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DOES CONFUSION REIGN AT THE INTERSECTION OF ENVIRONMENTAL AND ADMINISTRATIVE LAW?: REVIEW OF INTERPRETIVE RULES AND POLICY STATEMENTS UNDER JUDICIAL REVIEW PROVISIONS SUCH AS RCRA SECTION 7006(a)(1)

Tom J. Boer*

Many environmental statutes, including the Resource Conservation and Recovery Act (RCRA), have specific judicial review provisions providing for review of agency actions in the D.C. Circuit. Confusion has mounted, however, as the Environmental Protection Agency (EPA), industry, and environmental interest groups have tried to interpret the exact circumstances under which review is available pursuant to these provisions. This confusion stems in part from the wide array of agency pronouncements, including interpretive rules, policy manuals, and guidance documents, which fall within the Administrative Procedure Act (APA) definition of a "rule." The article analyzes the D.C. Circuit’s review of interpretive rules and policy statements, and attempts to discern a pattern that would provide guidance to interested parties seeking to comply with statutory review provisions like that in RCRA. The author calls on the D.C. Circuit to clarify the confusion surrounding its interpretation of judicial review provisions in environmental statutes.

INTRODUCTION

The judicial review provision of the Resource Conservation and Recovery Act (RCRA), section 7006(a)(1), states that:

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a petition for review of action of the Administrator in promulgating any regulation, or requirement under this chapter or denying any petition for the promulgation, amendment or repeal of any regulation under this chapter may be filed only in the United States Court of Appeals for the District of Columbia, and such petition shall be filed within ninety days from the date of such promulgation or denial, or after such date if such petition for review is based solely on grounds arising after such ninetieth day

Neither Congress, through RCRA or other comparable environmental statutes, nor the Court of Appeals for the District of Columbia have adequately defined what actions of the United States Environmental Protection Agency (EPA or the Agency) are included in the term "any regulation[] or requirement." Without guidance, it remains unclear whether review of all regulations or rules issued or promulgated under the Administrative Procedure Act (APA) must be challenged in the D.C. Circuit within the statutorily allotted time period, or whether RCRA section 7006(a)(1) applies only to a specific and limited set of agency actions.

The uncertainty in this area originates with the APA's broad definition of a "rule" as "the whole or part of 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 . . . ." According to Robert A. Anthony:

[Agency action] encompassed by this definition come[s] in a myriad of forms and bears endless labels: legislative rules, interpretive rules, opinion letters, policy statements, policies, program letters, Dear Colleague letters, regulatory guidance letters, rule interpretations, guidances, guidelines, staff instructions, manuals, questions and answers, bulletins, advisory circulars, models, enforcement policies, action levels, press releases, [and Congressional] testimony.

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4 Id. § 551(4).

5 Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?, 41 DUKE L.J. 1311, 1320 (1992);
The confusion that surrounds the RCRA judicial review provision is detrimental to the government, industry, and environmental groups. EPA is affected because the Agency may often prefer a definite and quick judicial resolution where conflict over a regulation is expected. If a rule or regulation is to be invalidated by the courts, EPA may elect to address the rule's infirmities and quickly formulate a new approach. At the same time, however, the Agency may make statements or pronouncements that it intends not to be subject to review under section 7006(a)(1), and only be reviewable in court when applied to a particular, specific set of circumstances. A clear judicial articulation defining those administrative actions that are subject to section 7006(a)(1) review would allow EPA to tailor its administrative actions by taking into account whether the Agency's decisions would be subject to immediate judicial review.

Industry is often concerned about judicial review provisions because it does not want to fail to file suit challenging a rule within the statutory time period. Generally, if industry disagrees with an agency action, it would prefer to challenge the action under the equivalent to RCRA's section 7006(a)(1) provision because standing and ripeness are not as likely to be significant bars to litigation. At the same time, however, industry does not want to spend the time or the money necessary to file a suit if there is a significant likelihood that it will be

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6 Cf. William F. West, Administrative Rulemaking Politics & Processes 50 (1985). For instance, in choosing between rulemaking and adjudication, agencies often choose rulemaking because they are interested in formulating and enforcing policies quickly and with a minimum expenditure of resources. See id.

7 See Eagle-Picher Indus. v. EPA, 759 F.2d 905, 914 (D.C. Cir. 1985) (“As a general proposition, however, if there is any doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being barred.”); see generally Horsehead Resource Dev. Co. v. EPA, 130 F.3d 1090 (D.C. Cir. 1997) (discussing RCRA § 7006 “window” for filing challenges to agency actions).

8 If a challenge under section 7006(a)(1) of RCRA is not possible, it may be necessary for a company to violate the agency's rule, regulation, or pronouncement to gain the necessary standing and establish ripeness in order to bring a challenge in court. This is not a preferred method of challenging an agency action because if the company loses, it may be forced to pay civil or criminal penalties for the violation which gave rise to standing and ripeness. Furthermore, if the rule is challenged in another circuit and the industry wins, that decision will only apply within that particular circuit—whereas a ruling by the D.C. Circuit would force the agency to reconsider nationwide application of the rule. This is a particularly important issue for large companies that operate within a geographic area encompassing numerous federal circuits.
dismissed as outside of the scope of judicial review provisions similar to RCRA section 7006(a)(1).

Although their motives for challenging an agency action may differ significantly, environmental organizations have many of the same underlying issues as industry. Environmental groups are concerned about the possibility that a failure to promptly challenge a rule due to confusion over the application of judicial review provisions of RCRA or other statutes may result in missing the statutory deadline for filing a challenge. These organizations are, in many cases, restricted by standing considerations to challenging rules through a judicial review process like RCRA section 7006(a)(1). These challenges, however, may also be a preferred approach to directly confronting EPA actions because a victory in the D.C. Circuit forces EPA to completely withdraw the rule, whereas a victory in another circuit would have only limited, rather than a nationwide, application.

This article seeks to find a pattern in the D.C. Circuit's review of interpretive rules and policy statements pursuant to the judicial review provisions similar to RCRA section 7006(a)(1). After a brief review of administrative rulemaking, this article: (1) addresses whether a freestanding interpretive rule would be reviewable in the D.C. Circuit under RCRA section 7006(a)(1); (2) discusses the factors the D.C. Circuit would consider in deciding whether to deny review on ripeness grounds; (3) considers whether review by the D.C. Circuit precludes future review of an interpretive rule in other circuits arising from the application of the rule in an enforcement case; and (4) calls for the D.C. Circuit to address these issues and thereby provide EPA and stakeholders the necessary insight into jurisdictional and ripeness issues when review of an agency action is sought.

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9 See generally supra note 7.
11 See 32 AM. JUR. 2D Federal Courts § 604 (1994) ("Although in theory federal law is unitary, conflicts inevitably develop among the circuits as to their interpretations of federal law. Absent some direction from the United States Supreme Court, binding precedent for the District Courts within a circuit is set by the Court of Appeals for that circuit. A case decided by the Court of Appeals for the Seventh Circuit does not control the outcome of a dispute in the Court of Appeals for the Fifth Circuit.") (citations omitted).
I. The Administrative Procedure Act: Sorting Out Legislative Rules, Interpretative Rules, and General Statements of Policy

A. A Primer on Administrative Law

When an administrative agency, such as EPA, decides to make a pronouncement to the public, a myriad of potential avenues are available.\(^\text{12}\) Under the APA, however, only three general methods of binding administrative rulemaking are specifically contemplated: (1) formal rulemaking with many of the procedures typical of an adjudicatory hearing;\(^\text{13}\) (2) informal rulemaking requiring only the minimal requirements of notice and comment;\(^\text{14}\) and (3) agency policy rulemaking which emerges from agency precedential adjudications.\(^\text{15}\) EPA, like many federal agencies, almost invariably uses the informal rulemaking process when choosing among these three options. This article, therefore, is concerned only with the informal, substantive rulemaking process—particularly the differences between legislative rules promulgated under the informal rulemaking requirements of the APA and interpretive rules and general statements of policy which are exempted from the informal rulemaking notice and comment requirements.\(^\text{16}\)

The Attorney General's Manual on the APA defines legislative rules, interpretive rules, and general statements of policy as follows:

\(^{12}\) See supra note 5 and accompanying text.

