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# Flexible Rulemaking and the Limits of the *Alaska Hunters* Doctrine

## INTRODUCTION

Without limited deference to flexible agency rulemaking by the courts, agencies will be unable to balance enforcement duties with the obligation to contribute to a stable regulatory climate for businesses. The Tenth Circuit in *United States v. Magnesium Corporation of America* clarified the limits of flexible agency rulemaking by holding that an agency is free to amend its tentative interpretations of rules and regulations without notice and comment.<sup>1</sup> The court's holding arose from a dispute between the Environmental Protection Agency and U.S. Magnesium<sup>2</sup> over the Environmental Protection Agency's inconsistent interpretations of the phrase "[p]rocess wastewater from primary magnesium processing by the anhydrous process" (magnesium wastewater).<sup>3</sup> The Environmental Protection Agency's initial, tentative interpretation exempted several magnesium wastewaters at a U.S. Magnesium processing facility from strict hazardous waste regulations.<sup>4</sup> After the Environmental Protection Agency amended its tentative interpretation to include the previously-exempt magnesium wastewaters, U.S. Magnesium challenged the amendment based on the *Alaska Hunters* doctrine.<sup>5</sup> U.S. Magnesium argued that, according to the *Alaska Hunters* doctrine, an agency may not amend a prior interpretation of a rule without first engaging in notice and comment.<sup>6</sup>

While circuits have split on the question of whether an agency can amend its interpretive rules without notice and comment,<sup>7</sup> the Tenth Circuit avoided this question and focused on the distinction between tentative and definitive

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1. *United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1131 (10th Cir. 2010).

2. U.S. Magnesium is a defendant-intervenor in this case. Magnesium Corporation of America is the original defendant, but it sold the magnesium facility at the center of the dispute to U.S. Magnesium in 2002. *Id.* at 1131 n.1. U.S. Magnesium and Magnesium Corporation of America are also "owned and controlled by the same corporate parent." *Id.*

3. *Id.* at 1138. As the court explained, "'primary magnesium processing' refers to the extraction of magnesium directly from ore or mineral deposits." *Id.* at 1131 n.2. Anhydrous "indicate[s] the fact that many of the key chemical reactions in the . . . process do not require the use of any water." *Id.*

4. *Id.* at 1133.

5. *Id.* at 1137–38.

6. *Id.* at 1138.

7. *See infra* note 51.

interpretations.<sup>8</sup> As the court explained, even under the *Alaska Hunters* doctrine, the Environmental Protection Agency was free to amend its initial, tentative interpretation because the doctrine only applies to definitive interpretations and does not require notice and comment for tentative interpretive rules.<sup>9</sup> By focusing on the distinction between tentative and definitive interpretations, the court's decision effectively balances deference to flexible agency rulemaking with the need for rules and regulations to provide a predictable business environment for regulated parties.

### I. PROCEDURAL HISTORY

Subtitle C of the Resource Conservation and Recovery Act (RCRA) requires the Environmental Protection Agency (EPA) to promulgate regulations creating a comprehensive scheme to safely manage the transportation, treatment, and disposal of hazardous wastes.<sup>10</sup> Hazardous wastes classified under Subtitle C are generally subject to strict regulatory requirements.<sup>11</sup> But, according to the EPA's regulations, hazardous wastes that are "uniquely associated with mineral industry operations" and are produced in high volumes with low hazard levels enjoy relaxed regulatory burdens.<sup>12</sup> When the EPA initially promulgated its hazardous waste regulations, the agency speculated that magnesium wastewater would probably qualify for relaxed hazardous waste regulations,<sup>13</sup> though a final decision was deferred for further study and the requisite report to Congress.<sup>14</sup>

The EPA submitted its findings to Congress in the *Report to Congress on Special Wastes from Mineral Processing* (Report to Congress).<sup>15</sup> In the Report to Congress, the EPA recommended that magnesium wastewater fall within the relaxed hazardous waste regulations.<sup>16</sup> The EPA emphasized that these findings were "tentative," and encouraged interested parties to comment on the Report to Congress to inform the Agency's "final regulatory determination."<sup>17</sup> The EPA then promulgated a final rule that confirmed that magnesium wastewater was exempt from stringent hazardous waste regulations.<sup>18</sup> But the final rule did

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8. *Id.* at 1138–41.

9. *Id.* at 1140.

10. 42 U.S.C. §§ 6921–6939F (2006).

11. *Id.*

12. Mining Waste Exclusion, 54 Fed. Reg. 36,592, 36,628–31 (Sept. 1, 1989) (codified at 40 C.F.R. pt. 261).

13. *Id.* at 36,631, 36,642.

