

## WHAT IS THE LAW TODAY? BETTER CHECK EPA'S WEBSITE

by

Robert J. Martineau, Jr. and Edward M. Callaway

According to a recent opinion of the United States Court of Appeals for the D.C. Circuit in *General Motors v. EPA*, a federal agency may be able to give the general public notice of new interpretations on the applicability of its regulations merely by posting the information somewhere on its website — even if the website says the information could be wrong. 2004 U.S. App. Lexis 6309 (Apr. 2, 2004). When the agency simply places such pronouncements on its website, the entire world is assumed to be aware of the document and its direct or indirect applicability to any regulated entity, starting the clock on the limited time to request judicial review. This allows an agency to circumvent the formal rulemaking procedures outlined by Congress in the Administrative Procedure Act. In addition, the court's interpretation places a heavy burden on the public to track agency actions.

In *GM v. EPA*, the court found that when the Environmental Protection Agency (EPA) posted a letter on its website responding to a question posed by a lawyer without reference to the lawyer's client, regulated entities were obligated to track down the document and present a judicial challenge to the policy interpretation contained therein within the brief, 90-day statutory deadline. *See id.* at \*26. In this instance, by letter dated July 29, 1997, the Acting Director of the EPA Office of Solid Waste, Elizabeth Cotsworth, responded to a letter from an attorney representing an unnamed client that used solvents to clean automated spray painting guns when changing paint colors. The Cotsworth letter stated that, based on the description of the system, "the used solvent is waste once it leaves the spray painting unit, and [thus] ... the equalization tank and associated piping are subject to hazardous waste regulatory requirements." In July 1998, EPA issued a copy of the Cotsworth letter as a supplement to the Resource Conservation and Recovery Act (RCRA) Permit Policy Compendium (a five-foot thick series of binders containing manually indexed documents), which became available online in some form in September 1998 on the EPA website.

---

**Robert J. Martineau, Jr.** and **Edward M. Callaway** are members in the Nashville, Tennessee law firm of Waller Lansden Dortch & Davis, PLLC. More information on this case can be found in WLF's LEGAL BACKGROUNDER Vol. 19, No. 2, "'Informal' EPA Waste Regulation Treads on Due Process Protections," Feb. 20, 2004.

In *GM v. EPA*, the court found that GM's petition challenging the Cotsworth policy interpretation was untimely because it was filed long after the 90-day period for judicial review expired following the posting of EPA's interpretation on the RCRA website. *Id.*; see 42 U.S.C. § 6976(a)(1). On the other hand, the court noted that a judicial challenge to the policy as applied to GM plants was premature because such a challenge must await the conclusion of administrative enforcement.

Citing its previous decision in *Appalachian Power v. EPA*, the court noted that “[a]lthough the interpretation was not published in the Federal Register, with the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statements on its website.” *Id.* (citing *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000)).

In *Appalachian Power*, the court found reviewable a policy document that was posted on the EPA website. In that case, however, a draft policy had been circulating for at least four years, and states and the regulated community were aware of the policy under development and challenged its implementation within the statutory period. *Appalachian Power*, 208 F.3d at 1022.

The *Appalachian Power* opinion cited by the court contained a longer discussion on the advantages and disadvantages of an agency posting policy interpretations on the Internet than the portion cited by the *GM* court. The *Appalachian Power* court noted that an agency “can issue or amend its real rules, i.e., its interpretive rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures.” 208 F.3d at 1020. The *Appalachian Power* court also recognized, however, that “the agency may also think there is another advantage — immunizing its lawmaking from judicial review.” *Id.*

The *GM* court's decision is curious in light of the disclaimers that EPA has placed on the RCRA Online web page. For example, the page states “While OSW makes every effort to keep this information timely and accurate, EPA makes no expressed or implied guarantees as to the accuracy or timeliness of the information contained in this database, the documents referenced in this database, or the choice of documents referenced in this database.” Furthermore, “since EPA cannot guarantee protection from potential alteration of or tampering with the materials on this server by outside parties, these materials do not constitute ‘official’ versions, and they are not intended, nor can they be relied upon, to create any rights enforceable by any party in litigation with the United States.”

The availability of agency policy interpretations and guidance documents afforded by technology and specifically by the Internet has increased the transparency of agency decision-making to the benefit of regulated entities. However, if the burden is on industry to track down agency policy interpretations wherever they reside on large-scale agency websites, then the implications for judicial reviewability of agency policy decisions is ominous indeed.