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Public Participation and Wetlands Regulation

*Royal C. Gardner**

I.

INTRODUCTION

An administrative agency . . . is not ordinarily a representative body. . . . Its deliberations are not carried on in public and its members are not subject to direct political controls as are legislators. . . . Its knowledge is rarely complete, and it must always learn the . . . viewpoints of those whom its regulations will affect. . . . [Public] participation . . . in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford safeguards to private interests.

Final Report of the Attorney
General's Committee
on Administrative Procedure¹

The public be damned.

William Henry Vanderbilt²

The federal agencies charged with protecting the nation's wetlands under the Clean Water Act (CWA)³ have recently created the impression that they subscribe to William Henry Vanderbilt's riposte rather than the philosophy of the Attorney General's Committee. The experiences of two federal task forces seeking public input with respect to wetlands regulations confirmed this impression. Although each task force focused on different issues, the pub-

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1. *Quoted in* S. Doc. No. 248, 79th Cong., 2d Sess. (1946), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT at 19-20 (1948) [hereinafter LEGISLATIVE HISTORY OF THE APA].

2. *Quoted in* ARTHUR T. VANDERBILT II, FORTUNE'S CHILDREN 79 (1989).

3. 33 U.S.C. §§ 1251-1376 (1988).

lic meetings of both elicited similar themes.⁴ From the farmers in Louisiana⁵ to the Native Americans in Alaska,⁶ a common complaint was that the federal government, principally the Department of the Army and the Environmental Protection Agency (EPA), was altering its wetlands regulations and policies without affording the public any prior notice or opportunity to comment on the changes.

The growing perception across the country is that the bureaucrats in Washington are running amok. A 1989 interagency manual that the federal government used to demarcate the boundaries of wetlands allegedly had the effect of converting dry corn fields into regulated wetlands.⁷ An Army-EPA Memorandum of Agreement signed in February 1990, which purportedly clarified the CWA's mitigation requirements, appeared to place new, onerous restrictions on landowners.⁸ Even more galling was the process: the bureaucrats made their policy decisions in private and then inflicted their ukases onto an unsuspecting public. Not only was the process unfair, many argued, but it was unlawful as well. The bureaucrats' practices violated the Administrative Procedure Act (APA),⁹ charged the critics.

The APA is, of course, the statute that sets forth the procedures under which a federal agency may promulgate rules. Central to the

4. One task force, the Federal Interagency Committee for Wetlands Delineation, was composed of representatives from the Army, the Environmental Protection Agency (EPA), the Fish and Wildlife Service, and the Soil Conservation Service, and solicited technical comments regarding the *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* (1989). See 55 Fed. Reg. 14,997 (1990) (announcing public meeting in Baton Rouge, Louisiana); 55 Fed. Reg. 24,138 (1990) (announcing public meetings in Sacramento, California; St. Paul, Minnesota; and Baltimore, Maryland). Another interagency task force, directed by the Domestic Policy Council, held six public meetings across the country to seek public comment concerning the implementation of President Bush's "no net loss of wetlands" policy. See 55 Fed. Reg. 30,279 (1990).

5. See *Transcript of Public Meeting Concerning the Federal Manual for Identifying and Delineating Jurisdictional Wetlands* 107 (May 5, 1990) (oral statement of Martin Cancienne of Louisiana Farm Bureau Federation) [hereinafter *Baton Rouge Transcript*].

6. See 56 Fed. Reg. 8560 (1991) for a summary of the public comments received by the Domestic Policy Council Task Force.

7. FEDERAL INTERAGENCY COMMITTEE FOR WETLANDS DELINEATION, *FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS: AN INTERAGENCY COOPERATIVE PUBLICATION* (1989) [hereinafter 1989 MANUAL]. See Marianne Lavelle, *Wetlands: The New Battle Cry in Washington*, NAT'L L.J., July 23, 1990, at 24 (cover headline entitled "Even the Deserts Are Wet").

8. Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, 55 Fed. Reg. 9210 (1990) [hereinafter Mitigation MOA]. A typical critical response to the MOA was Don Young, *Wetlands Before Hospitals?*, NAT'L WETLANDS NEWSL., Mar.-Apr. 1990, at 3.

9. 5 U.S.C. §§ 551-559 (1988).

APA is its requirement that agencies give the public notice of and an opportunity to comment on proposed rules.¹⁰ Agencies, though, require some flexibility to run their daily operations; consequently, the APA provides a number of exceptions to its rulemaking requirements, most notably for interpretative rules and statements of policy.¹¹ The Army and the EPA frequently rely upon these exceptions when implementing their responsibilities under the CWA.

The CWA prohibits the point source discharge of any pollutant into waters of the United States, except as authorized by permit.¹² Section 404 of the CWA, the primary source of federal wetlands regulation, authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into "waters of the United States," a term which includes wetlands.¹³ The EPA and other resource agencies play significant roles in the permitting process.¹⁴ Most important, the EPA developed, in conjunction with the Army, the section 404(b)(1) guidelines, which contain the substantive environmental criteria relevant to permit decisions.¹⁵ The guidelines and other regulations, however, fail to address or anticipate every permit scenario, thereby requiring the agencies to interpret certain passages or clarify particular concepts. When engaging in this activity, the agencies invoke the APA's exceptions, much to the regulated community's displeasure.¹⁶

10. *See id.* § 553.

11. *Id.* § 553(b)(A).

12. 33 U.S.C. § 1311(a) (1988).

13. Section 404 refers to "navigable waters," which § 502(7) defines as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (1988). Regulations of the Corps of Engineers interpret "waters of the United States" to include wetlands. *See* 33 C.F.R. § 328 (1990).

14. The most important responsibility § 404 assigns the EPA is the requirement to develop, in conjunction with the Army, the § 404(b)(1) guidelines. 33 U.S.C. § 1344(b)(1). Additionally, the EPA and other resource agencies, such as the Fish and Wildlife Service and the National Marine Fisheries Service, review permit applications and provide the Corps with comments on environmental impacts. The Corps must fully consider these comments, but may grant a permit despite the resource agencies' concerns. Finally, § 404(c) grants the Administrator of the EPA the authority to veto the Corps' decision to issue a permit if he determines that a proposed discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas." *Id.* § 1344(c). In practice, EPA rarely exercises its veto power. As of May 9, 1991, EPA had issued only eleven final vetoes. Telephone Interview with Will Garvey, EPA Office of Wetlands, Oceans, and Watersheds (May 9, 1991).

15. 40 C.F.R. § 230 (1990).

16. *See, e.g., Effects of Wetlands Protection Regulations on Small Business: Hearings Before the Comm. on Small Business of the House of Representatives*, 102d Cong., 1st Sess. (1991) [hereinafter *House Committee Hearing*]; *Hearing on Wetlands Regulation*

Much of the controversy surrounding the agencies' use of these exceptions flows from misunderstandings of the CWA's section 404 program and misinterpretations of the APA. This is to be expected, however, given the regulatory jungle the section 404 program spawned and the courts' inconsistent decisions regarding the necessity of the APA's notice and comment provisions. This article attempts to remove the underbrush from both statutes. First, the article will examine the APA and its rulemaking exceptions and provide a relatively straightforward explanation of these exceptions: an agency's pronouncement may qualify as an interpretative rule or statement of policy only if the agency does not intend it to have the force of law; the impact of the pronouncement is irrelevant in determining the applicability of the APA's exceptions. The article will then review the methods by which the Army and the EPA provide their field operatives guidance concerning the section 404 program. After examining those methods in the context of the APA's rulemaking exceptions, the article concludes that agencies have the legal authority to issue such guidance without first submitting it to public review.

II.

THE ADMINISTRATIVE PROCEDURE ACT AND INFORMAL RULEMAKING

Congress intended the APA, enacted in 1946, to constrain the legislative functions of federal agencies by requiring public participation when an agency engages in rulemaking.¹⁷ Rulemaking is the process by which an agency formulates, amends, or repeals a rule.¹⁸ The APA broadly defines the term "rule" as "the whole or a part of

Before the Senate Subcomm. on Energy and Water Development, 102d Cong., 1st Sess. (1991).

Indeed, Congress responded to the public's ire by prohibiting the Corps from expending any funds in connection with the 1989 Manual in fiscal year 1992. *See Energy and Water Development Appropriations Act of 1992, Pub. L. No. 102-104, 105 Stat. 510, 518 (1991).* As a result of this Act, the Corps immediately returned to using its 1987 Manual for wetlands delineations, a guidance document that was also produced without public notice or comment. *See Memorandum of John P. Elmore, Wetlands Delineation and the 1992 Energy and Water Development Appropriations Act (Aug. 23, 1991).* For a further discussion of recent developments related to wetlands delineation manuals, see *infra* note 215.

17. *See LEGISLATIVE HISTORY OF THE APA, supra* note 1, at 19. Somewhat ironically, Congress effectively delegates broad lawmaking authority to administrative agencies when it refuses to confront and resolve difficult issues by passing vaguely worded statutes. *See JOHN ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131-32 (1980).

18. 5 U.S.C. § 551(5) (1988).

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.”¹⁹ This definition captures a host of agency actions, from internal memoranda to published regulations.

The APA recognizes three kinds of rulemaking. First, an agency may engage in formal or “on the record” rulemaking, which involves public participation in an evidentiary hearing.²⁰ Second, agencies may adopt or amend rules through informal rulemaking, which requires a public notice and comment process.²¹ Finally, through a number of exceptions to informal rulemaking, the APA permits agencies to issue rules with no public participation other than that which the agency chooses for its own reasons.²²

Section four of the APA prescribes the method by which an agency can alter its rules through notice and comment procedures. The agency must first publish a notice of proposed rulemaking in the *Federal Register*, including either the terms of the proposed rule or a description of its substance.²³ The agency then must allow the public an opportunity to comment on the proposed rule.²⁴ The comment period may be as brief as fifteen days but, as a practical matter, is generally longer.²⁵ After considering the public’s input, the agency may promulgate a final rule and, in doing so, must explain the rule’s basis and purpose.²⁶ A final rule can become effective thirty days after its publication in the *Federal Register*.²⁷

19. *Id.* § 551(4).

20. *Id.* §§ 556-57.

21. *Id.* § 553.

22. *Id.* § 553(b). An agency need not provide the public notice of or an opportunity to comment on interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or when the agency determines that “good cause” exists to dispense with public participation. *Id.*

23. *Id.* The notice should also include a statement regarding the nature of the rulemaking procedure and refer to the legal authority that authorizes the proposed rule. *Id.*

24. *Id.* § 553(c). The public may also request a hearing concerning the proposed rule; however, the agency need not grant that request in an informal rulemaking procedure. *Id.*

25. Although the APA does not mention a minimum comment period, the Federal Register Act indicates that generally fifteen days’ notice provides sufficient opportunity to be heard. 44 U.S.C. § 1508 (1988).

26. 5 U.S.C. § 553(c) (1988).