14. *Magnesium Corp.*, 616 F.3d at 1133.

15. Availability of Report to Congress on Special Wastes from Mineral Processing, 55 Fed. Reg. 32,135, 32,135 (Aug. 7, 1990).

16. *Magnesium Corp.*, 616 F.3d at 1133.

17. Availability of Report to Congress on Special Wastes from Mineral Processing, 55 Fed. Reg. at 32,135.

18. Final Regulatory Determination for Special Wastes From Mineral Processing (Mining Waste Exclusion), 56 Fed. Reg. 27,300, 27,301 (June 13, 1991).

not attempt to interpret the magnesium wastewater phrase, an ambiguity that sparked the present dispute between the EPA and U.S. Magnesium.<sup>19</sup>

Soon after the final rule was announced, the EPA began to set limits on which wastes would qualify as magnesium wastewater subject to relaxed regulatory requirements.<sup>20</sup> The EPA concluded that five wastes from U.S. Magnesium's Rowley, Utah facility were not magnesium wastewaters.<sup>21</sup> According to the EPA's interpretation of the final rule, four pollution-control wastes from the Rowley facility were not "from primary magnesium processing," while the other non-exempt waste did not qualify as "wastewater."<sup>22</sup> U.S. Magnesium disagreed, prompting the EPA to seek injunctive relief and civil penalties from U.S. Magnesium.<sup>23</sup>

Following several years of proceedings, the district court granted U.S. Magnesium's motion for summary judgment by deciding that the *Alaska Hunters* doctrine precluded the EPA from amending its initial interpretation of the final rule without providing an opportunity for notice and comment.<sup>24</sup> The EPA's appeal to the Tenth Circuit was distilled to a single question: "whether EPA [was] precluded from pursuing its current and concededly plausible interpretation of its ambiguous [final rule] . . . because the Agency previously . . . offered a different and inconsistent interpretation of that language."<sup>25</sup>

## II. AMENDMENTS AND NOTICE: THE *ALASKA HUNTERS* DOCTRINE

On appeal, U.S. Magnesium did not contest the substance of the EPA's interpretation of the final rule, but focused its fire on alleged procedural errors following the EPA's Report to Congress.<sup>26</sup> According to U.S. Magnesium, the Report to Congress strongly suggested the EPA had, at the time, interpreted the magnesium wastewater phrase to exempt all pollution-control wastes produced at the Rowley facility from strict regulations.<sup>27</sup> The company argued that the EPA's lawsuit sought enforcement of a different, narrower interpretation of the

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19. *Magnesium Corp.*, 616 F.3d at 1133.

20. *Id.* at 1133–34.

21. *Id.* at 1134.

22. *Id.* U.S. Magnesium's production process generates significant amounts of chlorine gas, which the company uses to produce hydrochloric acid and chlorine. *Id.* The company's hydrochloric acid and chlorine production processes in turn generate various wastewaters, four of which the EPA alleged do not qualify for relaxed regulations because the wastewaters are not "from primary magnesium processing," but rather from hydrochloric acid and chlorine processing. *Id.* The fifth waste in dispute, dry anode dust, is the direct result of magnesium processing. *Id.* However, the EPA argued that the waste is a solid, not "wastewater" as required by the final rule. *Id.*

23. *Id.* The initial suit was eventually consolidated with a later case alleging related violations of the Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692 (2006). *Magnesium Corp.*, 616 F.3d at 1133.

24. *Id.* at 1134–35.

25. *Id.* at 1136.

26. *Id.* at 1138.

27. *Id.* at 1134.

magnesium wastewater phrase than that detailed in the Report to Congress, contrary to principles of administrative law espoused by the *Alaska Hunters* doctrine.<sup>28</sup> In the company's view, the *Alaska Hunters* doctrine dictates that "an agency may not interpret its own regulations in a way that conflicts with its own prior interpretation . . . without first engaging in notice and comment."<sup>29</sup> Because the EPA had not engaged in notice and comment prior to finalizing its current, amended interpretation, U.S. Magnesium argued that the EPA's enforcement action of the final rule amounted to an "impermissible attempt to short-circuit [the] required procedure."<sup>30</sup>

