Preservation of Error in Administrative Appeals – Comparative Research Update
December 11, 2025

DISCLAIMER: The below is a summary of certain legal research to look into the issue of preservation of error in administrative appeals as compared to other states. This is intended to be a working document that will be updated, and nothing in this document should be considered the provision of legal advice.

2010 Model State Administrative Procedure Act

There have been four "model" APA's developed by the National Conference of Commissioners on Uniform State Laws, with versions from the years 1946, 1961, 1981, and 2010. The model APA acts have been largely adopted, in whole or in part, by most states; however, no state has adopted the 2010 revision.

Of note, the 2010 Model State APA includes specific language requiring exhaustion of administrative remedies. *See* Section 506. That provision explicitly addresses that, when dealing with challenges to a rule or regulation, the petitioner need not have participated in the rulemaking proceeding. *See* Section 506(c) ("A petitioner for judicial review of a rule need not have participated in the rulemaking proceeding on which the rule is based or have filed a petition to adopt a rule under Section 318."). This provision is largely unchanged from the 1981 version.

But none of the materials reviewed from the Uniform Laws Commission indicated a detailed discussion or consideration of "preservation of error." The 2010 Model State APA generally contemplates that the particular states' appellate or civil rules, as appropriate, would apply to judicial review of agency action. *See* Section 502 (a) (except as otherwise provided, "judicial review of final agency action may be taken only as provided by rules of [appellate] [civil] procedure [of this state]").

State Specific Rules

West Virginia

W. Va. Code § 29A-4-2 permits a declaratory judgment action to challenge any agency rule. It specifically provides that "The declaratory judgment may be rendered whether or not the plaintiff of plaintiffs has or have first requested the agency to pass upon the validity of the rule in question." Thus, there is no "preservation" requirement for challenges to administrative rules.

West Virginia does appear to have a similar "preservation" rule in the context of contested cases, however, analogizing the circuit court as sitting in an appellate capacity. Thus, where a litigant has not raised the issue with the agency, it cannot raise the issue in judicial review. *See Noble v. W.Va. DMV*, 223 W.Va. 818, 821-22 (2009) (error to consider "non-jurisdictional question, outside the record made before the Commissioner, that was made for the first time on appeal").

North Carolina

North Carolina's State APA has unique facets. For rules, there is a review commission that oversees all regulatory actions. In addition, agencies are given authority to make "declaratory rulings," which can itself be used as a vehicle to challenge a rule. *See* N.C. G.S. § 150B-4. But the N.C. APA's review provisions otherwise appear to be limited to appeal of case adjudications.

In terms of preservation of error, there appear to be few cases that handle the issue from the standpoint of preserving error at the agency level.

California

California's Administrative Procedure Act governs adoption of state regulations. The review provisions of the statute make clear that "Any interested person" may challenge, by an action for declaratory relief, and such right to adjudication shall not be affected by a failure to "petition or to seek reconsideration" from the agency. *See* Cal. Gov. Code § 11350.

Cases suggest that, in contested administrative proceedings, the preservation of error rule works similarly. Cited exceptions exist, e.g. "when an injustice would result," but appear rarely applied. *See Sustainability, Parks, Recycling & Wildlife Def. Fund v. Dep't of Resources Recycling and Recovery*, 34 Cal. App. 5th 676, 697 (3d Dist. Cal. Ct. of Appeal). While there does not appear to be a separate administrative-law rule for preservation, it also appears that California courts have some further discretion in ruling upon matters not preserved at the trial court (or, presumably, the administrative agency). *See, e.g. Raphael v. Bloomfield*, 113 Call. App. 4th 617, 622 (2d Dist. Cal. Ct. App. 2003) (allowing discretion for new legal theories to be considered where they are purely legal and involve undisputed facts); *Kaushansky v. Stonecroft Attorneys, APC*, 109 Cal. App. 5th 788, 798 (2d Dist. Cal. Ct. App. 2025) (challenge to sufficiency of evidence is not waived by failure to argue it at the trial level, as an "obvious exception" to the preservation rule).

New York

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Florida

does the preservation of error doctri

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AI Overview

Yes, the preservation of error doctrine applies to the federal rulemaking process, meaning parties challenging agency rules in court must raise their objections during the agency's comment period or rulemaking stage to preserve those issues for judicial review; otherwise, courts may deem them waived or review them only under a strict "plain error" standard, ensuring the agency has a chance to correct itself before litigation, notes.

Key Principles

- **Notice to the Agency:** The core idea is to give the agency a fair opportunity to understand and address the alleged error, just like a trial judge.
- **Specificity:** Objections must be specific enough to alert the agency to the substance of the issue, not just vague complaints.
- **Timing:** Issues must be raised during the rulemaking (comment period) or administrative process, not for the first time in court.
- **Waiver:** Failure to object often results in waiver, meaning the court won't consider the issue on appeal.
- **Plain Error Exception:** Federal courts can review unobjected-to errors if they are "plain" or fundamental, but this is a high bar.

How it Works in Rulemaking

- **During Comments:** When an agency proposes a rule, interested parties submit comments, raising concerns about factual, legal, or procedural flaws (e.g., lack of evidence, arbitrary decisions).
- **Creating the Record:** These comments form part of the administrative record, putting the agency on notice and creating the basis for later judicial review.
- **Judicial Review:** When a court reviews an agency rule (often under the Administrative Procedure Act's arbitrary and capricious standard), it looks at the grounds raised in the agency record, not new ones.

In essence, if you want a federal agency's rule challenged in court, you must "preserve" that challenge by making it known to the agency during its deliberative process.

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Rule 51. Preserving Claimed Error - Law.Cornell.Edu

A party may **preserve** a claim of **error** by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, ...

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Preservation Rules in the Federal Courts of Appeals PDF

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does the preservation of error doctrine apply in federal rulemaking process?

Yes, the principle of **"issue exhaustion"**—which is the administrative law equivalent of the "preservation of error" doctrine in trial litigation—generally **applies in the federal rulemaking process**. This principle requires parties challenging an agency rule in court to have raised their objections with the agency during the public comment period.

Key Concepts

- **Purpose:** The core idea is that the administrative agency must be given a fair opportunity to consider and respond to objections, use its expertise, and correct potential errors before a court intervenes. This creates a robust administrative record for judicial review and promotes efficient governance by preventing issues from being raised for the first time on appeal.
- **Application:** While the traditional "preservation of error" doctrine is rooted in trial and appellate court rules (like the Federal Rules of Civil or Criminal Procedure), the issue exhaustion doctrine in administrative law developed through both specific statutory requirements (e.g., Clean Air Act, Securities Exchange Act) and common-law application by federal courts.
- **Waiver/Forfeiture:** If an issue is not properly raised during the rulemaking process (typically the notice-and-comment period), the argument is generally considered waived or forfeited, and a federal appellate court will likely decline to consider it.

Ask anything

- The final rule was not a "logical outgrowth" of the rule originally proposed, meaning the public did not have adequate notice or opportunity to comment on the final version's contents.

Ultimately, the goal is "simple fairness" and ensuring orderly administrative and judicial procedures.

↳ **Give an example of a rulemaking where issue exhaustion was an issue**

↳ **Tell me more about futility exceptions to issue exhaustion**

↳ **What are the effects of failing to raise an issue during rulemaking?**

9 sites

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Rule 51. Preserving Claimed Error. (a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary. (b) P...

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https://www.congress.gov/crs-product/R44699#:~:text=if%20the%20agency%20has%20relied,the%20product%20of%20agency%20expertise.&text=Given%20the%20broad%20scope%20of,decisionmaking%20when%20reaching%20its%20determination.&text=Courts%20%22must%20judge%20the%20propriety,reasons%20presented%20by%20the%20agency.

Arbitrary-and-Capricious Review

In addition to ensuring that agencies act within the scope of their statutory authority, courts will also review agency action to ensure the agency has acted reasonably.[227] The APA instructs courts to "hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, [or] an abuse of discretion."[228] This "catch-all" provision of the APA applies to factual determinations made during "informal" proceedings,[229] such as notice-and-comment rulemaking,[230] and most other policy determinations an agency makes.[231]

The seminal Supreme Court decision elaborating the arbitrary-and-capricious standard, *Motor Vehicle Manufacturers Ass'n v. State Farm Auto Mutual Insurance Co.*, explains that the scope of this review is "narrow," as "a court is not to substitute its judgment for that of the agency."[232] That said, courts will invalidate agency determinations that fail to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[233] When reviewing that determination, courts must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[234] In general, the Court noted, an agency decision is arbitrary

if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[235]

Given the broad scope of federal agency actions that are subject to judicial review, whether an agency decision is arbitrary and capricious is largely a situation-specific question.

The arbitrary-and-capricious standard requires an agency to demonstrate that it engaged in reasoned decisionmaking when reaching its determination.[236] Courts "must judge the propriety of [an agency's] action solely by the grounds invoked by the agency," and they may not create their own justifications to support an agency's decision beyond the reasons presented by the agency.[237] Further, courts require agencies to provide the "essential facts upon which the administrative decision was based"[238] and explain what justifies their

determinations with actual evidence beyond a "conclusory statement."[239] An agency's failure to provide an adequate explanation for its decision will typically result in remand or invalidation of its decision.[240]

Similarly, a court may find an agency to have acted arbitrarily and capriciously when the agency fails to provide an adequate response to significant comments raised during notice-and-comment rulemaking.[241] For example, in its 2024 *Ohio v. Environmental Protection Agency (EPA)* decision, which stayed implementation of an EPA Clean Air Act rule pending appeal, the Supreme Court held that the EPA would likely lose on the merits because it likely acted arbitrarily and capriciously when it failed to adequately respond to a particular public comment when it implemented its final rule.[242]

Beyond those circumstances in which courts find that an agency failed to provide an adequate explanation for its decision, courts may also find the decision itself to be arbitrary and capricious.[243] For example, courts will invalidate agency actions that are the product of "illogical"[244] or inconsistent reasoning.[245] In addition, courts will find an agency action to be arbitrary and capricious if the agency simply failed to consider an important factor relevant to its action,[246] such as the policy effects of its decision[247] or vital aspects of the problem in the issue before it.[248] Likewise, courts may invalidate or remand a determination to the agency if the agency decision failed to consider regulatory alternatives that would similarly serve the agency's goals[249] or provide "less restrictive, yet easily administered" options.[250] It bears mention that courts are sometimes particularly deferential to agencies' expertise when making predictive judgments based on scientific or technical determinations.[251]

Because of the wide range of statutory authorities and agency missions, what counts as a relevant factor that must be considered by an agency when reaching a decision can be context specific. An illustrative case is *Judulang v. Holder*, where the Supreme Court found the Board of Immigration Appeals' (BIA's) policy for deciding whether resident aliens may apply for relief from removal to be arbitrary and capricious.[252] The Court noted that the relevant factors for the BIA to consider were the "purposes of the immigration laws or the appropriate operation of the immigration system."[253] Because the BIA failed to root its determination in consideration of such factors and instead based its policy on an "irrelevant comparison between statutory provisions" unconnected to the merits of a removal decision or the administration of immigration laws, the Court held that the agency's determination was arbitrary and capricious.[254]

Agencies, of course, often change prior policies in response to changing circumstances or administrative preferences. In *FCC v. Fox Television Stations, Inc.*, the Supreme Court held that review under the arbitrary-and-capricious standard is not heightened or more stringent

simply because an agency's action alters its prior policy.[255] An agency must set forth a "reasoned explanation" for changing course,[256] but if the agency's action is permissible under its authorizing statute and reasonably supported, then the agency need not show that new policies are better than old ones.[257] In other words, an agency may be authorized to pursue a range of policy outcomes under its governing statutes, and courts may not scrutinize an agency's shift in policy more strictly than other agency decisions.[258]

RCW 34.05.570

Judicial review.

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW **2.06.020**(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW **2.06.020**(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW **34.05.425** or **34.12.050** was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW **34.05.514**, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW **34.05.562**, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

(i) Unconstitutional;

(ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;

(iii) Arbitrary or capricious; or

(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

[**2004 c 30 s 1**; **1995 c 403 s 802**; **1989 c 175 s 27**; **1988 c 288 s 516**; **1977 ex.s. c 52 s 1**; **1967 c 237 s 6**; **1959 c 234 s 13**. Formerly RCW **34.04.130**.]

NOTES:

Findings—Short title—Intent—1995 c 403: See note following RCW **34.05.328**.

Effective date—1989 c 175: See note following RCW **34.05.010**.

Fail to Comment at Your Own Risk:
Does Issue Exhaustion Have a Place in Judicial Review of Rules?

Jeffrey S. Lubbers*

The requirement that parties seeking judicial review of agency action first "exhaust" their administrative remedies initially developed as a prudential judicial construct[1] and now is also sometimes reflected in statutes.[2] The classic version of the exhaustion requirement generally requires a party to go through all the stages of an administrative adjudication before going to court. This ensures that the agency action being challenged is the final agency position and that the agency has had the opportunity to bring its expertise to bear and to correct any errors it may have made at an earlier stage. It also allows for the resolution of disputes before they come to court, thus avoiding potentially unnecessary additions to court dockets. I will refer to this as "remedy exhaustion."

The orthodox application of the remedy exhaustion requirement involves cases where the petitioner for judicial review has eschewed available administrative appeal opportunities. In some cases, a court's refusal to accept review will simply clear the way for the further administrative proceedings to take place;[3] but in other situations, the foreclosure of judicial relief occurs after "the opportunity to invoke the relevant administrative processes had passed."[4]

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[1] In 1938 the Supreme Court referred to it as "the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938) (employers challenging NLRB's jurisdiction must complete administrative proceedings before seeking judicial intervention). Later the Supreme Court explained that:

> [T]he exhaustion doctrine recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer. Exhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise.

McCarthy v. Madigan, 503 U.S. 140, 145 (1992).

[2] *See* pages 4 – 7, *infra*.

[3] As in *Myers*, 303 U.S. 41, 50–51 (1938).

[4] PETER L. STRAUSS, ET AL, GELLHORN AND BYSE'S ADMINISTRATIVE LAW 1241 (10th ed. 2003) [hereinafter GELLHORN & BYSE CASEBOOK] (discussing McGee v. United States, 402 U.S. 479 (1971) (Selective Service inductee denied opportunity to raise conscientious objector defense to criminal conviction because he had not sought personal appearance before the local board and did not take administrative appeal to contest the denial)).

However, the doctrine has developed a new permutation, covering situations where a petitioner for judicial review did follow all the steps of the administrative appeals process, but had failed to raise in that process the issues now sought to be litigated in court. In those cases, which have been called "issue exhaustion" cases,[5] the thwarted petitioner will likely be out of luck since normally there is no further opportunity to raise the issue at the agency. In that sense, issue exhaustion bears some resemblance to standing-to-sue cases—a particular litigant is deemed unfit to challenge the agency's action in court. Unlike remedy exhaustion, however, which only applies to agency adjudication, issue exhaustion can theoretically be applied to agency rulemaking. As this article will show, this has started to become a reality—to the potential detriment of the rulemaking process, if applied in an overbroad fashion.

Development of the Issue Exhaustion Doctrine: It Began with a Statutory Provision Applying to Agency Adjudications—*L.A. Tucker Truck Lines*.

It is common for appeals courts to rule that they will not review issues not brought up first in the lower court. This principle was first analogized to judicial review of agency adjudication by the U.S. Supreme Court in the pre-Administrative Procedure Act ("APA") case of *Hormel v. Helvering*.[6] Six decades later, in *Sims v. Apfel*,[7] involving review of a Social Security Administration disability decision, the Court hearkened back to *Hormel*, quoting this passage from the earlier case:

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. And the basic reasons which support this general principle applicable to trial courts make it equally desirable that parties should have an opportunity to offer evidence on the general issues involved in the less formal proceedings before administrative agencies entrusted with the responsibility of fact finding.[8]

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[5] *See* William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since* Darby, 18 PACE ENVTL. L. REV. 1, 11 (2000) ("'Issue exhaustion' is a term that refers to the need to raise an issue with an administrative agency before raising it on judicial review."). Recently, some courts have used the term "waiver" to describe the action of the challenger who had failed to raise the issue during the agency proceeding. *See* text at notes 124-31, *infra.* I prefer the term "issue exhaustion" because "waiver" has another common meaning in administrative law more generally (referring to agencies granting a waiver from a generally applicable requirement), because it makes it sound like more of an strategic action on the part of the petitioner in court, and because the term would imply that a non-complying challenger would be barred even if another commenter had raised the issue (which is not the case).

[6] 312 U.S. 552 (1941).

[7] 530 U.S. 103 (2000).

[8] *Id*. at 109 (quoting *Hormel*, 312 U.S. at 556). *See* discussion of *Sims*, text at notes 25–35, *infra*.

The Supreme Court went on to apply the issue exhaustion doctrine to review of an agency adjudicative action in 1952 in *United States v. L.A. Tucker Truck Lines, Inc.*,[9] in the context of review of an Interstate Commerce Commission order:

> [O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts . . . . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.[10]

In that case a trucker petitioned the ICC for an extension of his route certificate. After a hearing by a hearing examiner, the petition was denied and the Commission affirmed. The trucker requested reconsideration by the full Commission, and then "extraordinary relief," both of which were denied. The trucker appealed to the three-judge court provided for by statute and raised for the first time the contention that the hearing examiner had been improperly appointed. The lower court allowed this, but the ICC appealed to the Supreme Court.

In reversing, the Supreme Court noted that:

> [T]he Appellee did not offer nor did the court require any excuse for its failure to raise the objection upon at least one of its many opportunities during the administrative proceeding. Appellee does not claim to have been misled or in any way hampered in ascertaining the facts about the examiner's appointment. It did not bestir itself to learn the facts until long after the administrative proceeding was closed and months after the case was at issue in the District Court, at which time the Commission promptly supplied the facts upon which the contention was based and sustained.[11]

It added that "The issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of considerations of practical justice."[12]

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[9] 344 U.S. 33, 37 (1952).

[10] A few years later, the Court made clear that the Administrative Procedure Act (APA) does "not require a different result. That Act purports to strengthen, rather than to weaken, the principle requiring the exhaustion of administrative remedies before permitting court review." Fed. Power Comm'n v. Colorado Interstate Gas Co., 348 U.S. 492, 499–500 (1955). *But see* Darby v. Cisneros, 509 U.S. 137 (1993), discussed below, in which the Court read section 704 of the APA, (5 U.S.C. § 704) to mean that federal courts do not have authority to require plaintiffs to exhaust available administrative remedies before seeking judicial review under the APA, where neither relevant statutes nor agency rules specifically mandate exhaustion as prerequisite to judicial review.

[11] 344 U.S. at 35.

[12] *Id.* at 36.

While the appeal in that court was done under a statute that did not contain an issue exhaustion provision,[13] the Court noted that "more than a few statutes" did contain such provisions.[14] Indeed, as the Supreme Court noted almost 50 years later in *Sims*, "requirements of administrative issue exhaustion are largely creatures of statute."[15] Recently the Court clarified that even when a litigant failed to meet a statutory issue exhaustion provision, "we do not regard that lapse as 'jurisdictional.'"[16]

There are numerous statutes that contain either generic issue exhaustion provisions or those directed at objections to agency orders. See the statutes for the following agencies (arranged by U.S. Code provisions):

- Federal Labor Relations Authority, Unfair Labor Practices, 5 U.S.C. § 7123 ("No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances."). This exhaustion provision was first adopted in the Civil Service Reform Act of 1978, Pub. L. No. 95–454 § 7123(c), 92 Stat. 1213 (1978).

- Department of Justice, Executive Office of Immigration Review, Removal Orders, 8 U.S.C. § 1252(d) ("A court may review a final order of removal only if—(1) the alien has exhausted all administrative remedies available to the alien as of right. . . .") This exhaustion provision was first adopted in the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 208 (1952).

- Securities and Exchange Commission ("SEC"), Securities Act of 1933, 15 U.S.C. § 77i(a) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission."). This exhaustion provision was first adopted in the Securities Exchange Act of 1934 § 9(a), Pub. L. No. 73-22, 48 Stat. 80 (1934).

- SEC, Securities Act of 1934, 15 U.S.C. § 78y(c)(1) ("No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so."). This exhaustion provision was first adopted in the Securities Exchange Act of

[13] *See* U.S. v. L.A. Tucker Truck Lines, Statement of Jurisdiction (filed Jan. 28, 1952) ("While most of the cases invoking this doctrine have arisen under statutes which specifically provide that the court can consider on review only matters raised before the agency—a limitation not contained in the Urgent Deficiencies Act, under which this action was brought—the settled policy against unduly protracting litigation requires application of the principle to review of Interstate Commerce Commission orders by statutory three-judge district courts.")

[14] 344 U.S. at 36.

[15] *Sims*, 530 U.S. at 107. The Court cited Marine Mammal Conservancy, Inc. v. Dep't of Agric., 134 F.3d 409, 412 (D.C. Cir. 1998). Its statement was a bit more expansive: "The requirement that objections must first be presented to the agency, although sometimes treated as part of the judicially-created exhaustion doctrine, is largely derived from statute."

[16] EPA v. EME Homer City Generation, L.P., 134 S. Ct 1584, 1602 (2014).

1934, Pub. L. No. 73-291 § 25(a), 48 Stat. 902 (1934); but the words "or rule" were added in Pub. L. No. 94-29 § 20, 89 Stat. 159 (1975).[17]

- SEC, Public Utility Holding Company Act of 1935, 15 U.S.C. § 79x(a) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do.). This exhaustion provision was first adopted in the Public Utility Holding Company Act of 1935, Pub. L. No. 74-333 § 24(a), 49 Stat. 835 (1935).

- SEC, Investment Companies, 15 U.S.C. § 80a–42(a) (same). This exhaustion provision was first adopted in the Investment Company Act of 1940, Pub. L. No. 76-768 § 43(a), 54 Stat. 844 (1940).

- SEC, Investment Advisers, 15 U.S.C. § 80b–13 (same). This exhaustion provision was first adopted in the Investment Advisors Act of 1940, Pub. L. No. 76-768 § 213(a), 54 Stat. 856 (1940).

- Small Business Administration, 15 U.S.C. § 687a(e) ("No objection to an order of the Administration shall be considered by the court unless such objection was urged before the Administration or, if it was not so urged, unless there were reasonable grounds for failure to do so."). This exhaustion provision was first adopted in the Small Business Act, Pub. L. No. 87–341, 75 Stat. 753 (1961).

- Federal Energy Regulatory Commission ("FERC"), Natural Gas, 15 U.S.C. § 717r(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do."). This exhaustion provision was first adopted in the Natural Gas Act, Pub. L. No. 75-688 § 19(b), 52 Stat. 831-32 (1938).

- FERC, Natural Gas Policy, 15 U.S.C. § 3416(a)(4) ("No objection to such order of the Commission shall be considered by the court if such objection was not urged before the Commission in the application for rehearing unless there was reasonable ground for the failure to do so."). This exhaustion provision was first adopted in the Natural Gas Policy Act of 1978, Pub. L. No. 95-62 § 506(a)(4), 92 Stat. 3405 (1978).[18]

- FERC, Electric Utilities, 16 U.S.C. § 825*l*(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do."). This exhaustion provision was first adopted in the Public Utility Holding Company Act of 1935, Pub. L. No. 74-333 § 313(b), 49 Stat. 860 (1935).

[17] As noted in notes 44–45, *infra*, this is one of only two provisions that I have found that specifically apply issue exhaustion to rulemaking.

[18] Note that the word "order" in this statute was interpreted to include rules, ECEE, Inc. v. FERC, 611 F.2d 554, 559-66 (5th Cir. 1980).

- Department of the Treasury, Alcohol, 27 U.S.C. § 204(h) ("No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary or unless there were reasonable grounds for failure so to do."). This exhaustion provision was first adopted in the Federal Alcohol Administration Act, Pub. L. No. 74-401 § 4(g), 49 Stat. 980 (1935) (there have been minor subsequent amendments).

- National Labor Relations Board, Unfair Labor Practices, 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."). This exhaustion provision was first adopted in the National Labor Relations Act, Pub. L. No. 74-198 § 10(e), 49 Stat. 454 (1935).

- Department of Labor, Fair Labor Standards Act, 29 U.S.C. § 210(a) ("No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before such industry committee or unless there were reasonable grounds for failure so to do."). This exhaustion provision was first adopted in the Fair Labor Standards Act 1938, Pub. L. No. 75-718 §10 (a), 52 Stat. 1065-66 (1938).

- Social Security Administration, Civil Money Penalties, 42 U.S.C. § 1320a–8(d)(1) ("No objection that has not been urged before the Commissioner of Social Security shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."). This exhaustion provision was first adopted in the Social Security Act, Pub. L. No. 103–296 § 1129(d)(1), 108 Stat. 1511 (1994).

- Department of the Interior, Outer Continental Shelf Leasing Act, 43 U.S.C. § 1349(c)(5) ("Specific objections to the action of the Secretary shall be considered by the court only if the issues upon which such objections are based have been submitted to the Secretary during the administrative proceedings related to the actions involved."). This exhaustion provision was first adopted in the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95–372 § 23(c)(5), 92Stat. 657 (1978).

- Federal Communications Commission, General, 47 U.S.C. § 405(a) ("The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass."). This exhaustion provision was first adopted in an Act to further amend the Communications Act of 1934, Pub. L. No. 82-554 § 405, 66 Stat. 720 (1952).

- National Transportation Safety Board, Aviation Matters, 49 U.S.C. § 1153(b)(4) ("In reviewing an order under this subsection, the court may consider an objection to an order of the Board only if the objection was made in the proceeding conducted by the Board or if there was a reasonable ground for not making the objection in the proceeding."). This exhaustion provision was first adopted in the Independent Safety Board Act of 1974, Pub. L. No. 103–272 § 1153(b)(4), 108 Stat. 757 (1994).

In addition, there are agency regulations that require issue exhaustion within the agency's appeals system—in other words an appellant cannot raise an issue before the agency head that was not raised before the ALJ.[19] Some agencies have successfully argued that these regulations should also be respected by courts on judicial review. The Supreme Court noted this in *Sims*, when it said:

> [I]t is common for an agency's regulations to require issue exhaustion in administrative appeals. See, e.g., 20 CFR § 802.211(a) (1999) (petition for review to Benefits Review Board must "lis[t] the specific issues to be considered on appeal"). And when regulations do so, courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues. See, *e.g., South Carolina v. United States Dept. of Labor*, 795 F.2d 375, 378 (C.A.4 1986); *Sears, Roebuck and Co. v. FTC*, 676 F.2d 385, 398, n. 26 (C.A.9 1982). Yet, SSA regulations do not require issue exhaustion. (Although the question is not before us, we think it likely that the Commissioner could adopt a regulation that did require issue exhaustion.)[20]

While it might seem odd to think that an agency regulation could influence what arguments can be made in court, cases like the ones cited in the above passage have migrated the administrative adjudication rule into the judicial review process. Such rules, not surprisingly, appear to be limited to agency adjudications, where issue exhaustion can be more readily tied to remedy exhaustion. And no such regulation purporting to limit issues raised in judicial review of rules has been found.

Application of Issue Exhaustion in a Ratemaking Case—*Colorado Interstate*

Three years after the *L.A. Tucker* case, the above FERC natural gas statutory provision (formerly administered by the Federal Power Commission) was applied by the Supreme Court in *Federal Power Commission v. Colorado Interstate Gas Co.*[21] This case involved a ratemaking (within the APA's definition of rulemaking") of particular applicability in that the order in the case only applied to one company. The Commission's order had been reversed and remanded by the Tenth Circuit on a ground that that court had raised sua sponte, but one that had not been before the Commission at the time of the ratemaking. The Supreme Court, citing the statute (and *L.A. Tucker Truck Lines*) reversed, brushing aside the argument that the statute, on its face, only precluded *a party* from raising an issue in court that had not been presented for rehearing, and did not preclude *a court* from taking up a new issue sua sponte: "To allow a Court of Appeals to intervene here on its own motion would seriously undermine the purpose of the explicit requirements of § 19(b) that objections must first come before the Commission."[22] More importantly, the Court, found support

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[19] *See e.g.*, Department of Labor: 20 C.F.R. §§ 641.900(e), 645.800(c), 667.830(b); Department of Justice (Bureau of Prisons) 28 C.F.R. § 542.15(b)(2); NLRB: 29 C.F.R. § 102.46(b)(2), and OSHA: 29 C.F.R. §§ 1979.110(a), 1981.110(a).

[20] *Sims*, 530 U.S. at 108.

[21] 348 U.S. 492 (1955).

[22] *Id.* at 499.

in the APA's scope-of-judicial-review section (5 U.S.C. § 706(2)(a)), which states that in conducting its review: "To the extent necessary to decision *and when presented*, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[23]

The *Colorado Interstate* Court did not really examine this APA issue in any depth and I was unable to find any other federal court decision focusing on this phrase, so its importance to this issue is hard to judge. It is not immediately clear why "when presented" would necessarily imply that an issue must have been first presented to an agency before a litigant can "present" it to a court. In addition, even if read this way, the phrase's application is ambiguous in that it seemingly only applies to the questions of law enumerated in that sentence and not to all the matters covered by Section 706(2).

A variation of the sua sponte issue decided in *Colorado Interstate* is presented when the court petitioner has not raised the issue with the agency, but another party has. Because the issue exhaustion doctrine was intended to be protective of the agency, courts have understandably often ruled that it should not be applied to particular challengers in situations where *other* participants in the administrative process had raised the issues, even if the litigant in court had not. For example, the Third Circuit so ruled in an SEC case where the petitioner had not raised the challenge at the administrative level, but other party-intervenors to the administrative adjudication had:

> The principal purpose of the [exhaustion] doctrine . . . is to make sure that it is the agency and not the courts which passes first on the contentions of the participants. It was the intention of Congress as evidenced by the statutory plan to give to the agency rather than to the courts the primary responsibility for enforcing and elaborating the regulatory scheme as set up in the law. This purpose is advanced so long as the contentions and exceptions raised on review have been in fact effectively and meaningfully raised before the regulatory agency. This is true regardless of whether the person who appeals the agency decision or some other person aggrieved by the decision happens to have raised the points before the agency.[24]

Rejection of Issue Exhaustion in a "Non-Adversary" Adjudication—*Sims v. Apfel*.

All of the cases discussed so far have involved challenges to orders issued in administrative adjudications or ratemakings of particular applicability. But in one important case, the Supreme Court declined to apply the issue exhaustion doctrine in the context of a review of an agency adjudication. In *Sims v. Apfel*,[25] in which the government argued that a social security claimant should be barred from raising an issue that she had failed to raise at the Social Security Appeals Council (the agency board that reviews denials of benefits by agency administrative law judges), the Supreme Court declined to apply issue exhaustion. The government had argued "that an issue-

[23] 5 U.S.C. § 706 (emphasis added).

[24] Hennesey v. SEC, 285 F.2d 511, 515 (3d Cir. 1961).

[25] 530 U.S. 103 (2000).

exhaustion requirement is 'an important corollary' of any requirement of exhaustion of remedies."[26] But the Court concluded, "We think that this is not necessarily so and that the corollary is particularly unwarranted in this case."[27]

In reaching this decision, the Court began by noting "that requirements of administrative issue exhaustion are largely creatures of statute."[28] It then read its precedents, including *L.A. Tucker*,[29] as suggesting that "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." Finding SSA adjudication to be "informal"[30] and "inquisitorial rather than adversarial,"[31] the Court held that "a judicially created issue-exhaustion requirement is inappropriate. Claimants who exhaust administrative remedies need not also exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues."[32]

The Court that decided *Sims* was a divided Court. Four Justices dissented and Justice O'Connor supplied the fifth vote by emphasizing SSA's failure to notify claimants of the issue exhaustion requirement.[33]

Shortly thereafter, Professor Funk wrote:

> Outside the Social Security context, it is unlikely that [*Sims*] has any force. Not only do the four dissenters indicate the view that issue exhaustion is the general rule, subject to only the rarest of exceptions, but Justice O'Connor clearly viewed the situation in [*Sims*] as unique. Even Justice Thomas's opinion, by tying issue exhaustion to an analogy with adversarial litigation in the judicial context, suggests that in the vast range of formal and informal, but adversarial, administrative adjudication, issue exhaustion would be required.[34]

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[26] *Id.* at 107.

[27] *Id.*

[28] *Id.*

[29] *Supra* note 9.

[30] 530 U.S. at 111.

[31] *Id.*

[32] *Id.* at 112. Justice Thomas wrote for the five-Justice majority. Justice O'Connor concurred because the agency had failed to warn claimants that issue preclusion might obtain. Justice Breyer (writing for Chief Justice Rehnquist and Justice Scalia) dissented because he did "not see why the nonadversarial nature of the Social Security Administration internal appellate process makes a difference," at least for claimants represented by counsel. *Id.* at 117.

[33] *Id.* at 113 (O'Connor, J. concurring in part and concurring in the judgment). She also suggested that "[r]equiring issue exhaustion is particularly inappropriate here, where the regulation and procedures of the Social Security Administration (SSA) affirmatively suggest that specific issues need not be raised before the Appeals Council." *Id.*

[34] Funk, *supra* note 5 at 15.

Nevertheless, lower courts applying issue exhaustion in judicial review of adjudications have continued to accentuate the adversarial nature of the agency action below.[35]

With that in mind, query whether the issue exhaustion doctrine should have a place in rulemaking.

Exhaustion in Rulemaking

It should be apparent that the remedy exhaustion doctrine, involving the need to go through all the available procedural steps and agency fora, while important in agency adjudication, has no real application to notice-and-comment rulemaking where there is typically a single proceeding that must be completed before there is a rule to challenge. The closely related, APA-based finality requirement[36] clearly rules out challenges to *proposed* rules. On the other hand, the APA's presumption of reviewability and the application of the prudential ripeness doctrine announced in *Abbott Laboratories v. Gardner* in 1966 have served to allow pre-enforcement review of final rules in many situations.[37] Rules can also normally be challenged in court at the enforcement stage too, absent a statutory preclusion,[38] or unless some opportunity existed to challenge them first in an agency adjudicatory forum.[39]

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[35] *See e.g.,* Agha v. Holder, 743 F.3d 609, 616 (8th Cir. 2014):

> "Where the parties are expected to develop the issues in an adversarial administrative proceeding, . . . the rationale for requiring issue exhaustion is at its greatest." [quoting *Sims*]. In other words, "[t]he strongest case for imposing an exhaustion requirement exists where the administrative proceedings closely resemble a trial." (quoting Frango v. Gonzales, 437 F.3d 726, 728 (8th Cir. 2006)). Here, the administrative proceedings before both the Immigration Court and the BIA were adversarial, and Agha was represented by counsel. Thus, a court-imposed exhaustion requirement is proper, in addition to the statutory requirement.