\(^{13}\) See 5 U.S.C. §§ 556–557 (1994). In a 1973 decision, the United States Supreme Court interpreted the APA to require formal rulemaking only in the relatively rare circumstances where the agency's organic statute used the phrase "on the record after hearing," or nearly identical language. See United States v. Florida E. Coast Ry., 410 U.S. 224, 241 (1973). In all other situations, including the usual case in which the statute reads "after hearing," an agency may use informal notice-and-comment rulemaking procedures. See id. The flexibility afforded to agencies in choosing a rulemaking procedure after Florida East Coast, coupled with the increasing complexity of formal rulemakings, led many agencies to abandon the more formal procedure altogether. See Administrative Conference of the United States, A Guide to Federal Agency Rulemaking 4–5 (2d ed. 1992) [hereinafter ACWA] (noting that formal rulemaking is used infrequently). An example of the increasing complexity of formal rulemaking can be seen vividly in the Food and Drug Administration's proposed rule on the issue of whether a product labeled "peanut butter" must contain 87% or 90% peanuts. The formal rulemaking addressing this question took nine years and produced a transcript of 7736 pages. See 1 Kenneth C. Davis, Administrative Law Treatise § 6.8 (2d ed. 1978).

\(^{14}\) See 5 U.S.C. § 553.


\(^{16}\) See 5 U.S.C. § 553.
Substantive [legislative] rules—rules, other than organization or procedural . . . issued by an agency pursuant to statutory authority and which implement the statute . . . . Such rules have the force and effect of law.

Interpretative [interpretive] rules—rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers. [citations omitted]

General Statements of Policy—statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.17

Despite these seemingly straightforward definitions, numerous decisions in the D.C. Circuit have expressed that the distinction between these three forms of agency action is anything but clear-cut in practice.18 Part of this confusion may have arisen because "it often serves the interests of both agencies and the courts to blur or manipulate the distinction between legislative and nonlegislative rules."19 This leads to different arguments in court by litigants, and different bases for decisions by the D.C. Circuit in challenges to disputed rules, depending upon the specific factual circumstances surrounding the challenge and the rule and the specific goals of the parties.20 Despite the confu-
sion, it is possible to extract from the numerous decisions concerning informal rulemaking the general legal principles delineating the common distinctions between legislative rules, interpretive rules, and general statements of policy.

B. Legislative Rules

A legislative rule21 is "essentially an administrative statute—an exercise of previously delegated power, new law that completes an incomplete legislative design."22 Legally binding upon the courts, the agency, and the public, these rules have the force of law.23 In promulgating a legislative rule, agencies must abide by the notice and comment requirements of the APA.24 Furthermore, an agency must possess both the delegated authority to make rules with the force of law25 and, more specifically, the delegated authority to act with respect to the subject matter of the proposed legislative rule.26

C. Interpretive Rules

In issuing an interpretive rule "an agency can declare its understanding of what a statute requires without providing notice and statement binding effect while the courts will characterize the statement as an unreviewable general statement of policy exempt from notice and comment procedures.").

21 It has been argued that courts often confuse the term "substantive rule" to mean "legislative rule." See Anthony, supra note 5, at 1321 n.37. A preferable usage, it is argued, is to contrast the term "substantive rule" with a "procedural rule." See id.; 5 U.S.C. § 553(d) (1994). As such, the correct usage of the term "substantive rule' . . . embraces legislative rules, interpretive rules, and policy statements other than those concerned with procedure, practice, or agency organization." Anthony, supra note 5, n.37; see also Joseph, 554 F.2d at 1153 n.24 ("Interpretative rules may be substantive in the sense of addressing a substantive rather than a procedural issue of law . . . ."). But see Syncor, 127 F.3d at 93 ("We have long recognized that it is quite difficult to distinguish between substantive and interpretative rules."); American Hosp. Ass'n, 834 F.2d at 1045 ("the spectrum between a clearly interpretive rule and a clearly substantive one is a hazy continuum").

22 Asimow, supra note 19, at 383.

23 See supra note 17 and accompanying text.

24 The APA's section 553 requirements call for (1) publication of the notice of proposed rulemaking (including notice of any public proceedings and the terms of the proposal or subjects involved); (2) opportunity for all interested persons to comment through the submission of written views (with or without the opportunity for oral presentation); (3) agency consideration of the matter presented; and (4) publication of the rule in the Federal Register, including a statement of the rule's basis and purpose. See 5 U.S.C. § 553(a)(1); see also Anthony, supra note 5, at 1322 (describing requirements for legislative rule). An agency may also need to follow additional procedures demanded by its organic statute. Cf. Chrysler Corp. v. Brown, 441 U.S. 281, 302–03, 315 (1979).


26 See id. at 302–03.
comment, but an agency cannot go beyond the text of a statute . . . [and the interpretive rule] does not create any new right or duty but merely provides an interpretation of [the statute]." In *American Mining Congress v. Mine Safety & Health Administration* the court reconciled the case law distinguishing interpretive rules from legislative rules

on the basis of whether the purported interpretive rule has "legal effect," which in turn is best ascertained by asking (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative rule, not an interpretive rule.28

Thus the principle distinction between interpretive rules and legislative rules is that legislative rules have the force of law while interpretive rules do not.29 Because interpretive rules "merely clarify or explain existing law or regulations,"30 they may be issued by an agency without following the APA notice and comment procedures that are required for legislative rules.31 The APA does require, however, that interpretive rules of general applicability be published in the Federal Register.32

The D.C. Circuit has noted that "Congress intended the exceptions to § 553's notice and comment requirements to be narrow ones."33 The purpose of interpretive rules, "[i]n light of the obvious importance of [§ 553's] goals of maximum participation and full information . . . is to allow agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings."34 A concise

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28 995 F.2d 1106, 1112 (D.C. Cir. 1993). *But see infra* note 48 (noting the APA requires publication of interpretive rules of general applicability in the Federal Register—thus step two of the *American Mining Congress* test merely restates that which is already required by the APA).
29 See, e.g., Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977); White v. Shalala, 7 F.3d 296, 303 (2d Cir. 1993).
30 Powderly v. Schweiker, 704 F.2d 1092, 1098 (9th Cir. 1983).
32 See id. § 552(a)(1)(D).
34 *Id.* at 1044-45.
definition of an interpretive rule is: a nonbinding agency statement that has a tangible meaning, not issued by Congress, that interprets the language of a statute or a legislative rule. Courts do not treat interpretive rules as new law, on the premise that the rule must merely restate or explain the preexisting legislative acts and intentions of Congress or an agency's own legislative rules. At least in theory, an interpretive rule is limited to "indicat[ing] an agency's reading of a statute or rule. It does not create new rights or duties, but only 'reminds' affected parties of existing duties." Although interpretive rules cannot go beyond the text of a statute, this does not "imply that an interpretive statement may only paraphrase statutory or regulatory language. . . . Accordingly, an interpretive statement may 'suppl[y] crisper and more detailed lines than the authority being interpreted' without losing its exemption from notice and comment requirements under [the APA]." Courts have thus noted that "the mere fact that a rule may have a substantial impact 'does not transform it into a legislative rule.'"

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35 See id. at 1045; see also United Tech. Corp. v. EPA, 821 F.2d 714, 719–20 (D.C. Cir. 1987) ("If the rule is based on specific statutory provisions, and its validity stands or falls on the correctness of the agency's interpretation of those provisions, it is an interpretative rule."). See generally Elizabeth Williams, Annotation, What Constitutes "Interpretative Rule" Of Agency So As To Exempt Such Action From Notice Requirements Of Administrative Procedure Act, 126 A.L.R. FED. 347 (1990). It should be noted, however, that a rule that interprets statutory or regulatory language having specific meaning may, in some cases, be promulgated either as a legislative or interpretive rule. See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984); Anthony, supra note 5. But see Paralyzed Veterans of America v. D.C. Arena, 117 F.3d 579, 588 (D.C. Cir. 1997) (indicating that some "interpretive rules" must be issued as a legislative rule, "[i]f the statute . . . to be interpreted is itself very general, using terms like 'equitable' or 'fair,' and the 'interpretation' really provides all the guidance . . .").

