Logical Outgrowth Memorandum[1]

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[1] This memorandum has been created to be used as general instruction and as a starting point in researching logical outgrowth. Because a logical outgrowth analysis is fact-specific and courts make case-by-case assessments, this memo is not all-encompassing but rather serves as an illustration. This content is not intended to and does not constitute legal advice.

Introduction

The Administrative Procedure Act (APA) requires[2] agencies to publish in the Federal Register a *general notice* of proposed rulemaking[3] which needs to include: 1) a statement of the time, place, and nature of public rulemaking proceedings; 2) reference to the legal authority under which the rule is proposed; 3) either the terms or substance of the proposed rule or a description of the subjects and issues involved; and 4) the Internet address of a summary of not more than 100 words in length of the proposed rule, in plain language, that must be posted on https://www.regulations.gov). After general notice is provided, the agency must give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation.[4] After consideration of the relevant matter presented by the interested parties, the agency must incorporate in the final rule adopted a concise general statement of the rule's basis and purpose.[5]

This is all the APA states regarding providing notice to interested parties and considering comments in the rulemaking process. Because of this limited instruction, courts have developed the logical outgrowth doctrine,[6] which is a judicially created interpretation ensuring a balance between flexibility for agencies to respond to public comments and adequate notice to interested parties of the subjects that could be addressed in a final rule. The Supreme Court has described it as fair notice, notice that is reasonably foreseeable.[7]

Fair notice "always requires careful consideration on a case-by-case basis,"[8] with courts looking at specific language and changes from the proposed rule to the final rule. To be valid, changes made in a final rule from the measures contained in the proposed rule must be within scope of the notice provided by the proposed rule and reasonably foreseeable by interested parties.

This memorandum provides a synopsis of caselaw analyzing adequate notice and logical outgrowth, summarizing some of the major themes and rules developed by courts. The memo begins broadly, providing a basic summary of the doctrine (Basic Rule) and the purpose of notice (Purpose of Notice); it then dives into cases first describing what *is* logical outgrowth (Adequate Notice - Logical Outgrowth), and then analyzes cases where courts have determined what *is not* logical outgrowth (Inadequate Notice – Not Logical Outgrowth), with a brief overview of when a second round of notice and comment would be appropriate (Supplemental Notice of Proposed

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[2] 5 U.S.C. § 553(b)(A)-(B). Note that notice or hearing is not required for interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.
[3] Unless persons subject thereto are named and either personally served or otherwise have actual notice thereof.
[4] 5 U.S.C. § 553(c). Note that opportunity for oral presentation (hearing) is considered formal rulemaking, but most agency rulemaking falls under informal (notice-and-comment) rulemaking.
[5] *Id.*
[6] The term "logical outgrowth" first appeared in a 1974 circuit court case, *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974). There, petitioners alleged "that the final plan differed so radically from the one proposed in the Administrator's published notice that they had no meaningful forewarning of its substance." The court explained that "in shaping the final rule [an agency] may and should draw on the comments tendered."
[7] *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) ("The object, in short, is one of fair notice.").
[8] *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979).

Rulemaking). Finally, the memo ends with a reiteration of basic concepts to follow (Concepts for an Agency to Consider) and an appendix of cited cases (Appendix of Cases).[9]

Basic Rule

To satisfy the notice requirement of the APA, the notice of proposed rulemaking (NPRM) and the final rule need not be identical; an agency's final rule need only be a logical outgrowth of its notice.[10] A final rule qualifies as a logical outgrowth if:

- the notice provides sufficient detail and rationale for the rule to permit interested parties to comment meaningfully;[11]
- interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period;[12]
- a new round of notice and comment would not provide commentators with their first occasion to offer new and different criticisms which the agency might find convincing.[13]

A D.C. Circuit case[14] from 2022 provides a succinct rule summary:

> To comport with the APA's notice-and-comment requirements, an agency's final rule must be a logical outgrowth of the version set forth in its notice of proposed rulemaking. *Covad Comms. Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006). If it were otherwise, agencies could evade their notice-and-comment obligations by adopting final rules unrelated to their published proposals. An agency may not leave the public to "divine [the agency's] unspoken thoughts" on a final rule "surprisingly distant from the proposed rule." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (citing *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005) (formatting modified)). At the same time, the APA does not require that rules be subjected to multiple cycles of notice and comment until the version adopted as final is identical to the last notice of proposed rulemaking; after all, the very premise of agencies' duty to solicit, consider, and respond appropriately to comments is that rules evolve from conception to completion. The public right to have a say in such development is honored so long as affected parties "should have anticipated" the final rule in light of the notice. *Covad Comms. Co.*, 450 F.3d at 548. Notice suffices when it has "expressly asked for comments on a particular issue or otherwise made clear that the agency was contemplating a particular change." *CSX Transp.*, 584 F.3d at 1081.

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[9] Not all cases listed in the Appendix are thoroughly analyzed in this memo, but rather the Appendix is provided as a resource list of cases which can be used for additional research.
[10] *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076 (D.C. Cir. 2009).
[11] *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C.Cir.1988); *Fertilizer Inst. v. U.S. E.P.A.*, 935 F.2d 1303, 1311 (D.C. Cir. 1991).
[12] *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84 (D.C. Cir. 2010); *Daimler Trucks N. Am. LLC v. E.P.A.*, 737 F.3d 95 (D.C. Cir. 2013).
[13] *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C.Cir.1991); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 95 (D.C. Cir. 2010).
[14] *Brennan v. Dickson*, 45 F.4th 48, 69-70 (2022).

