

APA: Informal Rulemaking

Step #1: Notice of Proposed Rulemaking

Step #2: Public Comments

Step #3: Final Rule

CT Light and Power: Changes to NRC Rule

- Protection of duplicate safe shutdown capacity/alternative shutdown system
 - *Proposed Rule*: Postulated hazards approach
 - *Final Rule*: Stipulated 3 approved methods
- Protection of lubricant for reactor's coolant system
 - *Proposed Rule*: Set forth 2 acceptable approaches
 - *Final Rule*: Approved only one approach

APA §553

(b) General notice of proposed rule making shall be published in the Federal Register . . . The notice shall include—

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) ***either the terms or substance of the proposed rule or a description of the subjects and issues involved.***

Adequate Notice

Courts find inadequate notice if:

- 1) Agency fails to provide technical basis underlying proposed rule, or
- 2) Final rule is not a “logical outgrowth” of proposed rule b/c differences too great

Logical Outgrowth Rule

- Scenario 1:
 - Proposed Rule: “Must do X or Y”
 - Final Rule: “Must do X”
 - *Final rule usually considered a logical outgrowth of proposed
- Scenario 2:
 - Proposed Rule: “Must do X”
 - Final Rule: No longer requires X
 - * Final rule usually considered a logical outgrowth of proposed

Logical Outgrowth Rule

- Scenario 3:
 - Proposed Rule: “Must do X”
 - Final Rule: “Must do Y”
- Test murky
- Key Question: Extent new round of comments likely to produce new, helpful information
- Note: If proposed rule stated agency also considering “Y”, then logical outgrowth

Chevron 2-Step Analysis

- (1) Has Congress spoken directly on the precise issue in question?
- (2) If not, is the agency's interpretation a permissible and reasonable reading of the statute?

Arbitrary and Capricious Standard

- Did agency examine relevant data?
- Did agency articulate satisfactory explanation that connects facts/conclusions to policy choice?
- Did agency rely on factors Congress did not intend agency to consider?
- Did agency fail to consider important aspects of the problem?
- Is agency's explanation counter to the evidence?
- Is agency's rationale so implausible could not be ascribed to difference in agency's view?
- **Did agency consider all regulatory alternatives?*
- **Did agency adequately explain any "flip flops"?*