36 See American Hosp. Ass'n, 834 F.2d at 1045; General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984).

37 Orengo Caraballo v. Reich, 11 F.3d 186, 195 (D.C. Cir. 1993) (citations omitted); see also Zhang v. Slattery, 55 F.3d 732, 745 (2d Cir. 1995) ("Interpretive rules . . . do not create [new] rights . . .").

38 Orengo Caraballo, 11 F.3d at 195. Recent D.C. Circuit Court decisions, however, have indicated, albeit in dicta, that alterations to, or departures from, existing interpretations of an agency's own substantive rules may require notice and comment. See infra notes 74 & 75 and accompanying text; see also Paralyzed Veterans of America, 117 F.3d at 586 (stating that an agency may not make a "fundamental change in its interpretation of a substantive regulation without notice and comment . . .").

39 American Hosp. Ass'n, 834 F.2d at 1047 (quoting American Postal Workers Union v. United States Postal Serv., 707 F.2d 548 (D.C. Cir. 1983)).
D. The Practical Binding Effect of Interpretive Rules

Despite being, by definition, neither binding upon the courts nor the public, it is incorrect to assume that interpretive rules do not impose, as a practical manner, mandatory standards or obligations. This is because an interpretive rule will have practical binding effect before it is actually applied if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences, such as an enforcement action or denial of an application. If the document is couched in mandatory language, or in terms indicating that it will be regularly applied, a binding intent is strongly evidenced. In some circumstances, if the language of the [rule] is such that private parties can rely on it as a norm or safe harbor by which to shape their actions, it can be binding as a practical matter.

Thus, if an administrative agency treats an interpretive rule in the same manner it treats a legislative rule, i.e., as dispositive of the issues it addresses, the document will be binding. Where the agency uses mandatory or rigid language in an interpretive rule, private parties will likely consider themselves bound to follow the rule in the belief that they will suffer by noncompliance. In many instances in the area of environmental regulation, industry may prefer to consider an interpretive rule binding because it delineates the limits of accept-

40 See Anthony, supra note 5, at 1332-55 (listing examples of agency use of non-legislative rules to bind the public).
41 Id. at 1328-29 (citations omitted); see also Community Nutrition Inst. v. Young, 818 F.2d 943, 947 (D.C. Cir. 1987) (“mandatory, definitive language is a powerful, even potentially dispositive factor” suggesting that the interpretive rules were “presently binding norm[s]”).
42 See Paralyzed Veterans of America, 117 F.3d at 588 (“The Department’s interpretation of its regulation, of course, has real consequences. But that is always true when a Department or agency selects an interpretation of an ambiguous statute or rule, and often we acknowledge a government agency’s right to do so as an ‘interpretative’ rule without notice and comment.”); Fertilizer Inst. v. EPA, 935 F.2d 1303, 1308 (D.C. Cir. 1991).
43 See, e.g., Asimow, supra note 19, at 388–84.

Although the theoretical difference between the legal effect of legislative and nonlegislative rules is clear, the practical line-drawing problem has proved difficult for a number of reasons. The most important reason for the haziness of the distinction is that the practical impact of either type of rule on the members of the public is the same. Most members of the public assume that all agency rules are valid, correct, and unalterable. Consequently, most people attempt to conform to them rather than to mount costly, time consuming, and usually futile challenges. Although legislative and nonlegislative rules are conceptually distinct and although their legal effect is profoundly different, the real-world consequences are usually identical.

Id.
able behavior.\textsuperscript{44} By obeying the rule a company protects itself from civil or criminal penalties, and the expensive and time-consuming burden of a court challenge to an enforcement action. Companies that comply with an interpretive rule with practical binding effect therefore have an incentive to encourage compliance by other companies in the same industrial sector, e.g., their competitors.

E. Policy Statements

A general statement of policy cannot create a norm binding on either the promulgating agency\textsuperscript{45} or regulated parties.\textsuperscript{46} Although statements of policy and interpretive rules serve different functions, a policy statement is generally considered a weaker instrument because it cannot even bind the agency.\textsuperscript{47} A statement merely provides the agency with the internal guidance necessary to undertake discretionary duties. In fact, if a policy statement is determined by a court to be inflexible, it may be struck down as an attempt by the agency to subversively create a legislative rule.\textsuperscript{48}

An agency “that treats . . . a [policy] statement as binding and conclusive is effectively failing to offer an adequate explanation for the ensuing action.”\textsuperscript{49} The policy statement exemption in the APA was designed to “allow agencies to announce their ‘tentative intentions for

\begin{itemize}
\item \textsuperscript{44} Cf. \textsc{Davis} supra note 20 (“To the extent that an agency possesses significant discretionary power over a class of regulatees or beneficiaries, many are likely to ‘comply’ ‘voluntarily’ with an agency’s ‘nonbinding’ statement of its preferred policies.”). \textit{See generally} \textsc{Kenneth K. Kilbert \& Christian J. Helbling, Interpreting Regulations In Environmental Enforcement Cases: Where Agency Deference And Fair Notice Collide}, 17 \textsc{Va. Envtl. L.J.} 449 (1998) (discussing judicial deference to agency interpretations in environmental enforcement cases and importance of “fair notice”).
\item \textsuperscript{45} \textit{See} Vietnam Veterans of Am. v. Secretary of the Navy, 843 F.2d 528, 537–39 (D.C. Cir. 1988).
\item \textsuperscript{46} \textit{See} Bechtel v. FCC, 10 F.3d 875, 878 (D.C. Cir. 1993).
\item \textsuperscript{47} \textit{See} Syncor Int’l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997) (“An agency policy statement does not seek to impose or elaborate or interpret a legal norm. . . . We thus have said that policy statements are binding on neither the public, nor the agency. The primary distinction between a substantive rule—really any rule—and a general statement of policy, then, turns on whether an agency intends to bind itself to a particular legal position.”); \textit{see also} \textsc{United States Tel. Ass’n v. FCC}, 28 F.3d 1232, 1234 (D.C. Cir. 1994).
\item \textsuperscript{48} \textit{See} McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1320–21 (D.C. Cir. 1988) (to be exempt from legislative rulemaking requirements a policy statement must be tentative and not intended to be binding); \textsc{Community Nutrition Inst. v. Young}, 818 F.2d 943, 946–47 (D.C. Cir. 1987). In comparison, an agency may be bound by many of its existing interpretive rules, with the D.C. Circuit now requiring notice and comment procedures for changes to an agency’s interpretation of its own regulations. \textit{See infra} notes 74–75 and accompanying text.
\item \textsuperscript{49} \textsc{Panhandle Producers and Royalty Owners Assoc. v. Economic Regulatory Admin.}, 822 F.2d 1105, 1110 (D.C. Cir. 1987).
\end{itemize}
the future... without binding themselves."50 Courts will not void a policy statement where it has "some substantive impact, so long as it 'leave[s] the administrator free to exercise... informed discretion.'"51 A policy statement, therefore, is merely a flexible framework for the prospective implementation or fulfillment of a discretionary duty.52 In short, a policy statement is "an agency statement of substantive law or policy, of general or particular applicability and future effect, that was not issued legislatively and is not an interpretive rule."53

Policy statements are relatively easy to issue because an agency is not required to abide by the notice and comment requirements of the APA,54 but "[t]he price to the agency is that the policy 'is subject to complete attack before it is finally applied in future cases.'"55 An "agency relying on a previously adopted policy statement rather than a rule must be ready to justify the policy 'just as if the policy statement had never been issued.'"56 Thus, if a petitioner attacks the reasoning of a policy statement and the agency responds "merely by saying, in effect, 'That is no longer open to discussion. We resolved it in the Policy Statement,' then the agency's conduct would belie its characterization of the Policy Statement."57 However, "[w]hen a party attacks a policy on grounds that the agency already has dispatched in prior proceedings, the agency can simply refer to those proceedings if their reasoning remains applicable and adequately refutes the challenge. But the agency must always stand ready 'to hear new argument' and to 'reexamine the basic propositions' undergirding the pol-

50 American Hosp. Ass'n v. Bowes, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (quoting Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974)); see Syncor, 127 F.3d at 94 ("By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach. The agency retains the discretion and the authority to change its position—even abruptly—in any specific case because a change in its policy does not affect the legal norm.").


