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Rulemaking by Ambush: How Prohibitions Against It Became Dead Letters

Arthur G. Sapper

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FORWARD BY MELISSA A. BAILEY

Arthur G. Sapper—better known to friends and colleagues as Art—passed away late last year. Art authored this article, and I was honored to be asked to write a foreword.

I met Art at Georgetown Law where he taught a class in workplace safety law. I was working on Capitol Hill at the time—the Republicans were in charge in the Senate, and amending the Occupational Safety and Health Act to cut red tape and help small businesses was a popular theme. In my role as a staffer, I was often looking for witnesses who were OSHA experts. As I learned in his class at Georgetown, Art fit that description perfectly. When Art called me in 1996 to ask if I might like to come work with him on OSHA enforcement and policy issues at a law firm, I jumped at the chance. Art and I ultimately worked together for many years, and he taught me so much: how to analyze the law, write persuasively and be an effective advocate for the clients I represent.

In the professional context, people often say "everyone is replaceable." Art is not. I have been representing clients in the workplace safety matters for over twenty years, and have never met anyone with Art's expertise. His ability to identify a winning argument in an OSHA litigation is unparalleled, and his record of winning cases on appeal reflects that. This will be evident from the article that follows this foreword, but Art was the best legal writer I have ever encountered—clear, reasoned, persuasive and precise. While I hope I do, I do not think I will ever meet someone as well-versed in the intricacies of administrative law as Art was. To use a vastly over-used phrase, Art was a "lawyer's lawyer"—he loved that moment when he found the key legal argument and put pen to paper to make it effectively. To say we miss him at Ogletree Deakins is a gross

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understatement—he was a legal giant with regard to workplace safety and administrative law, both within the firm and with his peers.

More important than his professional accomplishments, Art was a family man. He cherished his children and grandchildren. Art worked hard to support them and because he loved the work. His office was filled with photos of his family, and he enjoyed talking about them. Working with someone who is both an excellent lawyer at the top of his profession and a deeply caring person is rare. Art was that lawyer and that person.

Melissa A. Bailey

INTRODUCTION

A rulemaking provision of the Occupational Safety and Health Act (OSH Act),[1] like that of several other post-APA statutes, imposes a requirement more stringent than the parallel provision of the Administrative Procedure Act (APA).[2] OSH Act section 6(b)(2)[3] requires the Occupational Safety and Health Administration (OSHA) to, in the Federal Register, publish a proposed rule adopting or modifying an occupational safety and health standard. The APA does not so require, however. Instead, APA section 553(b)(3) requires only that an agency publish "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[4] The words and legislative history of the OSH Act indicate that its drafters parted from the APA provision deliberately.

This article discusses how courts have, without closely examining the matter, effectively reduced the more stringent requirement of the OSH Act and other such organic statutes to one no more demanding than that of the APA's provision. They have equated OSH Act section 6(b)(2) to APA section 553(b)(3) even though their words are markedly and deliberately different. By applying tests devised to reflect the looser APA provision—the "logical outgrowth" test and the "fairly apprise" test—to decide whether a second round of rulemaking is required, the courts have failed to preserve the benefits of publication of a proposed rule—reductions in the costs of predicting possible final rules and preparing comments,

1. 29 U.S.C. §§ 651–78.

2. 5 U.S.C. §§ 551, 553–59, 701–06.

3. 29 U.S.C. § 655(b)(2).

4. 5 U.S.C. § 553(b)(3). Inasmuch as the APA has been enacted into positive law, and for clarity, this article will refer to the provision as "APA § 553(b)(3)."

reductions in the risks of failure to comment on a possible rulemaking outcome, and reductions in the risks and costs of being regulated by a rule more onerous than anticipated. Worse, the courts have indirectly encouraged OSHA and other agencies to not publish the texts of proposed standards.

This article argues that a rule should be fashioned that better gives effect to Congress's requirement in the OSH Act and other statutes that agencies publish the text of a proposed rule. It proposes that courts require that under such statutes a final rule "closely resemble" the proposed rule.

It is not the thesis of this essay that all deviations from a proposed OSHA standard's text must be the subject of a second round of rulemaking—that is, published as a revised proposed standard. As Phillip Kannan has written, "A balance must be struck between the agency's need to change its rules because of what it learns during the comment period and the public's right to participate meaningfully in the promulgation of the final rule."[5] It is instead the principal thesis of this essay that, where an agency's organic statute departs from the APA and requires that the text of a proposed regulation be published, that balance must be struck differently than it has been under the looser APA provision. The "closely resembles" test proposed here would better strike that balance.

I. THE APA PROVISION

APA section 553(b) requires that a "general" notice of proposed rulemaking be published in the Federal Register.[6] Paragraph (3) then states that the notice must include "either the terms *or* substance of the proposed rule or a description of the subjects and issues involved."[7] The Senate report on the provision stated that, "Agency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto."[8] The House report

5. Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 215 (1996) (emphasis omitted).

6. APA § 553(b).

7. APA § 553(b)(3) (emphasis added). In context, APA § 553(b)(3) states: "§ 553. Rule making . . . (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. 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."

8. S. REP. NO. 79-752 (1945), *reprinted in* STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 1944–46, S. DOC. NO. 248, at 185, 200 (1946).

suggests that sometimes agencies might not find it "possible" to draft proposed rules.[9]

Given the words of APA section 553(b) and its paragraph (3), it is understandable that courts have held that the APA does not require that the text of a proposed rule be published. The D.C. Circuit stated that "Section 553(b) does not require that interested parties be provided precise notice of each aspect of the regulations eventually adopted. Rather, notice is sufficient if it affords interested parties a reasonable opportunity to participate in the rulemaking process."[10]

Two scholars have observed that the breadth of the phrase "terms or substance of the proposed rule or a description of the subjects and issues involved" sharply limits the ability of the regulated public to complain that a final rule deviated excessively from a proposed rule[11]—what this article refers to as the "deviation issue." They noted that "[b]ecause the statute permits the agency to limit its notice to 'the subjects and issues involved,' . . . no new notice and comment is required if the final rule is within the subjects and issues involved in the proposal, even if the direction of the final rule is substantially different from the direction suggested by the notice."[12] The scholars contrasted APA section 553(b)(3) with "organic statutes" that "expressly" adopt a different model, those requiring "procedural devices imposed by modern [administrative] law,"[13] citing as an example a provision of the Clean Air Act[14] (discussed below). "But § 553 of the APA does not adopt this model."[15]

9. H.R. Rep. No. 79-1980 (1946), *reprinted in* S. DOC. NO. 248, *supra* note 8, at 233, 258 ("Prior to public procedures agencies must conduct such nonpublic studies or investigations as will enable them to formulate issues, or where possible to issue proposed or tentative rules for the purpose of public proceedings. Summaries and reports may also be issued as aids in securing public comment or suggestions.").

10. Forester v. Consumer Prod. Safety Comm'n, 559 F.2d 774, 787 (D.C. Cir. 1977). The Ninth Circuit similarly stated: "The EPA's failure to propose in advance the actual wording of the [best management practices] does not make the [best management practices] invalid. . . . Instead, the EPA is only required to publish in this context the 'terms or substance of the proposed rule or a description of the subjects and issues involved.'" Rybachek v. EPA, 904 F.2d 1276, 1287 (9th Cir. 1990) (quoting APA § 553(b)(3)).

11. Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 896 (2007) [hereinafter Beerman 2007]. One of the authors later revised his views on when courts should require a second round of rulemaking if the final rule strayed too far from the proposal. *See* Jack M. Beermann, *Rethinking Notice*, ADMIN. & REG. L. NEWS, at 12 (Winter 2014).

12. Beermann 2007, *supra* note 11, at 896 (quoting APA § 553(c)).

13. *Id.* at 900.