Purpose of Notice

The Office of the Federal Register explains that the purpose of the NPRM is to announce and explain an agency's plan to address a problem and to notify the public, giving interested parties the opportunity to submit comments. The NPRM and public comments then "form the basis of the final rule."[15] "The requirement of notice and a fair opportunity to be heard is basic to administrative law," and "[t]he purpose of the notice-and-comment procedure is both 'to allow the agency to benefit from the experience and input of the parties who file comments ... and to see to it that the agency maintains a flexible and open-minded attitude towards its own rules.'"[16] Notice-and-comment procedures are intended to encourage public participation, help educate the agency, and help produce a more informed agency decision.[17] Comments provide an agency with necessary additional information to consider during the rulemaking process.[18] "The necessary predicate, [] is that the agency has alerted interested parties to the possibility of the agency's adopting a rule different than the one proposed."[19]

In addition, agencies need to have the ability to promulgate a final rule that differs in some particulars from its proposed rule, otherwise this "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."[20]

The D.C. Circuit in *Small Refiner Lead Phase-Down Task Force v. EPA* (D.C. Cir. 1983)[21] asked the question of "how much notice is enough" and explained that "[i]n any particular case, the answer to that question must turn on how well the notice that the agency gave serves the policies underlying the notice requirement. Notice, as we see it, serves three distinct purposes."

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[15] The Office of the Federal Register, A Guide to the Rulemaking Process, at 4, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

[16] *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985) (citing *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978)).

[17] Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking, Sixth Edition, 289-290.

[18] "It is an elementary principle of rulemaking that a final rule need not match the rule proposed, indeed must not if the record demands a change." *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) (Referring to *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C.Cir.1991); *Small Refiner Lead Phase–Down Task Force v. EPA*, 705 F.2d 506, 546–47 (D.C.Cir.1983); *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 & n. 51 (D.C.Cir.1973)).

[19] *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

[20] "It is an elementary principle of rulemaking that a final rule need not match the rule proposed, indeed must not if the record demands a change." *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) (Referring to *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C.Cir.1991); *Small Refiner Lead Phase–Down Task Force v. EPA*, 705 F.2d 506, 546–47 (D.C.Cir.1983); *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 & n. 51 (D.C.Cir.1973)); *see also Trans-Pac. Freight Conf. of Japan/Korea v. Fed. Mar. Comm'n*, 650 F.2d 1235, 1249 (D.C. Cir. 1980) ("[I]f we were to say that regulatory agencies could only promulgate the exact rules noticed originally, we would compel the agencies to choose between (1) ignoring all comments and all that the agency might learn from interested parties to improve the proposed rules, or (2) engaging in an interminable step-by-step process of a new notice and comment on rules only slightly changed from the original proposals. The whole rationale of notice and comment rests on the expectation that the final rules will be somewhat different and improved from the rules originally proposed by the agency.").

[21] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983).

- First, notice improves the quality of agency rulemaking by ensuring that agency regulations will be "tested by exposure to diverse public comment." *BASF Wyandotte Corp.,* 598 F.2d at 641.
- Second, notice and the opportunity to be heard are an essential component of "fairness to affected parties." *National Association of Home Health Agencies v. Schweiker,* 690 F.2d 932, 949 (D.C.Cir.1982).
- Third, by giving affected parties an opportunity to develop evidence in the record to support their objections to a rule, notice enhances the quality of judicial review. *See Marathon Oil Co. v. EPA,* 564 F.2d 1253, 1271 n. 54 (9th Cir.1977).

Exposure to Diverse Public Comment

When an agency is making substantive decisions, it is important that "those decisions are in fact the product of informed, expert reasoning tested by exposure to diverse public comment."[22] Notice-and-comment assures that interested parties and the public are given the opportunity to participate by providing alternatives and additional information. It also ensures that the agency is well-informed about the impact of the proposed rule so it can make a fair decision.[23]

In *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637 (1st Cir. 1979), in finding that the EPA gave proper notice when promulgating regulations governing the discharge of pollutants into navigable waters, the First Circuit explained in detail the importance of APA notice compliance. First, the court explained that the requirement of notice providing "either the terms or substance of the proposed rule or a description of the subjects and issues involved"[24] is a critical one, and a court "must be strict in reviewing an agency's compliance with procedural rules."[25] EPA issued interim final regulations and sought comments on them. The court highlighted that "[i]t is clear that EPA gave careful consideration" to the comments after it summarized the comments in the preamble to the final regulation, accepted several critical suggestions, and "further demonstrated its openness to comments" by making a change in response to information received after the final regulations were printed.

Second, the court explained that "procedural rules were meant to ensure meaningful public participation in agency proceedings, not to be a straitjacket for agencies… [and that] [e]ven substantial changes in the original plan may be made so long as they are 'in character with the original scheme' and a 'logical outgrowth' of the notice and comment already given."[26]

The First Circuit stated that the "essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents on the final plan," and if given a new

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[22] *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 641 (1st Cir. 1979); *see also Bldg. Indus. Ass'n of Superior California v. Babbitt*, 979 F. Supp. 893, 901 (D.D.C. 1997); *Center for Biological Diversity v. U.S. Fish and Wildlife Service et al.*, 2023 WL 6388936, at *11 (D.D.C. Sept. 30, 2023); *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994).

[23] *N. L. R. B. v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (The rule-making provisions of [the APA], [], were designed to assure fairness and mature consideration of rules of general application.").

[24] 5 U.S.C. § 553(b)(3).

[25] *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1979).

[26] *Id.* (citing *South Terminal Corp. v. EPA*, 504 F.2d 646, 658, 659 (1st Cir. 1974)).

opportunity to comment, this wouldn't be a commenter's "first occasion to offer new and different criticisms which the Agency might find convincing."[27]

Fairness to Affected Parties
Notice-and-comment rulemaking also alerts interested parties that their rights may be affected.[28] The D.C. Circuit in *National Association of Home Health Agencies v. Schweiker*[29] explained that the notice and comment requirements were included in the APA for two main reasons, fairness to parties and agency self-education. 1) "[T]o reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies."[30] 2) "[T]o 'assure that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.'"[31]

Opportunity to Develop Evidence in the Record
By giving the public the opportunity to develop evidence in the record, an agency is ensuring that the record is being well-developed in order to enhance the quality of judicial review.[32]

Adequate Notice - Logical Outgrowth

Anticipation / Not a Surprise
Interested parties should anticipate an agency's final course of action considering the initial notice in the NPRM.

