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Aaron Gershonowitz & Brian Kennedy

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Chesapeake Action Network v EPA: Court Tells EPA to Reconsider Rule Because Petitioners Did Not Have a Fair Opportunity to Comment

Aaron Gershonowitz and Brian Kennedy

ABSTRACT
This article examines the decision in *Chesapeake Action Network v. Environmental Protection Agency,* and its impact on regulated parties. The key issues addressed are whether a party may comment on a proposed regulation then later claim they lacked the information required to make an informed comment; when does an agency's failure to provide the reasoning for a proposed rule serve as sufficient grounds to reopen the comment period; and how should regulated parties conduct themselves during a public comment period.

It is not unusual for a developing rule or other agency action to be something of a moving target. A proposal is made available for public comment and, based on the comments, the agency makes changes to the proposal. At that point, the agency must decide whether to make the proposal final and risk having the regulated community complain that it did not have an opportunity to review and comment on the changes, or make the new proposal available for further public comment. The public has a right to review and comment on proposals, but if every change based on comments required a new comment period, regulatory action would rarely become final. The DC Circuit, in *Chesapeake Action Network v EPA*,[1] ordered reconsideration of a rule based on the failure to give the public a fair opportunity to comment and provided guidance to those challenging rules based on the agency's failure to make important information available during the public comment period.

This article will analyze the *Chesapeake* decision with regard to two issues. First, whether a party who comments on an issue during the public comment period is barred from seeking judicial review of the administrative action based the failure of the agency to make critical information publicly available. That is, can a party comment on an issue and later claim that it did not have sufficient information to make an informed comment on the issue? Second, when is the agency's failure to disclose the reasoning

CONTACT Aaron Gershonowitz AGershonowitz@ForchelliLaw.com

[1] *Chesapeake Climate Action Network, et. al. v. Environmental Protection Agency*, 952 F.3d 310 (D.C. Cir. 2020).

underlying a proposal, grounds for reopening the public comment period? This article will use the *Chesapeak*e decision to provide guidance to regulated parties regarding what to do during the public comment period, particularly regarding how a regulated party determines when an objection is "impracticable."

The D.C circuit's decision in Chesapeake

The Administrative Procedure Act requires agencies to make proposed regulations publicly available by publication in the Federal Register. The Federal Register notice must include the basis and purpose of the regulation and a public comment period. Anyone may submit comments during the public comment period.[2] After a rule becomes final, one may seek judicial review of the rule only based on objections to the rule made during the public comment period. However, one may raise new issues:

> If the person raising an objection can demonstrate to the Administrator that it was *impracticable to raise such objection* within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.[3]

The *Chesapeake* case arose out of a challenge to a rule promulgated by the United States Environmental Protection Agency ("EPA") in 2014 exempting coal and oil-burning power plant utility boiler "startup" periods from certain limits on hazardous air pollutants. The Clean Air Act required the maximum degree of reduction in emissions that EPA deemed achievable and allowed work practice standards in place of numerical limits only where numerical limits were deemed to be not achievable.[4] EPA initially proposed a numerical standard during the startup period.[5] Based on comments made during the comment period, EPA replaced the numerical standard with work practice standards in the final rule. In response to a petition for reconsideration, EPA reopened the comment period for comments on the nature of the work practice standards.[6] After review of the comments from industry and environmental groups, EPA issued a final rule that for the first time included alternative definitions of the end of the "startup" period and stated that this procedure would be applicable beyond the energy generation industry.[7] Petitioners sought reconsideration or

[2] 42 U.S.C.A. § 7607(d) (2012).
[3] 42 U.S.C.A. § 7607(d)(7)(B) (2012).
[4] 42 U.S.C.A. § 7401 (2012).
[5] 77 Fed. Reg. 9306 (Feb. 16, 2012).
[6] 78 Fed. Reg. 3801 (June 25, 2013).
[7] 40 C.F.R. § 63.10042 (2020).

judicial review,[8] arguing that they did not have an opportunity to comment on the new provisions.