For a case refusing to apply issue exhaustion to a non-adversarial adjudication, see *Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 626 (9th Cir. 2008):

> Because ERISA and its implementing regulations create an inquisitorial, rather than adversarial process, and because the [plan's explanation of benefits] does not notify a claimant that issue exhaustion is required, *Sims* leads us to conclude that Vaught was not required to exhaust his issues or theories in the context of this case. *Accord* Wolf v. Nat'l Shopmen Pension Fund, 728 F.2d 182, 186 (3d Cir.1984) ("Section 502(a) of ERISA does not require either issue or theory exhaustion; it requires only claim exhaustion.").

[36] 5 U.S.C. § 704.

[37] 387 U.S. 136 (1967). But see the companion case of *Toilet Goods Ass'n v. Gardner*, 387 U.S. 167 (1966), where the Court found a pre-enforcement challenge to another FDA rule to be unripe for review because it could be challenged at the enforcement stage without any potential harm to the challenger in the interim.

[38] *See generally* Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733 (1983). *See also*, Ronald Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203 (2011).

[39] *See* Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) (mine safety regulation may not be challenged in advance of an administrative enforcement action by the Labor Department because of the opportunity to defend in the comprehensive administrative adjudication system presided over by the Federal Mine Safety and Health Review Commission).

In pre-enforcement challenges to rules, where the ripeness hurdle must be surmounted, it is certainly possible to envision the government raising issue exhaustion concerns. An excellent student note in 1986 by Douglas David Spencer was critical of an emerging trend in this direction.[40] Professor Funk raised the question of issue exhaustion in rulemaking in his 2000 survey of "new dimensions" of the exhaustion doctrine, and found that "courts are hopelessly confused" on the subject.[41] The *Gellhorn & Byse Casebook* in 2003 devoted a thoughtful note to this issue, suggesting that, while issue exhaustion might make sense in some rulemaking challenges, the "cases conspicuously lack discussion of whether, when, why, or how exhaustion doctrine developed in the context of adjudication should be applied to rulemaking."[42] Gabriel Markoff's recent useful survey of Clean Air Act rulemaking challenges found that, at least under that Act, which appears to contain one of only two explicit statutory issue exhaustion requirements for rulemaking challenges, the D.C. Circuit has applied it in 80% of the cases in which the government raised it as a defense.[43]

As noted above, there are numerous statutes containing more generic issue exhaustion requirements, or ones applying to agency orders. But there are few statutes that contain explicit statutory issue exhaustion requirement for rulemaking challenges—I have found only two—the Clean Air Act[44] and Securities Act of 1934.[45] And, of course, there are many other agency statutes that lack any such provision. Courts have not done a good job of sorting through these distinctions. As Professor Funk notes, "Unfortunately, some courts have ignored the specific statutory origin

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[40] David Douglas Spencer, Note, *The Duty to Participate in Agency Rulemaking*, 54 GEO. WASH. L. REV. 628 (1986). He wrote after another commentator had extolled the virtues of exhaustion generally and had supported denying the right of judicial review to a party who had failed to participate in rulemaking, suggesting that such parties could petition the agency to institute a new rulemaking proceeding and thereby obtain review. *See* Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 14–15, 34 (1984).

[41] Funk, *supra* note 5 at 18.

[42] GELLHORN AND BYSE'S CASEBOOK, *supra* note 4, at 1246.

[43] Gabriel H. Markoff, Note, *The Invisible Barrier: Issue Exhaustion as a Threat to Pluralism in Administrative Rulemaking*, 90 TEX. L. REV. 1065, 1079–83 (2012).

[44] 42 U.S.C. § 7607(d)(7)(B) ("Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review."). This provision was adopted in the 1977 Clean Air Act Amendments, Pub. L. No. 95-95 § 305(a), 49 Stat. 885, 775 (1977).

[45] 15 U.S.C. § 78y(c)(1) ("No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so."). More generally, the word "order" in some statutory review statutes has been construed to cover rules with respect to certain judicial review requirements. *See e.g.*, Investment Co. Inst. v. Bd. of Govs., 551 F.2d 1270(D.C. Cir. 1977) (treating a rule as an "order" for purposes of permitting direct review in the court of appeals). In one case involving a rulemaking, a court did the same for the purpose of enforcing the mandatory rehearing aspect of the Natural Gas Policy Act, 15 U.S.C. § 3416(a)(4), which can be considered a form of issue exhaustion. ECEE, Inc. v. FERC, 611 F.2d 554, 559-66 (5th Cir. 1980). Also, while not a statute specifically addressing issue exhaustion, the Atomic Energy Act, 42 U.S.C. § 2239, (covering both licensing and issuance of rules governing licensing) in combination with the Hobbs Act, 28 U.S.C. § 2344, has been read to limit judicial review to "parties" in the underlying proceeding, even when that proceeding was a rulemaking. *See* Gage v. AEC, 479 F.2d 1214, 1217–19 (D.C. Cir. 1973), discussed text at notes 54–60, *infra*. In a sense, this is closer to remedy exhaustion because court litigant must first be a party in the agency proceeding.

for [issue exhaustion] and have applied a similar exhaustion requirement in cases totally unrelated to that statute, while citing cases involving application of that statute."[46]

The upshot is that, as explained below, courts seem to be increasingly applying issue exhaustion principles to the judicial review of informal rulemaking, even though the doctrine was born in the adjudication context, and even though the Supreme Court has eschewed it in the informal adjudication context of social security disability claims.

As the American Bar Association Administrative Law Section's "Blackletter Statement" states:

> Courts enforce such issue exhaustion more stringently where the parties are expected to develop the issue in an adversarial proceeding than in circumstances in which they review the results of nonadversarial, informal hearings
>
> Some courts have also applied the issue-exhaustion doctrine to the notice-and-comment rulemaking process. Under this approach, a party that fails to raise an objection to a rule during notice and comment may not press that objection on direct judicial review of the rule unless (1) another party made the objection or (2) the agency's decision [sic] indicates that it did in fact consider the issue.[47]

The Relevance of *Darby v. Cisneros*

Does the APA have anything to say about this issue? Section 704, as construed by the Supreme Court in *Darby v. Cisneros*,[48] seems to preclude the application of common law exhaustion principles to agency rulemaking "unless either a statute requires it or an agency has required it by rule and provided that the rule would be inoperative pending its reconsideration."[49] In *Darby*, in the context of a review of an adjudicative order by the Department of Housing and Urban Development, the Supreme Court held that § 704 of the APA superseded the common law prudential (or equitable) doctrine of exhaustion of administrative remedies—at least in the context of APA cases. It found that section precludes exhaustion unless either another statute requires it or the agency has required some form of administrative appeal or reconsideration by rule and provided that meanwhile the agency action would be inoperative pending its reconsideration.

As Professor Funk has commented, "If one applies Section 704 faithfully with the Supreme Court's guidance in *Darby*, there could be no exhaustion required as a precondition of judicial review of rulemaking unless either a statute requires it (as in Section 405(a) of the Communications Act of

[46] Funk, *supra* note 5 at 17.

[47] AM. BAR ASS'N, SECTION OF ADMIN. L. & REG. PRACTICE, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 53–54 (2d ed.) (2013).

[48] 509 U.S. 237 (1993).

[49] Funk, *supra* note 5, at 18 (quoting 5 U.S.C. § 704).

1934) or an agency has required it by rule and provided that the rule would be inoperative pending its reconsideration."[50]

But if § 704, as construed by *Darby*, applies to rulemaking, what would that mean? That case involved remedy exhaustion, and after *Darby* most agencies made sure they had issued a procedural rule that required parties to file an administrative appeal in agency adjudications before seeking judicial review. To meet the § 704 requirements, that rule also had to provide that the agency action "meanwhile is inoperative." That does not pose a problem in the adjudication context because agency heads typically want a chance to review first-level decisions before they might be appealed to court. But in the rulemaking context, it is doubtful, even nonsensical, that agencies would want to issue such a procedural rule. Agencies would not want to delay the effectiveness of their hard-earned rule while opponents crafted a petition for reconsideration, potentially with new arguments.

After raising the question, Professor Funk, in describing *Darby* as a remedy exhaustion case arising in the context of administrative adjudication, notes that, "*Darby*, of course, did not address issue exhaustion, and because the question of issue exhaustion only arises when exhaustion of administrative remedies is required and satisfied, it is doubtful that *Darby* changes the legal landscape of issue exhaustion."[51]

I agree that *Darby* should not be read as bearing on issue exhaustion in rulemaking, but no court has really analyzed this question in any detail.[52]

The Early Application of Issue Exhaustion in Rulemaking Cases by the D.C. Circuit.

Not surprisingly, because issue exhaustion is an outgrowth of remedy exhaustion, which originated in the context of review of administrative adjudications, there appear to be few applications of it in the context of review of agency rulemakings until the 1970s. In that decade, the passage of numerous regulatory statutes with important rulemaking provisions led to an upsurge of rules and challenges to such rules in court, especially in the D.C. Circuit which hears most such cases.[53]

The D.C. Circuit began to raise issue exhaustion in the context of rulemaking in 1973 with two cases, (1) *Gage v. AEC*, involving an Atomic Energy Act rulemaking that was conducted under a

[50] *Id. See also* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 162 (1998). ("the reasoning of *Darby*—focusing on the APA's text and statutory structure—indicates that the [common-law exhaustion doctrine] has no proper place" in APA cases).

[51] *Id.* at 12. Professor Levin also points out that the APA provision being construed in *Darby* was § 704, which is a finality provision, and that issue exhaustion "has no equivalency whatsoever with the 'final agency action' principle." Letter from Ron Levin to author (Feb. 6, 2015) at 2.

[52] See the brief treatment by the court in *National Mining Ass'n v. Department of Labor*, *infra* note 128.

[53] For an illuminating history of rulemaking's "collision" "with vigorous judicial review" in the D.C. Circuit, see Reuel Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1141 (2001).

quasi-adjudicative procedural statute,[54] and (2) some overlooked dicta in its famous *Portland Cement* opinion involving a challenge to a rule issued by the Environmental Protection Agency ("EPA") under the Clean Air Act.[55]

Gage involved a rulemaking to implement the newly enacted National Environmental Policy Act ("NEPA")[56] that was conducted under the Atomic Energy Act's provisions (originally designed for adjudications) that entitled interested persons to become "parties" and have a "hearing" on their objections,[57] and also that allowed direct judicial review (under the Hobbs Act) only by such "parties."[58] In denying a party who had declined to participate in the rulemaking the right to invoke the court's jurisdiction, Judge Wilkey recognized that there was some incongruity in using these party designation procedures in rulemaking, but found that it made sense in cases involving direct review of rules to limit judicial review to persons who had participated in the rulemaking, if only to ensure a better record for judicial review:

> Unlike requests for review of adjudicative orders, petitions for "direct" review of rule-promulgating orders demand judicial scrutiny of regulations which may well not have been applied in a concrete case. Unlike adjudication, rule-making may proceed in the absence of those who may ultimately have a right to complain of the application of the regulations which result. Unlike those subject to adjudicative orders, persons who may ultimately be affected by regulations may have legitimate grounds for deciding not to join in the formulation of the rules. For example, the ultimate impact, or even the likelihood of enforcement, of proposed rules may be far from clear. Standing aside may not foreclose all opportunity to propose new regulations or to challenge the validity of the promulgated regulations when they are applied to such a person's detriment in a concrete case; but such abstinence will probably preclude the compilation of a record adequate for judicial review of the specific claims he has reserved. That is what happened in this case—and the effect of this void in the record on our ability to analyze petitioners' major claim highlights the flaw in their petition for relief from this court.[59]

Thus, Judge Wilkey also recognized that some interested persons may not choose to, or be able to, participate in rulemakings, but nevertheless he was concerned that such non-participation could lead to a record that would be inadequate for judicial review of claims made for the first time in court. Notwithstanding this conclusion, *Gage* is rarely cited in later cases applying issue exhaustion to notice-and-comment rulemaking, probably because the rulemaking procedures used by the AEC were quasi-adjudicative and different from the normal notice-and-comment rulemaking process. Moreover, Judge Wilkey's concern about the adequacy of the rulemaking

[54] 479 F.2d 1214, 1217–19 (D.C. Cir. 1973).

[55] Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir 1973).

[56] Pub. L. No. 91–190, § 2, Jan. 1, 1970, 83 Stat. 852, codified at 42 U.S.C. §§ 4321–4347d.

[57] *Gage*, 479 F.2d at 1217 (citing 42 U.S.C. § 2239).

[58] *Id.* at 1218 (citing 28 U.S.C. § 2344).

[59] *Id.* at 1218–19.

record would have little application where the challenge was based on constitutional or procedural arguments or to purely legal statutory challenges.[60] And there is an implication in the passage quoted above that non-participants could raise any issue in challenging a rule at the enforcement stage.

Portland Cement, on the other hand, is still one of the most oft-cited rulemaking cases—most famous for Judge Leventhal's groundbreaking pronouncement that agencies must disclose significant related studies or other relevant information in their possession at the time of the notice of proposed rulemaking.[61] But what is often forgotten is that he followed this principle with a corollary: "Conversely, challenges to standards must be limited to points made by petitioners in agency proceedings. To entertain comments made for the first time before this court would be destructive of a meaningful administrative process."[62] This principle was not enforced against the particular challengers in that case because EPA's disclosure failings had necessitated a remand anyway, and the court directed EPA to "consider the contentions presented in briefs to this court, though not previously raised, unless EPA explains why they are not material."[63] Shortly after that case, the Congress amended the Clean Air Act to specifically require persons to raise issues in the agency rulemaking before they can seek judicial review of those issues.[64]

A Contemporaneous Development—Issue Exhaustion in NEPA Cases

The issue exhaustion doctrine has also frequently arisen in the context of litigation over the adequacy of an agency environmental impact statement ("EIS") prepared under NEPA. The origin dates back to the language from *Portland Cement* which was quoted approvingly by the Supreme Court in connection with the NEPA aspect of *Vermont Yankee*,[65] which was in turn invoked by the Court in *Dep't of Transportation v. Public Citizen*,[66] in ruling that a challenger forfeited particular objections to the EIS by failing to raise them in the available public comment process. The issue

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[60] The challengers' arguments in *Gage* were that the agency's NEPA regulations did not go far enough in failing to bar all land acquisitions prior to the granting of a permit to construct a nuclear power plant. The court commented that, "[a]n extensive factual record would clearly be required in order to judge whether or not the present regulations implement the policies of NEPA 'to the fullest extent possible.'" *Id.* at 1219.

[61] *Id.* at 394 ("In order that rule-making proceedings to determine standards be conducted in orderly fashion, information should generally be disclosed as to the basis of a proposed rule at the time of issuance.").

[62] *Id.*

[63] *Id.* at 394–95.

[64] *See* Clean Air Act Amendments of 1977, Pub. L. No. 95–95, 91 Stat 685, 775, § 305(a) (adding subsection (d)), codified at 42 U.S.C. § 7607(d)(7)(B); for text of provision see *supra* note 44. The SEC provision, covering both orders and rules, also quoted in note 45, *supra*, was enacted in 1975, Pub. L. No. 94–29, § 20, 89 Stat 97, 159, but I have found no cases involving rulemaking under this provision.

[65] Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 553–554 ("Indeed, administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.') (citing *Portland Cement*, 486 F.2d at 394).

[66] 541 U.S. 752 (2004).

in *Public Citizen* was whether NEPA and the Clean Air Act required the Department to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers, when promulgating regulations that would allow such operations. The Court disallowed certain challenges to the preliminary EIS [environmental assessment or "EA"] based on issue exhaustion:

> What is not properly before us, despite respondents' argument to the contrary, [. . .] is any challenge to the EA due to its failure properly to consider possible alternatives to the proposed order[. . . .] Persons challenging an agency's compliance with NEPA must "structure their participation so that it . . . alerts the agency to the [parties'] position and contentions," in order to allow the agency to give the issue meaningful consideration. [Citing *Vermont Yankee*, 435 U.S. at 553]. None of the respondents identified in their comments any rulemaking alternatives beyond those evaluated in the EA and none urged [the Department] to consider alternatives. Because respondents did not raise these particular objections to the EA, [the Department] was not given the opportunity to examine any proposed alternatives to determine if they were reasonably available. Respondents have therefore forfeited any objection to the EA on the ground that it failed adequately to discuss potential alternatives to the proposed action.[67]

The Court did acknowledge that "Admittedly, the agency bears the primary responsibility to ensure that it complies with NEPA, . . . and an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action."[68] The Ninth Circuit has since defined the "so obvious standard" as a variant of the "futility exception" where the agency has "independent knowledge of issues that concern NEPA plaintiffs."[69] In a more recent NEPA case, that circuit cited its "general rule" that "we will not consider issues not presented before an administrative proceeding at the appropriate time."[70] But then it went on to add:

> However, we have repeatedly held that the exhaustion requirement should be interpreted broadly. Plaintiffs fulfill the requirement if their appeal "provided

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[67] *Dep't of Transportation v. Public Citizen*, 541 U.S. 752, 764–65 (2004).

[68] *Id.* at 765.

[69] 'Ilio'ulaokalani Coal. v. Rumsfeld, 464 F.3d 1083, 1093 (9th Cir. 2006) (quoting *Public Citizen*, 541 U.S. 752, 765 (2004). In distinguishing *Public Citizen* and allowing the procedural challenge to the EIS in '*Ilio'ulaokalani Coalition*, the court characterized the rationale of *Vermont Yankee* and *Public Citizen* as applying "in those instances in which an interested party suggests that certain factors be included in the agency analysis but later refuses the agency's request for assistance in exploring that party's contentions." *Id.* at 1092 (quoting Kunaknana v. Clark, 742 F.2d 1145, 1148 (9th Cir.1984)). *But see* Forest Guardians v. U.S. Forest Serv., 495 F.3d 1162, 1171 (10th Cir. 2007) (although "a close question," finding a comment challenging a U.S. Forest Service EIS insufficient to put the agency on notice of a substantial evidence soil standard claim, because the challenger's placement of its comment relating to soil erosion in a section of its comment titled "Impacts to Water Quality" and not the section titled "Unstable Soils"); Silverton Snowmobile Club v. U.S. Forest Serv., 433 F.3d 772, 783 (10th Cir. 2006) (indicating that arguments not raised before the agency during its compliance with NEPA's procedural requirements are waived).

[70] Nat'l Parks & Conservation Ass'n v. BLM, 606 F.3d 1058, 1065 (9th Cir.2010) (citing Marathon Oil Co. v. United States, 807 F.2d 759, 767–68 (9th Cir.1986)). I note that *Marathon* and the cases it relied on were all cases of agency adjudication.

> sufficient notice to the [agency] to afford it the opportunity to rectify the violations that the plaintiffs alleged." Plaintiffs need not state their claims in precise legal terms, and need only raise an issue "with sufficient clarity to allow the decision maker to understand and rule on the issue raised, but there is no bright-line standard as to when this requirement has been met."[71]

While it is true that NEPA procedures do call for notice to the public and solicitation of information from the public,[72] the analogy to notice-and-comment rulemaking is somewhat limited, because the comment process is less regularized and the substantive adequacy of agency compliance with NEPA is subject to a more limited scope of review.[73] Nevertheless, because *Public Citizen* was decided after *Sims*, some courts have viewed it as removing *Sims* as an obstacle to applying the issue exhaustion doctrine in the context of EIS challenges.[74]

General Issue Exhaustion Statutes and Judicially Developed Exceptions—the *WATCH* Case

As mentioned above, when the D.C. Circuit decided *Gage* and *Portland Cement*, there were already some statutes on the books, such as section 405(a) of the amended Communications Act, that *generally* required challengers to agency actions to first raise the issue with the agency in the form of a petition for rehearing.[75] In 1983, Judge Wald thoroughly examined the application of this provision to a licensing challenge in *Washington Ass'n for Television and Children ("WATCH") v. FCC*.[76] In this case a watchdog group challenged the Federal Communications Commission's ("FCC") renewal of licenses of three television stations in Washington, D.C. on the grounds that the stations had failed to provide any regularly scheduled weekday children's programs, claiming that this was in contravention of the Commission's policy. More specifically,

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[71] *Id.* (citations omitted)

[72] Council of Envtl. Quality regulations, 40 C.F.R. § 1506.6. Note that issue exhaustion issues can readily come up in other natural resources planning contexts, such as approvals of timber sales on national forest land, see Native Ecosystems Council v. Dombeck, 304 F.3d 886 (9th Cir. 2002); approval of mines, Idaho Sporting Cong. v. Rittenhouse, 305 F.3d 957, 965 (9th Cir. 2002), and review of cancellation of grazing permits, Buckingham v. Sec'y of the USDA, 603 F.3d 1073, 1080–81 (9th Cir. 2010). These Ninth Circuit cases are collected in a very thoughtful NEPA issue exhaustion opinion in *Oregon Natural Desert Ass'n v. McDaniel*, 751 F. Supp. 2d 1151 (D. Or. 2011). *See also* Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588 (D.C. Cir. 2015) (applying issue exhaustion to a challenge to Interior Department approval of proposed leases for resource exploration and development on the Outer Continental Shelf).

[73] *See, e.g.*, *High Sierra Hikers Ass'n*, 436 F. Supp. 2d 1117, 1149 (E.D. Cal. 2006) ("Judicial review of an agency's EIS under NEPA is extremely limited.").

[74] *See id.* at 1147 (specifically disagreeing with the pre-*Public Citizen* NEPA review case of *Vermont Public Interest Research Group v. U.S. Fish & Wildlife Service*, 247 F. Supp. 2d 495, 515–17 (D. Vt. 2002), which relied on *Sims* in finding issue exhaustion inapplicable to the non-adversary context of NEPA proceedings. But see the post-*Public Citizen* case of *Sierra Club v. Bosworth*, 352 F. Supp. 2d 909, 926 (D. Minn. 2005), which agreed with *Vermont Public Interest Group*, albeit without citing *Public Citizen*.

[75] *See* 47 U.S.C. § 405(a), quoted at page 7 *supra*. This provision continues to be regularly enforced, see FiberTower Spectrum Holdings, LLC v. FCC, No. 14–1039 slip. op. at 9 (D.C. Cir. Apr. 3, 2015) (applying issue exhaustion to a statutory argument that a license applicant sought to make in court after failing to make it to the Commission in its application for review of the license denial).

[76] 712 F.2d 677 (D.C. Cir. 1983).

WATCH raised two issues in its petition to the D.C. Circuit. The first was the agency's approval of the license renewals without holding a hearing on the stations' failure to carry regularly scheduled children's programming, as demanded by the group in its petition to deny. This issue was properly raised with the agency, but the FCC had explained in denying the hearing "that although licensees had a duty to provide weekday children's programming, they had no duty to provide it on a *regularly scheduled basis*."[77] The FCC relied on the fact that its policy statement on children's programming did not require such regular programming (a determination ultimately upheld by the D.C. Circuit).[78] However, the petition for judicial review also asked the court to review a second issue—the "general inadequacy" of the stations' children's programming—an argument that had not been presented to the Commission first.[79]

A major issue in this case was whether, although the statutory language admitted of no exceptions, the provision should be treated like other exhaustion cases—subject to exceptions in extenuating circumstances. Judge Wald concluded that it should be, although she went on to hold that none of these circumstances were present in this case.

What was especially interesting about her opinion in this case is that she analyzed how section 405(a) had been applied in prior D.C. Circuit cases. In addressing the blanket provision in the amended Communications Act, the court stated:

> [Our] cases assume that § 405 contains implied exceptions without explaining why. We understand these cases, however, as implicitly interpreting § 405 to codify the judicially-created doctrine of exhaustion of administrative remedies, which permits courts some discretion to waive exhaustion. There is no useful legislative history to confirm or refute this interpretation, but it has the merit of requiring the same degree of exhaustion for the FCC as for other agencies. We adopt that interpretation here and thus construe § 405 to incorporate the traditionally recognized exceptions to the exhaustion doctrine.[80]

Judge Wald cited similar general issue exhaustion statutes that also lacked specific exceptions such as the Securities Act of 1933 (15 U.S.C. § 77i(a)), along with others that did allow some exceptions, e.g., Securities Exchange Act of 1934, 15 U.S.C. § 78y(c)(1) ("reasonable ground for failure to do so."), Fair Labor Standards Act, 29 U.S.C. § 210(a) (same), Public Utility Holding

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[77] *Id.* at 679 (emphasis in original).

[78] *Id.* at 684–85.

[79] *Id.* at 681.

[80] 712 F.2d at 681–82 (footnotes omitted). Indeed as to the legislative history, she says,

> The main thrust of the provision may have been to ensure that in the mine run of cases, where issues *had* been raised before the agency, a party could obtain judicial review without first petitioning the Commission for rehearing. Early case law had suggested that a petition for rehearing was sometimes a prerequisite to judicial review.

Id. at 681 n.5 (emphasis in original).

Company Act, 15 U.S.C. § 79x(a) (same), National Labor Relations Act, 29 U.S.C. § 160(e) ("extraordinary circumstances"),[81] and then commented:

> The very senselessness of these differences in language suggests that Congress meant, in all these statutes, merely to codify the judicial doctrine of exhaustion of administrative remedies. That would explain Congress' failure to give careful attention to the nuances of language that might, in another context, connote differences in intended meaning.[82]

She then discussed some of the judicially recognized exceptions to the exhaustion requirement, although ultimately the court found that none of these exceptions applied in this case.[83] Among them are:

(1) issues, that "by their nature could not have been raised before the agency (e.g., a material change in circumstances or a serious impropriety in the administrative process),"[84]
(2) where the challenged action is "patently in excess of [the agency's] authority,"[85]
(3) where it would have been futile to raise before the agency,[86]
(4) where the agency has in fact considered the issue,[87]
(5) where "the obvious result would be a plain miscarriage of justice."[88]

WATCH's issue exhaustion analysis was applied in the context of a challenge to a licensing order, not to a challenge of the underlying rule, much less of a pre-enforcement challenge to a rule. Indeed most of the dozen cases construing section 405(a) cited by Judge Wald[89] also involved individual licensing or application cases. But there was a sprinkling of FCC rulemaking cases. For example, in *Gross v. FCC*,[90] the court reviewed the constitutionality of a rule banning the transmission of commercial messages by amateur radio stations, but barred petitioners from raising

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[81] *Id.* at 682 n.6. All of these statutes remain on the books.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 682 (citing Greater Boston Television Corp. v. FCC, 463 F.2d 268, 283-84 (D.C. Cir. 1971) (reviewing cases)).

[85] *Id.* (quoting Detroit Edison Co. v. NLRB, 440 U.S. 301, 312 n.10 (1979). The court also noted a disagreement among the commentators as to whether a party should be required to raise a jurisdictional challenge with the agency first. *Id.* at 682 n.8.

[86] *Id.* at 682. But the court cautioned that "Futility should not lightly be presumed, however." *Id.* at 682 n.9.

[87] *Id.* at 682 (citing cases where the issue was raised by dissenting commissioners (Office of Commc'n of the United Church of Christ v. FCC, 465 F.2d 519, 523–24 (D.C. Cir. 1972)) or by another party (Buckeye Cablevision, Inc. v. United States, 438 F.2d 948, 951 (6th Cir. 1971)); N.Y. State Broadcasters Ass'n v. United States, 414 F.2d 990, 994 (2d Cir. 1969)). The court then comments: "This exception can be seen as a variant of the futility exception, since it would almost surely be futile for a party to raise an objection already made by someone else." *Id.* at 682 n.10.

[88] *Id.* at 682 (quoting Hormel v. Helvering, 312 U.S. 552, 558 (1941)). These factors are similar to those later propounded by the Supreme Court in *McCarthy v. Madigan*, 503 U.S. 144–148.

[89] *See id.* at 681 n.3 and accompanying text.

[90] 480 F.2d 1288 (2d Cir. 1973).

"the sundry other grounds upon which petitioners seek for the first time on the instant petition to review to challenge."[91] In *American Radio Relay League, Inc. v. FCC*,[92] the court, in reviewing a substantive challenge to a rule limiting the manufacture and sale of certain amplifiers used by citizens band operators, brushed aside in a footnote the challenger's contention that the Commission did not comply with the APA's rulemaking procedures because that argument had not been made before the Commission.[93] And finally, *United States v. FCC*[94] involved a challenge to an FCC ratemaking involving AT&T (technically a rulemaking under the APA) brought by other federal agencies who argued in court that the rate of return granted to the company was unsupported. The court upheld the rate, pointing out, after citing section 405(a), that the FCC had sought comments on the rate, and the

> executive agencies did comment in response to that invitation, but they did not in their response raise any argument even resembling the one made here. Had the government brought what it now contends to be a failure to provide a full explanation to the Commission's attention, the Commission could easily have elaborated to cure any defect.[95]

In another case cited in *WATCH*, where the FCC's *failure to issue* a rule had been challenged by a petition for rehearing, which had been denied, the D.C. Circuit had allowed petitioners to argue for the first time that the FCC had improperly accepted and considered ex parte communications in the rulemaking proceedings.[96] The court first chided the petitioner [ACT] for

> offer[ing] no justification for its failure to raise the issue of "closed door bargaining" in its petition for rehearing beyond unsupported conclusory assertions that it is "most unlikely" that the Commission would have attempted to cure its "error" had ACT in fact raised the issue in time for the Commission to do so. . . . Such an assertion would be uncompelling in the absence of any concrete indication that reconsideration would have been futile, and, in other circumstances, we would be constrained from entertaining the objection.[97]

Nevertheless, the court allowed the objection to be made:

> That objection, however, essentially alleging a denial of administrative due process, raises neither a novel factual issue for which an initial Commission determination is quite clearly both necessary and appropriate, nor a legal issue on which the Commission, and even this court has not already made known its general views to

[91] *Id.* at 1290 n.5.

[92] 617 F.2d 875 (D.C. Cir. 1980).

[93] *Id.* at 879 n.8.

[94] 707 F.2d 610, 619 (D.C. Cir. 1983).

[95] *Id.*

[96] Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).

[97] *Id.* at 469.

> the contrary. Thus, we believe that a thorough airing of the merits of ACT's procedural challenge would not be inappropriate in this case, especially in light of the agency's tentative conclusion of these informal rulemaking proceedings shortly after ex parte discussions with regulatee representatives.[98]

This examination of the section 405(a) cases leading up to the D.C. Circuit's decision in *WATCH* shows how the issue exhaustion doctrine had been applied sporadically, but not uniformly—and not as a jurisdictional matter—in rulemaking review cases in the context of an explicit, generally applicable statutory exhaustion provision.

The Increasing Application to Rulemaking Cases

In recent years the issue exhaustion doctrine has grown to cover more and more rulemakings, even where there is no such statutory provision, albeit with some inconsistently applied exceptions. My concern is, while the doctrine has an appropriate place in some rulemaking challenges, that if it becomes as fully entrenched as it appears to be becoming, it could serve as a significant barrier to judicial review of rules, or at least a trap for the unwary. In addition, it may lead the "wary" to feel the need to file "shotgun" comments on rules to preserve their right to seek judicial review.

It is difficult to know how often courts have, without commenting, allowed issues raised in review petitions to be decided even where the challenger had not raised the same issues in rulemaking comments. To some extent, this may depend on whether the government raises this issue as a defense. But as the government succeeds more often in disposing of issues by raising issue exhaustion questions in rulemaking cases, one can expect the government to be more vigilant about raising it. And there are numerous examples of successful defenses on this ground. As Markoff documents, the EPA has succeeded 80% of the time since 1993 in raising the Clean Air Act issue exhaustion provision as a defense in rulemaking cases.[99]

While the post-1977 Clean Air Act cases are unique because they involve the only litigated statutory provision that explicitly covers rulemaking challenges, the D.C. Circuit also decides numerous other rulemaking-review cases involving rules issued by other agencies (or by the EPA) under other statutes that lack the type of provision found in the Clean Air Act. In one case involving a notice-and-comment proceeding (technically a rulemaking of particular applicability) to add hazardous waste sites to the Superfund National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), one of the challengers sought to contend in court for the first time that EPA lacked authority to aggregate sites for NPL listing purposes.[100] The court, per Judge Mikva, disallowed that argument, citing *WATCH*.[101]

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[98] *Id.* The court rejected that procedural challenge, thereby limiting the scope of its earlier decision prohibiting ex parte communications in informal rulemaking, Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977). It is likely that the court bent over backwards to allow this challenge so as to have an opportunity to limit the scope of *Home Box Office*.

[99] *See* Markoff, *supra* note 43.

[100] Linemaster Switch Corp. v. EPA, 938 F.2d 1299 (D.C. Cir. 1991).

[101] *Id.* at 1308.

Two years later, in *Ohio v. EPA*,[102] the court examined, and mostly upheld, a broader-based EPA rulemaking to amend the National Contingency Plan [NCP] to conform it with CERCLA. A group of states made a number of arguments that the rule was contrary to language in CERCLA, one of which was disallowed because they had not first made the argument to the agency. But in this case, the court made clear that it was so ruling because "[n]either the States *nor any other party* raised" the issue.[103]

This "any other party" codicil was recognized a year later in *Natural Resources Defense Council v. EPA*,[104] when the court's description of the *Ohio* case contained this blurb: "(court may excuse one party's failure to raise an issue in administrative forum where another party pressed and agency in fact considered identical issue)."[105] In that case, NRDC challenged an EPA rule issued under the Resource Conservation and Recovery Act ("RCRA"), in which the agency did not include used oils on its listing of covered hazardous wastes, instead explaining that it relied on other federal regulations to prevent any harm from used oil disposal. In court, NRDC wanted to argue that EPA's reliance on other federal regulations was forbidden by the statutory and regulatory command that EPA list substances that pose a substantial threat when "*improperly* managed."[106] The court noted that, "Petitioners do not deny that they failed to raise their 'improper management' argument before the agency. Instead, they contend that their raising 'various technical, policy, and legal' objections to the EPA's proposed non-listing was sufficient to preserve their right to press their statutory construction argument in court."[107]

Rejecting that argument, Judge Sentelle, writing for the court, concluded that if it were sufficient for parties to argue that they had made other "technical, policy, or legal" arguments before the agency,

> a party could never waive a legal claim as long as the party in fact appeared and argued something before the agency. While there are surely limits on the level of congruity required between a party's arguments before an administrative agency and the court, respect for agencies' proper role in the *Chevron* framework requires

[102] 997 F.2d 1520 (D.C. Cir. 1993).

[103] *Id.* at 1529 (emphasis supplied). For similar conclusions, see *City of Portland, Or. v. EPA*, 507 F.3d 706, 710 (D.C. Cir. 2007) ("Because neither [amicus] Walla Walla nor any other party raised this argument before the Agency during the rulemaking process, however, it is waived, and we will not consider it.') and *Military Toxics Project v. EPA*, 146 F.3d 948, 956–57 (D.C. Cir. 1998) ("We need not reach this challenge on the merits, however, because as the EPA also points out neither the MTP nor anyone else commented during the rulemaking process that the Rule as drafted would permit the DOD unilaterally to free itself from the strictures imposed by the RCRA. The MTP has thus waived the argument and may not raise it for the first time upon appeal.").