U.S. Magnesium drew support for its view of administrative law from a series of cases from the D.C. Circuit starting with *Alaska Professional Hunters Ass'n v. Federal Aviation Administration*.<sup>31</sup> In *Alaska Hunters*, several hunting and fishing guides from Alaska challenged a notice from the Federal Aviation Administration (FAA) that mandated that the guides comply with commercial airline regulations.<sup>32</sup> The new notice from the FAA represented a significant shift in enforcement by the FAA in Alaska. For several decades, the FAA had considered Alaskan hunting and fishing guides exempt from commercial airline regulations.<sup>33</sup> The D.C. Circuit ruled that the new notice was invalid and that an agency cannot "significantly revise[]" a "definitive interpretation" of its regulations without first engaging in notice and comment.<sup>34</sup>

The court in *Alaska Hunters* relied primarily on dicta from an earlier D.C. Circuit case, *Paralyzed Veterans of America v. D.C. Arena L.P.*, that explained, "Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking."<sup>35</sup> The court in *Paralyzed Veterans* began with the premise that the Administrative Procedure Act (APA) generally requires an agency to give notice and provide an opportunity for public comment before issuing any substantive rules.<sup>36</sup> While section 553 of the APA explicitly exempts "interpretative rules" from its notice and comment requirements,<sup>37</sup> the *Paralyzed Veterans* court reasoned that this notice and comment exemption does not apply when an agency *amends* an interpretive rule.<sup>38</sup> Rather, a different provision of the APA, section 551, governs amendments to interpretive rules.<sup>39</sup> As defined by section 551(5) of the APA,

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28. *Id.*

29. *Id.*

30. *Id.* at 1138.

31. *Id.*; see *Alaska Prof'l Hunters Ass'n v. Fed. Aviation Admin.*, 177 F.3d 1030 (D.C. Cir. 1999).

32. *Alaska Prof'l Hunters*, 177 F.3d at 1033.

33. *Id.* at 1031.

34. *Id.* at 1034.

35. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

36. *Id.*

37. 5 U.S.C. § 553(b)(3)(A) (2006).

38. *Paralyzed Veterans*, 117 F.3d at 586.

39. *Id.*

“rule making” includes the “agency process for . . . amending . . . a rule.”<sup>40</sup> The *Paralyzed Veterans* court decided that amending an interpretation of a rule is effectively amending the rule.<sup>41</sup> And because amending a rule requires notice and comment,<sup>42</sup> the court held that an agency may not amend its interpretation of a regulation without first engaging in the notice and comment process.<sup>43</sup>

The D.C. Circuit’s construction of the APA has generated significant scholarly debate.<sup>44</sup> Some commentators argue that the D.C. Circuit misinterpreted the APA by failing to properly distinguish between the effects of different statutory provisions.<sup>45</sup> The foundation of the D.C. Circuit’s ruling was section 551(5) of the APA, which only provides a definition of rulemaking, not a guideline for how to conduct rulemaking.<sup>46</sup> However, a guideline for the rulemaking process can be found in section 553 of the APA, which explicitly exempts “interpretative rules” from the notice and comment procedures required for substantive rules.<sup>47</sup> Accordingly, any amendment to an interpretive rule simply amounts to another interpretive rule, for which an agency does not have to undertake notice and comment.<sup>48</sup> In defense of the *Alaska Hunters* doctrine, other commentators suggest that an interpretation of a substantive “regulation essentially becomes part of that regulation itself.”<sup>49</sup> Any amended interpretation of a substantive rule thus necessarily amends the substantive rule itself, which, according to section 553, requires notice and comment.<sup>50</sup>

While the issue of whether an agency may amend its interpretation of a substantive rule without notice and comment has split the circuit courts, the Tenth Circuit was not compelled to navigate these troubled administrative waters.<sup>51</sup> Instead, the court directed its attention to the nature of the EPA’s interpretation, namely whether the *Alaska Hunters* doctrine, which governs

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40. 5 U.S.C. § 551(5) (2006).

41. *Paralyzed Veterans*, 117 F.3d at 586.

42. 5 U.S.C. § 551(5).

43. *Paralyzed Veterans*, 117 F.3d at 586.

44. *Magnesium Corp.*, 616 F.3d at 1139.

45. *Id.*; see, e.g., Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547, 567 (2000); Jon Connolly, Note, *Alaska Hunters and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 COLUM. L. REV. 155, 172–73 (2001).

46. *Magnesium Corp.*, 616 F.3d at 1139.

47. *Id.*

48. *Id.* at 1140.

49. *Id.*; see, e.g., Richard W. Murphy, *Hunters for Administrative Common Law*, 58 ADMIN. L. REV. 917, 923 (2006).

50. *Magnesium Corp.*, 616 F.3d at 1140.

