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What DC Circ.'s Finality Test Means For Biden Enviro Policies

By **David Fotouhi and Trenton Van Oss** (April 20, 2021, 4:15 PM EDT)

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As the Biden administration enacts policy shifts on key environmental issues, the question of whether its actions are final will be central to likely legal challenges to those actions.

On the day of his inauguration, President Joe Biden issued an executive order directing agency heads to "immediately review all existing regulations, orders, guidance documents, [and] policies" that were issued during the Trump administration and that "may be inconsistent with" the new administration's policies.[1]

The order came with a "non-exclusive list of agency actions that heads of the relevant agencies will review."[2] Within weeks, the U.S. Department of Justice's Environment and Natural Resources Division withdrew nine documents issued during the Trump administration, and foreshadowed new guidance to come after "further assessment."[3]

Shortly after that, an interagency working group issued a report containing what it called "interim findings" and "interim estimates" for the social cost of greenhouse gases,[4] which could affect the cost-benefit analyses that agencies like the U.S. Environmental Protection Agency use to justify and analyze the impacts of their actions. Regulated entities, nongovernmental organizations and other interested parties inevitably will seek judicial review of many of these actions.

Indeed, 12 states have already sued over the new, higher estimates for the social cost of greenhouse gases.[5] But in many cases, the availability of judicial review will turn on whether challengers can establish that the agency action they challenge is final.

Recent developments in finality doctrine at the U.S. Court of Appeals for the District of Columbia Circuit — where many battles over the legality of agency actions will play out[6] — may shape which cases proceed to the merits and which ones are tossed at the gate.

The canonical two-part test for identifying final agency action is well established. As the U.S. Supreme Court stated in 1997 in Bennett v. Spear:

First, the action must mark the consummation of the agency's decision making process — it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.[7]

But as courts, practitioners and academics have long observed, applying that test to the panoply of agency actions has proven vexing, and has often led to seemingly inconsistent results[8] — a small wonder, considering the hodgepodge of factors courts have consulted in answering finality's two central questions.

In a recent series of cases reviewing actions by the EPA, the D.C. Circuit has sought to clarify the finality inquiry. And while the multifactor approach is here to stay, these recent decisions have reoriented each factor around a central theme.

In its 2019 decision in California Communities Against Toxics v. EPA, the D.C. Circuit instructed courts to "take as their NorthStar the unique constellation of statutes and regulations that govern the action at issue."[9]

The D.C. Circuit's renewed emphasis on statutory and regulatory context — an emphasis the court expressly distinguished from attempts to "define the action by comparing it to superficially similar actions in the caselaw"[10] — is not a novel concept, but it shifts the focus of the finality inquiry as a whole. And that shift in focus brings with it several lessons for practitioners litigating the finality of a particular agency action.

First, the D.C. Circuit's emphasis on statutory and regulatory context gives definition to the otherwise disparate array of factors that courts have deemed relevant, particularly in assessing the second prong of finality's two-part test. Consider, for example, the long — and nonexhaustive — list of factors that courts have consulted in just four recent environmental cases: the D.C. Circuit's 2019 decision in California Communities, and its 2020 decisions in Natural Resources Defense Council v. Wheeler, POET Biorefining v. EPA and Sierra Club v. EPA.

For the first part of the test — whether the action marks "the consummation of the agency's decision making process" — those cases considered:

- Whether the agency claims its interpretation is compelled, or just a reasonable interpretation;[11]

- Whether an official with authority to speak for the agency is behind the action, or just a mere subordinate;[12]

- Whether the action is published in the Federal Register;[13] and

- Whether the action itself is subject to further consideration, regardless of whether or not the action is deemed "interim."[14]

The second part of the test — whether the action determines rights or obligations or gives rise to legal consequences — is even more generative of relevant factors. Recent cases have looked to:

- Whether the action has independent legal authority or actual legal effect in future proceedings;[15]

- Whether the action binds state permitting authorities or instead preserves their discretion;[16]
- Whether the action binds EPA officials or instead preserves their discretion;[17]
- Whether affected parties have a means to challenge the action, outside of preenforcement review;[18]
- The agency's own characterization of its action;[19]
- Whether the agency has applied guidance as if it were binding on regulated entities;[20]
- Whether the action imposes obligations, prohibitions or restrictions,[21] or whether it suspends regulatory requirements;[22]
- Whether the action puts parties to a choice between costly compliance and risking a penalty;[23] and
- Whether a guidance document uses unequivocal language that definitively interprets a legal provision.[24]

Those factors, considered in isolation, may seem unconnected, adding to the uncertainty of the result in any given case. Organized around a central theme of statutory and regulatory context, however, the factors take on a more defined role: The relevance of each factor is tied to its ability to pinpoint the significance of agency action under the complex web of statutes and regulations that shape realities on the ground for other regulators and regulated entities.