14. 42 U.S.C. § 7607(d).

15. Beermann 2007, *supra* note 11, at 900.

II. THE OSH ACT PROVISION

OSH Act section 6(b)(2) sharply contrasts with APA section 553(b)(3). OSH Act section 6(b)(2) states that "[t]he Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register . . . ." Similarly, the text of emergency temporary standards, which may be published without opportunity for public comment, "serve as a proposed rule for" later permanent rulemaking proceedings.[16]

The OSH Act's legislative history suggests that its departure from the APA's language was deliberate. An early Senate bill[17] and an early House bill[18] would have followed the APA's language. Later, more prominent House bills would have required that an advisory committee's "recommendation" be published[19] or, if none existed, the rulemaking body "make a proposal"[20]; the House bills were not clear, however, on whether the "recommendation" or "proposal" would be the text of a proposed standard. The lead bill in the Senate, however, which was introduced by Senator Harrison Williams, the chairman of the drafting committee and later co-author of the OSH Act,[21] would have required the Secretary of Labor to publish a "proposed rule."[22] The conference committee adopted the Senate bill's language.[23] OSH Act section 6(b)(2) thus states that, "The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register . . . ."[24]

The OSH Act was not the only organic statute of that era to depart from APA section 553(b)(3). The previous year, Congress passed the Federal Coal Mine Health and Safety Act of 1969, which in its section 101(e) stated that the Secretary of the Interior "shall publish proposed

16. OSH Act § 6(c)(3), 29 U.S.C. § 655(c)(3).

17. S. 2788, 91st Cong. § 4(c)(1) (Aug. 6, 1969) ("either the terms or substance of the proposed rule or a description of the subjects and issues involved") (introduced by Senator Javits, later influential in the adoption of the OSH Act).

18. H.R. 13373, 91st Cong. § 4(c)(1) (Aug. 6, 1969) ("either the terms or substance of the proposed rule or a description of the subjects and issues involved.") This bill was co-sponsored by Representative Steiger, later considered a co-author of the OSH Act. *See infra* note 20.

19. H.R. 16785, 91st Cong. § 7(a)(1)-(2) (Apr. 7, 1970).

20. H.R. 19200, 91st Cong. § 6(j)(1)-(2) (Sept. 15, 1970).

21. *See* Nat'l Constructors Ass'n v. Marshal, 581 F.2d 960, 970 n.23 (D.C. Cir. 1978); 29 C.F.R. § 1903.1 (referring to the OSH Act as the "Williams-Steiger Occupational Safety and Health Act of 1970").

22. H.R. REP. No. 91-1765, at 34 (1970) (Conf. Rep.).

23. *Id.* ("All Senate provisions as to procedure and time limitations were retained.").

24. OSH Act § 6(b)(2).

mandatory health and safety standards in the Federal Register. . . ."[25] (Its successor statute, the Federal Mine Safety and Health Act of 1977, also so requires.[26]) Just three days after passing the OSH Act, Congress passed the Clean Air Amendments of 1970, which stated that the EPA Administrator "shall publish proposed [national ambient air quality] regulations."[27] A later amendment of the same act several times referred to a "proposed rule."[28] In 1983, in *Small Refiner Lead Phase-Down Task Force v. EPA*, the D.C. Circuit would come to identify that feature as a "major difference[] between APA § 553(b) and Clean Air Act § 307(d)(3)."[29] Other statutes too require publication of a proposed rule.[30]

The *Small Refiner* opinion made another important comment, one that relates to the leeway an agency has to depart from a proposal when a statute goes beyond the APA and requires that a proposed rule be published. EPA argued that its rulemaking notice was sufficient because it "gave general notice that it might make unspecified changes in the definition of small refinery."[31] The court rejected the argument, observing that, "Agency notice must describe the range of alternatives being considered with reasonable specificity."[32] This observation then followed: "This is doubly true under Clean Air Act § 307(d)(3), which requires EPA to issue a specific 'proposed rule' as a focus for comments."[33] (For all the court's comments about the differences "between APA § 553(b) and Clean

25. Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91-173, § 101(e), 83 Stat. 742, 746.

26. 30 U.S.C. § 811(a)(2) ("The Secretary shall publish a proposed rule promulgating, modifying, or revoking a mandatory health or safety standard in the Federal Register.").

27. Clean Air Amendments of 1970, Pub. L. 91-604, § 4(a), 84 Stat. 1676, 1679 (codified as amended at 42 U.S.C. § 7409(a)(1)(A)).

28. Clean Air Act Amendments of 1977, Pub. L. 95-95, § 305(a), 91 Stat. 685, 773 (codified as amended at 42 U.S.C. § 7607(d)(3)).

29. 705 F.2d 506, 519 (D.C. Cir. 1983). However, a footnote in the decision states: "We express no view on whether the 'proposed rule' must take any particular form, so long as it is specific enough to comply with § 307(d)." *Id.* at 519 n.27. The reservation is puzzling, as it seems inconsistent with both the text of the statute and with the observation in the body of the opinion that the language made a "major" difference.

30. *See*, *e.g.*, 15 U.S.C. § 57a(b)(1); 21 U.S.C. § 360j(l)(5)(B); 25 U.S.C. § 1815(b); 25 U.S.C. § 2017(a)(2)(A); 25 U.S.C. § 5354(a)(3); 30 U.S.C. § 1251a(1); 33 U.S.C. § 1313(b)(1) & (c)(4); 33 U.S.C. § 1317(b)(1); 33 U.S.C. § 2712(e)(1); 34 U.S.C. § 10464; 34 U.S.C. § 10448(c); 42 U.S.C. § 300h(a)(1); 42 U.S.C. § 300mm-22(a)(6)(B)(ii) & (a)(6)(D)(i); 42 U.S.C. § 1761(g); 42 U.S.C. § 4905(a)(1); 42 U.S.C. § 6295(b)(3)(A)(i); 42 U.S.C. § 7411(b)(1)(B); 51 U.S.C. § 50922(c)(1).

31. *Small Refiner*, 705 F.2d at 549.

32. *Id.*

33. *Id.*

Air Act § 307(d)(3),"[34] its analysis of the deviation issue was, however, not different in kind from that in an APA case.[35])

III. CASE LAW UNDER THE OSH ACT

A. The Lead Standard Case

Unfortunately, a prominent rulemaking case under the OSH Act equated OSH Act section 6(b)(2) with APA section 553(b)(3). In the *Lead Standard Case*,[36] the D.C. Circuit examined challenges to OSHA's lead exposure standard.[37] Early in the opinion, the court noted that, "The OSH Act requires the agency to follow procedures more stringent than the minimal ones established in the Administrative Procedure Act, 5 U.S.C. § 553 (1976)."[38] The examples of OSH Act provisions that it then gave as examples of "more stringent" requirements did not include the OSH Act's requirement to publish a proposed rule, however.[39] Later in its lengthy opinion, the court addressed arguments that the final standard deviated so much from the proposed version that the public was denied a fair opportunity to comment. For example, industry complained that the final standard set a permissible exposure limit half that of the proposed standard. The court stated that this change "greatly increases the number of employees affected by the standard, as well as the standard's economic and technological demands on industry."[40]

The heart of the court's analysis began with this statement: "The OSH Act itself simply requires the Secretary to publish a proposed rule . . . but implicitly incorporates the general requirement for informal rulemaking in 5 U.S.C. § 553(b)(3) (1976): notice of 'the terms or substance of the proposed rule or a description of the subjects and issues involved.'"[41] The

34. *Id.* at 519.

35. *See infra* notes 121–22 and accompanying text.

36. United Steelworkers Am. v. Marshall (*Lead Standard Case*), 647 F.2d 1189 (D.C. Cir. 1980).

37. 29 C.F.R. § 1910.1025.

