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Article

US V. Magnesium Corp. — Don't Panic

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A recent Tenth Circuit decision could have an impact on companies that rely on a federal agency's interpretation of its own regulation. In *United States v. Magnesium Corporation of America, et al.,* (10th Cir. Aug. 17, 2010), the court held that the U.S. Environmental Protection Agency's prior interpretation of ambiguous language contained in its own regulation was a tentative one, and accordingly, the agency was free to change its mind and issue a new interpretation of its regulation without notice and comment.

The court's holding will most likely be applicable to any federal agency interpreting its own regulations and federal agencies may view the decision as support for foregoing formal notice and comment when changing regulatory interpretations. While the Tenth Circuit's decision is reason for concern, it does not disturb long-standing protections based on the principle of fair notice and the Administrative Procedure Act's judicial review proviso.

Background

The defendant, Magnesium Corporation of America (now U.S. Magnesium LLC), mines and processes magnesium at its Rowley, Utah facility and utilizes an anhydrous process to extract the magnesium. Wastewater is generated, which is potentially subject to regulation under Subtitle C of the Resource Conservation and Recovery Act (RCRA).

Facilities subject to RCRA Subtitle C must comply with comprehensive permitting processes, can incur substantial costs to remediate contaminated areas throughout their facility and can also be subject to major penalties for non-compliance.

The EPA was required under Subtitle C of RCRA to promulgate regulations for the treatment, storage and disposal of hazardous wastes. In 1978, after RCRA's enactment, the EPA proposed regulations implementing Subtitle C for notice and comment.

The proposed regulations would have subjected the hazardous wastes generated as a result of the processing of ores or minerals to Subtitle C, except that mineral processing wastes produced in very large volumes with relatively low health risks would fall under special standards.

After the comment period, however, the EPA reversed its position on high volume, low risk mineral processing wastes and decided those wastes should be subject to the same stringent Subtitle C requirements as other such wastes.

Congress, not satisfied with the EPA's decision to subject all hazardous mineral processing wastes to Subtitle C, enacted the Bevill Amendment requiring the EPA to, among other things, reconsider its position on whether ore and mineral processing wastes should be regulated under Subtitle C or by less stringent standards.

The Bevill Amendment also required the agency to produce a report for Congress' consideration within three years and to postpone the application of Subtitle C regulations to all mineral processing wastes until at least six months after the submission of the congressional report.

In 1989, the EPA issued a new rule setting out criteria required to exempt a waste from Subtitle C. Similar to the agency's initial 1978 proposal, the criteria required a candidate waste to be associated with the mineral industry and generated in high volume with low hazard levels. At the same time, the EPA also announced that wastewater from magnesium processing facilities utilizing the anhydrous process were likely candidates for exemption, subject to further study by the EPA, and which final agency determination would ultimately be reported to Congress.

In the EPA's 1990 Report to Congress on Special Wastes from Mineral Processing, the EPA recommended the exemption of several specific wastes, including process wastewater from primary magnesium processing by the anhydrous process.

Importantly, the EPA repeatedly referenced the tentative basis of its findings. In 1991, the EPA promulgated a "final regulatory determination and final rule" where the agency confirmed that process wastewater from primary magnesium

processing by the anhydrous process definitely qualified for exemption from Subtitle C.

The EPA, however, did not provide an interpretation of the phrase "process wastewater from primary magnesium processing by the anhydrous process" in the 1991 final rule. This phrase was the topic of repeated exchanges between the U.S. Magnesium facility and the government in 1991.

U.S. Magnesium's stance was that the 1991 final rule exempted all of the Rowley facility's process wastes from Subtitle C, while the EPA's position was that only some of the wastes were exempt. This disagreement resulted in the filing of a lawsuit by the U.S. in 2001, seeking injunctive relief and civil penalties for U.S. Magnesium's alleged violations of RCRA and its regulations.

District Court

Before the district court, the government argued that five U.S. Magnesium wastes did not qualify for exemption from Subtitle C because they were not "process wastewater from primary magnesium processing by the anhydrous process."

In its defense, U.S. Magnesium relied heavily on the EPA's 1990 Congressional Report, interpreting the phrase "process wastewater from primary magnesium processing by the anhydrous process" to mean that all wastes produced at the Rowley facility were exempt from Subtitle C regulation.

U.S. Magnesium argued that through the EPA's lawsuit, the agency was trying to enforce a different, narrower interpretation of the above phrase, and under the Administrative Procedure Act, U.S. Magnesium reasoned, the EPA was not allowed to take such a position.