Second, and as a corollary, litigators should brief each factor with an eye toward the structural analysis that the D.C. Circuit's recent cases demand. Somewhat counterintuitively, it generally will not be convincing to structure a brief around comparisons to purportedly similar actions in the case law.[25]

Where agency actions are governed under different "combination[s] of statutes and regulations," the court said in California Communities, it "is a mistake to assume — even if they appear facially similar — that they can lend each other definition through comparison, or that they are decipherable under a common rubric."[26] A common law approach to finality, in other words, is on the outs.[27]

Instead, in line with the D.C. Circuit's newly clarified analytical framework, a successful argument should undertake a structural analysis to identify how each factor informs the agency action's significance, or insignificance, under the particular statutory and regulatory context at issue — which may be easier said than done.

Third, the D.C. Circuit's new focus helps to differentiate conceptually between the finality inquiry and the distinction between legislative and interpretive rules. Those analyses, the court warned in California Communities, are "distinct."[28] But even recent cases have succumbed to some slippage between the two.[29]

The D.C. Circuit's focus on statutory and regulatory context in the finality inquiry provides a useful framing device to keep the two inquiries analytically distinct. Finality focuses on the practical significance of a particular action under the relevant statutory and regulatory regime, whereas the difference between a legislative rule and an interpretive rule hinges on the separate question of

whether an interpretation alters existing obligations or interprets old ones.

Or, stated differently, the first inquiry presents a question of effect, whereas the second presents a question of novelty. That distinction may sharpen the arguments advanced in both areas and prevent the analyses from collapsing into one another.

The D.C. Circuit warned in California Communities that its attempts to clarify the categorization of agency action are part of a "continuing project."[30] As the sustained disagreement even among the judges of that court makes clear, the renewed emphasis on statutory and regulatory context is no panacea for the problems inherent in finality analyses.

To drive that point home: in four recent cases challenging four purported "guidance documents" under the Clean Air Act, two cases — Sierra Club and California Communities — found the document at issue to be not final;[31] one — POET Biorefining — found the document final, but upheld it as a permissible interpretive rule;[32] and one — Natural Resources Defense Council — found the document final, and vacated it as a procedurally improper legislative rule.[33] These four cases yielded 150 pages and nine total opinions, not counting en banc proceedings.[34]

But especially for a doctrine as typified by multifactor analysis — and as infamously malleable — as finality, any shift in focus matters. And as the Biden administration's policy changes begin to face legal challenges, the D.C. Circuit's new focus may make all the difference.

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[1] Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order No. 13,990, 86 Fed. Reg. 7037, 7037 (Jan. 20, 2021).

[2] Fact Sheet: List of Agency Actions for Review, The White House (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/.

[3] Memorandum from Jean E. Williams, Deputy Assistant Attorney General, to ENRD Section Chiefs and Deputy Section Chiefs (Feb. 4, 2021), https://www.justice.gov/enrd/page/file/1364716/download.

[4] Interagency Working Group on Social Cost of Greenhouse Gases, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13,990 (Feb. 2021), https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.

[5] Complaint, Missouri et al. v. Biden et al., No. 4:21-cv-00287-SPM (E.D. Mo. March 8, 2021).

[6] See generally Eric M. Fraser et al., The Jurisdiction of the D.C. Circuit, 23 Cornell J.L. & Pub. Pol'y 131 (2013).

[7] Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (quotation marks and citations omitted).

[8] See, e.g., Cal. Cmtys. Against Toxics v. EPA, 934 F.3d 627, 630 (D.C. Cir. 2019) (noting that "predictable answers have eluded courts and commentators" and collecting sources).

[9] Id. at 631.

[10] Id.

[11] Id. at 636.