27. *Id.* § 553(d). This subsection provides that interpretative rules, statements of policy, and substantive rules that grant an exemption or relieve a restriction may be effective immediately. In addition, the agency may implement a final rule immediately if “good cause” exists. *Id.*

Agencies will occasionally publish “interim rules” or “interim final rules.” These

Requiring an agency to employ these procedures each time it issues a statement that implements, interprets, or prescribes law or policy or that describes the agency's organization, procedure, or practice would be unduly burdensome.²⁸ Congress intended section four of the APA to apply only to the making of substantive or legislative rules.²⁹ Accordingly, Congress crafted a number of exceptions to section four's rulemaking requirements.³⁰ The two most important, and the ones upon which this article focuses, are those applicable to "interpretative rules" and "general statements of policy." Agencies may issue these pronouncements without providing the public any notice or opportunity to comment.³¹

Congress created these exceptions for four principal reasons. First, Congress wanted to encourage agencies to adopt rules such as interpretative rules and policy statements.³² These rules can inform the public of agency practices, facilitate planning within the agency, and promote uniformity and consistency in agency decisions.³³ Requiring informal rulemaking for these pronouncements, with the attendant delays, would frustrate agency initiatives. Second, recognizing that these rules varied greatly in their content, Congress deemed it "wise to leave the matter of notice and public procedures to the discretion of the agencies concerned" and not mandate it as a matter of law.³⁴ Third, Congress noted that the APA allows interested parties to petition for the reconsideration of interpretative

rules are effective immediately, but the agencies often solicit public input before issuing a final rule. See OFFICE OF THE FEDERAL REGISTER, DOCUMENT DRAFTING HANDBOOK 40 (1986). Unless the rule fits an exception under § 4 of the APA or unless Congress or a court directs the agency to develop interim rules, such a practice violates the APA's requirement that the agencies afford the public an opportunity to comment on legislative rules prior to their issuance and effective date.

Recently, Congress provided for a modified version of informal rulemaking, a negotiated rulemaking procedure affectionately known as "reg neg." Negotiated Rulemaking Act of 1990, 5 U.S.C.A. §§ 581-590 (West Supp. 1991). "Reg neg" permits agencies engaged in informal rulemaking to promulgate rules through a consensus process in which identifiable interests participate in negotiations. See Marshall J. Breger, *Amendments to Procedure Act Encourage Agencies to Use ADR*, NAT'L L.J., Mar. 4, 1991, at 22.

28. Some informal rulemakings can take up to ten years to complete. See *infra* text accompanying notes 157-58.

29. LEGISLATIVE HISTORY OF THE APA, *supra* note 1, at 19 (Informal rulemaking procedures apply only to "substantive rules, which involve true administrative legislation.").

30. See *supra* note 22 for a list of exceptions.

31. 5 U.S.C. § 553(b)(A) (1988).

32. LEGISLATIVE HISTORY OF THE APA, *supra* note 1, at 18.

33. See *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974).

34. LEGISLATIVE HISTORY OF THE APA, *supra* note 1, at 18.

rules and statements of policy.³⁵ Finally, Congress observed that because interpretative rules are merely interpretations of statutory provisions and do not have the force of law, they are therefore subject to greater judicial review than substantive or legislative rules.³⁶

The dilemma for agencies, however, is how to distinguish between substantive or legislative rules, which require notice and comment, and interpretative rules or statements of policy, which do not. The issue is simple when Congress directs an agency to promulgate regulations; the resulting agency pronouncement is ordinarily a substantive rule.³⁷ In the absence of congressional direction, the *Attorney General's Manual on the APA*,³⁸ a contemporaneous construction of the statute, offers initial guidance.³⁹ It notes that substantive or legislative rules are rules that have the force of law and narrowly limit administrative discretion.⁴⁰ The Manual explains that interpretative rules, on the other hand, are statements issued by an agency to advise its staff and the public of the agency's construction of the statutes and rules it administers.⁴¹ The Manual describes general statements of policy as statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.⁴² Neither statements of policy nor interpretative rules carry the force of law.⁴³

Applying these platitudes to concrete circumstances proved difficult. How, for example, should a court treat an agency statement that interprets a statute or regulation but narrowly limits adminis-

35. *Id.* 5 U.S.C. § 553(e) (1988) states that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

36. LEGISLATIVE HISTORY OF THE APA, *supra* note 1, at 18. See, e.g., *Batterton v. Francis*, 432 U.S. 416, 425-26, 425 n.9 (1977).

37. See *Batterton*, 432 U.S. 416, 425 (1977).

38. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) [hereinafter ATTORNEY GENERAL'S MANUAL].

39. The Supreme Court has observed that the courts have deferred to discussions contained in the Attorney General's Manual "because of the role played by the Department of Justice in drafting the legislation . . ." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978). See also *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) ("[A]n administrative 'practice has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' ") (quoting *Norwegian Nitrogen Product Co. v. United States*, 288 U.S. 294, 315 (1933)).

40. ATTORNEY GENERAL'S MANUAL, *supra* note 38, at 30 n.3.

41. *Id.*

42. *Id.*

43. *Id.* As a technical matter, a substantive or legislative rule adopted without satisfying the APA's notice and comment requirements cannot have the force of law either. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979).

trative discretion as a result? The case law, to be charitable, is less than consistent. Reconciling the cases is a Herculean task akin to cleaning out the Augean stables.⁴⁴ Generally, however, courts rely upon one of two somewhat contradictory approaches to differentiate between rules requiring notice and comment and those that do not.⁴⁵ Some courts have adopted the "substantial impacts" test, which examines the consequences of an agency's action on the public.⁴⁶ Other courts subscribe to the "force of law" test, considering whether the agency intended its action to have the force of law.⁴⁷ As we shall see, the latter approach is more consistent with the language of the APA.

A. *Statements of Policy: Substantial Impacts Test*

Courts often discuss statements of policy in the negative. Policy statements may not establish "binding norms."⁴⁸ They may not unduly curtail a decisionmaker's discretion.⁴⁹ Most important, from the perspective of a substantial impacts test, statements of policy cannot substantially affect the rights or obligations of persons subject to the agency's jurisdiction.⁵⁰

A classic example of the substantial impacts approach can be found in the Court of Appeals for the District of Columbia's 1974 decision in *Pickus v. United States Board of Parole*.⁵¹ The *Pickus* court considered a challenge to regulations used in federal parole decisions that were issued by the Board of Parole without public notice and comment. The parole board's regulations specifying certain criteria relevant to the parole decision were substantive in nature, the court concluded, and therefore violated the APA.⁵² The court reasoned that the parole selection criteria could not be "a gen-

44. Cf. EDITH HAMILTON, MYTHOLOGY 232 (1942).

45. See Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 531 (1977); William T. Mayton, *A Concept of a Rule and the "Substantial Impact" Test in Rulemaking*, 33 EMORY L.J. 889, 899-910 (1984).

46. See *infra* notes 49-60 and 106-16 and accompanying text.

47. See *infra* notes 61-76 and 117-24 and accompanying text.

48. E.g., *American Bus Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980). Courts frequently invoke the concept of a "binding norm" as a talisman, but rarely describe what the term actually means. As a tool for distinguishing between rules requiring notice and comment and those that do not, the "binding norm" concept is singularly unhelpful.

49. *Id.*

50. See KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 6:30, at 594 (2d ed. 1978).

51. 507 F.2d 1107 (D.C. Cir. 1974).

52. *Id.* at 1114.

eral statement of policy if it substantially affects the rights of persons subject to agency regulations.”⁵³ The court determined that the first set of regulations, which consisted of nine general categories of factors and thirty-two subcategories, was “calculated to have a substantial effect on ultimate parole decisions.”⁵⁴ The court stated that the second set was similar to a formula and had “an even greater impact on an inmate’s chances for parole.”⁵⁵ Because the regulations had “significant consequences,” the court held that the Board of Parole needed to submit them for public review prior to their adoption.⁵⁶

A fundamental weakness of the substantial impacts test is that it does not flow from any provision of the APA. In listing the exceptions to informal rulemaking, the APA makes no distinction between statements of policy that have substantial impacts and those that have inconsequential impacts. An impacts analysis necessarily makes such a distinction; this judicial grafting constrains agencies further than the APA requires. The United States Supreme Court rejected such a course in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* when, in a different context, it held that courts may not impose on agencies more procedures than the APA mandates.⁵⁷

53. *Id.* at 1112. The court opined that “[t]he interested public should have an opportunity to participate . . . before rules having such substantial impact are promulgated.” *Id.*

54. *Id.* at 1112-13.

55. *Id.* at 1113.

56. *Id.*

57. 435 U.S. 519, 524 (1978); see also *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981) (holding OSHA “cotton dust” standard valid). *American Textile Mfrs.* stands for the proposition that the Supreme Court “will not impose requirements on rule making in addition to those demanded by Congress.” BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION* 170 (1990).

In *Vermont Yankee*, an environmental group challenged the Atomic Energy Commission’s (AEC’s) rule concerning the environmental effects associated with the uranium fuel cycle. The agency issued the rule after accepting written comments and holding a public hearing. This process satisfied any informal rulemaking requirements but fell short of satisfying formal rulemaking requirements because no discovery or cross-examination was permitted. The AEC, however, had the unquestioned authority to promulgate such a rule merely through the notice and comment process. 435 U.S. at 535 n.13. Despite this fact, the D.C. Court of Appeals “struck down the rule because of the perceived inadequacies of the procedures employed in the rulemaking proceedings.” *Id.* at 541.

The Supreme Court strongly rejected this imposition of procedural requirements beyond the APA’s dictates. The Court observed that the APA:

established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but

Although *Vermont Yankee*'s pronouncement should have been the death knell of the substantial impacts test,⁵⁸ it survived in a slightly different form. After *Vermont Yankee*, most courts employing an impacts analysis shied away from expressly considering a rule's consequences and instead focused upon two factors: whether the purported statement of policy imposed any rights or obligations upon the public and whether it denied agency decisionmakers' discretion in future determinations.⁵⁹

Leaving aside the issue of whether rights may be "imposed" rather than granted, it is clear that the discretion factor may in many situations subsume the rights and obligations factor. If an agency pronouncement allows a decisionmaker to exercise discretion in individual cases, then that pronouncement does not, by itself, grant rights or impose obligations. Indeed, at least one court has been frank enough to recognize that this two-criteria formulation may in fact be reduced to a single element: discretion.⁶⁰

B. *Statements of Policy: Force of Law*

Like the substantial impacts test, the force of law test examines a pronouncement's impact, but focuses upon how an agency intends to use the statement in future proceedings.⁶¹ Under this analysis, statements of policy and substantive rules are distinguished by "the different practical effect that these two types of pronouncements

reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare.

Id. at 524 (footnote omitted). The Court also expressly rejected the argument that the APA merely established minimum procedural requirements and that courts were therefore free to impose additional burdens when rules involved "complex or technical factual issues or 'Issues of Great Public Import.'" *Id.* at 545. Accordingly, courts may not require procedures in excess of the APA's requirements even if a rule is of great concern to the public. Obviously, rules that substantially impact upon the public may be characterized as "Issues of Great Public Import."

58. See Kathleen Taylor, Note, *The Substantial Impact Test: Victim of the Fallout from Vermont Yankee*, 53 GEO. WASH. L. REV. 118 (1985). But see KENNETH C. DAVIS, 1989 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE § 6:35-39, at 216-21 (1989) (arguing that *Vermont Yankee* is not good law).

59. *E.g.*, *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987); *Community Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987); *American Bus Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980).

60. *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988).