In *Owner–Operator Independent Drivers Association v. FMCSA*,[33] Petitioners argued that FMCSA violated the APA because FMCSA's NPRM did not give interested parties adequate notice that the agency was considering a modification of a provision in a prior rule of the agency addressing sleeper-berths. With respect to the sleeper-berth exception in FMCSA's NPRM, the notice outlined that FMCSA would consider a variety of possible changes, including but not limited to: *eliminating split-sleeper-berth periods or establishing a minimum time for one of the two "splits," such as 5 hours, 8 hours, or some other appropriate level.* Petitioners argued that "that option did not indicate that the *second* sleeper-berth period would have to be at least 2 hours long."[34] However, the D.C. Circuit stated that the NPRM actually directed Petitioners to

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[27] *Id.*
[28] *See Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1253 (9th Cir. 2000) (citing *Visiting Nurse Ass'n of N. Shore v. Bullen*, 93 F.3d 997, 1010 (1st Cir.1996) "Notice provisions are designed to 'outline [ ] the substance of the plan in sufficient detail to allow interested parties to decide how and whether to seek more information on the plan's particular aspects.'").
[29] *National Association of Home Health Agencies v. Schweiker,* 690 F.2d 932, 949 (D.C.Cir.1982).
[30] *Id.* at 949 (citing *Batterton v. Marshall*, 648 F.2d 694, 701 (D.C.Cir.1980)).
[31] *Id.* (citing *Guardian Federal Savings & Loan Association v. Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 662 (D.C.Cir.1978)).
[32] *Steinhorst Assocs. v. Preston*, 572 F. Supp. 2d 112, 119 (D.D.C. 2008); *Sprint Corp. v. F.C.C.*, 315 F.3d 369, 373 (D.C. Cir. 2003).
[33] *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188 (D.C. Cir. 2007).
[34] *Id.* at 210.

this issue when it asked: "If one [sleeper-berth] period is [required to be] 7 or more hours in length, ... would a second sleeper-berth period still be required?"[35]

In finding that the NPRM did not violate the APA with regards to this issue, the D.C. Circuit explained that "[t]he 'logical outgrowth' test is satisfied if interested parties '*should have anticipated' the agency's final course in light of the initial notice*."[36] Notice can be too general to be adequate, thus "[a]gency notice must describe the range of alternatives being considered with reasonable specificity[;][o]therwise, interested parties will not know what to comment on." (emphasis added). The D.C. Circuit held that the NPRM was sufficiently specific to satisfy that requirement and that the sleeper-berth exception in the final rule was "reasonably foreseeable" thus satisfying the logical outgrowth test.

In sum, FMCSA asked for comment on a specific issue and modified its final rule based on comments received. By providing a range of alternatives that FMCSA was considering and requesting comment on these alternatives, FMCSA's final rule was reasonably foreseeable to interested parties and thus adequate notice was provided.

In *Brennan v. Dickson*,[37] the FAA promulgated a remote identification rule (Remote ID) for operators and owners of unmanned aircraft systems. Petitioner, a drone user and his company, petitioned for review and vacatur of the Remote ID rule arguing that two requirements in the final rule were not logical outgrowths from the proposed rule. The court held that the Remote ID rule was a logical outgrowth of the proposed rule.

The first requirement in the final rule to which Petitioner objected involved a change from measuring the reported altitude of drone control stations using barometric pressure altitude to measuring it geometrically with GPS, arguing that the FAA requested comment on whether *both* systems should be used and gave "no indication" that GPS alone might be used. The court found that this change came as "no surprise" as the proposed rule acknowledged that only one form of altitude measurement was needed, although it did favor using barometric pressure. "Nonetheless, the agency requested comment on whether both barometric pressure and geometric altitude measurements should be part of the Remote ID message."[38] The court stated that "it remains a mystery how requiring one altitude measurement rather than both could be prejudicial…[and that] [i]n view of the FAA's call for comments on both barometric and geometric altitude, [Petitioner] had the requisite opportunity to comment on the achievable accuracy of GPS – an opportunity taken up by other commenters."[39]

The second requirement in the final rule to which Petitioner objected was the elimination of an internet-based "Limited Remote Identification" option for retrofitting existing drones in favor of a radio-broadcast module option. Petitioner argued that they "lacked the chance to voice concerns that a broadcast module would cause radio frequency interference problems with

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[35] *Id.*
[36] *Id.* at 209.
[37] *Brennan v. Dickson*, 45 F.4th 48 (D.C. Cir. 2022).
[38] *Id.* at 69.
[39] *Id.* at 70.

certain types of equipment that would negatively affect its use."[40] The court found that FAA did invite comment on the viability of a broadcast module option when the call for comments in the proposed rule stated "that any retrofit module would have to comply with Remote ID requirements, which in the Proposed Rule included use of radio broadcasts or internet transmissions. Members of the public had the opportunity to voice their concerns that retrofitting certain drones with radio broadcast module could interfere with radio signals used for navigation, video recording, or any other specialized function."[41]

In sum, FAA asked for comment on two systems of measuring drone altitude control stations, and ultimately picked one for the final rule. In addition, FAA eliminated one option for retrofitting existing drones with Remote ID, in favor of another. The D.C. Circuit found FAA had adequately apprised commenters on these issues in the NPRM, and such changes came as "no surprise" to the public in the final rule.

Partial Adoption

Agencies should use an NPRM as a focus for discussion, inviting comments on the contents of the proposed rule and being receptive to those public comments.