[104] 25 F.3d 1063 (D.C. Cir. 1994).

[105] *Id.* at 1074.

[106] *Id.* at 1075 (italics in original).

[107] *Id.* at 1074.

> that the court be particularly careful to ensure that challenges to an agency's interpretation of its governing statute are first raised in the administrative forum.[108]

This case also illustrates how difficult it can be for a reviewing court to determine if the petitioner had in fact made a similar argument in the rulemaking proceeding. As the court noted:

> At oral argument, counsel suggested that petitioners' comments had at least implied that EPA's proposal to rely on other federal regulations would be inconsistent with the agency's duty to consider the "improper management" of used oil. We asked counsel to supply the court with the full text of petitioners' comments. After examining these comments, however, we are still unable to discern any place in which petitioners could fairly be said to have raised this issue of statutory and regulatory construction.[109]

As the D.C. Circuit recently phrased the test in a case challenging an Interior Department offshore leasing decision that was subject to notice and comment, "The question in determining whether an issue was preserved, however, is not simply whether it was raised in some fashion, but whether it was raised with sufficient precision, clarity, and emphasis to give the agency a fair opportunity to address it."[110] In that case the court acknowledged that it did,

> see a connection between the comment and the current objection, [but that] Interior did not have anything close to the kind of explanation we do now, however, nor the same opportunity to parse the record and decipher the claims arguably latent in only a few sentences. . . . Interior received 280,189 comments on the 2012–2017 Program, some of them dense and lengthy. We cannot conclude on this record that CSE fairly raised the objection it now presses to Interior's method of assessing OCS drilling's coastal and onshore effects.[111]

It went on to explain: "When the government argues an issue is forfeited because it was not fairly raised, petitioners must explain why the issue was raised in a fashion sufficient to preserve it. Whether an objection is fairly raised depends on, among other things, the size of the record, the technical complexity of the subject, and the clarity of the objection."[112]

In a non-EPA environmental case, *National Ass'n of Manufacturers v. U.S. Department of the Interior*,[113] NAM also was tripped up by this doctrine. It attempted to argue that models within the Department's CERCLA natural resource damage [NRD] rule were arbitrary and capricious because they failed to evaluate restoration alternatives in terms of the effect they might have on

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[108] *Id.*

[109] *Id.* at 1074 n.7.

[110] Cntr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 602 (D.C. Cir. 2015).

[111] *Id.*

[112] *Id.*

[113] 134 F.3d 1095 (D.C. Cir. 1998).

natural resource "services." But the court rejected this line of argument because "NAM failed to raise this argument in the rulemaking proceedings below, and we find no reason to excuse NAM's failure to exhaust its administrative remedies."[114]

In response, NAM made a number of points, including that "the relationship between services and restoration was 'a general point applicable to any NRD assessment,' it 'had been emphasized repeatedly in prior rulemakings,' . . . 'other documents in the record highlighted the services concept," [and therefore] DOI was given a 'fair opportunity' to consider the issue below."[115]

Taking a hard line, Judge Henderson rejected that argument, "The fact that, buried in hundreds of pages of technical comments NAM submitted, some mention is made of the resource services concept and its relation to compensable values (rather than restoration alternatives) is insufficient to preserve the issue for review on appeal."[116]

These environmental cases demonstrate the potency of the issue exhaustion doctrine (sometimes referred to as a "waiver" rule) and also provide some basis for the judicial attitude that gives rise to it. As the court stated in *Ohio v. EPA*:

> [T]he waiver doctrine is also concerned with notions of agency autonomy and judicial efficiency. The doctrine promotes agency autonomy by according the agency an opportunity to discover and correct its own errors before judicial review occurs. Judicial efficiency is served because issues that are raised before the agency might be resolved without the need for judicial intervention. The efficiency concern is especially germane to this challenge to the NCP, involving an extremely complex rulemaking in which a multitude of issues might be raised for the first time before this court in the absence of the waiver doctrine.[117]

The doctrine has also been justified as sparing the agency from the burden of having to respond to vague comments. As Judge Randolph wrote in a Clean Air Act case:

> A citation to the section of the rule or a description of it may be all that is needed. If a comment lacking even that low level of specificity sufficed, the agency would be subjected to verbal traps. Whenever the agency failed to detect an obscure criticism of one aspect of its proposal, the petitioner could claim not only that it had complied with Section 307 but also that the agency acted arbitrarily because it never responded to the comment. Rulemaking proceedings and the legal doctrines that have grown up around them are intricate and cumbersome enough. Agency officials should not have to wade through reams of documents searching for "'implied' challenges."[118]

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[114] *Id.* at 1111.

[115] *Id.*

[116] *Id.*

[117] 997 F.2d 1520, 1528–29 (D.C. Cir. 1991).

[118] Natural Res. Def. Council v. EPA, 559 F.3d 561, 564 (D.C. Cir. 2009).

This argument has some appeal, especially in complex rulemakings such as those involved in CERCLA cases, where expedition is of particular concern and the overall program to prioritize the clean-up of particular toxic waste sites should not be hamstrung by challenges at every decision point.[119] On the other hand, while the doctrine might spare the courts from new arguments and the agencies from vague comments, it might also stimulate more specific "shotgun" comments to the agency as a defense mechanism.[120] Nor does the doctrine seem well suited for certain challenges. It seems less necessary or even useful for challenging parties to raise constitutional, procedural, or statutory authority questions to the agency before raising them in court. A rulemaking record is less necessary in such cases and it is more likely that it would be futile to make such arguments to the agency. Finally, even in fact-based challenges, the doctrine should not be applied in cases where the agency has adequate notice or knowledge of the factual issues raised by the challenger.

What about *Sims v. Apfel*?

Policy arguments aside, one might have thought that the Supreme Court's refusal to apply the doctrine to Social Security "informal" adjudication in the 2000 decision of *Sims v. Apfel*, might have arrested this trend of applying it to the more informal and non-adversarial rulemaking context.

In 2004, the Ninth Circuit addressed this issue saying, "[t]he Court's decision [in *Sims*] turned on the unique nature of Social Security benefit proceedings and offers no guidance relevant to rulemaking."[121] It then went on to apply issue exhaustion in a rulemaking context. However more recently it did apply the *Sims* rationale to a Surface Transportation Board ("STB") exemption proceeding (which it denominated a rulemaking), on the grounds that "the STB's procedures were informal and provided no notice to interested parties that to later challenge the STB's decision one must submit comments during the exemption process. In other cases, the STB, or its predecessor the ICC, explicitly requested public comment on exemptions."[122]

The D.C. Circuit was presented with this argument in 2005 in the case of *Advocates for Highway and Auto Safety v. Federal Motor Carrier Safety Administration* involving a challenge to a safety rule applying to trucking and bus companies.[123] The petitioner in the case raised several issues that it had not made in its comments to the agency in support of its claim that the agency had acted arbitrarily and capriciously. The government maintained that the petitioner had "waived" these

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[119] *See generally*, Lucia Ann Silecchia, *Note, Judicial Review of CERCLA Cleanup Procedures: Striking a Balance to Prevent Irreparable Harm*, 20 HARV. ENVTL. L. REV. 339 (1996)

[120] Markoff also argues that doctrine might result in a less "diverse, pluralistic array of parties represented" in post-rulemaking settlement discussions taking place in the judicial review phase because less well-financed interests are less able to participate in rulemakings. Markoff, *supra* note 43, at 1083–85. But without gainsaying that such settlement discussions are a key aspect of ultimate rule implementation, wouldn't this concern more give such groups a greater incentive to file extensive comments more proactively in order not to lose their seat at the negotiating table?

[121] Universal Health Servs., Inc. v. Thompson, 363 F.3d 1013, 1020 (9th Cir. 2004).

[122] Alaska Survival v. Surface Transp. Bd., 705 F.3d 1073, (9th Cir. 2013).

[123] 429 F.3d 1136 (D.C. Cir. 2005).

arguments, but petitioner cited *Sims* for the proposition that in this kind of informal rulemaking proceeding, "there can be no 'waiver.'"[124]

Judge Edwards for the unanimous panel agreed that "*Sims* indicates that this administrative-waiver doctrine does not represent an ironclad rule. And, as a general matter, a party's presentation of issues during a rulemaking proceeding is not a *jurisdictional* prerequisite to judicial review."[125] He acknowledged that petitioner's argument that "Rulemakings are classic examples of non-adversarial administrative proceedings" was "not unreasonable, because there appears to be no statute or regulation compelling exhaustion in advance of judicial review, and no argument has been made analogizing the agency's rulemaking to adjudication."[126]

However, he pointed to three D.C. Circuit cases, post-dating *Sims*, that had continued to apply the rule in rulemaking-review cases. In two of those cases the court failed to address *Sims*.[127] But in the third case, *National Mining Ass'n v. Department of Labor*,[128] involving a challenge to the Department of Labor's regulations under the Black Lung Benefits Act, the court, in a one-line dismissive conclusion, found *Sims* "inapplicable, for it addresses issue exhaustion, not issue waiver."[129] That case also dealt summarily, dismissing its impact on the issue exhaustion doctrine as "wholly inapposite" because it "addresses exhaustion of remedies, not waiver of claims."[130]

To his credit, Judge Edwards blanched at this distinction: "The distinction between 'issue exhaustion' and 'issue waiver' is illusive, to say the least. Indeed, both terms appear in the case law without apparent distinction, and they are sometimes treated as if synonymous."[131]

In the end, Judge Edwards accepted *National Mining Association's* conclusion anyway, for two reasons:

> First, the courts are not authorized to second-guess agency rulemaking decisions; rather, the role of the court is to determine whether the agency's decision is arbitrary and capricious for want of reasoned decisionmaking . . . . Therefore, it is unsurprising that parties rarely are allowed to seek "review" of a substantive claim that has never even been presented to the agency for its consideration. Second, as noted above, "[s]imple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body . . . has erred

[124] *Id.* at 1148.

[125] *Id.* (emphasis in original).

[126] *Id.* at 1149.

[127] *Id.* (citing Appalachian Power Co. v. EPA, 251 F.3d 1026 (D.C. Cir. 2001) and Nat'l Wildlife Fed'n v. EPA, 286 F.3d 554 (D.C. Cir. 2002)). However, both cases cited only pre-*Sims* precedent.

[128] 292 F.3d 849 (D.C. Cir. 2002).

[129] *Id.* at 874. It similarly found *Darby* "wholly inapposite" because it "addresses exhaustion of remedies, not waiver of claims." *Id.* (citing *Nat'l Wildlife Fed'n,* 286 F.3d at 562).

[130] *Id.* at 874 (citing Nat'l Wildlife Fed'n v. EPA, 286 F.3d 554, 562 (D.C. Cir. 2002).

[131] 429 F.3d 1149 (footnote omitted).

> against objection made at the time appropriate under its practice." *L.A. Tucker Truck Lines.*[132]

The court's reference to "simple fairness" makes a legitimate point, but does not go very far in identifying the specific circumstances when issue exhaustion is most appropriate, especially in a challenge to a rulemaking. However, Judge Edwards' first argument that arbitrary-and-capricious challenges should implicate application of doctrine is helpful, and points to the possibility of applying the issue exhaustion doctrine differently in rulemaking cases depending upon the type of challenge being made in court. This idea is discussed further below.

Other Circuits

Several other circuits have now joined the D.C. Circuit in applying the issue exhaustion doctrine in rulemaking cases, most of them, but not all in environmental cases. Conspicuously, after originally strongly rejecting the doctrine, the Fifth Circuit seems to be having second thoughts. In its 1981 decision in *City of Seabrook, Texas v. EPA*,[133] the court squarely rejected EPA's claim that a petitioner's failure to object to a conditional State Implementation Plan ("SIP") approval during the notice-and-comment procedure prevented it from challenging the action in court:

> The rule urged by EPA would require everyone who wishes to protect himself from arbitrary agency action not only to become a faithful reader of the notices of proposed rulemaking published each day in the *Federal Register*, but a psychic able to predict the possible changes that could be made in the proposal when the rule is finally promulgated. This is a fate this court will impose on no one.[134]

Moreover, the court drew a strong distinction between applying the issue exhaustion doctrine in rulemaking and doing so in cases such as *L.A. Tucker Truck Lines*, which involved appeals by a party to an essentially adversarial administrative proceeding, where a hearing was held and evidence was received.[135]

The Fifth Circuit explicitly reaffirmed the *Seabrook* decision in 1988, in *American Forest & Paper Ass'n v. EPA*,[136] but in a 1998 case the court went the other way. In *Texas Oil & Gas Ass'n v. United States EPA*,[137] a challenge to EPA new source performance standards under the Clean Water Act, in a footnote, and without even acknowledging the circuit precedents, the court applied issue exhaustion to several challenges, invoking only the same *L.A. Tucker Truck Lines* case that had been explicitly disavowed in the *Seabrook* case.[138] Then in 2003, in *BCCA Appeal Group v.*

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[132] *Id.* at 1149 (second ellipsis in original; citations omitted).

[133] 659 F.2d 1349 (5th Cir.1981).

[134] *Id.* at 1360–61 (footnote omitted).

[135] *Id.* at 1361 n.17.

[136] Am. Forest & Paper Ass'n v. EPA, 137 F.3d 291, 295 (5th Cir. 1998).

[137] 161 F.3d 923 (5th Cir. 1998).

[138] 161 F.3d at 933 n. 7.

EPA,[139] another panel with an unusual make-up[140] distinguished *Seabrook* and *American Forest & Paper Ass'n* and followed *Texas Oil and Gas.* In so doing, this panel recognized the conflict, but after citing a number of other cases, none of which involved rulemaking, it said only, "Because the present case is distinguishable from *Seabrook* on the law and the facts, the court need not resolve the conflict in the circuit at this time. Rather, the court finds *Texas Oil & Gas* controlling here."[141] The Fifth Circuit's departure from its earlier view, thus, is quite unsatisfying.

The Ninth Circuit has applied issue exhaustion in the context of an HHS Medicare reimbursement ratemaking proceeding[142] and an EPA rulemaking approving fuel standards set by a revised Nevada SIP.[143] However, more definitively, in a case considering challenges to a Bonneville Power Administration ("BPA") settlement with investor-owned utilities, the court noted:

> As a general rule, we will not review challenges to agency action raised for the first time on appeal. [However,] we will [generally] not invoke the waiver rule in our review of a notice-and-comment proceeding if an agency has had an opportunity to consider the issue. This is true even if the issue was considered sua sponte by the agency or was raised by someone other than the petitioning party . . . . We have also recognized that, so long as a statute does not require exhaustion, we may excuse waiver in exceptional circumstances.[144]

It explained:

> BPA sought broad public participation and invited comments in these proceedings. If we required each participant in a notice-and-comment proceeding to raise every issue or be barred from seeking judicial review of the agency's action, we would be sanctioning the unnecessary multiplication of comments and proceedings before the administrative agency. That would serve neither the agency nor the parties.[145]

The Third Circuit, in an opinion by then-Judge Alito, applied the issue exhaustion doctrine to a challenge to an EPA rule that denied Pennsylvania's request to re-designate part of the state from

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[139] 355 F.3d 817 (5th Cir. 2003).

[140] Apparently this was a panel of two, consisting of Judge Davis and a Court of International Trade Judge sitting by designation.

[141] 355 F.3d at 829 n.10. Judge Stephen Williams has recently recounted this set of Fifth Circuit cases in an interesting concurring opinion. Koretoff v. Vilsack, 707 F.3d 394, 399 n.1 (D.C. Cir. 2013) (Williams, J., concurring) (describing the conflict as "apparently not resolved," while acknowledging that "*Seabrook's* . . . fate has wobbled"). Judge Williams' views on the doctrine's application to rulemaking cases, expressed in that concurrence, are discussed text at notes 184–203, *infra*.

[142] Universal Health Servs., Inc. v. Thompson, 363 F.3d 1013, 1020 n.3 (9th Cir. 2004).

[143] Exxon Mobil Corp. v. EPA, 217 F.3d 1246 (9th Cir. 2000). Note that the only circuit precedent cited in this case involved the review of a Department of Labor formal adjudication. *Id.* at 1249 (citing Johnson v. Director, Office of Workers' Comp. Programs, 183 F.3d 1169, 1171 (9th Cir.1999)).

[144] Portland General Elec. Co. v. Bonneville Power Admin., 501 F.3d 1009, 1023-24 (9th Cir. 2007).

[145] *Id.* at 1024 n.13.

a nonattainment area to attainment status for ozone, pursuant to the Clean Air Act. Although this was technically a rulemaking, it primarily involved the Commonwealth of Pennsylvania as the principal "party." After first stating that "generally, federal appellate courts do not consider an issue that has not been passed on by the agency . . . whose action is being reviewed,"[146] the court engaged in a long analysis to determine that Pennsylvania had insufficiently raised the question in its comments of whether EPA had acted in a timely manner on its re-designation submittal.[147] The court's basis for the application of this doctrine was surprisingly thin. It quoted from a footnote in a case that concerned a state seeking review of a final decision by the Secretary of Education that made an argument for the first time in its brief.[148]

Even so, Judge Alito allowed the argument to be made:

> This is a rule of discretion, rather than jurisdiction, however, and our practice has been to hear issues not raised in earlier proceedings when special circumstances warrant an exception to the general rule. . . . Since New Jersey raises an issue of national importance, which is singularly within the competence of appellate courts and is not predicated on complex factual determinations, we will consider the State's argument as to the retroactivity of the 1978 ESEA amendments.[149]

The Fourth Circuit, has not specifically applied the issue exhaustion doctrine in a rulemaking review case, but has recognized the principle.[150] The Sixth Circuit has applied it in the context of

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[146] Sw. Pa. Growth Alliance v. Browner, 121 F.3d 106, 112 (3d Cir. 1997) (quoting State of N.J., Dep't of Educ. v. Hufstedler, 724 F.2d 34, 36 n.1 (3d Cir. 1983) *rev'd on other grounds sub nom.* Bennett v. New Jersey, 470 U.S. 632 (1985)).

[147] *See Sw. Pa. Growth Alliance*, 121 F.3d 111–112.

[148] *Hufstedler* at 724 F.2d 34, 36 n.1, states: "New Jersey raises this argument for the first time in its brief upon remand. Generally, federal appellate courts do not consider issues that have not been passed on by the agency or district court whose action is being reviewed." It cites Singleton v. Wulff, 428 U.S. 106, 120 (1976), but *Singleton* merely states, "it is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." Moreover, no agency action was at issue in *Singleton*.

[149] *Hufstedler*, 724 F.2d 34, 36 n.1 (citations omitted).

[150] 1000 Friends of Md. v. Browner, 265 F.3d 216, 228 (4th Cir. 2001). This case involved an EPA approval of a revised motor vehicle emissions budget ("MVEB") for the Baltimore area submitted by Maryland to meet the attainment criteria applying to its State Implementation Plan under the Clean Air Act. The environmental group challenged the approval on the ground that additional modeling was needed. EPA raised the issue exhaustion defense. The court, after ruling that, for jurisdictional purposes, the case did not involve a rulemaking challenge, *id.* at 224, said that the issue exhaustion rule (which it characterizes as the "waiver rule") has been rather routinely applied in cases similar to this one. *Id.* at 228 n.7 (citing Mich. Dep't of Envtl. Quality v. Browner, 230 F.3d 181, 183 n.1 (6th Cir. 1996); Military Toxics Project v. EPA, 146 F.3d 948, 956–57 (D.C. Cir. 1998); Natural Res. Def. Council *v.* EPA, 25 F.3d 1063, 1073–74 (D.C. Cir. 1994)). But then the court concluded that "the comments made by the Petitioner sufficiently raised the question of whether additional modeling was required."

> While the Petitioner's comments do not include a separately delineated section devoted to a claim that the revised MVEB cannot be approved without additional modeling and perhaps are phrased somewhat generally, the comments nonetheless refer (at least implicitly) to photochemical grid modeling three times, twice mentioning the process by name. Although the Petitioner stated in its comments that the modeling question would be "addressed more comprehensively" in other comments directed to another EPA action, this statement does not, as the EPA contends, suggest

an EPA rulemaking to disapprove Michigan's revisions to its SIP under the Clean Air Act—technically a rulemaking proceeding, but not one covered by the Act's issue exhaustion provision.[151] However, in a later case, it indicated it was not prepared to apply this rule broadly to all rulemaking cases:

> There are cases involving environmental law determinations that fall on the rulemaking side of the rulemaking/adjudication dichotomy for certain purposes holding that a party challenging a rule can waive an issue by not making a comment on point during the comment period [citing the *Michigan* case among others]. However, all of these cases nonetheless contain some characteristics of adjudications, and should not be applied broadly.[152]

In two recent cases, involving the EPA Clean Air Act provision and the FCC provision involved in the *WATCH* case, discussed above, the Tenth Circuit has applied issue exhaustion in rulemaking. In *In re FCC 11-161*,[153] challengers to an FCC rulemaking were deemed to have waived challenges to aspects of the rule that were not raised with sufficient specificity in their petition for reconsideration.[154] And in *Oklahoma v. United States EPA*,[155] the court reached the same result in an action challenging EPA's rejection of the state's SIP and the issuance of a Federal Implementation Plan to limit the emissions of sulfur dioxide. The court rejected three of the petitioners' arbitrary-and-capricious arguments because they were not raised with "reasonable specificity" during the public comment period.[156]

Possible Limits to Applying the Doctrine in Rulemaking Cases

Despite this increasing acceptance of the doctrine among the circuits, there have been some limits.

> that the Petitioner was expressly declining to raise the issue in this action. Instead, the statement merely placed the EPA on notice that the issue would *also* be raised in connection with the other action. We therefore conclude that the Petitioner's comments sufficiently raised the question of whether additional modeling was required before the revised MVEB could be deemed adequate, and we now proceed to address the merits of this question.

Id. at 228.

[151] *Mich. Dep't of Envtl. Quality*, 230 F.3d at 183 n.1 ("Petitioners also argued that the EPA approved similar rules in other states and the EPA's rulemaking violates the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (2000). However, petitioners failed to sufficiently raise these issues during the comment period and thus have waived them for purposes of appellate review.).

[152] Citizens Coal Council v. EPA, 447 F.3d 879, 904 n.25 (6th Cir. 2006) (en banc).

[153] 753 F.3d 1015 (10th Cir. 2014).

[154] *Id.* at 1063–64.

[155] 723 F.3d 1201 (10th Cir. 2013).

[156] *Id*. at 1214–15, 1220–22.

Futility Exception

At least one district court has recognized and applied a futility exception. In *Comite De Apoyo A Los Trabajadores Agricolas v. Solis*,[157] the court held that the agency cannot complain that challenger had failed to comment on an issue when the agency rejected similar comments from others as outside the scope of the rulemaking. And even in a Clean Air Act case, the D.C. Circuit allowed challenges by petitioners who failed to raise a particular issue in the rulemaking when the application of the rule to the challengers was not clear and the agency had denied a petition for reconsideration.[158] In that case, the per curiam court wrote:

> While we certainly require some degree of foresight on the part of commenters, we do not require telepathy. We should be especially reluctant to require advocates for affected industries and groups to anticipate every contingency. To hold otherwise would encourage strategic vagueness on the part of agencies and overly defensive, excessive commentary on the part of interested parties seeking to preserve all possible options for appeal. Neither response well serves the administrative process.[159]

The "Agency is Already on Notice" Exception

In the long-running litigation over EPA's authority to curtail air pollution in upwind states, the D.C. Circuit twice overturned EPA rules. In 2008 the court overturned (but did not vacate) the EPA's Clean Air Interstate Rule ("CAIR") in *North Carolina v. EPA*.[160] One of the key bases for its overturning of the rule was that "EPA may not use cost to increase an upwind State's obligation under the good neighbor provision—that is, to force an upwind State to 'exceed the mark.'"[161] After remand, the EPA produced its Cross-State Air Pollution Rule which used modeling to produce annual emission budgets for each upwind state. Industry and state petitioners challenged the rule, suggesting that the agency had improperly determined which states would "contribute significantly" to downwind states' non-attainment of air quality standards, and the court agreed.[162] More specifically the court found that EPA lacked the statutory authority for its conclusion that "an upwind State that exceeded the significance threshold at even one downwind State's receptor was drawn wholesale into the Rule's second stage—cost-based emissions reductions."[163] Judge Rogers dissented arguing, among other things, that the petitioners had not made that argument in

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[157] No. 09–240, 2010 WL 3431761, at *18 (E.D. Pa. 2010).

[158] Portland Cement Ass'n v. EPA, 665 F.3d 177, 186 (D.C. Cir. 2011).

[159] *Id.*

[160] 531 F.3d 896 (D.C. Cir. 2008) (per curiam). The court later issued a ruling that it would not vacate the rule "for EPA to conduct further proceedings consistent with our prior opinion" 550 F.3d 1176, 1178.

[161] 531 F.3d at 390–91.

[162] EME Homer City Generation LLP v. EPA, 696 F.3d 7 (D.C. Cir 2012), *rev'd* EPA v. EME Homer City Generation LLP, 134 S. Ct. 1584 (2014).

[163] 696 F.3d at 23.

the underlying rulemaking, in violation of the Clean Air Act's issue exhaustion provision.[164] For the majority, Judge Kavanaugh explained that EPA was on notice due to the court's earlier *North Carolina* opinion: "In sum, EPA knew from the beginning that it was required to comply with *North Carolina*, including that part of the Court's holding on which petitioners rely here."[165] He added the additional ground that "EPA considered—and rejected—precisely the same argument in [the] CAIR [rulemaking]."[166]

The Supreme Court reversed the D.C. Circuit and upheld the rule on the merits, but only briefly addressed the issue exhaustion claim.[167] First the court held that the Clean Air Act provision, although "mandatory" was not "jurisdictional."[168] It then shrugged off the need to decide this issue because EPA had not "pursued [this] argument vigorously before the D.C. Circuit."[169] It did this, despite an unacknowledged amicus brief by a group of law professors devoted entirely to urging the Court to invoke the issue exhaustion argument against the respondents in the case.[170]

The Agency's Response to a Comment Showed Awareness of the Issue

In NRDC v. EPA,[171] a challenge to an EPA rule under the RCRA, which has no statutory exhaustion provision, the court found that the petitioners comments did not properly raise the question of EPA's statutory authority to adopt a "comparable fuel exclusion" from coverage by the Act, but "[n]onetheless, EPA's response to [a commenter's] comment suggests that EPA understood [that comment] to challenge EPA's statutory authority to exclude comparable fuels in the first place and affirms its authority to do so. . . . Thus, the issue was expressly addressed by EPA and is properly before the court."[172]

Agency Has Duty to Examine Key Assumptions as Part of Its Affirmative Burden of Promulgating and Explaining a Non-Arbitrary, Non-Capricious Rule

In *NRDC v. EPA*, the court applied an alternative ground for not applying issue exhaustion to petitioners. It stated, "Moreover, even if a party may be deemed not to have raised a particular argument before the agency, EPA retains a duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a nonarbitrary, non-capricious rule and

[164] *Id*. at 52–54 (Rogers, J., dissenting).

[165] *Id.* at 24 n.18.

[166] *Id*.

[167] EPA v. EME Homer City Generation LLP, 134 S. Ct. 1584, 1602–03 (2014).

[168] *Id.* at 1602.

[169] *Id*. at 1603. The Court acknowledged that "Had EPA pursued the "reasonable specificity" argument vigorously before the D.C. Circuit, we would be obligated to address the merits of the argument." *Id.* It should be noted that the two dissenting Justices specifically "agree[d] with the majority's analysis turning aside EPA's threshold objections to judicial review." *Id.* at 1610 n.1 (Scalia J. dissenting).

[170] Amicus Curiae Brief of Law Professors on Issue Exhaustion in Support of Petitioners, 2013 WL 4875111.

[171] 755 F.3d 1010 (D.C. Cir. 2014).

[172] *Id.* at 1022.

therefore EPA must justify that assumption even if no one objects to it during the comment period."[173]

Lack of Notice to Commenter that Issue Needed to be Raised in the Comments—Logical Outgrowth Challenges

In the Fifth Circuit's *City of Seabrook* case, the court made the oft-quoted statement that a strict application of issue exhaustion in rulemaking might require a prospective litigant to be a "psychic able to predict the possible changes that could be made in the proposal when the rule is finally promulgated."[174] This relates to the requirement that agencies give adequate notice to the public about its proposed rule, and to the corollary that if an agency final rule deviates too far from the terms of the proposed rule, the agency should re-propose the rule. The test that courts use to determine this procedural challenge is the "logical outgrowth test"—whether the final rule is a logical outgrowth of the proposed rule such that commenters should have fairly anticipated that an agency might go there.[175]

The relevance to the issue exhaustion doctrine should be apparent. If there is a true logical outgrowth problem, it would be illogical to require a challenger raising this procedural failure to have made this argument before the agency, and I have not found any cases where the government raised such a defense. However, it is possible that in some circumstances, a litigant may make the similar claim that there was no reason to suspect that such an issue was going to be presented by the agency's rule until it was too late to comment. This argument did prevail in a review of an STB adjudication in *Riffin v. Surface Transportation Board*.[176] Riffin petitioned for review of a decision by the STB after the Board rejected his application for a certificate authorizing the acquisition and operation of a length of railroad track. In the proceeding below, Riffin had included in his application a reservation about shipping certain hazardous materials. The Board sought comment, and a commenter objected, raising the argument that the application was incomplete and defective. The Board noted that comment but rejected the application because the application's reservation violated the statutory duty of common carriers to transport hazardous material where appropriate agencies have promulgated comprehensive regulations. Riffin sought review on the ground that he had a common-law right to not carry hazardous materials, but the government sought to prevent him from making the argument because he hadn't made it before the STB. The D.C. Circuit rejected that position, ruling that because "the Board sua sponte raised the hazardous materials issue in its Decision without first providing Riffin an opportunity to address the issue," "Riffin had no reason to think he had to make his common-law arguments part of his application to the Board."[177]

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[173] *Id.* at 1023 (internal quotations and citations omitted).

[174] 659 F.2d at 1361. The case is discussed, text at notes 133–41 *supra*.

[175] *See* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007). *See generally*, JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 258–68 (5th ed. 2012)

[176] 733 F.3d 340 (D.C. Cir 2013).

[177] *Id.* at 343–44.

Constitutional Issues and Other Cases Where the Court Doesn't Need the Agency's View

Because agencies cannot determine constitutional questions, courts normally feel that they can decide such issues without requiring the petitioner to have presented the issue to the agency first. In some sense this thinking relates to the futility exemption. A recent high profile case involving the National Labor Relations Act's strong issue exhaustion provision[178] illustrates this. The Noel Canning Company had been found by the Board to have committed an unfair labor practice. Only at the court level did it make the argument that the Board was improperly constituted due to a lack of a quorum because several members had not been properly appointed under the Recess Appointment Clause of the Constitution. The D.C. Circuit, before addressing the constitutional issue raised sua sponte the issue exhaustion provision and decided that "the objections before us concerning lack of a quorum raise questions that go to the very power of the Board to act and implicate fundamental separation of powers concerns. We hold that they are governed by the 'extraordinary circumstances' exception to the 29 U.S.C. § 160(e) requirement and therefore are properly before us for review."[179]

A similar example is presented by *Kuretski v. Commissioner*[180] where a taxpayer was allowed to raise a new constitutional argument in a motion for reconsideration to the Tax Court. The contention was that the statutory provision allowing the President to remove Tax Court judges violated separation-of-powers principles. The D.C. Circuit allowed this, citing *Freytag v. Commissioner*[181]: "Just as the Supreme Court in *Freytag* elected to consider a belated constitutional challenge to the validity of a Tax Court proceeding, . . . we do so here. In *Freytag*, as here, the petitioners raised a nonfrivolous constitutional challenge to the validity of a Tax Court proceeding after the Tax Court's initial decision, and the petitioners' claim implicated the federal judiciary's strong interest in maintaining the separation of powers."[182]

Another example of a case where the court felt it was not necessary to require issue exhaustion on a purely legal, quasi-constitutional issue is *Action for Children's Television v. FCC*, discussed earlier, where the court said, "That objection, however, essentially alleging a denial of administrative due process, raises neither a novel factual issue for which an initial Commission determination is quite clearly both necessary and appropriate, nor a legal issue on which the Commission, and even this court has not already made known its general views to the contrary."[183]

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[178] See page 6, *supra*, for the statutory text.

[179] Noel Canning v. NLRB, 705 F.3d 490, 497 (D.C. Cir. 2013), *aff'd* NLRB v. Noel Canning, 134 S. Ct 2550 (2014). The Supreme Court did not address the issue-exhaustion issue.

[180] 755 F.3d 929, 943 (D.C.Cir.2014).

[181] 501 U.S. 868 (1991).

[182] Kuretski, 755 F.3d at 937.

[183] Action for Children's Television v. FCC, 564 F.2d 458, 469 (D.C. Cir. 1977).

The *Koretoff* Case and Judge Williams' Qualms

Judge Stephen Williams has also recently sounded some alarm bills on the extension of this doctrine to rulemaking in *Koretoff v. Vilsack*,[184] a pre-enforcement challenge to a Department of Agriculture rule issued under the authority of an almond marketing order.[185] The challengers made a series of arguments to the district court "that the rule exceeded the Secretary's authority under both the [statute] and the Almond Order,"[186] and also that the Secretary had failed to make one of the statutorily required findings. The district court allowed the ultra vires argument to be made, but ruled against the challenge on the merits; that court also found that the challengers had "waived" their other argument by failing make it in its comments to the agency. On appeal, the government argued that under *Advocates for Highway and Auto Safety*,[187] *all* the arguments should be disallowed, and the D.C. Circuit, after closely examining whether the challengers had actually made these arguments before the agency, agreed. However, it did throw the challengers a lifeline by concluding at the end of the opinion, "We emphasize that nothing in this opinion affects the producers' ability to raise their statutory arguments if and when the Secretary applies the rule.[188]

In carving out this exception for an as-applied challenge, the court cited *Murphy Exploration & Production Co. v. U.S. Department of Interior*.[189] In *Murphy*, the court had held that a failure to challenge a rule while participating in rulemaking proceedings did not estop a challenger from challenging the rule in a separate proceeding in which the rule was being applied. In that case, the court recognized that "because administrative rules and regulations are capable of continuing application, were we to limit review to the adoption of the rule without further judicial relief at the time of its application, we would effectively deny many parties ultimately affected by a rule an opportunity to question its validity."[190]

Judge Williams concurred in *Koretoff*, but in a separate opinion expressed some doubts about the developing doctrine:

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[184] 707 F.3d 394 (D.C. Cir. 2013).