61. *E.g.*, *Community Nutrition*, 818 F.2d at 952 (Starr, J., dissenting).

have in subsequent administrative proceedings.”⁶² A substantive rule establishes a standard of conduct and, when properly adopted, has the force of law.⁶³

As if to illustrate the difficulties of consistently applying the statement of policy exception, the seminal force of law case, *Pacific Gas & Electric Co. v. Federal Power Commission*, occurred in the same year as *Pickus*, and in the same circuit.⁶⁴ In *Pacific Gas*, the Court of Appeals for the District of Columbia held that the Federal Power Commission’s Order No. 467, which set priorities for deliveries of natural gas to pipeline companies during a natural gas shortage, was exempt from the APA’s notice and comment requirements because the agency did not intend it to have the force of law.⁶⁵

The *Pacific Gas* court suggested that only a rule with the force of law could be finally determinative of issues and rights; a statement of policy could not.⁶⁶ The court stated that in future administrative hearings an “agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy.”⁶⁷ An agency must be able to justify its decisions, the court reasoned, as if the statement of policy did not exist.⁶⁸ If an agency intended or treated a purported statement of policy as if it were a rule with the force of law, then the ersatz statement of policy should not qualify as an exception to the APA’s rulemaking requirements.

Applying these principles to Order No. 467, the *Pacific Gas* court noted that the agency labeled the document “Statement of Policy” and that the agency had not attempted to apply it as if it had the force of law.⁶⁹ The court stressed that the pipeline companies would have an opportunity to challenge the merits of the plan and to show that the plan should not apply in particular instances.⁷⁰ Because Order No. 467 did not have a “final, inflexible impact” on the pipeline companies, the court concluded that it indeed qualified as a statement of policy.⁷¹

62. *Pacific Gas & Elec. Co. v. Federal Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974).

63. *Id.*

64. *Compare Pickus v. United States Board of Parole*, 507 F.2d 1107, 1112-13 (D.C. Cir. 1974) with *Pacific Gas*, 506 F.2d at 38-39.

65. *Pacific Gas*, 506 F.2d at 45.

66. *Id.* at 38.

67. *Id.*

68. *Id.*

69. *Id.* at 39.

70. *Id.* at 40.

71. *See id.* at 41.

The dispositive factor in the force of law approach is the agency's intent.⁷² A court can examine three factors to arrive at an agency's intent. Courts can first assess the agency's own characterization of the pronouncement.⁷³ Perhaps the most forthright statement regarding this factor was crafted by then Judge Scalia when he observed that the "real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations"⁷⁴ Most courts decline to defer that heavily to an agency's own label and will concentrate more on the pronouncement's actual language.⁷⁵ Finally, courts will also review how agencies have treated the pronouncement in practice.⁷⁶ The content of the pronouncement and how the agency actually uses it are better indicia of intent than an agency's label, which certainly may be self-serving.

C. Community Nutrition Institute v. Young: *Substantial Impacts v. Force of Law*

This brief overview of the two different approaches suffers, of course, from oversimplification and artificiality. A court might combine the two approaches and ostensibly apply either both or portions of them.⁷⁷ More often, a court will recite passages that reflect the underlying philosophies of both substantial impacts and force of law cases, yet concentrate on the former.⁷⁸ Even more con-

72. See Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 389-90.

73. *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 39 (D.C. Cir. 1974).

74. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986).

75. See *Community Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (noting that courts give far greater weight to the language actually used by the agency); *id.* at 951 n.1 (Starr, J., dissenting) (noting that an agency's characterization is not entitled to "overwhelming" deference).

76. *Pacific Gas*, 506 F.2d at 41. See also *Public Citizen, Inc. v. United States Nuclear Regulatory Comm'n*, 940 F.2d 679, 682 (D.C. Cir. 1991) ("Where the language and context of a statement are inconclusive, we have turned to the agency's actual applications.").

77. See, e.g., *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987) (holding that Health and Human Services directives and contracts constituted "mere procedural rules or general statements of policy that do not substantially alter the rights or interests of regulated hospitals"). The *American Hospital* court valiantly attempted to reconcile the case law surrounding the APA's exceptions. *Id.* at 1045-48.

78. See, e.g., *American Bus Ass'n v. United States*, 627 F.2d 525 (D.C. Cir. 1980) (holding that the Interstate Commerce Commission's pronouncement regarding motor carriage transportation to and from Canada was not a general statement of policy). *American Bus* discusses *Pacific Gas* but fails to refer to its force of law standard. In *Batterton v. Marshall*, the D.C. Circuit noted that statements of policy cannot carry the

fusing, both approaches share common language; to some extent, each speaks of "binding norms"⁷⁹ and "rights and obligations."⁸⁰ Despite this conundrum, real differences do exist between the approaches. A recent case before the Court of Appeals for the District of Columbia, *Community Nutrition Inst. v. Young*,⁸¹ highlights the distinctions.

In *Community Nutrition*, a consortium of organizations and private individuals challenged the method by which the Food and Drug Administration (FDA) regulated unavoidable food contaminants.⁸² The Food, Drug and Cosmetic Act (FDCA)⁸³ requires the FDA to limit the amount of "poisonous or deleterious substances" found in food; in response, the FDA established "action levels."⁸⁴ The action levels, which were not subjected to public notice and comment, expressed the FDA's opinion of the maximum level of contaminants a certain food could contain.⁸⁵ If a food producer sold a product that contained contaminants over the action level, the FDA could subject the producer to enforcement proceedings for selling adulterated food.⁸⁶ The FDA admitted, however, that at enforcement proceedings it would be required to show that the food was "adulterated" within the meaning of the FDCA.⁸⁷ Merely establishing that a food producer failed to comply with an action level

force of law, and also implied that they cannot produce "significant effects on private interests." 648 F.2d 694, 702 (D.C. Cir. 1980). The court decided that the Department of Labor's methodology for calculating unemployment statistics was not a general policy statement because it effected "significant changes from the previous method" and left "no room for further exercise of administrative discretion." *Id.* at 706.

79. *Compare Cathedral Bluffs*, 796 F.2d at 537 (discussing "binding norm" and applying force of law test) and *Telecommunications Research & Action Center v. Federal Communications Comm'n*, 800 F.2d 1181, 1186 (D.C. Cir. 1986) (same) with *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (discussing "present-day binding effect" and examining impact of rule) and *Batterton v. Marshall*, 648 F.2d at 702 (discussing "'non-binding' rules" and examining impact of rule).

80. *Compare Cathedral Bluffs*, 796 F.2d at 537 (statements of policy not finally determinative of "issues or rights") and *Telecommunications Research*, 800 F.2d at 1186 (same) with *McLouth Steel*, 838 F.2d at 1320 (statement of policy does not impose rights and obligations) and *Batterton v. Marshall*, 648 F.2d at 701-02 (same).

81. 818 F.2d 943 (D.C. Cir. 1987).

82. *Id.* at 945.

83. 21 U.S.C. § 346 (1988).

84. *Community Nutrition Inst. v. Young*, 818 F.2d 943, 945 (D.C. Cir. 1987).

85. *Id.*

86. *Id.*

87. *Id.* at 948. The majority noted that "in a suit to enjoin shipment of allegedly contaminated corn, it appears that [the] FDA would be obliged to prove that the corn is 'adulterated,' within the meaning of the FDC Act, rather than merely prove non-compliance with the action level." *Id.*

would not prove a violation of the FDCA.⁸⁸

Applying a substantial impacts test, the majority held that despite the fact that the action levels did not have the force of law, the FDA had run afoul of the APA's rulemaking requirements.⁸⁹ After reciting a litany of cases that bemoan the fine dividing line between substantive rules and policy statements,⁹⁰ the *Community Nutrition* court provided two criteria upon which it based its decision. The court explained it would examine whether the action levels imposed any "rights and obligations" and whether the action levels left the FDA's decisionmakers "free to exercise discretion."⁹¹

The *Community Nutrition* majority emphasized that the FDA indicated, through formal and informal statements, that it would consider food with contaminants above the relevant action level to be adulterated.⁹² The FDA's regulations, for example, stated that the action levels defined the appropriate level of contaminants.⁹³ Furthermore, a food producer that wanted to market the "adulterated food" needed to secure an exception from the FDA.⁹⁴ Accordingly, the majority found that the action levels affected food producers' rights and obligations.⁹⁵

The fact that the action levels narrowly limited the FDA's enforcement discretion also troubled the court.⁹⁶ The court noted that the FDA could not "appropriately prosecute a producer for shipping corn" that contained less than twenty parts-per-billion of aflatoxin, the applicable action level.⁹⁷ This restriction on enforcement discretion, coupled with the action levels' impact on food producers' rights and obligations, led the court to hold that the action

88. *Id.*

89. *See id.* at 949.

90. *Id.* at 946 (noting that courts have described the distinction as "'tenuous,' 'fuzzy,' 'blurred,' and, perhaps most picturesquely, 'enshrouded in considerable smog.')" (citations omitted).

91. *Id.* The majority relied upon *American Bus Ass'n v. United States*, 627 F.2d 525 (D.C. Cir. 1980). *See supra* note 78.

92. *Community Nutrition Inst. v. Young*, 818 F.2d. 943, 947 (D.C. Cir. 1987).

93. *Id.* at 947 & n.7 (citing 21 C.F.R. § 109.4 (1986)).

94. *Id.* at 947.

95. *Id.*

96. *Id.* at 948. A more recent D.C. Circuit case, however, suggests that agency directives and manuals influencing an agency's "enforcement strategy" are excepted from the APA's notice and comment requirements. *Air Transport Ass'n of America v. Department of Transp.*, 900 F.2d 369, 377 (D.C. Cir. 1990), *vacated without opinion and remanded to consider the question of mootness*, 111 S. Ct. 944 (1991).

97. *Community Nutrition*, 818 F.2d at 948. Aflatoxins, the court explained, "are by-products of certain common molds that grow on various crops, including corn." *Id.* at 945 n.1.

levels were substantive rules.⁹⁸

The *Community Nutrition* dissent, authored by then Judge Starr, applied a force of law analysis and reached a different conclusion. Judge Starr emphasized that Congress provided exceptions to the APA because not all agency statements “rise to the dignity of law.”⁹⁹ Acknowledging that such statements could be of considerable importance and have “a direct effect on the regulated community,” he nevertheless contended that these factors were irrelevant for purposes of determining whether the statement violated the APA.¹⁰⁰ In Judge Starr’s view, the critical question was whether the agency intended the statement to have the force of law in future administrative proceedings.¹⁰¹ The proper inquiry was whether “the agency [must] merely show that the pronouncement has been violated or . . . if its hand is called, [must] show that the pronouncement itself is justified in light of the underlying statute and facts.”¹⁰²

In an enforcement proceeding, the FDA must prove that the food is adulterated without regard to the action levels. Judge Starr observed that because the FDA can only establish its case by offering “scientific or other probative evidence to support its contention that the product is adulterated,” the action levels have “no ‘force’ at all.”¹⁰³ Accordingly, he concluded that the FDA need not promulgate the action levels through a public notice and comment process.¹⁰⁴

In sum, *Community Nutrition* represents a clear example of the differences between the substantial impacts and force of law tests. A substantial impacts test focuses upon whether a statement of policy has an effect or impact upon the regulated public, while the force of law approach is more concerned with whether the agency’s pronouncement is *finally* determinative of rights and obligations. *Community Nutrition* is also an example of why the case law regarding the APA’s exceptions is so muddled. Both the majority and dissent occasionally discuss statements of policy and interpretative rules together.¹⁰⁵ While statements of policy and interpretative

98. *Id.* at 949.

99. *Id.* at 951 (Starr, J., dissenting).

100. *Id.*

101. *Id.* at 952 (citing *Pacific Gas & Elec. Co. v. Federal Power Comm’n*, 506 F.2d 33 (D.C. Cir. 1974)). See *supra* notes 64-71 and accompanying text for a discussion of *Pacific Gas*.