In *Association of American Railroads v. DOT*,[42] Petitioners argued that FRA violated the APA because its NPRM failed to give adequate notice that the final rule would adopt only part of the FRA's proposed rule. In the NPRM, FRA proposed to regulate "*all* aspects of railroad bridge worker safety,"[43] however, the final rule permitted OSHA to regulate some aspects of bridge worker safety. The court found that the NPRM emphasized that a variety of OSHA rules addressing bridge worker safety already applied to the agencies' overlapping jurisdiction with respect to occupational safety in the railroad industry. The NPRM even noted that "one question [to be addressed in the rulemaking] is whether the occupational safety issues presented by work on railroad bridges are so inherent to the railroad environment that the FRA alone should regulate them, or whether they cut across industry lines without raising special concerns in the railroad context and are thus properly addressed by general OSHA standards."[44] The court explained that "[q]uite clearly, the NPRM contemplated, gave notice of, and invited comments on the possibility that railroad bridge workers would remain subject to at least some OSHA regulations rather than unique FRA standards."[45] In addition, the court highlighted that the NPRM was only "a focus for discussion," that the "form and content of the proposal should not be viewed as exhaustive," and that "FRA is receptive to comments that…certain standards are unnecessary."[46]

Thus, the court held that the final rule was a logical outgrowth of the proposed rule because "it takes no great leap of logic or imagination to contemplate that the ultimate outcome of this

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[40] *Id.*
[41] *Id.*
[42] *Ass'n of Am. Railroads v. Dep't of Transp.*, 38 F.3d 582 (D.C. Cir. 1994).
[43] *Id.* at 588.
[44] *Id.* at 589.
[45] *Id.*
[46] *Id.*

rulemaking might be no rule, or only partial adoption of the proposed comprehensive rule."[47] In addition, the court found that the rulemaking generated diverse public comment, was fair to affected parties, and gave affected parties an opportunity to develop evidence in the records.

FRA adopted only part of its proposed rule, leaving in place the status quo with respect to some aspects of bridge worker safety. By including a question in the NPRM regarding this issue of overlapping jurisdiction between FRA and OSHA, FRA's final rule was a "logical outgrowth" of the proposed rule even if FRA simply adopted part of its proposed rule, leaving in place the status quo of a related regulation.

Final Rule Changes Neither the Substance nor the Basic Approach of the Proposed Rule

In *Spirit Airlines, Inc. v. DOT*,[48] the DOT promulgated a final rule entitled Enhancing Airline Passenger Protections, which was challenged by airlines as procedurally unlawful because the final rule was not a logical outgrowth of the NPRM.[49] In the NPRM, DOT explained it was considering prohibiting airlines from raising the price of an airline ticket after the consumer completes the purchase. Airlines argued that "it had no idea 'that DOT also intended to prohibit price increases for optional services, which a passenger can select after he buys a ticket, before the passenger purchases them…' [and that] DOT failed to give adequate 'notice of the scope and general thrust of the proposed rule.'"

The court found this argument "ridiculous," holding that the "final rule adopted the same operative language [of the NPRM]," which deemed it an unfair and deceptive practice when the seller of air transportation increases the price of that air transportation to a consumer, or increases the price of the seat or baggage *after* the air transportation had been purchased by the consumer.[50]

In sum, DOT's notice was adequate as it adopted the same operative language of the NPRM into the final rule when it prohibited airlines from price increases (including optional services) after the consumer completes the purchase.

In *Veterans Justice Group v. Secretary of Veterans Affairs*,[51] Petitioners, veterans' groups, challenged the validity of regulations issued by the VA claiming that the final rule was not a logical outgrowth of the proposed rule, because "the final rule replaces the Proposed Rule with something very different,…[a] concept… that was never mentioned in the Proposed Rule,"[52] and the group could not have anticipated that the change was possible. Under the Proposed Rule, submitting an informal claim (a narrative submission) would no longer serve as an effective date placeholder that could later be perfected by the filing of a formal claim ("incomplete claim process"). The final rule established an "intent to file" process, which allowed claimants to establish the effective date of an award in one of three ways.

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[47] *Id.*
[48] *Spirit Airlines, Inc. v. DOT*, 687 F.3d 403 (D.C. Cir. 2012).
[49] *Id.* at 416.
[50] *Id.* at 417.
[51] *Veterans Justice Group v. Secretary of Veterans Affairs*, 818 F.3d 1336 (Fed. Cir. 2016).
[52] *Id.* at 1334.

The court, citing *International Union, United Mine Workers*, explained that "a final rule is a logical outgrowth of a proposed rule 'only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.'"[53] The court found that the VA's substitution of the "intent to file" process for the proposed "incomplete claim" concept did not constitute a change in the basic approach of the Proposed Rule – the standardization of the claim initiation process, nor did it change the substance nor approach of the proposed regulation. In addition, the changes were foreshadowed in proposals and comments during the public comment period.

In sum, the VA's final rule sustained the same intent and basic approach of the proposed rule that should have alerted interested parties of a possible change which they should have anticipated and on which they should have filed comments.

Supportive Preamble Explanations

In *United Steelworks of America, AFL-CIO v. Marshall*,[54] OSHA issued new rules to protect workers from exposure to airborne lead in the workplace. In the NPRM, OHSA proposed a standard for a permissible occupational lead exposure limit to be set at 100 ug/m^3, while the final rule set the standard to 50 ug/m^3. The NPRM also would have allowed industry to meet the 100 ug/m^3 limit by relying on respirators whenever engineering and work practice controls proved infeasible, but the final rule strictly required industry, after interim phase-in periods, to meet the 50 ug/m^3 limit without relying on respirators. Petitioners (representing labor unions and industry interests) challenged virtually every aspect of the lead standard and rulemaking. With regard to notice, Petitioners argued the lack of sufficient notice in the NPRM on two main issues: 1) The proposed rule set the standard of 100 ug/m^3 while the final rule's standard was set to permissible exposure level (PEL) 50 ug/m^3; and 2) The proposed rule allowed industry to meet the PEL by relying on respirators, while the final rule required industry to meet the PEL, after interim phase-in periods, without relying on respirators.

