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## **REGULATION WITHOUT RULEMAKING: THE FORCE AND AUTHORITY OF INFORMAL AGENCY ACTION**

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*Men must turn square corners when they deal with the Government.*

Rock Island, A.& L.R. Co. v. United States, 254 U.S. 141, 143 (1920) (Holmes, J.)

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**§ XX.04 CONCLUSION**

**§ XX.01 INTRODUCTION**

Executive agencies routinely provide direction to the regulated community concerning how that community should act. This direction sometimes come in the form of published rules promulgated through notice and comment rulemaking under the Administrative Procedure Act (APA). Agencies also provide further guidance to regulated parties through means far less formal than APA rulemaking. Employees of the agencies answer questions over the telephone. Agencies may issue handbooks to its employees designed to guide them in the application of the agency's regulations. Agencies issue opinion letters and policy statements. Agencies sometimes issue guidance documents that are far more detailed than the original published regulations.

This paper explores the scope and legal consequences of such informal actions of executive agencies.

## § XX.02 HOW AGENCIES ACT

### [1] The Taxonomy Of Rules

The APA provides a broad definition of a “rule.” A rule is “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . .”<sup>1</sup> Linneaus faced no more difficult a task in categorizing all the living creatures of the world than that faced by commentators attempting to provide a taxonomy of APA rules.<sup>2</sup> The problem facing a taxonomist of agency rulemaking, like the taxonomist of the natural world, is that agencies engage in activities that are arguably rulemaking, but that don’t fit within the existing APA categories.

The United States Attorney General probably provided the first taxonomy of agency rulemaking in *The Attorney General’s Manual on the Administrative Procedure Act*.<sup>3</sup> The Attorney General divided agency actions into three broad categories, characterized in the *Manual* as “working definitions”:<sup>4</sup>

- “Substantive rules” are administered by the agency pursuant to statutory authority and which implement the statute. These rules have the force and effect of law.
- “Interpretive rules” are rules or statements that advise the public of the agency’s construction of its statute and rules.

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<sup>1</sup> 5 U.S.C.A. § 551(4).

<sup>2</sup> See, e.g., Peter L. Strauss, *The Rulemaking Continuum*, 41 *Duke L.J.* 1463, 1466-68 (1992) (outlining the “spectrum of activities identified as rulemaking”); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidance, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 *Duke L.J.* 1311, 1319-27 (1992) (providing “a short taxonomical guide to agency rulemaking”).

<sup>3</sup> *The Attorney General’s Manual on the Administrative Procedure Act* (1947). *The Attorney General’s Manual* is available on the web at <[www.law.fsu.edu/library/admin/](http://www.law.fsu.edu/library/admin/)>.

<sup>4</sup> *Attorney General’s Manual*, III § 4.

- “General statements of policy” are statements issued by the agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.

The Attorney General’s working definitions provide a useful set of broad categories for agency action. Some agency actions, however, like the platypus, require description but do not allow easy categorization.<sup>5</sup> For the purposes of this paper, we can lump together all “substantive rules,” which are also called “legislative rules.”<sup>6</sup> These rules are intended to create new law, and are binding on the public and the agency.<sup>7</sup> Legislative rules (at least when properly promulgated) arise under Section 553 of the APA. Such rules are typically promulgated by notice and comment rulemaking, which is more efficient than adjudicatory rulemaking subject to Sections 556 and 557 of the APA.<sup>8</sup> For present purposes, it is enough to categorize as legislative rules. Those rules that comport with APA requirements for their promulgation, and that they are binding rules of law.

The focus of this paper is the rules announced by agencies that do not comport with the formalities necessary to elevate them to legislative rules. Professor Strauss divides this universe of informal agency action into two types: (1) publication rules, and (2) everything else.<sup>9</sup>

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<sup>5</sup> Eighteenth century naturalists, faced with the platypus, debated long and hard about whether it was a reptile (because it laid eggs) or a mammal (because it suckled its young). Despite being duck-billed, the platypus never really contended for classification as a bird. *See generally* Bill Bryson, *In a Sunburned Country* 274-75 (2000).

<sup>6</sup> Tom J. Boer, Does Confusion Reign at the Intersection of Governmental and Administrative Law?: Review of Interpretive Rules and Policy Statements under Judicial Review Provisions such as RCRA Section 7006(a)(1), *26 B.C. Envtl. Affr. L. Rev.* 519, 524 (1999) (hereinafter, Boer, *Confusion*).

<sup>7</sup> *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 628 (5<sup>th</sup> Cir. 2001); Strauss, Continuum at 1466-67.

<sup>8</sup> While notice and comment rulemaking is more efficient than adjudicatory rulemaking, commentators argue that even notice and comment rulemaking has become “ossified”—that is, subject to greater procedural burdens in the promulgation of rules. *See generally*, Thomas O. McGarity, Some Thoughts on “Deossifying” the Rulemaking Process, *41 Duke L.J.* 1385, 1387-96 (1992). Academic articles describe notice and comment rulemaking as “informal” rulemaking, to distinguish it from adjudicatory rulemaking. Notice and comment rulemaking has sufficient formality to result in a legislative rule, and it therefore seems a misnomer to describe it as informal.

<sup>9</sup> Strauss, *supra* n.2 at 1467-68.

Publication rules are agency policies, interpretations, and so forth, that are made available to the public as provided in Section 552(1) and (2) of the APA.<sup>10</sup> “Everything else” includes for Strauss “materials of lesser dignity—press releases and the like.”<sup>11</sup> Strauss does not even attempt to come up with a name for these agency actions—perhaps, like the platypus, they defy accurate classification.

Let us leave legislative rules to their own, quite formal kingdom, and turn to the kingdom of informal agency actions. There is still some sense of decorum in this realm. Informal agency actions include the following acts, listed roughly from most formal to least formal.

[2] Interpretive Rules

An interpretive rule is a rule subject to the APA, but not subject to the notice and comment requirements of the APA.<sup>12</sup> A rule is interpretive when it is a clarification or explanation of existing laws or regulations, rather than a substantial modification or adaptation of new regulations.<sup>13</sup> Where an interpretation brings with it a change in the substance of the rule, that change requires notice and comment.<sup>14</sup> This line drawing is not always consistent, as some courts have read the scope of interpretive rulemaking more broadly, and are willing to allow a rule to affect the substantive rights of the parties without requiring notice and comment.<sup>15</sup>

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<sup>10</sup> *Id.*; see 5 U.S.C.A. § 552(1),(2) (1989 & Supp. 2001).

<sup>11</sup> *Id.*

<sup>12</sup> See 5 U.S.C.A. § 551(4) (defining “rule” to include statements designed to interpret law or policy); 5 U.S.C.A. § 553(b)(3)(A).

<sup>13</sup> See *Taunton Municipal Lighting Plant v. Dept. of Energy*, 669 F.2d 710 (Em. App. 1982).

<sup>14</sup> See, e.g., *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622 (5<sup>th</sup> Cir. 2001).

<sup>15</sup> See, e.g., *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9<sup>th</sup> Cir.), *cert. denied sub nom.*, *Cargill, Inc. v. United States*, 516 U.S. 955 (1995) (upholding “glancing duck” rule of wetlands jurisdiction based on statement in preamble to regulation). *Cf.* *Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers*, 121 S. Ct. 675 (2001) (“SWANCC”) (holding that migratory bird rule exceeds Corps’ jurisdiction). As a further example of how agency interpretations affect the rights of individuals, the General Counsel of EPA and the Chief Counsel of the Corps have issued a joint memorandum narrowly construing SWANCC. See Gary S.

Agencies can offer interpretive rules through rulings in individual cases, or through fairly informal guidance to the public.<sup>16</sup> Interpretive rulemaking can, however, take on all the trappings of full-blown notice and comment rulemaking. The United States Office of Surface Mining Reclamation and Enforcement (OSM) recently provided an extensively reviewed interpretive rule.<sup>17</sup> Even though OSM characterizes this publication as an interpretive rule, it was subject to notice and comment, including four public hearings. The agency even codified its interpretation in the Code of Federal Regulations.<sup>18</sup> Thus an agency may choose to act quite formally even when announcing an interpretive rule.<sup>19</sup>

[3] Published Guidance And Policies

Administrative agencies routinely issue official policies and guidance documents.<sup>20</sup> These documents are designed to provide information concerning how the agency intends to administer its programs. No matter how complete, turgid and complex a set of published regulations might be, an agency will still be required to interpret, and perhaps supplement, those

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Guzy and Robert M. Andersen, *Memorandum: Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters* (undated). We discuss the implications of this line drawing in Section XX.03[1] below.

<sup>16</sup> See, e.g., *Tauton*, 669 F.2d at 714-15 (interpretation made through published “ruling” is interpretive rule).

<sup>17</sup> OSM, Final Rule: Interpretive Rule Related to Subsidence Due to Underground Coal Mining, 64 Fed. Reg. 70,838 (Dec. 17, 1999).

<sup>18</sup> 30 C.F.R. § 761.200 (2000).

<sup>19</sup> Granted, the circumstances giving rise to the OSM interpretive rule on subsidence are unusual. OSM followed the formalities of notice and comment rulemaking in response to a court order to do so. *National Wildlife Federation v. Babbitt*, 835 F. Supp. 654, 671 (D.D.C. 1993) (finding that prior notice of intent issued by OSM was a legislative rule, requiring notice and comment). All this formality might be taken to mean that the rule is really a legislative rule, and not an interpretive rule at all. OSM seems to want to characterize this rule as interpretive because it sees the issue as one purely of statutory construction rather than a more substantial or technical matter. See 64 Fed. Reg. at 70839 (OSM withdrew earlier rulemaking because this was fundamentally a legal issue).

<sup>20</sup> EPA, for example, is a zealous issuer of guidance documents. Since January 1, 1999, for example, EPA has issued 126 guidance documents under the Clean Air Act. (This number comes from a search run on the EPA guidance document website. See <[www.epa.gov/guidance/](http://www.epa.gov/guidance/)>.) The documents on this website do not include any EPA document published in the Federal Register, and do not include Regional materials. *Id.*

regulations when implementing them.<sup>21</sup> Guidance documents and policy statements are significant because they are intended to communicate to the public just how the agency intends to regulate the public. MSHA, for example, collects its various policy statements in the Program Policy Manual. MSHA also sends out “Program Information Bulletins” to mine operators. Program Information Bulletins sometime provide notice to operators of changes in the administration of the MSHA program.<sup>22</sup> MSHA has recently used a Program Information Bulletin to amend a mistake in a formula published in the agency’s formal rules.<sup>23</sup> Such statements are likely to be treated as definitive by both the agency and the public.

[4]     Solicitor’s Opinions

The Department of the Interior’s Office of the Solicitor routinely issues opinions concerning the proper scope and interpretation of regulations and statutes administered by that agency. The practice seems less common in other federal agencies regulating the natural resources industry. Some states seek opinions from their Attorneys General, although these opinions may be less expansive than those proffered by the Solicitor for the Department of the Interior.

A Solicitor’s opinion can have significant impacts on private rights, even though the opinion is arguably directed only to the agency. For example, the Solicitor issued an opinion in

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<sup>21</sup> There is a school of thought in jurisprudence that the development of the law is largely driven by interpretation. *See generally*, Ronald Dworkin, *Law’s Empire* (1986); K. Kress, The Interpretive Turn, 97 *Ethics* 834 (1987). Some scholars are reacting against the broader application of the “interpretive turn.” Michael Moore, The Interpretive Turn in Modern Theory: A Turn For the Worse, 41 *Stan. L. Rev.* 871 (1989). It is clear, in any event, that agencies must act, and in doing so will interpret the statutes and regulations under which they act. Any agency must, for example, decide when rules apply and when they do not. This decision is an act of interpretation.