102. *Community Nutrition*, 818 F.2d at 952 (Starr, J., dissenting).

103. *Id.*

104. *Id.* at 953.

105. See *id.* at 946 (majority opinion), 951-52 (Starr, J., dissenting).

rules share the common characteristic of not reaching the level of a substantive rule requiring notice and comment rulemaking, there are important difference between the two, which, as we shall see, courts often fail to recognize.

D. *Interpretative Rules: Substantial Impacts*

Courts generally agree that interpretative rules are agency statements that clarify existing law or remind the public of pre-existing obligations.¹⁰⁶ Beyond that blackletter description, the consensus breaks down. Courts are divided about how much weight, if any, to accord to an interpretative rule's impact on the public.¹⁰⁷

Significantly, since the Supreme Court's decision in *Vermont Yankee* in 1978, most courts have eschewed relying expressly upon an interpretative rule's impact to determine whether the agency should submit the statement to the notice and comment process.¹⁰⁸ Indeed, courts frequently state that "the mere fact that a rule may have a substantial impact 'does not transform it into a legislative rule.'"¹⁰⁹ Yet, at the same time, these courts assert that substantive or legislative rules "grant rights, impose obligations, or produce other significant effects on private interests."¹¹⁰ The emphasis on a rule's effect reintroduces the specter of the substantial impacts test.

A court might interject an impacts analysis even when purporting to apply a force of law approach. For example, in *Caribbean Produce Exchange, Inc. v. Secretary of Health & Human Services*, the Court of Appeals for the First Circuit reiterated its position that the impact of an interpretative rule is a factor courts should consider when deciding whether the agency intended the particular pronouncement to have the force of law.¹¹¹ In *Caribbean Produce*, the

106. *E.g.*, *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985).

107. *Compare Cabais v. Egger*, 690 F.2d 234, 237 (D.C. Cir. 1982) (impact of interpretative rule irrelevant) with *Jerri's Ceramic Arts v. Consumer Product Safety Comm'n*, 874 F.2d 205, 208 (4th Cir. 1989) (examining impact of rule).

108. *E.g.*, *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984); *Rivera v. Becerra*, 714 F.2d 887, 889-91 (9th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984); *see also Asimow*, *supra* note 72, at 397. Some circuits, however, continued to rely upon the substantial impacts test. *See, e.g.*, *United States Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984); *Jerri's Ceramic Arts*, 874 F.2d at 208.

109. *See American Hosp. Ass'n*, 834 F.2d at 1046 (quoting *American Postal Workers Union v. United States Postal Service*, 707 F.2d 548, 560 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984)).

110. *See id.* at 1045 (quoting *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980)).

111. 893 F.2d 3, 8 (1st Cir. 1989).

district court permanently enjoined the FDA from using its *Macroanalytical Procedures Manual* to detect impermissible spoilage in imported garlic until the manual went through public notice and comment.¹¹² Setting aside the judgment, the First Circuit remanded the case, instructing the district court to address a number of particular issues.¹¹³ The First Circuit observed that the “primary question” should be whether the manual establishes “binding norms intended to have the force of law, restraining the discretion of officials and therefore subject to the notice-and-comment procedures.”¹¹⁴ The First Circuit noted later that whether the manual had a “substantial impact” may be relevant to the determination of the agency’s intent.¹¹⁵ While the First Circuit stressed that the manual’s impact was only one consideration and not dispositive,¹¹⁶ *Caribbean Produce* shows how a court will examine a rule’s impact even when ostensibly applying a force of law test.

E. Interpretative Rules: Force of Law

In contrast to the First Circuit’s instructions in *Caribbean Produce*, a strict force of law analysis does not consider the impact of an agency’s pronouncement when determining whether it qualifies as an interpretative rule. Instead, courts using this approach focus on two factors. First, they consider whether the agency’s pronouncement clearly interprets a pre-existing statute or regulation that the agency is attempting to explain or clarify.¹¹⁷ Of course, if Congress has specified that the agency must promulgate regulations to implement its statutory responsibilities, then the agency is generally bound to proceed with a public notice and comment process.¹¹⁸ Second, courts ask whether the agency intended the pronouncement to have the force of law.¹¹⁹ To determine this, courts will examine the agency’s characterization of its action, but will focus more on the pronouncement’s language and the manner in which the agency

112. *Id.* at 5.

113. *Id.* at 7-8.

114. *Id.* at 7.

115. *Id.* at 8.

116. *Id.*

117. See *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (EPA rule interpreting § 207(c) of the Clean Air Act), *cert. denied*, 471 U.S. 1074 (1985); *Chemical Waste Management v. United States Environmental Protection Agency*, 869 F.2d 1526, 1534 (D.C. Cir. 1989) (EPA rule clarifying Resource Conservation and Recovery Act regulations).

118. See *Batterton v. Francis*, 432 U.S. 416, 425 (1977).

119. See *Asimow*, *supra* note 72, at 389-90.

implements it.¹²⁰

A recent Sixth Circuit case illustrates the force of law approach with respect to interpretative rules. In *Friedrich v. Secretary of Health & Human Services*, the agency issued, without public notice and comment, a national coverage determination that stated that chelation therapy was not “reasonable and necessary” for the diagnosis or treatment of a claimant’s atherosclerosis for purposes of the Medicare Act.¹²¹ The Sixth Circuit noted that the national coverage determination interpreted “the statutory language ‘reasonably and necessary’ as applied to a particular medical service or method of treatment.”¹²² Furthermore, the court concluded that the agency did not intend to create new law with the national coverage determination.¹²³ Accordingly, despite the fact that this national coverage determination had an immediate effect on the public, the court held that the agency complied fully with the APA.¹²⁴

F. *Reconciling the Substantial Impacts and Force of Law Tests with the Language of the Administrative Procedure Act*

By enacting the APA, Congress clearly sought to limit the ability of federal agencies to promulgate certain rules without public notice and comment. In choosing the method most appropriate to achieve that goal, Congress set forth particular procedures that federal agencies must comply with when engaging in rulemaking,¹²⁵ but also provided that a number of rules are excepted from these requirements.¹²⁶ Courts have since struggled with the difficult task of distinguishing between rules requiring notice and comment and rules that are excepted. The logical starting point for the inquiry is the language of the APA itself.

Congress, in crafting the APA’s exceptions, stated that agencies need not submit “general statements of policy” and “interpretative rules” through a public notice and comment process.¹²⁷ Significantly, Congress did not frame the exceptions in terms of “substantive” and “non-substantive rules.” Thus, the plain language of the APA indicates that the proper inquiry is not whether a particular

120. See *supra* notes 72-76 and accompanying text.

121. 894 F.2d 829, 830 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 59 (1990).

122. *Id.* at 837.

123. *Id.*

124. See *id.* at 836 (“The extent of the impact is not an indicative factor in our search for the proper characterization of the national coverage determination.”).

125. 5 U.S.C. § 553 (1988).

126. *Id.* § 553(b)(A)-(B).

127. *Id.* § 553(b)(A).

agency pronouncement is a substantive rule, but whether the pronouncement qualifies as a statement of policy or an interpretative rule.¹²⁸ While concededly a subtle distinction, it is nevertheless crucial.

Courts justify their examination of the impact of agency pronouncements by focusing on the concept that substantive rules are not excepted from informal rulemaking requirements. Instead of concentrating on the APA's language, courts sometimes observe that Congress intended to require agencies to submit substantive rules to the public.¹²⁹ A court employing this approach will reason that substantive rules are rules of substance: they greatly affect the public's rights and obligations, encode substantive value judgments upon the public's behavior, and may be quite controversial.¹³⁰ Accordingly, a court deems it proper to examine the impact of an agency's pronouncement.¹³¹

This reasoning is flawed in two respects. First, such an approach assumes incorrectly that the category of substantive rules includes all rules of substance and all rules that have a substantial impact on the public. While the APA lacks a definition of substantive rules, its legislative history and the Attorney General's Manual indicate that substantive rules encompass all legislative rules, that is, rules that have the force of law or that are treated by agencies to have the force of law.¹³² The category of rules that have the force of law or are intended to have the force of law is not coextensive with the category of rules that have substantial impacts.¹³³ The latter is necessarily broader than the former.

Second, and more importantly, courts using an impacts approach ignore the APA's language.¹³⁴ These courts often note that the APA's exceptions are limited and only narrowly countenanced.¹³⁵

128. See DAVIS, *supra* note 50, § 7:20, at 97.

129. See *Air Transport Ass'n of America v. Department of Transp.*, 900 F.2d 369, 376 (D.C. Cir. 1990), *vacated without opinion and remanded to consider the question of mootness*, 111 S. Ct. 944 (1991).

130. See *id.*

131. See *id.*

132. See LEGISLATIVE HISTORY OF THE APA, *supra* note 1, at 19; ATTORNEY GENERAL'S MANUAL, *supra* note 38, at 30 n.3.

133. The concept that all rules with substantial impacts are not substantive rules requiring notice and comment should not be confused with the issue of whether rules with substantial impacts have the force of law. An agency issues rules with the force of law only when the agency satisfies the APA and when Congress has delegated that power to the agency. See DAVIS, *supra* note 50, § 7:17, at 78.

134. See Asimow, *supra* note 72, at 399-400 (substantial impacts test lacks "solid foundation in the APA").

135. *E.g.*, *Batterton v. Marshall*, 648 F.2d 694, 704 (D.C. Cir. 1980).

In deciding what procedures to require of agencies, however, Congress expressly provided for exceptions to informal rulemaking. Although Congress may have limited the APA's exceptions to a small number, it is beyond a court's province to diminish further those exceptions. A court may not interpret the APA in such a manner so as to read the exceptions out of existence. Indeed, the Supreme Court has noted that section four of the APA generally "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures."¹³⁶ A court simply may not require rulemaking procedures in excess of the APA.

It is somewhat understandable why a court would apply a substantial impacts test and seek to impose additional procedures on agencies beyond those Congress specified in the APA. When read literally, the APA's exceptions to informal rulemaking offer agencies great latitude in implementing their responsibilities. The APA's exceptions are so broad that it appears that much of agency action is not subject to notice and comment requirements.¹³⁷ Invoking principles of equity and fairness, a court will state that the public deserves notice of and an opportunity to comment on rules that have a significant effect on its activities.¹³⁸

Nevertheless, courts applying an impacts analysis eviscerate an agency's ability to invoke the exceptions, especially with regard to interpretative rules, and therefore interpret the APA contrary to Congress's intent. Interpretative rules, by their nature, are designed to have an impact on the public. Additionally, interpretative rules are intended to limit an agency's decisionmaking discretion. If, for example, the Internal Revenue Service (IRS) interprets the term "charitable," that interpretation will certainly have an effect on the public.¹³⁹ The IRS may also reasonably expect its field personnel to employ, henceforth, that particular interpretation. Indeed, the IRS may have issued the interpretation to promote uniformity and con-

136. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

137. See DAVIS, *supra* note 50, § 6:30, at 593 (APA exemptions are "too extensive").

138. See *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 913-14 (5th Cir. 1983) (examining issue of fairness to the affected parties); see also DAVIS, *supra* note 50, § 6.31, at 597; Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 384.

139. See *Eastern Kentucky Welfare Rights Org. v. Simon*, 506 F.2d 1278, 1290 n.30 (D.C. Cir. 1974) (noting that appellees emphasize that Revenue Ruling "has a substantial impact on the availability of hospital services for the poor"), *rev'd on other grounds*, 426 U.S. 26 (1976).

sistency nationally.¹⁴⁰ The APA, by allowing for an interpretative rule exception, permits the IRS to issue its pronouncement without affording the public an opportunity to comment.¹⁴¹ A court may not eliminate an agency's prerogative, granted by Congress, to issue such rules in the absence of public notice and comment merely because the rule has a great effect on the public.