U.S. Magnesium contended that an agency may not interpret its own regulations in a manner that conflicts with its own prior interpretation without first providing for notice and comment. In 2007, the district court awarded U.S. Magnesium partial summary judgment and held that the EPA could not now change its interpretation of its own 1991 rule without first submitting it for notice and comment.

Tenth Circuit Court of Appeals

On appeal to the U.S. Court of Appeals for the Tenth Circuit, neither party disputed the ambiguity of the EPA's 1991 final rule. Both parties also agreed that the agency's current interpretation — which did not exempt the five wastes from Subtitle C — was a plausible one and that an agency's interpretation of its own ambiguous regulation is entitled to substantial deference.

Thus, the primary question before the Tenth Circuit, and a matter of first impression for the court, was whether the EPA was precluded from changing its original interpretation of the ambiguous regulation without following the notice and comment requirement of the APA.

The Tenth Circuit recognized that the issue of whether an agency may alter its interpretation of its own regulation without notice and comment was the subject of a circuit split (the Third, Fifth, Sixth and D.C. Circuits requiring notice and comment, and the First and Ninth Circuits taking a contrary view).

The EPA maintained that its initial interpretation to Congress in 1990 was a tentative one, and an agency is not required to provide an opportunity for notice and comment when the agency is changing a merely tentative interpretation of its own rules. In response, U.S. Magnesium pointed to *Alaska Professional Hunters Ass'n v. FAA,* 177 F.3d 1030 (D.C. Cir. 1999), wherein the court held invalid the Federal Aviation Administration's notice of a new interpretation of its rule.

In *Alaska Hunters,* the D.C. Circuit stated that the agency couldn't significantly revise its previous definitive interpretation of its own regulations without first engaging in notice and comment. According to *Alaska Hunters,* if an agency amends its interpretation of a rule, it is effectively amending the rule itself, and the APA defines this amendment as a kind of rulemaking, which would require the agency to follow notice and comment procedures.

Upon analyzing *Alaska Professional Hunters* and varying scholarly writings on the case, the Tenth Circuit determined that the holding in *Alaska Professional Hunters* applied only to definitive regulatory interpretations and that even under *Alaska Hunters,* an agency is free to disavow and amend a tentative interpretation of one of its rules without notice and comment.

The court remarked, "[b]efore an agency adopts a definitive interpretation of its own rule it remains free to hear new arguments, make adjustments and change directions, all without having to undergo notice and comment."

In vacating the entry of summary judgment in U.S. Magnesium's favor and remanding the matter to the district court, the Tenth Circuit held that the EPA's interpretation of its 1991 rule was a tentative one, and accordingly, the agency was free to change its mind and issue a new interpretation of its own regulations without notice and comment. The court noted how the EPA's 1990 congressional report repeatedly described its conclusions as tentative and that the EPA had expressly contemplated and undertaken more administrative process on the subject.

The court cautioned, however, that an agency cannot attempt to protect itself by slapping the word "tentative" onto each one of its proclamations, explaining, "[I]t's not enough for

an agency just to say that its policy is tentative; to avoid the necessity of notice and comment, the policy must actually be tentative."

Perhaps recognizing that its decision would cause significant concern among the regulated community, the court made clear that there are at least two other layers of protection potentially available to defendants, neither of which was raised by *U.S. Magnesium.*

First, pursuant to Section 706(2)(A) of the APA, an agency is required to explain why it has exercised its discretion in a certain manner and courts are empowered to review the agency's actions and findings to determine if they are arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law.

Second, the Due Process Clauses of the Fifth and 14th Amendments prohibit the imposition of penalties without "fair notice." This principle has been extended to agency actions and, as the Tenth Circuit noted, due process will apply when an agency advances a novel interpretation of its own regulation in the course of a civil enforcement action. The D.C. Circuit has described the "fair notice" doctrine as follows:

"If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation. *General Electric Co. v. EPA,* 53 F.3d 1324, 1328-29 (D.C. Cir. 1995)."

What This Means to You

Companies subject to a federal agency interpretation of an agency regulation should consider the interpretation as tentative unless the agency has made it clear in the administrative record that the interpretation is definite and final. Based on the recent Tenth Circuit decision, a subsequent agency interpretation of a regulation that is different or inconsistent from a prior tentative interpretation may not require formal APA notice and comment.

However, as the court observed, protection may be available in the forms of the Administrative Procedure Act and the Due Process Clauses of the Fifth and 14th Amendments. Pursuant to the APA, an agency must clearly explain why it has exercised its discretion in a given manner. In addition, the concepts of due process preclude an agency from penalizing a company for violating a rule without first providing fair notice of the substance of the rule. ■