[185] Petitioners had claimed in district court that the formal rulemaking procedures required to issue or amend a marketing order were required. *See* 7 U.S.C. § 608c(15)(A)&(B) (providing that any handler subject to an order may file a petition with USDA alleging a violation of law, seeking a modification or exemption, and requesting a hearing; rulings on such petitions are reviewable in federal district court). The D.C. Circuit had earlier held that this rule was not an amendment to the order, but instead constituted minimum quality and inspection requirements. Koretoff v. Vilsack, 614 F.3d 532, 539 n.3 (D.C. Cir. 2010). Therefore this was an *informal* rulemaking and the statutory exhaustion requirement did not apply.

[186] *Koretoff*, 707 F.3d at 397.

[187] *See* note 123, *supra*.

[188] *Id.* at 399.

[189] 270 F.3d 957, 958 (D.C. Cir. 2001) ("Nothing . . . prevents [plaintiff] from pursuing its claim in a second forum, i.e., apart from the original rulemaking, if such a forum is otherwise available. As we have held before, such a forum is available to a party when a rule is brought before this court for review of further agency action applying it." (internal quotation marks omitted in original)).

[190] *Id*. at 958–59 (internal quotations omitted).

> I write separately primarily to note that in the realm of judicial review of agency rules, much of the language of our opinions on "waiver" has been a good deal broader than the actual pattern of our holdings, and that that pattern itself may unfairly disadvantage parties that generally are not well represented by interest groups.[191]

He first recognized the different view proffered by the Fifth Circuit in the *Seabrook* case, and chastised the government for, in its brief in this case, "stretch[ing] the principle still further, throwing into the hopper a case involving an adjudication rather than a rulemaking, even though parties to a litigation obviously have a far clearer burden to speak up to protect their interests than do all of the potentially millions of persons that may be affected by a rulemaking."[192]

Then, focusing on the court's recognition that an "application challenge" would be allowed, he pointed out that in the *Murphy* case cited for that exception the court had

> [drawn] an analogy to our cases holding that a party's missing a statutory deadline for *facial* review of a regulation would not bar its challenge on "review of further [agency] action *applying* it." Of course where a statute specifically precludes even an application challenge if the claim was not timely raised before the agency, we necessarily honor the statute unless the challenger poses a valid constitutional objection.[193]

He concluded:

> Generally speaking, then, the price for a ticket to facial review is to raise objections in the rulemaking. This system probably operates quite well for large industry associations and consumer or environmental groups (and the firms and individuals thus represented). But for some the impact is more severe. Firms filling niche markets, for example, as appellants appear to be, may be ill-represented by broad industry groups and unlikely to be adequately lawyered-up at the rulemaking stage. As the Fifth Circuit observed, we presumably do not want to "require everyone who wishes to protect himself from arbitrary agency action not only to become a faithful reader of the notices of proposed rulemaking published each day in the *Federal Register*, but a psychic able to predict the possible changes that could be made in the proposal when the rule is finally promulgated."[194]

Then he proposed a solution:

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[191] 707 F.3d at 399 (Williams, J., concurring).

[192] *Id*. at 399–400 (citing Orion Reserves Ltd. P'ship v. Salazar, 553 F.3d 697 (D.C. Cir. 2009)).

[193] 707 F. 3d at 400 (citing *Murphy Exploration*, 270 F.3d at 958).

[194] *Id.* at 401 (quoting City of Seabrook, Tex. v. EPA, 659 F.2d 1349, 1360–61 (5th Cir.1981).

> A decision of our court has suggested a principle that would open the door to facial challenges by such mavericks. In an [earlier vacated decision[195]] we said that where a party had participated in the rulemaking, "it made sense to speak of [the party's] failure to raise [its argument] below." But that could not rightly be said where there was no indication that the plaintiff had participated in the rulemaking in any way. Thus we found no waiver.
>
> Such a principle would provide facial review for parties who don't bother to participate in the rulemaking—probably a group largely coincident with parties who fail to anticipate its inflicting serious costs on their interests. . . . The argument for allowing facial review under these circumstances is of course at its strongest where the issue posed cannot require a remand to the agency (e.g., a claim under *Chevron*'s "first step") and the hardship to the plaintiff from delay is especially acute.[196]

This idea of limiting the issue exhaustion rule to parties who actually participated in the rulemaking is worth considering. It has the advantage of being easy to apply,[197] but there is a real risk that some participants might game the system. In a parenthetical, Judge Williams acknowledges "there would be some risk that the rule might induce strategic behavior expanding that group: non-participation in order to get facial review without disclosing one's position to the agency."[198] But "It's not clear that such a strategy presents many advantages."[199]

One problem with Judge Williams' approach is that numerous courts (including the D.C. Circuit) have completely precluded certain petitioners from obtaining judicial review of rules where they found that that the petitioner had been aware of the rulemaking but had chosen not to participate.[200] To reconcile this line of cases with Judge Williams' suggestion would require courts to engage in examination of the intentions or bad faith of such petitioners.

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[195] The case is an earlier round of the *Murphy Exploration* litigation, *Murphy Exploration & Production Co. v. U.S. Department of Interior*, 252 F.3d 473 (D.C. Cir. 2001) (vacated). In *Koretoff*, Judge Williams explained the vacation thusly:

> After the opinion was issued, the government submitted evidence that the challenger had, in fact, participated in the rulemaking proceeding, and the panel—in the *Murphy* decision cited earlier—vacated the relevant part of the opinion. See *Murphy*, 270 F.3d at 958. The panel's reasoning, of course, remains available to future panels."

707 F.3d 401.

[196] *Id.* (citations omitted).

[197] This would be much simpler for the court to determine than the proposal suggested by Gabriel Markoff, which would limit issue exhaustion to rulemakings "where participation had been sufficiently pluralistic, Markoff, *supra* note 43 at 1086, which would require courts to "examine the substance of the comments themselves in order to determine whether competing viewpoints on the proposed rule had been offered." *Id.* at 1087.

[198] 707 F.3d 401.

[199] *Id.*

[200] *Gage v. AEC* is one of those cases, see text at notes 54–60, *supr*a. *See also* Spencer, *supra* note 40, at 657 and cases cited in his article at n. 197.

Professor Levin also blanches at the idea of giving preference to non-participants over participants:

> To me, it is counterintuitive to give a person who diligently participated in a rulemaking proceeding fewer rights than a person who sat on the sidelines. The former would rightly regard this situation as unfair. We should seek to encourage potentially affected persons to file comments – thus, courts would be sending the wrong message if they were to adopt an exhaustion rule that made commenters worse off than non-commenters.[201]

He also elaborates on another type of "strategic behavior" that could be encouraged by such a differentiation:

> The practical implications of the proposal are also troubling. Do we want to give a disgruntled commenter an incentive to recruit a non-commenter straw plaintiff to bring a judicial review proceeding to litigate contentions that the commenter is not permitted to litigate directly? If appeals by a commenter and a noncommenter are consolidated, should there be issues that only the latter is permitted to brief?[202]

I agree with the concerns that led Judge Williams to propose making the doctrine inapplicable to parties who did not participate in the rulemaking, but agree with Professor Levin's view that a better goal is "to make the non-commenter no worse off than the person who commented—not to make him better off."[203] The guiding principles that close this paper seek to advance that goal.

I believe that the issue exhaustion doctrine, while perfectly appropriate as applied to adjudication raises problems in the rulemaking context if it is applied across the board. As Markoff has argued:

> Rulemakings do not involve the rights of a few parties; the rules ultimately promulgated affect the physical and economic health and well-being of the entire United States and may have international effects as well. Thus, when a meritorious argument is procedurally barred, it is society at large who suffers for it—not only the individual petitioner. Further, unlike in adjudicatory proceedings, where the parties are contesting their specific interests, there is no guarantee that the parties that participate in rulemakings will be representative of the general interests at stake—a possibility supported by the empirical evidence of imbalanced participation.[204]

[201] Letter from Ron Levin, *supra* note 51, at 5.

[202] *Id.* at 5–6

[203] *Id.* at 6.

[204] Markoff, *supra* note 43, at 1086.

Ossification Effects and Other Policy Arguments

As one who has been a consistent worrywart about increasing ossification of rulemaking,[205] while also generally favoring broader access to judicial review, I should address whether how issue exhaustion affects those two, sometimes conflicting, values.

As discussed above, several judges have suggested the doctrine potentially has a "force-feeding effect" of inducing people to comment on every possible issue they might potentially want to raise in court, which could make the agency's rulemaking task (and the courts' task on judicial review) that much harder.[206] While I support the notice-and-comment process, I would not want commenters to feel they have to file "shotgun" comments in an effort to inoculate themselves from later issue-exhaustion defenses.

Professor Wagner, who has cautioned about information overload in agency proceedings,[207] believes that issue exhaustion in rulemaking is a contributing factor:

> The courts' demand that parties exhaust their administrative remedies was originally conceived of as a way to save agency resources, both by avoiding "premature interruption" of the rulemaking process and by bringing the courts into the picture only as a last resort. But when viewed from the perspective of information, this requirement actually increases the burden on agencies. In order to preserve their claims, rational parties will react by erring on the side of providing too much rather than too little information. Indeed, the rule suggests not only that a party must file a comment before it can litigate but also that it must file that same, specific comment before raising it in court. If a party neglects to raise an argument during the comment period, however preliminarily, it is generally foreclosed from raising the issue later. Because the threat of litigation may be the only, or at least the best, way for stakeholders to get the agency's attention during the rulemaking process, they have strong incentives to lay the groundwork for future legal action by including every plausible argument in their comments.
>
> Additionally, and more worrisome from the standpoint of information excess, the courts have held that more general comments from affected parties--even if lodged in writing and on time—are usually not material enough to matter legally. To preserve issues for litigation, affected parties are thus best-advised to provide comments that are specific, detailed, and well documented. This seemingly

[205] *See e.g.*, Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO NORTHERN. L. REV. 469 (2008).

[206] *See* Portland Cement Ass'n v. EPA, 665 F.3d 177,186 (D.C. Cir. 2011); Portland General Elec. Co. v. Bonneville Power Admin, 501 F.3d 1009, 1024 n. 13 (9th Cir. 2007).

[207] Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1322–23 (2010) ("Rather than filtering information, the incentives tilt in the opposite direction and encourage participants to err on the side of providing too much rather than too little information. Evidence is then offered to show how this uncontrolled and excessive information is taking a toll on the basic objectives of administrative governance."

> reasonable requirement for specificity again encourages interested parties to provide too much documentation, too many specifics, and too much detail, rather than too little.[208]

Another concern is that issue exhaustion seems to exacerbate the already existing tendency for commenters to submit comments at the last possible time in the comment period.[209] This strategy apparently has taken root in NEPA proceedings already.[210]

On the other hand, as Professor Levin argues, the agencies (and, one would have to add, the Department of Justice) support the issue exhaustion doctrine and would prefer to be able to pass on issues rather than be confronted with them for the first time in court. As he pithily put it, "I think they would prefer the shotgun to the sandbag any day."[211]

This paper cannot resolve that question, but I think the competing views argue for a middle ground approach. In some contexts, issue exhaustion makes sense and serves the administrative process and in others it may work too much unfairness or needless formality. The guiding principles at the end seek to help draw this line.

A related issue is that issue exhaustion may benefit well-resourced commenters at the expense of groups that cannot afford to monitor every rulemaking that might affect them. Although some statutes and cases allow for extraordinary circumstances or reasonable grounds for failure to exhaust, these safety valves will likely not be of much use for the low-resourced commenter who simply cannot afford to participate.

While my concern for such participants was fueled by my reading of Judge Williams' concurrence in *Koretoff*, he explained to me that that "lack of resources is only a part of it," and that he was "thinking of firms that have interests that are not well aligned with the weight of industry

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[208] *Id.* at 1363–64 (footnotes omitted).

[209] *See* Steven J. Balla, *Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States*, Admin. Conference of the U.S., 31 n.(Mar. 15, 2011) pdf (finding that one third of comments in a sample of rulemakings were filed in the last three days of the comment period and "analytically informative" comments were even more likely to be filed at the end), *available at* https://www.acus.gov/sites/default/files/documents/Consolidated-Reports-%2B-Memoranda.

[210] E-mail to author from Elizabeth Lewis, former Oceana law clerk (Mar. 17, 2015) (describing the commonly held view that in order to best position itself for potential issue-exhaustion battles in court it was strategically beneficial to submit factual comments in NEPA proceedings at the end of the comment period to avoid tipping off opposing participants about issues that might later be litigated). However, this raises the question of whether, in the absence of the issue-exhaustion doctrine, the strategy would be to submit such comments earlier (or not at all).

[211] Letter from Ron Levin, *supra* note 51 at 4. The Supreme Court has expressed its concerns about "sandbagging" by lawyers appealing lower court losses. It first used the term in *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977), to refer to actions "on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." In *Pickett v. U.S.*, 556 U.S. 129, 134 (2009), the Court, citing *Wainwright*, referred to it in the context of "the contemporaneous-objection rule," which the Court said "prevents a litigant from 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor. *See also* Stern v. Marshall, 131 S. Ct .2594, 2608 (2011) (applying doctrine to failure to raise an issue in the Bankruptcy Court).

viewpoints, which is likely to be true in any industry with a heterogeneous distribution of firms."[212] Thus, he suggested that the concern in the ACUS recommendation be "for persons or firms whose interests are not in close alignment with those persons or firms dominating the associations representing group viewpoints and who reasonably do not find it worthwhile to engage in continuous monitoring of the agency in question."[213]

In any event, the upshot is that it is likely that some unwary potential petitioners are going to be thwarted by the issue exhaustion doctrine, and the litigated cases are probably the tip of the iceberg. As Markoff speculates, "the most important direct effect of issue exhaustion is not in those few dozen cases that are actually adjudicated and barred by the doctrine; it is in the hundreds of cases that are likely never filed because the parties know that they would be barred by the doctrine because they were unable to file comments earlier in the rulemaking process."[214]

Obviously there are even stronger fairness concerns in applying the doctrine to a court challenger that did not know about the rulemaking until it was over or didn't even exist at the time. Perhaps a looser application of the doctrine when a rule is challenged in the enforcement context, as the *Koretoff* court suggested, would help here.[215] I could not, however, find any reported enforcement cases where the issue exhaustion issue had been raised. Indeed, Professor Levin noted[216] that he had seen only two opinions in which issue exhaustion has been discussed in a rulemaking case that did not arise on direct review: *Murphy Exploration*, discussed above in connection with *Koretoff*, and *Dobbs v. Train*,[217] But as he pointed out:

> Neither of these was an enforcement case. In each, litigation was initiated by the challenger. The government pleaded the rule defensively, and the challenger responded by claiming the rule was invalid. And in each case it turned out that the challenger had not only known about the rule all along, but had actually participated in the rulemaking proceeding. Surprise, whether fair or unfair, wasn't involved at all.[218]

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[212] Letter to author from Judge Stephen Williams (April 27, 2015) in connection with the ACUS Committee on Judicial Review consideration of recommendations derived from this report.

[213] *Id*.

[214] Markoff, *supra* note 43, at 1083.

[215] Parties subject to an agency enforcement action based on a rule may challenge the rule, although sometimes Congress seeks to bar such challenges if a party fails to meet a statutory deadline for a pre-enforcement review. But even where a deadline was missed, courts will allow certain types of challenges to be heard in an enforcement challenge, *see e.g.*, Adamo Wrecking Co. v. U.S., 434 U.S. 275 (1978) (allowing challenge to rule in criminal prosecution notwithstanding 30-day limitation on judicial review imposed by the Clean Air Act). *See also* ACUS Recommendation 82-7, *Judicial Review of Rules in Enforcement Proceedings*, 47 Fed Reg. 58,208 (Dec. 30, 1982), and Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203 (2011).

[216] E-mail from Professor Levin to author and to ACUS staff attorney Stephanie Tatham, April 4, 2015.

[217] 409 F. Supp. 432, 434-35 (N.D. Ga. 1975), *aff'd sub nom*. Dobbs v. Costle, 559 F.2d 94 (5th Cir. 1977).

[218] E-mail from Professor Levin to author and to ACUS staff attorney Stephanie Tatham, April 4, 2015.

One should also think about the effect on the courts. On the one hand, a strict application of the doctrine can keep cases or issues out of court entirely. In that sense it may relieve the burden on courts—but that argument surely proves too much because it could be used to severely limit other access-to-review doctrines such as reviewability, standing, ripeness and finality as well. Moreover, the doctrine clearly forces courts to make tough calls on whether the disputed issue had been adequately presented to or known by the agency. I found numerous cases where courts felt compelled to spend a lot of time and effort examining the record and making fine distinctions about whether challenger had raised the issue with sufficient specificity in the rulemaking.

Does the Type of Challenge Matter?

Of course there are many different types of court challenges to rulemaking. Under the APA, petitioners for review can challenge agency rules as (1) unconstitutional, (2) ultra vires, (3) the product of a procedurally defective rulemaking, or (4) arbitrary and capricious. Such challenges can typically be made either pre-enforcement or as a defense to an enforcement action. The GELLHORN & BYSE CASEBOOK usefully breaks down the possible types of rulemaking challenges into five:

> (1) facial constitutional and statutory authority for the rule (which usually can be determined without any need for an administrative record); (2) procedural compliance in the rulemaking; (3) factual support for and judgment reasonability of the rulemaking; (4) as-applied constitutional and statutory for the rulemaking; (5) other issues unique in the particular enforcement context.[219]

It then concludes that challenges 4 and 5 would rarely if ever be ripe for review until the enforcement stage, at which point the rule would be challengeable in court unless there were available opportunities to do so in an agency adjudication.[220] It concludes that type 1 would be "most unlikely to implicate exhaustion concerns,"[221] leaving types 2 and 3, and asks rhetorically "isn't it sensible to insist that *someone* in the rulemaking must prominently have raised them?"[222]

I would suggest that many procedural challenges need not be subject to the issue exhaustion doctrine, since the APA requirement that the challenger show "prejudicial error"[223] along with the presumption that agencies should know the procedural requirements in their own statutes and regulations should provide sufficient bounds and grounds for such challenges. This is not to dispute that it is often beneficial for rulemaking participants to raise procedural issues in their comments, so that agencies can address the problem. On the other hand, some procedural requirements found in the APA or other government-wide procedural statutes are or should be clearly held in mind by the agencies in all rulemakings. Moreover, some procedural challenges

[219] GELLHORN & BYSE CASEBOOK, *supra* note 4, at 1245.

[220] *Id.* at 1245–46. *See* note 39 *supra*. But see the discussion *supra*, text at notes 215–18.

[221] *Id.* at 1246.

[222] *Id.* at 1247.

[223] 5 U.S.C. § 706(2).

cannot logically be raised during the comments. For example, a "logical outgrowth" challenge,[224] based on a lack of fair notice in the notice of proposed rulemaking that the agency was considering an issue that was later added in the final rule, could not by its nature have been raised until the final rule was issued.[225]

However, I agree that arbitrary-and-capricious challenges should perhaps be viewed differently. In such cases there may be a basis for concern that an overly permissive policy might defeat the twin purposes of the general exhaustion doctrine, namely to ensure that the agency has had the opportunity to bring its expertise to bear on the issue before it comes to court, and that courts are spared from having to hear issues that could have been resolved at the agency. On the other hand, we must also remember that rulemaking is a process designed for broad participation, including by those who are unrepresented by counsel, and who may frame their comments "in non-legal terms rather than precise legal formulations."[226]

Conclusion

Since 2000 when Professor Funk wrote that "courts are hopelessly confused" on the subject of issue exhaustion in rulemaking, I don't things have improved much. The Supreme Court has yet to opine on the appropriateness of issue exhaustion in rulemaking. The doctrine has garnered increasing acceptance in the D.C. Circuit and spotty acceptance in other circuits. But a close review of the cases shows that that many of them either involve the Clean Air Act, in which the doctrine is statutory, or involve either rulemakings of particular applicability or rulemakings conducted under quasi-adjudicative procedures, or are based on precedents that stem from the application of issue exhaustion in agency adjudications or in challenges to NEPA assessments. And the D.C. Circuit's recent *Koretoff* case has raised the possibility of limiting the doctrine to pre-enforcement review cases—thus preserving the right for parties to raise previously unpresented issues in a defense to rule-enforcement. In short, for the most part, the issue exhaustion doctrine is a prudential doctrine originally designed to apply to court challenges to agency adjudications, and it does not comfortably fit most challenges to agency rulemakings

Courts still do not devote enough attention to the fact that most of the statutes and judicial precedents derive from remedy exhaustion statutes or at least statutes governing agency adjudication. Courts are inconsistent on the subject of whether the formal/informal distinction raised in *Sims* should be dispositive. They are also inconsistent on whether the type of legal challenge to the rulemaking matters. Given all this, it is perhaps not surprising that it is possible

[224] *See e.g.*, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007) (recognizing the logical outgrowth test and citing court of appeals cases that have applied it).

[225] But see Utility Air Regulatory Group v. EPA, 744 F.3d 741 (D.C. Cir. 2014) (under Clean Air Act's rulemaking exhaustion provision, even a procedural challenge such as a logical outgrowth claim must first be presented to EPA in petition for reconsideration). In this case the challengers did present this issue in a petition for reconsideration in 2012; however the agency had already signaled its opposition to this argument in court and had not ruled on the petition by May 2014. Meanwhile the challenged rule had gone into effect after the court and agency denied stay requests. *See* Richard G. Stoll, *Protection of Judicial Review Watered Down in D.C. Circuit*, Daily Environment Report (BNA) (May 16, 2014).

[226] Paraphrasing the court in *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 900 (9th Cir. 2002).

to distill a fairly long list of ad hoc exceptions to application of the doctrine has grown, and that courts apply them rather inconsistently. And Congress has only twice waded into the area of issue exhaustion in rulemaking.

Congress does of course, retain the power to require issue exhaustion, and there may be some rulemaking contexts where that would make sense, such as that presented by the Clean Air Act, where judicial review is concentrated in the D.C. Circuit and the parties are sophisticated repeat players, or by CERCLA, for the reasons mentioned above.[227] There may also be situations in the context of challenges to agency delay or inaction where the failure to file a petition for rulemaking would appropriately prevent consideration of the challenge on the basis of failure to exhaust administrative remedies.

But clearer lines need to be drawn—for the courts and for Congress to consider in individual statutes. The case for issue exhaustion is strongest in those types of rulemakings that are closest to adjudications. If the rulemaking statute is a formal or hybrid one, offering opportunities to request hearings, or if the rulemaking is one of particular applicability, issue exhaustion would normally be appropriate, unless the party had a good excuse for not participating in the hearing.

Issue exhaustion also makes more sense as well when the court challenge is based on factual disputes with the agency (or complaints that the agency should have chosen an alternative approach to the rule), couched as an arbitrary-and-capricious challenge. These are the types of arguments that can most beneficially be brought to the agency's attention first.

But constitutional or other purely legal arguments, or procedural challenges, would normally not benefit as much and might even be fruitless if not futile to bring to the agency's attention. Not only are these the type of questions that courts can decide without agency's help (some legal issues may be exceptions), but agencies should be intrinsically aware of their own jurisdiction, statutory authority, and applicable procedures anyway.

Guiding Principles[228]

Congress in enacting judicial review statutes, and the courts in interpreting such statutes and in making prudential decisions about what issues may be raised in challenges to rules, should consider the following principles:

1. The "issue exhaustion doctrine," which requires that issues raised in court challenges to agency action should first be raised with the agency, applies less squarely to rulemaking cases than it does to cases involving administrative adjudication. It also applies more comfortably to pre-enforcement review cases than to as-applied cases such as cases where rules are challenged in the context of an enforcement proceeding.

2. The issue exhaustion doctrine is most appropriately applied to certain types of rulemaking:

[227] *See* text at note 119, *supra*.

[228] This report seeks to present some guiding principles for the Committee on Judicial Review to consider in its deliberations. Further development of recommendations is expected.

- Where statutorily required;
- To rulemakings of particular applicability;
- To rulemakings that are conducted using procedures that include a right to a hearing, unless the litigating party had a good excuse for not participating in such hearings;

3. The issue exhaustion doctrine is most appropriately applied in rulemaking cases to certain types of issues and is less appropriately applied to others.

A. Most appropriately applied to challenges to:

- Agency fact-finding, reasoning, choice of alternatives and other similar issues that are incorporated in the arbitrary and capricious test.
- Agency failures to exercise their discretion;

B. May be appropriately applied to challenges to (depending on the circumstances):

- Agency interpretations of their own statute;
- Agency failures to follow a statutory requirement found in a law that is not the APA or its own organic statute;

C. Ordinarily not appropriately applied to challenges to:

- Agency violations of the Constitution;
- Agency actions that raise purely legal questions that would not be aided by the agency's view;
- Agency violations of basic procedural requirements contained in the APA, their own statutes, or their own regulations.

4. Even when the issue exhaustion doctrine is applicable in the rulemaking context, courts should allow parties who did not raise the issue in the comment process to raise it in court if:

- Another commenter raised the issue sufficiently;
- The agency raised the issue sua sponte;
- Other circumstances make clear that the agency was aware of the issue;
- The issue was so fundamental that the agency can be presumed to have been aware of it;
- They are challenging the rule in the context of an as-applied challenge, such as a defense to an enforcement action;

5. In addition, even when the issue exhaustion doctrine is applicable in the rulemaking context, courts should apply the standard exceptions to the exhaustion of remedies doctrine, such as:

- issues, that by their nature could not have been raised before the agency (e.g., a material change in circumstances or a serious impropriety in the administrative process);
- where the challenged action is patently in excess of the agency's authority;
- where it would have been futile to raise before the agency;
- where the agency has in fact considered the issue;
- where the obvious result would be a plain miscarriage of justice.[229]

6. Reviewing courts should allow litigants challenging rules to have a full opportunity to demonstrate that they did in fact raise the issue first with the agency or that any of the above circumstances—indicating that application of the doctrine would be inappropriate—are present.

[229] *See WATCH*, 712 F.2d at 682.

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-NINETEENTH YEAR
IN CHICAGO, ILLINOIS
JULY 9-16, 2010

WITH PREFATORY NOTE AND COMMENTS

October 15, 2010

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REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

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REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

Prefatory Note

The 1946 Model State Administrative Procedure Act

The Model State Administrative Procedure Act (Act) of the National Conference of Commissioners on Uniform State Laws (Uniform Law Commissioners) has furnished guidance to the states since 1946, the date that the first version of the Act was promulgated and published. The Federal Administrative Procedure Act was drafted at about the same time as the 1946 Act, and there was substantial communication between the drafters of the two acts.

The 1946 Act incorporated basic principles with only enough elaboration of detail to support essential features[1] of an administrative procedure act. This is a major characteristic of a "model", as distinguished from a "uniform", act. The drafters of the 1946 Act explained that a model act approach was required because details of administrative procedure must vary from state to state as a result of different general histories, different histories of legislative enactment and different state constitutions. Furthermore, the drafters explained, the Act could only articulate general principles because 1) agencies – even within a single state – perform widely diverse tasks, so that no single detailed procedure is adequate for all their needs; and 2) the legislatures of different states have taken dissimilar approaches to virtually identical problems.[2] By about 1960, twelve states had adopted the 1946 Act.[3]

The 1961 Model State Administrative Procedure Act

As a result of several studies conducted in the nineteen fifties, the Uniform Law Commissioners decided to revise the 1946 Act. The basis given for that decision was that a maturing of thought on administrative procedure had occurred since 1946. The drafters of the 1961 Act explained that their goals were fairness to the parties involved and creation of procedure that is effective from the standpoint of government.[4] The resulting 1961 Act also followed the model, not uniform, act approach, because "details must vary from state to state." The 1961 APA purposely included only "basic principles" and "essential major features." Some of those major principles were: requiring agency rulemaking for procedural rules; rulemaking procedure that provided for notice, public input and publication; judicial review of rules; guarantees of fundamental fairness in adjudications; and provision for judicial review of agency adjudication. Over one half of the states adopted the 1961 Act or large parts of it.[5]

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[1] 1946 Model State Administrative Procedure Act preface at 200.

[2] Id. at 200

[3] Those states, as identified in the preface to the 1961 Model State Administrative Procedure Act were: North Dakota, Wisconsin, North Carolina, Ohio, Virginia, California, Illinois, Pennsylvania, Missouri, Indiana.

[4] Preface to 1961 Model State Administrative Procedure Act.

[5] Uniform Laws Annotated at 357 (1980 Master Edition) catalogued numerous states that used the 1961 Model State Administrative Procedure Act. They are: Arizona, Arkansas, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

The 1981 Model State Administrative Procedure Act

In the nineteen seventies, the Uniform Law Commissioners began work on another revision of the Act which was completed in 1981. The Uniform Law Commissioners based the need for this revision on greater experience with administrative procedure by state governments, and growth in state government in such areas as the environment, workplace safety and benefit programs. This growth, it was argued, was so great as to effect a change in the nature of state government. The 1981 Act sought to deal with those changes.

The preface to the 1981 Act explained that the approach to drafting had changed from the 1946 and 1961 Acts. According to the drafters, the 1981 Act was entirely new, with more detail than earlier versions of the Act. This expanded focus on detail was explained to be based on changed circumstances in the states and greater state experience with administrative procedure since 1961.[6] The 1981 Act, when completed, consisted of ninety-four sections[7]. In the twenty-odd years since promulgation of the 1981 Act, Arizona, New Hampshire, and Washington have adopted many of its provisions. Several other states have drawn some of their administrative procedure provisions from the 1981 Act.[8]

The Present Revision

There are several reasons for revision of the 1981 Act. It has been more than twenty-eight years since the Act was last revised. There now exists a substantial body of legislative action, judicial opinion and academic commentary that explain, interpret and critique the 1961 and 1981 Acts and the Federal Administrative Procedure Act. In the past two decades state legislatures, dissatisfied with agency rulemaking and adjudication, have enacted statutes that modify administrative adjudication and rulemaking procedure. The Section on Administrative Law & Regulatory Practice of the American Bar Association has recently undertaken a major study of the Federal Administrative Procedure Act and has recommended revision of some provisions of that act. Since some sections of the Model State Administrative Procedure Act are similar to the Federal Act, the ABA study furnishes useful comparisons for the Act. The emergence of the Internet, which did not exist at the time of the last revision of the Act, is another event that the Model State Administrative Procedure Act must address. Many states adopted legislative review statutes since the 1981 Act was adopted. Finally, since the 1981 Act, twenty five states have adopted central panel administrative law judge provisions. What has been learned from the experience in those states can be used to improve this Act.

The 2010 Act is a Model Act like the 1946, 1961, and 1981 Acts. A model act is needed because state administrative law in the 50 states is not uniform, and there are a variety of approaches used in the various states. The drafting committee has sought to draft provisions that

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[6] Preface, 1981 Model State Administrative Procedure Act. The greater emphasis on detail in the 1981 Model State Administrative Procedure Act is apparent from the text of the preface.

[7] For example, the 1961 Model State Administrative Procedure Act contained nineteen sections; the 1981 Model State Administrative Procedure Act contained almost ninety sections divided among five different articles. The 2010 Act contains slightly more than 60 sections divided into eight articles. The 2010 Act is 75% of the length of the 1981 Act, but covers more topics.

[8] Some of those states are: Florida, Iowa, Kansas, California, Mississippi and Montana.

represent best practices in the states, and has limited the use of alternatives. The drafting committee had three goals governing the drafting process, fairness, efficiency, and ensuring public access to agency information. The 2010 Act has made use of bracketed language in many sections so that a state legislature may make one of several decisions depending on the type of bracket. For example, the bracketed term [publisher] in Article Two allows state legislatures to substitute the specific state agency name in their state for the agency that performs publication functions. Other brackets give state legislatures the choice to select one of several alternatives. For example, in Section 201(b), four options are bracketed for the type of format, electronic or written, in which the publisher can publish rulemaking documents. Other brackets are used for timing requirements and the numbers of days, months or years are bracketed so that state legislatures have the option of changing the specified amount of time for that particular timing requirement. The bracketed number represents the drafting committee recommendation as to best practices. See for example, Section 304(a), which brackets the number 30 as part of timing requirements for rulemaking. Finally brackets are use in Article Seven with the term [joint resolution] or [concurrent resolution] because states constitutions vary as to whether a concurrent resolution (without the governor signing a bill) is proper for legislative disapproval review of an agency rule. States can choose which provisions of the 2010 Act to adopt.

The 2010 Act returns to the external hearing rights approach followed in the 1961 Act because this is the approach taken by the federal APA and the majority of state laws. The 2010 Act requires hearings when constitutionally required as well as hearings required by statute. This approach is codified in the definition of a contested case in Section 102(7). The external hearing rights approach is narrower than the approach adopted in the 1981 Act which contained an internal definition of the scope of hearing rights (1981 MSAPA Section 4-102). Under the 1981 Act, evidentiary hearings were required for an extremely wide range of disputes between citizens and the government. For example, under the 1981 Act, a hearing would be required for a state park ranger's refusal to issue a camping permit, even if the permit denial did not infringe upon other constitutionally or statutorily protected rights. A variety of other generalized approaches, however, have been taken in some states to require hearings whenever agency actions substantially and directly affect the property, privileges or rights of individuals who are parties to or are affected by agency actions. The Act's inclusion of an external rights approach does not imply that the uses of generalized standards to determine when hearings are required are inappropriate in those states.

The 2010 Act is lengthier than the 1961 Act, but shorter and less detailed than the 1981 Act [9]. The 2010 Act is designed especially for adoption by states that currently have the 1961 Act, but would like to replace that act with a more modern up to date administrative procedure act. The 2010 Act is designed to ensure fairness in administrative proceedings, increase public access to the law administered by agencies, and promote efficiency in agency proceedings by providing for extensive use of electronic technology by state governments. The 2010 Act is streamlined when compared to the 1981 Act and has been drafted to be less detailed and less comprehensive. Consistent with both the 1961 MSAPA and the 1981 MSAPA, the Act provides for a uniform minimum set of procedures to be followed by agencies subject to the act. The 2010

9 . The 1981 Act contained 19,572 words. The 2010 Act contains only 16,505 words. This is a reduction of approximately 20% even though the 2010 Act has many new provisions and one entirely new Article 6 concerning administrative law judges.

Act creates only procedural rights and imposes only procedural duties. Throughout the 2010 Act there are provisions that refer generally to other state laws governing related topics. When specific state laws are inconsistent with the provisions of the 2010 Act, those specific state laws will be controlling.