After reviewing the statutory language and the Supreme Court's opinion in *Vermont Yankee*, it is evident that use of an impacts analysis is unjustified. The question is not whether the public should participate or whether it is fair to promulgate such rules without notice and comment. Congress, by specifying exceptions to informal rulemaking, has already established a level of procedural safeguards it considers to be fair. The question is not whether the agency would benefit from public participation; as a host of commentators emphasize, public participation often leads to better rules.¹⁴² Rather, the proper inquiry, and the one to which courts should confine themselves, is whether an agency is legally mandated by the APA to proceed with informal rulemaking.

Limiting the courts to this role does not foreclose all of the public's avenues for redress. Although the public may not challenge an agency's statement of policy or interpretative rule for lack of public notice and comment, individuals aggrieved by such rules have two other remedies. The first, in accordance with section 4(e) of the APA, is to petition the agency to reconsider or repeal its pronouncement.¹⁴³ The second option is to attack the agency's action substantively. The individual may assert that the statement of policy or interpretative rule is arbitrary and capricious, an abuse of discretion, not in accordance with law, or in excess of statutory jurisdiction, authority, or limitations.¹⁴⁴ The fact that an agency's statement of policy or interpretative rule is immune from challenges alleging procedural deficiencies does not insulate it from a suit regarding its substance.

In sum, the proper inquiry for a court reviewing the applicability of the APA's exceptions is twofold. First, the court must decide whether the agency's pronouncement is a statement describing how the agency will exercise its discretion, and thus facially a general

140. See *supra* notes 32-33 and accompanying text.

141. *Eastern Kentucky*, 506 F.2d at 1290, 1290-91 n.30.

142. E.g., Asimow, *supra*, note 45, at 573-75; Peter J. Henning, Note, *An Analysis of the General Statement of Policy Exceptions to Notice and Comment Procedures*, 73 GEO. L.J. 1007, 1012 (1985).

143. 5 U.S.C. § 553(e) (1988).

144. See 5 U.S.C. § 706 (1988).

statement of policy, or whether the pronouncement clarifies or describes a particular pre-existing statute or duly promulgated regulation, thus facially qualifying as an interpretative rule. Second, if the agency's pronouncement appears to be an exception, the court must determine whether the agency intended the pronouncement to have the force of law. If the agency intended the pronouncement to have the force of law or treats it as such, then the exceptions provide no shelter for the agency's action.

III.

SECTION 404 OF THE CLEAN WATER ACT

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁴⁵ To achieve this lofty goal, the CWA proscribes the point source discharge of any pollutant, except in accordance with other provisions of the CWA.¹⁴⁶ One such provision is section 404, which allows a person to discharge dredged or fill material into waters of the United States if the Secretary of the Army, acting through the Corps of Engineers, issues a permit.¹⁴⁷ The Corps' regulations, promulgated through public notice and comment, define waters of the United States to include wetlands.¹⁴⁸

To receive a section 404 permit, an applicant must show that the proposed discharge satisfies two major regulatory requirements. First, the proposed discharge must comply with the section 404(b)(1) guidelines, the substantive environmental criteria the EPA developed in conjunction with the Army.¹⁴⁹ The guidelines provide information on unacceptable adverse impacts to the aquatic environment.¹⁵⁰ Second, the proposed discharge must pass a "pub-

145. 33 U.S.C. § 1251 (1988).

146. *Id.* § 1311(a).

147. *Id.* § 1344(a).

148. See 33 C.F.R. § 328 (1990). The Corps' regulations define "waters of the United States" to include interstate wetlands, wetlands adjacent to navigable waterbodies, and wetlands the destruction or degradation of which would affect interstate commerce. Whether these categories include all wetlands remains an open question. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 n.8 (1986). For an article contending that all wetlands have a nexus to interstate commerce, see Jerry Jackson, *Wetlands and The Commerce Clause: The Constitutionality of Current Wetland Regulation Under Section 404 of the Clean Water Act*, 7 VA. J. NAT. RESOURCES L. 307 (1988).

149. See 33 U.S.C. § 1344(b) (1988).

150. For a discussion of the § 404(b)(1) guidelines, see Royal C. Gardner, *The Army-EPA Mitigation Agreement: No Retreat From Wetlands Protection*, 20 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,337, 10,338-40 (1990).

lic interest review," as that concept is fleshed out by the Corps of Engineers' regulations.¹⁵¹

The fact that two different sets of regulations apply to a single discharge often confuses the regulated community. A proposed discharge must comply with the guidelines and must not be contrary to the public interest. If both conditions are not met, the Corps will not issue a permit.¹⁵²

Both the guidelines and the public interest review were subjected to public notice and comment, thereby satisfying the APA's rulemaking requirements.¹⁵³ Contrary to the present public impression, the agencies responsible for the section 404 program frequently give the public notice of proposed rules and provide an opportunity to comment. In 1990, for example, the Corps was involved in at least three rulemakings that affected its CWA regulatory responsibilities: historic properties,¹⁵⁴ administrative penalties,¹⁵⁵ and fees.¹⁵⁶ The rule concerning historic properties, now codified at 33 C.F.R. § 325, Appendix C, emphasizes that informal rulemaking can be an arduous procedure. The Corps initially offered Appendix C for public comment on April 3, 1980;¹⁵⁷ the final rule became effective on July 29, 1990.¹⁵⁸

While Appendix C is certainly an exceptional case, it illustrates

151. See 33 C.F.R. § 320 (1990). The public interest review is also applicable in the context of the Corps' other regulatory authorities, §§ 9 and 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401, 403 (1988), and § 103 of the Ocean Dumping Act, 33 U.S.C. § 1413 (1988). The Supreme Court has docketed a case that involves the proper scope of the public interest review. See *United States v. Alaska*, Original No. 118 (Apr. 1, 1991) (granting motion to file bill of complaint). While the case is an action to quiet title to submerged lands in Norton Sound, Alaska, the critical issue is whether the Corps has the authority, pursuant to a public interest review of a § 10 permit, to request (or, in Alaska's view, require) a State to disclaim any rights it might otherwise assert under the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1988), as the result of a permitted project's effect on the coastline. Alaska asserts that the public interest review, at least in the § 10 context, should be more appropriately limited to an examination of navigational impacts.

152. See 33 C.F.R. §§ 320.4(a)(1), 320.4(r)(1)(ii), 323.6(a), 325.4(a)(1) (1990).

153. The guidelines were published as a proposed rule on September 18, 1979 (44 Fed. Reg. 54,222); the final rule was published on December 24, 1980. The public interest review was offered up for public comment in the early 1980s. See 47 Fed. Reg. 31,794 (1982) (discussing public comments).

154. 55 Fed. Reg. 27,000 (1990) (final rule).

155. 54 Fed. Reg. 50,708 (1990) (final rule).

156. 55 Fed. Reg. 41,354 (1990) (proposed rule).

157. 45 Fed. Reg. 22,112 (1980) (proposed rule).

158. 55 Fed. Reg. 27,821 (1990) (correcting notice of June 29, 1990). The June 29, 1990 notice erroneously stated that Appendix C was effective immediately. Final rules, however, generally may only be effective thirty days after their publication. See *supra* note 27 and accompanying text.

the delays associated with rulemaking. Not surprisingly, in order to impart information and guidance quickly, agencies are willing to dispense with public notice and comment if the APA does not require them. The Corps and the EPA frequently resort to guidance documents that are intended to clarify regulatory requirements of the section 404 program. This guidance generally takes the form of interagency memoranda of agreement (MOAs), manuals, and other internal memoranda. The agencies consider these guidance documents to be statements of policy and interpretative rules. Because the agencies do not intend these pronouncements to have the force of law, the APA does not require public notice and comment.

A. *Memoranda of Agreement*

MOAs are agreements between agencies that specify how the agencies relate to one another in the context of a jointly administered program. MOAs specify procedures, establish policy, and offer interpretive guidance, and most MOAs engender very little controversy. For example, the Army has separate MOAs with the EPA,¹⁵⁹ the Department of Commerce,¹⁶⁰ the Department of Interior,¹⁶¹ the Department of Transportation,¹⁶² and the Department of Agriculture¹⁶³ that describe the procedures that the agencies should follow when requesting elevation.¹⁶⁴ Generally, these "404(q) MOAs" limit review of a permit decision to situations in which significant new information is developed, an issue of national significance is present, or insufficient interagency coordination at the district level has occurred.¹⁶⁵ No one has suggested that the

159. Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army (Nov. 12, 1985) [hereinafter EPA MOA].

160. Memorandum of Agreement Between the Department of Commerce and the Department of the Army (Mar. 25, 1986) [hereinafter DOC MOA].

161. Memorandum of Agreement Between the Department of the Interior and the Department of the Army (Nov. 8, 1985) [hereinafter DOI MOA].

162. Memorandum of Agreement Between the Department of Transportation and the Department of the Army (Jan. 18, 1983) [hereinafter DOT MOA].

163. Memorandum of Agreement Between the Department of the Army and the Department of Agriculture (Jan. 7, 1983) [hereinafter USDA MOA].

164. Elevation is the process by which a federal agency requests review by higher headquarters of a district engineer's permit decision. Although the agencies cite § 404(q) of the Clean Water Act as authority to enter into these MOAs, that section does not expressly discuss elevation procedures. Instead, § 404(q) literally provides that the Secretary of the Army shall enter into interagency agreements "to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section." 33 U.S.C. § 1344(q) (1988). In practice, the elevation process contributes to the delays associated with permit decisions.

165. See EPA MOA, *supra* note 159, at 1; DOC MOA, *supra* note 160, at 1; DOI

section 404(q) MOAs require public notice and comment. Indeed, the MOAs simply describe agency practice and procedures, which is another exception to the APA's rulemaking requirements.¹⁶⁶

An MOA that is of more public interest is the Army-EPA MOA on section 404 enforcement.¹⁶⁷ This enforcement MOA describes the policies and procedures the Corps and the EPA will follow in undertaking enforcement activities associated with the section 404 program.¹⁶⁸ The MOA allocates responsibilities between the two agencies, with the aim of strengthening the section 404 enforcement program.¹⁶⁹ For example, the MOA assigns the Corps the task of ensuring that permittees satisfy permit conditions, and provides that the EPA is generally the lead enforcement agency for repeat and flagrant unpermitted dischargers.¹⁷⁰

The enforcement MOA is a general statement of policy; it announces prospectively the manner in which the Corps and the EPA propose to exercise their discretionary enforcement powers. The Army and the EPA did not intend the document to have the force of law, and the MOA clearly states that it is not "intended to diminish, modify or otherwise affect the statutory or regulatory authorities of either agency."¹⁷¹ In practice, the MOA divides the responsibility of enforcement, but has no bearing on the final determination of the rights and obligations of an individual subject to an enforcement action. Accordingly, the APA permits the agencies to issue the enforcement MOA without public notice and comment.

Although the public paid little attention to the 404(q) and enforcement MOAs, a more recent MOA on mitigation created a maelstrom. In February 1990, the Army and the EPA signed an agreement intended to clarify the mitigation requirements of the

MOA, *supra* note 161, at 1; DOT MOA *supra* note 162, at 2; USDA MOA, *supra* note 163, at 2.