52 Policy statements must be "designed to inform rather than to control." American Trucking Ass'ns, Inc. v. ICC, 659 F.2d 452, 462 (5th Cir. 1981).

53 Anthony, supra note 5, at 1325.

54 The APA requires that each agency publish, in the Federal Register, all "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency . . . ." See 5 U.S.C. § 552(a)(1)(D) (1994)(emphasis added); see generally Asimow, supra note 14, at n.31. Because of this broad requirement, publication in the Federal Register alone provides no insight into the nature or type of rule being published.


56 Id. at 877 (quoting Bethel v. FCC, 967 F.2d 873, 881 (D.C. Cir. 1992)).

The non-binding, and prospective, character of a policy statement generally makes it unripe for review until actually applied to a factual situation.

II. PUTTING THE PIECES TOGETHER: AN ANALYSIS OF THE D.C. CIRCUIT'S APPROACH TO THE REVIEW OF INTERPRETIVE RULES

In the past, the D.C. Circuit has rarely hesitated to review EPA interpretive rules under the jurisdictional authority granted by RCRA section 7006(a)(1). The D.C. Circuit has also reviewed interpretive rules promulgated by EPA under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Clean Air Act (CAA), both of which contain jurisdictional provisions similar to section 7006(a)(1). The D.C. Circuit, however, has never explicitly stated that it has jurisdiction under RCRA section 7006(a)(1), or the equivalent provisions in these other statutes, to review interpretive rules. This is a significant omission, but perhaps not surprising considering the perpetual state of confusion and flux of administrative law decisions in the D.C. Circuit.

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58 Bechtel, 10 F.3d at 878 (citing McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1321 (D.C. Cir. 1988)).
59 See United States Tel. Ass'n v. FCC, 28 F.3d 1232, 1234 (D.C. Cir. 1994) (noting that because a general statement of policy cannot be binding, courts prefer to review a statement after it is applied); Industrial Safety Equip. Ass'n, Inc. v. EPA, 837 F.2d 1115, 1119 n.8 (D.C. Cir. 1988) ("Discretionary agency positions are generally best not tested on review until the policy is actually applied to a specific factual situation."); Office of Communication of United Church of Christ v. FCC, 826 F.2d 101, 105–06 (D.C. Cir. 1987); Pacific Gas, 506 F.2d at 49 (noting that general statements of policy are not subject to judicial review if there is no immediate and significant impact).
60 See generally supra note 18.
61 42 U.S.C. §§ 9601-9675 (1994). The judicial review provision of CERCLA, found at section 9613(a), states in relevant part that "[r]eview of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations . . . ." See id. § 9613.
63 See, e.g., Fertilizer Inst. v. EPA, 935 F.2d 1309 (D.C. Cir. 1991) (reviewing an interpretive rule under CERCLA section 9613(a)); General Motors Corp. v. Ruckelshaus, 742 F.2d 1561 (D.C. Cir. 1984) (reviewing an interpretive rule promulgated under the CAA). However, not all environmental statutes contain a comparable judicial review provision. See, e.g., Emergency Planning and Community Right to Know Act, 42 U.S.C. §§ 11001–11050 (1994).
64 See generally supra note 18.
A. American Portland Cement, Montrose Chemical, and Florida Power & Electric: The Beginning of a Shift or More “Smog”?

The D.C. Circuit’s analysis in American Portland Cement Alliance v. EPA\(^65\) and Montrose Chemical Corp. of California v. EPA,\(^66\) raises the possibility that the D.C. Circuit may be in the process of substantially narrowing the limits of its jurisdiction under RCRA section 7006(a)(1) and like provisions. In Portland Cement the court held that section 7006(a)(1) did not confer jurisdiction to review petitions filed by trade associations challenging EPA’s “Regulatory Determination on Cement Kiln Dust.”\(^67\) The court found that it lacked jurisdiction “because EPA’s Regulatory Determination [did] not constitute one of the three actions designated as reviewable under RCRA § 7006(a)(1), but instead [was] simply a determination to undertake rulemaking in [the] future.”\(^68\) The court concluded that “[b]y its plain terms, RCRA § 7006(a)(1) provides for review by the D.C. Circuit of only three types of EPA actions: the promulgation of final regulations, the promulgation of requirements, and the denial of petitions for the promulgation, amendment, or repeal of RCRA regulations.”\(^69\)

In stating the jurisdictional limitations of section 7006(a)(1), the court in Portland Cement noted that just because it “ha[d] taken jurisdiction in the past does not affect [future] analysis because jurisdictional issues that were assumed but never expressly decided in prior opinions do not thereby become precedents.”\(^70\) Because there is no explicit precedent stating that section 7006(a)(1) and equivalent provisions in other statutes provide the D.C. Circuit jurisdiction to review interpretive rules, the possibility exists that the D.C. Circuit may eventually conclude that these judicial review provisions do not provide the circuit with final or exclusive jurisdiction over interpretive rules.\(^71\) Furthermore, this statement from Portland Cement dem-

\(^{65}\) 101 F.3d 772 (D.C. Cir. 1996).
\(^{66}\) 132 F.3d 90 (D.C. Cir. 1998).
\(^{67}\) See Portland Cement, 101 F.3d at 773–74.
\(^{68}\) Id. at 773.
\(^{69}\) Id. at 775.
\(^{70}\) Id. at 776.
\(^{71}\) The Portland Cement court, in its discussion of its jurisdiction to review agency actions under RCRA § 7006(a), neglected to specifically list interpretive rules. See id. at 774–75. Combined with the court’s strict view on the limits of its jurisdiction, see id. at 775 (“it is axiomatic in our federal jurisprudence that inferior courts, including . . . this Court, have only that jurisdiction afforded to them by Congress”) (citation omitted), this indicates that the D.C.
onstrates that the D.C. Circuit would not feel bound to accept jurisdiction under such provisions to review interpretive rules merely because it may have undertaken review in the past.

The court in *Montrose Chemical Corp. v. EPA* addressed whether two internal EPA memoranda constituted regulations reviewable under CERCLA section 9613(a), a provision equivalent to RCRA section 7006(a)(1). Citing *Portland Cement*, the court articulated three factors relevant to determining whether an agency action may be subject to review:

1. the agency's own characterization of the action; 2. whether the agency published such actions in the Federal Register or Code of Federal Regulations; and 3. whether the action had binding effects on either private parties or the agency.

In an attempt to preclude judicial review, EPA contended that the challenged memoranda did not amount to "regulations" within the meaning of CERCLA section 9613(a)—while Montrose did not dispute that the court would be without jurisdiction if it were to find that the memoranda were not regulations. The court determined that the memoranda were not valid "regulations" as defined in the statute because they did not satisfy the three-part test, and therefore the court lacked jurisdiction to review the documents. This three part test is not entirely new and has been used in similar forms by the D.C. Circuit in the past, but it has never been as succinctly stated and applied.

Similar to the court in *Montrose Chemical*, the court in *Portland Cement* was particularly concerned with the nonbinding characteristics of the EPA determination being challenged, stating that "[a]n announcement of an agency's intent to establish law and policy

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Circuit has begun to take a harder look at its jurisdiction to review cases brought under provisions such as RCRA § 7006(a).

74 *Montrose Chemical*, 132 F.3d at 94 (citing *Portland Cement*, 101 F.3d at 776).
75 See id.
76 See id.
77 See *Portland Cement*, 101 F.3d at 776; see also *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (discussing how reviewability of agency action is affected by the binding effect of the pronouncement); *Telecommunications Research and Action Ctr. v. FCC*, 800 F.2d 1181, 1186 (D.C. Cir. 1986) (discussing the impact of an agency's characterization of an administrative action); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (stating the dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations).
in the future is not the equivalent of actual promulgation of a final regulation." EPA did not contend that the determination was a final agency action—in fact the determination itself only stated that the agency planned to undertake rulemaking in the future. The court's rationale appears to be grounded in a reluctance to review a determination that was not binding on EPA or on industry.