Petitioners are environmental groups objecting to EPA's exemption of startup operations from certain Clean Air Act obligations. Petitioners raised two objections: (1) that the final rule introduced concepts that were not in the proposal and could not have been anticipated and (2) that EPA's proposal did not include critical elements of the reasoning underlying the proposal.[9] Petitioners argued that it was impracticable to raise these objections during the comment period and that the objections arose after the comment. The District Court denied the request for reconsideration or judicial review. The Court of Appeals reversed, holding that the objections met the first prong of the standard – impracticable – and not the second prong – arising after.

The first prong is met, the Court explained, when the final rule is not a logical outgrowth of the proposed rule.[10] A final rule is a logical outgrowth "if interested parties should have anticipated that the change was possible and thus reasonably should have filed their comments on the subject during the notice-and-comment period." A final rule is not a logical outgrowth "if interested parties would have to divine the agency's unspoken thoughts."[11]

The first issue addressed by the court was whether one could comment on an issue during the comment period and then, after issuance of the final rule, claim that comment was impracticable. EPA argued that the final rule was a natural outgrowth of the proposal because the petitioners had commented on the lack of analysis of "best performing sources," a key concept introduced in the final rule.[12] Support for EPA's position was found in *Portland Cement v E.P.A.*[13] In *Portland Cement*, petitioners claimed that the final rule was not a logical outgrowth of the proposal and the court rejected that because EPA had requested comment on the matter and the petitioner had commented. The proposed rule in *Portland Cement* did not contain a continuous emissions monitoring system (CEMS") requirement, but the notice of proposed rulemaking requested comments on that issue. The request for comments on a CEMS requirement should have put the petitioners on notice that EPA was considering such a requirement.

[8] The Court noted that the legal standard for judicial review was the same as a petition for reconsideration.
[9] *Chesapeake Climate Action Network, et. al. v. Environmental Protection Agency*, 952 F.3d 310, 319 (D.C. Cir. 2020).
[10] *Chesapeake Climate Action Network, et. al. v. Environmental Protection Agency*, 952 F.3d 310, 319 (D.C. Cir. 2020).
[11] *Chesapeake Climate Action Network, et. al. v. Environmental Protection Agency*, 952 F.3d 310, 319 (D.C. Cir. 2020) (citing *Clear Air Council v. Pruitt, 862 F.3d 1, 10 (D.C. Cir. 2017)*.
[12] *Chesapeake Climate Action Network, et. al. v. Environmental Protection Agency*, 952 F.3d 310, 320 (D.C. Cir. 2020).
[13] *Portland Cement Association v. Environmental Protection Agency,* 665 F.3d 177, 189 (D.C. Cir. 2011).

The *Chesapeake* Court rejected the idea that *Portland Cement* meant that comment on an issue proves that the final rule is a logical outgrowth of the proposal. The Court noted that such a rule would place an "unreasonable burden" on commenters, to make them anticipate "every conceivable course correction" regarding how EPA would cure this missing component.[14] Thus, even if the concept of "best performing sources" was a natural outgrowth of the proposal, petitioners could not have anticipated how EPA would apply that concept and reconsideration or judicial review, therefore, was warranted. Petitioners argued in their comments that EPA should use a "best-performer" analysis in setting work practices.[15] The final rule employed a "best-performer" analysis to determine the duration of the "startup" time. The Court reasoned that even though petitioners commented on use of this type of analysis, they did not have sufficient notice of how that analysis would be used. Thus, the final rule was not a natural outgrowth of the proposal.[16] In other words, even if the notice indicates that the agency is considering use of a method of analysis, not every use of that method is a logical outgrowth of the proposal.