<sup>22</sup> *See, e.g.*, Program Information Bulletin P01-5 (Apr. 6, 2001) (notifying operators of requirements to complete a new “dust data card” to record respirable dust sampling results).

<sup>23</sup> Program Information Bulletin P01-1 (Jan. 19, 2001) (amending formula for occupational noise at 30 C.F.R. Part 62, Table 62-1). This latter practice may be somewhat questionable, although it is easy to understand the agency’s impulse to correct an error as quickly as possible.

1997 that caused a great deal of controversy. The Solicitor adopted a narrow reading of the millsite exception under the Mining Law of 1872, construing that statute to allow five acres of millsite land only for each patented claim.<sup>24</sup> This decision gave rise to some considerable objection, and indeed the Solicitor himself was required to testify before a Congressional committee to explain how he arrived at his interpretation of the Mining Law.<sup>25</sup>

[5] Handbooks, Manuals, and Directives

Agencies regulating natural resources and the environment tend to develop fairly complex and thorough internal documentation in the form of handbooks, manuals, and directives.<sup>26</sup> The Forest Service, for example, issues directives to its employees that are codified either in the Forest Service Manual or the Forest Service Handbook.<sup>27</sup> The Manual is meant to include guidance of a general application, while the Handbook is more specialized and technical. General directives can be supplemented by Regional Foresters and Forest Supervisors. The directives in the Handbook and Manual are intended to be binding (or provide direction) only to Forest Service employees, and not the public at large. Still, if a Forest Service employee feels bound to act in a particular way because he or she is directed to do so by a statement in a Manual or Handbook, that decision will have real consequences for those subject to regulation by the Forest Service.

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<sup>24</sup> Solicitor's Opinion, *Limitations on Patenting Millsites under the Mining Law of 1872*, M-36988, GFS (MIN) SO-1 (Nov. 7, 1997).

<sup>25</sup> Former Solicitor Leshey's testimony can be found at <[www.doi.gov/ocl/millsite.htm](http://www.doi.gov/ocl/millsite.htm)>. *See generally, John Leshey, Public Lands at the Millenium, 46 Rocky Mt. Min. L. Inst. 1-1 (2000).*

<sup>26</sup> The APA requires the agencies to make handbooks, manuals and directives available to the public. 5 U.S.C.A. § 552(1) and (2).

<sup>27</sup> *See generally*, Forest Service Manual, Title 1100, Directive System (June 4, 2001). A helpful summary of the Forest Service Directive System can be found at <[www.fs.fed.us/im/directives/dughtml/overview.html](http://www.fs.fed.us/im/directives/dughtml/overview.html)>.



Other agencies have similar internal handbooks or manuals. MSHA provides direction to its staff through the MSHA Handbook, as well as Program Information Bulletins and Procedure Instruction Letters.<sup>28</sup> MSHA also provides detailed guidance to its mine inspectors in the Coal Mine Health Inspection Procedures Handbook. The BLM has a directive system similar to that in the Forest Service, and has created both Handbooks and a Manual. State agencies will also offer instruction to their employees. These documents are often available on-line.

Manuals and handbooks carry a lot of weight with the agencies, including administrative review bodies within the agencies. In Rio de Viento, Inc.,<sup>29</sup> for example, the Interior Board of Land Appeals (IBLA) was asked to determine, *inter alia*, what costs should properly be considered in determining whether a well was producing in paying quantities. The IBLA and the parties to the dispute based much of the argument on a draft section of the BLM Manual. This draft had previously been implemented through an Instruction Memorandum (IM), but that IM had expired several years earlier.<sup>30</sup> Nonetheless, the IBLA quoted extensively from this long dead document in its analysis of the issues in the case.

#### [6] Letters And Websites

It is common for those subject to regulations to write letters to administrative agencies seeking guidance on the scope and application of regulations. Sometimes agencies reply, and provide that guidance.<sup>31</sup> Similarly, an uncertain miner or well operator might visit a website to

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<sup>28</sup> The Federal Mine Safety and Health Review Commission and administrative law judges hearing MSHA matters look to the MSHA handbook and Program Policy Letters for guidance when determining whether a violation of MSHA standards has occurred. *See, e.g.*, *Energy West Mining Co. v. Secretary of Labor*, 16 F.M.S.H.R.C. 816, 820 (1994) (no violation because sampling method was not improper under regulations, Program Policy Manual, or Coal Mine Health Inspection Procedures Handbook).

<sup>29</sup> 153 IBLA 32, GFS (O&G) 18 (2000).

<sup>30</sup> *Id.* at 35 n. 4.

<sup>31</sup> In 1998, for example, Region VIII of EPA issued a letter to the State of Utah in response to a query concerning whether two manufacturing facilities were “adjacent” and hence would be considered a single source for air

review information about the agency's programs. The websites often include the official documents described above. Websites might also include general descriptions of programs and their administration, FAQs, or similar informational material designed specifically for the website.

[7] Telephone Queries, Including Official Hotlines

Faced with some uncertainty about the scope or application of a regulation, a person can always pick up the telephone and call the administrative agency, or even stop in for a chat. EPA has led the way in formalizing this process, and has set up hotlines and call centers designed to provide information relating to everything from RCRA and CERCLA compliance to Environmental Justice. The EPA hotlines emphasize that they are informational only, and do not provide regulatory interpretation. Still, a person who calls a hotline to ask whether a particular waste product is regulated will no doubt rely on that answer. Similarly, if you call up a regulator to ask whether you need a permit for an activity or whether you have calculated a fee or royalty properly, you hope to be able to rely on that answer.<sup>32</sup>

[8] Memoranda Of Understanding

Administrative agencies will often enter into Memoranda of Understanding (MOUs) to sort out ambiguities relating to their respective programs. These MOUs will parse out enforcement authority, jurisdiction, and territory. Thus, an interagency MOU can have considerable effect on the regulated community, and the MOU can change expectations about the permitting process, enforcement oversight, or even where to go for guidance. An MOU can be

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permitting. Letter from Richard Long, EPA to Lynn Menlove, Utah Division of Air Quality (May 21, 1998). The letter provides a detailed parsing of the applicable statute and regulations. That letter in turn relied on several previous interpretive letters from EPA on the issue.

<sup>32</sup> *But see* Nolichuckey Sand Company, Inc. v. Secretary of Labor, 2001 WL 578331 (F.M.S.H.R.C.) (oral statement of mine inspector that guards did not comply with rules did not provide adequate notice to operator of agency's authoritative interpretation when agency published that interpretation after date of inspection).

especially significant for those working in Indian Country, as questions of jurisdiction can be knotty and uncertain. If a person has a permit from the tribe for an activity, and then an MOU suddenly requires a permit from a state or federal agency, the regulated party can accrue considerable risk even after having sought to comply with the regulations applicable to its activities.

A Memorandum of Understanding reallocating jurisdictional authority can lead to some confusion. In Union Oil Company v. Farmington Indian Minerals Office,<sup>33</sup> for example, Union Oil wished to appeal a decision reached by the Farmington Indian Minerals Office. That office was created through a Memorandum of Agreement between the Bureau of Indian Affairs, the Bureau of Land Management, and the Minerals Management Service, under which each delegated its authority to this office. The Interior Board of Indian Appeals struggled to determine under which agency's authority the office was acting when rendering its decision, and ultimately dismissed the appeal for lack of jurisdiction.<sup>34</sup>

[9] Executive Orders And Proclamations

The President of the United States may issue a valid Executive Order where he is empowered to do so by statute or by the Constitution. Executive Orders are binding on executive agencies and officials, but of course can have significant impacts on private citizens. President Kennedy, for example, used an Executive Order to end racial discrimination in federally funded housing.<sup>35</sup> William Rodgers has argued that a President's use of an Executive Order reflects a certain heroism, and when issuing an Executive Order, the President "is

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<sup>33</sup> 35 IBLA 127 (2000).

<sup>34</sup> *Id.*

<sup>35</sup> *See* Executive Order 11,063, 27 Fed. Reg. 11527 (1962).

assuming the ‘mythic figure’ of the cowboy, riding off on his own where others fear to tread.”<sup>36</sup> The President assumes this stance in part because he cannot “make law” through an Executive Order, which assures that those adversely affected by an Executive Order have free reign to attack the order, and to set those attacks on a Constitutional basis.<sup>37</sup> As Rodgers notes, “[t]he cowboy rides close to the outlaw.”<sup>38</sup>

The President can also issue proclamations. Proclamations are meant to be “hortatory or declaratory,” and therefore not as substantive as Executive Orders.<sup>39</sup> President Clinton, however, used the Executive’s proclamation power to create the Grand Staircase–Escalante National Monument.<sup>40</sup> This particular proclamation was made under a specific statute, the Antiquities Act,<sup>41</sup> and so has a more obvious legal basis than the usual Presidential proclamation. Nonetheless, President Clinton’s decision was roundly criticized.<sup>42</sup>

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<sup>36</sup> William H. Rodgers, *Executive Orders and Presidential Commands: Presidents Riding to the Rescue of the Environment*, 21 *J. Land Resources & Envtl. L.* 13 (2001).

<sup>37</sup> *Id.* at 16.

<sup>38</sup> *Id.* at 19.

<sup>39</sup> See Note, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 *Geo. Wash. L. Rev.* 659 (1987).

<sup>40</sup> *Proclamation 6920* of September 18, 1996, 61 *Fed. Reg.* 50221 (Sept. 24, 1996).

<sup>41</sup> 16 U.S.C.A. § 431.

<sup>42</sup> See Matthew W. Harrison, *Legislative Delegation and Presidential Authority: The Antiquities Act and the Grand Showcase–Escalante National Monument—A Call for New Judicial Examination*, 13 *J. Envt’l L. & Litig.*, 409, 410 n.4 (1998). See generally, Congressional Research Service, *Report for Congress: RL 30528: National Monuments and the Antiquities Act 4-5* (Apr. 17, 2000).

## § XX.03 THE LEGAL EFFECT OF INFORMAL AGENCY ACTION

### [1] Drawing The Line: When Does Agency Action Require Notice And Comment Rulemaking?

A critical distinction in the realm of rulemaking is the distinction between “legislative rules” and “interpretive rules.” Legislative rules are promulgated by the agency pursuant to adjudicatory or notice and comment rulemaking, and have the same effect and force as a statute.<sup>43</sup> Interpretive rules do not have the force of law; they are not the equivalent of a statute. In the standard formulation of the distinction, “legislative rules are those that ‘create new law, rights, or duties, in what amounts to a legislative act,’” while “[i]nterpretive rules, on the other hand, do not create rights, but merely ‘clarify an existing statute or regulation.’”<sup>44</sup>

Agencies sometimes issue a document purporting to be an interpretive rule, but which in fact creates new law, rights, or obligations. Indeed, as the notice and comment rulemaking process has become more onerous over time, agencies have a strong incentive to avoid the burdens of rulemaking if possible.<sup>45</sup> If an agency issues a policy or guidance document that amounts to legislation without going through notice and comment rulemaking, the agency’s action may be vacated. A legislative rule promulgated without proper notice and comment rulemaking is “procedurally invalid.”<sup>46</sup>

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<sup>43</sup> Richard J. Pierce, Rulemaking and the Administrative Procedure Act, 32 *Tulsa L.J.* 185, 186 (1996).