Whether Portland Cement and Montrose Chemical signal a shift in the D.C. Circuit's interpretation of these judicial review provisions, or merely a slight adjustment, remains to be seen. It is uncertain to what extent these cases may affect the D.C. Circuit's future consideration of interpretive rules. Neither in Portland Cement nor Montrose Chemical did the D.C. Circuit make an explicit indication that interpretive rules are unreviewable under RCRA section 7006(a)(1) or comparable provisions. Nor did Portland Cement explicitly overrule or vacate any earlier cases which had demonstrated the Circuit's willingness to review interpretive rules under judicial provisions. Recently, in Florida Power & Light v. EPA, however, the D.C. Circuit again revisited these issues. In coming to its decision, the court examined explanations for the review of policy statements and interpretive rules undertaken in several previous D.C. Circuit decisions. The circuit failed to identify one instance where a judicial review provision provided the basis for review of an interpretive rule prior to its application. For instance, the circuit explained that the decision to review a policy statement in Edison Electric Institute v. EPA "hinged on a determination that the challenged statement effectively reopened a prior regulation and, thus, the challenge was really to the substance of the prior regulation."

In Florida Power & Light, the petitioner sought review of preamble statements in a 1994 proposed rule under RCRA's judicial review

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78 101 F.3d at 777.
79 See id. ("EPA's stated intent is to defer law and policymaking ... until the formulation of tailored standards.").
80 See id. ("Where, as here, a proposed regulation is still in 'flux,' review is 'premature,' and the court has no jurisdiction under the APA.") (quoting Action on Smoking & Health v. Department of Labor, 28 F.3d 162, 164-65 (D.C. Cir. 1994)).
81 145 F.3d 1414 (D.C. Cir. 1998).
82 See id. at 1419-20.
83 996 F.2d 326 (D.C. Cir. 1993). Whether petitioners in Edison Electric were challenging an interpretive rule or a policy statement is not entirely clear—the challenge concerned "EPA's interpretation of the storage provision, as articulated in its Enforcement Policy Statement." Id. at 331. Furthermore, it is interesting to note that EPA argued in Edison Electric that the court was "without jurisdiction to consider the petition for review because it was not timely filed [under section 7006(a)(1) of RCRA]." Id.
84 Florida Power & Light, 145 F.3d at 1420.
provision. In addressing whether jurisdiction was appropriate under RCRA section 7006, the court based its analysis on the three elements identified in Portland Cement. The court determined that the challenged statements, although published in the Federal Register, were not characterized as a final rule by the agency and that EPA had not applied the challenged statements as binding. The court concluded that "unless and until [the agency] invokes the preamble in an attempt to affect the outcome of a real dispute, there is little need for and no factual basis to inform our inquiry into its validity." Ultimately, the court dodged making a final determination on whether the preamble statements at issue were interpretive rules, noting that even if they were, the claims of the petitioner failed the test of ripeness and were therefore unreviewable.

The D.C. Circuit, in Florida Power & Light, appears to have at least entertained the possibility that it had authority under judicial review provisions such as RCRA section 7006(a)(1) to review interpretive rules. Specifically, the court applied the factors identified in Portland Cement to the challenged agency action, a preamble statement. As noted, however, the circuit chose to sidestep the issue of whether the preamble statement was an interpretive rule, and whether an interpretive rule would satisfy the Portland Cement analysis. Ultimately, the court chose to decline review based on its ripeness analysis, once again leaving unanswered the question of whether, under these judi-
cial review provisions, interpretive rules are subject to pre-enforce­ment or pre-application review in the circuit.

B. Application of the Portland Cement Factors to Interpretive Rules

It is possible to analyze how the D.C. Circuit may approach this issue in future cases, however, by applying to interpretive rules the Portland Cement/Montrose Chemical three part test for determining whether an agency action is a "regulation" within the jurisdiction of RCRA section 7006(a)(1) and similar provisions. This analysis highlights the confusion in this area of administrative law.

The first prong of the test requires that the court inquire into the agency’s characterization of the action. For the sake of argument, suppose the agency calls its action "an issuance of an interpretive rule of general applicability"—and that the agency's characterization is not challenged. Because the D.C. Circuit has not explicitly determined whether an interpretive rule is reviewable under judicial review provisions in some environmental statutes, the agency's characterization, at least at the first stage of the test, has little value.

The second prong of the test considers whether the rule has been published in the Federal Register. In issuing an interpretive rule of general applicability, however, an agency is required by the APA to publish the rule in the Federal Register. The D.C. Circuit has not specifically articulated its reasoning for adopting this second prong. But for the purposes of analysis here, the basis for this prong is nearly irrelevant—an interpretive rule of general applicability will always, by necessity, meet the requirement.

93 See Montrose Chemical, 132 F.3d at 95; American Portland Cement, 101 F.3d at 776.
95 For instance, the D.C. Circuit may have adopted the second prong in an effort to allow review of only legislative rules under section 7006(a)(1)—overlooking the publication requirement for interpretive rules of general applicability. Cf. supra note 54. An alternative, equally plausible basis for the requirement is that the D.C. Circuit wanted to limit its jurisdiction to those agency actions which had been amply announced to the public through publication.
96 Recently, in Florida Power & Light, the D.C. Circuit appeared to indicate that the more important consideration is publication in the Code of Federal Regulations (CFR), rather than mere publication in the Federal Register. See 145 F.3d at 1418. If the D.C. Circuit narrows this test by eliminating publication in the Federal Register as a consideration, instead requiring publication in the CFR, the vast majority of interpretive rules would certainly not be reviewable under a judicial review provision.
With the first prong essentially meaningless\(^9^7\) and the second prong met, the third prong is determinative. This prong requires that the court determine whether the action had a binding effect on either private parties or the agency.\(^9^8\) Legislative rules clearly meet this requirement.\(^9^9\) Policy statements, just as clearly, fail to meet this requirement.\(^1^0^0\) Interpretive rules cannot be legally binding on private parties.\(^1^0^1\) But, as has been noted, interpretive rules can have a binding \textit{practical} effect on private parties.\(^1^0^2\)

The extent to which an agency, however, is bound by its own interpretive rules of general applicability, as compared to the extent to which it is bound by its legislative rules, is not entirely settled. An agency's interpretation of an ambiguous statute may be changed significantly without notice and comment, so long as the new interpretation is a reasonable one and the revised interpretive rule of general applicability is published in the Federal Register.\(^1^0^3\) While an interpretive rule of this type may be "binding" on the agency, the administrative hurdles necessary to make a change are minimal as compared to a legislative rule and can be accomplished with no pre-publication fanfare or notification and with, essentially, immediate effect.\(^1^0^4\) Yet if an agency wishes to change an interpretation of its own legislative rule, rather than of a statute, the D.C. Circuit has indicated that notice and comment may be necessary—thereby setting a greater barrier to change.\(^1^0^5\) In this case the agency is "bound" by its interpretation of its legislative rule in the same manner the agency is bound by the legislative rule: a re-interpretation would require both notice and comment and publication in the Federal Register—essentially the promulgation of a new legislative rule.\(^1^0^6\)

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\(^9^7\) Cf. \textit{Montrose Chemical}, 132 F.3d at 94 (stating that "although EPA maintains that its memorandum did not constitute a regulation subject to review, that is an issue for [the court] to decide," thereby giving little credence to the agency's own characterization).

\(^9^8\) See \textit{Montrose Chemical}, 132 F.3d at 95; \textit{American Portland Cement}, 101 F.3d at 776.

\(^9^9\) See supra note 12 and accompanying text. \textit{But see infra} Section III.A. (noting that a legislative rule may, in rare circumstances, be unripe for review—even if the D.C. Circuit possesses jurisdiction for review under RCRA section 7006(a)(1)).

\(^1^0^0\) See supra notes 45–46 and accompanying text. The fact that policy statements do not meet the requirement could easily confuse this analysis because of the unfortunate and incorrect "tendency of the courts and litigants to lump interpretive rules and policy statements together . . ." \textit{Syncor Int'l} v. \textit{Shalala}, 127 F.3d 90, 93–94 (D.C. Cir. 1997).

\(^1^0^1\) See supra note 29 and accompanying text.

\(^1^0^2\) See generally supra Section I.D. (discussing the practical binding effect of interpretive rules).

\(^1^0^3\) See \textit{Syncor}, 127 F.3d at 94.

