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Matthew J. Wilshire

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Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol28/iss2/20

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38H27V

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D.C. Circuit Strikes Down EPA Guidance Document

In Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir 2000), the D.C. Circuit Court of Appeals severely limited the ability of the Environmental Protection Agency (EPA) to implement its regulations through informal (and less expensive) means such as opinions and guidance statements. In the case, several electric power companies and trade associations representing the chemical and petroleum industry challenged an EPA guidance statement interpreting Section 70.6(a)(3)(i)(B) of the 1992 regulations under Title V of the 1990 Clean Air Act. The plaintiffs claimed that the guidance document, which interpreted Section 70.6(a)(3)(i)(B) as requiring that state agencies monitor pollution levels frequently and through advanced technologies,1 was an unwarranted extension of the regulations. The EPA responded by claiming that since the guidance was not itself binding on the states, it was not subject to judicial review.

The court disagreed. Writing for a unanimous court,2 Judge Randolph held that whether the judiciary may review a legal interpretation by a federal agency depends on whether the interpretation is final and affects the rights and obligations of other parties. The court found that the guidance at issue was both final and had a significant effect on the plaintiffs and state agencies, and was thus reviewable. The court then struck down the guidance as an unreasonable interpretation of EPA regulations, holding that Title V's provision for periodic testing only requires states to test regularly, not as often as the EPA required.3 The court also held that guidance statements do not

1. The guidance document specifically stated, "Periodic monitoring is required for each emission point at a source subject to title V of the Act that is subject to an applicable requirement, such as a Federal regulation or a SIP emission limitation." EPA, PERIODIC MONITORING GUIDANCE FOR TITLE V OPERATING PROGRAMS 5 (1998).
2. Judge Henderson and Judge Williams concurred.
3. The court stated that "[n]othing on the face of the regulation or in EPA's commentary at the time said anything about giving State authorities a roving commission to pore over existing State and federal standards, to decide which are deficient, and to use the permit system to amend, supplement, alter or expand the extent and frequency of testing already provided." Appalachian Power Co. v. EPA, 208 F.3d 1015, 1026 (D.C. Cir. 2000).
receive *Chevron* style deference because they are not formal regulations.

The results of this case are disturbing on a practical and theoretical level. The court repeatedly voiced its concern that agencies could announce new burdens on state agencies without proper notice or comment through guidance statements. This concern suggests that, as a general matter, the D.C. Circuit court disfavors changes in policy through interpretive statements from federal agencies. The EPA and other agencies may thus be forced either to go through the onerous process of drafting new regulations for only minor changes in policy, or lose the deference it expects from the federal judiciary. Furthermore, the court's substantive conclusion is questionable. The regulation at issue clearly gave the EPA authority to mandate certain monitoring procedures for state agencies that did not require periodic testing, and the guidance statement merely attempted to flesh out the definition of "periodic." The court seemed to believe that the states should define the contours of the regulation, so long as they stay within the plain meaning of the text. If allowed to stand,4 *Appalachian Power* may force EPA and other agencies to produce many new regulations to ensure that its other regulations are followed both in letter and in spirit.

Matthew J. Wilshire

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4. This case has been consolidated with others on this issue and has been appealed to the United States Supreme Court.