166. 5 U.S.C. § 553(b)(A) (1988).

167. Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act (Jan. 19, 1989) [hereinafter Enforcement MOA]. Section 309 of the Clean Water Act provides for civil and criminal penalties for permitless discharges and discharges that violate permit conditions or limitations. 33 U.S.C. § 1319 (1988).

168. See Enforcement MOA, *supra* note 167, at 1.

169. *Id.* at 2 (Section II.D.).

170. *Id.* The Corps investigates approximately 6,000 reported violations annually. *Hearing on Wetlands Regulation Before the House Subcomm. on Exports, Tax Policy and Special Problems*, 102d Cong., 1st Sess. (1991) (statement of Michael Davis, Office of the Assistant Secretary of the Army (Civil Works)).

171. Enforcement MOA, *supra* note 167, at 5.

section 404(b)(1) guidelines.¹⁷² This mitigation MOA stated that the agencies are committed to a goal of no net loss of wetlands and explained the sequence that field personnel must use when determining mitigation requirements.¹⁷³ Many representatives of the regulated community believed that these provisions placed additional burdens upon the public and should have been subjected to informal rulemaking.¹⁷⁴ Because, however, the mitigation MOA does not have the force of law, it is excepted from the public notice and comment process.

1. No Net Loss of Wetlands

During the 1988 presidential campaign, candidate George Bush stated on more than one occasion that he favored establishing a policy of no net loss of wetlands.¹⁷⁵ "No net loss" became a shorthand expression for increased protection of wetlands.¹⁷⁶ When the mitigation MOA used the phrase "no net loss," many people assumed that the document must be establishing a new policy that drastically affected property owners' rights and, as such, should have gone through an informal rulemaking process. A review of the MOA's language on this point shows that such concerns amount to hyperbole.

Noting that the CWA and the guidelines contain the goal of restoring and maintaining aquatic resources, the MOA states that the "Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, *will strive to achieve a goal of no overall net loss of values and func-*

172. Mitigation MOA, *supra* note 8. The February MOA was a revised version of an earlier MOA, the implementation of which was thrice delayed. See 54 Fed. Reg. 52,438, 52,439 (1989) (delaying MOA's effective date until Jan. 16, 1990); 55 Fed. Reg. 1726 (1990) (delaying MOA's effective date until Jan. 31, 1990); *Impasse on Wetlands*, WASH. POST, Feb. 1, 1990, at A19 (Talking Points) (reporting postponement of MOA's implementation until Feb. 7, 1990).

When the February MOA was signed, neither environmental nor development groups were satisfied with the final product. See Linda Winter, *Sununu Pulled Rank*, NAT'L WETLANDS NEWSL. 3, Mar.-Apr. 1990; *Wetlands MOA Threatens Alaska*, ON TOP OF ANWR, Jan.-Feb. 1990, at 3; *Land Developers Leery of Wetland Protection Pact*, L.A. TIMES, May 14, 1990, at A3. For two contrary viewpoints regarding the differences between the two MOAs, compare Gardner, *supra* note 150, at 10,342-44 with GEORGE MITCHELL, *WORLD ON FIRE* 185-88 (1991).

173. Mitigation MOA, *supra* note 8, at 2-3, 55 Fed. Reg. at 9211-12.

174. See *supra* note 16.

175. See *Where the Candidates Stand on the Environment*, CHRISTIAN SCI. MONITOR, Oct. 20, 1988, at 3.

176. See, e.g., Peter Steinhart, *No Net Loss*, AUDUBON, July 1990, at 18, 19.

tions.”¹⁷⁷ The MOA explains, however, that mitigation that would contribute to the goal of no net loss may not always be appropriate or practicable.¹⁷⁸ Accordingly, the MOA recognizes “that no net loss of wetlands functions and values may not be achieved in each and every permit action.”¹⁷⁹ The discussion of no net loss concludes with the reiteration that “it remains a goal of the Section 404 regulatory program to contribute to the national goal of no overall net loss of the nation’s remaining wetlands base.”¹⁸⁰

The Army and the EPA, through the MOA’s cautious language and the MOA’s introduction in the *Federal Register*, emphasize that they did not intend to establish a national policy of no net loss.¹⁸¹ At most, the MOA observes that compliance with the guidelines’ mitigation requirements can contribute to the goal of no net loss. The agencies noted that any national policy regarding no net loss is the responsibility of an interagency task force of the Domestic Policy Council.¹⁸²

Despite the agencies’ protestations that the MOA did not establish a national policy instituting no net loss, the MOA’s discussion of no net loss is an expression of goals and therefore fits neatly into the exception for general statements of policy. The MOA announces the manner that the Corps proposes to exercise its permitting authority and provides that the Corps will “strive to achieve a goal” of no overall net loss of wetlands functions and values. Striving to achieve a goal of no net loss hardly constitutes a command. Indeed, the document clearly recognizes that no net loss cannot be achieved in every permit action.¹⁸³ The MOA’s no net loss discussion leaves the permit decisionmaker with a great amount of discretion.¹⁸⁴ Moreover, the MOA is not finally determinative of a permit applicant’s rights and obligations. In any case in which the Corps imposes mitigation requirements that contribute to the goal of no net loss, the Corps must justify that decision based on the requirements contained in the guidelines. In other words, the MOA’s pro-

177. Mitigation MOA, *supra* note 8, at 2, 55 Fed. Reg. at 9211 (emphasis added).

178. *Id.* at 2-3, 55 Fed. Reg. at 9211-12.

179. *Id.* at 2, 55 Fed. Reg. at 9211.

180. *Id.*

181. See Introduction to Mitigation MOA, 55 Fed. Reg. at 9210.

182. *Id.* See Remarks by President Bush, Sixth Int’l Waterfowl Symposium (June 8, 1989), reprinted in PUB. PAPERS 691, 692 (1989).

183. Mitigation MOA, *supra* note 8, at 2, 55 Fed. Reg. at 9210-11.

184. See, e.g., *id.* at 5 & n.7, 55 Fed. Reg. at 9212-13 & n.7 (mitigation required only when appropriate and practicable).

nouncement concerning no net loss does not have the force of law. Thus, the APA does not require informal rulemaking.

2. Sequencing and Buy Downs

The MOA directs field personnel to consider mitigation in the sequence of avoidance, minimization, and compensation when determining the level of mitigation required by the guidelines.¹⁸⁵ Avoidance involves the consideration of less environmentally damaging alternative sites.¹⁸⁶ Minimization refers to project modifications or permit conditions that reduce adverse impacts on a particular site.¹⁸⁷ Compensation, or compensatory mitigation, means enhancement or creation of wetlands to offset unavoidable impacts that remain after minimization.¹⁸⁸

As a practical matter, sequencing prevents the use of compensatory mitigation at the avoidance stage, a process known as a "buy down."¹⁸⁹ Compensatory mitigation is offered to reduce or "buy down" the adverse impacts of a proposed discharge during the consideration of alternatives. For example, if a permit applicant wishes to discharge fill material into ten acres of wetlands, he or she might offer to create ten acres of wetlands and enhance five acres of low-value wetlands. The net adverse impacts of the proposed project have been reduced to an insignificant level, thus obviating the need to consider alternative sites. Sequencing, however, does not permit the consideration of compensatory mitigation at the avoidance stage.

Prior to the MOA, some Corps districts employed the buy down, while most did not. The EPA, on the other hand, clearly rejected any interpretation of the guidelines that allowed for buy downs.¹⁹⁰ The MOA sought to clarify this inconsistent application of the

185. *Id.* at 3, 55 Fed. Reg. at 9211-12.

186. See 40 C.F.R. § 1508.20(a) (1990); 33 C.F.R. § 230.10(a) (1990).

187. See 40 C.F.R. § 1508.20(b) (1990); 33 C.F.R. § 230.10(d) (1990).

188. See 40 C.F.R. § 1508.20(e) (1990); 33 C.F.R. § 230.75(d) (1990).

189. See Memorandum of General John F. Wall, Views of the Chief of Engineers 5 (May 5, 1985). Professor Houck refers to the buydown process as "mitigation-based permitting." Oliver A. Houck, *More Net Loss of Wetlands: The Army-EPA Memorandum of Agreement on Mitigation Under the § 404 Program*, 20 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,212, 10,214 (June 1990).

190. See *Oversight Hearings on Section 404 of the Clean Water Act Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 10-11 (1986) (testimony of Malcolm Wallop, Senator from Wyoming); William L. Want, *The Army-EPA Agreement on Wetlands Mitigation*, 20 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,209, 10,210 (June 1990).

guidelines' provisions.¹⁹¹

The MOA's treatment of sequencing qualifies as an interpretative rule. It is the agencies' construction of how the guidelines should be applied. That the agencies are interpreting a regulation rather than a statute should not matter; courts have routinely stated that the interpretative rule exception applies with equal force in the context of regulations. While the MOA's discussion of sequencing does not interpret a particular term or phrase found in the guidelines, it examines the process of applying the guidelines, specifically 40 C.F.R. § 230.10(a)-(d). The guidelines are amenable to a number of different interpretations, and the field applied the provisions inconsistently. Hence, the agencies acted well within their authority to provide a document that clarified the proper procedure.

The Army and the EPA characterize the MOA as a guidance document that does not alter the guidelines' substantive requirements. More importantly, the agencies do not intend the MOA to have, or rely upon it as if it had, the force of law. Simply put, any permit decision that involves the rejection of compensatory mitigation at the avoidance stage must be justified on the guidelines alone. Once again, the APA does not require informal rulemaking for this portion of the MOA.¹⁹²

B. *Wetlands Delineation Manuals*

"Waters of the United States," as defined by the Corps' regulations issued after public notice and comment, include wetlands.¹⁹³

191. An example of the inconsistencies arose in the Sweedens Swamp permit decision. See *Bersani v. EPA*, 674 F. Supp. 405 (N.D.N.Y. 1987), *aff'd sub nom. Bersani v. Robichaud*, 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989). The applicant sought to fill 32 acres of wetlands to construct a shopping mall, but offered to create 45 acres of wetlands. Initially, the Corps' New England District recommended a denial of the permit. *Bersani*, 850 F.2d at 42. General John F. Wall, then Director of Civil Works, reviewed the recommendation and reached a different decision, concluding that, in light of the proposed compensatory mitigation, no other less environmentally damaging practicable alternative existed. *Id.* The EPA, however, interpreted the guidelines' provisions as not "allowing mitigation as a remedy for destroying wetlands when a practicable alternative exists." Notice of Decision to Prohibit the Use of the Sweedens Swamp Site for the Discharge of Dredged or Fill Material in Attleboro, Massachusetts, 51 Fed. Reg. 22,977, 22,978 (1986). Consequently, the EPA exercised its authority under CWA § 404(c) and vetoed the permit decision. The Court of Appeals for the Second Circuit upheld EPA's action. *Bersani*, 850 F.2d at 47.

192. In *Municipality of Anchorage v. United States*, 32 Env't Rep. Cas. (BNA) 1199 (D. Alaska 1990) (appeal pending), the court rejected a notice and comment challenge to the mitigation MOA on ripeness grounds.

193. 33 C.F.R. § 328.3 (1990). See 51 Fed. Reg. 41,206, 41,217 (1986) for discussion of public comments.