To be sure, since an agency's interpretation of an ambiguous statute is entitled to
Applying the Portland Cement three part jurisdictional test for judicial review to interpretive rules leads to confounding and inconclusive results depending upon whether the agency’s interpretive rule involves a statute or legislative rule. An interpretation, re-interpretation, of an agency’s own legislative rule apparently satisfies the test and could be reviewed in the D.C. Circuit. This is because such an action has “final” characteristics, changeable in the future only through notice and comment, and therefore is essentially binding on the agency.

judicial deference under Chevron, it might be thought that the interpretive rule—particularly if it changes a prior statutory interpretation as an agency may do without notice and comment—is, in reality a change in the legal norm. Still, in such a situation the agency does not claim to be exercising authority to itself make positive law. Instead it is construing the product of congressional lawmaking “based on specific statutory provisions.”

Id. (citations omitted); cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 863–64 (1984). In Chevron, the Court stated that

The fact that the agency has from time to time changed its interpretation of [a] term . . . does not, as respondents argue, lead us to conclude that no deference should be accorded the agency’s interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

Chevron, 467 U.S. at 863–64.

104 See supra notes 31–32 and accompanying text.

105 See Syncor, 127 F.3d at 94–95 (“Otherwise, the agency could evade its notice and comment obligation by ‘modifying’ a substantive rule that was promulgated by notice and comment rulemaking.”); see also Paralyzed Veterans of America v. District Columbia Arena, 117 F.3d 579, 586 (D.C. Cir. 1997). Yet, in the confusing and constantly evolving area of administrative law, it is not clear how strictly the D.C. Circuit will enforce this relatively new distinction between interpretations of statutes and legislative rules. The D.C. Circuit’s discussion to date on this issue has been largely dicta rather than binding precedent. Cf. Black’s Law Dictionary 408 (4th ed. 1979) (defining dicta as “[e]xpressions in court’s opinion which go beyond the facts before the court and therefore are individual views of author of opinion and not binding in subsequent cases.”). For instance, although Syncor Intl Corp. v. Shalala discussed the distinctions between an agency’s interpretation of a regulation and the interpretation of a statute, the court ultimately concluded that the rule at issue was not an interpretive rule. 127 F.3d 90, 95 (D.C. Cir. 1997). In fact, the Syncor court even explicitly noted that its discussion concerning an agency’s interpretation of its own substantive regulation was not at issue. See id. at 94 (“We should note, in order to be complete (although this variation is not implicated in the case before us), that an interpretative rule can construe an agency’s substantive regulation as well as a statute . . . .”) (citations omitted) (emphasis added).


107 Consider, for instance, cases where the agency simultaneously publishes a legislative rule and an interpretation of general applicability of an aspect of that rule. In the past the D.C. Circuit, however, has ignored the issue and implicitly treated the conglomerate as one legislative rule.

108 Assuming strict adherence to the distinction discussed supra note 105.
An agency's interpretation, or re-interpretation, of a statute does not so clearly satisfy the *Portland Cement* test. It is difficult, under existing precedent, to argue that such interpretations are "final" or "binding," given that the agency can issue a reinterpretation without notice and comment. Therefore such rules do not appear to be reviewable pursuant to RCRA section 7006 or similar provisions, under the current D.C. Circuit approach.

III. RIPENESS & PRECLUSIVENESS CONSIDERATIONS

Beyond the jurisdictional barriers to the review of interpretive rules potentially presented by RCRA section 7006 and similar provisions there remain two further potential issues: (1) the threshold issue of ripeness; and (2) the implications of the D.C. Circuit's pre-application review of interpretive rules on issues of preclusiveness.

A. Ripeness Considerations

Even if the D.C. Circuit were to determine that it had jurisdiction under RCRA section 7006(a)(1) and similar provisions to review interpretive rules, ripeness might still prove a bar to litigation.\(^\text{109}\) Ripeness is a threshold doctrine by which courts test the fitness of controversies for judicial resolution.\(^\text{110}\) Thus the D.C. Circuit might be obligated to dismiss a challenge to an interpretive rule if the rule is not ripe for review.

In assessing whether a case is ripe, a court must generally consider "[1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration."\(^\text{111}\) The D.C. Circuit has held, in considering the fitness prong, that it is "dispositive that Congress has affirmatively expressed a preference for prompt review of RCRA regulations by establishing a ninety-day window for filing challenges," thus creating an assumption of reviewability of regulations promulgated under RCRA and other statutes with similar pro-

\(^{109}\) See, e.g., *Florida Power & Light v. EPA*, 145 F.3d 1414, 1420 (D.C. Cir. 1998) (noting that in cases discussing review of preamble statements "the issues of reviewability and ripeness converge") (citations omitted).


\(^{112}\) *Edison Elec.*, 996 F.2d at 333; see *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998) ("pre-enforcement review of agency rules and regulations has become the norm, not the exception, a trend accelerated by Congress' enactment of a host of regulatory statutes specifically providing for this. The review provision of the Clean Air Act . . . is typical.")
visions. If the D.C. Circuit finds that interpretive rules fall within the scope of a judicial review provision, like RCRA section 7006, such rules would therefore be subject to the presumption of ripeness.

Despite the presumption, however, it is possible that "a challenge filed within the statutory period might not be considered 'fit for judicial decision' when there are clear and significant institutional benefits to be derived from postponing review." In cases arising under RCRA section 7006, and similar provisions, once an issue is determined to be clearly fit for review, however, there "is no need to consider the hardship to the parties of withholding court consideration" because of the presumption for reviewability as evidenced by the statute. Thus the second prong of the traditional ripeness test need not be considered in this context.

In *Edison Electric*, the D.C. Circuit outlined a four stage analysis for determining whether a regulation is fit for review and therefore ripe. The first consideration is whether the review presents a "purely legal question." The second issue is whether the agency position "represents its final word on the subject, i.e. its policy has crystallized." Third, the court must consider whether its deliberations are unlikely to be aided by application of the interpretation or regulation to a particular set of facts. Finally, a court contemplates whether the case can be characterized as one in which "resolution of the dispute is likely to prove unnecessary if the court elects to defer review." The inquiry does not require that a rule necessarily be applied prior to judicial review, in fact "[i]t is clear beyond peradventure that the validity of a rule can be ripe for review whether or not


113 *See Edison Elec.*, 996 F.2d at 333; *Clean Air Implementation Project*, 150 F.3d at 1204; *Mountain States Tel. & Tel. Co.*, 939 F.2d at 1040–41.

114 *Edison Elec.*, 996 F.2d at 333.

115 *Action for Children's Tel.* v. FCC, 59 F.3d 1249, 1258 (D.C. Cir. 1995); *see also* Natural Resources Defense Council v. EPA, 22 F.3d 1125, 1133 (D.C. Cir. 1994) (holding that when an issue is determined to be fit for judicial review, thereby meeting the first element of the ripeness test, and Congress has emphatically declared a preference for immediate review, it is not necessary to consider the "hardship to the parties" element of the ripeness test). *But see Clean Air Implementation Project*, 150 F.3d at 1205 (considering, without comment to the aforementioned cases, hardship to the parties in a case filed pursuant to the CAA judicial review provision).

116 *See Edison Elec.*, 996 F.2d at 333.

117 *Id.*

118 *See id.* at 333–34.

119 *Id.* at 334.
it has actually been improperly applied and enforced in a concrete factual setting."^{120}

Despite the presumption that "purely legal" questions are fit for judicial review, such review may still be inappropriate when the challenged policy is "not sufficiently fleshed out to allow the court to see the concrete effects and implications of its decision or when deferring consideration might eliminate the need for review altogether."^{121} Finding that a controversy lacks ripeness due to an insufficiently "fleshed out" policy only occurs when the agency action is either tentative or unfinished.^{122} An interpretive rule of general applicability, however, is generally considered the final agency statement of a statutory or regulatory definition or requirement.^{123} Thus, in effect, an interpretive rule is the final "crystallization" of agency policy, and an agency is subsequently bound, although possibly to varying extents, by its pronouncement.^{124} An interpretive rule of general applicability, by its nature, will also present a purely legal question.^{125} Thus the first and second prongs of the fitness test are satisfied by an interpretive rule. The third prong is also easily satisfied. Because the nature of an interpretive rule is such that it will present a purely legal question, the D.C. Circuit is unlikely to find that a rule's application to specific facts is necessary in order to make a determination of whether the rule is a valid interpretation of an underlying statute or legislative rule.

