

[10th Circuit Holds That EPA May Change Tentative Interpretation of Regulation without Following Procedural Requirements of the Administrative Procedure Act](#)

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In [United States v. U.S. Magnesium](#), No. 08-4185, the 10th Circuit United States Court of Appeals addressed whether failure to comply with the notice and comment procedures of the Administrative Procedure Act (“APA”) precluded the United States Environmental Protection Agency (“EPA”) from changing its prior interpretation of an ambiguous 1991 regulation.

The lawsuit underlying the appeal concerned five waste byproducts (“the five Complaint wastes”) generated by U.S. Magnesium through its magnesium production process. The United States argued that U.S. Magnesium’s handling of these wastes did not comply with Subtitle C of the Resource Conservation and Recovery Act of 1976 (“RCRA”). U.S. Magnesium responded that the EPA previously exempted the five wastes from Subtitle C’s requirements in a prior interpretation of its own regulation, and that the EPA was precluded from changing that interpretation without first complying with the notice and comment procedures of the Administrative Procedure Act (“APA”). The district court agreed with U.S. Magnesium and granted partial summary judgment in its favor.

However, after determining that the EPA never previously adopted a “definitive” interpretation of Subtitle C, the 10th Circuit vacated the district court’s order. The 10th Circuit held that EPA remained free to change its prior tentative regulatory interpretation and issue a new interpretation without assuming APA notice and comment obligations.

Background

The final Subtitle C regulations issued by EPA in 1980 treated large volume, low risk mineral processing wastes as hazardous wastes subject to the same stringent Subtitle C requirements as other such wastes. Shortly thereafter, Congress passed the Bevill Amendment, which required EPA to determine whether it should regulate such wastes under Subtitle C or under a less stringent regime, such as Subtitle D. In response, in 1990, EPA submitted a required Report to Congress on Special Wastes from Mineral Processing, which recommended the exemption of “[p]rocess wastewater from primary magnesium processing by the anhydrous process,” though the EPA noted that its “findings” were “tentative.” Thereafter, EPA’s “[f]inal regulatory determination and final rule” in June 1991 EPA confirmed that “[p]rocess wastewater from primary magnesium processing by the anhydrous process” definitively qualified for exemption from Subtitle C and should be subject to less onerous regulatory terms, mostly under Subtitle D.

EPA did not purport, however, to interpret the phrase “[p]rocess wastewater from primary magnesium processing by the anhydrous process.”

A 1991 dispute between EPA, U.S. Magnesium, and the State of Utah regarding whether the phrase “[p]rocess wastewater from primary magnesium processing by the anhydrous process” exempted from Subtitle C all of U.S. Magnesium’s pollution-control wastes led to the underlying lawsuit in 2001.

Analysis

The 10th Circuit addressed whether EPA is precluded from pursuing its current and concededly plausible interpretation of its ambiguous 1991 regulation, under which the five Complaint wastes do not qualify as “process wastewater from primary magnesium processing by the anhydrous process,” because the Agency previously offered a different and inconsistent interpretation of that language. The EPA argued that the initial interpretation it offered in its 1990 Report to Congress was a tentative one, and that an agency need not undertake the rigors of APA notice and comment to change a merely tentative interpretation of its own rules. The court agreed with EPA, noting that even under the case law relied on by U.S. Magnesium, before an agency adopts a definitive interpretation of its own rule it remains free to hear new arguments, make adjustments, and change directions, all without having to undergo APA notice and comment. As a result, the 10th Circuit held that that EPA had not previously adopted a definitive interpretation of its 1991 rule, was free to adopt a different interpretation, and therefore vacated the district court’s order granting partial summary judgment to U.S. Magnesium.