The second issue addressed by the Court was the failure of EPA to disclose the reasoning underlying its rule. Regarding the petitioners' claim that key elements of EPA's reasoning did not become clear until the final rule, EPA argued that it should have been clear to petitioners that the inability to measure emissions in the "startup" period was a key premise underlying the proposal.[17] EPA's argument was based on the fact that petitioners commented on the issue of measurability and thus, petitioners should not be heard to complain that EPA did not timely reveal the assumption it was making regarding measurability.[18] As with the issue of logical outgrowth, the Court's response was that one should not confuse discussion of measurability with discussion of this particular use of the concept of measurability. That is, while the measurement of emissions during the "startup" period was an issue, EPA did not disclose that it was assuming that measurement was not feasible. Thus, petitioners could rightly claim to be surprised by a final rule that included provisions that assume there is no way to measure emissions. The court's message to EPA, then, was that if EPA intended commenters to address a specific use of

[14] *Chesapeake Climate Action Network, et. al. v. Environmental Protection Agency*, 952 F.3d 310, 320 (D.C. Cir. 2020).
[15] *Chesapeake Climate Action Network, et. al. v. Environmental Protection Agency*, 952 F.3d 310, 321 (D.C. Cir. 2020).
[16] Ibid.
[17] *Chesapeake Climate Action Network, et. al. v. Environmental Protection Agency*, 952 F.3d 310, 320 (D.C. Cir. 2020).
[18] Ibid.

measurability, it should have said so. The court stated that "commenters do not have to be mind readers."[19]

Logical outgrowth

The Administrative Procedure Act states that a party may raise issues that were not raised during the comment period only if it was impracticable to raise such issues during the comment period.[20] Caselaw states that it is impracticable to raise an issue, if the issue is not a logical outgrowth of the proposal. Caselaw then explains how courts determine whether a change is a logical outgrowth of a proposal – courts look to whether "interested parties should have anticipated that the change was possible."[21] The *Chesapeake* Court cited several cases that state this rule, but it did not use the facts of any of those cases to explain how we know what parties should have anticipated.

The first case cited by the Court is *Clean Air Council v Pruitt*,[22] where the court found a rule to be a logical outgrowth of a proposal, reasoning as follows: The proposal exempted certain low production well sites and requested information to evaluate that exclusion. EPA used the information received during the comment period to remove that exclusion. Because the final rule used information obtained during the comment period to modify the proposal, the court concluded that commenting on that proposal was not impractical and the final rule was a logical outgrowth of the proposal.[23] The notice of proposed rulemaking in *Pruitt* also requested information about alternative means of compliance. Based on information received during the comment period, the final rule included alternative means.[24] The final rule was a direct outgrowth of the proposal and, the court stated that no regulated party had to "divine the agency's unspoken thoughts."[25] Pruitt thus stands for the proposition that when a notice of proposed rulemaking asks for comment to assist it in evaluating a provision in the proposal and in response, the agency uses the information received during the comment period to modify the proposal, no regulated party can claim it could not have anticipated this change.

The Court also discussed *CSX Transportation v Surface Transportation Board,* which represents a very different type of change between the notice

[19] *Chesapeake Climate Action Network, et. al. v. Environmental Protection Agency*, 952 F.3d 310, 322 (D.C. Cir. 2020).
[20] 42 U.S.C.A. § 7607(d)(7)(B).
[21] *Chesapeake Climate Action Network, et. al. v. Environmental Protection Agency*, 952 F.3d 310, 322 (D.C. Cir. 2020) (citing *Clear Air Council v. Pruitt,* 862 F.3d 1, 10 (D.C. Cir. 2017)
[22] *Clear Air Council v. Pruitt,* 862 F.3d 1, 10 (D.C. Cir. 2017).
[23] Ibid.
[24] *Clear Air Council v. Pruitt,* 862 F.3d 1, 11 (D.C. Cir. 2017).
[25] *Clear Air Council v. Pruitt,* 862 F.3d 1, 12 (D.C. Cir. 2017*)* (citing *CSX Transportation Inc. v. Surface Transportation Board,* 584 F. 3d 1076, 1080 (D.C. Cir. 2009).

of proposed rulemaking and the final rule.[26] The Board changed the method of resolving rate disputes by requiring use of 4 years of data instead of the one year that had been in the proposal. Petitioners argued that nothing in the notice of proposed rulemaking put them on notice that the Board was considering changing the number of years of data to be considered and offered as evidence, the fact that no one commented on this issue.[27] The court combined the fact that no one commented on the issue, with the "convoluted" argument made by the Board regarding how the final rule grows out of the notice, to conclude that the final rule was not a logical outgrowth of the proposal.[28] From *CSX Transportation*, we can see two factors that lead to the conclusion that a rule is not a logical outgrowth. First, if no one commented on the issue, it must be that the notice did not put the regulated community on notice that there was an issue. Second, if the agency has trouble explaining how the final rule relates to the notice, the final rule is not a logical outgrowth.