In considering the final aspect of the test, it is unlikely that resolution of a dispute over an interpretive rule will "prove unnecessary" if the court chooses to defer review. First, as previously noted, the D.C.

\(^{120}\) General Motors Corp. v. Ruckelshaus, 724 F.2d 979, 990 n.58 (D.C. Cir. 1983). See also Federal Communications Comm'n v. WNCN Listeners Guild, 450 U.S. 582, 585–86 (1981) (reviewing the validity of a policy statement not yet applied to any particular set of facts); Baltimore Gas and Elec. Co. v. Interstate Commerce Comm'n, 672 F.2d 146, 149 (D.C. Cir. 1982) ("Nor do we consider review excluded for lack of a final agency decision or simply because the order in question is 'interpretive."); Independent Banker Assoc. v. Smith, 534 F.2d 921, 926 (D.C. Cir. 1976) (holding that interpretive rules represent the definitive position of the issuing agency and thus raise a "clearcut legal issue susceptible of judicial resolution").

\(^{121}\) Chamber of Commerce of U.S. v. Reich, 57 F.3d 1099, 1100 (D.C. Cir. 1995) (per curiam) (citations and internal quotations omitted).

\(^{122}\) See id.

\(^{123}\) See generally supra note 17 (definition of interpretive rule).

\(^{124}\) See supra Section I.C. But consider the different procedural requirements that the D.C. Circuit has indicated may be necessary for an agency to change an interpretation of a statute as compared to an interpretation of a regulation. See supra notes 103–06 and accompanying text.

\(^{125}\) See generally supra note 12 (definition of interpretive rule); see also supra note 35 and accompanying text.
Circuit has stated that judicial review provisions, like RCRA section 7006(a)(1), indicate Congress' preference for prompt review of agency actions promulgated under the particular statutory authority. Thus, if the circuit determines that it has jurisdiction, there will be a presumption that the interpretive rule is ripe. On the other hand, promulgating an interpretive rule does not technically change the legal rights of regulated parties; rather, an agency is merely putting those parties on notice of its interpretation of a statute or regulation—an interpretation the agency plans to use in bringing future enforcement proceedings or in conducting its business. Thus, because legal rights have not been altered by an interpretive rule, an argument can be advanced that the underlying issues are no more ripe for review under RCRA section 7006(a)(1) after the publication of the rule, then they were before publication. But the practicality of such an argument is questionable.

Deferring review will simply cause the issue to resurface when the agency relies on the interpretive rule in an enforcement proceeding. The D.C. Circuit has stated that judicial review should be available where "one is left with the overpowering sense that if the question is not adjudicated at this time, it will be in the not-too-distant future." The fact that a group is prepared to bring a suit to challenge a rule demonstrates that there is concern and disagreement over the rule. In such an instance, it appears nearly certain that if the challenge is dismissed, it will quickly resurface after the rule's application. Thus, having addressed all four of the Edison Electric requirements, it appears that an interpretive rule would likely be found ripe for review in an action filed within the appropriate time period called for in a judicial review provision.

126 See, e.g., Syncor Int'l v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997) ("An interpretative rule . . . typically reflects an agency's construction of a statute that has been entrusted to the agency to administer. The legal norm is one that Congress has devised; the agency does not purport to modify that norm . . . .").

127 See id.; see also West, supra note 6, at 40 ("[I]nterpretive rules serve to advise potentially affected parties of how agencies will construe statutory language in future situations.").

128 The assertion that legal rights or expectations are not modified by interpretive rules is essentially a "legal fiction." See Black's Law Dictionary 620 (6th ed. 1990) (a legal fiction is an "[a]ssumption of fact made by court as basis for deciding a legal question."). See generally supra Section I.D.


130 Cf. Eagle-Picher Indus. v. EPA, 759 F.2d 905, 918 (D.C. Cir. 1985) (declining review on ripeness grounds is likely to merely postpone review).

131 Cf. Fertilizer Inst. v. EPA, 935 F.2d 1303 (D.C. Cir. 1991) (considering a challenge to an interpretive rule under CERCLA section 9613(a) within the 90 day period with no discussion of ripeness concerns and no indication that the rule has been applied).
Even if challenges to the interpretive rule filed within the judicial review period, prior to enforcement or application by the agency, were held to be unripe, review would not entirely be foreclosed. The D.C. Circuit has held in cases “involving the confrontation between a statutory bar and a claim not yet prudentially ripe that a ‘time limitation on petitions for judicial review . . . can run only against challenges ripe for review.’”132 In Baltimore Gas and Electric Co. v. Interstate Commerce Commission the petitioner had filed a timely petition, as required by the statute, for review of an Interstate Commerce Commission (ICC) interpretative rule.133 The court, however, found that the action was not yet ripe because the ICC’s interpretation lacked any current impact and imposed no requirements on the petitioner and others similarly situated.134 In dismissing the case, the court stated that the petitioner and others similarly situated would not be barred, if and when a fact-based controversy arose from the challenged interpretative order.135 Because the ripeness inquiry is wholly separate from the jurisdictional inquiry, if the D.C. Circuit merely postpones finding an interpretive rule ripe for review, when review is finally conducted, it could still be done pursuant to jurisdictional provisions such as RCRA section 7006(a)(1).136 If the D.C. Circuit is going to review an interpretive rule of general applicability under such jurisdiction, however, it would better serve the public to find the rule ripe for review in the first instance. Otherwise, industry will be forced to conform to the interpretive rule in order to provide the factual basis necessary to have the standing and ripeness necessary to challenge the rule, or risk civil or criminal penalties by violating

132 Louisiana Envtl. Action Network v. Browner, 87 F.3d 1379, 1385 (D.C. Cir. 1996) (quoting Baltimore Gas & Elec. Co. v. Interstate Commerce Comm’n, 672 F.2d 146, 149 (D.C. Cir. 1982)); see also General Motors Corp. v. Ruckelshaus, 724 F.2d 979, 983 n.30 (D.C. Cir. 1983) (“And, in any event, the . . . limitation period may not begin to run with respect to interpretative rules until a fact-based controversy is ripe for judicial review.”).
133 See 672 F.3d at 148.
134 See id. at 149.
135 See id.

If we were to defer review [where Congress has declared a preference concerning the timing of review] merely because we could find no significant harm to the petitioner from delay, we would achieve the perverse result of postponing review to the detriment of the agency and the court and in contravention of the express preferences of Congress, in the name of a prudential doctrine that is intended to protect the institutional needs of courts and agencies. As we have repeatedly observed, the ripeness doctrine requires a pragmatic and commonsense application.) (footnote omitted).

Id.
the rule in an effort to create ripeness. Encouraging such behavior is economically inefficient and serves no worthy legal purpose.

An alternative scenario might arise if no challenge to the promulgation of an interpretive rule is made during the time-frame imposed by the applicable review provision. Without a challenge within the limitations period, all future cases challenging the interpretive rule's promulgation may be foreclosed. But if an interpretive rule was clearly unripe during the review period, a later case might still be possible. In *Eagle Picher Industries, Inc. v. EPA*, the court emphasized, however, that "petitioners who delay filing requests for review on their own assessment of when an issue is ripe for review, do so at the risk of finding their claims time-barred."137 The court warned that "in general, we will refuse to hypothesize whether, in retrospect, a claim would have been deemed ripe for review had it been brought during the statutory period, in order to save an untimely claim."138 There are only three limited exceptions to the court's general refusal to consider saving an untimely claim: (1) where changed circumstances give rise to a new cause of action beyond the statutory period; (2) where compelling case precedent makes it clear beyond a reasonable doubt that the claim was not ripe during the statutory period; or (3) where clear evidence that a failure to consider a petitioner's claims would work a manifest injustice.139 This final scenario again illustrates why it is important for the D.C. Circuit to settle the issue of its jurisdiction to review interpretive rules under judicial review provisions. Currently, under *Eagle Picher* precedent, parties may choose to challenge a questionable interpretive rule prior to enforcement or application, within the appropriate statutory review period, rather than choosing to wait and thereby risk finding their claims time-barred.140

137 Id. at 909.

138 Id.

139 See id. In certain rare circumstances it may also be possible to obtain review under the "reopener" doctrine. See, e.g., Natural Resources Defense Council v. EPA, 25 F.3d 1063, 1073 n.6 (D.C. Cir. 1994); Ohio v. EPA, 838 F.2d 1325, 1328 (D.C. Cir. 1988).