<sup>44</sup> *Sweet v. Sheahan*, 235 F.3d 80 (2d Cir. 2000) (internal citations omitted). This formulation of the distinction is commonly invoked. *See, e.g., Shell Offshore*, 238 F.3d at 628; *Splane v. West*, 216 F.3d 1058, 1063 (Fed. Cir. 2000) (interpretive rule “reminds affected parties of existing duties”); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1393 (9<sup>th</sup> Cir. 1995) (legislative rule imposes extra-statutory obligations; interpretive rule is what the administrative officer thinks the statute or regulation means).

<sup>45</sup> *See, e.g., Mark Seidenfeld, Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 *Tex. L. Rev.* 483, 484-86 (1997).

<sup>46</sup> *American Mining Congress v. Mine Safety and Health Administration*, 995 F.2d 1106 (D.C. Cir. 1993); *National Family Planning and Reproductive Health Assoc. v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992).

Courts sometime struggle with making the distinction between an interpretive and legislative rules. The distinction between creating new law and construing existing law does not create bright lines, but rather results in a “hazy continuum.”<sup>47</sup> Faced with a blurred line rather than a bright line, courts have attempted to add some substance to the distinction by creating more complete tests for when an agency has engaged in legislative rulemaking. One measure of the nature of a rule is its relationship to the organic statute:

If the rule is based on specific statutory provisions, and its validity stands or falls on the correctness of the agency’s interpretation of those provisions, it is an interpretive rule. If, however, the rule is based on an agency’s power to exercise its judgment as to how best to implement a general statutory mandate, the rule is likely a legislative one.<sup>48</sup>

In other words, the more a regulation expands upon the scope of a statutory delegation, the more likely that the rule is legislative rather than interpretive.

The D.C. Circuit, in a thorough analysis of the distinction, set out a four part test for determining whether a rule is legislative. In *American Mining Congress v. Mine Safety and Health Administration*,<sup>49</sup> the D.C. Circuit, adopting the common view of the distinction, noted that a rule is legislative when it has “legal effect.”<sup>50</sup> The court found that a rule is a legislative rule whenever any one of the following four tests is met:<sup>51</sup>

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<sup>47</sup> *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987). *See also* *American Mining Congress v. MSHA*, 995 F.2d 1106, 1108 (D.C. Cir. 1993) (*citing* cases describing the distinction as “enshrouded in considerable fog,” “fuzzy,” “tenuous,” “blurred,” and “baffling”); Anthony, *Interpretive Rules*, *supra* n. 2 at 1321.

<sup>48</sup> *Star Enterprise v. EPA*, 235 F.3d 139, 146 (3d Cir. 2001). *See also* *United Techs. Corp v. EPA*, 821 F.2d 714, 719-20 (D.C.Cir. 1987).

<sup>49</sup> 995 F.2d 1106 (D.C.Cir. 1993).

<sup>50</sup> *Id.* at 1112.

<sup>51</sup> *Id.*

1. In the absence of the rule, there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties;
2. The agency has published the rule in the Code of Federal Regulations;
3. The agency has explicitly invoked its general legislative authority; and
4. The rule effectively amends a prior legislative rule.

These tests are designed to indicate when an agency rule is meant to have binding effect. An agency clearly has the opportunity to unequivocally indicate which of its rules are legislative and which are interpretive. When an agency characterizes a substantive rule as “guidance” or “policy,” however, courts are willing to step in and vacate the agency rule.

A recent case on this question is *Appalachian Power Company v. EPA*.<sup>52</sup> In *Appalachian Power*, the D.C. Circuit reviewed a guidance document issued by EPA setting standards for periodic monitoring under the Clean Air Act. The D.C. Circuit determined that in this instance the guidance document was effectively a legislative rule, and therefore must be set aside as it was not properly promulgated.

EPA issued its “Periodic Monitoring Guidance” in 1998.<sup>53</sup> EPA issued the guidance document to amplify the requirements of a Clean Air Act regulation requiring States to provide for “periodic monitoring” of applicable permit standards where none might otherwise exist.<sup>54</sup> The petitioners in the litigation argued that this clause of the regulations simply required the States to assure that some periodic monitoring was included in an air permit, and nothing more.<sup>55</sup> EPA read considerably more substance into the rule, and issued a lengthy guidance document

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<sup>52</sup> 208 F.3d 1015 (D.C. Cir. 2000).

<sup>53</sup> *Appalachian Power*, 208 F.3d at 1017.

<sup>54</sup> 40 C.F.R. § 70.6(a)(3); *Appalachian Power*, 208 F.3d at 1018.

<sup>55</sup> *Appalachian Power*, 208 F.3d at 1019.

requiring an approach to periodic monitoring that would not be required if the regulation was a simple “gap filling” requirement, and included substantive requirements concerning the nature of such monitoring.<sup>56</sup> The D.C. Circuit noted that the propagation of rules through an ever widening circle of guidance documents was common. In this way, “[l]aw is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.”<sup>57</sup>

Upon review, the court found the guidance document to be a legislative rule, requiring notice and comment rulemaking. The court noted that the promulgated regulation simply required States to include periodic monitoring where the state standards did not already incorporate periodic monitoring. The guidance, however, applies to federal and state standards, and effectively amends federal standards by incorporating periodic monitoring into those standards via the guidance.<sup>58</sup> The court found that the original regulation was “much narrower” than the scope of the guidance document.<sup>59</sup> An agency cannot escape the notice and comment requirement by labeling a major substantive legal addition to a rule a mere interpretation.<sup>60</sup> EPA tried to argue that the guidance document was somehow within the scope of the prior rulemaking, but the court would have none of it.<sup>61</sup> The court found that the guidance document was in effect an amendment to the existing rule, and therefore could be promulgated only after

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<sup>56</sup> *Id.* at 1019-20.

<sup>57</sup> *Id.* at 1020.

<sup>58</sup> *Id.* at 1023-24.

<sup>59</sup> *Id.* at 1025.

<sup>60</sup> *Id.* at 1024.

<sup>61</sup> *Id.* at 1026-27.



notice and comment.<sup>62</sup> Even though the petitioners had challenged only a portion of the guidance, the court found the challenged piece to be “intertwined” with the remainder of the document.<sup>63</sup> Where there is “substantial doubt” that an agency would adopt a portion of a rule independently, the court reasoned, it is best to vacate the entire rule.<sup>64</sup> The guidance document was therefore set aside in its entirety.<sup>65</sup>

*Appalachian Power* helps clarify the line between legislative and interpretive rules: where an agency document imposes substantive requirements beyond those in the existing legislative rule, and is in effect an amendment to the existing rule, that document is a legislative rule. The courts will require that document to be subject to notice and comment rulemaking. Despite the strong language in *Appalachian Power*, courts are willing to find a rule to be merely interpretive, and therefore exempt from notice and comment rulemaking. In *Splane v. West*,<sup>66</sup> for example, the court reviewed an opinion issued by the general counsel construing regulations relating to MS disability claims. While the opinion had precedential effect, and was binding on the agency, the court found that the opinion stayed within the scope of standard statutory construction, and therefore was an interpretive rule, not subject to the requirement of notice and comment.<sup>67</sup> In *Truckers United for Safety v. Federal Highway Administration*,<sup>68</sup> a trade group challenged a guidance document that set out, in question and answer format, the agency’s

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<sup>62</sup> *Id.* at 1028.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*, citing *Davis County Solid Waste Management v. EPA*, 108 F.3d 1454, 1458 (D.C. Cir. 1997).

<sup>65</sup> *Id.*

<sup>66</sup> 216 F.3d 1058 (Fed. Cir. 2000).

<sup>67</sup> *Id.* at 1063-64.

<sup>68</sup> 139 F.3d 934 (D.C. Cir. 1998).

interpretation of its regulations. Some of the answers indicated that trucking companies would be held strictly liable for violations of certain regulations.<sup>69</sup> The trucking companies argued that the Q&A guidance document improperly imposed new liability standards without notice and comment. The court disagreed. Applying the four part test described in *AMC v. MSHA*,<sup>70</sup> the court found that the guidance document was intended to be an interpretation, not legislation, and that it was consistent with prior law. Although the regulations did not on their face impose strict liability, that view was consistent with the authority of the agency under previous application of the regulations.<sup>71</sup>

*Splane* and *Truckers United* show that not every interpretation or guidance document is subject to challenge as an improper promulgation of a legislative rule. Where, however, as is common, a document characterized by the agency as a policy or guidance document in fact imposes new and substantive requirements on the regulated community, that document is vulnerable to a challenge similar to that made in *Appalachian Power*.

As discussed above, an agency can properly promulgate and rely on an interpretive rule or policy statement without engaging in notice and comment rulemaking. Once the agency has acted and issued or adopted an interpretation (even if the interpretation is adopted very informally), the interpretation can take on considerable substance. Indeed, a recent line of cases has held that an agency can change a well-established policy or interpretive rule only after notice and comment rulemaking. These cases give rise to a quirky result: the original interpretation can be adopted without the formality of notice and comment rulemaking, but once adopted, subsequent changes to the policy do require that formality.

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<sup>69</sup> See 139 F.3d at 935-37.

<sup>70</sup> See *supra* at n 51.

<sup>71</sup> 139 F.3d at 939.

The leading case in this line of cases is *Alaska Professional Hunters Ass’n v. Federal Aviation Administration*.<sup>72</sup> In *Alaska Hunters*, a trade group brought a challenge to a decision by the Federal Aviation Administration (FAA) to require pilots providing guide services in Alaska to comply with FAA regulations applicable to commercial air operations. The FAA imposed this rule through a “Notice to Operators” published in the Federal Register and not through notice and comment rulemaking.<sup>73</sup> The guide pilots argued that this change was inconsistent with advice they had received from the Alaska Region of the FAA since 1963. All parties acknowledged that while the Alaska Region of the FAA had never written down its interpretation of the relevant regulations, it had always told guide pilots that the commercial air operations regulations did not apply to them.<sup>74</sup>

No one thought that the agency’s original interpretation of the applicability of the commercial air operation regulations to guide pilots was a legislative rule, requiring notice and comment. Rather, the question before the court was whether the Notice to Operators required notice and comment because it changed the prior interpretation. Certainly on its face it would appear that an agency’s new interpretation, like its first, would be an interpretive rule, and so would be exempt from the requirement of notice and comment rulemaking. That is what the FAA thought, and made that argument to the court.<sup>75</sup>

The court, however, disagreed. Citing *Paralyzed Veterans of America v. D.C. Arena*,<sup>76</sup> the court noted that once an agency gives a regulation an interpretation, it can change that

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<sup>72</sup> 177 F.3d 1030 (D.C. Cir. 1999).

<sup>73</sup> *Alaska Hunters*, 177 F.3d at 1030, 1033.

<sup>74</sup> *Id.* at 1031-32.

<sup>75</sup> *Id.* at 1033.

<sup>76</sup> 117 F.3d 579 (D.C. Cir. 1997).

interpretation only through notice and comment rulemaking.<sup>77</sup> The court reasoned that when an agency has given a regulation a “definitive” interpretation, amending that interpretation is tantamount to an amendment of the rule itself, and so must comply with the requirements of Section 553 of the APA. This view demonstrates the close link (and hence the blurred line) between legislation and interpretation. Here, the interpretation was simple and clear: do these regulations apply to this activity, yes or no? The FAA argued that this type of interpretation was not “authoritative,” unlike that in *Paralyzed Veterans*, yet answering that fundamental question really is about as authoritative and clear as an interpretation can get. The FAA also argued that the interpretation was not authoritative because it represented the view of a single Region of the FAA. The court noted, however, that the agency as a whole was aware of and had acknowledged that view as FAA policy.<sup>78</sup> In the court’s view, the regional policy became “administrative common law applicable to Alaskan guide pilots.”<sup>79</sup>

The Fifth Circuit has applied the principles of *Alaska Hunters* in the context of a natural resources dispute. In *Shell Offshore, Inc. v. Babbitt*,<sup>80</sup> Shell Offshore challenged an attempt by the Minerals Management Service (MMS) to disallow calculation of transportation costs for royalty purposes using a FERC tariff rate. MMS regulations allowed royalty payors to use “approved” FERC tariffs when calculating transportation costs.<sup>81</sup> MMS had accepted any rate filed with FERC as an “approved” rate, and had included tariffs for pipelines for production from

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<sup>77</sup> *Id.* at 1033-34.

