y]ears after *Mead*, we are no closer to determining when Congress has delegated, and an agency has exercised, authority to issue interpretations with the force of law.”²⁹²

The Court nevertheless continues invoking the standards articulated in *Mead* when addressing deference to guidance documents. In *Barnhart v. Walton*, for instance, Justice Breyer observed that “Courts grant an agency’s interpretation of its own regulations considerable leeway,” adding that the Court in *Mead* clarified that *Chevron* deference did not necessarily require notice-and-comment rulemaking.²⁹³ His remark about *Mead* seems somewhat gratuitous, however, as *Barnhart* involved the application of *Chevron* deference to an agency’s statutory interpretation contained in a regulation—and no one there disputed that the agency had accurately interpreted its regulation. Guidance documents only became relevant because Justice Breyer referenced consistent earlier agency informal interpretations, noting that “this Court will normally accord particular deference to an agency interpretation of ‘longstanding’ duration.”²⁹⁴ And that recognition carried particular force in that case, since Congress had re-enacted the applicable statutory provisions and opted not to change the agency’s longstanding interpretation.²⁹⁵

In June 2005, the Supreme Court preserved one critical aspect of agency flexibility. In *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, much was at stake: the ability of a new administration to ascend into power and, through rulemaking, alter a prior administration’s interpretation and

290. *Id.* at 233.

291. See Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 738–39 (2002) (“[T]he Supreme Court should reorient the *Christensen/Mead* rule to reward diligent agencies and punish agencies that attempt, like the Queen of Hearts, to reach ultimate conclusions without process adequate to ensure the reliability of the result.”); Ronald M. Levin, *Mead and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771 (2002) (“*Mead*, the beverage, is by definition fermented, but the ferment over *Mead*, the judicial decision, has only just begun.”); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 809 (2002) (the majority and dissent in *Mead* “were mistaken in seeking to define the domain of *Chevron* with anything other than a meta-rule.”); Russell L. Weaver, *The Undervalued Nonlegislative Rule*, 54 ADMIN. L. REV. 871, 880 (2002) (“The *Christensen-Mead* dual deference approach . . . deprives non-legislative rules of a valuable function in the regulatory process, and accordingly denies regulated entities the ability to gain more definitive guidance regarding the meaning of regulatory provisions.”). See also Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 351 (2003).

292. Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1491 (2005).

293. 535 U.S. 212, 217, 222 (2002).

294. *Id.* at 220.

295. *Id.*

implementation of an ambiguous statutory program.²⁹⁶ The *Chevron* doctrine stood on the side of future administrations, while the principle of *stare decisis* served as a potential counter-weight. The United States warned that there “is a significant conflict in the circuits concerning the interaction of the *Chevron* doctrine with the rule of *stare decisis*.”²⁹⁷ It further argued that *Chevron* deference should not be displaced by principles of *stare decisis* and a prior judicial interpretation.²⁹⁸ Industry petitioners elaborated, arguing that interpretations of ambiguous statutory language should not rest on an approach that favors a race to the courthouse, with the outcome solidified until further congressional action.²⁹⁹

In a 6-3 decision, the Supreme Court refused to limit a future administration’s flexibility to re-interpret ambiguous statutory language through rulemaking.³⁰⁰ Writing for a majority, Justice Thomas opined that Congress delegated to the Federal Communications Commission the authority to promulgate rules, and the Commission interpreted the statute while exercising that authority.³⁰¹ As such, it was entitled to *Chevron* deference when interpreting ambiguous language.³⁰² The agency could change a prior interpretation, provided that it “adequately explains the reason for a reversal of policy,” and it would not be bound by a prior judicial construction:

A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court

296. 545 U.S. 967 (2005).

297. Brief of Federal Petitioners at 39, *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (Nos. 04-277, 04-281).

298. *Id.* at 40–41. The United States distinguished *Neal v. United States*, 516 U.S. 284 (1996), by suggesting that the interpretation at issue there was the only permissible interpretation of that statute—effectively an interpretation rendered under a *Chevron* step one analysis. *Id.* The Cable-Industry petitioners argued that *stare decisis* would not trump *Chevron* deference, although it believed that the Court did not need to reach that issue. Brief of Cable-Industry Petitioners at 16, 30, *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (Nos. 04-277, 04-281).

299. Petitioners argued that the Court’s opinion in *Maslin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), only required adherence to a prior interpretation where the statutory language is clear, *id.* at 30–31, and they referred the Court to the following law review articles for guidance: Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272 (2002); Richard W. Murphy, A “New” Counter-Marbury: *Reconciling Skidmore Deference and Agency Interpretative Freedom*, 56 ADMIN. L. REV. 1 (2004); Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L. J. 2225 (1997); Greg D. Polsky, *Can Treasury Overrule the Supreme Court*, 84 B.U. L. REV. 185 (2004); Russell L. Weaver, *The Emperor Has No Clothes: Christensen, Mead and Dual Deference Standards*, 54 ADMIN. L. REV. 173 (2002). *Id.* at 32–33. For an insightful note on *Brand X*, see Doug Geyser, *Courts Still “Say What the Law Is”*: *Explaining the Functions of the Judiciary and Agencies After Brand X*, 106 COLUM. L. REV. 2129 (2006).