38. *Lead Standard Case*, 647 F.2d at 1207.

39. *Id*. ("Thus the agency must give interested parties the opportunity to request a public hearing on objections to a proposed rule, and must publish notice of the time and place for such hearing in the Federal Register. 29 U.S.C. § 655(b)(3) (1976).").

40. *Id.* at 1221.

41. *Id.* The entire passage is as follows:

> The OSH Act itself simply requires the Secretary to publish a proposed rule in the Federal Register, 29 U.S.C. § 655(b)(2) (1976), but implicitly incorporates the general requirement for informal rulemaking in 5 U.S.C. § 553(b)(3) (1976): notice of "the terms or substance of the proposed rule or a description of the subjects and issues involved." The agency must

court then analyzed the permissibility of the deviation by using the logical outgrowth test used when APA section 553(b)(3) governs the degree of notice required.[42] Heavily relying on statements in the preamble accompanying the proposed standard—rather than the text of the proposed rule—it concluded that "the language of the proposal contains enough suggestions of the possibility of a lower PEL to meet the test of 'adequate' notice."[43]

B. The Correctness of the Lead Standard Case*'s Equation of OSH Act Section 6(b)(2) with APA Section 553(b)(3)*

The court's equation of OSH Act section 6(b)(2) with APA section 553(b)(3) was unfortunate and is much to be criticized. First, it has no textual basis, for the words of OSH Act section 6(b)(2) impose a requirement markedly different from those in APA section 553(b)(3). There is also no textual basis in the OSH Act for the court's assertion that OSH Act section 6(b)(2) "implicitly incorporates" APA section 553(b)(3)'s requirement,[44] let alone so as to limit OSH Act section 6(b)(2)'s contrary text. For one thing, OSH Act section 6(b)(2) makes no reference to the APA, let alone to its provision on rulemaking proposals. The only OSH Act rulemaking provision that refers specifically to APA section 553 is OSH Act section 6(b)(7),[45] and then only in connection with special rulemakings concerning warning devices such as labels, and medical examinations. More general references to the APA in OSH Act rulemaking provisions in OSH Act sections 6(a)[46] and 6(c)(1)[47] say that

> "fairly apprise interested persons" of the nature of the rulemaking . . . but a final rule may properly differ from a proposed rule—and indeed must so differ—when the record evidence warrants the change. "A contrary rule would lead to the absurdity that in rule-making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." . . . Where the change between proposed and final rule is important, the question for the court is whether the final rule is a "logical outgrowth" of the rulemaking proceeding. *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974). The courts have described the notice requirement with other verbal formulas, but general principles only take us so far. We must proceed to compare carefully the specific language of the proposal with that of the final rule, in light of the evidence adduced at the hearings.

Id. (citations omitted).

42. *Id.*
43. *Id.* at 1222.
44. *Id.* at 1221.
45. 29 U.S.C. § 655(b)(7).
46. 29 U.S.C. § 655(a).
47. 29 U.S.C. § 655(c)(1).

the APA rulemaking provisions do *not* apply to the adoption of certain standards.

Second, the APA itself contradicts the court's assertion, in two ways. The first sentence of APA section 559 states that the APA "do[es] not limit or repeal additional requirements imposed by statute or otherwise recognized by law."[48] OSH Act section 6(b)(2)'s requirement that a proposed standard be published is obviously an "additional requirement[] imposed by statute."[49] The fourth sentence of APA section 559 states that a "[s]ubsequent statute may not be held to supersede or modify" the APA, "except to the extent that it does so expressly."[50] Inasmuch as OSH Act section 6(b)(2)'s express requirement to publish a proposed standard would seem to satisfy this anti-supersession provision, it would supersede and thus make unnecessary any need to reference the APA's requirement for notice of "the terms or substance of the proposed rule or a description of the subjects and issues involved."[51]

Third, equating OSH Act section 6(b)(2) with APA section 553(b)(3) was contrary to the OSH Act's legislative history, which, as shown above, indicates that the drafters of its rulemaking provisions Congress deviated from the APA's language deliberately.

Fourth, the *Lead Standard Case* court's equation of OSH Act section 6(b)(2) with APA section 553(b)(3) contravened its own precedent. Two years before, in *National Constructors Association v. Marshal*, the court stated, with respect to the OSH Act's rulemaking provisions, that "OSHA does not explicitly refer to the APA" and that it requires that a proposed standard be published.[52] It explicitly noted that the OSH Act rulemaking requirements were stricter than "the APA's lower standard," reserving only "how much stricter" they are.[53] The *Lead Standard Case* opinion made no reference to this statement.

Given the defects in this aspect of the *Lead Standard Case*, it is perhaps not surprising that other panels of the same court would later depart from its equation of OSH Act section 6(b)(2) with APA section 553(b)(3). The court in *Small Refiner* later found that a similar deviation from the APA provision in the Clean Air Act made a "major

48. APA § 559.

49. *Id.*

50. *Id.*

51. APA § 553(b)(3).

52. 581 F.2d 960, 962 (D.C. Cir. 1978) ("The Secretary must, in any event, publish, and accept comments on, the proposal to promulgate or modify a standard. . . . OSHA does not explicitly refer to the APA, and its promulgation procedure is a hybrid of informal and formal rulemaking.").

53. *Id.* at 971 n.27.

difference[]"[54] and made it "doubly true" that a rulemaking proposal "must describe the range of alternatives being considered with reasonable specificity."[55] The court's 2005 decision in *United Mine Workers v. Mine Safety and Health Administration* construed a provision nearly identical in words and identical in substance to OSH Act section 6(b)(2)—the cognate provision of the 1977 Mine Safety Act, set out in note 26—and yet characterized that provision as "more stringent" than APA section 553(b).[56] Three years later, the D.C. Circuit called the 1977 Mine Safety Act's provision "more confining than" APA section 553(b)(3).[57]

The result of the court's equation in the *Lead Standard Case* of OSH Act section 6(b)(2) and APA section 553(b)(3) is that its resolution of the deviation arguments there was less demanding than it should have been. The court never asked whether the difference in language between OSH Act section 6(b)(2) and APA section 553(b)(3) required it to resolve the deviation issue differently. It did not ask whether the test used under the APA specially reflected its words and could not be simply transplanted to the OSH Act. Had the court anticipated its later observation in the *Small Refiner* case about the import of a requirement that the text of a proposed regulation be published, it might have applied a more demanding test for determining whether a deviation from a proposed regulation is permissible; instead, the more demanding language in OSH Act section 6(b)(2) made no difference to the analysis. Moreover, as Professor Arnold Rochvarg has observed, the D.C. Circuit's approach in the *Lead Standard Case* permitted agencies to give notice in a manner that would be impermissible under the words of the OSH Act—to make remarks in the preamble to a proposed regulation.[58]

54. Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 519 (D.C. Cir. 1983).

55. *Id.* at 549.

56. 407 F.3d 1250, 1259 (D.C. Cir. 2005) ("Whether governed by the more stringent requirement under section 101(a)(2) of the [1977] Mine Act, 30 U.S.C. § 811(a)(2), or section 4 of the APA, 5 U.S.C. § 553(b), . . . we hold that the maximum cap provision of the final rule was not a 'logical outgrowth' of the proposed rule.").

57. Nat'l Mining Ass'n v. Mine Safety & Health Admin., 512 F.3d 696, 699 n.3 (D.C. Cir. 2008) ("In this respect § 101(a)(2) [of the 1977 Mine Act] is more confining than the Administrative Procedure Act, which allows agencies to give notice of 'either the terms or substance of the proposed rule or a description of the subjects and issues involved.' 5 U.S.C. § 553(b)(3).").