The present definition of wetlands, also a product of informal rulemaking, has remained unchanged since 1977.¹⁹⁴ Wetlands are

those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.¹⁹⁵

Thus, wetlands identification is based on the presence of three parameters: hydrology, hydrophytic vegetation, and hydric soils. In *United States v. Riverside Bayview Homes, Inc.*, the United States Supreme Court unanimously held that this definition is a reasonable interpretation of the scope of the CWA's jurisdiction.¹⁹⁶

As the *Riverside Bayview* Court recognized, the dividing line between land and water is difficult to draw.¹⁹⁷ Generally, the task of identifying wetlands subject to section 404 regulation falls to the Corps.¹⁹⁸ The Corps makes "jurisdictional calls," which consist of two elements: a "determination," or decision whether a particular area is a water of the United States, and a "delineation," or demarcation of the boundaries of those waters.¹⁹⁹

Beginning in 1978, the Corps furnished its field offices with guidance on making jurisdictional calls. An early series of manuals addressed regional issues in wetlands determinations and delineations.²⁰⁰ The Corps slowly developed these regional manuals into a national manual and, after a number of drafts, issued the Wetlands

194. Compare 42 Fed. Reg. 37,122, 37,144 (1977) with 33 C.F.R. § 328.3(b) (1990). The regulatory definition of wetlands may soon be amended or amplified, however. See 56 Fed. Reg. 40,446 (Aug. 14, 1991) (preamble to proposed revision of 1989 Manual states that portions of the revised manual "may be promulgated as a legislative rule"). See *infra* note 215.

195. 33 C.F.R. § 328.3(b) (1990).

196. 474 U.S. 121, 139 (1985).

197. *Id.* at 132 ("[T]he transition from water to solid ground is not necessarily or even typically an abrupt one.").

198. See Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989) [hereinafter Geographic Jurisdiction MOA]. The MOA states that "[i]t shall be the policy of the Army and EPA for the Corps to continue to perform the majority of the geographic jurisdictional determinations[.]" *Id.* at 1.

199. See Federal Defendants' Memorandum in Support of Motion to Dismiss at 5, *Merlino v. United States*, 33 Env't Rep. Cas. (BNA) 1262, 21 Env'tl. L. Rep. (Env'tl. L. Inst.) 21,322 (W.D. Wash. 1991) (notice and comment challenge to 1989 Manual).

200. See, e.g., United States Army Corps of Engineers Waterways Experiment Station, Preliminary Guide to Wetlands of the West Coast States, Technical Report Y-78-4 (1978).

Delineation Manual, Technical Report Y-87-1, in 1987.²⁰¹ The 1987 Manual provided technical advice on how to identify and delineate wetlands based on an area's hydrology, vegetation, and soils. The Corps did not allow the public an opportunity to participate before promulgating these pronouncements.

Other federal agencies have also found it necessary to identify and delineate wetlands to implement their statutory responsibilities. The EPA, for example, produced a "Wetland Identification and Delineation Manual" for its personnel in 1988.²⁰² The Soil Conservation Service (SCS), pursuant to the Food Security Act of 1985,²⁰³ needed to identify wetlands in order to determine eligibility for agricultural subsidies. Additionally, the Fish and Wildlife Service (FWS) identified and mapped wetlands to carry out its responsibilities under such statutes as the Fish and Wildlife Coordination Act²⁰⁴ and the Emergency Wetlands Resources Act of 1986.²⁰⁵ The fact that four federal agencies identified wetlands differently prompted a call for a unified federal methodology.²⁰⁶

In response to this concern for consistency, the Army, the EPA, the SCS, and the FWS issued the *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* (1989 Manual) in January 1989. The 1989 Manual emphasizes that, as the regulatory definition makes clear, a wetland must possess three characteristics: hydrology, hydrophytic vegetation, and hydric soils.²⁰⁷ Providing procedures to determine the presence of those three parameters, the 1989 Manual discusses field indicators and other information that determine whether a particular area contains the three necessary criteria.²⁰⁸ The agencies implemented the 1989 Manual without public notice and comment.²⁰⁹

201. United States Army Corps of Engineers Waterways Experiment Station, Technical Report Y-87-1 (1987).

202. WILLIAM S. SIPPLE, U.S. ENVTL. PROTECTION AGENCY, WETLAND IDENTIFICATION AND DELINEATION MANUAL (1988) (revised interim final).

203. 16 U.S.C. § 3801(a)(16) (1988) (defining the term wetland).

204. 16 U.S.C. §§ 661-668e (1988).

205. 16 U.S.C. § 3931 (1988). For the National Wetlands Inventory, the Fish and Wildlife Service employed LEWIS M. COWARDIN, U.S. FISH & WILDLIFE SERV., CLASSIFICATION OF WETLANDS AND DEEPWATER HABITAT OF THE UNITED STATES (1979).

206. See THE CONSERVATION FOUNDATION, PROTECTING AMERICA'S WETLANDS: AN ACTION AGENDA 36-38 (1988).

207. 1989 MANUAL, *supra* note 7, at 5 (stating that hydrophytic vegetation, hydric soils, and wetland hydrology "are mandatory and must all be met for an area to be identified as wetland").

208. *Id.* at 9-19.

209. The SCS never formally implemented the 1989 Manual. At the time of the 1989

The Army's adoption of the 1989 Manual resulted in an increase of areas regulated under section 404 in some Corps districts. The reason for this is twofold. First, inconsistencies in identifying and delineating wetlands existed within the Corps nationwide; some districts had been rigorously regulating areas that satisfied the definition of wetlands, while others had not. The Corps required all districts to employ the methodology contained in the 1989 Manual.²¹⁰ Naturally, those districts that had not been regulating waters to the full extent of the CWA experienced an increase in their jurisdiction. Second, and more important from a rulemaking concern, the 1989 Manual slightly altered the methodology the Corps employed in identifying and delineating wetlands.

One of the 1989 Manual's more significant changes centered around the use of hydric soils to presume the presence of hydrology. Under the 1989 Manual, an area must be inundated or saturated for seven consecutive days during the growing season to satisfy the hydrology criteria.²¹¹ Often, however, the hydrology is not readily apparent or present during certain times of the year. The 1989 Manual provides field indicators, such as oxidized root channels or morphological plant adaptations, that one can use to presume that sufficient hydrology may have been present at other times during the growing season.²¹² More controversially, field personnel may also rely upon hydric soil characteristics to presume the hydrology criteria.²¹³ Critics of the 1989 Manual point to bootstrapping presumptions such as this, where one parameter is used to establish the presence of another, to argue that the 1989 Manual has collapsed the three parameter test to a two, or even one, parameter test.²¹⁴

Many commentators contend that such a significant change in methodology without public notice and comment, along with the

Manual's adoption, the SCS had already promulgated a legislative rule, codified in the *Code of Federal Regulations*, pertaining to wetlands delineations. See 7 C.F.R. § 12.31 (1991). Accordingly, the SCS opined that, prior to implementing the 1989 Manual, it must amend its regulations to ensure consistency. The SCS, however, never undertook this revision of its regulations.

210. Geographic Jurisdiction MOA, *supra* note 198, at 1-2 ("In making its determinations, the Corps will implement and adhere to the 'Federal Manual for Identifying and Delineating Jurisdictional Wetlands,' EPA guidance on isolated waters, and other guidance, interpretations, and regulations issued by EPA to clarify EPA positions on geographic jurisdiction and exemptions.").

211. 1989 MANUAL, *supra* note 7, at 7.

212. *Id.* at 15-19.

213. *Id.* at 18 (listing "hydric soil characteristics" as field indicator of hydrology).

214. See *supra* note 16.

resulting increase in jurisdiction, violates the APA.²¹⁵ Because, however, the 1989 Manual itself does not have the force of law and the Corps and the EPA do not rely upon it as such in enforcement actions to establish violations of the CWA, the 1989 Manual is excepted from the APA's public notice and comment requirements.

The 1989 Manual is an interpretative rule because it constitutes the agencies' clarification of the definition of wetlands. The regulatory definition of wetlands requires hydrology, hydrophytic vegeta-

215. *Id.*; see also *Baton Rouge Transcript*, *supra* note 5, at 144-49 (oral statement of Warren Rich). Congress responded to the controversy surrounding the 1989 Manual by including a provision in the 1992 Energy and Water Development Appropriations Act that precluded the Corps from using any fiscal year 1992 funds in connection with the Manual. Pub. L. No. 102-104, 105 Stat. 510, 518 (1991). The Act states that no 1992 funds

shall be used to identify or delineate any land as a "water of the United States" under the Federal Manual for Identifying and Delineating Jurisdictional Wetlands that was adopted in January 1989 (1989 Manual) or any subsequent manual not adopted in accordance with the requirements for notice and public comment of the rule-making process of the Administrative Procedure Act.

Id. The Senate Report also chastises the Corps for failing to permit public participation in the development of the 1989 Manual. S. REP. NO. 80, 102d Cong., 1st Sess. 55 (1991). The Senate conference report directs that "until the 1989 delineation manual or any subsequent manual is subjected to the Administrative Procedures [sic] Act, the Corps is restricted to the pre-1989 criteria it used in identifying and delineating lands as wetlands. These criteria were set forth in the 1987 manual" *Id.* As noted earlier, see *supra* note 16, the Corps responded by immediately employing its 1987 Manual for wetlands delineations.

Two points are worth noting. First, the 1987 Manual, like the 1989 Manual, was not subjected to public notice and comment. Thus, Congress has not corrected any perceived procedural faults related to wetlands delineations. Second, as a technical matter, nothing in the Act prevents the Corps from reissuing the 1989 Manual and implementing it without public notice and comment. The Act only provides that any subsequent manual must be adopted *in accordance with* the APA's notice and comment requirements; the Act does not state that any future manual may be promulgated *only after* public notice and comment. The distinction is critical and underscores the lack of understanding of the APA. As explained above, see *infra* notes 216-22 and accompanying text, the 1989 Manual, as an interpretative rule, is fully in accord with the APA even though the public did not participate in its development.

The Corps, the EPA, the FWS, and the SCS responded to the controversy regarding the 1989 Manual by publishing for public notice and comment proposed revisions to the 1989 Manual. 56 Fed. Reg. 40,446 (Aug. 14, 1991). In doing so, the agencies have granted "additional procedural rights in the exercise of their discretion," beyond those required by the APA. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978); *supra* note 57. While the revised manual will remain a technical guidance document and thus an interpretative rule without the force of law, the agencies may parse out certain portions to adopt as a legislative rule modifying or amplifying the regulatory definition of wetlands. See 56 Fed. Reg. 40,446 ("When the agencies determine what portions of the manual that may be promulgated as a legislative rule, they will provide notice of specific proposed regulatory language in the *Federal Register* at least 30 days prior to the end of the public comment period.").

tion, and hydric soils. The 1989 Manual, consistent with the regulatory definition, simply informs agency personnel how to take the concept of a three parameter approach and give it operational effect in the field.²¹⁶

Moreover, the Corps and the EPA do not intend the 1989 Manual to have any legal effect. In enforcement actions, for example, the Corps and the EPA do not assert that an individual has violated the CWA because he has discharged dredged or fill material without a permit into an area that appears to be wetlands, as discussed in the 1989 Manual; rather, the agencies contend that the individual has violated the CWA because he has engaged in permitless discharges in wetlands, as defined by regulations. In enforcement proceedings, the 1989 Manual has "no 'force' at all."²¹⁷ The agencies can only prove their case by offering "scientific or other probative evidence" to support the contention that a discharge area constitutes wetlands.