300. *Brand X*, 545 U.S. at 997–1003.

301. *Id.* at 980–82.

302. *Id.*

decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.³⁰³

Justice Thomas emphasized that *Chevron* was premised upon the principle that it is for agencies, not courts, to fill statutory gaps.³⁰⁴

With that issue resolved, Justices Breyer and Scalia then engaged in a dialogue over whether *Chevron* deference could exist in circumstances where the agency does not act in a rulemaking process pursuant to delegated authority.³⁰⁵ Justice Scalia, joined by Justices Souter and Ginsburg on only the merits of the Court's decision, disagreed with the Court's approach toward deference under *Mead*.³⁰⁶ *Mead*, according to Scalia, "drastically limited the categories of agency action that would qualify for deference under *Chevron*."³⁰⁷ Instead, Justice Scalia believed that the Court should afford deference beyond what it said in *Mead*.³⁰⁸ Concurring in the Court's opinion, Justice Breyer responded that *Mead* clearly suggests that *Chevron* deference is not necessarily dependent upon the administrative formality of a rulemaking.³⁰⁹ "It is not surprising," he wrote, "that the Court would hold that the existence of a formal rulemaking proceeding is neither a necessary nor sufficient condition for according *Chevron* deference to an agency's interpretation of a statute."³¹⁰

303. *Id.* at 967, 982. "Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Id.* at 982–83; see also *id.* at 985 ("Before a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction."). Justice Thomas agreed that *Neal* was inapposite, as it involved unambiguous statutory language. *Id.* at 984. This appears consistent with ending the inquiry at step one of *Chevron*, when a court initially must determine whether the agency's interpretation is clearly right or clearly wrong—perhaps another way of stating that the language is not ambiguous. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (describing interpretation as "clearly wrong" and that contained in *Edelman v. Lynchburg College*, 535 U.S. 106 (2002) as "clearly right").

304. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

305. *Id.* at 1003–20.

306. *Id.* at 1005 (Scalia, J., dissenting).

307. *Id.* at 1014–15 (Scalia, J., dissenting). Writing for a majority in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1009 (2008), Justice Scalia would have applied *Skidmore* deference to an agency interpretation contained in an amicus brief, albeit with the level of deference reduced by a change in interpretation.

308. *Brand X*, 545 U.S. at 1014–20 (Scalia, J., dissenting).

309. *Id.* at 1003–05 (Breyer, J., concurring).

310. *Id.* at 1004. In *Barnhart v. Walton*, 535 U.S. 212, 217–22 (2002), Justice Breyer examined whether an agency's construction of a statute (in its regulation) was permissible, under *Chevron* step two. In concluding that it was, he relied upon earlier agency guidance documents illustrating that the interpretation was longstanding. *Id.* at 219–21. He added that merely because the prior interpretation did not occur following notice and comment "does not automatically deprive that interpretation of the judicial deference otherwise its due," citing *Chevron* and then invoking *Mead*. *Id.* at 221–22. Elsewhere, Justice Breyer elaborates on his approach toward agency deference, explaining that deference ought to be governed by a court's judgment about whether and to what degree it can assume that a reasonable legislator intended that an agency could interpret an ambiguous term and through what means. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 85, 104–08 (2005). Some lower courts, for instance, apply *Chevron* deference when they conclude that Congress expressly delegated to the agency the authority to render the particular type of agency decision. *E.g.*, *Pharm. Research and Mfrs. v. Thompson*, 362 F.3d 817, 821–22 (D.C. Cir. 2004) (concluding that *Chevron*

But Justice Breyer never fully engaged Justice Scalia on a fundamental issue. Justice Scalia posited yet again his view that the Court's approach toward deference in *Mead* could lead to bizarre and possibly unconstitutional results.³¹¹ He questions, for instance, what would happen if a particular agency's interpretation is not entitled to deference and a court instead concludes that the "best" interpretation contradicts the agency's view.³¹² The agency, according to Justice Scalia, could then respond by adopting its rejected interpretation in a rulemaking proceeding, and subsequently be upheld under *Chevron*.³¹³ This he believed "is not only bizarre. It is probably unconstitutional."³¹⁴ He also feared that courts would now have to determine whether a prior judicial interpretation was premised upon a *Chevron* step one analysis, and if it was, whether the same *stare decisis* principle would apply. "I would," he opined, "adhere to what has been the rule in the past: When a court interprets a statute without *Chevron* deference to agency views, its interpretation (whether or not asserted to rest upon an unambiguous text) is the law."³¹⁵