[12] Id. See also POET Biorefining LLC v. EPA, 970 F.3d 392, 404 (D.C. Cir. 2020); Natural Res. Def. Council v. Wheeler, 955 F.3d 68, 78 (D.C. Cir. 2020).

[13] Natural Res. Def. Council, 955 F.3d at 78; Cal. Cmtys. Against Toxics, 934 F.3d at 636.

[14] POET Biorefining, 970 F.3d at 404–05; Natural Res. Def. Council, 955 F.3d at 78.

[15] Sierra Club v. EPA, 955 F.3d 56, 63 (D.C. Cir. 2020); Cal. Cmtys. Against Toxics, 934 F.3d at 637.

[16] Sierra Club, 955 F.3d at 63–64; Cal. Cmtys. Against Toxics, 934 F.3d at 637.

[17] POET Biorefining, 970 F.3d at 405.

[18] POET Biorefining, 970 F.3d at 406; Sierra Club, 955 F.3d at 63; Cal. Cmtys. Against Toxics, 934 F.3d at 637–38. But see id. at 645 (Rogers, J., dissenting) (arguing that "the opportunity for judicial review at a later time has no direct bearing on the availability of pre-enforcement review").

[19] Sierra Club, 955 F.3d at 63.

[20] Id. See also POET Biorefining, 970 F.3d at 406.

[21] POET Biorefining, 970 F.3d at 405; Sierra Club, 955 F.3d at 63; Cal. Cmtys. Against Toxics, 934 F.3d at 640.

[22] Natural Res. Def. Council, 955 F.3d at 80.

[23] Sierra Club, 955 F.3d at 63. But see infra n.27.

[24] POET Biorefining, 970 F.3d at 405. Some of the cases also appear to consider whether any future legal challenges would be heard in the D.C. Circuit, rather than in the regional courts of appeals. See Cal. Cmtys. Against Toxics, 934 F.3d at 640; see also Sierra Club, 955 F.3d at 65–68 (Wilkins, J., concurring). It is not entirely clear why, apart from a generalized notion of congressional intent for centralized review of national agency action, this factor would be relevant.

[25] Cal. Cmtys. Against Toxics, 934 F.3d at 631; see also id. at 642 (Rogers, J., dissenting) (unsuccessfully

deploying that analytical approach).

[26] Id. at 632 (majority opinion).

[27] Notably, the D.C. Circuit has appeared to deemphasize the "line of cases which incorporate the analysis of Ciba-Geigy v. EPA, 801 F.2d 430 (D.C. Cir. 1986)." Sierra Club, 955 F.3d at 64. The Ciba-Geigy cases focused on "whether the agency action at issue (usually a preenforcement letter threatening action if the regulated entity does not change a certain behavior) has a practical effect on regulated parties, even if the action itself has no formal legal force," id., and tended to engage in more of a case-comparative analysis than the D.C. Circuit's more recent cases condone, see Ciba-Geigy, 801 F.2d at 435–39.

[28] Cal. Cmtys. Against Toxics, 934 F.3d at 631.

[29] See, e.g., Natural Res. Def. Council, 955 F.3d at 84 (begrudgingly "assuming" a "needle-threading rule" could "determine 'legal rights and obligations' or carry 'legal consequences' (so as to amount to final agency action) but still lack 'legal effects' (so as to fall short of a legislative rule)"); id. at 89 (Rao, J., dissenting) ("The majority conflates aspects of these two standards").

[30] Cal. Cmtys. Against Toxics, 934 F.3d at 631 (quoting Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014)).

[31] Sierra Club, 955 F.3d 56; Cal. Cmtys. Against Toxics, 934 F.3d 627.

[32] POET Biorefining, 970 F.3d 392.

[33] Natural Res. Def. Council, 955 F.3d 68.

[34] See POET Biorefining, 970 F.3d at 397 (majority opinion); id. at 414 (Henderson, J., concurring in part and dissenting in part); Natural Res. Def. Council, 955 F.3d at 73 (majority opinion); id. at 86 (Rao, J., dissenting); Sierra Club, 955 F.3d at 58 (majority opinion); id. at 65 (Wilkins, J., concurring); id. at 68 (Randolph, J., concurring); Cal. Cmtys. Against Toxics, 934 F.3d at 630 (majority opinion); id. at 641 (Rogers, J., dissenting).