D.C. Circuit Invalidates EPA Document as "Binding on its Face"

In *General Electric Co. v. EPA* (*GE*), the Court of Appeals for the District of Columbia Circuit invalidated the Environmental Protection Agency's PCB (polychlorinated biphenyls) Risk Assessment Review Guidance Document (the Document or the Guidance Document) on the grounds that the Environmental Protection Agency (EPA) had improperly failed to use notice and comment procedures to issue the Document.[1] According to the court, the Document appeared to bind private parties and EPA with the "force of law" and was therefore a legislative rule within the meaning of the Toxic Substances Control Act (TSCA) and the Administrative Procedures Act (APA).[2] EPA was therefore required to use notice and comment procedures to promulgate the Document.[3] The holding in *GE* that an agency document's language alone can make the document binding and notice and comment procedures therefore required is arguably inconsistent with prior cases. The court's decision also severely limits agencies' ability to use guidelines and similar documents to explain their regulations in precise, practical terms. However, the decision is likely to benefit both industry and environmental groups that wish to challenge these kinds of agency documents.

The Guidance Document at issue in *GE* set forth EPA's interpretation of two regulations regarding the cleanup and disposal of PCB remediation waste and PCB bulk waste.[4] The two regulations state that EPA will approve an application to use a non-generic method of sampling, cleanup, and disposal of these wastes if the method does "not pose an unreasonable risk of injury to health or the environment."[5] The Document established two approaches for the required risk assessment: one involving separate calculations of cancer and non-cancer risks, and the other using a "total toxicity factor."[6] The Document indicated that

1. 290 F.3d 377 (D.C. Cir. 2002).
2. *Id.* at 384.
3. *See id.* at 385.
4. *Id.* at 379.
5. 40 C.F.R. §§ 761.61(c)(2), 761.62(c)(1) (2003).
6. *GE*, 290 F.3d at 379. *see* 15 U.S.C. § 2605(e)(4) (requiring the use of these procedures); 15 U.S.C. § 2605(c)(2) (same); 5 U.S.C. § 553 (same).

EPA was willing to approve any risk assessment with a total toxicity factor of 4.0 $(mg/kg/day)^{-1}$.[7]

General Electric Company (GE) filed a petition for review of the Document, alleging that EPA had improperly failed to publish a notice of proposed rulemaking, give interested parties an opportunity to comment, and hold an informal hearing before issuing the Document.[8] The court's resolution of this controversy turned on whether the Guidance Document constituted a legislative rule, and was therefore subject to notice and comment procedures.[9] According to the court, whether an agency document constitutes a legislative rule depends on whether the agency document binds private parties or the agency itself with the "force of law."[10] The court reasoned that "an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding . . . or is applied by the agency in a way that indicates [that] it is binding."[11]

The court determined that EPA's Guidance Document was a binding legislative rule because it appeared "on its face" to bind both EPA and applicants seeking approval of a risk-based cleanup plan.[12] The court relied on the following features of the Document in finding that the document was binding: (1) the use of the word "must" in the Document, (2) the Document's apparent unwillingness to accept approaches other than the two mentioned above, and (3) the Document's use of the 4.0 $(mg/kg/day)^{-1}$ total toxicity factor.[13] This "binding" language effectively created a presumption that the Document was indeed binding.[14] EPA was not able to rebut this presumption by pointing to any approved applications that did not conform to the Document.[15]

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7. *GE*, 290 F.3d at 379.

8. *Id.* at 385. Before deciding the issue whether the guidance Document should have been issued pursuant to notice and comment procedures, the court addressed two preliminary issues: whether the case was ripe for review, and whether the court had jurisdiction to review the Document. *Id.* at 380-85. The court found that the case was ripe, and that it had jurisdiction under the TSCA. *Id.* at 380, 385. The court's resolution of these two issues was heavily informed by its finding that the Document was a binding legislative rule. *See id.* at 380-85.

9. *Id.* at 378-79, 385. The court specified that before it could "reach the merits, [it] must consider whether the Document is a 'rule' subject to [its] jurisdiction under . . . the TSCA." *Id.* at 381. While GE argued that the term "rule" should be read broadly "to track the definition in the APA," EPA argued that direct appellate review was narrowly limited to legislative rules. *Id.* The court found it unnecessary to decide which interpretation of the term "rule" was correct because it concluded that the Document was "indeed a legislative rule." *Id.* at 381-82.

10. *Id.* at 382

11. *Id.* at 383 (citing Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000) and McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1321 (D.C. Cir. 1988)).

12. *Id.* at 385.

13. *Id.* at 384-85.

14. *See id.* at 384-85.

15. *Id.* at 385.

There is little support in prior cases for the *GE* court's proposition that that an agency document can be binding and have the "force of law" merely because of the language it contains. The court in *GE* cited its decision in *Appalachian Power Co. v. EPA* to support this proposition.[16] However, in *Appalachian Power* the court held that EPA's Periodic Monitoring Guidance was binding for at least two reasons other than the language the Guidance used.[17] First, EPA in its brief in that case had described the interpretation contained in the Periodic Monitoring Guidance as "settled."[18] Secondly, the court in *Appalachian Power* noted that states were relying on the Periodic Monitoring Guidance in requiring compliance with certain conditions in permits.[19] *Appalachian Power* thus does not stand for the proposition that certain agency documents are binding and cannot be issued without notice and comment procedures merely because of the language they contain. The other cases that the court in *GE* cited for this proposition can be similarly distinguished.[20] In

16. *Id.* at 383 (citing *Appalachian Power*, 208 F.3d at 1023.)