The logical outgrowth cases can be divided into three categories. Pruitt indicates that where a notice of proposed rulemaking requests information about a provision in the proposal and the agency receives comment on the provision and modifies that provision in a manner consistent with the comments, the rule is likely a logical outgrowth. On the other hand, from *CSX Transportation*, we see that where the notice of proposed rulemaking does not put commenters on notice that it is considering a change and the agency receives no comments on the provision, a change to that provision is likely to not be a logical outgrowth.

A third type of case, illustrated by *International Union, United Mine Workers v Mine Safety and Health Administration*,[29] is where the agency requests information on a proposal and modifies that proposal, but the modification is so different from the proposal that regulated parties claim they could not have anticipated this change. In *International Union*, the Mine Safety & Health Administration included a provision in its proposal that "a minimum air velocity of 300 feet per minute must be maintained."[30] The notice also requested comment on the minimum air velocity. The final rule set a maximum air velocity of 500 feet per minute.[31] Commenters claimed that they could not, from a request to comment on minimum velocity, have anticipated a change that set a maximum velocity. The Court agreed, finding this rule to not be a logical

[26] *CSX Transportation Inc. v. Surface Transportation Board,* 584 F. 3d 1076, 1080 (D.C. Cir. 2009).
[27] *CSX Transportation Inc. v. Surface Transportation Board,* 584 F. 3d 1076, 1079 (D.C. Cir. 2009)
[28] *CSX Transportation Inc. v. Surface Transportation Board,* 584 F. 3d 1076, 1080 (D.C. Cir. 2009).
[29] *International Union, United Mine Workers of America v. Mine Safety and Health Administration,* 408 F. 3d 1250 (D.C. Cir. 2010).
[30] Ibid.
[31] *International Union, United Mine Workers of America v. Mine Safety and Health Administration,* 408 F. 3d 1250, 1260 (D.C. Cir. 2010).

outgrowth.[32] The rule seems to be that even if the notice requests comment on a provision and the agency receives comment, a final rule cannot differ so significantly from the proposal as to be not a logical outgrowth.

The dilemma facing the *Chesapeake* Court was that petitioners were claiming that the final rule introduced concepts that were not in the proposal. In other words, they argued that this is a case like *CSX Transportation*. EPA, on the other hand argued that because petitioners had commented on these issues, the case was much more like *Pruitt*, or at least petitioners could not claim to be surprised by the final rule. The Court's decision was that the difference between the proposal and the conclusion was so great that a reasonable person would not have anticipated the direction the agency took.

EPA's failure to disclose critical reasoning

Objecting that the proposal did not disclose critical reasoning underlying the rule is a much more subtle objection than one based on the argument that the final rule is not a logical outgrowth of the notice of proposed rulemaking. The logical outgrowth objection is determined by looking to whether a straight line can be drawn from the proposal to the comments to the final rule. The more directly connected the final rule is to the proposal, the more likely it is that the final rule is a logical outgrowth of the proposal.

In an undisclosed reasoning case, there is a straight line from the proposal to the final rule, however, the line can be seen only after the final rule is issued, because the straight line is based on some undisclosed premise. In the *Chesapeake* case, the proposal discussed when it is feasible to start to remove pollutants.[33] It did not, however, connect that analysis with the issue whether pollutants were measurable during the startup period. Indeed, petitioners argued that because the proposal included numeric standards, the proposal assumed that pollutants were measurable during startup period.[34] In the final rule, however, it became clear that EPA was assuming that pollutants were not measurable during the startup period. This undisclosed assumption gave new, unanticipated meaning to the portion of the proposal regarding measurability and the Court found that this undisclosed premise provided grounds to challenge the rule.[35] The rule of