58. Arnold Rochvarg, *Adequacy of Notice of Rulemaking Under the Federal Administrative Procedure Act—When Should a Second Round of Notice and Comment be Provided?*, 31 AM. U. L. REV. 1, 8 (1981); s*ee also infra* notes 106–09.

IV. THE EFFECTS OF THE *LEAD STANDARD CASE* ON JUDICIAL REVIEW AND RULEMAKING UNDER THE OSH ACT RULEMAKING; THE WAGES OF INCOMPLETE JUDICIAL ANALYSIS

The treatment of OSH Act section 6(b)(2) by the *Lead Standard Case* appears to have had a regrettable effect on OSH Act case law and rulemaking.

A. Effects on Judicial Review Under the OSH Act

As discussed below, the *Lead Standard Case* has been widely cited. It has had at least two kinds of influence.

1. Perpetuating the equation of OSH Act section 6(b)(2) and APA section 553(b)(3).

In *National Oilseed Processors Association v. OSHA*, the D.C. Circuit repeated the *Lead Standard Case*'s erroneous equation of OSH Act section 6(b)(2) and APA section 553(b)(3): it stated that "[t]he Occupational Safety and Health Act incorporates the notice and opportunity requirements for general rulemaking of the Administrative Procedure Act, *see* 29 U.S.C. § 655(b)(2); 5 U.S.C. § 553(b)(3)."[59] A district court later quoted without comment the *Lead Standard Case*'s equation of OSH Act section 6(b)(2) with APA section 553(b)(3).[60]

2. Encouraging the use of the logical outgrowth test in OSH Act cases.

The *Lead Standard Case*'s use of the logical outgrowth test was expressly cited in two OSH Act cases.[61] Apparently, as a result of the influence of the D.C. Circuit on administrative law issues, federal courts have taken to analyzing arguments that a final OSHA standard deviated excessively from a proposed standard as if the rulemaking process were governed only by the APA. The same logical outgrowth test is used as under the APA, with no added stringency to reflect the OSH Act requirement that a proposed standard be published.[62] The idea expressed

59. 769 F.3d 1173, 1178 (D.C. Cir. 2014).

60. Louisiana Chem. Ass'n v. Bingham, 550 F. Supp. 1136, 1147 (W.D. La. 1982), *aff'd*, 731 F.2d 280 (5th Cir. 1984).

61. Edison Elec. Inst. v. OSHA, 849 F.2d 611, 621 (D.C. Cir. 1988); United Steelworkers Am. v. Schuylkill Metals Corp., 828 F.2d 314, 318 (5th Cir. 1987).

62. *See Nat'l Oilseed*, 769 F.3d at 1180 (rejecting challenge to inclusion of combustible dust as a specific hazard category on safety data sheets); Am. Iron & Steel Inst. v. OSHA, 182 F.3d 1261,

in the *Small Refiner* case that there is a "major" difference when an organic statute requires that the text of a proposed rule be published[63] has been forgotten or overlooked.

The same phenomenon occurred in the 1977 Mine Safety Act cases. Even though the D.C. Circuit called that statute's requirement to publish a published rule "more confining than" APA section 553(b)(3),[64] it still applied the logical outgrowth test without apparent adjustment or nuance.[65] The same has been true in other circuits when reviewing deviation issues under other organic statutes requiring publication of a proposed standard.[66]

B. Effects on Rulemaking Under the OSH Act

The effects of the above developments are that all too often, OSHA acts as if OSH Act section 6(b)(2) did not exist and does not publish the texts of proposed rules, even when they are crucially important. Four such examples are now discussed.

1. The definition of "Process" under the Process Safety Management Standard

Perhaps the most spectacular violation of OSH Act section 6(b)(2) occurred during the rulemaking for OSHA's Process Safety Management Standard,[67] which seeks to prevent "catastrophic" releases of highly hazardous chemicals.[68] Under the proposal, coverage would have depended on whether a threshold quantity of a regulated chemical was

1276 (11th Cir. 1999); Alabama Power Co. v. OSHA, 89 F.3d 740, 745 (11th Cir. 1996); *Edison Elec.*, 849 F.2d at 621; United Auto. Workers v. OSHA, 938 F.2d 1310, 1324 (D.C. Cir. 1991); Taylor Diving & Salvage Co. v. U.S. Dep't of Labor, 599 F.2d 622, 626 (5th Cir. 1979); United Steelworkers Am. v. Pendergrass, 855 F.2d 108, 114 (3d Cir. 1988); *Schuylkill Metals*, 828 F.2d at 318; United States v. Pitt-Des Moines, Inc., 970 F. Supp. 1346, 1356 (N.D. Ill. 1997) (refusing to dismiss criminal indictment for violation of OSHA standard).

63. Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 519 (D.C. Cir. 1983).

64. Nat'l Mining Ass'n v. Mine Safety & Health Admin., 512 F.3d 696, 699 n.3 (D.C. Cir. 2008) ("In this respect § 101(a)(2) [of the 1977 Mine Act] is more confining than the Administrative Procedure Act, which allows agencies to give notice of 'either the terms or substance of the proposed rule or a description of the subjects and issues involved.' 5 U.S.C. § 553(b)(3).").

65. *Id.* at 698–700 (discussing the 1977 Mine Act).

66. *E.g.*, Brazos Elec. Power Coop. v. Sw. Power Admin., 819 F.2d 537, 542–43 (5th Cir. 1987) (applying "logical outgrowth" test conventionally without apparent influence from then-requirement in organic statute that proposed rules be published, and citing *Lead Standard Case*).

67. 29 C.F.R. § 1910.119. Its formal name is "Process safety management of highly hazardous chemicals."

68. *Id.*

involved in a "process."[69] The proposed definition of "process" had a single sentence; it would essentially have defined a "process" as any "activity" that "involves" a highly hazardous chemical.[70]

During the rulemaking, OSHA evidently realized that that definition failed to address an important question: Should quantities of regulated chemicals be added together to meet the threshold quantity, and thus be covered, if they are in vessels in close proximity? In a formal statement of additional issues, OSHA stated that it "is interested in suggestions concerning at what point materials should be aggregated due to their proximity (*e.g.*, two storage tanks located next to each other where the failure of one could lead to the failure of the other)."[71] The statement of additional issues said nothing about a different question—interconnection, that is, whether quantities in vessels should be aggregated if the vessels are interconnected. More importantly, OSHA proposed no regulatory language for the public to comment upon, even as to proximity.

When the final standard was published, a second sentence had been added to the definition of "process"—a sentence that had not been proposed and that bore no resemblance to any proposed provision.[72] The newly-added second sentence stated for the first time that proximity would be an aggregation criterion. Although proximity had been mentioned by OSHA in its formal statement of additional issues, its emergence as regulatory text violated section 6(b)(2) because no proposed version had been published. Far worse for the chemical industry, and much more surprising, was that the final standard also contained for the first time the word "interconnected" as an alternative aggregation criterion. Again, OSHA's formal statement of additional issues never mentioned interconnection as a possible aggregation criterion.

The effect of the addition of the second sentence of the definition of "process" on the coverage of the Process Safety Management Standard has been immense, for the coverage of the standard was thereby greatly

69. 55 Fed. Reg. 29150, 29163 (proposed July 17, 1990) (to be codified at 29 C.F.R. § 1910.119(b)(1)(i)-(ii)) (setting out certain scope provisions).

70. *Id.* (to be codified at 29 C.F.R. § 1910.119(c)) ("*Process* means any activity conducted by an employer that involves a highly hazardous chemical including any use, storage, manufacturing, handling, or movement of a highly hazardous chemical, or combination of these activities.").