With regard to the first issue, the court found that although the difference between the proposed PEL and final rule PEL is "obviously substantial," the published explanation accompanying the proposed rule gives notice that OSHA might set a PEL lower than 100 ug/m^3. First, OSHA asked whether the proposed exposure limit to lead should be 100 ug/m^3 and whether this level incorporates an appropriate margin of safety. The court found that this question of "appropriate margin of safety" gave notice that OSHA might find the 100 ug/m^3 PEL not safe enough. Second, OSHA asked whether subclinical effects of exposure should be considered in establishing a standard for occupational exposure to lead. The court found the issue of subclinical effects in the context of the published proposal as whole "portended a lower PEL." In addition, the NPRM even noted that the question of both clinical and subclinical effects should be fully discussed in the comments, which might necessitate a different permissible exposure limit in the final rule. Third, OSHA asked to the extent there are groups with increased susceptibility to lead in the working population, whether such increased susceptibility should be

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[53] *Id.*

[54] *United Steelworks of America, AFL-CIO v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980).

considered in establishing the occupational exposure to lead. The court noted three things that should have alerted the parties that OSHA might lower the proposed PEL with regards to groups with increased susceptibility to lead. First, that the NPRM stating there was evidence that these groups needed their blood-lead levels kept as low as 30 ug/100g; Second, that OSHA believed its statutory mandate required it to protect these groups; and third, that the supplemental notice announcing the public hearing stated that comments had revealed that 100ug/m^3 is inadequate. The court explained that the language of the NPRM contains enough suggestions of the possibility of a lower PEL to meet the test of "adequate" notice. The court did point out, however, that OSHA would have served the parties better had it listed two or more alternatives in the proposal and invited comments on them.

With regard to the second issue, the court found the question of adequate notice regarding respirators as a means of compliance more difficult to answer, due to the subtle change between the NPRM and final rule.[55] The NPRM clearly established a hierarchy of preference among the three general means of compliance, putting great pressure on industry to meet the PEL as soon as possible without relying on respirators, making respirators the last resort. The court then looked at the language of the final rule, which required "careful reading and even imaginative construction." While the court acknowledged that the final rule standard appeared to contradict itself, at first banning all respirators but then contemplating respirators after the phase-in period ended, OSHA's "somewhat confusing explanation in the Preamble"[56] helped to resolve the apparent contradiction. The court ultimately found that industry's argument that had it had proper notice it could have done detailed feasibility studies, did not pass the "harmless error" rule for notice. Citing the First Circuit in *Costle*, the court stated that "we must be satisfied that given a new opportunity to comment, commenters would not have their first occasion to offer new and different criticisms which the Agency might find convincing."[57]

While the D.C. Circuit found that OSHA provided adequate notice on both issues, there was a lengthy dissenting opinion discussing the agency's failure to properly notify the public on the PEL as 50 ug/m^3, finding the majority's defense on that issue "wholly illogical."

> [The agency] never expressly stated it was considering or might consider the 50 ug/m 3 standard that it eventually promulgated. Very little evidence was submitted by the industry petitioners or the agency on any level but the 100 ug/m^3, or higher. OSHA concedes that no evidence whatsoever was introduced on the economic feasibility of complying with the 50 ug/m^3 level. Because of this, and after noting the thousands of pages introduced by all the parties, supporting both a stringent or lenient rule, and finding no evidence on the 50 ug/m^3 level, it is a plain absurdity to conclude that the parties were sufficiently informed to permit their meaningful participation in discussing the possibility that the proposed permissible exposure limit of 100 ug/m^3 would be reduced 50%.

[55] The court blames the confusion on both industry and OSHA. Industry had overstated the role of respirators in the proposal and understated their role in the final standard, while OSHA's compliance rules in the final standard "appear ill-drafted and ill-explained."
[56] *United Steelworks of America, AFL-CIO v. Marshall*, 647 F.2d 1189, 1224 (D.C. Cir. 1980).
[57] *Id.* at 1225.

> A review of the vague statements in the notice of proposed rulemaking also points out that the 50 ug/m 3 PEL is not a "logical outgrowth" of the proposed rulemaking at 100 ug/m^3. See Majority Opinion at 1216. Whether a 100 ug/m^3 PEL would provide an appropriate margin of safety, considering the uncertainty of OSHA's scientific models and medical evidence, is a very open-ended question. Further, whether subclinical effects should be considered is also misleading since subclinical effects undoubtedly can appear at the 100 ug/m^3 level in addition to lower exposure levels. This does not lead to a logical outgrowth that the proposed PEL should be cut in half… However, one could accept the most liberal interpretations of these statements in the notice of proposed rulemaking had they indeed produced any significant amount of evidence at the 50 ug/m^3 level. But no such evidence evolved. That no such evidence was offered by anyone during the extended hearings, especially considering the intensity of the participants' adversarial positions, constitutes the best support for concluding that the 50 ug/m^3 level was not a "logical outgrowth" of the Notice of the Rulemaking proposal of a "100 ug/m^3 level."

This decision, majority and dissenting opinions combined, demonstrates the nuanced and fact-specific inquiry a court undergoes when analyzing whether a final rule is a logical outgrowth of its NPRM and whether an agency has provided adequate notice to the public.