Even after *Christensen* and *Mead*, federal agencies curiously still argue for *Chevron* deference under circumstances where it would no longer apply, including where an agency would otherwise argue that a guidance document was not a reviewable final agency action. Perhaps the most apt example involves a case where three law students were denied the benefit of their student loan cancellation due to their present employment.³¹⁶ The critical issue was the extent that the court should defer to Department of Education (DOE) interpretations regarding the criteria for student loan cancellation, which were pronounced in a student aid financial handbook, and through telephone calls and e-mails.³¹⁷ The handbook, according to the court, introduced a new criteria not found in the statute or the regulation—and the regulation merely parroted the statute.³¹⁸ The district court upheld the DOE's interpretation of the statute

deference was applicable to Secretary of the United States Dept. of Health and Human Services' interpretation of the Medicaid Act); *Hospital Corp. of Am. v. Comm. of Internal Revenue*, 348 F.3d 136 (6th Cir. 2003) (finding that *Chevron* deference applied to regulation issued without notice and comment); *Schneider v. Feinberg*, 345 F.3d 135 (2d Cir. 2003) (granting *Chevron* deference to tables not published along with a duly published regulation); see also *Tualatin Valley Builders Supply, Inc. v. United States*, 522 F.3d 937, 944–48 (9th Cir. 2008) (O'Scannlain, concurring) (urging *Chevron* deference for IRS revenue procedure).

311. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1014–18 (2005) (Scalia, J., dissenting).

312. *Id.* at 1016–17.

313. *Id.* at 1017.

314. *Id.* According to Justice Scalia, executive agencies may not overturn or disregard decisions rendered by Article III courts. *Id.* "That is what today's decision effectively allows. Even when the agency itself is party to the case in which the Court construes a statute, the agency will be able to disregard that construction and seek *Chevron* deference for its construction next time around." *Id.*

315. *Id.* at 1019.

316. *De La Mota v. U.S. Dep't of Educ.*, 412 F.3d 71 (2d Cir. 2005).

317. *Id.* at 78.

318. *Id.* at 75–76, 78.

and its regulations, giving the agency some degree of deference.³¹⁹ On appeal, the DOE argued for *Chevron* deference, which, if applicable, the Second Circuit observed was mandatory under *In re New Times Securities Services*.³²⁰ The DOE alternatively argued that it would be entitled to *Skidmore* deference if not *Chevron* deference.³²¹ The Second Circuit easily dispatched the government's *Chevron* argument, by holding that the interpretation did not "emerge from any formal rule-making procedures" and, instead, reflected "ad hoc, previously unwritten rules."³²²

The court then went further and, in reversing the judgment of the district court, rejected the government's argument that it was entitled to *Skidmore* deference as a consequence of its specialized experience.³²³ Important in the court's analysis is the fact that the interpretation was developed by a staff member, who "does not report to the Secretary, bears no law-making authority, and is constrained by political accountability."³²⁴ In order for *Skidmore* deference to apply, there must be a thorough consideration of the issue that the Second Circuit suggested "requires a macro perspective that a staff member, acting alone, lacks."³²⁵ The court distinguished this case from those where it has applied *Skidmore* deference to agency officials who "hold substantial responsibility."³²⁶ And the court warned future litigants that it would not suffice if the agency head, after the fact or through the litigation, simply endorsed the staff member interpretation.³²⁷

More recently, the Court in *Gonzales v. Oregon* further restricted the degree of deference afforded administrative agencies, when, for instance, it is not clear whether the agency is interpreting its own regulation or the underlying

319. *Id.* at 74, 77.

320. 371 F.3d 68, 80 (2d Cir. 2004).

321. *De La Mota*, 412 F.3d at 79.

322. *Id.*

323. *Id.* at 79–82.

324. *See id.* at 80.

325. *Id.*

326. *Id.* The Second Circuit, for instance, refused to afford *Chevron* deference to an administrative law judge's interpretation, where the judge lacked delegated authority to issue binding decisions. *Lin v. U.S. Dep't of Justice*, 416 F.3d 184 (2d Cir. 2005). The court rejected the government's argument that the immigration judge's decision was a binding rule, carrying the force of law: "[t]here is, in sum, no reason to believe that an IJ's summarily affirmed decision [by the Board of Immigration Appeals] contains the sort of authoritative and considered statutory construction that *Chevron* deference was designed to honor." *Id.* at 191. The court further avoided *Skidmore* deference by concluding that the decision was not persuasive. *Cf. Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007) (*en banc*) (on appeal after its remand, court addressed applying *Chevron* deference to the Board of Immigration Appeals subsequent decision).