51. *Id.* at 1139, 1140. The Third, Fifth and Sixth Circuits have adopted the view of the D.C. Circuit, while the First and Ninth Circuits arrived at a contrary conclusion. *Id.* at 1139. Compare *SBC Inc. v. Fed. Comm’n Comm’n*, 414 F.3d 486, 498 (3d Cir. 2005), *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001), and *Dismas Charities, Inc. v. U.S. Dep’t of Justice*, 401 F.3d 666, 682 (6th Cir. 2005), with *Warder v. Shalala*, 149 F.3d 73, 81–82 (1st Cir. 1998) and *Erringer v. Thompson*, 371 F.3d 625, 632 (9th Cir. 2004).

definitive interpretive rules, also controls the EPA's tentative interpretation of its hazardous waste regulations found in the Report to Congress.<sup>52</sup>

### III. TENTATIVE AND DEFINITIVE STATEMENTS: AVOIDING DOCTRINE

The court in *United States v. Magnesium* ruled that the EPA did not need to engage in notice and comment of an amendment to a tentative interpretation of a substantive rule because the *Alaska Hunters* doctrine does not apply to tentative interpretations.<sup>53</sup> As the court explained, the "*Alaska Hunters* doctrine applies only to *definitive* regulatory interpretations; even under *Alaska Hunters*, an agency remains free to disavow and amend a *tentative* interpretation of one of its rules without notice and comment."<sup>54</sup> Following the *Alaska Hunters* decision, the D.C. Circuit has consistently held that an agency remains committed to its interpretive rule only when the interpretation is definitive and does not include "conditional or qualified statements, including statements that something 'may be' permitted."<sup>55</sup> In line with the D.C. Circuit's elaborated doctrine, the Tenth Circuit decided that an agency's tentative interpretation of a substantive rule does not become an essential part of the substantive rule itself and thus does not justify strict notice and comment requirements.<sup>56</sup>

According to the court, U.S. Magnesium had not demonstrated that the EPA's interpretation of the final rule had ever been definitive.<sup>57</sup> The Agency's Report to Congress, which formed the crux of U.S. Magnesium's argument, had consistently described its findings as "tentative."<sup>58</sup> Also, other actions and communications by the EPA, such as the EPA's on-site tests of Rowley's pollution-control wastes, did not establish that the EPA's interpretation of the phrase was definitive.<sup>59</sup> As the court summarized, "none of these arguments . . . adopted a *definitive*, rather than a *tentative*, interpretation that the five Complaint wastes were 'process wastewater from primary magnesium processing by the anhydrous process.'"<sup>60</sup>

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52. *Magnesium Corp.*, 616 F.3d at 1140–41.

53. *Id.* at 1140.

54. *Id.* at 1140.

55. *Id.* at 1141 (quoting *MetWest Inc. v. Sec'y of Labor*, 560 F.3d 506, 509–10 (D.C. Cir. 2009)); see also *Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1041 (D.C. Cir. 2008) (holding that inconclusive guidance documents were not sufficient to bind future agency interpretations); *Ass'n of Am. R.R. v. Dep't of Transp.*, 198 F.3d 944, 948–50 (D.C. Cir. 1999) (finding that the agency had not adopted a definitive interpretation of the regulation necessary to limit the agency's discretion).

56. *Magnesium Corp.*, 616 F.3d at 1141.

57. *Id.* at 1142.

58. *Id.* at 1141.

59. *Id.* at 1142–43. An EPA site visit director visited the Rowley facility in June 1989. *Id.* at 1142. U.S. Magnesium pointed out that the director tested aggregated waste streams to measure pollution and argued this action demonstrated EPA intended to regulate the facility's pollution-control wastes as a whole. *Id.* This action did not convince the court that EPA had demonstrated a definitive commitment to its interpretation. *Id.* at 1142–43.

60. *Id.* at 1143.

The court acknowledged that the line between definitive and tentative interpretations can be difficult to draw.<sup>61</sup> As a rough limit, simply adding the word “tentative” to every agency statement is not enough; “the policy must actually *be* tentative.”<sup>62</sup> But, as the court recognized, this may have minimal practical effects on overly flexible agency rulemaking because an agency can simply offer tentative interpretations and later “embrace some new (assuredly tentative) interpretation whenever it wants.”<sup>63</sup> Despite the practical difficulties of distinguishing between definitive and tentative interpretations, other statutory and constitutional requirements would sufficiently insulate regulated parties from the deleterious effects of overly flexible rulemaking.<sup>64</sup>

### CONCLUSION

Some legal practitioners have expressed concern that *United States v. Magnesium* may open the door to unpredictable amendments to tentative interpretive rules.<sup>65</sup> According to these practitioners, tentative agency interpretations of substantive rules are subject to an increased level of unpredictability that might negatively affect regulatory compliance.<sup>66</sup> From the perspective of regulated parties, agency rulemaking can frustrate long-term business planning when the rules become too flexible.<sup>67</sup> However, these concerns are misplaced and fail to appreciate the potential benefits of flexible rulemaking.