Inadequate Notice - Not Logical Outgrowth

Not in Character with the Original Scheme of the Notice

In *Chocolate Mfrs. Ass'n of U.S. v. Block*,[58] the D.C. Circuit analyzed whether the USDA erred when it eliminated flavored milk from the list of approved supplemental foods from the Women, Infant, and Children Program after receiving comments during the comment period to do so. The court held that the Department of Agriculture's proposed rule did not provide adequate notice that the elimination of flavored milk would be considered in the rulemaking procedure. In its reasoning, the court explained that the detailed preamble to the proposed rule, in which the agency identified specific foods it was examining for excess sugar (not listing flavored milk), along with the proposed rule's "total silence" that the agency was even considering eliminating flavored milk, strongly indicated to Petitioners and the public that flavored milk was not at issue.[59] In fact, the proposed rule even approved the continued use of flavored milk. "Under the specific circumstances of this case, it cannot be said that the ultimate changes in the proposed rule were in character with the original scheme or a logical outgrowth of the notice."[60]

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[58] *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098 (D.C. Cir. 1985).
[59] Note, though, the court did acknowledge that "an approval of a practice in a proposed rule may properly alert interested parties that the practice may be disapproved in the final rule in the event of adverse comments." The totality of the circumstances in this case, however, provided that interested persons could only conclude that flavored milk would not be considered.
[60] *Id.* at 1107.

In addition, the court, citing *Small Refiner Lead Phase-Down Task Force v. EPA*,[61] explained that "in the final analysis each case 'must turn on how well the notice that the agency gave serves the policies underlying the notice requirement.'" Acknowledging that even though ultimately Petitioner's comments "may well have been futile…[they] should have had the opportunity to make them." Because the affected parties did not receive adequate notice, they did not receive a "fair notice to contribute to the administrative rulemaking process," which "does not serve the policy underlying the notice requirement."

Something is Not a Logical Outgrowth of Nothing

In certain situations, it may be easy for a court to apply a logical outgrowth analysis if a final rule or interim final rule do not "even come close to complying with the notice requirement of § 553."[62] In *Kooritzky v. Reich*, the D.C. Circuit Court found that the Department of Labor's NPRM "contain[ed] nothing, not the merest hint" to suggest that the Department held the position it stated in its rule. A category of employment-based immigrant visas requires, among many other things, a labor certification issued by the Secretary of Labor. After processing, if the certification is approved the certification is "valid indefinitely." This certification and a completed Form I-140 then gets sent to the Immigration and Naturalization Service. If approved, this certification and employer's priority date gets sent to the U.S. Consulate in the country from which the alien is being recruited. Due to heavy demand and limited number of visas, a prospective employee and employer often must wait several years after completion of the forms for the visa to be issued. Sometimes the prospective employee becomes unable or unwilling to take the job after the passage of a substantial period, so the employer substitutes another prospective employee's name on the labor certification, to retain the priority date.

In the wake of the 1990 Immigration Act's revisions of immigration laws, the DOL issued an NPRM (56 FR 32244, July 15, 1991) announcing that it would not alter its existing rule that labor certifications were valid indefinitely. The DOL promulgated an interim final rule on October 23, 1991, "containing a significant new provision not mentioned in the [NPRM]." This new provision limited the validity of labor certifications to the prospective employee named on the application, changing the employer's freedom to substitute a new prospective employee's name if need be. Although the DOL reopened the comment period and received more than a hundred comments, DOL never responded to them and did not promulgate a new rule.

Petitioner argued that the DOL failed to comply with the notice and comment provisions of the APA, and the D.C. Circuit agreed. "Something is not a logical outgrowth of nothing... The Department's notice of proposed rulemaking did not contain the terms of the no-substitution rule it later promulgated; it did not propose abolishing substitution; and it did not mention the issues involved in doing so…The necessary predicate, [] is that the agency has alerted interested parties to the possibility of the agency[] adopting a rule different than the one proposed."[63]

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[61] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983).
[62] *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994).
[63] *Id.* at 1513.

In 2023, the D.C. Circuit Court found that PHMSA did not follow proper APA rulemaking requirements when the agency promulgated a final rule regulating gathering and transmission pipelines. Oil and gas associations filed a petition for review of PHMSA safety standards requiring members to install remote-controlled or automatic shut-off valves in some types of new or replaced gas and hazardous liquid pipelines. Petitioners argued that PHMSA did not follow APA rulemaking procedures because the risk assessment accompanying the NPRM referred only to transmission lines; not mentioning gathering pipelines, though gathering lines were included in the final rule. The NPRM and accompanying risk assessment were "all about transmission lines. They contained no data, analysis, or conjecture about the costs and benefits of applying the proposed safety standard to gathering facilities."[64] The court, quoting *Kooritzky*, found that PHMSA tried "to make something out of nothing, but that is an impossible task,"[65] stating further that "in order to provide the public with a meaningful chance of participating in the rulemaking process, as required by the APA, an agency must disclose critical information justifying the proposal in time for public comment."[66]

<u>First Opportunity for Comment</u>

If a final rule would provide commenters their "first occasion to offer new and different criticisms which the agency might find convincing," the final rule is not a logical outgrowth of the proposed rule.[67]

In *Daimler Trucks North America LLC v. EPA*,[68] the D.C. Circuit held that EPA's final rule, which changed an emissions standards inquiry involving nonconformance penalties from forward-looking to backward-looking, was not a logical outgrowth of its NPRM. Vehicle manufacturers are required to obtain certificates from EPA demonstrating compliance with relevant emissions standards. If a manufacturer is unable to meet the applicable emission standard, the manufacturer must pay a nonconformance penalty (NCP). EPA had previously promulgated regulations (1985 Rule) establishing the NCP framework. In the 1985 Rule, one of the three criteria that must be met for a vehicle to be subject to an NCP is that "substantial work [meaning modification of existing technology or design parameters] will be required to meet the standard." The 1985 Rule also established the formula for calculating the amount of the penalty.

In a 2012 NPRM, EPA proposed amendments to its regulations on the determination of the penalty amount, but it did not provide any indication that it was contemplating amendments to its "substantial work" criterion. When EPA promulgated the final rule, it amended the "substantial work" criterion by changing the verb tense from "substantial work will be required" to "substantial work is required." EPA explained that it was clarifying the regulatory text determining that "[s]ubstantial work is determined by the total amount of work required to meet the standard for which the NCP is offered, compared to the previous standard, irrespective of when EPA establishes the NCP."