The 2010 Act is divided into eight articles. Article One contains extensive definitions of key terms used in the act. These definitions are designed to be used with the operative provisions in the other articles of the act. Some of the key definitions in Article One include contested case, Section 102(7), which defines the scope of hearings rights under Article Four to include opportunities for hearings required by federal or state constitutional or statutory law. This definition utilizes the external hearing right approach and limits the circumstances to which the Article Four hearing procedures apply. Another key definition is guidance document, Section 102(14), which is applicable to Section 311 which authorizes an agency to issue a guidance document without following the rulemaking procedural requirements of Article Three. Another key definition is Rule, Section 102(30), which defines which agency pronouncements are rules that have to be adopted following the procedures of Article Three, Sections 304 to 308, and which listed documents are not subject to those requirements (Section 102 (30) (A) to (F). Many of the new Article One definitions result from the technological development of the internet and the widespread use of electronic media by governmental entities. Examples of this type of definition include electronic (Section 102(8), electronic record (Section 102(9), and internet web site (Section 102(17). New definitions for contested cases under Article Four include presiding officer (Section 102(26), final order (Section 102(12)), initial order (Section 102(16)), and recommended order (Section 102(28)). The latter three definitions reflect the complexity of types of orders in state administrative law.

Article Two contains provisions ensuring public access to agency law and policy. This article provides for indexing of agency documents, as well as electronic posting and distribution of documents. Article Two modernizes and codifies publishing responsibilities for agencies that have primary responsibility for rules publishing (Section 201), and for agencies that adopt rules (Section 202 and 203). Article Two also provides for declaratory orders which interpret or apply statutes administered by the agency and states the manner of applicability of agency rules, guidance documents or orders (Section 204) and default procedural rules (Section 205). The provisions of Article Two are not intended to replace the requirements of state open meeting or public records laws.

Article Three contains provisions governing rulemaking by agencies. Important new provisions are agency record in rulemaking (Section 302), which provides for the rulemaking documents to be maintained by the agency and facilitates judicial review based on an agency rulemaking record; negotiated rulemaking (Section 303) which provide for a process by which an agency can obtain feedback from various stakeholder groups appointed to a committee and can attempt to obtain advisory information concerning consensus on the terms or substance of a proposed rule through the committee process; direct final rulemaking (Section 310), which provides for a streamlined process for adoption of rules that are expected to be non controversial; and guidance document (Section 311) which include an agency interpretive statement and other statements that are issue by an agency but that do not have the force of law behind them. Section 311 provides for the procedures to be use with guidance documents, and also provides for important safeguards in the use of guidance documents by an agency. Article Three provides a basic set of rulemaking procedures under Sections 304 to 308 that an agency must follow, with

an exception for emergency rulemaking (Section 309) and for direct final rulemaking (Section 310) which are governed by different procedures that are specified in each section.

Article Four contains provisions for adjudication in contested cases. Section 401 provides that Article Four applies to an adjudication made by an agency in a contested case. The contested case definition, Section 102(7), codifies the external hearing rights concept. When an opportunity for a hearing is required by a federal or a state constitutional or statutory law provision, the Article Four procedures are applicable. Article Four provides for a variety of presiding officers (Section 402), including the agency head, and for recommended, initial, and final orders in contested cases (Section 413). This is based on variations in state law governing delegation of decisional authority in adjudication. Article 4 procedures are designed to be used by both central panel agencies (governed by Article Six) and enforcement agencies that conduct their own contested case hearings (Section 402(a)).

Section 408 governs ex parte communications but also contains separation of functions provisions (Section 408(d), (e)). Section 408 (c) prescribes limited exceptions for ex parte communications authorized by statute or for uncontested procedural issues. Section 408(d) prescribes limited exceptions for communications with legal advisors, and ministerial communications with staff of the presiding officer and the final decision maker. Section 408(e) includes an agency head exception that is narrower than the provisions of the 1981 Act (Section 4-213(b)). Section 408(e) permits the agency head to have communications with staff that does not augment, diminish or modify the evidence in the agency hearing record (Section 408(e)(2)), and that satisfies one of three other alternatives: including an explanation of the technical or scientific basis or terms in the evidence in the agency hearing record (Section 408(e)(2)(A)), an explanation of the precedent, policies, or procedures of the agency (Section 408(e)(2)(B)), or any other communication that does not address the quality, sufficiency of , or the weight that should be given to evidence in the agency hearing record, or the credibility of witnesses (Section 408(e)(2)(C)). These three alternatives are new and are a departure from the 1981 Act which included only the "does not augment, diminish or modify the evidence in the agency hearing record" language. An ex parte communication will fall within the Section 408(e) exception if both the stated language of subsection (e)(2), and one of the alternatives listed in subsection (e)(2)(A),(B), or (C), are satisfied. Section 408(e)(2) is a middle ground reached by the drafting committee in response to polar positions that advocated on the one hand for no agency head exception (thus deleting subsection (e) entirely), and views on the other hand that supported the approach of the 1981 Act (with only the language of subsection (e)(2) and not the added language in subsection (e)(2)(A),(B), or (C). This middle ground recognizes the need for agency heads, who often lack legal or technical knowledge of the issues that come before the agency, so as to obtain staff advice when acting as a presiding officer or a final decision maker, but also carefully circumscribes the types of communication that can occur. If an improper ex parte communication is made or received by a presiding officer or final decision maker, Section 408(f) requires that the communication be made part of the record, and Section 408(g) requires notice to the parties and an opportunity to respond to the communication.

Article Five contains provisions governing judicial review of final agency action. The standing (Section 505) and scope of review (Section 507) sections are key provisions that are set forth in short and concise language. Most states have a substantial body of judicial review case law covering these issues and others. The 2010 Act's provisions are designed to be consistent with the existing laws of many states that take a variety of approaches to judicial review. The Act

does not address civil or appellate procedure issues, the court chosen for judicial review of administrative law rules or orders, or the vehicle for review such as whether an appeal or a writ of mandate is filed to invoke judicial review of administrative agency action. Those issues are governed by state law other than this act.

Article Six contains provisions governing central panel hearing agencies, typically named the office of administrative hearings. The growth of central panel agencies in the states since the adoption of the 1981 Act has been significant with 25 states currently having these agencies. In central panel agencies, the ALJ's who preside over contested case hearings work for the central panel agency, not for the agency whose contested case is being adjudicated. This provides for a neutral separation of the hearing and decision authority from the agency authority to enforce the law and adopt agency rules. Central panel agencies have independence from other executive branch agencies which can provide for greater fairness in contested case hearings. Article Six is based on the ABA Model Central Panel Act, and provides for the essential provisions of law that a state legislature would need to create a central panel agency. This Act is drafted so that central panel administrative law judges would be presiding officers in contested case proceedings governed by the provisions of Article Four (Section 402(a)), and those provisions would govern procedures in contested cases heard by central panel administrative law judges. The chief administrative law judge of the central panel agency may also adopt procedural rules to govern contested case hearings (Section 604(6)). A key provision in Article Six is Section 606(a) which provides that an administrative law judge shall issue a final order in a contested case, if final order authority has been delegated to the central panel agency by the agency head.

Article Seven contains provisions related to legislative review of agency rules. Legislative review of agency rules has become widespread in the states. State constitutions vary as to whether a joint or concurrent resolution (without gubernatorial approval) vetoing an agency rule satisfies the state constitution. Some state constitutions require that the legislature pass a bill that is presented to the governor for approval. Article Seven is drafted so that both state approaches are presented as bracketed alternatives. Under Section 703, the rules review committee has the power to approve or disapprove of rules within 30 days after receiving a copy of the rule from the adopting agency. Disapproved rules will still become effective at the adjournment of the next regular session of the legislature unless before adjournment the Legislature adopts a joint or concurrent resolution sustaining the action of the rules review committee.

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the [State] Administrative Procedure Act.

SECTION 102. DEFINITIONS. In this [act]:

(1) "Adjudication" means the process for determining facts or applying law pursuant to which an agency formulates and issues an order. "Adjudicate" has a corresponding meaning.

(2) "Adopt", with respect to a rule, includes to adopt a new rule and to amend or repeal an existing rule. "Adoption" has a corresponding meaning.

(3) "Agency" means a state board, authority, commission, institution, department, division, office, officer, or other state entity that is authorized by law of this state to make rules or to adjudicate. The term does not include the Governor, the [Legislature], or the Judiciary.

(4) "Agency action" means:

(A) the whole or part of an order or rule;

(B) the failure to issue an order or rule; or

(C) an agency's performing or failing to perform a duty, function, or activity or to make a determination required by law.

(5) "Agency head" means the individual in whom, or one or more members of the body of individuals in which, the ultimate legal authority of an agency is vested.

(6) "Agency record" means the agency rulemaking record required by Section 302, the hearing record in adjudication required by Section 406, the hearing record in an emergency adjudication under Section 407, or the record for review compiled under Section 507(b).

(7) "Contested case" means an adjudication in which an opportunity for an evidentiary

hearing is required by the federal constitution, a federal statute, or the constitution or a statute of this state.

(8) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(9) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(10) "Emergency adjudication" means an adjudication in a contested case when the public health, safety, or welfare requires immediate action.

(11) "Evidentiary hearing" means a hearing for the receipt of evidence on issues on which a decision of the presiding officer may be made in a contested case.

(12) "Final order" means the order issued by the agency head sitting as the presiding officer in a contested case, the order issued following the agency head review of a recommended order, the order issued following the agency head review of an initial order, or the order issued by the presiding officer when the presiding officer has been delegated final decisional authority with no subsequent agency head review.

(13) "Final rule" means a rule adopted, amended, or repealed under Sections 304 through 308, an emergency rule adopted under Section 309, or a direct final rule adopted under Section 310.

(14) "Guidance document" means a record of general applicability developed by an agency which lacks the force of law but states the agency's current approach to, or interpretation of, law, or describes how and when the agency will exercise discretionary functions. The term does not include records described in paragraph (30)(A), (B), (C), or (D).

(15) "Index" means a searchable list in a record of subjects and titles with page numbers, hyperlinks, or other connectors that link each index entry to the text to which it refers.

(16) "Initial order" means an order that is issued by a presiding officer with final decisional authority if the order is subject to discretionary review by the agency.

(17) "Internet website" means a website on the Internet or other appropriate technology or successor technology that permits the public to search a database that archives materials required to be published by the [publisher] under this [act].

(18) "Law" means the federal or state constitution, a federal or state statute, a federal or state judicial decision, a federal or state rule of court, or an executive order that rests on statutory or constitutional authority.

(19) "License" means a permit, certificate, approval, registration, charter, or similar form of permission required by law and issued by an agency.

(20) "Licensing" means the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(21) "Notice" means a record containing information required to be sent to a person by this [act].

(22) "Notify" means to take steps reasonably required to inform a person, regardless of whether the person actually comes to know of the information.

(23) "Order" means an agency decision that determines or declares the rights, duties, privileges, immunities, or other interests of a specific person.

(24) "Party" means the agency taking action, the person against which the action is directed, any other person named as a party, or any person permitted to intervene and that does intervene.

(25) "Person" means an individual, corporation, business trust, statutory trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or

commercial entity.

(26) "Presiding officer" means an individual who presides over the evidentiary hearing in a contested case.

(27) "Proceeding" means any type of formal or informal agency process or procedure commenced or conducted by an agency. The term includes adjudication, rulemaking, and investigation.

(28) "Recommended order" means an order issued by a presiding officer if the officer does not have final decisional authority and the order is subject to review by the agency head.

(29) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(30) "Rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy or the organization, procedure, or practice requirements of an agency and has the force of law. The term includes the amendment or repeal of an existing rule. The term does not include:

(A) a statement that concerns only the internal management of an agency and which does not affect private rights or procedures available to the public;

(B) an intergovernmental or interagency memorandum, directive, or communication that does not affect private rights or procedures available to the public;

(C) an opinion of the Attorney General;

(D) a statement that establishes criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections, settling commercial disputes, negotiating commercial arrangements, or defending, prosecuting, or settling cases, if disclosure of the criteria or guidelines would enable persons violating the law to avoid detection, facilitate disregard of requirements imposed by law, or give an improper advantage to persons that are in

an adverse position to the state;

(E) a form developed by an agency to implement or interpret agency law or policy; or

(F) a guidance document.

(31) "Rulemaking" means the process for the adoption of a new rule or the amendment or repeal of an existing rule.

(32) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(33) "Writing" means a record inscribed on a tangible medium. "Written" has a corresponding meaning.

Comment

Adjudication. This definition is based on 1981 MSAPA Section 4-101(a). The purpose of the definition is to differentiate between agency proceedings under Article Four from rulemaking proceedings under Article Three. This definition should be read in conjunction with the definitions of "contested case" Section 102(7), "evidentiary hearing" under Section 102(11), and of "order", Section 102(23), infra. Article Four procedures apply to adjudications that are contested cases, Section 401, and that result in a final order of the agency, Section 413.

Adopt with respect to a rule. This definition is new to this act. The purpose of this definition is to include amendment or repeal of an existing rule within the meaning of the term adopt with respect to a rule. This definition eliminates to need to use the phrase, "adopt, amend, or repeal" in numerous sections of the act. This definition should be read in conjunction with the terms "final rule" in Section 102(13), "rule" in Section 102(30), and "rulemaking" in Section 102(31). This term is primarily used in Article Three which governs rulemaking by agencies.

Agency. This definition is based on 1961 MSAPA Section 1(1), and 1981 MSAPA Section 102(1). The definition includes the authorized by law to make rules or to adjudicate language from 1961 MSAPA Section 1(1), which was omitted from 1981 MSAPA Section 102(1). This definition uses the term to adjudicate rather than the term to determine contested cases from the 1961 Act. The purpose of this definition is to subject as many state actors in the executive branch of state government as possible to this definition. The definition applies only to state actors, not local agencies. There are exceptions for the governor, the legislature, and the judiciary. The exception for the governor means the governor personally. The term agency is

used numerous times in the other articles of the Act. The term "agency" includes the Office of Administrative Hearings provided in Article 6. The term "agency should be read in conjunction with the terms "party" in section 102(24), and the term "person" in Section 102(25).

Agency Action. This definition is based on 1981 MSAPA Section 1-102(2). The purpose of the definition is to identify those matters that are subject to judicial review under Article Five. The term "agency action" includes the term "rule", defined in Section 102(30), and the term "order", defined in section 102(23). Failure to issue an order or rule is not judicially reviewable except as provided in Section 501(d) of the Act. Failure to issue an order or rule does not include an agency denial of a petition for a declaratory order or to initiate rulemaking. See Sections 204(d) and 318(1) of the Act. The third definition of agency action, under Section 102(4)(C), is broader and includes agency action that is neither a "rule" nor an "order". The purpose of the third definition is to make agency action broadly subject to judicial review, but the availability of judicial review of agency action is governed by the provisions of Article Five, See Section 501, and the scope of review by Section 508.

Agency Head. This definition is based on 1981 MSAPA Section 1-102(3). The purpose of the definition is to differentiate between the agency as an organic whole and the particular person or persons (single agency head, or commissioners, and board members) in whom the final decisional authority of the agency is vested. The term "agency head" is also used numerous times throughout the act to differentiate between agency employees other than the agency head who may be delegated the responsibility to carry out functions under the Act from the agency head who has the legal authority to carry out those functions. See, for example, Section 402(a) in which the agency head has the authority to be the presiding officer in a contested case, but the agency head may also designate another individual to be the presiding officer.

Agency Record. This definition is new to the Act. The purpose of the definition is to differentiate between the different types of agency records required to be maintained under the provisions of Articles Three, Four, and Five. The definition lists the different types of agency records by more specific terms and by sections of the Act. The definition provides a roadmap for the various types of agency records requirements in the Act. The definition should be read, as applicable, in conjunction with the provisions of Sections 302, 309, 310, 406, 407, and 507(b). The term "record" defined in Section 102 (29) refers to the medium for storage of information and does not address the requirements of the content of agency records.

Contested case. This term is similar to the "contested case" definition in Section 1(2) of the 1961 MSAPA. Like the 1961 MSAPA, this Act looks to external sources such as statutes and constitutions to determine when a party is entitled to an evidentiary hearing. However, this term differs from the 1961 MSAPA's term "contested case" because it also includes evidentiary hearings required by the constitution, federal or state, and makes provision in Article 4 for the type of evidentiary hearing to be held in a case where a constitution creates the right to an evidentiary hearing. Including constitutionally created rights to an evidentiary hearing within the provisions of this Act eliminates the problem of looking outside the Act to determine the type of evidentiary hearing required in cases where the right to the evidentiary hearing is created by a constitution. Evidentiary hearing rights created by judicial decisions means constitutional decisions by courts in that state. See Goldberg v. Kelly, 397 U.S. 254 (1970). The definition of "contested case" should be read in conjunction with the definitions of "adjudication" under Section 102(1), "evidentiary hearing" under Section 102(11), "final order" under Section

102(12), and of "order", Section 102(23). Article Four procedures apply to adjudications that are contested cases, Section 401, and that result in a final order of the agency, Section 413. Article Four does not apply to informal adjudications, which are not contested cases.

Electronic. This definition is new to the act. The definition is based on and has the same meaning as the provisions of the Uniform Computer Information Transactions Act Section 102(a)(26), and the Uniform Electronic Transactions Act, Section 2(5). The term "electronic" refers to the use of electrical, digital, magnetic, wireless, optical, electromagnetic and similar technologies. It is a descriptive term meant to include all technologies involving electronic processes. The listing of specific technologies is not intended to be a limiting one. The definition is intended to assure that this act will be applied broadly as new technologies develop. For example, biometric identification technologies would be included if they affect communication and storage of information by electronic means. As electronic technologies expand and include other competencies, those competencies should also be included under this definition. State agencies widely use electronic media to disseminate information to the public. See Article Two for agency duties to provide public access to agency law. This definition should be read in conjunction with the terms "record" defined in Section 102(29), "electronic record" defined in Section 102(9), and "internet web site" defined in Section 102(17).

Electronic Record. This definition is new to the Act. The definition is based on and has the same meaning as the provisions of the Uniform Electronic Transactions Act, Section 2(7). An "electronic record" is a document that is in an "electronic" form. Documents may be communicated in electronic form; they may be received in electronic form; they may be recorded and stored in electronic form; and they may be received in paper copies and converted into an electronic record. This Act does not limit the type of electronic documents received by the [publisher]. The purpose of defining and recognizing electronic documents is to facilitate and encourage agency use of electronic communication and maintenance of electronic records. State agencies widely use electronic media to disseminate information to the public. See Article Two for agency duties to provide public access to agency law. This definition should be read in conjunction with the terms "record" defined in Section 102(29), "electronic" defined in Section 102(8), and "internet web site" defined in Section 102(17).

Emergency Adjudication. This definition is based on 1981 MSAPA Section 4-105(a). The definition should be read in conjunction with Section 407, emergency adjudication procedure. The definition is designed to be used with the emergency adjudication procedures provided by Section 407. The danger to the public health, safety, or welfare standard requiring immediate action is a strict standard that is defined by law other than this Act. Federal and state case law have held that in an emergency situation an agency may act rapidly and postpone any formal hearing without violation, respectively, of federal or state constitutional law. FDIC v. Mallen, 486 U.S. 230 (1988); Gilbert v. Homar (1997) 520 U.S. 924; Dep't of Agric. v. Yanes, 755 P.2d 611 (OK. 1987).

Evidentiary Hearing. This definition is new to this Act and describes the process for an evidentiary hearing. This definition should be read in conjunction with the definitions of "adjudication" under Section 102(1), "contested case" under Section 102(7), "final order" under Section 102(12), and of "order", Section 102(23). Article Four procedures apply to adjudications that are contested cases, Section 401, and that result in a final order of the agency, Section 413. The definition of contested case in Section 102(7) includes the language "opportunity for an

evidentiary hearing", and that term is defined here. The contested case definition provides for external sources of law to determine the opportunity for an evidentiary hearing, but the type of hearing provided is defined in this definition. The specifics of hearing procedure for contested cases are detailed in the provisions of Article Four of this Act.

Final Order. This definition is new to this act and applies to Article Four adjudication proceedings. See Section 413, Orders: Final, Recommended, and Initial. This definition should be read in conjunction with the terms "initial order" in Section 102(16), "order" in Section 102(23), and "recommended order" in section 102(28).

Guidance document. This definition is new to this act and is similar to the Michigan APA, M.C.L.A. 24.203(6), and the Virginia APA, Va. Code Ann. SECTION 2.2-4001. See also the; Idaho I.C. SECTION 67-5250 and N.Y. McKinney's State Administrative Procedure Act, SECTION 102. This is a definition intended to recognize that there exist agency statements for the guidance of staff and the public that differ from, and that do not constitute, rules. Many states recognize such statements under the label "interpretive statement" or "policy statement." See Wash. Rev. Code, SECTION 34.05.010(8) & (15). See: Michael Asimow, Guidance Documents in the States, 54 Adm. L. Rev. 631 (2002); Michael Asimow, California Underground Regulations, 44 Adm. L. Rev. 43 (1992). This definition should be read in conjunction with Section 311, Guidance Documents. Agencies are required by Section 202(a) to publish guidance documents issued by agencies under Section 311 and to publish the index of currently effective guidance documents prepared under Section 311(f).

Index. This definition is new to this act and is designed to include both paper and electronic versions of an index . The definition of index has been added as a guide to agencies, [publisher]s and editors about their duties to make records available and easily accessible to the public in the form of an index, as that term is used throughout this act. States can satisfy the requirement of an index by providing a record that is searchable by Word on the Internet, unless a hard copy index is required. Agencies may also satisfy the index requirements by providing hypertext links to index items. This definition should be read in conjunction with Sections 201, and 202. The rules publisher is required to publish an index of the contents in the administrative bulletin, Section 201(g), and index of the contents of the administrative code, Section 201(h). Agencies are required by Section 202 to publish an index of declaratory orders prepared under Section 204(g), an index of currently effective guidance documents prepared under Section 311(f), and an index of final orders in contested cases prepared under Section 418(a).

Initial Order. This definition is new to this act and applies to Article Four adjudication proceedings. See Section 413, Orders: Final, Recommended, and Initial. This definition should be read in conjunction with the terms "final order" in Section 102(12), "order" in Section 102(23), and "recommended order" in section 102(28).

Internet website. This definition is new to the act and is designed to be used by agencies and publishers to comply with the requirements of Section 201, publication: publisher's duties, Section 202, publication: agency duties, Section 316, filing of rules,, and Section 418, availability of orders; index of this Act. In many states, the Internet website is maintained by the [publisher], and in some states the agency also maintains its own Internet website. State agencies widely use electronic media to disseminate information to the public. See Article Two for agency duties to provide public access to agency law. This definition should be read in conjunction with

the terms “electronic” defined in Section 102(8), “electronic record” defined in Section 102(9), and “record” defined in Section 102(29). The definition of “internet web site” broadly includes successor technology so that the definition does not become obsolete with technological changes that have not been anticipated.

Law. This definition is new to this act and includes a broad definition of types of laws applicable to this Act. The definition broadly defines “law” to include legal authority that is binding on either the public or the agency. The term “Law” includes an executive order that rests on statutory or constitutional authorization. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 188-89 (1999); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952). See also Kevin M. Stack, “The Statutory President,” 90 Iowa L. Rev. 539, 550-52 (2005); Jim Rossi, “State Executive Law making in Crisis,” 56 Duke L. Rev. 237, 261-64 (2006). For example, a Governor’s declaration of a state of emergency would fall within the category of an executive order with statutory or constitutional authorization. See, e.g., New Mexico Executive Order 2005-040 (2005). This definition should be read in conjunction with the defined terms “rule”, Section 102(30) and “order”, Section 102(23).

License. This definition is based on 1981 MSAPA Section 102(4), which is a revised version of 1961 MSAPA Section 1(3) definition of license. This definition should be read in conjunction with Section 419, licenses.

Licensing. This definition is based on 1961 MSAPA Section 14(a). This definition should be read in conjunction with Section 419, licenses.

Notice. The definition of notice is new to this act and refers to the content of information required to be provided by provisions of this act. This definition is be used with Article Four adjudication in contested cases, Section 405, notice in contested cases.

Notify. The definition of notify is new to this act and is similar to the definition of notice in the Uniform Arbitration Act Section 2(a), and the Uniform Computer Information Transactions Act Section 102(a)(49), which is based on the provisions of the Uniform Commercial Code Section 1-201(26). The definition is consistent with the due process of law requirements for methods of notifying persons. Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306, 314-316 (1950); Goldberg v. Kelley, 397 U.S. 254, 267-268 (1970); Dusenberry v. United States, 534 U.S. 161, 168-170 (2002); See Ho v. Donovan 569 F.3d 677, 680-681 (7th. Cir.,2009). Under those requirements, using a method of notice that is reasonable likely to inform is sufficient to satisfy due process of law requirements. The notice sender does not have to prove that the notice recipient received the notice in every case to satisfy due process of law requirements. See Section 405, notice in contested case, for more specific requirements of notice in contested cases.

Order. This definition is based on 1981 MSAPA Section 102(5). An order includes solely agency legal determinations that are addressed to particular, identified persons in particular circumstances. An order may be addressed to more than one person. Further, the definition is consistent with modern law in rejecting the right/privilege distinction in constitutional law. The addition of the language “or other interests” is intended to clarify this change and to include entitlements. The definition of “order” should be read in conjunction with the definitions of “adjudication” under Section 102(1), “contested case” under Section 102(7)”,

"evidentiary hearing" under Section 102(11), and "final order" under section 102(12). The term "order" is primarily used in Article Four contested case proceedings. Article Four procedures apply to adjudications that are contested cases, Section 401, and that result in a final order of the agency, Section 413. In addition to this term, three type of orders are defined in the act, and the term "order" should be read in conjunction with the terms "final order" in section 102(12), "initial order in section 102(16), and "recommended order" in section 102(28)

Party. This definition is similar to 1961 MSAPA Section 1(5), and 1981 MSAPA Section 102(6). The definition includes the agency, any person against whom agency action is brought and any person who intervenes. The term" party' should be read in conjunction with the terms "agency" in Section 102(3), and the term "person" in Section 102(25). The term "party" is used in Article Four contested case proceedings. For example, See Section 403, contested case procedure, Section 404, evidence in contested case, Section 405, notice in contested case, and Section 409 intervention. The term "agency" is also used extensively in Articles Three, Four, and Five. This section is not intended to deal with the issue of a person's entitlement to judicial review. Standing and other issues relating to judicial review of agency action are addressed in Article 5 of this Act.

Person. This definition is based on 1961 MSAPA Section 1(6), and 1981 MSAPA Section 102(8). The term "person" should be read in conjunction with the term "agency" in Section 102(3), and the term "party" in Section 102(24). The term "person" is broadly defined to include individuals, associations of individuals, and corporate and governmental entities. The term "person" is used extensively in the act including Article Two (See, e.g., Section 204(a)), Article Three (See, e.g., Section 306(a)), Article Four (See, e.g., Section 405(b)), and Article Five (See, e.g., Section 505). The term "person" is based on the standard definition used in acts adopted by the National Conference of Commissioners on Uniform State Laws. See UCITA Section 102 (a)(51).

Presiding Officer. This definition is new to the Act and should be read in conjunction with the definitions of "adjudication" under Section 102(1), "agency head" under Section 102(5) "contested case" under Section 102(7), "evidentiary hearing" under Section 102(11), and of "order", Section 102(23). The term 'presiding officer" is used in Article Four procedures which apply to adjudications that are contested cases, Section 401, and that result in a final order of the agency, Section 413. The presiding officer presides over contested case evidentiary hearings, Section 402. Under Section 402(a), the "presiding officer" includes an agency staff member, an administrative law judge appointed under Section 602, the agency head, or one or more members of the agency head when designated to preside at a hearing.

Proceeding. This definition is new to this act and broadly defines agency actions including those conducted by an agency in rulemaking, governed by Article Three, and in adjudication, governed by Article four.

Recommended Order. This definition is new to this act and applies to Article Four adjudication proceedings. See Section 413, Orders: Final, Recommended, and Initial. This definition should be read in conjunction with the terms "final order" in section 102(12), "initial order" in Section 102(16), and "order" in Section 102(23).

Record. This definition is new to the act and is based on the broad definition of record in

modern electronic age statutes such as the Uniform Computer Information Transactions Act, Section 102(a)(55), and the Uniform Electronic Transactions Act, Section 2(13). This definition is also based on the definition of record in the E-Sign Act, 15 U.S.C. Section 7006(9). The definition includes both paper and electronic documents. State agencies widely use electronic media to disseminate information to the public. See Article Two for agency duties to provide public access to agency law. This definition should be read in conjunction with the terms "electronic" defined in Section 102(8), "electronic record" defined in Section 102(9), and "internet web site" defined in Section 102(17). The term "record" refers to the medium for storage of information and does not address the requirements for the content of agency records. See the definition of "agency record" in Section 102(6) and the types of agency records defined there for that purpose.

Rule. This first sentence of this definition is based on 1961 MSAPA Section 1(7), and 1981 MSAPA Section 102 (10). The language "and has the force of law" is new to this act and is designed to contrast rules with guidance documents which do not have the force of law. The second sentence of this definition is based on the second sentence of 1981 MSAPA Section 102(10). The exceptions to the definition are widely used in state APAs. Subsection (A) is drawn from 1981 Model State APA § 3-116(1). Subsection (B) is based on 1961 MSAPA Section 1(7)(C). Subsection (C) is drawn from 1981 Model State APA § 3-116(9). Subsection (D) is drawn from 1981 Model State APA § 3-116(2). Subsection (E) is based on 1981 Model State APA § 3-116(7). Subsection (f) is new to this act, and should be read in conjunction with the term "guidance document" in Section 102(14) and Section 311, Guidance documents. With the exception of guidance documents which must be made available to the public under Section 311(c), the stated exceptions are designed to exempt those statements from the procedural and publication requirements of Article Three that otherwise apply to "rules".

The essential part of this definition is the requirement of general applicability of the statement. This criterion distinguishes a rule from an order, which focuses on particular applicability to identified parties only. Applicability of a rule may be general, even though at the time of the adoption of the rule there is only one person or firm affected: persons or firms in the future who are in the same situation will also be bound by the standard established by such a rule. It is sometimes helpful to ask in borderline situations what the effect of the statement will be in the future. If unnamed parties in the same factual situation in the future will be bound by the statement, then it is a rule. The word "statement" has been used to make clear that, regardless of the term that an agency uses to describe a declaration or publication and whether it is internal or external to the agency, if the legal operation or effect of the agency action is that it has the force of law, then it meets this definition. The term "rule" applies primarily to Article Three rulemaking proceedings but the term is also used in the other articles. The term "rule" should be read in conjunction with the term "rulemaking" in Section 102(31).

Rulemaking. This definition is a revised version of 1981 MSAPA Section 102(11). The purpose of this definition is to include amendment or repeal of an existing rule within the meaning of adoption of a rule. This definition eliminates the need to repeat the phrase "adopt, amend or repeal" in numerous sections of the act. This definition should be read in conjunction with the term "rule" in Section 102 (30). This term is primarily used in Article Three which governs rulemaking by agencies.

Sign. This definition is based on UETA Section 2(8), and includes both paper and

electronic signatures. See also the federal E-Sign Act, 15 U.S.C. Section 7001 et. Seq.

Written. This definition is new to this act and relates to the definition of record in Section 102(29) in that written documents are inscribed on a tangible medium. The definition of record in Section 102(29) includes both tangible medium (written) and electronic documents.

SECTION 103. APPLICABILITY.

(a) This [act] applies to an agency unless the agency is expressly exempted by a statute of this state.

(b) This [act] applies to all agency proceedings and all proceedings for judicial review or civil enforcement of agency action commenced after [the effective date of this [act]]. This [act] does not apply to an adjudication for which notice was given before that date and rulemaking for which notice was given or a petition was filed before that date.

Comment

Subsection (a) is intended to define which agencies are subject to the provisions of this act. Many states have made use of an applicability provision to define the coverage of their Administrative Procedure Act. See: Iowa, I.C.A. SECTION 17A.23; Kansas, K.S.A. SECTION 77-503; Kentucky, KRS SECTION 13B.020; Maryland, MD Code, State Government, SECTION 10-203; Minnesota, M.S.A. SECTION 14.03; Mississippi, Miss. Code Ann. SECTION 25-43-1.103; Washington, West's RCWA 34.05.020. States vary widely as to what state agencies are subject to the APA, and what agencies are exempt from the APA. The issue of what agencies are exempt from the APA will be decided by each state using its own legislative process. Some states list the agencies or agency proceedings that are exempt from the requirements of the APA. See Washington, West's RCWA 34.05.30.This section provides a way to resolve those issues.

Subsection (b) is based on Section 1-108 of the 1981 MSAPA. Agency proceedings on remand following judicial review after the act takes effect are governed by the prior law.

[ARTICLE] 2

PUBLIC ACCESS TO AGENCY LAW AND POLICY

SECTION 201. PUBLICATION, COMPILATION, INDEXING, AND PUBLIC INSPECTION OF RULEMAKING DOCUMENTS.

(a) The [publisher] shall administer this section and other sections of this [act] that require publication. The [publisher] shall publish the [administrative bulletin] and the [administrative code].

(b) The [publisher] shall publish in [electronic and written] [electronic or written] [electronic] [written] format all rulemaking-related documents listed in Section 202(c). The [publisher] shall prescribe a uniform numbering system, form, and style for proposed rules.

(c) The [publisher] shall maintain the official record of a rulemaking, including the text of the rule and any supporting documents, filed with the [publisher] by an agency. An agency engaged in rulemaking shall maintain the rulemaking record required by Section 302(b) for that rule.

(d) The [publisher] shall create and maintain an Internet website. The [publisher] shall make available on the Internet website the [administrative bulletin], the [administrative code], and any guidance document filed with the [publisher] by an agency.

(e) The [publisher] shall publish the [administrative bulletin] at least once [each month].

(f) The [administrative bulletin] must be provided in written form on request, for which the [publisher] may charge a reasonable fee.

(g) The [administrative bulletin] must contain:

(1) notices of proposed rulemaking prepared so that the text of the proposed rule shows the text of any existing rule proposed to be changed and the change proposed;

(2) newly filed final rules prepared so that the text of a newly filed amended rule

shows the text of the existing rule and the change that is made;

(3) any other notice and material required to be published in the [administrative bulletin]; and

(4) an index.

(h) The [administrative code] must be compiled, indexed by subject, and published in a format and medium prescribed by the [publisher]. The rules of an agency must be published and indexed in the [administrative code].

(i) The [publisher] shall make the [administrative bulletin] and the [administrative code] available for public inspection and, for a reasonable charge, copying.

(j) The [publisher], with notification to the agency, may make minor nonsubstantive corrections in spelling, grammar, and format in a proposed or final rule. The [publisher] shall make a record of the corrections.

(k) The [publisher] shall make available on the [publisher's] Internet website, at no charge, all the documents provided by an agency under Section 202(c).