<sup>78</sup> *Id.* at 1035.

<sup>79</sup> *Id.*

<sup>80</sup> 238 F.3d 622 (5<sup>th</sup> Cir. 2001).

<sup>81</sup> *Shell Offshore*, 238 F.3d at 624-25, *citing* 30 C.F.R. § 206.105(b)(5).

the Outer Continental Shelf (OCS).<sup>82</sup> MMS came to doubt FERC's jurisdiction over OCS pipelines, and therefore denied Shell's request for approval of its royalty payment calculation. MMS sent a "Dear Payor" letter to Shell requiring Shell to petition FERC to determine the scope of FERC's jurisdiction over the offshore pipeline.<sup>83</sup> As in *Alaska Hunters*, the rule at issue was not an original interpretation of a regulation, but rather a proposed change in the interpretation of the regulation. As the court noted, "If Interior had, from the beginning, interpreted their regulation as requiring an affirmation of FERC jurisdiction, their interpretation of their own regulation would be entitled to substantial deference. However, Interior changed their policy . . . ."<sup>84</sup> As the court posed the question, "can Interior switch from one consistently followed permissible interpretation to a new one without providing an opportunity for notice and comment?"<sup>85</sup> Citing *Alaska Hunters*, the court held that Interior could not.

Even though the MMS interpretation, like that of the FAA in *Alaska Hunters*, had never been written down or officially published, the court found that the long standing interpretation created a substantial rule applicable to offshore lessees. The proposed new interpretation "as a practical matter" enacted a new substantive rule, and therefore required the opportunity for notice and comment.<sup>86</sup> "Interior's new practice may be a reasonable change in its oversight practices and procedures, but it places a new and substantial requirement on many OCS lessees, was a significant departure from long established and consistent past practice, and should have

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<sup>82</sup> *Id.* at 625.

<sup>83</sup> *Id.* at 625-26.

<sup>84</sup> *Id.* at 626.

<sup>85</sup> *Id.* at 629.

<sup>86</sup> *Id.* at 630.

been submitted for notice and comment before adoption.”<sup>87</sup> Shell and other OCS lessees are therefore entitled to rely on the existing policy until the new policy is promulgated by MMS through notice and comment rulemaking. It is important that the previous interpretation be definitive. If the interpretation is “ambiguous and incomplete,” it will not trigger the requirements of *Alaska Hunters*.<sup>88</sup>

[2] Judicial Review Of Informal Agency Action

Should an agency deny a permit, or initiate an enforcement action, based on a guidance document or policy statement, the affected party may want a judge to review the agency’s action. Generally, an agency action is capable of judicial review only when it is final and justiciable. Justiciability is comprised of three subcategories or tests: standing, ripeness, and exhaustion of administrative remedies.<sup>89</sup> When the agency has published a final rule after notice and comment rulemaking, judicial review is typically available to those that participated in the rulemaking process. It can be a bit more difficult to determine whether a less formal agency action, such as the issuance of a policy or guidance document is reviewable.

In *Appalachian Power Company, supra*, for example, EPA argued that its periodic monitoring guidance document was not subject to judicial review because it was a mere policy statement. EPA reasoned that as a policy statement, the document was not binding, and therefore was not final (and, continuing the chain of reasoning, could not be reviewed as a final agency

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<sup>87</sup> *Id.*

<sup>88</sup> *See* Association of American Railroads v. Department of Transportation, 198 F.3d 944, 946-47 (D.C. Cir. 1999); *see also* Arizona v. Shalala, 121 F. Supp. 2d 40 (D.D.C. 2000).

<sup>89</sup> For a fine discussion of these issues, *see* J. Michael Klise, [cite to this volume]; *see also* Thomas Means and J. Michael Klise, Judicial Review of Agency Action: an Overview, in Rocky Mountain Mineral Law Foundation, 4 *Natural Resources and Environmental Administrative Law and Procedure* Part 8 (*Rocky Mt. Min. L. Fdn.* 1999).

action).<sup>90</sup> The court, however, found that this particular guidance document was binding, since the agency intended to use it to deny permits and state programs, and therefore found the guidance document capable of review.<sup>91</sup>

EPA acknowledged that the guidance document reflected the “settled” position of the agency.<sup>92</sup> EPA argued, nonetheless, that the guidance document should not be subject to judicial review because it included the following disclaimer: “The policies set forth in this paper are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party.”<sup>93</sup> The court treated the disclaimer language skeptically:<sup>94</sup>

At any rate, the entire Guidance, from beginning to end—except the last paragraph [the disclaimer]—reads like a ukase. It commands, it requires, it orders, it dictates. Through the Guidance, EPA has given the States their “marching orders”. . . .

The court, finding the document to be a final and binding agency action, also found it to be subject to judicial review.<sup>95</sup>

A policy statement that really is just a policy statement is not subject to judicial review – it simply indicates the agency’s leaning, and is not binding.<sup>96</sup> If the agency begins treating the policy like a substantive rule, the policy will then be subject to judicial review.<sup>97</sup> The idea is that

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<sup>90</sup> 208 F.3d at 1020.

<sup>91</sup> *Id.* at 1022-23.

<sup>92</sup> *Id.* at 1022. *See also* *Barrick Goldstrike v. Browner*, 45 F.3d 45 (D.C. Cir. 2000).

<sup>93</sup> *Appalachian Power*, 208 F.3d at 1023.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1023.

<sup>96</sup> *Hudson v. FAA*, 192 F.3d 1031, 1034 (D.C. Cir. 1999).

<sup>97</sup> *Id.*

the policy statement is not ripe for review until the agency acts in a way that makes it clear that the agency intends to treat the policy as something more than a policy.<sup>98</sup>

[3] The Level Of Deference Courts Will Accord Informal Agency Interpretations

For nearly two decades, the deference accorded to an agency's interpretation of a statute it administers has been governed by the Supreme Court's landmark *Chevron* decision.<sup>99</sup> Less well known, but more long-standing and arguably more deferential to the agency than *Chevron*, is *Seminole Rock* deference to an agency's interpretation of its own regulations.<sup>100</sup> In recent years significant disagreement among courts and commentators has surrounded *Chevron* and, to a lesser extent *Seminole Rock*, regarding the formality which an agency's interpretation must assume to be given deference. Last year in *Christensen v. Harris County*, the Supreme Court limited *Chevron* deference to only those agency interpretations of a statute announced in a format having the "force of law," but did not similarly limit an agency's interpretation of its own regulations. Now in a very recent case described by Justice Scalia as "one of the most significant opinions ever rendered by the Court dealing with the judicial review of administrative action," *United States v. Mead*, the Court has confirmed its "force of law" rule and significantly muddled the applicable test under *Chevron*.<sup>101</sup> The majority opinion in *Mead* does not address *Seminole Rock* deference, but raises significant issues as to its continued efficacy. In this section, we examine the evolution of the law under *Chevron*, *Seminole Rock*, *Christensen*, and now *Mead* with an eye toward identifying issues of concern going forward for the natural resources practitioner.

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<sup>98</sup> *Id.* See also *Arizona v. Shalala*, 121 F. Supp. 2d 40, 49 (D.D.C. 2000).

<sup>99</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>100</sup> *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

<sup>101</sup> *United States v. Mead*, 121 S. Ct. 2164 (2001).



[a] Chevron Deference To An Agency's Statutory Interpretation

Prior to Justice Steven's 1984 unanimous opinion in *Chevron*, the Supreme Court and lower courts took an inconsistent approach toward resolving ambiguities in a statute administered by an agency. Sometimes the reviewing court took it upon itself to resolve the ambiguity while other times the court would defer to the agency, but there was no certainty as to when one approach would be applied as opposed to another.<sup>102</sup> The significance of *Chevron* is that it resolved that uncertainty in favor of the agency by presuming that Congress, by leaving gaps in the statute, either implicitly or explicitly intended to delegate authority to the agency to determine ambiguities in the statute.<sup>103</sup> Under *Chevron's* now familiar two-step analysis implementing that presumption, the court looks first to whether Congress has directly spoken to the issue. If Congress has spoken to the issue, then no further analysis is required because the agency must follow the expressed intent of Congress. If, however, Congress has not directly addressed the issue then the court must defer to the agency if it is based on a permissible construction of the statute. The court is bound by the agency's construction even if other constructions are available or the court would have reached a contrary construction if the question had originally arisen in a judicial proceeding.<sup>104</sup>

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<sup>102</sup> See, e.g., Davis & Pierce, *Administrative Law Treatise*, § 3.1 (3<sup>rd</sup> ed. 1994) ("Circuit courts frequently identified, and decried, the Supreme Court's pre-1984 unexplained inconsistency in its decisions allocating institutional responsibility for defining ambiguous terms in agency-administered statutes.") (hereinafter, Davis & Pierce); Robert A. Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 *Yale J. on Reg.* 1, 6 (1990).

<sup>103</sup> See *Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 740-41 (1996) ("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"). The *Chevron* Court found that presumption warranted because of (i) the agency's ability to make policy determinations given its technical expertise and experience, (ii) the agency's political accountability as part of the executive branch, and (iii) judges corresponding lack of expertise and accountability. *Chevron*, 467 U.S. at 865.

<sup>104</sup> *Chevron*, 467 U.S. at 843-844.

Justice Stevens' opinion unfortunately did not discuss the format which an agency's interpretation of the statute must assume to be entitled to deference. In the years following *Chevron* both the Supreme Court and lower courts gave *Chevron* deference to agency interpretations contained not just in legislative rules, but in a wide variety of formats including opinion letters, manuals, legislative rules, and informal adjudications.<sup>105</sup> Beginning in the early 1990s an inter-circuit disagreement developed over the format agency interpretations must assume to be entitled to *Chevron* deference.<sup>106</sup> Several circuit courts of appeal concluded that *Chevron* deference should apply only to those agency pronouncements having the force of law.<sup>107</sup>

Those circuits adopting a "force of law" approach did so based largely on a law review article authored by Professor Anthony in 1990 and later adopted by Professors Davis and Pierce in their administrative law treatise.<sup>108</sup> Under the Anthony view, *Chevron* deference is warranted only if Congress intended to delegate to the agency the power to interpret with the force of law in the particular format that was used because

[a]n agency possesses only the power Congress has delegated to it. When an agency policy decision is affirmed under *Chevron* step two, a court has permitted

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<sup>105</sup> See, e.g., *Pension Benefit Guaranty Corporation v. LTV Corporation*, 496 U.S. 633, 647-52 (1990) (agency opinion letters); *Garvey Properties v. First Fin. S. & L. Ass'n*, 845 F.2d 519, 521 (5<sup>th</sup> Cir. 1988) (FHLBB general counsel opinion letter); *Thorson v. Gemini*, 123 F.3d 1140, 41 (8<sup>th</sup> Cir. 1997) (Secretary of Labor opinion letters); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1507 (9<sup>th</sup> Cir. 1995) (deference to unpublished Regional Solicitor's opinion).