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[64] *GPA Midstream Ass'n v. United States Dep't of Transportation*, 67 F.4th 1188, 1196 (D.C. Cir. 2023).
[65] *Id.*
[66] *Id.* at 1197.
[67] *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (citing *United Steelworkers*).
[68] *Daimler Trucks North America LLC v. EPA*, 737 F.3d 95 (D.C. Cir. 2013).

Petitioners challenged this change, arguing that EPA failed to give adequate notice and opportunity for comment before amending the regulatory definition of the "substantial work" criterion. Petitioners maintained that the amendment made a significant change as the "test set forth in EPA's regulation had always asked whether 'substantial work' 'will be required' to comply with a new or revised emission standard not, after the standard became effective, whether 'substantial work' 'was required' in the past." The court agreed with Petitioners, stating that the revisions to the "substantial work" criterion went beyond mere clarification. "[EPA] did not propose, and offered no indication that it was contemplating, amendments to the 'substantial work' criterion…"

Unexpressed Intention / Unspoken Thoughts

In *Shell Oil Co. v. E.P.A.*,[69] the D.C. Circuit found that the EPA failed to give sufficient notice and opportunity to comment after promulgating several rules pursuant to the Resource Conservation and Recovery Act (RCRA). Petitioners challenged, among other items, the adequacy of notice of two rules categorizing substances as "hazardous": 1) the "mixture" rule which classified as a hazardous waste any mixture of a "listed" hazardous waste with any other solid waste, and 2) the "derived from" rule, which classified any residue derived from the treatment of hazardous waste.

For the "mixture" rule, the EPA acknowledged that the rule was a new provision and "had no 'direct counterpart in the proposed regulations,'" but still added the rule "for purposes of clarification and in response to questions raised during the comment period…"[70] arguing that "the rule merely clarifies the intent behind the proposal." For the "derived from" rule, EPA "defended the rule as 'the best regulatory approach [they could] devise…' [but] acknowledged, however, that the rule was a new provision, 'added both in response to comment and as a logical outgrowth of § 261.3(b).'"[71] For both rules, EPA argued that the final rules were foreseeable because certain "comments received in response to the rulemaking appeared to anticipate both the mixture and the derived-from rules."[72]

The court found that the final rules defined a hazardous waste more broadly than did the proposed regulations and were not persuaded by EPA's arguments citing to generalized references to comments. The court stated that "an unexpressed intention cannot convert a final rule into a 'logical outgrowth' that the public should have anticipated. Interested parties cannot be expected to divine the EPA's unspoken thoughts. The reasons given by the EPA in support of its contention that interested parties should have anticipated the new rules are simply too insubstantial to justify a finding of implicit notice." [73]

The court further explained that while a comment may evidence recognition of a problem, it was EPA's responsibility to address a potential regulatory loophole, as comments cannot determine how the agency will choose to address an issue. "[C]omments by members of the public would

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[69] *Shell Oil Co. v. E.P.A.*, 950 F.2d 741 (D.C. Cir. 1991).
[70] *Id.* at 749.
[71] *Id.* at 750.
[72] *Id.*
[73] *Id.* at 751.

not in themselves constitute adequate notice," as notice comes from the agency,[74] although the court explains that comments can be a factor in providing notice. Here, "the ambiguous comments and weak signals from the agency gave petitioners no such opportunity to anticipate and criticize the rules or to offer alternatives. Under these circumstances, the mixture and derived-from rules exceed the limits of a 'logical outgrowth.'"[75]

Supplemental Notice of Proposed Rulemaking

If it appears that an agency's final rule will materially differ from its proposed rule or if an agency wants public input on a new or modified proposal, the agency should consider having a second round of notice and comment, or a supplemental notice of proposed rulemaking (SNPRM), to avoid a potential weakness on this issue in court. An agency may also want to issue a SNPRM to seek additional comment to make sure the agency has understood previously submitted comments and has responded appropriately, or if the agency has received new information or has identified changed circumstances.

In 2007, the D.C. Circuit[76] held that the FAA gave proper notice when issuing a final rule that mandated drug and alcohol testing for *all* employees of contractors and subcontractors at any tier who performed safety-related functions for air carriers. Petitioners, aircraft maintenance employers, argued that the FAA "mischaracterized" the new regulatory language as "clarification" thus rendering the proposed rule as misleading and procedurally improper. Although the FAA itself even conceded in the NPRM and SNPRM[77] that some of its own informal guidance is conflicting, the D.C. Circuit found that this "alleged 'mischaracterization'" did not warrant overturning the final rule.

> The FAA went out of its way to ensure that interested parties had the opportunity to participate and comment in the rulemaking – to the point of issuing the SNPRM seeking additional comment, and thereby delaying issuance of a final rule, precisely because of the conflicting guidance and possible consequent confusion… As a result, the entire air carrier industry, of which the petitioners are part, was well aware of the rulemaking and its substance and cannot reasonably claim ignorance of the proceeding or inadequate opportunity to comment."[78]

FAA's Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities SNPRM specifically stated:

> In Notice 02-04, published on February 28, 2002, the FAA proposed to make it clear that each person who performs a safety-sensitive function directly or by contract (including by subcontract at any tier) for an employer is subject to drug and alcohol testing. The comment period closed on July 29, 2002. Several

[74] *Id.*
[75] *Id.*
[76] *Aeronautical Repair Station Ass'n, Inc. v. F.A.A.*, 494 F.3d 161 (2007).
[77] SNPRM: Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities, 69 Fed.Reg. 27,980 (May 17, 2004).
[78] *Id.* at 170-171.

commenters stated that the change was more than clarifying and would have an economic impact. The FAA has prepared an initial regulatory evaluation on this issue. The FAA is reopening the issue for public comment before making a final determination…

Currently, both sections [of 14 CFR part 121, appendix I, section III and appendix J, section II] specify that employees performing a listed safety-sensitive function are required to be tested if performing the function "directly or by contract for an employer." The change proposed in Notice 02-04 was to add the following parenthetical phrase after the word "contract," so that it would be clear that each person who performs a safety-sensitive function directly or by contract (including by subcontract at any tier) for an employer is subject to testing. In this SNPRM, we are proposing the same language as in Notice 02-04... [T]he FAA acknowledges that some employers and some maintenance providers may be confused about testing employees performing work under a subcontract. Therefore, in Notice 02-04 and again in this SNPRM, the FAA has proposed to make it clear that all persons performing safety-sensitive work must be tested.