[32] *International Union, United Mine Workers of America v. Mine Safety and Health Administration,* 408 F. 3d 1250, 1261 (D.C. Cir. 2010).
[33] *Chesapeake Climate Action Network, et. al. v. Environmental Protection Agency*, 952 F.3d 310, 315 (D.C. Cir. 2020).
[34] *Chesapeake Climate Action Network, et. al. v. Environmental Protection Agency*, 952 F.3d 310, 316 (D.C. Cir. 2020).
[35] *Chesapeake Climate Action Network, et. al. v. Environmental Protection Agency*, 952 F.3d 310, 321 (D.C. Cir. 2020).

law that comes out of the case is that if the line between the proposal and final rule can only be seen after the final rule, the final rule is subject to challenge. Because the agency can, after the fact, draw a reasonably straight line between the proposal and the final rule, the undisclosed premise argument is often made based on the policies underlying notice and comment rulemaking.

Courts have identified three policies underlying notice and comment rulemaking. First, notice improves the rulemaking process by ensuring that agency regulations will be "tested by exposure to diverse public comment."[36] Second, notice and the opportunity to be heard are an essential component of "fairness to affected parties."[37] Third, judicial review is only possible if affected parties have an opportunity to develop evidence in the record to support their objections to a rule.[38]

The decision in *Small Refiner Lead Phase-Down Task Force v EPA*, illustrates how these policies are applied.[39] The proposal indicated that certain changes were being considered, but only in general terms.[40] After the final rule, petitioners objected, arguing that they could not have anticipated these changes.[41] EPA responded by showing that it had given notice that changes were being considered. The Court used the policies underlying the notice rules to explain why the notice was not adequate:

> Agency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision making.[42]

Similarly, in *National Association of Clean Water Agencies v EPA*,[43] the Court stated:

> A purpose of notice-and-comment provisions under the APA (and presumably of the more elaborate procedural safeguards in § 307 of the Clean Air Act) is "to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is likely to give real consideration to alternative ideas." By waiting until the petition for reconsideration to respond to a

[36] *BASF Wyandotte Corp. v. Costle*, 508 F. 2d 637, 641 (1st Cir. 1979).
[37] *National Association of Home Health Agencies v. Schweiker*, 690 F. 2d 932, 949 (D.C. Cir. 1982).
[38] *Marathon Oil Company v. Environmental Protection Agency*, 564 F. 2d 1253, 1257 n.54 (9th Cir. 1977) ("Such comment is often an invaluable source of information to a reviewing court attempting to evaluate complex statistical and technological decisions.").
[39] *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 705 F.2d 506, 549 (D.C. Cir. 1983).
[40] *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 705 F.2d 506, 513 (D.C. Cir. 1983).
[41] *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 705 F.2d 506, 514 (D.C. Cir. 1983).
[42] *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 705 F.2d 506, 549 (D.C. Cir. 1983) (citing *Home Box Office, Inc. v. Federal Communications Commission*, 567 F. 2d 9, 36-37 D.C. Cir. 1977; *Rodway v. United States Department of Agriculture*, 514 F.2d 809, 814 (D.C. Cir. 1975) (providing general reference to changes in food stamps program is inadequate notice of particular change).
[43] *National Association of Clean Water Agencies v. Environmental Protection Agency*, 734 F. 3d 1115, 1148 (D.C. Cir. 2013) (citing *New Jersey, Department of Environmental Protection v. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980).

> comment that had been raised during the comment period, EPA deprives the affected party of the opportunity to respond to EPA's rationale and influence agency action at an earlier stage.

Petitioners' argument in *Chesapeake* was essentially that because of the undisclosed premise, it did not have a fair opportunity to comment. Its argument used the general concepts from these cases to argue that the policy underpinnings of notice and comment rulemaking require an additional comment period and the Court reached its conclusion without citing any cases. Instead, the Court made its decision based on the record, more than based on caselaw. EPA argued that petitioners should have known where EPA was headed and commented accordingly. The Court examined EPA's citations to the record intended to prove that petitioners should have known, and decided, based on the record, that EPA erred in determining that petitioners should have known.

Does the case recommend that commenters broaden the scope of their comments?