327. *De La Mota v. U.S. Dep't of Educ.*, 412 F.3d 71, 80 (2d Cir. 2005). The court also concluded that the interpretation neither had "validity" nor the "power to persuade," additional elements for receiving *Skidmore* deference. Here, the court observed that the Department labeled its interpretation as "advisory" only, and as a tentative interpretation it would not have any power to persuade. *Id.* at 81–82 ("We are especially disinclined to defer to an agency when it does not purport to speak authoritatively.").

statute.³²⁸ In 1994, Oregon had legalized physician-assisted suicide.³²⁹ Within the first year of the Bush administration, Attorney General John Ashcroft published in the Federal Register what he styled an Interpretive Rule, concluding that the use of controlled substances in this manner violated the Controlled Substances Act (CSA).³³⁰ Attorney General Reno, under the Clinton administration, had earlier concluded that the CSA did not allow displacement of state authority.³³¹ Oregon and others then challenged the interpretive rule issued by Attorney General Ashcroft.³³²

Justice Kennedy's opinion for a 6-3 majority began by summarizing seemingly simple principles of deference, noting that substantial deference is afforded an agency's interpretation of an ambiguous regulation under *Auer*, or an ambiguous statute under *Chevron*.³³³ But an agency is only entitled to substantial deference of an ambiguous statute to the extent it qualifies for *Chevron* deference under *Mead*, otherwise the interpretation is merely "entitled to respect" under *Skidmore*.³³⁴ The government sought to defend its interpretation under an *Auer* standard of deference, claiming it was an interpretation of 21 C.F.R. § 1306.04.³³⁵ This, according to Justice Kennedy, was problematic, because "[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."³³⁶ After rejecting the application of *Auer* deference, effectively announcing an anti-parroting canon that would reduce the level of deference when an agency merely repeats statutory words, Justice Kennedy then rebuffed the suggestion that *Chevron* might apply; he reasoned that *Chevron* only would have applied if Congress had delegated the power to the Attorney General to

328. 546 U.S. 243 (2006).

329. *Id.* at 249.

330. Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56607-08 (Nov. 9, 2001). The district court declined to address the procedural issues associated with the notice of the interpretive rule, but observed that it lacked the indicia of process employed by another interpretive rule that the government had furnished the court. *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1084 n.9 (D. Or. 2002).

331. 546 U.S. at 253.

332. The government argued before district court Judge Robert E. Jones that jurisdiction to review the Attorney General's Interpretative Rule existed under 21 U.S.C. § 877, providing the Court of Appeals with the exclusive jurisdiction over "final determinations, findings, and conclusions of the Attorney General" made under the CSA. *Oregon v. Ashcroft*, 192 F. Supp. 2d at 1085. The court admitted that the issue was difficult, but nonetheless concluded that the Interpretative Rule was not "final," and therefore the court could exercise subject matter jurisdiction—but, if jurisdiction was wanting, he would (as a precautionary matter) approve a transfer to the appellate court pursuant to 28 U.S.C. § 1631. *Id.* at 1085-87. Judge Jones' concerns proved prescient, as the Ninth Circuit concluded that the lower court lacked subject matter jurisdiction, and commenting on Judge Jones' well-reasoned opinion, approved the transfer. *Oregon v. Ashcroft*, 368 F.3d 1118, 1120 n.1 (9th Cir. 2004).

333. *Gonzales v. Oregon*, 546 U.S. at 256-58.

334. *Id.*

335. *Id.* at 256.

336. *Id.* at 244.

issue such a rule—and here, the “CSA gives the Attorney General limited powers, to be exercised in specific ways.”³³⁷ And the type of rule did not fall within any of those specific circumstances.³³⁸ The Court, therefore, applied *Skidmore* deference, with the agency’s reasoning diminished further by the Attorney General’s lack of expertise in the area and the “apparent absence” of any attempt on the part of the Attorney General to solicit the views of others.³³⁹

When an agency issues a guidance document or interpretation, as was the case in *Gonzales v. Oregon*, it should recognize that the document or interpretive rule will not be afforded anything more than *Skidmore* deference if the agency intends to rely on it in a subsequent judicial challenge. This means cabining *Chevron* deference to those instances where the agency has acted pursuant to notice-and-comment rulemaking, unless Congress has expressly and specifically provided otherwise. The language in *Mead*, therefore, should be understood as not suggesting otherwise.³⁴⁰ The Court’s more recent language in *Long Island Care* suggests as much.³⁴¹

Indeed, *Skidmore* deference should apply when the agency acts informally. The reason is perhaps best illustrated by what happened in *Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Service*³⁴² and thereafter. There, the Ninth Circuit reviewed the USFWS’s policy for identifying distinct population segments of species that might qualify for being listed under the ESA as either threatened or endangered.³⁴³ The court noted that Congress, in section 4(h) of the ESA, expressly delegated to the agency the authority to develop guidelines for listing, and required that those guidelines be developed in a manner similar to notice-and-comment rulemaking under the

337. *Id.* at 259. Justice Kennedy observed that one element of the Attorney General’s authority to adopt regulations on the scheduling of controlled substances required following the APA procedures for rulemaking, which was not done. *Id.* at 259–61. The dissent opined that the Attorney General issued his memorandum as an interpretative rule, exempted from notice-and-comment rulemaking. *Id.* at 281 (Scalia, J., dissenting).