17. *Appalachian Power*, 208 F.3d at 1021-23.

18. *Id.* at 1022.

19. *Id.* at 1023. Moreover, in *Appalachian Power*, the court's consideration of whether the Guidance was binding was part of its analysis of the availability of judicial review, not part of its analysis of whether notice and comment were required. *Id.* at 1020-23. As the court noted in *American Portland Cement Alliance v. EPA*, "the ultimate availability of substantive judicial review is distinct from the question of whether the basic rulemaking strictures of notice and comment and reasoned explanation apply." 101 F.3d 772, 777 (quoting Am. Med. Ass'n v. Reno, 857 F.3d 1129, 1134 (D.C. Cir. 1995)).

20. *See* Chamber of Commerce v. Dep't of Labor, 174 F.3d 206, 211-13 (D.C. Cir. 1999) (holding that the OSHA was required to use notice and comment procedures for a Directive that subjected certain employers to inspection in part because the OSHA admitted in its brief that the Directive left "no room for discretionary choices by inspectors in the field"); Chemical Mfrs. Ass'n v. EPA, 28 F.3d 1259, 1263 (1994) (holding that the Department of Labor was not required to subject the IRIS database to notice and comment rulemaking because the "database by itself has no preclusive effect; the data in the database constrain no one until so applied in a particular rule"); McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1320-22 (D.C. Cir. 1988) (notice and comment procedures required for EPA model because EPA had denied petitions based on their failure to conform with model and EPA insisted it had used notice and comment procedures to issue model); Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 945-49 (D.C. Cir. 1987) (notice and comment procedures required for FDA's action levels based on language in regulation providing for the establishment of action levels, fact that FDA required parties to secure exceptions to action levels, and FDA statements to public outside action levels document indicating actions levels were binding). Several of the cases the court in *GE* cited consider the issue whether judicial review of an agency document is available rather than the issue whether notice and comment procedures were required to issue an agency document. *See* Molycorp, Inc. v. EPA, 197 F.3d 543, 545-46 (D.C. Cir. 1999) (holding review was not available for EPA's Technical Background Document under RCRA because that document was merely an agency policy statement that "does not seek to impose or elaborate or interpret a legal norm. It merely represents an agency position with respect to how it will treat—typically enforce—the governing legal norm. By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach. . . ."); Florida Power & Light Co. v. EPA, 145 F.3d 1414, 1418-21 (D.C. Cir. 1998) (holding review of preamble statements to proposed rule under RCRA was not available because the agency had not characterized them as binding, published them in

those cases, whether a particular agency document was binding frequently depended not on the document's language, but on whether the agency had relied on the document in enforcement actions.[21]

By holding that an agency must use notice and comment procedures for any document that includes binding language, the decision of the court in *GE* undermines agencies' ability to use guidelines and similar documents to explain environmental regulations in precise, practical terms. It limits agencies' ability to actively promote their environmental goals by setting forth particular methods for complying with environmental regulations in informal agency documents available to the public.

On the other hand, the court's decision in *GE* may benefit both industry and environmental groups that want to challenge an agency guideline or similar document.[22] After *GE*, these groups may successfully challenge any guideline that appears binding on its face, even if the agency has not yet applied it.[23]

Thus, the court's holding in *GE* is bad for EPA and other administrative agencies but good for the industry and environmental groups that challenge these agencies. By holding that agencies must use notice and comment procedures for any documents that contain precise language, the court in GE gave those groups a potentially enormous

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the Code of Federal Regulations, nor relied on them in enforcement actions); American Portland Cement Alliance v. EPA, 101 F.3d 772, 774-79 (D.C. Cir. 1996) (holding that review of Regulatory Determination under RCRA was not available because EPA did not designate it as a final regulation nor publish it in the Code, and EPA's stated intent was to defer law and policymaking with respect to the issue).

21. *See, e.g., Florida Power,* 145 F.3d at 1418-21 (EPA had not relied on preamble statements to proposed rule under RCRA in enforcement actions), *McLouth,* 838 F.2d at 1322 (EPA had denied petitions based on their failure to conform with model), *Comty. Nutrition,* 818 F.2d at 947 (FDA had required parties to secure exceptions to action levels).

22. *See, e.g.*, U.S. Air Tour Ass'n v. F.A.A., 298 F.3d 997, 1013-14 (D.C. Cir. 2002) (citing *GE,* 290 F.3d at 380 while holding ripe for review environmental group's challenge to FAA rule imposing a cap on a number of commercial air tours that could run in Grand Canyon National Park).

23. If courts apply the rule enunciated in *GE* fairly, environmental groups will especially benefit from the court's decision to focus on the language of agency documents rather than on the agencies' application of such documents in enforcement actions. This is because environmental groups tend to challenge agency policies of non-enforcement, rather than agency policies of enforcement. Because of the court's decision in *GE*, in order to challenge an agency document for failure to use notice and comment procedures, environmental groups need not show that the document has been used to support an actual policy of non-enforcement. Instead, they need only show that the language contained in the document purports to bind the agency to a policy of non-enforcement. *See GE,* 290 F.3d at 384-85. Moreover, if the court accepts the argument that the document is binding on its face, the court is likely to find that the case is ripe for review, *see GE,* 290 F.3d at 380-81, and that the document is a final agency action for which judicial review is presumptively available. *Id.* at 381-85; *see also* 5 U.S.C. § 704 (2003) ("final agency action . . .[is] subject to judicial review).

advantage in litigation. Nevertheless, since the court's holding in *GE* is arguably inconsistent with prior cases, litigants should not rely on *GE* alone when adjudicating the validity of agency documents.

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