<sup>106</sup> See, e.g., *Southern Ute Indian Tribe v. Amoco Production Co.*, 119 F.3d 816, 832-33 (10<sup>th</sup> Cir. 1997), overruled on other grnds, 119 S. Ct. 1719 (1999) ("*Chevron* should be held to apply to the meanings agencies give statutes in all legislative rules and in most adjudications. But it should not be held to apply to agency pronouncements in less formal formats.") (*citing* Davis & Pierce) (internal quotations omitted).

<sup>107</sup> It is difficult to accurately characterize one or the other position as a majority or minority because there are often conflicting opinions within the different circuits. Cf. Angstreich, 34 *U.C. Davis L.Rev.* at 64 (counting eight circuits as "willing to defer to informal interpretations") and *Southern Ute*, 119 F.3d at 832 ("[m]ost circuits agree with our conclusion" that *Chevron* deference is not accorded pronouncements in less formal formats).

<sup>108</sup> See Anthony, *supra* n. 102.

the agency to announce a policy that is binding on the court and on all citizens. It is fair to infer that Congress has delegated this power to any agency that has the power to promulgate legislative rules when the agency chooses to act through use of its legislative rulemaking power. ... Congress has not delegated to any agency the power to make policy decisions that bind courts and citizens through formats like letters, manuals, guidelines, and briefs.<sup>109</sup>

A contrary rule granting *Chevron* deference to agency interpretations set forth in informal formats would, according to Anthony, be an “abdication of judicial duties under *Marbury* [*v. Madison*], endow them [the informal interpretations] with force of law when Congress did not intend them to have such a force, ... bind the public without [the agency] itself being bound by interpretations in these formats[,] [a]nd since these formats are exempt from APA public participation requirements ... private parties [would be] bound by a proposition they had no opportunity to help shape and will have no meaningful opportunity to challenge when it is applied to them.”<sup>110</sup>

Informal agency pronouncements under the Anthony view are, however, still entitled to some limited deference under *Skidmore v. Swift & Co.*<sup>111</sup> Deference under *Skidmore* recognizes that “while [agency interpretations are] not controlling upon the courts by reason of their authority, [they] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>112</sup> An agency interpretation entitled to the lesser *Skidmore* deference will be accorded that weight commensurate with the (i) thoroughness of the agency’s consideration, (ii) validity of its reasoning, (iii) consistency with earlier and later pronouncements, and (iv) all those factors which give it power to persuade, if lacking power to

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<sup>109</sup> Davis & Pierce, *supra* n. 102 at § 3.5 (summarizing Anthony view).

<sup>110</sup> Anthony, *supra* n. 102 at 57-58.

<sup>111</sup> 323 U.S. 134 (1944).

<sup>112</sup> *Id.* at 140.

control.<sup>113</sup> Accordingly, agency pronouncements qualifying for *Chevron* rather than *Skidmore* deference will frequently mean a sea change in results. Under *Chevron* the agency's interpretation is outcome determinative so long as it is reasonable, whereas *Skidmore* shifts nearly all power to the court. Indeed, it is not clear that *Skidmore* really adds any deference at all because a court would always give an agency interpretation whatever persuasive value it warrants.

[b] Deference To An Agency's Interpretation Of Its Own Regulation

[i] Seminole Rock

Cases which parallel but pre-date *Chevron* by several decades require courts to defer to an agency's interpretation of its own regulation as opposed to *Chevron*'s deference to the agency's interpretation of a statute it administers. The principle announced over fifty years ago in *Bowles v. Seminole Rock & Sand Co.* is that when a case "involves an interpretation of an administrative regulation ... the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulations."<sup>114</sup>

Although frequently not couched as a "two-step" test, the *Seminole Rock* standard is for all practical purposes the same as the *Chevron* standard. A court must at least implicitly first determine whether the regulation is ambiguous and then, assuming it is ambiguous, determine whether the agency's interpretation is plainly erroneous. The plainly erroneous standard is

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<sup>113</sup> *Id.*

<sup>114</sup> 325 U.S. 410, 413-414. The level of deference accorded an agency's interpretation under *Seminole Rock* is arguably higher than that accorded under *Chevron*. See, e.g., *Udall v. Tallman*, 380 U.S. 1 (1965) ("When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order") (emphasis added).

equivalent to *Chevron*'s reasonableness test.<sup>115</sup> The rationale generally offered for *Seminole Rock* deference to an agency's interpretation of its regulations is that an agency is better positioned than a court to determine what the agency intended when it issued the rule, how and when the agency intended the rule to apply, and what makes most sense given the agency's purpose.<sup>116</sup>

In recent years, commentators have begun criticizing *Seminole Rock* on grounds similar to those leveled against *Chevron*. Among the critics is again Professor Anthony who claims that an agency's informal interpretation of its regulations is contrary to the APA directive that a court should determine the meaning of the terms of an agency action.<sup>117</sup> Professor Anthony would give *Seminole Rock* deference to an agency interpretation of its own regulations only when set forth in those formats having the force of law, and *Skidmore* deference to informal agency pronouncements not having the force of law. Because nearly all agency interpretations of their own regulations are contained in informal formats which do not have the force of law, such as manuals, handbooks, opinion letters and the like, Professor Anthony's view, if adopted, would largely eliminate *Seminole Rock* deference to agencies' interpretations of their regulations or force them to promulgate formal interpretations.

[ii] Christensen v. Harris County

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<sup>115</sup> See *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 584 ("It would seem that there are few, if any, cases in which the standard applicable under *Chevron* would yield a different result than the 'plainly erroneous or inconsistent' standard set forth in *Bowles v. Seminole Rock & Sand Co.*"); Scott H. Angstreich, *Shoring Up Chevron: A Defense Of Seminole Rock Deference To Agency Interpretations*, *U.C. Davis L. Rev.*, 70 (2000).

<sup>116</sup> See *Davis & Pierce*, *supra* n. 102 at § 6.10.

<sup>117</sup> 5 U.S.C.A. § 706. Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 *Admin. L.J. of Am.U.* 1 (1996); Anthony and Michael Asimow, *The Court's Deferences - a Foolish Inconsistency*, *Admin. & Reg. Law News*, 10 (Fall 2000). Other critics include Professor Manning who, like Professor Anthony, believes informal agency interpretations should not be accorded *Seminole Rock* deference, but on separation of powers grounds. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 *Colum. L. Rev.* 612 (1996).

Some of the dispute over what format decisions must be in before they will be entitled to *Chevron* deference was resolved by the Court last year in *Christensen v. Harris County*.<sup>118</sup> At issue in *Christensen* was the proper level of deference to be accorded an opinion letter in which the Department of Labor took the position that employers could compel the use of compensatory time only if the employee had agreed to the practice in advance. The government argued that the Court was required to defer to the opinion letter under both (i) *Chevron* as an interpretation of a statute the agency administered and (ii) *Seminole Rock* as an interpretation of the agency's regulation.

With little discussion, the Court rejected the government's *Chevron* argument because *Chevron* applies only to those interpretations having the "force of law." The Court held that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."<sup>119</sup> Those informal pronouncements were instead "entitled to respect" under *Skidmore* to the extent the interpretations had the "power to persuade."<sup>120</sup> The Court cited generally to the Davis & Pierce treatise on administrative law indicating that the Court, like Professors Davis & Pierce, had adopted Professor Anthony's view of *Chevron*.

The *Christensen* Court did not draw the same "force of law" line with respect to the government's argument that the opinion letter was entitled to deference under *Seminole Rock* as an interpretation of the agency's regulation. Instead, the Court acknowledged, albeit in dicta, that the case cited by the government for deference to an agency interpretation of its own

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<sup>118</sup> 120 S. Ct. 1655 (2000).

<sup>119</sup> *Christensen*, 120 S.Ct. at 1662-63.

<sup>120</sup> *Id.* at 1663.

regulation, *Auer v. Robbins*,<sup>121</sup> was still good law even though in *Auer* the Court had given *Seminole Rock*- type deference to the agency’s position announced in a brief.<sup>122</sup> The Court made no attempt to explain why *Chevron* deference is only granted to agency pronouncements having the force of law, but the same or even a heightened level of deference is appropriate to the most informal of agency pronouncements when the agency is interpreting its own regulations.<sup>123</sup>

[iii] Mead: The New Standard

The Court’s most recent and significant deference decision confirms the holding in *Christensen*, but creates an exception of highly uncertain dimensions, and again fails to square the inconsistency between the Court’s “force of law” approach under *Chevron* and *Seminole Rock* deference to any informal agency pronouncements regardless of format. In *Mead*, the issue was whether a “ruling letter” issued by the Customs Service was entitled to deference under *Chevron*.<sup>124</sup> The ruling letters “represent[ed] the official position of the Customs Service with respect to the particular transaction or issue” and were “binding on all Customs Service personnel.”<sup>125</sup> The ruling letters were not, however, subject to notice and comment before being issued, were not to be relied upon by persons other than the recipient, were subject to modification or revocation without notice except to the recipient, and could be published, but were only required to be made available for public inspection. The Federal Circuit gave no

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<sup>121</sup> 519 U.S. 452 (1997).

<sup>122</sup> *Christensen*, 120 S.Ct. at 1663.

<sup>123</sup> Anthony & Asimow, *supra* n. 117 (criticizing inconsistency).

<sup>124</sup> *Mead*, 121 S.Ct. 2164.

<sup>125</sup> *Id.* (citation omitted).

deference to the letters because they did not carry the “force of law.”<sup>126</sup> The Court granted *certiorari* “to consider the limits of *Chevron* deference owed to administrative practice in applying a statute.” In an 8-1 decision written by Justice Souter with Justice Scalia dissenting, the Court held that the ruling letters were “beyond the *Chevron* pale” because there was “no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law.”<sup>127</sup>

The Court recognized that under *Chevron* when Congress did not expressly delegate authority to the agency to fill a particular gap in the statute that “it can still be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law.”<sup>128</sup> According to the Court, “a very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”<sup>129</sup> The Court did not, however, expressly limit *Chevron* deference to notice and comment rulemaking or formal adjudication, but instead included with little additional clarification a reference to other cases in which “we have sometimes found reasons for *Chevron* deference even when no such formality was required and none was afforded.”<sup>130</sup>

The Court’s clearest statement of the new standard is

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

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<sup>126</sup> *Id.* at 2170.

<sup>127</sup> *Id.* at 2175.

<sup>128</sup> *Id.* at 2172.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 2173.



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.<sup>131</sup>

Applying that standard to the “ruling letter,” the Court found that (i) the letter’s binding effect was not sufficient to warrant *Chevron* deference because it was not “the legislative type of activity that would naturally bind more than the parties to the ruling”; (ii) the precedential value of the ruling was limited and did not by itself warrant *Chevron* deference; and (iii) there was no evidence that the agency “ever set out with a lawmaking pretense in mind when it undertook to make classifications like these.”<sup>132</sup> The Court did, however, believe the ruling should be entitled to whatever level of deference was appropriate under *Skidmore*.

Justice Scalia dissented. He describes *Mead* as an “avulsive change in administrative law” because “[t]he doctrine of *Chevron*—that all authoritative agency interpretations of statutes they are charged with administering deserve deference” is now “instead a presumption that agency discretion does not exist unless the statute, expressly or impliedly, says so.”<sup>133</sup> He viewed the majority’s rule as being contrary to the origins of judicial review of administrative action and could find nothing to support the majority’s need for formality of procedure. Justice Scalia identified four practical problems associated with the new rule, including (i) “protracted confusion” given the “utter flabbiness of the Court’s criterion”; (ii) an “artificially induced increase in informal rulemaking” by agencies to ensure that their interpretations receive heightened deference; (iii) “ossification of large portions of statutory law” because once a court

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<sup>131</sup> *Id.* at 2171.