Concepts for an Agency to Consider

- Agency notice must describe the range of alternatives being considered with reasonable specificity, to alert the public of the issues on which they may wish to submit comments.[79]
- An agency will serve interested parties better by listing in the NPRM "two or more alternatives…and invite comments on each."[80]
- An agency must give careful consideration and demonstrate its openness to diverse public comments to ensure improvements in the quality of its rulemaking.[81]
- An NPRM should be a "focus for discussion" and the "form and content of the proposal should not be viewed as exhaustive." The agency should be "receptive to comments that…certain standards are unnecessary."[82]
- NPRMs should be well drafted and the reasoning well explained, including explanations in the preamble.[83]
- Changes from an NPRM made in a final rule may be considered a logical outgrowth of the proposed rule when the final rule does not change the substance or basic approach of the proposed rule.[84]
- An agency must disclose critical information justifying the proposal in time for public comment.[85]
- While comments raising a foreseeable possibility of agency action may be a factor in providing notice, *ultimately adequate notice must come from the Agency*.[86]
- If it appears that an agency's final rule will materially differ from its proposed rule, the agency should consider having a second round of notice and comment, or a supplemental notice of proposed rulemaking.

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[79] *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 209 (D.C. Cir. 2007).
[80] *United Steelworks of America, AFL-CIO v. Marshall*, 647 F.2d 1189 (1980).
[81] *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637 (1979).
[82] *Association of American Railroads v. DOT*, 38 F.3d 582, 589 (1994).
[83] U*nited Steelworks of America, AFL-CIO v. Marshall*, 647 F.2d 1189, 1223 (D.C. Cir. 1980)
[84] *Veterans Justice Group v. Secretary of Veterans Affairs*, 818 F.3d 1336 (2016); *See also Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098 (1985).
[85] *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994).
[86] *Shell Oil Co. v. E.P.A.*, 950 F.2d 741 (D.C. Cir. 1991) (finding that "comments by members of the public would not in themselves constitute adequate notice.").

Appendix of Cases

Introduction / Basic Rule

- *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974)
- *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007)
- *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637 (1st Cir. 1979)
- *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076 (D.C. Cir. 2009)
- *Florida Power & Light Co. v. United States*, 846 F.2d 765 (D.C.Cir.1988)
- *Fertilizer Inst. v. E.P.A.*, 935 F.2d 1303 (D.C. Cir. 1991)
- *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 95 (D.C. Cir. 2010)
- *Daimler Trucks N. Am. LLC v. E.P.A.*, 737 F.3d 95 (D.C. Cir. 2013)
- *Covad Comms. Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006)

Purpose of Notice

- *National Tour Brokers Ass'n v. United States*, 591 F.2d 896 (D.C. Cir. 1978)
- *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C.Cir.1973)
- *Trans-Pac. Freight Conf. of Japan/Korea v. Fed. Mar. Comm'n*, 650 F.2d 1235 (D.C. Cir. 1980)
- *National Association of Home Health Agencies v. Schweiker,* 690 F.2d 932 (D.C. Cir. 1982)
- *Marathon Oil Co. v. EPA,* 564 F.2d 1253 (9th Cir.1977)
- *Bldg. Indus. Ass'n of Superior California v. Babbitt*, 979 F. Supp. 893 (D.D.C. 1997)
- *Center for Biological Diversity v. U.S. Fish and Wildlife Service et al.*, 2023 WL 6388936 (D.D.C. Sept. 30, 2023)
- *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246 (D.C. Cir. 1994)
- *N. L. R. B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969)
- *Indep. Acceptance Co. v. California*, 204 F.3d 1247 (9th Cir. 2000)
- *Visiting Nurse Ass'n of N. Shore v. Bullen*, 93 F.3d 997 (1st Cir. 1996)
- *Batterton v. Marshall*, 648 F.2d 694 (D.C.Cir.1980)
- *Steinhorst Assocs. v. Preston*, 572 F. Supp. 2d 112 (D.D.C. 2008)
- *Sprint Corp. v. F.C.C.*, 315 F.3d 369 (D.C. Cir. 2003)

Adequate Notice – Logical Outgrowth

- *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188 (D.C. Cir. 2007)
- *Brennan v. Dickson*, 45 F.4th 48 (D.C. Cir. 2022)
- *Ass'n of Am. Railroads v. Dep't of Transp.*, 38 F.3d 582 (D.C. Cir. 1994)
- *Spirit Airlines, Inc. v. DOT*, 687 F.3d 403 (D.C. Cir. 2012)
- *United Steelworks of America, AFL-CIO v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980)

Inadequate Notice – Not Logical Outgrowth

- *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098 (D.C. Cir. 1985)
- *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983)
- *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994)

- *GPA Midstream Ass'n v. United States Dep't of Transportation*, 67 F.4th 1188 (D.C. Cir. 2023)
- *Daimler Trucks North America LLC v. EPA*, 737 F.3d 95 (D.C. Cir. 2013)
- *Shell Oil Co. v. E.P.A.*, 950 F.2d 741 (D.C. Cir. 1991)

Supplement Notice of Proposed Rulemaking

- *Aeronautical Repair Station Ass'n, Inc. v. F.A.A.*, 494 F.3d 161 (D.C. Cir. 2007)