71. Additional Issues, 55 Fed. Reg. 46074, 46075 (Nov. 1, 1990).

72. 57 Fed. Reg. 6356, 6404 (Feb. 24, 1991) (to be codified at 29 C.F.R. § 1910.119(b)) (The second sentence stated: "For purposes of this definition, any group of vessels which are interconnected and separate vessels which are located such that a highly hazardous chemical could be involved in a potential release shall be considered a single process.").

expanded.[73] More important for the present discussion, the lack of publication of a proposed version of the second sentence impoverished the rulemaking process. Not only was the chemical industry deprived of the opportunity to comment on the addition of two immensely important coverage criteria, but it was deprived of the opportunity to observe that the second sentence was so poorly drafted as to lead to irrational results. The second sentence of the final definition of "process" states that "any group of vessels which are interconnected and separate vessels which are located such that a highly hazardous chemical could be involved in a potential release shall be considered a single process."[74] Query: Does the phrase "which are located such that a highly hazardous chemical could be involved in a potential release" apply only to vessels that are co-located, or does it apply also to vessels that are interconnected? Stated differently, should commas have been placed as shown here?

> ". . . any group of vessels which are interconnected, and separate vessels which are located, such that a highly hazardous chemical could be involved in a potential release shall be considered a single process."

Or as shown here?

> ". . . any group of vessels which are interconnected, and separate vessels which are located such that a highly hazardous chemical could be involved in a potential release, shall be considered a single process."

Commenters would very likely have pointed out the ambiguity and demanded that commas be placed after "interconnected" and "located" to ensure that the qualifying phrase "which are located such that a highly hazardous chemical could be involved in a potential release" applies to all vessels. Commenters would also have likely argued that no other placement would make practical sense, for not all interconnections can cause or contribute to a catastrophic incident. As it turns out, the sentence has been construed, for purely linguistic and grammatical reasons, such that the qualifying phrase applies only to co-located vessels,[75] which is irrational as a policy matter.

73. *See, e.g.*, *Wynnewood Refin. Co.,* 27 BNA OSHC 1971, 1974–75 (Nos. 13-0644 & 13-0791, 2019), *aff'd sub nom* Scalia v. Wynnewood Ref. Co., 978 F.3d 1175, 1883–84 (10th Cir. 2020).

74. 57 Fed. Reg. 6356, 6404 (Feb. 24, 1991) (to be codified at 29 C.F.R. § 1910.119(b)).

75. Both tribunals in the *Wynnewood* case held that the phrase "which are located such that a highly hazardous chemical could be involved in a potential release" applies only to vessels that are co-located and not to vessels that are interconnected. *Supra* note 73.

2. The definition of "Emergency Response" in the HAZWOPER Standard

OSHA has a standard entitled "Hazardous waste operations and emergency response" but informally known as the "HAZWOPER Standard."[76] Its paragraph (q) sets out requirements for emergency response at non-hazardous waste sites.[77] The key provision defining the scope of paragraph (q) is the definition of "emergency response" in paragraph (a)(3). As adopted in 1986[78] and corrected in 1987,[79] the definition confined coverage to incidents involving concentrations above "established permissible exposure limits."[80]

In 1987, a proposed rule was published that would have retained that limitation.[81] Nothing in the preamble indicated that that limitation might be changed. On the contrary, the preamble stated that "the agency did not want to cover releases of hazardous substances that did not expose employees to exposures of hazardous substances above the established permissible exposure limits of this rule."[82] The 1989 final rule, however, removed the limitation to permissible exposure limits and replaced it with the following text: "where there is no potential safety or health hazard,"[83] which seems to apply to any condition that poses a mere possibility ("potential") of being hazardous. The change was substantial, as it vastly expanded both the coverage of paragraph (q) and the uncertainty of its coverage, as employers could have little notice of what OSHA or an adjudicator might consider to be a "potential" hazard.

As stated above, nothing in the 1987 proposal hinted that OSHA was considering this change. Moreover, a criterion turning on the word "potential" would have been inconceivable to the regulated community, for the Supreme Court in the *Benzene Decision* only a few years before had condemned mere-possibility standards as invalid.[84] Even if some change might be expected, the substitution of a mere-possibility criterion for the permissible exposure limits could not reasonably have been expected. Had the regulated community realized that OSHA might

76. 29 C.F.R. § 1910.120.
77. 29 C.F.R. § 1910.120(q).
78. 51 Fed. Reg. 45654, 45663 (Dec. 19, 1986) (to be codified at 29 C.F.R. § 1910.120).
79. 52 Fed. Reg. 16241, 16242 (May 4, 1987) (to be codified at 29 C.F.R. § 1910.120).
80. *Id.* For such exposure limits, *see* 29 C.F.R. § 1910.1000 tbls. Z-1, Z-2 & Z-3.
81. 52 Fed. Reg. 29620, 29640 (Aug. 10, 1987) (to be codified at 29 C.F.R. § 1910.120).
82. *Id.* at 29624.
83. 54 Fed. Reg. 9294, 9317–18 (Mar. 6, 1989) (to be codified at 29 C.F.R. § 1910.120).
84. Indus. Union Dep't v. Am. Petrol. Inst. (*Benzene Decision*), 448 U.S. 607, 641, 646 (1980).

substitute an amorphous "potential hazard" criterion for the permissible exposure limits, it might have strongly urged their retention, argued that a "potential hazard" criterion would be unlawful, or suggested a criterion intermediate between them, such as some fraction of either or both of the permissible exposure limits or levels known to immediately cause death.

3. Medical removal and medical removal protection

OSHA published a proposed standard for exposure to lead in 1975.[85] The proposed standard was silent on whether employers would be required to remove employees with high lead levels from high-lead areas, whether the employees could return to their jobs after the removal period, and whether they would receive any compensation during their removal. In 1977, OSHA announced that the rulemaking record would be re-opened for an "additional comment period" and an additional public hearing on those subjects.[86] OSHA explained that it feared that, without such protections, employees would not cooperate with medical surveillance.[87] Descriptions of the issues and their ramifications, and questions posed by OSHA to the public, took up three pages in the Federal Register.[88] OSHA did not, however, publish either proposed provisions or alternative proposed provisions on these subjects. The final standard emerged with provisions imposing substantial duties on employers.[89]

One of the provisions, however, was ambiguous. It stated that "the employer shall maintain the earnings, seniority and other employment rights and benefits of an employee as though the employee had not been removed" for up to 18 months.[90] Does "earnings" include overtime pay, production bonuses, paid lunch periods and shift differentials that employees would have accrued but for their removal? When that question arose in enforcement cases, employers argued, *inter alia*, that the rulemaking proposals gave inadequate notice to commenters that such items might be included in the term "earnings," especially as the preamble had used the terms "rate of pay" and "earnings" interchangeably. The Occupational Safety and Health Review Commission agreed with the

85. 40 Fed. Reg. 45934 (Oct. 3, 1975) (to be codified at 29 C.F.R. § 1910).
86. 42 Fed. Reg. 46547 (Sept. 16, 1977) (to be codified at 29 C.F.R. § 1910).
87. *Id.*
88. *Id.* at 46547–49.
89. 43 Fed. Reg. 52952 (Nov. 14, 1978) (to be codified at 29 C.F.R. § 1910).
90. 29 C.F.R. § 1910.1025(k)(2)(ii).

employers, in part indicating that it was troubled by the rulemaking notice provided.[91] OSHA appealed.