Following *United States v. Magnesium*, regulated parties do not face any added regulatory uncertainty because, even under the *Alaska Hunters* doctrine, amendments to tentative interpretations of substantive rules do not require notice and comment. The court merely restated a current rule of administrative law; it did not alter or adopt the *Alaska Hunters* doctrine.<sup>68</sup>

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61. *Id.* at 1142 n.14.

62. *Id.*; see *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987).

63. *Magnesium Corp.*, 616 F.3d at 1143 n.16.

64. *Id.* at 1144.

65. See, e.g., Karen A. Caffee, *Tenth Circuit Ruling Confirms: Be Wary of Relying on Agency’s Tentative or Preliminary Interpretations of Regulations*, MARTINDALE-HUBBELL (Sept. 6, 2010), [http://www.martindale.com/environmental-law/article\\_Bingham-McCutchen-LLP\\_1143452.htm](http://www.martindale.com/environmental-law/article_Bingham-McCutchen-LLP_1143452.htm) (“In light of the holding of the case, companies should be cautious about relying on EPA’s initial interpretations of its regulations.”); *EPA’s Tentative Regulatory Interpretations*, HUSCH BLACKWELL LLP (Sept. 13, 2010), <http://www.huschblackwell.com/epas-tentative-regulatory-interpretations> (“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.”).

66. *Ruling Prompts Warning to Industry Over EPA Rules for Undefined Waste*, 18 Def. Env’t. Alert (Inside Wash. Publishers) No. 18 (Aug. 31, 2010) (stating that “one key waste lawyer says [the ruling] should serve as a warning to industry to be cautious handling materials that lack an EPA definition and treat them as hazardous until the agency issues a decision that they are not hazardous”).

67. *Id.*

68. *Id.*

As the Tenth Circuit explained, at least two layers of statutory and constitutional law protect regulated parties from unnecessarily onerous rulemaking.<sup>69</sup> First, other provisions of the APA empower courts to review “arbitrary and capricious” agency actions or conclusions.<sup>70</sup> Second, the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution “prohibit the imposition of penalties without fair notice.”<sup>71</sup> Because U.S. Magnesium did not raise either of these two potential objections to the EPA’s decision to amend its interpretation of the magnesium wastewater phrase,<sup>72</sup> the Tenth Circuit simply had to make clear the preexisting limits of the *Alaska Hunters* doctrine.<sup>73</sup>

Further, the exemption of tentative interpretations from the control of the *Alaska Hunters* doctrine enhances business predictability through balanced, flexible agency rulemaking procedures. If the court had included tentative interpretations within the *Alaska Hunters* doctrine, the EPA would need to engage in notice and comment for every interpretive rule. Under this doctrine, the EPA would have no flexibility to issue tentative interpretations that evolve toward a final, definitive interpretive rule. Further, regulated parties may consider every favorable statement from the EPA to be an interpretive rule requiring notice and comment prior to amendment. Such a scenario would be procedurally intractable. Wary of litigation from inconsistent yet plausible interpretations, the EPA could become hesitant to issue new tentative interpretations, leaving businesses in the dark until the moment an interpretation formally flows from the EPA.

Alternatively, the EPA could proceed with business as usual, as companies attempt to wade through inconsistent yet plausible statements to decide which statements rise to the level of interpretive rules. Without some deference to agency flexibility, regulated parties will have insufficient regulatory predictability to successfully manage their businesses. By excluding tentative interpretive rules from the *Alaska Hunters* doctrine, the Tenth Circuit’s decision in *United States v. Magnesium* effectively balanced deference to agency rulemaking with concerns about business predictability.

*Nate Johnson*

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69. *Magnesium Corp.*, 616 F.3d at 1143–44.

70. *Id.* at 1144 (citing 5 U.S.C. § 706(2)(A) (2006)).

71. *Magnesium Corp.*, 616 F.3d at 1144.

72. *Id.*

73. The district court “seemed to believe . . . EPA could not now change its interpretation of its own 1991 rule without first providing an opportunity for notice and comment.” *Id.* at 1135.

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