<sup>132</sup> *Id.* at 2174.

<sup>133</sup> *Id.* at 2177-79. Justice Scalia describes the rule as: “Only when agencies act through ‘adjudication[,] notice-and-comment rulemaking, or ... some other [procedure] indicat[ing] comparable congressional intent [whatever that means]’ is *Chevron* deference applicable—because these ‘relatively formal administrative procedure[s] [designed] to foster ... fairness and deliberation’ bespeak (according to the Court) congressional willingness to have the agency, rather than the courts, resolve statutory ambiguities.” (alterations in original).

interprets the statute, the agency will now no longer have continuing discretion; and (iv) breathing new life into the anachronism of *Skidmore*.<sup>134</sup>

[iv] What Agency Interpretations Are Accorded Deference Under *Mead*

Regardless of where one falls on the continuum spanning the majority's and dissent's respective views of whether an agency or court is the appropriate entity to resolve ambiguities in statutes, Justice Scalia is surely correct that "[w]e will be sorting out the consequences of the *Mead* doctrine ... for years to come."<sup>135</sup> The *Mead* standard is ambiguous. The Court appears to largely adopt Professor Anthony's view of *Chevron*. The line of authority following the Anthony approach will, accordingly, provide some guidance going forward. However, neither Professor Anthony nor the courts following his position have created an exception similar to *Mead*'s for procedures indicating congressional intent similar to that in rulemaking and adjudication. After *Mead*, there are categories of agency interpretations which will clearly be entitled to deference, some which clearly will not, and several gray areas.

[a] Notice And Comment Rules/Formal Adjudication

Rules promulgated after notice and comment, which in Professor Anthony's words, "possess the fullest credentials" to receive *Chevron* deference will continue to receive *Chevron* deference post-*Mead*. Formal adjudications will likewise continue to receive full *Chevron* deference.<sup>136</sup>

[b] Rules Promulgated Without Notice And Comment

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<sup>134</sup> *Id.* at 2181-83.

<sup>135</sup> *Id.* at 2178.

<sup>136</sup> Formal adjudications meeting the requirements of 5 U.S.C. §§ 554-56 are, however, rare in the natural resources arena.

Rules not promulgated with notice and comment will generally not be entitled to *Chevron* deference after *Mead* because they do not have the requisite “formality” to bind. The most significant category of rules issued without notice and comment are interpretive rules. Justice Souter did not directly discuss interpretive rules in *Mead*, but in dicta characterized them as “enjoy[ing] no *Chevron* status as a class.”<sup>137</sup> The *Christensen* opinion also strongly suggests the same by citing several cases holding that interpretive rules are not entitled to *Chevron* deference.<sup>138</sup>

Other rules lacking notice and comment, and which will likely not be entitled to *Chevron* style deference under *Mead*, are those categories of rules exempted by 5 U.S.C. § 553(a)(2) from the APA’s rulemaking requirements.<sup>139</sup> The issue is of some significance in the context of natural resources because among the exempt categories are rules relating “to public property” which has been interpreted to mean “public lands.”<sup>140</sup> It is certainly the exception for the Forest Service and Interior to rely on the public property exception although the issue does occasionally arise.<sup>141</sup> The Forest Service for instance recently relied on the public property exception in its interim final rule extending the effective date for a portion of its new planning regulations. The

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<sup>137</sup> The statement that interpretive rules do not enjoy *Chevron* status “as a class” may suggest that some interpretive rules such as those subject to notice and comment will be entitled to *Chevron* deference.

<sup>138</sup> *Citing* EEOC v. Arabian American Oil Co., 499 U.S. 244, 256-58 (1991) (“interpretative guidelines do not receive *Chevron* deference” and *Martin v. Occupational Safety and Health Review Comm’n*, 499 U.S. 144, 157 (1991) (“interpretative rules” not entitled to *Chevron* deference).

<sup>139</sup> Section 553 (a)(2) provides that “[t]his section applies ... except to the extent that there is involved ... a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.”

<sup>140</sup> *See, e.g., American Colloid Co. v. Babbitt*, 145 F.3d 1152, 1158 (10<sup>th</sup> Cir. 1998) (“The rule-making requirements of section 553 do not apply to matters concerning the public lands.”).

<sup>141</sup> *See State of Alaska v. Lyng*, 797 F.2d 1479 (9<sup>th</sup> Cir. 1986) (“the Department of Agriculture has decided voluntarily to impose these [rulemaking] requirements on all agencies of the Department when making rules relating to public property or grants”). *See also* 49 Fed. Reg. 10056 (March 16, 1984) (Minerals Management Service issued final rule without notice and comment, in part, because “the rulemaking involves ‘public property.’ ... Although the Interior Department generally does not exempt rulemaking from the APA where public property is involved, that policy is overridden in the present instance by the importance of implementing

agency acknowledged its policy not to rely on the public property exception, but recognized an “exception to the exception” which allows the Forest Service to publish final rules without notice and comment when the agency finds for good cause that those procedures would be “impracticable, unnecessary, or contrary to the public interest.”<sup>142</sup>

[d] Informal Adjudication

One of the most significant questions left unresolved by *Mead* is whether informal adjudications are entitled to *Chevron* deference. The issue is particularly significant in the natural resources arena because administrative decisions rendered by the Forest Service and Department of the Interior are typically informal adjudications.<sup>143</sup> Evidence that Congress intended to delegate authority to Interior and the Forest Service to adjudicate disputes—the touchstone of the *Mead* test—is limited.<sup>144</sup> Moreover, Justice Souter on two occasions in *Mead* referred to *Chevron* deference to “formal adjudications” and Justice Thomas in *Christensen* also referred to “formal adjudications” as having the force of law worthy of *Chevron* deference. Those references while certainly not dispositive suggest that informal adjudications may not receive *Chevron* deference.

However, even after *Mead* some informal adjudications, in our opinion, still warrant *Chevron* style deference. IBLA opinions are one example. Adjudications before the IBLA are a

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the statutory objectives of the OCSLA.”).

<sup>142</sup> 66 Fed. Reg. 27552 (May 17, 2001).

<sup>143</sup> See, e.g., Gippert & Mulach, Administrative Review of U.S.D.A. Forest Service Decisions, *Nat. Res. and Env., Administrative Law and Procedure*, Paper 14c (1999) (“None of [the three Forest Service appeals processes] provide an ‘adjudication under the [APA], but instead allow for informal internal review by Forest Service line officers”); *Everett v. U.S.*, 158 F.3d 1364, 1368 (D.C. Cir. 1998) (Forest Service consideration of special use permit application constituted informal adjudication).

<sup>144</sup> See, e.g., 43 U.S.C. § 1701(a)(5) (Federal Land Policy Management Act providing that “in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required ... to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking”).

formal process in which the Solicitor's Office and the challenging party typically both file substantive briefs, a panel of at least two independent administrative law judges on the IBLA consider the dispute, and the judges draft a formal written opinion which is then published and is available from a variety of sources.<sup>145</sup> To use the words of Justice Souter, the IBLA "sets out with a lawmaking pretense in mind." Moreover, IBLA decisions have significant precedential effect which binds the parties to the action, non-parties, and agency personnel. That precedential effect, while not dispositive under *Mead* favors granting *Chevron* deference. IBLA adjudicative proceedings also satisfy due process concerns because additional parties are free to participate either as intervenors or as *amicus curiae*.<sup>146</sup> Finally, courts adopting Anthony's "force of law" approach have given *Chevron* deference to IBLA decisions and the majority in *Mead* did not intend to alter *Chevron* (at least as narrowed by *Christensen*).<sup>147</sup>

Other informal adjudications such as Forest Service decisions appear less likely to warrant *Chevron* deference after *Mead* given the informality of the appeals process.<sup>148</sup> Forest Service decisions have traditionally contained little legal analysis; until recently were not published or readily available to the public (they are now available on the Internet);<sup>149</sup> had

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<sup>145</sup> See generally, 43 C.F.R. Part 4; Michael C. Hickey, Litigation Before the Department of the Interior, 11 *Nat. Res. & Env.* 20 (Summer 1996); David L. Huges, Practice and Procedure Before the Interior Board of Land Appeals, reprinted in *The Public Land and Resources Law Digest*, 11 (1994). Indeed, the IBLA procedure was developed largely to achieve objectivity. See Huges at 14 ("the current [IBLA] appeals process cures the perception of a lack of objectivity inherent in the old system").

<sup>146</sup> See, e.g., *Amoco Production Company*, 143 IBLA 45, GFS (O&G) 10 (1998) (Jicarilla Apache Tribe intervened in dispute); *Burlington Resources Oil & Gas Co.*, 150 IBLA 178, GFS (O&G) 34 (1999) (New Mexico Oil & Gas Association participating as *amicus curiae*).

<sup>147</sup> See, e.g., *American Colloid*, 145 F.3d at 1154 ("We do give deference to the decisions of the Interior Board of Land Appeals"); *Hoyl v. Babbitt*, 129 F.3d 1377, 1382 (10<sup>th</sup> Cir. 1997) ("we accord *Chevron* deference to [IBLA's] interpretation" of the Mineral Leasing Act). Cf. *Southern Ute*, at 833-34 n.25 (discussing "some deference" given IBLA decision in *Aulston v. United States*, 915 F.2d 584, 585 (10<sup>th</sup> Cir. 1990)).

<sup>148</sup> Courts in the past have occasionally granted *Chevron* deference to Forest Service appeals decisions. See *State of Alaska v. Lyng*, 797 F.2d 1479 (9<sup>th</sup> Cir. 1986).

<sup>149</sup> <<http://www.FS.Fed.US/Forests>>.

limited precedential effect<sup>150</sup>; were not decided by independent judges; and were often subject to complaints that the deciding officers engaged in ex parte communications.<sup>151</sup> The Forest Service has recently amended its regulations governing certain appeals and taken steps in recent years to make its appeal process fairer.<sup>152</sup> At this point, however, these steps do not seem to be sufficient.

[e] Manual, Handbook, Or Opinion Interpreting Statute

Under *Mead* and *Christensen* it is now the rule in all circuits that interpretations of a statute contained in manuals, handbooks, opinions, or similar informal formats will not be entitled to *Chevron* deference. Under *Skidmore* those interpretations will receive only that level of deference commensurate with their power to persuade.

[f] Manual, Handbook, Or Opinion Interpreting Agency Rule

An agency's interpretation of a rule set forth in a manual, handbook, opinion, or similar format will, as the law stands today, be accorded *Seminole Rock*'s high degree of deference. In our opinion, *Seminole Rock* deference to agency interpretations in informal formats is tenuous at best. Regardless of the merits of *Mead*'s "force of law" rule for agency interpretations of statutes, it is the standard and there is little or no justification for granting deference to informal agency interpretations of an agency's own regulation when no such deference is owed to agency interpretations of a statute it administers.<sup>153</sup> The justifications for applying a "force of law" rule for statutory interpretations apply equally to agency interpretations of its regulations. The current dichotomy between the two principles does, as Justice Scalia and several commentators

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<sup>150</sup> See *Duncan Energy Co. v. U.S. Forest Service*, 50 F.3d 584, 591 (8<sup>th</sup> Cir. 1995) ("the Forest Service's position in other cases cannot be considered as binding authority").

<sup>151</sup> See Gippert and Mulach, *supra* n. 143.