338. *Id.* at 259–61.

339. *Id.* at 268–69. Dissenting, Justice Scalia (joined by Justice Thomas and the Chief Justice) questioned the efficacy of the anti-parroting cannon articulated by Justice Kennedy, and opined that Attorney General Ashcroft’s memorandum was entitled to *Auer* deference or, at the very least, *Chevron* deference. *Id.* at 275–99 (Scalia, J., dissenting).

340. See *supra* notes 279–295 and accompanying text.

341. In an unanimous opinion, the Court provided its modern gloss on *Chevron*, stating:

[T]he ultimate question is whether Congress would have intended, and expected, courts to treat an agency’s rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of “gap-filling” authority. Where an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency’s determination.

Long Island Care at Home Ltd. v. Coke, 127 S.Ct. 2339, 2350–51 (2007).

342. 475 F.3d 1136 (9th Cir. 2007).

343. *Id.* at 1140–45.

APA.³⁴⁴ In such a circumstance, the court held that the USFWS's distinct population segment policy was entitled to *Chevron* deference and then proceeded to uphold the policy.³⁴⁵

But applying either *Auer* or *Chevron* in lieu of *Skidmore* deference in such a circumstance is problematic. Not long after the Ninth Circuit's decision, the Solicitor of the Department of the Interior issued a formal legal opinion questioning the language in both the policy and the court's decision, and, with *Brand X* in support, directed that its interpretation should be followed.³⁴⁶ Solicitor's opinions *must* be followed by agency officials, and they can trump informal agency documents, such as the distinct population segment policy.³⁴⁷ Yet, solicitor's opinions, which are not subject to any opportunity for notice-and-comment, are subject to the lower standard of *Skidmore* deference. A future court, therefore, might confront the unnecessarily complicated problem of having to determine whether *Brand X* allows a former policy that received *Chevron* deference to be altered by a new interpretation only entitled to *Skidmore* deference. It would have been much easier had the court in *Northwest Ecosystem Alliance* simply afforded the policy *Skidmore* deference, thus allowing the next court to examine the persuasiveness of the reasoning contained in each document. A uniform application of *Skidmore* deference also might avoid the future problems with the anti-parroting canon confronted in *Oregon v. Gonzales* and avoided more recently in *Federal Express Corp. v. Holowecki*.³⁴⁸

V. BRINGING SYMMETRY TO DISPARATE THREADS

The purpose of this Article is not to debate the political or constitutional legitimacy of the role of agencies in implementing presidential directives or policy.³⁴⁹ Nor is it necessary to address the wisdom of having greater

344. *Id.* at 1141–42. The heading to section 4(h) of the Act refers to “Agency guidelines.” Congress clearly understood the difference between guidelines and rulemakings; in the very next section of the Act it included in the heading “Submission to State agency of justification for regulations . . .” 16 U.S.C. §§ 1533(h), (i) (2006).

345. *Nw. Ecosystem Alliance*, 475 F.3d at 1143–45.

346. The Meaning of “In Danger of Extinction Throughout All or a Significant Portion of its Range”, Solicitor General Opinion M-37013, (Feb. 23, 2007), available at <http://www.doi.gov/solicitor/opinions.html>.

347. Binding Nature of Solicitor's M-Opinions on the Office of Hearings and Appeals, Solicitor General Opinion M-3703, (Jan. 18, 2001), available at <http://www.doi.gov/solicitor/opinions.html>.

348. 128 S. Ct. 1147 (2008). In *Federal Express Corp.*, the Court again confronted how to treat an agency's interpretation of a statutory term parroted in the regulation, but it artfully avoided the issue by reasoning that the agency's interpretation was reasonable under *Skidmore* deference (thus avoiding the need to address *Auer* deference). *Id.* at 1156, 1158. Eskridge and Baer explain that *Seminole Rock* (or *Auer*) deference is only sporadically invoked, and they note the problem, identified in Justice Thomas's dissent in *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting), of potentially encouraging agencies to develop vague regulations only to receive heightened deference. See Eskridge & Baer, *supra* note 258, at 1104.