The Fifth Circuit in *Schuylkill Metals* reversed.[92] It applied APA section 553(b) and its logical outgrowth test. The court was apparently unaware that OSH Act section 6(b)(2) had a stricter requirement than the APA.[93] Among the many cases it cited was the *Lead Standard Case*.[94] A later decision on the same issue by the Ninth Circuit in *Asarco* essentially followed the Fifth Circuit's opinion. [95]

4. Rescue of construction employees

Another example of a failure by OSHA to comply with OSH Act section 6(b)(2) concerns a requirement that construction industry employers "provide for prompt rescue of employees in the event of a fall or shall assure that employees are able to rescue themselves."[96] No proposed version was ever published. OSHA thought it enough that a proposal *in*applicable to construction work had once been published.[97]

It is difficult to believe that OSHA would have behaved as set out above had the *Lead Standard Case* not equated OSH Act section 6(b)(2) with APA section 553(b)(3).

V. THE TESTS APPLIED BY COURTS TO DETERMINE THE LAWFULNESS OF A DEVIATION—THE LOGICAL OUTGROWTH AND FAIRLY APPRISE TESTS—REST ON APA SECTION 553(B)(3)

A problem with applying the "logical outgrowth" test to organic statutes with proposal requirements very different from APA section 553(b)(3)'s is that the test specially reflects the APA's language regarding

91. Amax Lead Co., 12 BNA OSHC 1878 (Nos. 80-1793, 81-856 & 81-2267, 1986). The Commission stated that "if the Secretary did intend 'earnings' to have a broader meaning than 'rate of pay,' his action would be contrary to the spirit, and possibly the letter, of notice-and-comment rulemaking." *Id.* at 1885.

92. United Steelworkers Am. v. Schuylkill Metals Corp., 828 F.2d 314 (5th Cir. 1987).

93. *Id.* at 317 ("Before promulgating a rule, the Secretary must provide interested parties with notice in the Federal Register and an opportunity to comment. Such notice must 'include[] either "the terms or substance of the proposed rule or a description of the subjects and issues involved."' *Action For Children's Television v. FCC*, 183 U.S. App. D.C. 437,564 F.2d 458, 470 (D.C. Cir.1977) (quoting 5 U.S.C. § 553(b)).").

94. *Id.*

95. McLaughlin v. ASARCO, Inc., 841 F.2d 1006 (9th Cir. 1988).

96. 29 C.F.R. § 1926.502(d)(20).

97. 59 Fed. Reg. 40672, 40709 (Aug. 9, 1994) (to be codified at 29 C.F.R. §§ 1910, 1926).

what an agency must publish of a proposal. The same is true of the "fairly apprise" test used by some courts.

A. Origin of the Logical Outgrowth Test

The Supreme Court in *Long Island Care* explicitly attributed the logical outgrowth test to both the language and "object" of APA section 553(b)(3):

> Fair notice is the object of the APA requirement that a notice of proposed rulemaking contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved," 5 U.S.C. § 553(b)(3). The Circuits have generally interpreted this to mean that the final rule must be a logical outgrowth of the rule proposed.[98]

Before that the D.C. Circuit also had attributed the development of the logical outgrowth test to the APA: "The 'logical outgrowth' test was developed under the APA to determine how significantly proposals on which public comment have been received may be altered without allowing more public comment."[99]

The Supreme Court and the D.C. Circuit were correct in attributing the logical outgrowth test to APA section 553(b)(3). The first use of the term "logical outgrowth" was in the First Circuit's 1974 *South Terminal* case,[100] which began its discussion by quoting APA section 553(b)(3).[101] It also cited other cases—such as *Mount Mansfield Television*,[102] *International Harvester*,[103] and *Owensboro*[104]—that either expressly

98. Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 160 (2007). The Court principally cited National Black Media Coalition v. FCC, 791 F.2d 1016, 1022 (2d Cir. 1986). It then cited, as "see also, *e.g.*," *Lead Standard Case* and South Terminal Corp. v. EPA, 504 F.2d 646, 659 (1st Cir. 1974).

99. Nat'l Constructors Ass'n v. Marshal, 581 F.2d 960, 971 n.27 (D.C. Cir. 1978).

100. South Terminal Corp. v. EPA, 504 F.2d 646, 659 (1st Cir. 1974).

101. *Id.* at 656.

102. Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 488–89 (2d Cir. 1971) ("The contention that the notice was insufficient and that the Commission has thereby violated 5 U.S.C. § 553 (1964) is without merit. This contention is based on the fact that the offnetwork and feature film restrictions were not specifically proposed in the 1965 Notice of Proposed Rule-Making. All that is required by 5 U.S.C. § 553(b)(3), however, is that 'either the terms or substance of the proposed rule or a description of the subjects and issues involved' be included in the notice. This requirement has been met in this case. . . . The evolution of these proceedings illustrates why 5 U.S.C. § 553(b)(3) 'does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule.' California Citizens Band Association v. United States, 375 F.2d 43, 48 (9th Cir.), cert. denied, 389 U.S. 844 . . . (1967).").

103. Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973).

104. Owensboro on Air, Inc. v. United States, 262 F.2d 702, 708 (D.C. Cir. 1958).

rested on the APA's language or can be traced back to *Logansport Broadcasting*,[105] which expressly so rested.

The courts' analysis of the deviation issue rested on the APA's language in another way: they permit reliance not on the language or description of a proposed rule but on agency statements in the preamble to the proposed rule. Two such cases pointed out by Professor Arnold Rochvarg[106] are D.C. Circuit's *Lead Standard Case*[107] and the First Circuit's *South Terminal* case.[108] Professor Rochvarg explicitly locates the source for this in the language of the APA itself—that "[p]ublication of 'a description of the subjects and issues involved' is adequate under the APA."[109] But OSH Act section 6(b)(2) would not have permitted such reliance.

B. Origin of the "Fairly Apprise" Test

Some cases have used a "fairly apprise" test instead of, or in addition, to the "logical outgrowth" test. That test likewise can be traced back to APA section 553(b)(3). It originated in a Third Circuit decision stating that "we must determine whether the notice given was 'sufficient to fairly apprise interested parties' of all significant subjects and issues involved,"[110] partially quoting the Senate report on the bill that became the APA. [111]

105. Logansport Broad. Corp. v. United States, 210 F.2d 24, 28 (D.C. Cir. 1954) ("[Petitioner] argues that this additional consideration adopted by the Commission after all evidence was submitted violated the notice requirements of Section 4(a) of the Administrative Procedure Act [5 U.S.C. § 553(a)]. That section, however, requires only that the prior notice include 'a description of the subjects and issues involved.' We think the procedure followed by the Commission amply fulfilled this requirement. . . . Surely every time the Commission decided to take account of some additional factor it was not required to start the proceedings all over again. If such were the rule the proceedings might never be terminated.").

106. Rochvarg, *supra* note 58, at 8.

107. United Steelworkers Am. v. Marshall, 647 F.2d 1189, 1224 (D.C. Cir. 1980) (referring to several statements in preamble).

108. South Terminal Corp. v. EPA, 504 F.2d 646, 659 (1st Cir. 1974) (mentioning possible alternatives in preamble).

109. Rochvarg, *supra* note 58, at 8 ("This second source [of a logical outgrowth] is appropriate because the APA does not require publication of the proposed rule itself. Publication of 'a description of the subjects and issues involved' is adequate under the APA. Thus, an agency's choice to publish the subjects and issues involved in the notice of proposed rulemaking, rather than a proposed rule, should not necessarily require another round of notice and comment.).

110. Am. Iron Steel Inst. v. EPA, 568 F.2d 284, 291 (3d Cir. 1977).

111. S. REP. NO. 79-752 (1945), *reprinted in* STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 1944–46, S. DOC. NO. 248, at 185, 200 (1946).

VI. WHY THE LOGICAL OUTGROWTH AND FAIRLY APPRISE TESTS ARE UNSUITED TO THE OSH ACT AND OTHER ORGANIC STATUTES REQUIRING PUBLICATION OF PROPOSED RULES

Both the logical outgrowth and fairly apprise tests are, however, unsuited to OSH Act 6(b)(2) and other organic statutes like it, for they defeat the advantages of requirements to publish the texts of proposed rules.