Legislative Note: *Throughout this act the drafting committee has used the term [publisher] to describe the official or agency to which substantive publishing functions are assigned. All states have such an official, but their titles vary. Each state using this act should determine what that agency is, then insert its title in place of [publisher] throughout this act. Each state also has an [administrative bulletin] and an [administrative code]. The bulletin is similar to the Federal Register, and the code is similar to the Code of Federal Regulations. The names of the administrative bulletin and the administrative code vary from state to state. Each state should insert the proper title in place of [administrative bulletin], and [administrative code]. The [publisher] has statutory authority under subsections (f) and (i) to provide written materials for a reasonable charge. In many states, [publishers] have statutory authority under a public records act to adopt regulations setting fees for providing written copies of documents under this section.*

Comment

Article 2 is intended to provide easy public access to agency law and policy that are relevant to agency process. Article 2 also adds provisions for electronic publication of the administrative bulletin and code. The development of the internet and the widespread use of electronic media have made public access to agency law and policy much easier. The arrival of the Internet and electronic information transfer, which occurred after the last revision of the

Model State Administrative Procedure Act, has revolutionized communication. It has made available rapid, efficient and low cost communication and information transfer. Many states as well as the federal agencies have found that it is an ideal medium for communication between agencies and the public, especially in connection with rulemaking. Since the last Model Administrative Procedure Act was written, many states have adopted various types of statutes that permit agencies to use electronic technology to communicate with the public. The agencies have found this technology particularly useful in connection with rulemaking.

Section 201 is a revised and modernized version of 1961 MSAPA Section 5 and 1981 MSAPA Section 2-101. The purpose of this section is to provide adequate notice to the public of proposed and final agency action in rulemaking. It also seeks to assure adequate record keeping and availability of records for the public. Subsection (a) provides for the publisher's responsibilities to administer publication provisions of this section and other publication sections of the act, and to publish the administrative bulletin and the administrative code. Throughout this article and article three, the term publisher is bracketed. States have a variety of names for the agency that performs publishing responsibilities. Each state should insert the correct name for that state in the brackets whenever the term publisher appears in the act. The terms administrative bulletin and administrative code are also bracketed for similar reasons. Each state should insert the correct name for that state whenever those terms appear in that act. Section 201 does not address the issue related to what languages rules should be published in, nor does it address issues related to translation of information contained in these documents into languages other than English.

Subsection (b) requires the publisher to publish rulemaking documents that are filed by an agency with the publisher under section 202(c). Subsection (b) has four bracketed options for publication format. A state may select one of the four options. The issue raised by these options is whether or not a state wants to make available to its citizens a written publication option or electronic publication only. Electronic publication provides for substantial cost savings to agencies but some members of the public may lack access to the internet or may prefer a written publication format. The second sentence of subsection (b) is based on 1981 MSAPA Section 2-101(b) [first clause]. Publishers that administer the provisions of this subsection must also comply with the applicable provisions of the federal E-Sign Act (15 U.S.C. Section 7001 to 7031) and the Uniform Electronic Transactions Act (UETA). This section does not address records retention policies for agencies. That subject is governed by law of the state other than this act. In some states, the public records act prescribes the period of time that agencies have to retain filed documents, and other records.

Subsection (c) requires that the [publisher] maintain the official record for adopted rules, including the text of the rules and any supporting documents, filed by the agency. Subsection (c) also requires that the agency adopting the rule maintain the rulemaking record for that rule. Section 302(b) provides the requirements for the rulemaking record. While the [publisher] is an agency, and the term "agency" is defined broadly in section 102(3), the term agency used in Article Two and Three means an agency other than the publisher except to the extent that the publisher has rulemaking authority and does adopt rules. In that case the publisher would have to comply with the requirements of section 202, as well as administer the requirements of this section.

Subsection (d) requires the [publisher] to 1) maintain an Internet web site, and 2) publish

the [administrative bulletin], the [administrative code] and any guidance document filed with the [publisher] by an agency on the Internet web site. The term "Internet web site" is defined in Section 102(17) and includes successor technology. The term "guidance document" is defined in Section 102(14), is excluded from the term rule in section 102(30)(F), and is governed by the provisions of section 311. Most states have internet web sites for state agencies. The provisions of subsection (d) can be implemented with existing internet technology. Subsection (d) does not address issues related to authentication, preservation and archival storage of electronic documents published on an Internet website. Subsection (d) does not address the principles for deciding what rules are in effect and enforceable at a specific point in time. Providing a hypertext link on an Internet website will satisfy the publication requirements for agencies and publishers.

Subsection (e) requires the publisher to publish the [administrative bulletin] at least once [each month]. The term [each month] is bracketed to give states the option of adapting this requirement to existing laws governing frequency of publication of the [administrative bulletin] in each state.

Subsection (f) requires the publisher to provide the administrative bulletin in written form on request, for which the publisher may charge a reasonable fee. This requirement can be satisfied by states making the administrative bulletin available on the Internet, searchable, and printable.

Subsection (g) requires the [administrative bulletin] to contain notices of proposed adoption of a rule, newly filed rules, other notices and materials, and an index of the contents of the bulletin. The text of subsection (g)(1) and (g)(2) requires an agency to utilize redlining or underlining and striking of the text of the proposed or adopted rules so that changes from the existing text of the rule are clearly delineated.

Subsection (h) requires the publisher to compile, index by subject, and publish the administrative code which must include the publication and indexing of the rules of an agency States can satisfy this requirement by providing an administrative code that is searchable by word on the Internet.

Subsection (i) requires the publisher to make the [administrative bulletin] and the [administrative code] available for public inspection and, for a reasonable charge, copying.

Subsection (j) provides for a limited non substantive power of the publisher to make corrections in spelling, grammar, and format in proposed or adopted rules of the agency provided that the agency is notified by the rules [publisher] of the changes. The [publisher] must make a record of the corrections. Subsection (j) is based on the Maine Administrative Procedure Act, 5 M.R.S.A. Section 8056(10).

Subsection (k) is drawn from the Washington Administrative Procedure Act. See WA ST 34.05.260.

SECTION 202. PUBLICATION; AGENCY DUTIES.

(a) Unless the record is exempt from disclosure under law of this state other than this [act], an agency shall publish on its Internet website and, on request and for a reasonable charge, make available through the regular mail:

(1) each notice of a proposed rule under Section 304;

(2) each rule filed under Section 316;

(3) each summary of regulatory analysis required by Section 305;

(4) each declaratory order issued under Section 204;

(5) the index of declaratory orders prepared under Section 204(g);

(6) each guidance document issued under Section 311;

(7) the index of currently effective guidance documents prepared under Section 311(e);

(8) each final order in a contested case issued under Section 413, 414, or 415; and

(9) the index of final orders in contested cases prepared under Section 418(a).

(b) An agency may provide for electronic distribution to a person that requests electronic distribution of notices related to rulemaking or guidance documents. If a notice is distributed electronically, the agency need not transmit the actual notice but must send all the information contained in the notice.

(c) An agency shall file with the [publisher] in an electronic format acceptable to the [publisher]:

(1) notice of the adoption of a final rule;

(2) a summary of the regulatory analysis required by Section 305 for each proposed rule;

(3) each final rule;

(4) an index of currently effective guidance documents under Section 311(f); and

(5) any other notice or matter that an agency is required to publish under this [act].

Legislative Note: *Agencies have statutory authority under subsection (a) to provide written materials for a reasonable charge. In many states, agencies have statutory authority under a public records act to adopt regulations setting reasonable charges for providing written copies of documents under this section.*

Comment

This Section provides for the publication duties of agencies. See Section 201 for publication duties of the [publisher]. The term "agency" is broadly defined in Section 102(3). The term "agency", as used in Section 202, does not include the publisher unless the publisher has rulemaking authority in which case the publisher will have to comply with the publication responsibilities of Section 202 when it engages in rulemaking a well as the Section 201 publication responsibilities. In states in which the publisher is responsible for all publication duties, particularly the maintenance of Internet web sites, the agency can carry out its responsibilities under Section 202 by providing the required information to the publisher.

Subsection (a) requires agencies to publish on the agency Internet web site the following: notice of proposed rulemaking, filed rules, summary of regulatory analysis, declaratory order and index of declaratory orders, guidance documents and index of currently effective guidance documents, final order and index of final orders. These documents are also to be made available by the agency thorough the regular mail on request and for a reasonable charge. In states where the publisher has the sole responsibility for publishing agency rules and other documents, including guidance documents, an agency may satisfy the publication requirement of subsection (a) by filing the listed documents with the publisher. The term "Internet web site" is defined in Section 102(17) and includes successor technology. The term "guidance document" is defined in Section 102(14), is excluded from the term rule in section 102(30)(F), and is governed by the provisions of section 311.

Subsection (b) is drawn from the Washington Administrative Procedure Act. See WA ST 34.05.260. Subsection (b) authorizes agencies to utilize electronic distribution of notices or guidance documents. The term "electronic" is defined in Section 102(8) , and the term "electronic record" is defined in Section 102(9).

Subsection (c) requires an agency to file with the [publisher] in an electronic format acceptable to the publisher (1) notice of the adoption of a rule, (2) summary of the regulatory analysis, (3) each adopted rule, (4) an index of currently effective guidance documents, and (5) any other notice or matter that an agency is required to publish under this act. Subsection (c)(5) would require the agency to file with the publisher the list of documents stated in subsection (a).

SECTION 203. REQUIRED AGENCY PUBLICATION AND RECORDKEEPING. An agency shall:

(1) publish a description of its organization, stating the general course and method of its operations and the methods by which the public may obtain information or make submissions or requests;

(2) publish a description of all formal and informal procedures available, including a description of all forms and instructions used by the agency;

(3) publish a description of the process for application for a license, available benefits, or other matters for which an application is appropriate, unless the process is prescribed by law other than this [act];

(4) adopt rules for the conduct of public hearings [if the standard procedural rules adopted under Section 205 do not include provisions for the conduct of public hearings];

(5) maintain the agency's current rulemaking docket required by Section 301(b); and

(6) maintain a separate, official, current, and dated index and compilation of all final rules filed with the [publisher], make the index and compilation available for public inspection and, for a reasonable charge, copying at the principal office of the agency [and online on the [publisher]'s Internet website], update the index and compilation at least [monthly], and file the index and the compilation and all changes to both with the [publisher].

Comment

One object of this section is to make available to the public all procedures followed by the agency, including especially how to file for a license or benefit. It is modeled on the 1961 Model State Administrative Procedure Act, Sections 2(a) (1) & (2), the 1981 Model State APA Sections 2-104(1), (2), and the Kentucky Administrative Procedure Act, KRS Section 13A.100. Persons seeking licenses or benefits should have a readily available and understandable reference sources from the agency. Subsections (1), (2), and (3), require the agency to publish the description of the organization of the agency and the procedures followed by the agency. This is a modified version of the provisions in the 1961 and 1981 MSAPA's which required the agency to adopt rules providing this information. Some states provide more detail in subsection (1) including contact information for agency officials, organizational charts, and hours of operations

for agency offices. The term methods of operation in subsection (1) refers to information about how the agency carries out its responsibilities that would be helpful to the public Subsection (2) is not intended to require publication of internal procedures available to and applicable to employees only, and that are of no real interest to the public. Subsection (3) requires publication of a description of application processes that are appropriate to the agency. For social welfare agencies, the publication would include available benefits administered by that agency.

Subsection (4) requires that agencies adopt rules for the conduct of public hearings. An agency may use a guidance document to elaborate on issues not squarely addressed by these rules.

Subsection (5) requires the agency to maintain custody of the agency's current rulemaking docket required by Section 302(b).

Subsection (6) requires an agency to maintain the official version of the index and rules compilation and to make that available to the public for inspection and for a reasonable charge copying at the principal office of the agency. An agency must also make the index and compilation available online on the publisher's internet web site, must update the index and compilation at least monthly, and must file the index and compilation and all changes to both with the publisher. The publisher is the repository of the official language of the rules. If questions arise about authentication of agency rules, the publisher is the source for the official version of the rule in question.

SECTION 204. DECLARATORY ORDER.

(a) A person may petition an agency for a declaratory order that interprets or applies a statute administered by the agency or states whether or in what manner a rule, guidance document, or order issued by the agency applies to the petitioner.

(b) An agency shall adopt rules prescribing the form of a petition under subsection (a) and the procedure for its submission, consideration, and prompt disposition. The provisions of this [act] concerning formal, informal, or other applicable hearing procedure do not apply to an agency proceeding for a declaratory order, except to the extent provided in this [article] or to the extent the agency provides by rule or order.

(c) Not later than 60 days [or at the next regularly scheduled meeting of the agency, whichever is later,] after receipt of a petition under subsection (a), an agency shall issue a declaratory order in response to the petition, decline to issue the order, or schedule the matter for

further consideration.

(d) If an agency declines to issue a declaratory order requested under subsection (a), it shall notify promptly the petitioner of its decision. The decision must be in a record and must include a brief statement of the reasons for declining. An agency decision to decline to issue a declaratory order is subject to judicial review for abuse of discretion. An agency failure to act within the applicable time under subsection (c) is subject to judicial action under Section 501(d).

(e) If an agency issues a declaratory order, the order must contain the names of all parties to the proceeding, the facts on which it is based, and the reasons for the agency's conclusion. If an agency is authorized not to disclose certain information in its records to protect confidentiality, the agency may redact confidential information in the order. The order has the same status and binding effect as an order issued in an adjudication and is subject to judicial review under Section 501.

(f) An agency shall publish each currently effective declaratory order.

(g) An agency shall maintain an index of all of its currently effective declaratory orders, file the index [annually] with the [publisher], make the index readily available for public inspection, and make available for public inspection and, for a reasonable charge, copying the full text of all declaratory orders to the extent inspection is permitted by law of this state other than this [act].

Comment

This section is a revised version of 1961 MSAPA Section 8, and 1981 MSAPA Section 2-103 and Hawaii Revised Statutes, Section 91-8. This section embodies a policy of creating a convenient procedural device that will enable parties to obtain reliable advice from an agency. Such guidance is valuable to enable citizens to conform with agency standards as well as to reduce litigation. The term "person" in Subsection (a) is broader than the term aggrieved person for judicial review in Article 5, and is also broader than the term person toward whom agency action is directed in adjudication under Article 4. Ripeness and standing requirements that restrict court issued declaratory judgments do not apply to declaratory orders issued by administrative agencies. Subsection (a) refers to declaratory orders that interpret or apply the statue administered by the agency. In states that have constitutional agencies, the term statute

would include the entire body of law, including constitutional provisions, that the agency is responsible for enforcing.

Subsection (d) provides that agency decisions to decline to issue a declaratory order are reviewable for abuse of discretion (See Massachusetts v. EPA 549 U.S. 497(2007) (EPA decision to reject rulemaking petition and therefore not to regulate greenhouse gases associated with global warming was judicially reviewable and decision was arbitrary and capricious.). Limited agency resources may provide a valid basis for an agency to decline to issue a declaratory order. The term notify in subsection (d) incorporates the definition of notify in section 102(22) (reasonable steps to inform a person). Mailing [or e-mailing] a copy of the notice to the petitioner at the address last known to the agency would satisfy the requirement to notify the person. Agency failures to act are subject to judicial action under section 501(d).

Subsection (e) is based on the Washington APA, West's RCWA 34.05.240. A declaratory decision issued by an agency is judicially reviewable; is binding on the applicant, other parties to that declaratory proceeding, and the agency, unless reversed or modified on judicial review; and has the same precedential effect as other agency adjudications. A declaratory decision, like other decisions, only determines the legal rights of the particular parties to the proceeding in which it was issued. The requirement in subdivision (e) that each declaratory decision issued contains the facts on which it is based and the reasons for its conclusion will facilitate any subsequent judicial review of the decision's legality. It also ensures a clear record of what occurred for the parties and for persons interested in the decision because of its possible precedential effect.

Subsections (f), and (g) require that an agency publish and index all current declaratory orders. Subsection (f) requires publication of currently effective declaratory orders. This would include all declaratory orders issued by the agency that is currently being relied on by the agency, and this would exclude declaratory orders that have been amended, repealed, or replaced by later orders.

SECTION 205. STANDARD PROCEDURAL RULES.

(a) The [Governor] [Attorney General] [designated state agency] shall adopt standard procedural rules for use by agencies. The standard rules must provide for the procedural functions and duties of as many agencies as is practicable.

(b) Except as otherwise provided in subsection (c), an agency shall use the standard procedural rules adopted under subsection (a).

(c) An agency may adopt a rule of procedure that differs from the standard procedural rules adopted under subsection (a) if it explains with particularity the reasons for the variation.

Comment

This Section is based on Section 2-105 of the 1981 MSAPA. One purpose of this provision is to provide agencies with a set of standard procedural rules. This is especially important for smaller agencies. Another purpose of this section is to create as uniform a set of procedures for all agencies as is realistic, but to preserve the power of agencies to deviate from the common model where necessary because the use of the standard rules is demonstrated to be impractical for that particular agency. This section requires all agencies to use the standard rules as the basis for the rules that they are required to adopt under Section 203(4). An agency may deviate from the standard rules only for impracticability. Agency procedural rules must be consistent with the statutory requirements of this Act. An agency may adopt a procedural rule that is more protective of the rights of parties to a contested case under Section 403(k) provided that the agency satisfies the requirements of Section 205(c). Procedural rules adopted under Section 205 have the force of law and must be adopted consistent with the requirements of Sections 304 to 308 of Article Three of the Act.

[ARTICLE] 3

RULEMAKING; PROCEDURAL REQUIREMENTS AND EFFECTIVENESS OF RULES

SECTION 301. RULEMAKING DOCKET.

(a) In this section, "rule" does not include an emergency rule adopted under Section 309 or a direct final rule adopted under Section 310.

(b) An agency shall maintain a rulemaking docket for all pending rulemaking proceedings that is indexed.

(c) The agency shall maintain a rulemaking docket under subsection (b) that must for each pending rulemaking proceeding state or contain:

(1) the subject matter of the proposed rule;

(2) notices related to the proposed rule;

(3) how comments on the proposed rule may be submitted;

(4) the time within which comments may be submitted;

(5) where comments may be inspected;

(6) requests for a public hearing;

(7) appropriate information concerning a public hearing, if any; and

(8) the timetable for action on the proposed rule.

(d) On request, the agency shall provide, for a reasonable charge, a written rulemaking docket maintained under subsection (c).

Comment

This article should be read in conjunctions with the definitions of "Rule", Section 102(30), and "Rulemaking", Section 102(31). This section is modeled on Minn. M.S.A. Section 14.366, and is similar to 1981 MSAPA Section 3-102. This section and the following section, Section 302, state the minimum docketing and rulemaking record keeping requirements for all agencies. This section also recognizes that many agencies use electronic recording and maintenance of dockets and records. Electronic recording and docket maintenance has become

the standard practice for state agencies. However, under subsection (d), a state agency is required to provide a written rulemaking docket on request and for a reasonable charge. The current rulemaking docket is a summary list of pending rulemaking proceedings or an agenda referring to pending rulemaking. . The requirements of this section do not apply to emergency rules under Section 309, and direct final rules under Section 310.

SECTION 302. RULEMAKING RECORD.

(a) An agency shall maintain a rulemaking record for each proposed rule. Unless the record and any materials incorporated by reference are privileged or exempt from disclosure under law of this state other than this [act], the record and materials must be readily available for public inspection in the principal office of the agency and available for public display on the Internet website maintained by the [publisher]. If an agency determines that any part of the rulemaking record cannot be displayed practicably or is inappropriate for public display on the Internet website, the agency shall describe the part and note that the part is not displayed.

(b) A rulemaking record must contain:

(1) a copy of all publications in the [administrative bulletin] relating to the rule and the proceeding on which the rule is based;

(2) a copy of any part of the rulemaking docket containing entries relating to the rule and the proceeding on which the rule is based;

(3) a copy and, if prepared, an index, of all factual material, studies, and reports agency personnel relied on or consulted in formulating the proposed or final rule;

(4) any official transcript of oral presentations made in the proceeding on which the rule is based or, if not transcribed, any audio recording or verbatim transcript of the presentations, and any memorandum summarizing the contents of the presentations prepared by the agency official who presided over the hearing;

(5) a copy of all comments received by the agency under Section 306(a) in response to the notice of proposed rulemaking;

(6) a copy of the rule and explanatory statement filed with the [publisher]; and

(7) any petition for agency action on the rule, except a petition governed by Section 204.

Comment

Several states have adopted this type of agency rule-making record provisions: Az., A.R.S. Section 41-1029; Colo., C.R.S.A. Section 24-4-103; Minn., M.S.A. Section 14.365; Miss., Miss. Code Ann. Section 25-43-3.110; Mont., MCA 2-4-402; Okla., 75 Okl.St.Ann. Section 302; and Wash., RCWA 34.05.370.

The language of subsection (a) is based on Section 3-112(a) of the 1981 Model Act. Similar language is found in the Washington Administrative Procedures Act, RCWA Section 34.05.370. The requirement of an official agency rulemaking record in subsection (a) should facilitate a more structured and rational agency and public consideration of proposed rules. It will also aid the process of judicial review of the validity of rules. The requirement of an official agency rulemaking record was suggested for the Federal Act in S. 1291, the "Administrative Practice and Regulatory Control Act of 1979," title I, Section 102(d), [5 U.S.C. 553(d)], 96 Cong.Rec. S7126 at S7129 (daily ed. Jun. 6, 1979) (Sen. Kennedy). The second sentence of subsection (a) is intended to exclude privileged material from disclosure and display. Privileged material includes confidential business information and trade secrets, as well as internal advice memoranda. Procedures that an agency may use in dealing with confidential communications and materials in rulemaking are discussed in Jeffrey Lubbers, Federal Agency Rulemaking Guide (4th ed., 2006), pp 331-333. The exemptions in the state open records laws would be examples of records and materials that are exempt from disclosure and display under law other than this act. The third sentence in subsection (a) is intended to enable an agency to decide, for example, that a blueprint that may not be practically displayed on the internet, indecent material, or copyrighted material should be available for inspection in hard copy but not posted on the Internet. It is not intended to authorize exclusion from the Internet record of, for example, information that reflects adversely on the government.

The language of subsection (b) is based on 1981 MSAPA Section 3-112(b). Subsection (b) requires *all written* submissions made to an agency and *all written* materials considered by an agency in connection with a rulemaking proceeding to be included in the record. It also requires a copy of any existing record of oral presentations made in the proceeding to be included in the rulemaking record. The language in Subsection (b) (3) is based on language endorsed by the ABA Section of Administrative Law & Regulatory Practice. See ABA Section of Administrative Law and Regulatory Practice, "A Blackletter Statement of Federal Administrative Law," 54 Admin. L. Rev. 1, 34 (2002).

Section 310 provides that the agency must comply with Section 313(1) (concise explanatory statement) when it issues a direct final rule. In the case of direct final rules, the agency is expected to publish the rule in the administrative bulletin along with a statement that it does not expect the rule to be controversial. This would then trigger Section 302(1) ("all publications in the [administrative bulletin] relating to the rule").

Section 309 doesn't expressly require this, but neither is the agency exempted from Section 313. This statement would be incorporated into the agency record under Section 302(6). To issue an emergency rule, the agency has to determine that some imminent peril requires immediate action, and this finding must be memorialized in a record. This "record" (meaning stored information) needs to be included in the Section 302 "agency record," so that a court can potentially review it. Section 302 includes this concept. Under Section 312(3), any adopted rule must be filed with the publisher and be accompanied by "any finding required by law as a prerequisite to adoption or effectiveness of the adoption." And Section 302(6) says the agency record must include "a copy of the rule and explanatory statement filed with the [publisher]." Reading the two together, the finding will have to be part of the agency record.

SECTION 303. ADVANCE NOTICE OF PROPOSED RULEMAKING; NEGOTIATED RULEMAKING.

(a) An agency may gather information relevant to the subject matter of a potential rulemaking proceeding and may solicit comments and recommendations from the public by publishing an advance notice of proposed rulemaking in the [administrative bulletin] and indicating where, when, and how persons may comment.

(b) An agency may engage in negotiated rulemaking by appointing a committee to comment or make recommendations on the subject matter of a proposed rulemaking under active consideration within the agency. In making appointments to the committee, the agency shall make reasonable efforts to establish a balance in representation among members of the public known to have an interest in the subject matter of the proposed rulemaking. At least annually, the agency shall publish in the [administrative bulletin] a list of all committees with their membership. Notice of a meeting of the committee must be published in the [administrative bulletin] at least [15 days] before the meeting. A meeting of the committee is open to the public.

(c) A committee appointed under subsection (b), in consultation with one or more agency representatives, shall attempt to reach a consensus on the terms or substance of a proposed rule. The committee shall present the consensus recommendation, if any, to the agency.

The agency shall consider whether to use it as the basis for a proposed rule under Section 304, but the agency is not required to propose or adopt the recommendation.

(d) This section does not prohibit an agency from obtaining information and opinions from members of the public on the subject of a proposed rule by any other method or procedure.

Comment

This section is based on the provisions of Section 3-101 of the 1981 MSAPA. Seeking advice before proposing a rule frequently alerts the agency to potential serious problems that will change the notice of proposed rulemaking and the rule ultimately adopted. This section is designed to encourage gathering information. This device is commonly used in federal administrative law. See William Funk, "Public Participation and Transparency in Administrative Law--Three Examples and an Object Lesson," 61 Admin. L. Rev. 171, 191 -197 (2009). It is not intended to prohibit any type of reasonable agency information gathering activities; however, the section seeks to enable agencies to act in a fashion that will result in a balance among interested groups from whom information is received. The advanced notice of proposed rulemaking under subsection (a) is a preliminary step for seeking information and is not the same as the notice of proposed rulemaking under Section 304, which begins the rulemaking process.

Several states have enacted provisions of this type in their APAs. Some of them merely authorize agencies to seek informal input before proposing a rule; several of them indicate that the purpose of this type of provision is to promote negotiated rulemaking. Those states are Idaho, I.C. ‘ 67-5220; Minnesota, M.S.A. § 14.101; Montana, MCA 2-4-304; and Wisconsin, W.S.A. 227.13. Subsection (b) is intended to authorize negotiated rulemaking.

Subsection (c) provides that the committee may seek to reach a consensus on the terms or substance of a proposed rule but the agency is not required to propose or adopt the consensus recommendation only to consider it.

Subsection (d) authorizes agencies to use other methods to obtain information and opinions. Under subsection (d), agencies may meet informally with specific stakeholders to discuss issues raised in the negotiated rulemaking process. Negotiated rulemaking under subsection (b) is an option for agency use but is not required to be used prior to starting a rulemaking proceeding. Negotiated rulemaking committees are also used in federal administrative law. See the federal Negotiating Rulemaking Act, 5 U.S.C. Sections 561 to 570.

SECTION 304. NOTICE OF PROPOSED RULE.

(a) At least [30] days before the adoption of a rule, an agency shall file notice of the proposed rulemaking with the [publisher] for publication in the [administrative bulletin]. The notice must include:

(1) a short explanation of the purpose of the proposed rule;

(2) a citation or reference to the specific legal authority authorizing the proposed rule;

(3) the text of the proposed rule;

(4) how a copy of the full text of any regulatory analysis of the proposed rule may be obtained;

(5) where, when, and how a person may comment on the proposed rule and request a hearing;

(6) a citation to and summary of each scientific or statistical study, report, or analysis that served as a basis for the proposed rule, together with an indication of how the full text of the study, report, or analysis may be obtained; and

(7) any summary of a regulatory analysis prepared under Section 305(d).

(b) Not later than three days after publication of the notice of the proposed rulemaking in the [administrative bulletin], the agency shall mail the notice or send it electronically to each person that has made a timely request to the agency for a mailed or electronic copy of the notice. An agency may charge a reasonable fee for a mailed copy requested by a person.

Comment

Many states have similar provisions to provide notice of proposed rulemaking to the public. Most states have an administrative bulletin that is published regularly. If a state does not have an administrative bulletin, it will still have to comply with the publication requirement. This section is based on the provisions of Section 3-103 of the 1981 MSAPA. Rule is defined in Section 102(30). Rulemaking is defined in Section 102(31). The publisher has the responsibility to publish a notice of proposed rulemaking under Section 201(g)(1). Subsection (b) requires that individual notice of the proposed rulemaking be provided in written or electronic form to each individual who has made a timely request to the agency. To be timely under this subsection, the request would have to be made prior to the publication of the notice of proposed rulemaking.

Subsection (a)(6) This language is adapted from N.Y. APA § 202-a. This language also codifies requirements used in federal administrative law. In the federal cases, disclosure of technical information underlying a rule has been deemed essential to effective use of the opportunity to comment. See *American Radio Relay League v. FCC*, 524 F.3d 227(D.C. Cir.,

2008); *Portland Cement Ass'n v. Ruckelshaus,* 486 F.2d 375 (D.C. Cir. 1973).

Article 3 has a number of timing requirements for rulemaking proceedings governed by the provisions of this article. Section 304(a) provides for a minimum of 30 days prior to the adoption of a rule for the notice of proposed adoption of a rule to be filed by the agency with the publisher. Section 304(b) provides for a three day deadline for the agency to send notice by mail or electronically to persons who have made a timely request for notice of the proposed adoption of a rule. Other timing requirements are found in Sections 306, 307, 309 [emergency rules], 310 [direct final rules], 316, and 317.

SECTION 305. REGULATORY ANALYSIS.

(a) An agency shall prepare a regulatory analysis for a proposed rule that has an estimated economic impact of more than $[ ]. The analysis must be completed before notice of the proposed rulemaking is published. The summary of the analysis prepared under subsection (d) must be published with the notice of proposed rulemaking.

(b) If a proposed rule has an economic impact of less than $[ ], the agency shall prepare a statement of minimal estimated economic impact.

(c) A regulatory analysis must contain:

(1) an analysis of the benefits and costs of a reasonable range of regulatory alternatives reflecting the scope of discretion provided by the statute authorizing the proposed rule; and

(2) a determination whether:

(A) the benefits of the proposed rule justify the costs of the proposed rule; and

(B) the proposed rule will achieve the objectives of the authorizing statute in a more cost-effective manner, or with greater net benefits, than other regulatory alternatives.

(d) An agency preparing a regulatory analysis under this section shall prepare a concise summary of the analysis.

(e) An agency preparing a regulatory analysis under this section shall submit the analysis

to the [appropriate state agency].

(f) If an agency has made a good faith effort to comply with this section, a rule is not invalid solely because the regulatory analysis for the proposed rule is insufficient or inaccurate.

Legislative Note: *State laws vary as to which state agency or body an agency preparing the regulatory analysis should submit the analysis. In some states, it is the department of finance or revenue; in others it is a regulatory review agency or regulatory review committee. The appropriate state agency in each state should be inserted into the brackets.*

Comment

Regulatory analyses are widely used as part of the rulemaking process in the states. See Robert W. Hahn, "State and Federal Regulatory Reform: A Comparative Analysis," 29 J. Legal Stud. 873, 875-78 (2000); Richard Wisnant & Diane De Witt Cherry, "Economic Analysis of Rules: Devolution, Evolution, and Realism," 31 Wake Forest L.Rev. 693, 694 n.2 (1996). States should set the dollar amount of estimated economic impact for triggering the regulatory analysis requirement of this section at a dollar amount so that as they deem appropriate or by other approach make the choice to prepare regulatory analyses carefully so that the number of regulatory analyses prepared by any agency are proportionate to the resources that are available . The subsection also provides for submission to the rules review entity in the state, if the state has one. States that already have regulatory analysis laws can utilize the provisions of Section 305 to the extent that this section is not inconsistent with existing law other than this act. Agencies may rely on agency staff expertise and information provided by interested stakeholders and participants in the rulemaking process. Agencies are not required by this act to hire and pay for private consultants to complete regulatory impact analysis. The concise summary of the regulatory analysis required by subsection (d) means a short statement that contains the major conclusions reached in the regulatory analysis. Subsection (f) is based on 1981 MSAPA Section 3-105(f).

SECTION 306. PUBLIC PARTICIPATION.

(a) An agency proposing a rule shall specify a public comment period of at least [30] days after publication of notice of the proposed rulemaking during which a person may submit information and comment on the proposed rule. The information or comment may be submitted in an electronic or written format. The agency shall consider all information and comment on a proposed rule which is submitted pursuant to this subsection within the comment period.

(b) An agency may consider any other information it receives concerning a proposed rule during the rulemaking. Any information considered by the agency must be incorporated into the

record under Section 302(b)(3). The information need not be submitted in an electronic or written format. Nothing in this section prohibits an agency from discussing with any person at any time the subject of a proposed rule.

(c) Unless a hearing is required by law of this state other than this [act], an agency is not required to hold a hearing on a proposed rule but may do so. A hearing must be open to the public, recorded, and held at least [10] days before the end of the public comment period.

(d) A hearing on a proposed rule may not be held earlier than [20] days after notice of its location, date, and time is published in the [administrative bulletin].

(e) An agency representative shall preside over a hearing on a proposed rule. If the representative is not the agency head, the representative shall prepare a memorandum summarizing the contents of the presentations made at the hearing for consideration by the agency head.

Legislative Note: *State laws vary on the length of public comment periods and on whether a rulemaking hearing is required. The bracketed number of days in subsections (a) and (d) should be interpreted to require that if a rulemaking hearing is held, it will be held before the end of the public comment period. In that case, the minimum time period would be 50 days rather than 30 days.*

Comment

This section gives discretion to the agency about whether to hold an oral hearing on proposed rules in the absence of a statutory or constitutional requirement that an oral hearing be held. The first sentence of subsection (a) is based on 1981 MSAPA Section 3-104(a). Subsection (b) is based on 1981 MSAPA Section 3-104(b)(2). Under subsection (c), the agency may extend the comment period for 10 days after the hearing in cases in which the agency holds a rule making hearing under this subsection. Subsection (e) is based on 1981 MSAPA Section 3-104(b)(3). The agency representative described in subsection (e) need not be an officer or employee of the agency unless that is required by law other than this [act]. In some states, an employee of the state attorney general's office will serve as the agency representative presiding on a hearing related to rulemaking.

Article 3 has a number of timing requirements for rulemaking proceedings governed by the provisions of this Article. Section 306(a) provides for a minimum of 30 days for a public comment period after publication of the notice of proposed adoption of a rule under Section 304(a). Under Section 306(c), an agency rulemaking public hearing may not be held later than 10 days before the end of the public comment period. Under Section 306(d) an agency rulemaking

hearing may not be held earlier than 20 days after notice of the location, date, and time is published in the administrative bulletin. Other timing requirements are found in Sections 304, 307, 309 [emergency rules], 310 [direct final rules], 316, and 317.

The agency representative appointed under Section 306(e) to preside over a public hearing under Section 306(c) has the authority to manage the hearing and to set reasonable limits on public participation at the public hearing.

SECTION 307. TIME LIMIT ON ADOPTION OF RULE.

(a) An agency may not adopt a rule until the public comment period has ended.

(b) Not later than [two years] after a notice of proposed rulemaking is published, the agency shall adopt the rule or terminate the rulemaking by publication of a notice of termination in the [administrative bulletin]. [The agency may extend the time for adopting the rule once for an additional [two years] by publishing a statement of good cause for the extension but must provide for additional public participation as provided in Section 306 before adopting the rule.]