140 See 759 F.2d at 1919 ("We conclude that the petitioners were not justified in failing to seek judicial review during the statutory period. We recognize, however, that the relationship between the ripeness doctrine and the statutory review provisions that exhibit a strong congressional preference for 'pre-enforcement' review was largely uncharted before this decision.").
B. Review in the D.C. Circuit May Not Preclude Further Challenge to an Interpretive Rule

If the D.C. Circuit accepts that it has jurisdiction under RCRA section 7006(a)(1) to review the promulgation of interpretive rules, the court is essentially stating its belief that such review precludes further review of the rule's promulgation by other circuits. Because of the inherent nature of interpretive rules, however, once reviewed and sustained by the D.C. Circuit under a statutory judicial review provision, the rule still cannot have the "force of law."141 An interpretive rule never has a "legal effect" but rather serves only as a pronouncement to the public as to how the agency interprets the underlying statute or regulation.142 The legal basis for any agency action or enforcement proceeding is the underlying statute or legislative rule, although the agency itself is guided by the interpretive rule.143

A court "always has the power to substitute its judgment for that of the agency in the case of an interpretative rule .... Thus, in cases arising after the ... review period has expired, the court may undertake and enforce its own interpretation of the statute without reviewing the interpretative rule as such."144 If the D.C. Circuit reviews an interpretive rule under section 7006(a)(1), other circuits will be prevented from hearing a challenge to a rule that is not grounded in the actual application of the specific rule to the petitioner.145 But when an

141 See West, supra note 6, at 40-41 ("[S]ome authorities believe that interpretive rules are more apt to be overturned by the courts on substantive grounds, since the judiciary retains the constitutional role as final interpreter of the law."); see also 2 Am. Jur. 2d Administrative Law § 161 (1994) ("Interpretive rules are not intended to have any legal effect and do not have the force and effect of law. Accordingly, an interpretive rule is not binding on a court, which may disagree with an administrator's interpretation of a statute or regulation.") (citations omitted).

142 See supra Section I.C.

143 See General Motors Corp. v. Ruckelshaus, 724 F.2d 979, 983 n.30 (D.C. Cir. 1983) ("Suffice it to say that a limitation on judicial review does not lend to an interpretative rule any binding force not already provided by the underlying statute."); American Mining Congress v. Mine Safety and Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993); Citizens to Save Spencer County v. EPA, 600 F.2d 844, 876 (D.C. Cir. 1979); see also supra notes 74-75 and accompanying text.

144 General Motors Corp., 724 F.2d at 983 n.30; see also Kelley v. E.I. DuPont De Nemours and Co., 17 F.3d 836, 841-42 (6th Cir. 1994) (reviewing EPA interpretive rules in a case arising under CERCLA); Beazer East, Inc. v. EPA, 963 F.2d 603, 605 n.2 (3rd Cir. 1992) (showing a willingness to review EPA interpretive rules in the process of reviewing an internal agency memorandum); ACUSA, supra note 12, at 65 ("Nonetheless, the agency cannot expect the interpretation to be binding in later proceedings; because it does not have the force of law, parties can challenge the interpretation.").

145 The RCRA § 7006 judicial review provision provides exclusive jurisdiction to the D.C. Circuit. See 42 U.S.C. § 6976(a) (1996). Therefore, if the D.C. Circuit determines that it has
interpretive rule plays a role in future agency action or enforcement proceedings that end up in court, the court may essentially review the interpretive rule through its inherent authority to undertake a statutory construction analysis. Thus, the court would determine whether the agency's interpretation is in agreement with the text and purpose of the actual statute or legislative rule. For example, a district court presiding in an enforcement proceeding could hold that the rule is an invalid interpretation of the underlying statutory language and thus refuse to follow the interpretation stated in the rule.

As stated, D.C. Circuit review of the interpretive rule under RCRA section 7006(a)(1) would preclude other circuits from reviewing the promulgation of an interpretive rule. But other courts, as demonstrated, have the ability to review the interpretive rule through their authority to engage in statutory construction. Thus, if a rule is relied upon in an enforcement action or other agency proceeding, another court could refuse to follow the rule, finding that the interpretation is in conflict with the underlying statute's language and purpose. Courts, however, give an agency's interpretation deference, and if a circuit were to sustain a rule, the principles of res judicata and stare decisis will prevent the rule from being continually challenged on identical grounds. Courts, in reviewing an interpretive rule during an enforcement proceeding, or in the course of other litigation, must entitle the rule to substantial judicial deference under Chevron U.S.A. v. Natural Resources Defense Council, Inc. Agency interpretations of their own legislative rules are given an even greater degree of deference by the courts. Furthermore, a decision by the D.C. Circuit that

jurisdiction to review interpretive rules under § 7006, its jurisdiction is necessarily exclusive and thereby precludes any other court from exercising jurisdiction until the rule is applied in a specific instance by the Agency.

146 See generally supra note 141.
147 See generally supra note 141.
148 The principle of res judicata holds "that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action." BLACK'S LAW DICTIONARY 1174 (5th ed. 1979). The doctrine of stare decisis holds that, "when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and properties are the same." See id. at 1261.

149 467 U.S. 837, 842-45 (1984); see, e.g., Kelley v. EPA, 15 F.3d 1100, 1108 (D.C. Cir. 1994). But see American Postal Workers Union v. United States Postal Serv., 707 F.2d 548, 561 (D.C. Cir. 1983) ("A reviewing court may accord varying degrees of deference to an agency's interpretation of a statute.").
an interpretive rule was valid would certainly be persuasive to other circuits examining the validity of a rule in an enforcement action.

CONCLUSION

The state of administrative law in the D.C. Circuit is in a constant state of flux and confusion. Administrative law is a complex field filled with delicate legal nuances. Yet with each successive D.C. Circuit opinion addressing administrative law, the legal terminology seems to become more confused and the "shroud of smog" grows thicker.\textsuperscript{151} The confusion does not arise solely from the judicial system; administrative agencies also bear significant responsibility due to their often mystifying classification of their own actions. Often notices in the Federal Register are labeled inappropriately, with policy statements labeled interpretive rules, interpretive rules labeled guidance, and on and on. Statements made in preambles to substantive rules are often not clearly marked as interpretive rules, policy statements, or "suggestions" or "guidance." In recognition of the different treatment afforded to different administrative actions, agencies may label seemingly identical actions differently in litigation.\textsuperscript{152} Although outside the scope of this article, the specific issues addressed here, in addition to the entire field of administrative law, would be simplified if both the courts and the administrative agencies exercised restraint and discretion in their use of administrative law terminology and made a concerted effort to establish enduring and clearly defined standards.

Whether an interpretive rule of general applicability is subject to review pursuant to statutory provisions similar to RCRA section 7006(a)(1) cannot be conclusively determined through application of the current test set forth by the D.C. Circuit in \textit{Portland Cement} and \textit{Montrose Chemical}. It is essential, however, that the D.C. Circuit decide this jurisdictional issue. In doing so, it will lift a layer of fog from the current state of administrative law, thereby giving both regulators and regulated parties notice of whether interpretive rules

\textsuperscript{150} See Stinson v. United States, 113 S. Ct. 1913, 1919 (1993); United States v. Yuzary, 55 F.3d 47, 51 (2d Cir. 1995) ("Federal courts are bound by an agency's interpretation of its own legislative rule unless the interpretation is inconsistent with the legislative rule, violates the constitution or a federal statute, or is plainly erroneous.").

\textsuperscript{151} See Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997) ("tendency of courts and litigants to lump interpretative rules and policy statements together in contrast to substantive rules"); Community Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987); see also supra notes 18, 21 & 35.

\textsuperscript{152} See supra note 20 and accompanying text.
of general applicability are subject to review. This will allow all parties in administrative rulemakings to adjust their decisionmaking accordingly and lead to more efficient use of the judicial system and greater clarity throughout the administrative rulemaking process.