A. The Costs of APA section 553(b)(3) on Regulated Persons

A rulemaking triggered by a proposal that meets APA section 553(b)(3) by doing no more than describing "the subjects and issues involved" can be expensive and risky for regulated persons, for such a proposal can result in a very large number of wildly different final rules. Worse, case law under the "logical outgrowth" test states that, "A rule is deemed a logical outgrowth if interested parties 'should have anticipated' that the change [in the final rule] was possible. . ."[112]—not likely, but merely "possible."

As a consequence, commenters in an APA rulemaking must anticipate what each possible final rule might be and must discuss each of them—or, more realistically, pay professionals such as regulatory lawyers and environmental engineers specializing in the field to do so. Under such a regime, the cost of preparing comments even on the most likely final rules can be high. Worse, the risk of failure—that is, failing to anticipate, and object to or comment on, the actual final rule—is high and the consequences and cost of failure can be far reaching. In the absence of adverse comment, the agency is more likely to force an unrealistic or sub-optimal, and therefore wealth-wasting, regulation on an industry. Inasmuch as law is not a frictionless system,[113] the costs of litigation over

112. Northeast Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 952 (D.C. Cir. 2004); *see also, e.g.*, Chesapeake Climate Action Network v. EPA, 952 F.3d 310, 319 (D.C. Cir. 2020). This gloss first appeared in *Northeast Md. Waste Disposal*, which apparently derived it from use of the word "might" in this sentence in *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003): "Under the 'logical outgrowth' test, then, the key question is whether commenters 'should have anticipated' that EPA might use a 30 µg/L standard when it first provided notice of its proposals" (citing Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983)). The gloss has been followed by at least five other circuits. Tex. Ass'n of Mfrs. v. Consumer Prod. Safety Comm'n, 989 F.3d 368, 381 (5th Cir. 2021); Mkt. Synergy Grp., Inc. v. Dep't of Labor, 885 F.3d 676, 681 (10th Cir. 2018); Mid Continent Nail Corp. v. United States, 846 F.3d 1364, 1373 (Fed. Cir. 2017); Council Tree Commc'ns, Inc. v. FCC, 619 F.3d 235, 250 (3d Cir. 2010); Miami-Dade Cnty. v. EPA, 529 F.3d 1049, 1059 (11th Cir. 2008).

113. Professor Thomas Krattenmaker, Georgetown University Law Center (1972–73).

the meaning and legality of a regulation can also be high and recurring. And pre-enforcement judicial review might be barred if an objection had not been made during the rulemaking.[114]

B. Is Use of the Logical Outgrowth Test Compatible with Statutory Requirements to Publish the Texts of Proposed Rules?

The above costs and risks can be substantially lowered, however, if the agency were required to publish the text or alternative texts of a proposed rule. The costs of trying to foresee and analyze each possible final rule would be greatly reduced, as would the risk of failing to anticipate and discuss a possible final rule.

The congressional requirement to publish proposed rules would be frustrated, and the benefits of the requirement, would be lost, however, if courts were to tolerate deviation from a proposed rule as readily as the logical outgrowth test permits. Inasmuch as the logical outgrowth test demands only a logical relationship to a proposal, commenters would again be required to anticipate and comment upon a broad range of possible final rules. Under the logical outgrowth test, agencies have little incentive to publish texts or alternative texts of proposed rules. In sum, applying that test would effectively defeat Congress's purpose in requiring agencies to present commenters with the text of a proposed rule.

Might a court fulfill Congress's purpose in statutes such as OSH Act section 6(b)(2) by applying the logical outgrowth test more strictly? After all, the D.C. Circuit in *Small Refiner* found that a similar deviation from the APA provision in the Clean Air Act made a "major difference"[115] and made it "doubly true" that a rulemaking proposal "must describe the range of alternatives being considered with reasonable specificity."[116] In *City of Waukesha,* the D.C. Circuit stated that it would "bear in mind that the [logical outgrowth] doctrine must be considered in the context of this

114. *See, e.g.*, City of Portland v. EPA, 507 F.3d 706, 710 (D.C. Cir. 2007); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir 1973). *But see* ADMIN. CONF. U.S., STATEMENT NO. 19, ISSUE EXHAUSTION IN PREENFORCEMENT JUDICIAL REVIEW OF ADMINISTRATIVE RULEMAKING" (Sept. 25, 2015), www.acus.gov/sites/default/files/documents/ACUS%20Statement%20%23%2019%20%28Issue%20Exhaustion%29_0.pdf (drawing largely on an earlier version of Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 ADMIN. L. REV. 109 (2018)).

115. *Small Refiner*, 705 F.2d at 519.

116. *Id.* at 549.

specific statute, where its applicability may be somewhat stricter than in the generic APA case."[117]

The analyses of the deviation issues in *Small Refiner* and *City of Waukesha* did not, however, bear out this hope, as they were not detectably stricter than that in a case governed by APA section 553(b)(3). Worse, the *Small Refiner* opinion relied on means of conveying notice inconsistent with the words and advantages of the stricter requirement: It faulted commenters for not sending a "letter of inquiry" to the agency seeking to learn the agency's "thinking" on a feature of a possible final rule proposed by other commenters.[118] That requirement was not only unprecedented and not fairly to be anticipated but it was inconsistent with the organic statute's placement of the burden of notice on the agency, not the regulated public. The court also relied on the prospect that a commenter could have heard another private party propose such a feature at a rulemaking hearing[119]—another device inconsistent with the organic statute's requirement for publication of the text of a proposed rule.

Much the same occurred in *City of Waukesha.* Despite the court's statement that the "applicability [of the "logical outgrowth" test] may be somewhat stricter than in the generic APA case" because the rulemaking provisions of the organic statute departed from the APA, [120] no difference in treatment is detectable. The rulemaking provision of the Safe Drinking Water Act of 1970 ("SDWA")[121] states in part that EPA "shall, with respect to . . . each alternative maximum contaminant level that is being considered . . ., publish, seek public comment on, and use for the purposes of paragraphs (4), (5), and (6) an analysis" of the costs and benefits of that alternative[122]—a requirement much more stringent than that of APA section 553(b)(3), particularly in its requirement that alternatives be

117. *City of Waukesha*, 320 F.3d at 245-46 ("Turning then to consider whether the 'logical outgrowth' test was satisfied by EPA, we bear in mind that the doctrine must be considered in the context of this specific statute, where its applicability may be somewhat stricter than in the generic APA case."). Earlier, the court had reserved the question of greater strictness. Nat'l Constructors Ass'n v. Marshal, 581 F.2d 960, 971 n.27 (D.C. Cir. 1978) ("We need not decide how much stricter the ['logical outgrowth'] requirement is under OSHA, however, because in this case even the APA's lower standard was not met.").

118. *Small Refiner*, 705 F.2d at 548. The court's comment about a "letter of inquiry" was as follows: "We think SRTF was therefore obliged to take reasonable steps—a letter of inquiry to EPA ought to have sufficed—to keep informed of EPA's thinking on this matter. Had SRTF done so, EPA presumably would have informed it that other commenters had proposed a past production requirement." *Id*. No other case has ever required such a letter of inquiry.

119. *Id.*

120. *City of Waukesha*, 320 F.3d at 245–46.

121. Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j.