349. This topic is widely discussed. See, e.g., Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000); Cynthia R. Farina, *Undoing the New Deal Through the New*

presidential control or involvement in agency decision making. As important as this debate may appear for understanding our constitutional structure, the reality is that administrative agencies must and do interpret congressional directives, and they will continue to do so and even change their interpretation as new administrations come to power. This, quite simply, is embedded in the modern administrative process. It is not surprising, therefore, that executive agencies during the past thirty-five years have generally reflected the philosophy of the then-President. After all, people vote for a President at least in part based on an expectation that administrative policies and priorities will change and reflect the views of their candidate. But the ability of executive agencies to effectuate change is constrained by Congress, bureaucratic inertia and the courts.

The question, though, is how much administrative law principles will unnecessarily inhibit agency flexibility. In this regard, the Court's evolving approach toward deference to guidance documents is both promising and troublesome. It is promising to the extent that the Court acknowledges the need to distinguish between regulations and guidance documents. It is troublesome because the Court has yet to appreciate the interconnectedness of the doctrines of deference and finality/ripeness, and to distinguish between legislative and non-legislative rules. If it were to do so, several principles might provide a coherent structure for administrative law; a structure that does not unduly constrain agency flexibility.

First, we should recognize that the modern administrative state, embracing widespread public access to information through the internet, is dependent upon the ability of agencies to develop guidance documents, policy statements

Presidentialism, 22 HARV. J.L. & PUB. POL'Y 227 (1998); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916 (1988); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985) (arguing for increased Presidential control); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983). In her thoughtful article advocating greater Presidential involvement, Elena Kagan expresses the likely dominant philosophy of "making the regulatory activity of the executive branch agencies more and more an extension of the President's own policy and political agenda." Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001). *But cf.* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006) (asserting that the Executive cannot exercise the same interpretive powers as agencies unless Congress has specifically delegated the authority to the President); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) (although favoring increased Presidential control, arguing for enhanced commitment of checks and balances). *See also* Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005); Nick Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L. J. 963 (2001); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827 (1991); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); Jerry L. Mashaw, *As If Republican Interpretation*, 97 YALE L. J. 1685 (1988).

and interpretive rules. Agencies must be able to develop and change these types of documents, based on new information, changes in the law, or even changes in the policy orientation of new administrations. Second, when an agency issues such documents, it should anticipate that courts will not afford them anything more than *Skidmore* deference.

Recognizing that notice-and-comment rulemakings entitled to *Chevron* deference are readily distinguishable from the myriad forms of guidance entitled to *Skidmore* deference comports with modern-day legislative practice. Congress today undoubtedly appreciates the different ways an agency acts. And clearly understood rules of deference will only enhance Congress' decisions in the future. In the Energy Independence and Security Act of 2007, for instance, Congress directed that agencies prepare rulemakings, it encouraged "accelerated" rulemakings, and, where appropriate, it directed the issuance of "guidance."³⁵⁰ We can expect that Congress' choice of these different methods was deliberate, and its future choices will be even more informed if courts adhere to the conceptual framework proposed in this Article.

Third, a corollary to affording such documents diminished deference is the recognition that by their very nature they are not binding—that is, an agency may not simply rely on the document when implementing its program; rather, it may employ the reasoning contained in the document. But that is no different than saying that the agency must explain its decision fully, not merely invoke the document as if it were a rule contained in the CFR. Such a scenario may lessen the need for courts to explore whether—and the ability of parties to argue that—such documents are de facto legislative rules that have been issued inappropriately without the trappings of a notice-and-comment proceeding. This does not mean that, in unique circumstances, an agency action is immune from a claim that it has engaged in a de facto rulemaking, when the issue is both final and ripe, such as should have been the case in *Irritated Residents* or *Fund for Animals*. But aside from those instances where the agency's action has crystallized sufficiently for a party to satisfy the requirements for finality and ripeness, administrative law doctrines should be clear to both agencies and the public that, while such documents might be informative, they cannot be dispositive when they are applied to the public.

Accepting these principles might avoid the dilemma that threatens agency flexibility. A new administration's attempt to effectuate change is presented with two options. First, it may navigate the notice-and-comment process and possibly receive *Chevron* deference if interpreting an ambiguous statute it is charged with administering.³⁵¹ Or, if appropriate, it can alter existing guidance documents.

350. The Energy Independence and Security Act of 2007, Pub. L. No. 100-140, § 433(d), 121 Stat. 1492, 1614 (2007).

351. Agencies undoubtedly are aware of *Chevron* deference. See, e.g., E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L. J. 1 (2005).

Yet, when altering existing guidance documents, a new administration confronts a choice. If, in a new guidance document, the agency is modifying an interpretation or application of a statute contained in a prior guidance document, *Skidmore* deference may apply, but the Court in *Federal Express* cautioned that one aspect of *Skidmore* focuses on whether the agency had “applied its position with consistency.”³⁵² This aspect of *Skidmore*, therefore, will naturally arise if the goal of the new administration is to do precisely the converse—change.