<sup>152</sup> *Id.*

have pointed out, create an incentive to promulgate a “barebones” rule and then embellish that rule with informally announced agency interpretations which are beyond effective challenge.<sup>154</sup> To avoid such an incentive and to create consistency between agency interpretations of statutes and regulations, we believe *Seminole Rock* deference to informally announced agency interpretations is unlikely to stand and should be relied upon with caution.

[g] Mead Exceptions

In *Mead* Justice Souter recognized, but did not further define, certain categories of administrative actions other than adjudication and notice and comment rules which will be entitled to *Chevron* style deference. According to the Court, those formal delegations of 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.”<sup>155</sup> The administrative procedure followed by the agency in these other undefined instances in which Congress delegated authority need not have the administrative formality of notice and comment rulemaking or adjudication.<sup>156</sup> However, congressional delegations of authority allowing agencies to act with the force of law other than through rulemaking or adjudication are relatively rare, this exception appears to be limited.

[4] The Binding Effect Of Informal Agency Action

Agencies and the regulated community alike rely frequently on the seemingly settled principle that an agency is “bound by its regulations” unless the agency undertakes the necessary

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<sup>153</sup> Asimow and Anthony, *supra* n. 117.

<sup>154</sup> *Mead*, 121 S.Ct. at 2181.

<sup>155</sup> *Id.* at 2171 (emphasis added).

<sup>156</sup> *Id.* at 2173 (“we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded” (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995))).

rulemaking procedures to amend or alter those regulations. While it certainly is “settled law” that agencies are bound by their legislative rules, the source of that principle is not settled nor is it clear when agencies will be bound by pronouncements in formats less formal than legislative rules. In this section we examine the principal authority cited by courts for the proposition that agencies are bound by their rules, the “*Accardi* doctrine,” the potential sources of that doctrine – due process and the APA, and some general rules which can be discerned from the surrounding body of case law to determine when informal agency pronouncements are binding, including the effect of informal guidance issued by the Forest Service and agencies within the Department of the Interior.

[a] The *Accardi* Doctrine

The principle that agencies are bound by their own rules is generally attributed to a trilogy of cases decided in the 1950s by the Supreme Court, the most well known of which is *United States ex rel. Accardi v. Shaughnessy*.<sup>157</sup> The *Accardi* trilogy of cases all involved agency adjudicatory proceedings relating to either deportation by the INS or employment discharges.<sup>158</sup> In each case the Court found the agency obligated to follow its own regulations. Unfortunately, in none of the cases did the Court explain the rationale for the rule. Justice Frankfurter’s concurrence in *Vitarelli* comes the closest by characterizing a rule’s binding effect on an agency as a “judicially evolved rule of administrative law ... now firmly established” and

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<sup>157</sup> 347 U.S. 260 (1954). The other cases in the trilogy include *Service v. Dulles*, 354 U.S. 363 (1957) and *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

<sup>158</sup> *Accardi* is not limited to the areas of deportation and employment. The IBLA, for example, frequently cites *Accardi* and *Vitarelli* in challenges involving actions of BLM and other Interior agencies for the proposition that “a duly promulgated regulation has the force and effect of law, is binding on the Department, and may not be waived.” *See, e.g.*, *Chevron U.S.A., Inc. and Pittsburg & Midway Coal Mining Co.*, 139 IBLA 173, GFS (MIN) 74 (1997); *Kathleen K. Rawlings et al.*, 137 IBLA 368, GFS (MIN) 26 (1997).



supported by the equitable notion that “[h]e that takes the procedural sword shall perish with that sword.”<sup>159</sup>

Subsequent courts have generally not questioned the *Accardi* doctrine. Rather, given the span of nearly five decades since *Accardi* was decided, courts simply refer to the principle as “well settled” or “familiar.” However, as one court recently observed, “the principle has become ‘well settled’ only by judicial repetition; its origins are quite obscure.”<sup>160</sup> The principal theories suggested as the source of the rule that agencies are bound by their own regulations are the APA and the due process clause. Whether the source is the APA or due process is of some significance in determining what format agency pronouncements must assume before they will be considered binding. If the source of the doctrine is the APA, then a strong argument can be made that informal agency pronouncements such as manuals and guidelines which are not promulgated with the protections afforded legislative rules do not have the force and effect of law under the APA and, therefore, cannot be binding on the agency.<sup>161</sup> A similar limitation would not necessarily pertain if the due process clause is the source because there is no similar distinction between legislative and less formal rulemaking.<sup>162</sup>

There is no definitive answer regarding the source of the *Accardi* Doctrine; ample authority can be found to support both the due process and APA theories. The Supreme Court

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<sup>159</sup> 359 U.S. at 547.

<sup>160</sup> *Wilkinson v. Legal Services Corp.*, 27 F. Supp. 2d 32, 35, 48 (D.D.C. 1998) (“Identifying the legal source of the Supreme Court’s pronouncement that governmental agencies are bound to follow their own rules is no simple matter.”)

<sup>161</sup> *See* 5 U.S.C. § 706(2); Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own “Laws.”*, 64 *Tex. L. Rev.* 1, 13 (1985); Schwartz, *The Irresistible Force Meets The Immovable Object: Estoppel Remedies For An Agency’s Violation Of Its Own Regulations Or Other Misconduct*, 44 *Admin. L. Rev.* 653, 672 (1991).

<sup>162</sup> *United States v. Caceres*, 440 U.S. 741, 758 (1979) (Marshall, J., dissenting) (it is “central to our concept of due process, that government officials no less than private citizens are bound by rules of law”); *Wilkinson*, 27 F. Supp.2d at 57 (“the notion that Congress could authorize a state of affairs by which we all were bound by law while government officials remained free to exercise their authority arbitrarily and capriciously violates the essence of due process”).

has stated on several occasions that *Accardi* “enunciate[s] principles of federal administrative law rather than of constitutional law.”<sup>163</sup> On the other hand, it is difficult to argue with Justice Marshall’s dissent in *United States v. Caceres* that the *Accardi* line of cases could be explained only on due process grounds and not the APA because none of the *Accardi* line of cases even mentions the APA even though the APA had been enacted for close to a decade when the cases were decided.<sup>164</sup> Rather than being able to follow a clear cut rule for determining when informal agency pronouncements are binding on the agency, it is necessary in any dispute to align the facts of a given case with the courts’ application of *Accardi* in other cases.

[b] Accardi’s Application To Informal Agency Pronouncements

The Supreme Court’s willingness to apply *Accardi* to informal agency pronouncements has expanded and contracted over time with little effort to harmonize the differing views. *Accardi* itself involved validly promulgated legislative “[r]egulations with the force and effect of law” which were published in the Code of Federal Regulations.<sup>165</sup> Nothing in the opinion, however, suggests that the Court found the rules to be binding on the agency only because they were legislative rules. Indeed, the Court subsequently expanded *Accardi*’s application to internal agency manuals in *Morton v. Ruiz*. In *Morton*, the most expansive application of *Accardi* to date, the Court cited *Accardi*’s companion cases of *Vitarelli* and *Dulles* for the proposition that the Bureau of Indian Affairs was bound by a requirement in the agency’s unpublished internal manual that certain general assistance information would be published in the Federal Register.

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<sup>163</sup> Bd. of Curators of University of Mo. v. Horowitz, 435 U.S. 78, 92 and n.8 (1978); see also *Fort Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 654 (1990) (*Accardi* is a “familiar rule of administrative law”); *Vitarelli*, 359 U.S. at 547 (Justice Frankfurter in partial concurrence referring to doctrine as an “evolved rule of administrative law”).

<sup>164</sup> See also *Montilla v. U.S.*, 926 F.2d 162, 167 (2<sup>nd</sup> Cir. 1991) (“The *Accardi* doctrine is premised on fundamental notions of fair play underlying the concept of due process”).

<sup>165</sup> 347 U.S. at 265.

Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required.<sup>166</sup>

*Morton*'s expansive application of *Accardi* to an internal agency manual was, with no explanation, subsequently limited in *Schweiker v. Hansen*. In *Schweiker*, the plaintiff claimed a Social Security Administration ("SSA") employee failed to comply with the SSA's claims manual by not advising the plaintiff to file a written application for benefits. The majority held, without distinguishing *Morton*, that the SSA's "Claims Manual is not a regulation. It has no legal force, and it does not bind the SSA."<sup>167</sup>

Although the case law is inconsistent and cases can be readily found to support virtually any position, courts after *Morton* and *Schweiker* seem to offer four overlapping approaches toward the binding effect of an informal agency pronouncement. First, some courts continue to cite *Morton* as good law for the proposition that an agency is bound by its own internal guidelines.<sup>168</sup> Second, several courts acknowledge *Schweiker*'s limits on *Morton*, but stress *Morton*'s language of "[w]here the rights of individuals are affected" to find that the agency may be bound even by internal manuals or other informal guidance where the informal action affects individual rights.<sup>169</sup> Instances where the internal procedure affects individual rights is arguably

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<sup>166</sup> 415 U.S. 199, 235 (1974).

<sup>167</sup> 450 U.S. 785, 789 (1981); *see also* *Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("not all agency publications are of binding force ... and it remains to be shown that the notice provisions, which began life as unpublished staff instructions, are the kind of agency law the violation of which is remediable at all").

<sup>168</sup> *See, e.g.*, *Mass. Fair Share v. Law Enforcement Assistance*, 758 F.2d 708 (D.C. Cir. 1985) (agency bound by manual provisions governing procedures for grant funding); *Wilkinson*, 27 F. Supp.2d at 60-61 (collecting cases).

<sup>169</sup> *See Cargill, Inc. v. U.S.*, 173 F.3d 323, 340 and n.34 (5<sup>th</sup> Cir. 1999) (*Morton* not applicable because "[t]he regulations allegedly violated here do not affect individual rights by, for example, creating particular expectations and reliance interests"); *Montilla v. I.N.S.*, 926 F.2d 162, 167 (2<sup>nd</sup> Cir. 1991) (*Morton* "has continued vitality, particularly where a petitioner's rights are 'affected.'"); *Jackson v. Culinary School of Washington, Ltd.*, 27 F.3d 573, 584 and n.21 (D.C. Cir. 1994), *vacated on other grnds*, 515 U.S. 1139 (1995) ("Although *Schweiker* is terse, the decision appears to turn implicitly on the notion that the applicant's rights were not detrimentally affected by the agency's breach of its own internal rules. We recognized that the

boundless because virtually all agency action will directly or indirectly affect individuals. The limitation appears, however, to focus on compelling factual situations such as the right to obtain general assistance at issue in *Morton*. Third, some courts acknowledge the limited binding effect of informal agency actions, but will hold the agency bound to a manual or other similar agency pronouncement in those instances in which the agency intended to bind itself.<sup>170</sup> Finally, some courts and commentators reject *Morton* as an aberration or cite *Schweiker* as strongly limiting *Morton*.<sup>171</sup>

One final twist to the already confusing application of the *Accardi* doctrine is an exception of uncertain dimensions where the agency fails to comply with its own procedural rules. The exception recognized by the Court in *American Farm Lines v. Black Ball Freight Service* is that

it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.<sup>172</sup>

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analysis under *Morton* turned on the underlying existence of an enforceable right.”).

<sup>170</sup> *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (“Although the rules in the Personnel Manual may not qualify as binding regulations for all purposes ... [t]he Board ... treated the rule ... as binding upon it, and we defer to its judgment.”); *Chiron Corp. v. National Transp. Safety Bd.*, 198 F.3d 943-44 (D.C. Cir. 1999) (acknowledging, but not following under facts of the case, rule that “[w]hile some unpublished agency pronouncements can be binding, not every ‘piece of paper emanating from a Department or Independent Agency is a regulation. ... The general test is whether the agency intended to bind itself with the pronouncement.”).