122. Safe Drinking Water Act, 42 U.S.C. § 300g-1(b)(3)(C)(i).

published and analyzed. The proposal had mentioned and analyzed alternative maximum contaminant levels of 20, 40, and 80 µg/L (micrograms per liter). The final regulation adopted a level of 30 µg/L. Various regulated entities or their trade associations sued, arguing, among other things, that the failure to mention and analyze a level of 30 µg/L violated the SDWA requirement. They also argued that the differences between the SWDA rulemaking requirements and those of the APA made the "logical outgrowth" test inapplicable.[123]

The court rejected the argument, in a discussion that has much to be criticized. First, the court first downplayed the differences between the APA and SWDA rulemaking procedures, calling the SWDA procedures only "somewhat different" from APA procedures.[124] That is a puzzlement, as the SWDA's requirements are not "somewhat" different from the APA's; they are greatly different. Second, the court then stated that the differences do not "necessarily" mean that the "logical outgrowth" test is inapplicable.[125] The court failed to explain, however, why the differences between the two provisions do not make that test inapplicable, and no answer is apparent. It then stated: "Under other statutes that have altered the notice-and-comment format for rulemaking, such as the Clean Air Act, the court has held that the 'logical outgrowth' test is applicable," citing *Husqvarna AB v. EPA*.[126] But the *Husqvarna* opinion made no such "holding." It instead *assumed* without discussion that the logic outgrowth test would apply; it never discussed whether, given the differences in the statutes, it *should* be applied.[127]

Third, the *City of Waukesha* court erected a straw man: It reasoned that a "logical outgrowth" test must be applied or else "EPA would be prevented from issuing a final [maximum contaminant level] of 20.1 µg/L, even where it had conducted a cost-benefit analysis for 20 µg/L and EPA had decided that a slight shift in the [maximum contaminant level] would

123. *City of Waukesha*, 320 F.3d at 245.

124. *Id.*

125. *Id.*

126. *Id.* (citing Husqvarna AB v. EPA, 254 F.3d 195, 203 (D.C. Cir. 2001)).

127. *Husqvarna*, 254 F.3d at 203. The *Husqvarna* court's sole references to the logical outgrowth test was as follows: "Second, Husqvarna had opportunity to comment on the proposed ABT program. The final ABT provisions were a logical outgrowth of those proposed in the Supplemental Proposal, even though they were in part based on comments received during the 30 day extension period. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 546–47 (D.C. Cir. 1983); *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980). The Supplemental Proposal gave Husqvarna fair notice of the subjects and issues involved in formulating the ABT program. Likewise, the four-year phase-in period was a logical outgrowth of the proposed five-year implementation schedule." *Id.* (citation omitted).

be advantageous." This ignores the loss of the public's opportunity to comment on that alternative. The logical outgrowth test is also not needed to avoid the result feared by the court; other tests much narrower than it might do so too and yet avoid its costs. And despite the suggestion in *City of Waukesha* that application of the logical outgrowth test "may be somewhat stricter" than in a normal APA case, it applied that test in a conventional way lacking in any detectable added strictness.[128]

The problem underlying *Small Refiner* and *City of Waukesha* is not that judges are human and cannot be expected to be so disciplined as to apply the "logical outgrowth" test in two different ways, one stricter and one less strict. The chief problem is that the inherent looseness of the "logical outgrowth" test will always undo any such intention, for it tolerates deviations with merely some logical connection to the proposal, which could permit a wide range of final rules. For this reason, the "logical outgrowth" test cannot preserve the benefits of publication of a proposed rule—a great reduction in the costs of predicting possible final rules and preparing comments; a great reduction in the risk of failure (that is, not discussing a possible outcome)—and it exposes the public to the costs of being regulated by an unnecessarily costly rule. The "logical outgrowth" test and the "fairly apprise" test were crafted in light of the looser requirements of the APA, and both fail to reflect the different balance struck by statutes such as OSH Act section 6(b)(2) and Clean Air Act section 307(d)(3). A different test is needed.

VII. PROPOSALS AND RAMIFICATIONS

A. A Proposal: The "Closely Resembles" Test

Where an organic statute requires that publication of the text of a proposed rule, courts should, for the reasons stated above, no longer apply the logical outgrowth or fairly apprise tests to determine whether a new proposal must be published. Instead, courts should apply a "closely resemble" test—that is, require that, unless the text of a final rule closely

128. *City of Waukesha*, 320 F.3d at 245–46. The reader can judge for him or herself. The full passage in *City of Waukesha* stated: "Further, strictly applying the plain language of the SDWA . . . would lead to the absurd results that the doctrine is intended to avoid in the first place. Without a "logical outgrowth" test, EPA would be prevented from issuing a final [maximum contaminant level] of 20.1 µg/L, even where it had conducted a cost-benefit analysis for 20 µg/L and EPA had decided that a slight shift in the [maximum contaminant level] would be advantageous. Indeed, petitioners conceded at oral argument that their position would have required EPA to conduct an entirely new cost-benefit analysis in order for it to adopt the MCLs that petitioners themselves had suggested to EPA in their comments." *Id.* at 245.

resembles the text of a proposed rule or alternative proposed rule, a revised proposed rule be published for public comment.

Such a test would have two corollaries: the first corollary would be that courts must no longer hold that the sole purpose of such a non-APA requirement is the "fair" notice required by the APA. As stated above, a requirement to publish the text of a proposed rule confers benefits well beyond fair notice—to substantially lower the costs and risks of rulemaking far more than the parallel APA provision does. The second corollary of an organic statute's requirement to publish a proposed rule should be that courts must no longer rely on anything other than the text of the proposed rule. Holding that a final rule closely resembles a possible rule mentioned in a preambular discussion or in agency testimony would defeat the requirement to publish a proposed *rule*.

B. The Benefits and Corollaries of a "Closely Resembles" Test

A "closely resembles" test applied where an agency's organic statute requires that the text of a proposal rule be published would be practical to apply and have considerable benefits.

First, a "closely resembles" test would give agencies an incentive to propose alternative texts of a proposed rule, which might entirely avoid the deviation problem. The test would also encourage regulators to seriously consider alternative approaches early and not to become prematurely committed to any single approach. It will also force agencies to, in the final rule, explain why they chose one published alternative over another, leading to fewer arbitrary rules and a sounder basis for judicial review.

Second, if a single proposed rule were published for public comment, a "closely resembles" test would give agencies an incentive to, before a final rule is issued, publish and ask for comment on alternative proposed texts as their advisability arises. This might be used to good effect if, for example, a first-round commenter were to point out fundamental difficulties with a proposed rule, or were to recommend a greatly different text than was originally proposed, one that the agency now finds superior to its own.

Third, the agency could avoid the delay and cost of a second rulemaking round by publishing a revised proposed rule in the form of an

interim or direct final rule; the agency would then delay its effective date only if substantial adverse comment is received.[129]

Fourth, even if a second round of rulemaking were required, the second round should not be substantially burdensome, as the issues would already have been much illuminated in the first round and the comments in the second round would be narrowly focused on the agency's presumably narrower second proposal. Previous cost estimates, if any, would only have to be adjusted, not created from scratch. And if the agency were to say that this were not true—that cost estimates would have to be created from scratch—then that is evidence that a second round was needed.

CONCLUSION

Courts developed the "logical outgrowth" and "fairly apprise" tests to determine the permissibility of deviation by final rules from proposals, which the APA required to be no more specific than to state "either the terms or substance of the proposed rule or a description of the subjects and issues involved." But these tests are inappropriate when Congress requires in an agency's organic statute that a proposal state the text of a proposed rule, as they tolerate costs that the more specific requirement was intended to avoid. A test tailored to such an organic statute should be developed instead. Under such a statute, a "closely resembles" test should be used. Under it, if neither the proposed rule nor any alternative proposed rule have been published, or if the final rule does not closely resemble the proposed rule or an alternative proposed rule, the final rule should be held invalid and the agency should be required to publish a revised proposed rule for public comment.

129. See the summary of these techniques in OFF. FED. REG., A GUIDE TO THE RULEMAKING PROCESS (2011), www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.