(c) An agency shall file an adopted rule with the [publisher] not later than [ ] days after the adoption of the rule.

(d) A rule is void unless it is adopted and filed within the time limits in this section.

Comment

This section codifies the final adoption and filing for publication requirements for rulemaking that is subject to the procedures provided in Sections 304 through 308 of this Act. Subsection (a) is based on 1981 MSAPA Section 3-106 (a). Section 702(a) of this act requires that the agency shall file a copy of the adopted amended or repealed rule with the rules review committee at the same time it is filed with the publisher. Subsection (d) provides that a rule that is not properly adopted and filed for publication has no legal effect.

Article 3 has a number of timing requirements for rulemaking proceedings governed by the provisions of this Article. Section 307(a) provides that the agency may not adopt a rule until the public comment period has ended. Section 307(b) provides that an agency shall adopt proposed rule or terminate proceeding by publishing notice of termination in the [administrative bulletin] not later than two years after the notice of proposed adoption of a rule. Section 307(b) also provides that an agency may extend the time for adopting a rule for an additional two years by filing a statement of good cause for the extension in the rulemaking record, but must provide for additional public participation as provided in Section 306 prior to adopting the rule. Other timing requirements are found in Sections 304, 306, 309 [emergency rules], 310 [direct final rules], 316, and 317.

SECTION 308. VARIANCE BETWEEN PROPOSED AND FINAL RULE. An agency may not adopt a rule that differs from the rule proposed in the notice of proposed rulemaking unless the final rule is a logical outgrowth of the rule proposed in the notice.

Comment

This section draws on provisions from several states. See Mississippi Administrative Procedure Act, Miss. Code Ann. Section 25-43-3.107 and the Minn. Administrative Procedure Act, M.S.A. Section 14.05. The variance test adopted by state and federal courts is the logical outgrowth test. If the adopted rule is a logical outgrowth of the proposed rule, no further comment period is required. If it is not a logical outgrowth, then a further comment period is required. At a minimum, the logical outgrowth test is designed to ensure fair notice to affected persons. *Long Island Care at Home Ltd. v. Coke* 551 U.S. 158 (2007). Fair notice is met when changes between the adopted rule and the proposed rule are reasonable foreseeable from the proposed rule. Courts utilize several factors to apply the logical outgrowth test including: (1) any person affected by the adopted rule should have reasonably expected that the change from the published proposed rule would affect the person's interest; (2) the subject matter of the adopted rule or the issues determined by that rule are different from the subject matter or issues involved in the published rule proposed to be adopted; and (3) the effect of the adopted rule differs from the effect of the rule proposed to be adopted or amended. 1981 MSAPA Section 3-107 dealt with variance by using the language "substantially different" as the test for improper variance. The "logical outgrowth" language used in Section 308 is based on the case law set forth below.

The following cases discuss and analyze the logical outgrowth test and these factors. These judicial opinions also convey the wide acceptance and use of the logical outgrowth test in the states. *First Am. Discount Corp. v. Commodity Futures Trading Comm'n,* 222 F.3d 1008, 1015 (D.C.Cir.2000); *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1300 (D.C.Cir.2000); *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C.Cir.1994); *Trustees for Alaska v. Dept. Nat. Resources*, 795 P.2d 805 (1990); *Sullivan v. Evergreen Health Care*, 678 N.E.2d 129 (Ind. App. 1997); *Iowa Citizen Energy Coalition v. Iowa St. Commerce Comm*. ___IA___, 335 N.W.2d 178 (1983); *Motor Veh. Mfrs. Ass'n v. Jorling,* 152 Misc.2d 405, 577 N.Y.S.2d 346 (N.Y.Sup.,1991); *Tennessee Envir. Coun. v. Solid Waste Control Bd.*, 852 S.W.2d 893 (Tenn. App. 1992); *Workers' Comp. Comm. v. Patients Advocate,* 47 Tex. 607, 136 S.W.3d 643 (2004); *Dept. Of Pub. Svc. re Small Power Projects*, 161 Vt. 97, 632 A.2d 13 73 (1993); *Amer. Bankers Life Ins. Co. v. Div. of Consumer Counsel*, 220 Va. 773, 263 S.E.2d 867 (1980).

SECTION 309. EMERGENCY RULE. If an agency finds that an imminent peril to the public health, safety, or welfare or the loss of federal funding for an agency program requires the immediate adoption of an emergency rule and publishes in a record its reasons for that

finding, the agency, without prior notice or hearing or on any abbreviated notice and hearing that it finds practicable, may adopt an emergency rule without complying with Sections 304 through 307. The emergency rule may be effective for not longer than [180] days [renewable once for no more than [180] days]. The adoption of an emergency rule does not preclude the adoption of a rule under Sections 304 through 307. The agency shall file with the [publisher] a rule adopted under this section as soon as practicable given the nature of the emergency, publish the rule on its Internet website, and notify persons that have requested notice of rules related to that subject matter. This section does not prohibit the adoption of a new emergency rule if, at the end of the effective period of the original emergency rule, the agency finds that the imminent peril to the public health, safety, or welfare or the loss of federal funding for an agency program still exists.

Comment

This section is taken from the 1961 MSAPA, Section 3(2)(b), and the Virginia Administrative Procedure Act, Va. Code Ann. Section 2.2-4012.1. Many states have emergency rulemaking provisions that are based on these provisions of the 1961 MSAPA. See N.Y.S. A. Section 202(6); F.S.A. Section 120.54(4)(a); 29 Del. Stats. Ch. 101, Section 10119; Utah Stats.Ch 63G-3-304; and Wash. Stats.RCW 34.05.350. Some state courts will invalidate an emergency rule when the agency has not established that there is an emergency that justifies the use of emergency rulemaking procedures. Citizens for a Better Environment v. Illinois Pollution Control Bd. 152 Ill.App.3d 105, 504 N.E.2d 166 (Ill.App. 1 Dist.,1987). Both the 1981 MSAPA Section 3-108(a) and the federal Administrative Procedure Act, 5 U.S.C. Section 553(b)(B) use the "unnecessary, impracticable or contrary to the public interest" good cause standard for the same purposes as the imminent peril standard used in this section and in the 1961 MSAPA Section (3)(2)(b). For scholarly commentary, See Michael Asimow, "Interim Final Rules: Making Haste Slowly, "51 Admin. L. Rev. 703, 712-15 (1999); Ellen R. Jordan, "The Administrative Procedure Acts Good Cause Exemption," 36 Admin. L. Rev. 113, 132-33(1984). This Section can be used to adopt program requirements necessary to comply with federal funding requirements, or to avoid suspension of federal funds for noncompliance with program requirements. When an emergency rule has the effect of repealing an existing rule, the impact of the end of the emergency on the repealed rule, whether the repealed rule comes back into existence, is not governed by the provisions of Section 309 but would be governed by law of this state other than this act, such as the governing statute that delegates rulemaking authority to the agency that issued the emergency rule.

Article 3 has a number of timing requirements for rulemaking proceedings governed by the provisions of this Article. Section 309 provides that emergency rules are effective for not longer than [180] days [renewable once up to an additional [180] days]. Section 317(d) provides that emergency rules adopted under Section 309 become effective upon adoption by the agency.

SECTION 310. DIRECT FINAL RULE. If an agency proposes to adopt a rule which is expected to be noncontroversial, it may use direct final rulemaking authorized by this section and must comply with Section 304(a)(1), (2), (3), and (5), Section 304(b), and Section 313(1). The proposed rule must be published in the [administrative bulletin] with a statement by the agency that it does not expect the adoption of the rule to be controversial and that the proposed rule takes effect 30 days after publication if no objection is received. If no objection is received, the rule becomes final under Section 317(e). If an objection to the rule is received from any person not later than [ ] days after publication of the notice of the proposed rule, the proposed rule does not become final. The agency shall file notice of the objection with the [publisher] for publication in the [administrative bulletin], and may proceed with rulemaking under Sections 304 through 307.

Comment

Section 310 Direct final rulemaking has been recommended by the Administrative Conference of the United States [ACUS Recommendation 95-4, 60 Fed. Reg. 43110 (1995)]. The study that provided the basis for the recommendation was prepared by Professor Ronald M. Levin and has been published [Ronald M. Levin, "Direct Final Rulemaking" 64 George Washington Law Review 1 (1995)]. Section 310 provides a procedure for direct final rulemaking that applies to noncontroversial rules. Under this rule when the agency is merely making a stylistic correction or correcting an error that the agency believes is noncontroversial, the rule may be adopted without full rulemaking procedures. See the VA Fast-Track Rule provision at Va. Code Ann. Section 2.2-4012.1.]

In order to prevent misuse of this procedural device, noncontroversial rule promulgation may be prevented by the objection of any person . The public comment period provides notice of the noncontroversial rule and the opportunity to object to the adoption of the rule. If an objection to the direct final rulemaking process is received within the public comment period, the agency must give notice of the objection and then the agency may proceed with the normal rulemaking process, including the public comment provisions of Section 306.

Article 3 has a number of timing requirements for rulemaking proceedings governed by the provisions of this Article. Section 310 provides that direct final rules are effective 30 days after publication if no objection is received. Section 317(e) provides that direct final rules to which no objection is received become effective 30 days after publication unless a later date is specified.

SECTION 311. GUIDANCE DOCUMENT.

(a) An agency may issue a guidance document without following the procedures set forth in Sections 304 through 307.

(b) An agency that proposes to rely on a guidance document to the detriment of a person in any administrative proceeding shall afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the document. The agency may not use a guidance document to foreclose consideration of issues raised in the document.

(c) A guidance document may contain binding instructions to agency staff members if, at an appropriate stage in the administrative process, the agency's procedures provide an affected person an adequate opportunity to contest the legality or wisdom of a position taken in the document.

(d) If an agency proposes to act in an adjudication at variance with a position expressed in a guidance document, it shall provide a reasonable explanation for the variance. If an affected person in an adjudication may have relied reasonably on the agency's position, the explanation must include a reasonable justification for the agency's conclusion that the need for the variance outweighs the affected person's reliance interest.

(e) An agency shall maintain an index of all of its effective guidance documents, publish the index on its Internet website, make all guidance documents available to the public, and file the index [annually] with the [publisher]. The agency may not rely on a guidance document, or cite it as precedent against any party to a proceeding, unless the guidance document is published on its Internet website.

(f) A guidance document may be considered by a presiding officer or final decision maker in an agency adjudication, but it does not bind the presiding officer or the final decision

maker in the exercise of discretion.

(g) A person may petition an agency under Section 318 to adopt a rule in place of a guidance document.

(h) A person may petition an agency to revise or repeal a guidance document. Not later than [60] days after submission of the petition, the agency shall:

(1) revise or repeal the guidance document;

(2) initiate a proceeding to consider a revision or repeal; or

(3) deny the petition in a record and state its reasons for the denial.

Comment

This section seeks to encourage an agency to advise the public of its current opinions, approaches, and likely courses of action by using guidance documents (also commonly known as interpretive rules and policy statements). The section also recognizes agencies' need to promulgate such documents for the guidance of both its employees and the public. Agency law often needs interpretation, and agency discretion needs some channeling. The public needs to know the agency's opinion about the meaning of the law and rules that it administers. Increasing public knowledge and understanding reduces unintentional violations and lowers transaction costs. See Michael Asimow, "California Underground Regulations," 44 Admin. L. Rev. 43 (1992); Peter L. Strauss, "Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element," 53 Admin. L. Rev. 803 (2001). This section strengthens agencies' ability to fulfill these legitimate objectives by excusing them from having to comply with the full range of rulemaking procedures before they may issue these nonbinding statements. At the same time, the section incorporates safeguards to ensure that agencies will not use guidance documents in a manner that would undermine the public's interest in administrative openness and accountability.

Four states have adopted detailed provisions regulating guidance documents in their administrative procedure acts. See Ariz. Rev. Stat. Ann. §§ 41-1001, 41-1091; Mich. Comp. Laws §§ 24.203, 24.224; Va. Code Ann. § 2.2-4008; Wash. Rev. Code Ann. § 34.05.230. This section draws on those provisions, and also on requirements and recommendations issued by federal authorities and the American Bar Association.

The term guidance document is defined in section 102(14) and is excluded from the definition of rule in section 102(30)(F). Subsection (a) exempts guidance documents from the procedures that are required for issuance of rules. Many states have recognized the need for this type of exemption in their administrative procedure statutes. These states have defined guidance documents—or interpretive rules and policy statements—differently from rules, and have also excused agencies creating them from some or all of the procedural requirements for rulemaking. See Ala. Code § 41-22-3(9)(c) ("memoranda, directives, manuals, or other communications which do not substantially affect the legal rights of, or procedures available to, the public");

Colo. Rev. Stat. § 24-4-102(15), 24-4-103(1) (exception for interpretive rules or policy statements "which are not meant to be binding as rules"); AMAX, Inc. v. Grand County Bd. of Equalization, 892 P.2d 409, 417 (Colo. Ct. App. 1994) (assessors' manual is interpretive rule); Ga. Code Ann. § 50-13-4 ("Prior to the adoption, amendment, or repeal of any rule, *other than interpretive rules or general statements of policy*, the agency shall [follow notice-and-comment procedure]") (emphasis added); Mich. Comp. Laws § 24.207(h) (defining "rule" to exclude "[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory"); Wyo. Stat. Ann. § 16-3-103 ("Prior to an agency's adoption, amendment or repeal of all rules *other than interpretative rules or statements of general policy*, the agency shall . . .") (emphasis added); In re GP, 679 P.2d 976, 996-97 (Wyo. 1984). See also Michael Asimow, "Guidance Documents in the States: Toward a Safe Harbor," 54 Admin. L. Rev. 631 (2002) (estimating that more than thirty states have relaxed rulemaking requirements for agency guidance documents such as interpretive and policy statements). The federal Administrative Procedure Act draws a similar distinction. See 5 U.S.C. § 553(b)(A) (exempting "interpretative rules [and] general statements of policy" from notice-and-comment procedural requirements).

A guidance document, in contrast to a rule, lacks the force of law. Many state and federal decisions recognize the distinction. See, e.g., Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986); District of Columbia v. Craig, 930 A.2d 946, 968-69 (D.C. 2007); Clonlara v. State Bd. of Educ., 501 N.W.2d 88, 94 (Mich. 1993); Penn. Human Relations Comm'n v. Norristown Area School Dist., 374 A.2d 671, 678 (Pa. 1977).

Subsection (b) requires an agency to allow affected persons to challenge the legality or wisdom of guidance documents when it seeks to rely on these documents to their detriment. In effect, this subsection prohibits an agency from treating guidance documents as though they were rules. Because rules have the force of law (i.e., are binding), an agency need not respond to criticisms of their legality or wisdom during an adjudicative proceeding; the agency would be obliged in any event to adhere to them until such time as they have been lawfully rescinded or invalidated. In contrast, a guidance document is not binding. Therefore, when affected persons seek to contest a position expressed in a guidance document, the agency may not treat the document as determinative of the issues raised. See Recommendation 120C of the American Bar Association, 118-2 A.B.A. Rep. 57, 380 (August 1993) ("When an agency proposes to apply a nonlegislative rule . . . , it [should] provide affected private parties an opportunity to challenge the wisdom or legality of the rule [and] not allow the fact that a rule has already been made available to the public to foreclose consideration of [their] positions"); Robert A. Anthony, "Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?," 41 Duke L.J. 1311 (1992).

An integral aspect of an adequate opportunity to challenge a guidance document is the agency's responsibility to respond reasonably to arguments made against the document. Thus, when affected persons take issue with propositions expressed in a guidance document, the agency "must be prepared to support the policy just as if the [guidance document] had never been issued." Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974); see Center for Auto Safety v. NHTSA, 452 F.3d 798, 807 (D.C. Cir. 2006); Professionals and Patients for Customized Care v. Shalala, 56 F.3d 592, 596 (5th Cir. 1995); American Mining Cong. v. MSHA, 995 F.2d 1106, 1111 (D.C. Cir. 1993); Anthony, supra. An agency may not, therefore, treat its prior promulgation of a guidance document as a justification for not responding to

arguments against the legality or wisdom of the positions expressed in such a document. Flagstaff Broadcasting Found. v. FCC, 979 F.2d 1566 (D.C. Cir. 1992); Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992); Giant Food Stores, Inc. v. Commonwealth, 713 A.2d 177, 180 (Pa. Cmwlth. 1998); Agency Policy Statements, Recommendation 92-2 of the Admin. Conf. of the U.S. (ACUS), 57 Fed. Reg. 30,103 (1992), ¶ II.B.

An agency may, however, refer to a guidance document during a subsequent administrative proceeding and rely on its reasoning, if it also recognizes that it has leeway to depart from the positions expressed in the document. See, e.g., Steeltech, Ltd. v. USEPA, 273 F.3d 652, 655-56 (6th Cir. 2001) (upholding decision of ALJ who "expressly stated that the [guidance document] was not a rule and that she had the discretion to depart from [it], if appropriate," but who adhered to the document on determining "that the present case does not present circumstances that raise policy issues not accounted for in the [document]"); Panhandle Producers & Royalty Owners Ass'n v. Econ. Reg. Admin., 847 F.2d 1168, 1175 (5th Cir. 1988) (agency "responded fully to each argument made by opponents of the order, without merely relying on the force of the policy statement," but was not "bound to ignore [it] altogether"); American Cyanamid Co. v. State Dep't of Envir. Protection, 555 A.2d 684, 693 (N.J. Super. 1989) (rejecting contention that agency had treated a computer model as a rule, because agency afforded opposing party a meaningful opportunity to challenge the model's basis and did not apply the model uniformly in every case). See generally John F. Manning, "Nonlegislative Rules," 72 Geo. Wash. L. Rev. 893, 933-34 (2004); Ronald M. Levin, "Nonlegislative Rules and the Administrative Open Mind," 41 Duke L.J. 1497 (1992). The relevance of a guidance document to subsequent administrative proceedings has been compared with that of the agency's adjudicative precedents. See subsection (d) infra.

What constitutes an adequate opportunity to contest a policy statement within an agency will depend on the circumstances. See ACUS Recommendation 92-2, supra, ¶ II.B. ("[A]ffected persons should be afforded a fair opportunity to challenge the legality or wisdom of [a policy statement] and suggest alternative choices in an agency forum that assures adequate consideration by responsible agency officials," preferably "at or before the time the policy statement is applied to [them]"). Affected persons' right to a meaningful opportunity to be heard on the issues addressed in guidance documents must be reconciled with the agency's interest in being able to set forth its interpretations and policies for the guidance of agency personnel and the public without undue impediment. An agency may use its rulemaking authority to set forth procedures that it believes will provide affected persons with the requisite opportunity to be heard. To the extent that these procedures survive judicial scrutiny for compliance with the purposes of this subsection (b), the agency will thereafter be able to rely on established practice and precedent in determining what hearing rights to afford to persons who may be affected by its guidance documents. As new fact situations arise, however, courts should be prepared to entertain contentions that procedures that have been upheld in past cases did not, or will not, afford a meaningful opportunity to be heard to some persons who may wish to challenge the legality or wisdom of a particular guidance document.

Subsection (c) permits an agency to issue mandatory instructions to agency staff members, typically those who deal with members of the public at an early stage of the administrative process, provided that affected persons will have an adequate to contest the positions taken in the guidance document at a later stage. See Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (2007), §

II(2)(h) (significant guidance documents shall not "contain mandatory language . . . unless . . . the language is addressed to agency staff and will not foreclose agency consideration of positions advanced by affected private parties"); ACUS Recommendation 92-2, supra, ¶ III (an agency should be able to "mak[e] a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence"). For example, an agency manual might prescribe requirements that are mandatory for low-level staff, leaving to higher-ranking officials the discretion to depart from the interpretation or policy stated in the manual. The question of what constitutes an adequate opportunity to be heard may vary among agencies or programs. In some programs, centralization of discretionary authority may be a necessary concession to "administrative uniformity or policy coherence"; in other programs, the obligation to proceed through multiple stages of review might be considered so burdensome as to deprive members of the public of a meaningful opportunity to obtain agency consideration of whether the guidance document should apply to their particular situations. The touchstone in every case is whether the opportunity to be heard prescribed by subsection (b) remains realistically available to affected persons.

Subsection (d) is based on a similar provision in ABA Recommendation No. 120C, supra. It is in accord with general principles of administrative law, under which an agency's failure to reasonably explain its departure from established policies or interpretations renders its action arbitrary and capricious on judicial review. See 1981 MSAPA § 5-116(c)(8)(iii) (court may grant relief against agency action other than a rule if it is "inconsistent with the agency's prior practice or precedent, unless the agency has stated credible reasons sufficient to indicate a fair and rational basis for the inconsistency"); Yale-New Haven Hospital v. Leavitt, 470 F.3d 71, 79-80 (2d Cir. 2006). It has been said that a guidance document should constrain subsequent agency action in the same manner that the agency's adjudicative precedents do. See Peter L. Strauss, "The Rulemaking Continuum," 41 Duke L.J. 1463, 1472-73, 1486 (1992) (cited with approval on this point in United States v. Mead Corp., 533 U.S. 218, 232 (2001)); see also Manning, supra, at 934-37. Subsection (d) refers only to official acts of the agency (compare the definition of "agency action" in Section 102(3)), not to informal acts of agency staff, such as inspections. The latter types of conduct are frequently not accompanied by a written statement at all, so it would be outside the scope of requirements imposed by subsection (d) to require these government personnel to "explain' a departure from the position taken in a guidance document.

One purpose of this subsection is to protect the interests of persons who may have reasonably relied on a guidance document. An agency that acts at variance with its past practices may be held to have acted in an arbitrary and capricious manner if the unfairness to regulated persons outweighs the government's interest in applying its new view to those persons. Heckler v. Community Health Servs., 467 U.S. 51, 61 (1984) ("an administrative agency may not apply a new [case law] rule retroactively when to do so would unduly intrude upon reasonable reliance interests"); Miguel-Miguel v. Gonzales, 500 F.3d 941, 951 (9th Cir. 2007); Epilepsy Found. v. NLRB, 268 F.3d 1095, 1102 (D.C. Cir. 2001); Microcomputer Tech. Inst. v. Riley, 139 F.3d 1044, 1050 (5th Cir. 1998). Accordingly, where persons may have justifiably relied on a guidance document, the agency's explanation for departing from the position taken in that document should ordinarily include a reasonable justification for the decision to override their reliance interests.

The first two sentences of subsection (e) are based directly on Va. Code Ann. § 2.2-4008. Similar provisions have been adopted in Arizona and Washington. See Ariz. Rev. Stat. Ann. §

41-1091; Wash. Rev. Code Ann. § 34.05.230(3)-(4).

The last sentence of the subsection is based on the federal APA. See 5 U.S.C. § 552(a)(2); Smith v. NTSB, 981 F.2d 1326 (D.C. Cir. 1993). Subject to harmless error principles, see Section 508(b), a court may invoke the sanction prescribed in this section without necessarily concluding that the party against whom the document is cited has valid objections to the substance of the document.

Subsection (g) is based on Wash. Rev. Code Ann. § 34.05.230(2), which provides for petitions "requesting the conversion of interpretive and policy statements into rules." However, it is phrased more generally than the Washington provision, because an agency that receives a rulemaking petition will not necessarily wish to "convert" the existing guidance document into a rule without any revision. Knowing that it will now be speaking with the force of law, in a format that would be more difficult to alter than a guidance document is, the agency might prefer to adopt a rule that is narrower than, or otherwise differently phrased than, the guidance document that it would replace. In any event, the agency will, as provided in section 318, need to explain any rejection of the petition, whether in whole or in part, and such a rejection will be judicially reviewable to the same extent as other actions taken under that section.

Subsection (h) extends the principles of section 318 by allowing interested persons to petition an agency to revise or repeal an existing guidance document. Thus, while this Act does not require an agency to obtain the views of the public before issuing a guidance document, this subsection provides a procedure by which members of the public may bring their views regarding an existing guidance document to the agency's attention and request that the agency take account of those views. This process may be of particular importance to persons who are indirectly affected by a guidance document (such as persons who stand to benefit from the underlying regulatory program) but are unlikely to be the targets of an enforcement action in which they could challenge the legality or wisdom of the document under subsection (b). See Nina A. Mendelson, "Regulatory Beneficiaries and Informal Agency Policymaking," 92 Cornell L. Rev. 397, 438-44 (2007); see also ACUS Recommendation No. 76-5, 41 Fed. Reg. 56,769 (1976) (noting that section 553(e) of the federal APA "allow[s] any person to petition at any time for the amendment or repeal of . . . an interpretive rule or statement of general policy").

The subsection requires an agency to respond to the petition in [sixty] or fewer days. An agency that is not prepared to revise or repeal the guidance document within that time period may initiate a proceeding for the purpose of giving the matter further consideration. This proceeding can be informal; the notice and comment requirements of Sections 304 through 308 are inapplicable to it, because those sections deal with rules rather than guidance documents. The agency may, however, voluntarily solicit public comments on issues raised by the petition. Cf. ACUS Recommendation 76-5, supra, ¶ 2. This section does not prescribe a time period within which the agency must complete the proceeding, but judicial intervention to compel agency action "unlawfully withheld or unreasonably delayed" may be sought in an appropriate case. § 501(b). If the agency declines to revise or repeal the guidance document, within the [sixty] day period or otherwise, it must explain its decision. Denials of petitions under this subsection, like denials of petitions for rulemaking under section 318, are reviewable for abuse of discretion, and the agency's explanation will provide a basis for any judicial review of the denial.

When an agency grants a petition to revise or repeal a guidance document in part, and denies the petition in part, the agency should explain the partial denial to comply with the requirements of Section 311(h)(3).

SECTION 312. REQUIRED INFORMATION FOR RULE. A final rule filed by an agency with the [publisher] under Section 316 must contain the text of the rule and be accompanied by a record that contains:

(1) the date the final rule was adopted by the agency;

(2) a reference to the specific statutory or other authority authorizing the rule;

(3) any finding required by law as a prerequisite to adoption or effectiveness of the rule;

(4) the effective date of the rule; and

(5) the concise explanatory statement required by Section 313.

Comment

This section is based on 1981 MSAPA Section 3-111 (a). Agency action is defined in section 102(3) to include an agency rule or order [(subsection (3)(a)], and the failure to issue a rule or order [(subsection (3)(b)]. The term adoption in this section should be read with the definition of the terms "adopt" in Section 102(2), "rule in Section 102(30), and "rulemaking" in Section102 (31). The term rulemaking includes the adoption of a new rule and the amendment or repeal of an existing rule.

SECTION 313. CONCISE EXPLANATORY STATEMENT. When an agency adopts a final rule, the agency shall issue a concise explanatory statement that contains:

(1) the agency's reasons for adopting the rule, including the agency's reasons for not accepting substantial arguments made in testimony and comments;

(2) subject to Section 308, the reasons for any change between the text of the proposed rule contained in the notice of proposed rulemaking and the text of the final rule; and

(3) the summary of any regulatory analysis prepared under Section 305(d).

Comment

This section is based on 1981 MSAPA Section 3-110(a). Many states have adopted the

requirement of a concise explanatory statement. Arkansas (A.C.A. Section 25-15-204) and Colorado (C.R.S.A. Section 24-4-103) have similar provisions. The federal Administrative Procedure Act uses equivalent terms in Section 553 (c) (5 U.S.C.A. Section 553). This provision also requires the agency to explain why it rejected substantial arguments made in comments. Such explanation helps to encourage agency consideration of all substantial arguments and fosters perception of agency action as not arbitrary. Subsection (2) requires a statement of reasons for any substantial change between the text of the proposed rule, and the text of the adopted rule. Section 308 prohibits adoption of a rule that differs from the proposed rule unless the adopted rule is the logical outgrowth of the proposed rule. An adopted rule that contains a substantial change from the proposed rule can be adopted under Section 308 if the logical outgrowth test is satisfied but the agency will have to provide a statement of reasons under Section 313(2). If the logical outgrowth test is not met, then the rule cannot be adopted under Section 308, and section 313(2) does not apply.

Agency action is defined in section 102(4) to include an agency rule or order [(subsection (4)(a)], and the failure to issue a rule or order [(subsection (4)(b)]. The term adoption in this section should be read with the definition of the terms "adopt" in Section 102(2), "rule in Section 102(30), and "rulemaking" in Section102 (31). The term rulemaking includes the adoption of a new rule and the amendment or repeal of an existing rule.

SECTION 314. INCORPORATION BY REFERENCE. A rule may incorporate by reference all or any part of a code, standard, or rule that has been adopted by an agency of the United States, this state, or another state, or by a nationally recognized organization or association, if:

(1) repeating verbatim the text of the code, standard, or rule in the rule would be unduly cumbersome, expensive, or otherwise inexpedient;

(2) the reference in the rule fully identifies the incorporated code, standard, or rule by citation, place of inspection, and date[, and states whether the rule includes any later amendments or editions of the incorporated code, standard, or rule];

(3) the code, standard, or rule is readily available to the public in written or electronic form at no charge or for a reasonable charge;

(4) the rule states where copies of the code, standard, or rule are available from the agency adopting the rule for a reasonable charge, if any, or where copies are available from the agency of the United States, this state, another state, or the organization or association originally

issuing the code, standard, or rule; and

(5) the agency maintains a copy of the code, standard, or rule readily available for public inspection at the principal office of the agency.

Comment

Several states have provisions that require the agencies to retain the voluminous technical codes. See, Alabama, Ala.Code 1975 Section 41-22-9; Michigan, M.C.L.A. 24.232; and North Carolina, N.C.G.S.A. § 150B-21.6. To avoid the problems created by those retention provisions, but to assure that these technical codes are available to the public, this section adopts several specific procedures. One protection is to permit incorporating by reference only codes that are readily available from the outside promulgator, and that are of limited public interest as determined by a source outside the agency. See Wisconsin, W.S.A. 227.21. These provisions will guarantee that important material drawn from other sources is available to the public, but that less important material that is freely available elsewhere does not have to be retained. The bracketed language in subsection (2) is based on variations in state law as to whether later amendments to codes are automatically incorporated into the rule, or whether a new rulemaking proceeding would be required to include code amendments. This issue is discussed in Jim Rossi, "Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards," 46 W&M L.Rev. 1343 (2005).

SECTION 315. COMPLIANCE. An action taken under this [article] is not valid unless taken in substantial compliance with this [article].

Comment

This section is a slightly modified form of the 1961 Model State Administrative Procedure Act, Section (3)(c). See also 1981 MSAPA Section 3-113(a). Section 503(a) governs the timing of judicial review proceedings to contest any rule on the ground of noncompliance with the procedural requirements of this [act]. The scope of challenges permitted under Section 503(a) includes all applicable requirements of article 3 for the type of rule being challenged.

SECTION 316. FILING OF RULE. An agency shall file in written and electronic form with the [publisher] each final rule. In filing a final rule, an agency shall use a standard form prescribed by the [publisher]. The agency shall file the rule not later than [ ] days after adoption. The [publisher] shall maintain a permanent register of all filed rules and concise explanatory statements for the rules. The [publisher] shall affix to each final rule a certification of the time and date of filing. The [publisher] shall publish the notice of each final rule in the

[administrative bulletin].

Comment

This section is based on the 1961 Model State Administrative Procedure Act, Section 4(a) and its expansion in the 1981 MSAPA, Section 3-114(a). Section 201(g)(2) provides that the administrative bulletin must contain newly filed adopted rules. This section provides that the publisher is responsible for publishing the notice of adopted rules in the administrative bulletin.

Article 3 has a number of timing requirements for rulemaking proceedings governed by the provisions of this Article. Section 316 provides that the agency shall file an adopted rule with the [publisher] not later than [ ] days after adoption. The publisher shall publish the notice of each adopted rule in the [administrative bulletin].

SECTION 317. EFFECTIVE DATE OF RULE.

(a) Except as otherwise provided in this section, [unless disapproved by the [rules review committee][,] [or] [withdrawn by the agency under Section 703,] a rule becomes effective [30] days after publication of the rule [in the administrative bulletin] [on the [publisher's] Internet website].

(b) A rule may become effective on a date later than that established by subsection (a) if that date is specified in the rule or required by law other than this [act].

(c) A rule becomes effective immediately on its filing with the [publisher] or on any subsequent date earlier than that established by subsection (a) if it is required to be implemented by a certain date by law other than this [act].

(d) An emergency rule under Section 309 becomes effective on adoption by the agency.

(e) A direct final rule under Section 310 to which no objection is made becomes effective [30] days after publication, unless the agency specifies a later effective date.

Comment

This is a substantially revised version of the 1961 Model State Administrative Procedure Act, Section 4 (b) & (c) and 1981 Model State Administrative Procedure Act, Section 3-115. Most of the states have adopted provisions similar to both the 1961 Model State Administrative Procedure Act and the 1981 Model State Administrative Procedure Act, although they may differ on specific time periods. Some rules may have retroactive application or effect provided that

there is express statutory authority for the agency to adopt retroactive rules. See Bowen v. Georgetown University Hospital 488 U.S. 204 (1988).

Article 3 has a number of timing requirements for rulemaking proceedings governed by the provisions of this Article. Section 317(a) provides that an adopted rule becomes effective 30 days after publication of the adopted rule in the [administrative bulletin] [on the publisher's Interne web site], unless one of several exceptions apply, These exceptions include: a) other subsections of Section 317; b) disapproval by rules review committee; and 3) withdrawal by agency under Section 703. Section 317(b) provides that a later effective date than 30 days in subsection (a) is applicable if required by law other than this [act] or specified in the rule. Section 317(c) provides that an adopted rule becomes effective immediately upon filing with the [publisher] or any subsequent date earlier than that established by subsection (a) (30 days after publication). Section 317(d) provides that Emergency rules (Section 309) become effective upon adoption by the agency. Section 317(e) provides that direct final rules to which no objection is made become effective 30 days after publication unless a later date is specified.

SECTION 318. PETITION FOR ADOPTION OF RULE. Any person may petition an agency to adopt a rule. An agency shall prescribe by rule the form of the petition and the procedure for its submission, consideration, and disposition. Not later than [60] days after submission of a petition, the agency shall:

(1) deny the petition in a record and state its reasons for the denial; or

(2) initiate rulemaking.

Comment

This section is substantially similar to the 1961 MSAPA Section 6.. See also Section 3-117 of the 1981 MSAPA. Agency decisions that decline to adopt a rule are judicially reviewable for abuse of discretion (See Massachusetts v. EPA 127 S. Ct. 1438 (2007) (EPA decision to reject rulemaking petition and therefore not to regulate greenhouse gases associated with global warming was judicially reviewable and decision was arbitrary and capricious.). When an agency grants a rulemaking petition in part, and denies the petition in part, the agency should explain the partial denial to comply with the requirements of Section 318(1).