A recent case in the Eastern District of Virginia illustrates this point. In *United States v. Hobbs*, the United States alleged that the four defendants filled wetlands on their property without a permit in violation of the CWA.²¹⁸ The defendants filed motions for summary judgment, alleging that the 1989 Manual, used by the EPA in evaluating the property, was void because it was promulgated without public notice and comment.²¹⁹ The court concluded that the 1989 Manual "aided agency officials in 'interpreting' the dictates of the CWA and, therefore [was] guidance [material] rather than legislation."²²⁰ The court further noted that the parties could present wetlands delineations based on methods other than those contained in the 1989 Manual because "the jury was ultimately bound to evaluate the evidence in light of the regulatory definition of the term 'wetlands.'"²²¹ The court properly denied the defendants' motions.²²² Accordingly, because the 1989 Manual interprets the term "wetlands" and because it does not have the force of law, the APA does not require public notice and comment prior to its adoption.²²³

216. See *House Committee Hearing*, *supra* note 16 (testimony of Dr. G. Edward Dickey, Acting Principal Deputy Assistant Secretary of the Army (Civil Works Department)).

217. *Community Nutrition Inst. v. Young*, 818 F.2d 943, 952 (D.C. Cir. 1987) (Starr, J., dissenting).

218. 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,830 (1990) (appeal pending).

219. *Id.* at 20,832.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Cf. Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983)

C. *Other Guidance Documents and Tabb Lakes*

In addition to interagency documents such as MOAs and manuals, the Corps provides its field personnel guidance in the form of internal memoranda or letters.²²⁴ These guidance documents often state or clarify policy, discuss operating procedures, or explain the effects of relevant court decisions.²²⁵ Occasionally, these pronouncements are subjected to APA rulemaking challenges. Perhaps the best-known case is *Tabb Lakes, Ltd. v. United States*, which involved a Corps memorandum that recognized the "migratory bird rule."²²⁶

As noted earlier, the section 404 program applies to waters of the United States. The definition of waters of the United States includes any wetlands adjacent to navigable waters and any other wetlands the degradation or destruction of which could affect interstate commerce.²²⁷ Specifically, Corps regulations, published in 1986, provide that section 404 jurisdiction exists over

wetlands . . . the use, degradation, or destruction of which could affect interstate or foreign commerce including any such waters:

- (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
- (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
- (iii) Which are used or could be used for industrial purpose by industries in interstate commerce.²²⁸

The preamble to the Corps' regulations provided four other indicators of interstate commerce nexi, including waters that are or could be used by migratory birds that cross state lines.²²⁹

(rejecting notice and comment challenge to EPA's delineation methodology while applying substantial impacts analysis). Two other recent notice and comment challenges to the 1989 Manual were dismissed on ripeness grounds. See *Mulberry Hills Dev. Co. v. United States*, 772 F. Supp. 1553, (D. Md. 1991); *Merlino v. United States*, 21 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 21,322 (W.D. Wash. 1991).

224. The Corps frequently employs "Regulatory Guidance Letters" (RGLs) to impart information to the field. See 56 *Fed. Reg.* 2408 (1991) for all current RGLs as of that date.

225. See, e.g., RGL No. 90-6 (Aug. 14, 1990) (expiration dates for wetlands jurisdictional delineations) reprinted in 56 *Fed. Reg.* 2411; RGL No. 88-11 (Aug. 22, 1988) (discussing *Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561 (D. Mass. 1987), appeal dismissed, 841 F.2d 440 (1st Cir.), cert. denied, 488 U.S. 848 (1988)).

226. 715 F. Supp. 726 (E.D. Va. 1988), *aff'd per curiam*, 885 F.2d 866 (4th Cir. 1989) (table opinion).

227. 33 C.F.R. § 328(a)(3) (1990).

228. *Id.*; see 51 *Fed. Reg.* 41,206, 41,250 (1986).

229. 51 *Fed. Reg.* at 41,217. The other three indicators of an interstate commerce connection were: whether birds protected by Migratory Bird Treaties used or could use

In November 1985, General Kelly, then Deputy Director of Civil Works for the Corps, issued a memorandum to provide guidance regarding identifying waters of the United States.²³⁰ Discussing factors that would provide an interstate commerce nexus sufficient to justify the Corps' jurisdiction over isolated waterbodies, the memorandum listed the three criteria from the regulations and the four criteria found in the preamble.²³¹ Factor number five, "waters which are or could be used as habitat by other migratory birds which cross state lines," became known as the migratory bird rule.²³²

Shortly after the issuance of the Kelly memorandum, the Corps asserted jurisdiction over isolated wetlands in York County, Virginia.²³³ Because the wetlands were not adjacent to navigable waters, the Corps needed to establish an interstate commerce connection to justify regulating the property. Relying on the Kelly memorandum, the Corps concluded that the use of the wetlands by migratory birds crossing state lines provided a sufficient nexus.²³⁴

After withdrawing a permit application, the landowner brought an action in United States District Court seeking a declaration that the Kelly memorandum was invalid under the APA's public notice and comment requirements and that therefore the Corps could not rely upon the migratory bird rule to assert jurisdiction.²³⁵ The district court agreed, holding that the migratory bird rule was not an interpretative rule and violated the APA.²³⁶ Accordingly, the court found no CWA section 404 jurisdiction over the property.²³⁷

The district court reached its conclusion by applying the substantial impacts test. The court stressed that "[b]eyond any doubt, the [Kelly] memorandum produced a 'significant effect on public interests.'"²³⁸ The significant impact—that the Corps would attempt to

the waters as habitat; whether endangered species used or could use the waters as habitat; and whether farmers used the waters to irrigate crops sold in interstate commerce. *Id.*

230. Memorandum of General Patrick J. Kelly, EPA Memorandum on Clean Water Act Jurisdiction Over Isolated Waters (Nov. 8, 1985).

231. *Id.* at 1.

232. In lighter discussions, the concept has also been referred to as the "reasonable bird test" (*i.e.*, would a reasonable bird use a particular wetland as habitat).

233. *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 727 (E.D. Va. 1988), *aff'd per curiam*, 885 F.2d 866 (4th Cir. 1989) (table opinion).

234. *Id.*

235. *Id.* at 727.

236. *Id.* at 729.

237. *Id.*

238. *Id.* at 728.

assert section 404 jurisdiction over wetlands used by migratory birds—was dispositive. In the court's view, because the Kelly memorandum produced "significant effect[s] on public interests," it could not qualify as an interpretative rule.²³⁹

The court's discussion of the interpretative rule exception is sorely lacking. Although the court mentioned that interpretative rules clarify or explain existing regulations, it made no examination of the regulations that the Kelly memorandum purportedly clarified. Had it done so, the court's review of the issues would have been constrained to a proper focus.

The Kelly memorandum obviously provided the Corps' views on the definition of waters of the United States. The Kelly memorandum specifically clarifies whether the list of interstate commerce connections for other waters should be considered illustrative or exhaustive. In other words, did the phrase "including any such waters" that preceded the three indicators mean "such as" or "limited to"?²⁴⁰ When the issue is properly framed, it is clear that the Kelly memorandum is simply guidance that provides the Corps' interpretation of its regulations.

Equally important, the Corps did not rely upon the migratory bird rule as if it had the force of law. To be sure, the Corps used the rule to make a wetlands determination. Because, however, the migratory bird rule was not enshrined in its regulations, the Corps, if forced into court as it was in *Tabb Lakes*, would have to justify why migratory birds provided a sufficient interstate commerce connection. In that proceeding, the Corps could only establish jurisdiction by showing that the migratory bird rule was consistent with the regulatory definition of waters of the United States.

The district court's use of the substantial impacts test robs the Corps of the opportunity to clarify its regulations. It is hard to imagine that Congress intended the APA to be applied in such a manner that precludes an agency from interpreting whether a list appearing in its regulations was intended to be illustrative or exhaustive without going through a public notice and comment process. Indeed, the fact that Congress expressly excepted interpretative rules from informal rulemaking strongly suggests otherwise. Clarifying whether a particular list is illustrative or exhaustive is precisely the type of rule Congress exempted from public notice and comment.

239. *Id.* at 729.

240. 33 C.F.R. § 328.3(a)(3) (1990).

Concluding that the migratory bird rule is an interpretative rule would not have ended the *Tabb Lakes* court's inquiry. In this particular case, the court should have gone on to decide two additional issues. First, was it reasonable for the Corps to interpret the indicators of sufficient interstate commerce nexus in the form of an illustrative list? Second, if the Corps cleared that hurdle, a more difficult question is whether the migratory bird rule itself provides a sufficient nexus to interstate commerce.²⁴¹ Because the district court incorrectly applied an impacts analysis, it failed to reach these issues.

The Fourth Circuit, in a brief, unpublished *per curiam* opinion over one dissent, affirmed the district court's ruling that use of the migratory bird rule without public notice and comment violated the APA.²⁴² The only remarkable aspect of the majority's opinion is its dearth of analysis concerning the APA, its exceptions to notice and comment rulemaking, and the role, if any, that the impact of an agency's pronouncement should play in such cases. The dissent, on the other hand, correctly noted that the district court had erred in finding the migratory bird rule was a legislative rule because "it had a 'significant effect on public interests.'"²⁴³ The impact of a rule, the dissent emphasized, "has no place in the determination of whether it is substantive or interpretive."²⁴⁴

Tabb Lakes presently stands as the sole adverse rulemaking decision against the federal government in the realm of the section 404 program. The national impact of this case is questionable, however. The fact that the Fourth Circuit failed to analyze the relevant APA issues severely undercuts whatever persuasiveness it might have otherwise enjoyed. Moreover, courts are generally reluctant to rely upon unpublished opinions.²⁴⁵ Finally, the underpinning of the lower court's holding—that the impact of an agency's pronouncement upon the public is dispositive when examining the APA's exceptions—is clearly inconsistent with the APA's language and

241. While migratory waterfowl's use of a wetland may establish an interstate commerce nexus, the connection becomes more tenuous when only migratory non-waterfowl, such as robins and finches, use the wetland as habitat. See *Tabb Lakes, Ltd. v. United States*, 20 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,008, 20,009 n.2 (4th Cir. 1990) (Hall, J., dissenting).

242. *Tabb Lakes*, 20 *Envtl. L. Rep. (Envtl. L. Inst.)* at 20,008.

243. *Id.* at 20,009 (Hall, J., dissenting).

244. *Id.*

245. Even the Fourth Circuit disfavors reliance upon unpublished opinions. 4th Cir. I.O.P. 36.6, *reprinted in* 28 *U.S.C.A. (West Supp. 1991)*.

Supreme Court decisions discussing the proper judicial role in interpreting the APA.

IV. CONCLUSION

The APA does not require public notice and comment rulemaking for general statements of policy and interpretative rules. When deciding whether a particular agency pronouncement qualifies as a general statement of policy or interpretative rule, the impact of that pronouncement upon the public is irrelevant. Rather, the proper inquiry should be limited to whether the agency intended the pronouncement to have the force of law, or relied upon it as such. Rules that agencies treat as having legal effect are substantive, or legislative, and therefore require public notice and comment prior to their implementation.

Contrary to popular belief, then, the federal agencies charged with protecting the nation's wetlands are not running amok. In issuing controversial pronouncements such as MOAs, manuals, and migratory bird rules without affording the public an opportunity to participate, the agencies are acting within the constraints imposed by Congress as set forth in the APA. The agencies did not intend these pronouncements to have the force of law and do not rely upon them as if they had legal effect. Consequently, upon close inspection, it is clear that these pronouncements concerning wetlands regulation qualify as general statements of policy or interpretative rules.

