

ENVIRONMENTAL JUSTICE “GUIDELINES” AVOID DUE PROCESS SAFEGUARDS

by
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A fundamental safeguard provided by the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*, is to ensure that federal agencies provide an opportunity for informed and meaningful public participation as a part of their rulemaking processes. Section 553 prescribes the minimum rulemaking requirements that a federal agency must follow. The APA procedural safeguards contemplate that an agency will not enforce its regulations until it has issued a final rule after considering and responding to issues raised by public participation. The APA also allows for a delay in the date the regulations take effect, allowing regulated entities advance notice and an opportunity to come into compliance.

One way that federal agencies attempt to short-cut APA safeguards is the publication of interim final rules, an interim final guidance, or interim policy statements. By using the label “interim,” a federal agency generally makes the rule, guidance, or policy statement immediately effective but allows for a concurrent public comment period. Because an interim rule is immediately enforceable, there is no incentive for the agency to issue it as a final rule, which would require that the agency respond to public comments at the time it publishes the final rule.

In the past seven years, the U.S. Environmental Protection Agency (“EPA”) has published over sixty-five interim final rules, interim guidances, and interim policy statements in the Federal Register. However, not all of EPA’s interim rules have been published there, as required by the Federal Register Act, 44 U.S.C. § 1501 *et seq.*

The most noteworthy example is EPA’s *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (“Interim Guidance”), issued on or about February 13, 1998. EPA made it available on the Internet, and announced the opportunity to submit written comments through an EPA press advisory. By labeling this guidance as interim, EPA did not provide the justification and explanation for the Interim Guidance provisions that would have been required if it were published in the Federal Register. Hence, the public has been denied an opportunity to comment on EPA’s rationale. By making it immediately effective, EPA also failed to provide regulated entities with an advance notice and a grace period to come into compliance.

Additionally, EPA did not adhere to a number of other safeguards in issuing its Interim Guidance. The General Counsel to the U.S. General Accounting Office (“GAO”) has concluded that the Interim Guidance meets the definition of a “rule” for purposes of the Congressional Review Act (“CRA”) portion of the Small Business Regulatory Enforcement Fairness Act (“SBREFA”), 5 U.S.C. § 801 *et seq.*

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In his legal opinion, B-281575, January 20, 1999 at p. 6, the GAO General Counsel concludes that the new steps in the Interim Guidance are mandatory and “affect the rights and duties of the recipient, the complainant, and the affected population; they will have future effect and they effect a change in the existing regulation.” As determined by the GAO General Counsel, EPA avoided congressional review under SBREFA, and EPA should have delayed enforcement of the Interim Guidance until SBREFA requirements were followed.

EPA has avoided having to seek the Attorney General’s approval for the substantive changes made by EPA’s Interim Guidance to EPA’s Title VI regulations, 40 C.F.R. Part 7. Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1, provides in part that “[n]o rule, regulation, or order shall become effective unless and until approved by the President . . .” The Attorney General is delegated the authority to approve Title VI rules, regulations, or orders for the President.

EPA has avoided other safeguards. If it had issued the Interim Guidance as an APA rule, the agency would have had to make a significant regulatory action determination under Executive Order 12866; conduct a regulatory flexibility analysis under the Regulatory Flexibility Act; assess information collection activities under the Paperwork Reduction Act; determine effects on state, local, and tribal governments under the Unfunded Mandates Reform Act and Executive Orders 12875 (Enhancing Intergovernmental Partnerships) and 13084 (Consultation and Coordination with Indian Tribal Governments); and evaluate the effects on children under Executive Order 13045.

EPA has also avoided addressing legal questions relating to the Interim Guidance. The agency uses criteria that are not publicly available. The Interim Guidance, for example, requires EPA to consider cumulative risks in determining whether air emissions to be permitted by a state environmental agency decision create a disparate impact. EPA has yet to issue cumulative risk standards. The Interim Guidance allows EPA to make decisions as to cumulative risks with the use of apparently unknown standards.

As demonstrated by EPA’s use of its Interim Guidance in conducting Title VI investigations and as determined by the GAO’s General Counsel, substantial changes are made to the duties and obligations that parties have under Title VI and EPA’s discriminatory effects regulations. EPA did not provide advance explanation, adequate fair notice, nor opportunity to be heard before the Interim Guidance was enforced. Due process requires that EPA explain its decisions and choices so that an informed and meaningful opportunity for public comment is provided, and that EPA issues a final rule before the rule is enforced or used.

EPA’s use of interim final rules, interim final guidances, interim policy statements, and other interim guidance indicates that a broad remedy is needed. Its failure to promulgate these far-reaching environmental justice guidelines as a rule may provoke congressional action that would prohibit the agency from enforcing or using an interim rule or policy unless it promulgates such rule or policy in compliance with APA requirements. Congress has already enacted a limited statutory restriction that prohibits EPA from using its Interim Guidance during fiscal year 1999 to investigate any complaint filed with EPA after October 21, 1998. *See* 112 STAT. 2461, 2496.