<sup>171</sup> *Fano v. O’Neill*, 806 F.2d 1262, 1264 and n.1 (5<sup>th</sup> Cir. 1987); *See Schwartz, supra* n.161 at 674 (*Morton* is “generally regarded by scholars as one of the most unreliable of recent Supreme Court administrative law decisions”); *Davis & Pierce*, § 6.5 (*Morton* is “best understood in its unique factual context”).

<sup>172</sup> 397 U.S. 532, 539 (1970).

The *American Farm Lines* exception typically is invoked with respect to legislative rules, but courts have recognized it as applying “to agency deviations from internal guidelines not published in the Federal Register.”<sup>173</sup>

[c]     Binding Effect Of Interior / Forest Service Informal Guidance

The Forest Service’s informal guidance consists primarily of its Manual and Handbook. Agencies within Interior issue pronouncements in several informal formats. Some of the more frequently encountered Interior pronouncements include BLM’s Manual, corresponding Handbooks, and Instruction Memoranda, and the Minerals Management Service’s (“MMS”) Payor Handbook. Courts generally analyze the effect of those informal pronouncements through the lens of the APA rather than *Accardi*. That is, courts look to whether the informal pronouncement is (i) a legislative rule with the independent force and effect of law or (ii) an interpretive rule. This was, for example, the approach taken by the Ninth Circuit in *Western Radio Services Co. Inc. v. Espy*, in which the court discusses at length the effect of the Forest Service Manual and Handbook.<sup>174</sup> The court found that the Manual and Handbook did not have the force and effect of law and, therefore, was not binding on the agency because the Manual and Handbook (i) merely established guidelines, (ii) were not substantive, (iii) were not published in accordance with the procedural requirements of the APA, and (iv) were not promulgated pursuant to an independent congressional authority.<sup>175</sup>

The Ninth Circuit opinion raises the almost metaphysical issue of what import manuals, handbooks and the like assume if they are not binding on the agency. They must, of course, have

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<sup>173</sup> EPI Corporation v. Chater, 91 F.3d 143, 1996 WL 428409 (6<sup>th</sup> Cir. 1996); Port of Jacksonville v. U.S. Coast Guard, 788 F.2d 705, 709 (11<sup>th</sup> Cir. 1986).

<sup>174</sup> 79 F.3d 896 (9<sup>th</sup> Cir. 1996).

<sup>175</sup> *Id.* at 901.

some relevance or else the agency would be engaging in a meaningless exercise. The answer is that interpretive rules in the form of manuals, handbooks and other informal guidance while generally not binding on the agency are binding on agency personnel.

Of course, a rule with the force and effect of law—binding not only the agency and regulated parties, but also the courts—is by definition a substantive rule. However, a rule may lack this force and still bind agency personnel. Accordingly, an interpretive rule binds an agency’s employees, including its ALJs, but it does not bind the agency itself. ... In other words, a rule may be ‘binding’ but not, for purposes of notice and comment, ‘substantive,’ or legislative.<sup>176</sup>

This has been the IBLA’s approach on several occasions when addressing the binding effect of various Department of Interior informal publications. According to the IBLA, while binding on BLM employees,<sup>177</sup> “Instruction Memoranda and BLM Manual provisions do not have the force and effect of law and are not binding on either this Board or the public at large.”<sup>178</sup> The IBLA has taken the same approach toward the United States Geological Survey’s Conservation Division Manual and MMS Payor Handbook.<sup>179</sup> Consequently, manuals, handbooks, and similar guidance will help the regulated public understand what actions agency employees are expected to take, may assist in negotiations with those employees, may support a charge that the agency is acting arbitrarily and capriciously, but do not support an independent action for their breach.

[d] Estoppel

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<sup>176</sup> *Warder v. Shalala*, 149 F.3d 73, 82 (1<sup>st</sup> Cir. 1998) (internal quotations and citations omitted).

<sup>177</sup> *United States v. Lynn H. Grooms et al.*, 146 IBLA 289, 293, GFS (MIN) 2 (1999) (“While binding on BLM employees, the BLM Manual does not have the force and effect of law and is not binding on the Department or this Board.”); *accord*, *Beard Oil Co.*, 111 IBLA 191, 194, GFS (O&G) 107 (1989).

<sup>178</sup> *See, e.g.*, *Pamela S. Crocker-Davis*, 94 IBLA 328, 332, GFS (O&G) 129 (1986) (citing *Schweiker*);

<sup>179</sup> *Mobil Producing Texas & New Mexico, Inc.*, 115 IBLA 164, 169, GFS (O&G) 38 (1990) (“Because the CDM is not law, its provisions are not binding on the Board”); *Mustang Fuel Corp.*, 134 IBLA 1, 7 and n.8, GFS (O&G) 16 (1995) (“the MMS Payor Handbook does not have the force and effect of law enjoyed by statutes and regulations”).

Equitable estoppel—which bars the government from taking inconsistent positions to the detriment of the party invoking the doctrine—provides another possible theory for binding agencies to informal agency pronouncements.<sup>180</sup> Estoppel is extremely difficult to invoke against the government.<sup>181</sup> The standard employed typically requires (i) the government to have known the facts, (ii) the government to have intended that its conduct would be acted upon or that the party asserting estoppel had the right to believe the government so intended, (iii) the private entity to be ignorant of the facts, and (iv) the private party to rely on the government’s conduct to his injury.<sup>182</sup> Many courts and the IBLA view estoppel as an extraordinary remedy, particularly as it relates to public lands and will require some affirmative misconduct by the agency.<sup>183</sup>

Notwithstanding the high standard for invoking estoppel against the government, the IBLA has recently estopped the government on several occasions from forfeiting unpatented mining claims where the claim holder did not timely file annual assessments or similar information due to misinformation provided by BLM.<sup>184</sup> In each instance, the claim holder requested filing information and was given erroneous information in a letter or, in one case, information left on BLM’s answering machine.<sup>185</sup>

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<sup>180</sup> Several articles address the issue of estoppel against the government at length. *See, e.g.*, Laitos, Smith, Mang, *Equitable Defenses Against the Government in the Natural Resources and Environmental Law Context*, 41 *Chem. Waste. Lit. Rptr.* 604 (2001); Raven-Hansen, *supra* n. 160.

<sup>181</sup> *See* Raven-Hansen, *supra* n.160 at 3 (Justice Marshall characterizes Supreme Court view of estoppel as “we’ll know an estoppel when we see one,” although the Court has yet to see one).

<sup>182</sup> *See, e.g.*, *United States v. Georgia-Pacific Co.*, 421 F.2d 92 (9<sup>th</sup> Cir. 1970).

<sup>183</sup> 43 C.F.R. § 1810.3. Various other doctrines can be invoked to avoid estoppel claims such as that the public is presumed to know the law and that the Secretary is not bound by the acts of his subordinates.

<sup>184</sup> *See* Floyd Higgins et al, 147 IBLA 343, GFS (MIN) 22 (1999); Carl Dresselhaus et al., 128 IBLA 26, GFS (MIN) 2 (1994); *Leitmotif Mining Co., Inc.*, 124 IBLA 344, GFS (MIN) 52 (1992).

<sup>185</sup> Oral statements are not sufficient to invoke estoppel. *Id.*

[5] The Special Case Of Executive Orders

An Executive Order must be authorized either by an Act of Congress or the Constitution.<sup>186</sup> If the Executive Order is not authorized in one of these ways, it is unenforceable. In *Youngstown Sheet and Tube Co. v. Sawyer*,<sup>187</sup> for example, the Supreme Court upheld an injunction against the enforcement of an Executive Order from Harry Truman directing the Secretary of Commerce to seize the nation's steel mills and keep them running.<sup>188</sup> Truman issued this order to avert the economic and security risks associated with a pending strike by steel workers.<sup>189</sup> There was no Congressional legislation authorizing this act, but the President argued that he was authorized to take control of the steel industry under his authority as Commander in Chief, and under the grant to the President in the Constitution of "executive Power."<sup>190</sup> The Court disagreed, noting that the looming steel workers strike did not fall within the President's war powers, and that his executive powers under the Constitution quite explicitly do not include the power to legislate.<sup>191</sup> That power has been exclusively granted to Congress.

Presidents are usually able to find some statutory basis for their Executive Orders. Even so, the Executive Order must be consistent with the laws passed by Congress more generally. In *Chamber of Commerce of the United States v. Reich*, for example, the D.C. Circuit vacated an Executive Order from President Clinton requiring federal agencies to refuse to enter into

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<sup>186</sup> *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 583.

<sup>189</sup> *Id.* at 582.

<sup>190</sup> *Id.* at 587.

<sup>191</sup> *Id.* at 587-88.



contracts with any company that hires permanent replacement workers for striking workers.<sup>192</sup> The Executive Order was at least arguable authorized under the Procurement Act.<sup>193</sup> The court found, however, that the Executive Order was inconsistent with the National Labor Relations Act.<sup>194</sup> Because Congress has specifically acted in this area, Congress had preempted any authority the President might otherwise have had under the Procurement Act.<sup>195</sup> It is therefore not enough for the President to find an Act of Congress that gives him authority to issue an Executive Order. The President must also assure that his order is consistent with all the other Acts of Congress, or else his Order will be found to have been preempted. Similarly, an agency acting under an Executive Order must still comply with other Acts of Congress.<sup>196</sup>

Executive Orders are not usually reviewable. They are typically seen as part of the internal administration of the Executive branch, and therefore free from court interference.<sup>197</sup> Where, however, an Executive Order is tied closely to a specific statutory foundation, courts may step in and review the Executive Order under APA Standards.<sup>198</sup> Similarly, an Executive Order does not give private citizens a right to enforce that Executive Order, unless the Executive Order clearly states that it intends to create a private right of action.<sup>199</sup> Where, however, a party alleges

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<sup>192</sup> Chamber of Commerce of the United States v. Reich, 74 F.3d 1322, 1324-25 (D.C. Cir. 1996).

<sup>193</sup> 40 U.S.C.A. § 471 *et seq.*

<sup>194</sup> 29 U.S.C.A. § 151 *et seq.*

<sup>195</sup> 74 F.3d at 1338-39.

<sup>196</sup> Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 571-72 (D.D.C. 1986) (OMB cannot use review under Executive Order to cause delay in rulemaking beyond Congressionally imposed deadlines).

<sup>197</sup> Sur Contra la Contaminacion v. EPA, 202 F.3d 443, 449 (1<sup>st</sup> Cir. 2000); Meyer v. Bush, 981 F.2d 1288, 1295 (D.C. Cir. 1993)

<sup>198</sup> City of Carmel-by-the-Sea v. Dept. of Transportation, 123 F.3d 1142, 1166 (9<sup>th</sup> Cir. 1997) (review under APA where there is “law to apply”).

<sup>199</sup> *See, e.g.*, In re Surface Mining Regulation Litigation, 627 F.2d 1346, 1357 (D.C. Cir. 1980) (executive orders without specific foundation in congressional action are not judicially enforceable in private civil suits).

that the Executive Order is inconsistent with a statute or the Constitution, the courts will review the order.<sup>200</sup>

## **§ XX.02      CONCLUSION**

As Justice Holmes indicated in 1920, men must turn square corners when they deal with the Government. That principle has not changed. Recent cases like *Mead* and *Alaska Hunters* indicate that courts will require – at least occasionally – that the Government turn square corners when it deals with private parties, even when undertaking informal agency action.

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<sup>200</sup> *Chamber of Commerce*, 74 F.3d at 1328.