The *Chesapeake* decision creates something of a dilemma regarding how to prepare comments in notice and comment rulemaking. Most commenters examine the notice and provide comments in two areas. First, where the proposal is consistent with the client's interests and the client has evidence to support that, comments are made adding material to the record to support the proposal. Second, where the client's position is that the proposal is wrong or misguided, comments are used to point that out and argue for some alternative to the proposal. The decision does not suggest a change in that procedure.

However, where there is a hint in the proposal that the agency is considering moving in a new direction, does one put in comments that address that? My advice prior to the *Chesapeake* decision would have been no. The reason not to comment was not because a hint is inadequate notice and we will be able to challenge the final rule if the agency goes in that direction. The reason not to comment was the fear that if the agency was not thinking about moving in a particular direction, we will give them the idea and then have no opportunity to challenge because it was our comment they were responding to. In other words, we would not comment because commenting might lead the agency in a direction that is harmful to the commenter.

The *Chesapeake* decision suggests that commenters need to make a very thorough review of the record to decide whether to comment based on a hint. A review of the agency's briefs in *Chesapeake* and the cases cited in *Chesapeake* indicates that an agency typically responds to a claim of lack of

notice by saying – if you combine a number of unrelated items, so that you look here and put that together with this and see the attached material here and here, then any reasonable person reviewing that material would be on notice of the agency's position. In *Chesapeake* the court said that "commenters do not have to be mind readers" and the logical outgrowth test rejects "divination of unspoken thoughts."[44] However, agencies do a good job of piecing together strings of what appear to be unrelated information with a hint here and a hint there to argue that the regulated community was on notice. Thus, even though the agency lost and the case has good language that suggests one does not need to try to read the agency's mind, prudent commenters may be wise to attempt to read the agency's mind.

From the agency's perspective, the decision suggests including a broader range of ideas in the proposal. If the goal of the agency is to make its rulemaking bullet-proof, the agency does that best by making sure that everything they may want to include in the final rule is explained in the proposal. That means that the proposal should not merely explain what is being proposed; it should also discuss the range of options being considered. The agency's thought process is also important. The more the underlying reasoning is explained, the better opportunity commenters will have to address the issues and the less likely it is that commenters will be able to argue – we had no opportunity to comment because we did not understand where the agency was headed.

To the extent that a goal of the agency is a simplified process, the *Chesapeake* decision does not provide much assistance. It suggests that where an agency reviews the comments received during the comment period and is convinced to change directions, a real change in direction may need a new comment period. That delays the issuance of the rules and complicates the process.

The decision suggests that an agency does not protect itself with strategic vagueness; that is, a notice that contains hints that an agency may move in a particular direction is insufficient. The agency may think that it can avoid comments on the issue by not clearly raising it and then avoid review by showing that there were enough hints to put the commenters on notice. The *Chesapeake* decision suggests that such a strategy should fail because a court will require reconsideration.

An agency may attain a simplified process by consultation with industry and public interest groups during the development of a proposal. That would help the agency understand the type of comments that are likely and help them better develop the record on those issues.

[44] *Chesapeake Climate Action Network, et. al. v. Environmental Protection Agency*, 952 F.3d 310, 319 (D.C. Cir. 2020).

Conclusion

Notice and comment rulemaking is central to our regulatory process. The theory is that the opportunity to be heard is essential to both fairness and to making sure that the rules are tested by comment before becoming effective. While commenting on prospective rules is an important opportunity for industry and public interest groups, it is an obligation as well, in the sense that a party cannot seek reconsideration of a rule on an issue that they could have commented on. The Chesapeake decision suggests a broadening of the opportunity to seek reconsideration because the Court concluded that an issue could be subject to review even if the party making the challenge commented on the issue during the comment period. The decision also suggests a broadening because it further develops the rule that an undisclosed premise could be grounds for challenge.

About the authors

Aaron Gershonowitz and Brian Kennedy. Aaron Gershonowitz is a partner at Forchelli Deegan Terrana, LLP in Uniondale, New York, where he concentrates on environmental law. He is also an adjunct faculty member at St. Francis Law School. Brian Kennedy is an associate at Forchelli Deegan Terrana, LLP, where he concentrates on municipal law and environmental law.