Alternatively, if, in a new guidance document, the agency is modifying an interpretation or application of its own regulations, which otherwise might receive *Auer* (or *Seminole Rock*) deference, the issue becomes even more problematic, because enough cases suggest that the agency must engage in notice-and-comment rulemaking when doing so.³⁵³ Of course, an agency might avoid this result by simply parroting the statute in its regulation and then in subsequent guidance documents merely requesting *Skidmore* deference by claiming that it was interpreting the statutory language, albeit with an understanding that it would have to explain any reason for its changing positions—effectively extending the principle of *Brand X* to instances where *Skidmore* rather than *Chevron* deference is applicable. Although such an approach makes little sense, if instead we require that the agency engage in notice-and-comment rulemaking, then we will vest in the first administration that issues a guidance document the ability to force any future administration through a notice-and-comment rulemaking process. We concomitantly will perpetuate the muddled reasoning that pervades the effort to differentiate legislative from non-legislative rules, as well as allow challenges to what otherwise are not final agency actions ripe for review. It seems far sounder to instead let the agency know that it will receive—albeit even diminished—*Skidmore* deference in lieu of *Auer* deference to the extent the agency has departed from a prior interpretation, and it chooses not to proceed through notice-and-comment rulemaking. Admittedly, this may sacrifice *Auer* deference in some instances, but it would do so on the altar of otherwise curtailing guidance documents or forcing agencies through notice-and-comment rulemaking. The need to avoid paralysis and ensure agency flexibility may demand this sacrifice.

And when Congress objects to the manner in which an agency has exercised its discretion, it may change the law or employ its appropriations power and block the agency from using any money to carry out its program. Thomas Merrill was correct when he posited that “[i]t is unlikely that Congress would stand idly by in response to a major realignment in the division of powers that enhanced an executive branch’s ability to institute policy changes

352. *Fed. Express Corp. v. Holowecki*, 128 S.Ct. 1147, 1156 (2008).

353. *See supra* notes 77–78 and accompanying text.

and minimized the role of the courts in checking administrative abuses,”³⁵⁴ but he underestimates a more fundamental point. Congress does react, but often it does so in response to a specific agency initiative or court decision and undoubtedly with principles of deference in mind.³⁵⁵ It has passed riders preventing agencies from implementing rules,³⁵⁶ adopted moratorium on programs,³⁵⁷ prohibited agencies from implementing their interpretations,³⁵⁸

354. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969, 1030–31 (1992).

355. Thomas Merrill further suggests that “Congress contemplate[s] courts would always apply independent judgment on questions of law, reserving deference for administrative findings of fact or determination of policy.” *Id.* at 995. I would suggest that the modern era of legislative practice may be quite different, with savvy legislators and sophisticated lobbyists, coupled with active agency involvement in the development of new legislation, all of whom are acutely aware of the deference afforded executive agencies absent clear congressional directives. This explains why some modern environmental or energy legislation, unlike the broad statutes passed during the late 1960s and 1970s, are considerably more detailed and occasionally appear to reflect congressional micromanagement. The classic example is the detailed Clean Air Act Amendments of 1990. Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended in scattered sections of 42 U.S.C.). In 1991, a congressional employee aptly observed that, “[I]f the courts continue to frustrate the intent of those who write the laws by finding discretion even where none was intended, it should not surprise anyone to find lawmakers writing new laws that are even more prescriptive and that state with greater clarity the limits of EPA’s discretion.” Steven Shimberg, *Checks and Balance: Limitations on the Power of Congressional Oversight*, 54 LAW & CONTEMP. PROBS. 241, 247 (1991). For instance, after the Eleventh Circuit issued a decision rejecting a decision by the NPS on the use of motor vehicles in the Cumberland Island, GA, wilderness area, *Wilderness Watch and Public Employees for Environmental Responsibility v. Mainella*, 375 F.3d 1085 (11th Cir. 2004), Congress passed an appropriations rider responding to the decision and effectively reinstating aspects of the NPS’s approach by excluding certain areas from the wilderness category. Consolidated Appropriations Act, 2005, Pub. L. No. 447, § 145, 118 Stat. 2809, 3072-72 (codified as amended in scattered sections of 1 U.S.C.).

356. See generally R. Bryant McCulley, Note, *The Proof is in the Policy: The Bush Administration, Nonpoint Source Pollution, and EPA’s Final TMDL Rule*, 59 WASH. & LEE L. REV. 237 (2002) (describing how EPA and Congress squared off over the implementation of the agency’s rules for establishing total maximum daily loads under the CWA, with Congress passing a rider prohibiting the implementation of the rule but only to have the agency sign the rule before the effective date of the congressional action).

357. Since 1994, Congress, for instance, has imposed a moratorium on the expenditure of funds to process or accept applications for patents for mining or mill sites. See, e.g., Department of the Interior and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2519 (codified as amended in scattered sections of 43 U.S.C.). See generally John D. Leshy, *Mining Law Reform Redux, Once More*, 42 NAT. RES. L. J. 461 (2002). Similarly, when the Republican Party captured the majority of Congress in 1994, it eliminated funding for the USFWS’s listing of species under the ESA. ROBIN KUNDIS CRAIG, ENVIRONMENTAL LAW IN CONTEXT 396–97 (2005). The listing moratorium prompted the Clinton Administration to issue a policy document, the Petition Management Guidance, to address how the agency would review listing petitions. *Id.* at 397–98. Yet, even though a court subsequently found the listing guidance inconsistent with the Act, *Center for Biological Diversity v. Norton*, 254 F.3d 833, 836 (9th Cir. 2001), the agency continued to argue that it could rely on the document. Such reliance became misplaced, however, after one court concluded that the guidance document had not been issued pursuant to the rulemaking requirements. See *Colorado River Cutthroat Trout v. Kempthorne*, 448 F. Supp. 2d 170, 177 (D.D.C. 2006) (noting that the court in *Am. Lands Alliance v. Norton*, 2004 WL 3246687 (D.D.C. June 2, 2004) had issued nationwide injunction against use of the guidance)).

358. See *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 759–61 (10th Cir. 2005) (explaining that interpretation regarding R.S. 2477 incorporated into a proposed rule, with

and, when necessary, conducted oversight hearings.³⁵⁹ The Court in *Federal Express* aptly acknowledged this reality when it observed that agencies are “subject to the oversight of the political branches,”³⁶⁰ and nothing suggests that this dynamic has led to a crisis in administrative law.

CONCLUSION

These issues are all too important, not only for the future of administrative flexibility in the area of environmental law, but also for resolving some of the apparent trends in administrative law. To the degree that Congress has left agencies with sufficient flexibility to fill statutory gaps, future administrations must enjoy the ability to implement policies and programs in a manner consistent with their principles. This means that courts should recognize that agency guidance documents are an important and useful tool for agencies, and that administrative law doctrines should be shaped by that reality. When the Bush administration began its exit from Washington D.C., it released a number of different guidance documents, ranging from a December 18, 2008 memorandum from the EPA Administrator on “EPA’s Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program,”³⁶¹ to opinions issued by the Solicitor of the Department of the Interior.³⁶² And so, one can presume that

Congress blocking implementation of rule with an appropriations rider, and court nevertheless afforded *Mead* deference to that interpretation).

359. For a discussion about the utility of congressional oversight hearings as an effective tool, see Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Custodes (Who Shall Watch the Watchers Themselves)?*, 54 LAW & CONTEMP. PROBS. 205 (1991).

360. *Fed. Express Corp. v. Holowecki*, 128 S.Ct. 1147, 1158 (2008).

361. Memorandum from Stephen L. Johnson, Administrator, to Regional Administrators, EPA’s Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Program, Dec. 18, 2008. Notice of Issuance of the Administrator’s Interpretation, 73 Fed. Reg. 80300 (Dec. 31, 2008) (noticing the availability of the document and providing an electronic link for access to the memorandum). Senator Barbara Boxer (D-Calif.) called Administrator Johnson’s action “illegal” and requested that it be withdrawn, see http://epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&ContentRecord_id=5ff1fa60-802a-23ad-48f7-70e4f829d9a5&Region_id=&Issue_id= (last visited Jan. 23, 2009), while others have threatened to challenge the document in court. See Sierra Club Press Release, Jan. 15, 2009, *available at* http://action.sierraclub.org/site/MessageViewer?em_id=86161.0. As is true with this memorandum, agencies now generally publish in the federal register notice of the availability of guidance documents and such documents are typically available through easy internet searches. And sometimes an agency allows comments on a draft document, and other times it does not, but it is not clear that merely by affording an opportunity for comment on a draft that courts should provide a different level of deference. Cf. Stephen M. Johnson, *Good Guidance, Good Grief*, 72 MO. L. REV. 695 (2007); Nina A. Mendelson, *Regulatory Beneficiaries and Information Agency Policymaking*, 92 CORNELL L. REV. 397 (2007); Paul R. Noe & John D. Graham, *Due Process and Management for Guidance Documents: Good Governance Long Overdue*, 25 YALE J. ON REG. 103 (2008).

362. See <http://www.doi.gov/solicitor/opinions.html> (the Bush administration Solicitor opinions M-37019 to M-37023 were all released to the public on the internet only shortly after the Obama Administration was sworn in).

these documents are somehow intended to cabin the Obama administration's flexibility, but a clear understanding of how to apply administrative law principles to such documents would suggest otherwise.