[ARTICLE] 4

ADJUDICATION IN CONTESTED CASE

SECTION 401. CONTESTED CASE. This [article] applies to an adjudication made by an agency in a contested case.

Comment

Article 4 of this Act does not apply to all adjudications but only to those adjudications, defined in Section 102(7) as a "contested case." An adjudication that is not made in a contested case is not subject to this article but is subject to Sections 311(d) and (f), and Article 5. For a statute to create a right to an evidentiary hearing, express use of the term "evidentiary hearing" is not necessary in the statute. Statutes often use terms like "appeal" or "proceeding" or "hearing", but in context it is clear that they mean an evidentiary hearing. An evidentiary hearing is one in which the resolution of the dispute involves particular facts and the presiding officer's decision is based on the hearing record. Hearing rights are created by statutes that establish an agency and delegate powers to the agency (agency enabling acts). The provisions of this [act] do not create hearing rights. Article Four does not apply to adjudications that are not a contested case. See Goss v. Lopez 419 U.S. 565 (1975) for an example of informal adjudication procedures required when a public school district suspends students for ten days or less. In those circumstances the constitution does not require an opportunity for an evidentiary hearing.

The term "contested case" used in this section is similar to the "contested case" definition in Section 1(2) of the 1961 MSAPA. Like the 1961 MSAPA Section 9, this Act looks to external sources such as statutes and constitutions to determine when a party is entitled to a hearing. However, this term differs from the 1961 MSAPA's term "contested case" because it also includes hearings required by the constitution, federal or state, and makes provision in Article 4 for the type of hearing to be held in a case where a constitution creates the right to a hearing. Including constitutionally created rights to a hearing within the provisions of this Act eliminates the problem of looking outside the Act to determine the type of hearing required in cases where the right to the hearing is created by a constitution. Hearing rights created by judicial decisions mean a constitutional decision by a court in that state. See Goldberg v. Kelley, 397 U.S. 254 (1970). The definition of "contested case" should be read in conjunction with the definitions of "adjudication" under Section 102(1), "evidentiary hearing" under Section 102(11), and of "order", Section 102(23), infra. Article Four procedures apply to adjudications that are contested cases, Section 401, and that result in a final order of the agency, Section 413.

This section is subject to the exception in Section 407 for an emergency hearing if the requirements for that exception under this Article apply. If the requirements for an emergency adjudication under Section 407 are met, a hearing in a contested case may be conducted following the procedures in that section. This is an external hearing rights approach that is consistent with the 1961 MSAPA Section 9. Hearings that are required by procedural due process guarantees serve to protect life, liberty and property *interests*, which arise where a statute creates a justified expectation or legitimate entitlement. This section includes more than what were described as "rights" under older common law.

Section 401 does not apply to adjudications that are not a contested case. However, these types of adjudications are subject to the provisions of Article 5 governing judicial review, and they are subject to the provisions of Section 311(d), and (f), governing variance by the agency from a position supported by a guidance documents and use of guidance documents in agency adjudication, respectively. Those requirements apply to all adjudications, including informal adjudications, and not just to contested cases. Section 401, governing contested case hearings, does not apply to investigatory hearings, a hearing that merely seeks public input or comment, pure administrative process proceedings such as tests, elections, or inspections, and situations in which a party has a right to a de novo administrative or judicial hearing. An agency may by rule make all or part of article 4 applicable to adjudication that does not fall within the requirements of Section 401, including hearing rights conferred by agency regulations, or on the record appeals.

This section draws on the Minnesota, (see Minnesota Statutes Annotated, Section 14.02, subd. 3); Washington (see Revised Code of Washington, 34.05.413(2)) and Kansas (see Kansas Stat. Ann., KS ST Section 77-502(d) & Kansas Stat. Ann., KS ST Section 77-503) Administrative Procedure Acts.

SECTION 402. PRESIDING OFFICER.

(a) A presiding officer must be an administrative law judge assigned in accordance with Section 604(2), the individual who is the agency head, a member of a multi-member body of individuals that is the agency head, or, unless prohibited by law of this state other than this [act], an individual designated by the agency head.

(b) An individual who has served as investigator, prosecutor, or advocate at any stage in a contested case or who is subject to the authority, direction, or discretion of an individual who has served as investigator, prosecutor, or advocate at any stage in a contested case may not serve as the presiding officer in the same case. An agency head that has participated in a determination of probable cause or other preliminary determination in an adjudication may serve as the presiding officer or final decision maker in the adjudication unless a party demonstrates grounds for disqualification under subsection (c).

(c) A presiding officer or agency head acting as a final decision maker is subject to disqualification for bias, prejudice, financial interest, ex parte communications as provided in Section 408, or any other factor that would cause a reasonable person to question the impartiality

of the presiding officer or agency head. A presiding officer or agency head, after making a reasonable inquiry, shall disclose to the parties any known facts related to grounds for disqualification which are material to the impartiality of the presiding officer or agency head in the proceeding.

(d) A party may petition for the disqualification of a presiding officer or agency head promptly after notice that the person will preside or, if later, promptly on discovering facts establishing a ground for disqualification. The petition must state with particularity the ground on which it is claimed that a fair and impartial hearing cannot be accorded or the applicable rule or canon of practice or ethics that requires disqualification. The petition may be denied if the party fails to exercise due diligence in requesting disqualification after discovering a ground for disqualification.

(e) A presiding officer or agency head whose disqualification is requested shall decide whether to grant the petition and state in a record facts and reasons for the decision. The decision to deny disqualification is not subject to interlocutory judicial review.

(f) If a substitute presiding officer is required, the substitute must be appointed [as required by law, or if no law governs,] by:

(1) the Governor, if the original presiding officer is an elected official; or

(2) the appointing authority, if the original presiding officer is an appointed official.

(g) If participation of the agency head is necessary to enable the agency to take action, the agency head may continue to participate notwithstanding a ground for disqualification or exclusion.

Legislative Note: *The first alternative under subsection (a) would be applicable in states that have adopted central panel hearing offices but would not apply to states that do not have central panel hearing offices. Article 6 governs central panel hearing offices under this act. If a state does not have a central panel hearing agency, presiding officers would include administrative*

law judges who are employees of the agency with final decision authority. States vary in the terms used to describe agency employees who are presiding officers. The term includes administrative judges, hearing officers, and hearing examiners. Administrative law judges can be employees of the central panel hearing office or of the agency with final decision authority.

Comment

Section 402(a) is based on 1981 MSAPA Section 4-202(a). Subsection (a) governs who may be appointed to serve as a presiding officer in a contested case. If the case is heard by a multimember body of individuals as the agency head, , one member of the agency head may serve as chair, but all of the persons sitting as judge in the case are collectively the presiding officer. Otherwise, the presiding officer will be a single individual, either the agency head, or an individual designated by the agency head, or one or more administrative law judges assigned by the Office of Administrative Hearings in accordance with Section 604(2). The term presiding officer is defined in Section 102(26) , and the term agency head is defined in Section 102(5). Subsection (a) confers a limited amount of discretion on the agency head to determine who will preside. This discretion is also limited by the phrase "unless prohibited by law of this state other than this act," which prevents the use of "other persons" as presiding officers to the extent that the other state law prohibits their use. Thus, if this language is adopted by a state that has an existing central panel of administrative law judges whose use is mandatory in enumerated types of proceedings, the agencies must continue to use the central panel for those proceedings, but may exercise their option to use "other persons" for other types of proceedings.

Subsection (a) provides for states that have created a central panel of administrative law judges, and have made the use of administrative law judges from the central panel mandatory unless the agency head or one or more members of the agency head presides. In some states, however, the use of central panel administrative law judges is mandatory only in certain enumerated agencies or types of proceedings. Half of the states have central panels. For those states with central panels, the first clause in subsection (a) would harmonize Section 401 with the existing central panel legislation. For states that do not have a central panel agency, this first clause would not apply.

Subsection (b) is based on 1981 MSAPA Section 4-214. Subsection (b) prohibits agency employees from serving as presiding officers in a specific contested case if they have served in the same case as a staff adversary or advocate, or of they are subject to supervision by a staff advocate or adversary in the same case. These employees are subject to the ex parte communication prohibitions contained in section 408 and to disqualification under subsection (c).

Subsection (c) is based in part on 1981 MSAPA Section 4-202(b). A final decision maker is the agency official with the legal authority to issue a final order. The agency head has this authority. An agency head may also delegate the legal authority to issue a final order to another agency official including a presiding officer or in states with a central panel (See Article 6) to the administrative law judge that presides over the contested case proceeding.

Subsection (d) is based on 1981 MSAPA Section 4-202(c).

Subsection (e) is based in part on 1981 MSAPA Section 4-202(d). Disclosure duties

under subsection (e) are based on state ethics codes governing ethical standards for judges in the judicial branch of the government, Section 12 of the 2000 Uniform Arbitration Act, and on state law governing the ethical responsibilities of government officials and employees.

Subsection (f) is based on 1981 MSAPA Section 4-202(e).

Subsection (g) adopts the rule of necessity for agency decision makers. See California Government Code Section 11512(c) (agency member not disqualified if loss of a quorum would result); United States v. Will (1980) 449 U.S. 200 (common law rule of necessity applied to U.S. Supreme Court to decide issues before the court relating to compensation of all Article III judges).

SECTION 403. CONTESTED CASE PROCEDURE.

(a) This section does not apply to an emergency adjudication under Section 407.

(b) An agency shall give notice of the agency decision to a person when the agency takes an action as to which the person has a right to a contested case hearing. The notice must be in writing, set forth the agency action, inform the person of the right, procedure, and time limit to file a contested-case petition, and provide a copy of the agency procedures governing the contested case.

(c) In a contested case, the presiding officer shall give all parties a timely opportunity to file pleadings, motions, and objections. The presiding officer may give all parties the opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed recommended, initial, or final orders. The presiding officer, with the consent of all parties, may refer the parties in a contested case to mediation or other dispute resolution procedure.

(d) In a contested case, to the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall give all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence.

(e) Except as otherwise provided by law other than this [act], the presiding officer may conduct all or part of an evidentiary hearing or a prehearing conference by telephone, television, video conference, or other electronic means. The hearing may be conducted by telephone or

other method by which the witnesses may not be seen only if all parties consent [or the presiding officer finds that this method will not impair reliable determination of the credibility of testimony]. Each party must be given an opportunity to attend, hear, and be heard at the proceeding as it occurs. This subsection does not prevent an agency from providing by rule for electronic hearings.

(f) Except as otherwise provided in subsection (g), a hearing in a contested case must be open to the public. A hearing conducted by telephone, television, video conference, or other electronic means is open to the public if members of the public have an opportunity to attend the hearing at the place where the presiding officer is located or to hear or see the proceeding as it occurs.

(g) A presiding officer may close a hearing to the public on a ground on which a court of this state may close a judicial proceeding to the public or pursuant to law of this state other than this [act].

(h) Unless prohibited by law of this state other than this [act], a party, at the party's expense, may be represented by counsel or may be advised, accompanied, or represented by another individual.

(i) A presiding officer shall ensure that a hearing record is created that complies with Section 406.

(j) The decision in a contested case must be based on the hearing record and contain a statement of the factual and legal bases of the decision. If a finding of fact is set forth in language of a statute of this state other than this [act], it must be accompanied by a concise and explicit statement of the underlying facts supporting the finding of fact. The decision must be prepared electronically and, on request, made available in writing.

(k) Subject to Section 205, the rules by which an agency conducts a contested case may

include provisions more protective than the requirements of this section of the rights of parties other than the agency.

(l) Unless prohibited by law of this state other than this [act], an agency may dispose of a contested case without a hearing by stipulation, agreed settlement, consent order, or default.

Comment

This section specifies the minimum hearing procedure requirements that must be met in contested cases under this act. This section applies to all agencies whether or not an agency rule provides for a different procedure; this procedure is excused only if a statute expressly provides otherwise. This section does not prevent an agency from adopting more stringent procedures than those in this section. This section does not supersede conflicting state or federal statutes.

There are several interrelated purposes for this procedural provision: 1) to create a minimum fair hearing procedure; and 2) to attempt to make that minimum procedure applicable to all agencies. In many states, individual agencies have lobbied the legislature to remove various requirements of the state Administrative Procedure Act from them. The result in a considerable number of states is a multitude of divergent agency procedures. This lack of procedural uniformity creates problems for litigants, the bar and the reviewing courts. This section attempts to provide a minimum, universally applicable procedure in all disputed cases. The important goal of this section is to protect citizens by a guarantee of minimum fair procedural protections. The procedures required here are only for actions that fit the definition of a contested case and fall within the provisions of Section 401. Thus, they do not spread quasi judicial procedures widely, and do not create any significant agency loss of efficiency or increased cost.

This section is modeled in part on the Arizona Regulatory Bill of Rights, see A.R.S. Section 41-1001.01 and the California Administrative Adjudication Bill of Rights, see West Ann. Cal. Gov. Code Section 11425.10.

Subsection (a) excludes emergency adjudications from the requirements of this Section. Section 407 provides for the procedures to be used in emergency adjudications.

Subsection (b) requires the agency to make available to a person to which an agency action is directed a copy of the agency procedures governing the contested case. Those agency procedures would include applicable procedures published by the agency under Section 203(2), procedures required under the agency governing statute, and procedural rules adopted under Section 205(a), or (c). The second sentence of subsection (b) requires that the agency give notice to a person when the agency takes an action and the person has a right to a contested case hearing to challenge the agency action. This notice would precede the filing of a contested case proceeding. The notice requirements in Section 405 would apply when the contested case proceeding has commenced. The third sentence of subsection (b) is based on provisions of the North Carolina Administrative Procedure Act. N.C. stats. § 150B-23(f).

Subsection (c) is based in part on 1981 MSAPA Section 4-207. The first sentence of subsection (c) is based on 1981 MSAPA Section 4-207(a). The second sentence of subsection (c)

is based on 1981 MSAPA Section 4-207(b). The third sentence of subsection (c) is new, and authorizes the use of mediation and other alternative dispute resolution procedures to resolve or settle contested cases. Since the 1981 MSAPA was adopted, the use of mediation and other alternative dispute resolution procedures has become widespread not only in civil litigation but also in administrative adjudication. See the Administrative Dispute Resolution Act, 5 U.S.C. Sections 571 to 583 (1990).

Subsection (d) is based on 1981 MSAPA Section 4-211(2).

Subsection (e) is based on 1981 MSAPA Section 4-211(4). Under subsection (e) hearings in contested cases can be conducted using the telephone, television, video conferences, or other electronic means. Due process of law may require live in person hearings when there are disputed issues of material fact that require the fact finder to make credibility determinations. See Whiteside v. State, (2001) 20 P. 3d 1130 (Supreme Court of Alaska) (due process of law violated with telephone hearing in driver's license revocation hearing when driver's credibility was material to the hearing, and the driver was not offered an in person hearing); But see Babcock v. Employment Division (1985) 72 Or. App. 486, 696 P. 2d 19, 21 (telephone hearings do not violate due process of law in hearings in which the credibility of a party is at issue because audible indicia of a witness's demeanor are sufficient for credibility). Telephone hearings are widely used in high volume short hearing dockets such as unemployment compensation hearings.

Subsection (f) is based on the second sentence of 1981 MSAPA Section 4-211(6).

Subsection (g) is based on the first sentence of 1981 MSAPA Section 4-211(6).

Subsection (h) is based on 1981 MSAPA Section 4-203(b). This Act does not expressly confer a right to self-representation in contested cases. The absence of such a provision reflects a belief that a broad right to self-representation is inappropriate for an APA that will apply globally to all contested cases, ranging from the simplest proceedings to very complex ones. States have the option to provide a right to self-representation in particular statutes that require evidentiary hearings, and the absence of a corresponding right in this Act should not be interpreted as discouraging such legislation.

Subsection (i) is based on the first sentence of 1981 MSAPSA Section 4-211(5).

Subsection (j) is based on 1961 MSAPA Section 12, and on 1981 MSAPA Section 4-211(5). See also Section 202(a) requiring an agency to publish on its Internet web site each final order in a contested case. , and the provisions of 15 U.S.C. Section 7004.

Subsection (k) is new, and permits an agency to adopt procedural rules that are more protective of the rights of parties other than the agency to an agency adjudication than the requirements of this section, subject to the provisions of Section 205(a) which provide for the adoption of procedural rules which must be used by all agencies in the state under Section 205(b) unless the agency adopts their own rules under Section 205(c).

Subsection (l) is based on 1961 MSAPA Section 9(d).

SECTION 404. EVIDENCE IN CONTESTED CASE. The following rules apply in a contested case:

(1) Except as otherwise provided in paragraph (2), all relevant evidence is admissible, including hearsay evidence, if it is of a type commonly relied on by a reasonably prudent individual in the conduct of the affairs of the individual.

(2) The presiding officer may exclude evidence in the absence of an objection if the evidence is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of an evidentiary privilege recognized in the courts of this state. The presiding officer shall exclude the evidence if objection is made at the time the evidence is offered.

(3) If the presiding officer excludes evidence with or without objection, the offering party may make an offer of proof before further evidence is presented or at a later time determined by the presiding officer.

(4) Evidence may be received in a record if doing so will expedite the hearing without substantial prejudice to a party. Documentary evidence may be received in the form of a copy if the original is not readily available or by incorporation by reference. On request, parties must be given an opportunity to compare the copy with the original.

(5) Testimony must be made under oath or affirmation.

(6) Evidence must be made part of the hearing record of the case. Information or evidence may not be considered in determining the case unless it is part of the hearing record. If the hearing record contains information that is confidential, the presiding officer may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record.

(7) The presiding officer may take official notice of all facts of which judicial notice may

be taken and of scientific, technical, or other facts within the specialized knowledge of the agency. A party must be notified at the earliest practicable time of the facts proposed to be noticed and their source, including any staff memoranda or data. The party must be afforded an opportunity to contest any officially noticed fact before the decision becomes final.

(8) The experience, technical competence, and specialized knowledge of the presiding officer or members of an agency head that is a multi-member body that is hearing the case may be used in evaluating the evidence in the hearing record.

Comment

Subsection (1) is based upon the second sentence of 1981 MSAPA Section 4-215(d)

Subsection (2) is based upon 1981 MSAPA Section 4-212(a), and upon 1961 MSAPA Section 10(1). Subsection (1) codifies the rule that hearsay evidence is admissible in contested case hearings whether or not a hearsay exception applies. This is a relaxed standard for admissibility in contrast to the evidence rules in civil jury proceedings in which hearsay evidence would not be admissible unless a hearsay exception applied. See Section 413(f) for the legal residuum rule and the reliability alternatives. Under subsection (2) evidence is unduly repetitious if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. In most states a presiding officer's determination that evidence is unduly repetitious may be overturned only for abuse of discretion. The term statutory in subsection (2) refers to evidence rules that are codified by statute in some states with an evidence code (See California Evidence code).

Subsection (3) is new but codifies generally accepted practices for evidentiary objections.

The first sentence of subsection (4) is based upon 1961 MSAPA Section 10 (1) and 1981 MSAPA Section 4-212(d). The second and third sentences of subsection (4) is based upon 1961 MSAPA Section 10 (2), and 1981 MSAPA section 4-212(e).

Subsection (5) is based on 1981 MSAPA Section 4-212(b), Government Code Section 11515, and 1961 MSAPA Section 10(4).

The first and third sentences of subsection (6) are new. The second sentence of subsection (6) is based on 1981 MSAPA Section 4-215(d), first sentence.

Subsection (7) is based generally on 1961 MSAPA Section 10 (4), and on 1981 MSAPA Section 4-212(f).

Subsection (8) is based upon 1961 MSAPA Section 10(4), fourth sentence, and 1981 MSAPA Section 4-215(d), third sentence.

SECTION 405. NOTICE IN CONTESTED CASE.

(a) Except as otherwise provided in an emergency adjudication under Section 407, an agency shall give notice in a contested case that complies with this section.

(b) In a contested case initiated by a person other than an agency, not later than [five] days after filing, the agency shall give notice to all parties that the case has been commenced. The notice must contain:

(1) the official file or other reference number, the name of the proceeding, and a general description of the subject matter;

(2) contact information for communicating with the agency, including the agency mailing address [, electronic mail address,] [,] [facsimile number,] and telephone number;

(3) a statement of the date, time, place, and nature of the prehearing conference or hearing, if any;

(4) the name, official title, mailing address, [electronic mail address,] [facsimile number,] and telephone number of any attorney or employee who has been designated to represent the agency; and

(5) the names and last known addresses of all parties and other persons to which notice is being given by the agency.

(c) In a contested case initiated by an agency, the agency shall give notice to the party against which the action is brought. The notice must contain:

(1) a statement that a case that may result in an order has been commenced against the party;

(2) a short and plain statement of the matters asserted, including the issues involved;

(3) a statement of the legal authority under which the hearing will be held citing the statutes and any rules involved;

(4) the official file or other reference number and the name of the proceeding;

(5) the name, official title, mailing address, [and] [electronic mail address,] [and] [facsimile number,] [and] [telephone number] of the presiding officer and the name, official title, mailing address, [electronic mail address,] [facsimile number,] and telephone number of the agency's representative;

(6) a statement that a party that fails to attend or participate in any subsequent proceeding in the case may be held in default;

(7) a statement that the party served may request a hearing and includes instructions in plain English about how to request a hearing; and

(8) the names and last known addresses of all parties and other persons to which notice is being given by the agency.

(d) When a hearing or a prehearing conference is scheduled, the agency shall give parties notice that contains the information required by subsection (c) at least [30] days before the hearing or prehearing conference.

(e) A notice under this section may include other matters that the presiding officer considers desirable to expedite the proceedings.

Comment

Section 405 is based generally on 1961 MSAPA Section 9 (a), and (b), and 1981 MSAPA Section 4-206. See also; Oregon, O.R.S. Section 183.415; Kansas, K.S.A. Section 77-518; Iowa, I.C.A. Section 17A.12; Montana, MCA 2-4-601; and Michigan, M.C.L.A. 24.271.

Subsection (a) is new and provides that notice requirements in this section apply to contested case proceedings but do not apply to emergency adjudications which are governed by Section 407. Notice is defined in Section 102 (21). Notify is defined in Section 102(22).

Subsection (b) is also new and codifies a timing requirement for notice (within 5 days) and separate notice requirements for an agency when a person other than an agency initiates a

contested case proceeding. This subsection would apply when a person other than an agency applies for a license or for governmental benefits, and the agency denies the application. The person may commence a contested case proceeding to challenge the denial of the application. When a contested case proceeding is commenced, subsection (b) requires the agency to give notice to all parties that the proceeding has been commenced. The notice must contain the matters listed in subsection (b)(1) to (b)(4). Subsection (b)(1) is based upon 1981 MSAPA Section 4-206(c)(3). Subsection (b)(2) is new, and requires notice of agency contact information including the agency mailing address and telephone number. Subsection (b)(3) is based upon 1961 MSAPA Section 9(b)(1), and 1981 MSAPA Section 4-206(c)(4). Subsection (b)(4) is based upon 1981 MSAPA Section 4-206(c)(2).

Subsection (c) is new and applies when the agency initiates a contested case proceeding against a person other than the agency. This subsection applies when the agency seeks the revocation of an existing professional license or seeks to terminate a recipient's governmental benefits. When the agency is required to provide the licensee or recipient with the opportunity for a contested case hearing, the notice requirements of this subsection apply. Subsection (c)(1) is new and requires notice that an action that may result in an order has been commenced against the party notified. Subsection (c)(2) is based on 1961 MSAPA Section 9(b)(4), and 1981 MSAPA Section 4-206(c)(7). Subsection (c)(3) is based upon 1961 MSAPA Section 9 (b)(2), and 1981 MSAPA Section 4-206(c)(5). Subsection (c)(4) is based upon 1981 MSAPA Section 4-206(c)(3). Subsection (c)(5) is a modified version of 1981 MSAPA Section 4-206(c)(2),(6) with electronic mail and facsimile information requested. Subsection (c)(6) is based upon 1981 MSAPA Section 4-206(c)(8). Subsection (c)(7) is new and provides for plain language instructions on how to request a hearing. Subsection (c)(8) is based upon 1981 MSAPA Section 4-206(c)(1).

Subsection (d) is a modified version of 1981 MSAPA Section 4-206(a), with a minimum time limit of 30 days notice before the hearing.

Subsection (e) is based upon 1981 MSAPA section 4-206(d).

SECTION 406. HEARING RECORD IN CONTESTED CASE.

(a) An agency shall maintain the hearing record created under Section 403(i) in each contested case.

(b) The hearing record must contain:

(1) a recording of each proceeding;

(2) notice of each proceeding;

(3) any prehearing order;

(4) any motion, pleading, brief, petition, request, and intermediate ruling;

(5) evidence admitted;

(6) a statement of any matter officially noticed;

(7) any proffer of proof and objection and ruling thereon;

(8) any proposed finding, requested order, and exception;

(9) any transcript of the proceeding prepared at the direction of the agency;

(10) any recommended order, final order, or order on reconsideration; and

(11) any matter placed on the record after an ex parte communication under Section 408(f).

(c) The hearing record constitutes the exclusive basis for agency action in a contested case.

Comment

Section 406 is based generally on 1961 MSAPA Section 9(e) and 1981 MSAPA Section 4-221. Subsection (a) is a modified version of 1981 MSAPA Section 4-221(a). Subsection (b)(1) is a modified version of 1981 MSAPA Section 4-221(b)(8). Subsections (b)(2) to (8) are based upon 1981 MSAPA Section 4-221(b)(1) to (7). Subsection (b)(9) is a modified version of 1981 MSAPA Section 4-221(b)(8). Subsection (b)(10) is a modified version of 1981 MSAPA Section 4-221(b)(9). Subsection (b)(11) is based upon 1981 MSAPA Section 4-221(b)(11). Subsection (c) is a revised version of 1981 MSAPA Section 4-221(c). The recording of an agency hearing can be made by certified shorthand reporter, video or audio recording, or other electronic means. Judicial review under Section 507 is limited to matters in the agency hearing record. Subsection (b)(9) refers to the official governmental transcript prepared at the direction of the agency.

SECTION 407. EMERGENCY ADJUDICATION PROCEDURE.

(a) Unless prohibited by law of this state other than this [act], an agency may conduct an emergency adjudication in a contested case under this section.

(b) An agency may take action and issue an order under this section only to deal with an imminent peril to the public health, safety, or welfare.

(c) Before issuing an order under this section, an agency, if practicable, shall give notice and an opportunity to be heard to the person to which the agency action is directed. The notice

of the hearing and the hearing may be oral or written and may be by telephone, facsimile, or other electronic means.

(d) An order issued under this section must briefly explain the factual and legal reasons for using emergency adjudication procedures.

(e) To the extent practicable, an agency shall give notice to the person to which the agency action is directed that an order has been issued. The order is effective when signed by the agency head or the designee of the agency head.

(f) After issuing an order pursuant to this section, an agency shall proceed as soon as practicable to provide notice and an opportunity for a hearing following the procedure under Section 403 to determine the issues underlying the order.

(g) An order issued under this section may be effective for not longer than [180] days or until the effective date of any order issued under subsection (f), whichever is shorter.

Comment

Section 407 is based generally on the 1961 Model State Administrative Procedure Act, section 14(c) and the 1981 Model State Administrative Procedure Act, Section 4-501. Subsection (a) is new and authorizes emergency adjudication in a contested case following the requirements of this section unless law other than this act prohibits such action. Subsection (b) is a revised version of 1961 MSAPA Section 14(c), and 1981 MSAPA Section 4-501(b). Subsection (b) uses the terms "imminent peril to the public health, safety or welfare, rather than the 1981 MSAPA terms "immediate danger to the public health, safety, or welfare" but no operative difference in emergency adjudication standards is intended. Subsection (c) is new, and requires the agency, if practicable, to give advance notice and opportunity to be heard to the person to whom the agency action is directed. The means of notice and hearing are also specified. Subsection (d) is a revised version of 1981 MSAPA Section 4-501(c). Subsection (e) is a revised version of 1981 MSAPA Section 4-501(d). Subsection (f) is a revised version of 1981 MSAPA Section 4-501(e). Subsection (g) is new, and provides for a time limit for the effectiveness of the emergency order either 180 days, or the effective date of an order in a contested case proceeding governed by Section 403 procedures, whichever is shorter.

The procedure of this section is intended permit immediate agency emergency adjudication, but also to provide minimal protections to parties against whom such action is taken. Emergencies regularly occur that immediately threaten public health, safety or welfare: licensed health professionals may endanger the public; developers may act rapidly in violation of law; or restaurants may create a public health hazard. In these cases the agencies must possess the power to act rapidly to curb the threat to the public. On the other hand, when the agency acts

in such a situation, there should be some modicum of fairness, and the standards for invoking this remedy must be clear, so that the emergency label may be used only in situations where it fairly can be asserted that rapid action is necessary to protect the public.

Federal and state case law have held that in an emergency situation an agency may act rapidly and postpone any formal hearing without violation, respectively, of federal or state constitutional law. FDIC v. Mallen, 486 U.S. 230 (1988); Gilbert v. Homar (1997) 520 U.S. 924; Dep't of Agric. v. Yanes, 755 P.2d 611 (OK. 1987).

The generic provision in this section has several advantages over the present divergent approaches to emergency agency action. First, all agencies have the needed power to act without delay, but there is provision for some type of brief hearing, if feasible. Second, this article limits the agency to action of this type only in a genuine, defined emergency. Third, there are pre and post deprivation protections. This section seeks to strike an appropriate balance between public need and private fairness.

This section does not apply to an emergency adjudication, cease and desist order, or other action in the nature of emergency relief issued pursuant to express statutory authority arising outside of this act.

SECTION 408. EX PARTE COMMUNICATIONS.

(a) In this section, "final decision maker" means the person with the power to issue a final order in a contested case.

(b) Except as otherwise provided in subsection (c), (d), (e), or (h), while a contested case is pending, the presiding officer and the final decision maker may not make to or receive from any person any communication concerning the case without notice and opportunity for all parties to participate in the communication. For the purpose of this section, a contested case is pending from the issuance of the agency's pleading or from an application for an agency decision, whichever is earlier.

(c) A presiding officer or final decision maker may communicate about a pending contested case with any person if the communication is required for the disposition of ex parte matters authorized by statute or concerns an uncontested procedural issue.

(d) A presiding officer or final decision maker may communicate about a pending contested case with an individual authorized by law to provide legal advice to the presiding

officer or final decision maker and may communicate on ministerial matters with an individual who serves on the [administrative] [personal] staff of the presiding officer or final decision maker if the individual providing legal advice or ministerial information has not served as investigator, prosecutor, or advocate at any stage of the case, and if the communication does not augment, diminish, or modify the evidence in the record.

(e) An agency head that is the presiding officer or final decision maker in a pending contested case may communicate about that case with an employee or representative of the agency if:

(1) the employee or representative:

(A) has not served as investigator, prosecutor, or advocate at any stage of the case;

(B) has not otherwise had a communication with any person about the case other than a communication a presiding officer or final decision maker is permitted to make or receive under subsection (c) or (d) or a communication permitted by paragraph (2); and

(2) the communication does not augment, diminish, or modify the evidence in the agency hearing record and is:

(A) an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence in the agency hearing record;

(B) an explanation of the precedent, policies, or procedures of the agency; or

(C) any other communication that does not address the quality or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses.

(f) If a presiding officer or final decision maker makes or receives a communication in

violation of this section, the presiding officer or final decision maker:

(1) if the communication is in a record, shall make the record of the communication a part of the hearing record and prepare and make part of the hearing record a memorandum that contains the response of the presiding officer or final decision maker to the communication and the identity of the person that communicated; or

(2) if the communication is oral, shall prepare a memorandum that contains the substance of the verbal communication, the response of the presiding officer or final decision maker to the communication, and the identity of the person that communicated.

(g) If a communication prohibited by this section is made, the presiding officer or final decision maker shall notify all parties of the prohibited communication and permit parties to respond in a record not later than 15 days after the notice is given. For good cause, the presiding officer or final decision maker may permit additional testimony in response to the prohibited communication.

(h) If a presiding officer is a member of a multi-member body of individuals that is the agency head, the presiding officer may communicate with the other members of the body when sitting as the presiding officer and final decision maker. Otherwise, while a contested case is pending, no communication, direct or indirect, regarding any issue in the case may be made between the presiding officer and the final decision maker. Notwithstanding any provision of [state open meetings law], a communication permitted by this subsection is not a meeting.

(i) If necessary to eliminate the effect of a communication received in violation of this section, a presiding officer or final decision maker may be disqualified under Section 402(d) and (e), the parts of the record pertaining to the communication may be sealed by protective order, or other appropriate relief may be granted, including an adverse ruling on the merits of the case or dismissal of the application.

Comment

Section 408 governs ex parte communications. Many of the provisions in this section are new, but some are based upon 1961 MSAPA Section 13, and 1981 MSAPA Section 4-213. Ex parte communication provisions are also contained in the federal Administrative Procedure Act, 5 U.S.C. Section 557(d).

Subsection (a) is new and provides a definition of "final decision maker" for purposes of this section.

The first sentence of subsection (b) is a revised version of 1981 MSAPA Section 4-213(a),(c). One major difference between the two provisions is that the 1981 MSAPA limited the prohibition on types of ex parte communications to those relating to any issues in the proceeding, and subsection (b) is broader and prohibits any communication concerning a pending contested case. Another difference is that there are four exceptions to the prohibition that are referenced in current subsection (b), whereas 1981 MSAPA Section 4-213(b) had three exceptions. The second sentence of subsection (b) is new and provides a specific definition of when a proceeding is pending for purposes of subsection (b). Subsection (b) prohibits ex parte communications but recognizes four exceptions to the prohibition that are codified in subsections (c), (d), (e), and (h).

Subsection (c) contains two exceptions. The first exception is for disposition of ex parte matters authorized by statute, and this exception is based upon 1961 MSAPA Section 13, and 1981 MSAPA Section 4-213(a),(c). The second exception is new and applies to communications related to uncontested procedural issues. This exception does not apply to contested procedural issues nor does it apply to issues that do not easily fall into the procedural category. For example, other communications not on the merits but are related to security or to the credibility of a party or witness are prohibited by subsection (b). See Matthew Zaheri Corp., Inc. v. New Motor Vehicle Board (1997) 55 Cal. App. 4th 1305.

Subsection (d) contains two exceptions. The first exception is new and allows communications by a presiding officer or final decision maker with an individual authorized by law to provide legal advice to the presiding officer or final decision maker. This recognizes the role of agency counsel in advising agency officials in adjudication. The second exception for communications on ministerial matters with staff who work for the presiding officer or final decision maker is based upon 1961 MSAPA Section 13(2), and 1981 MSAPA Section 4-213(b). Both exceptions require that the communicating individual that provides legal advice or ministerial information to the presiding officer or final decision maker must not have served as an investigator, prosecutor or advocate in the same contested case and that the communication must not augment diminish or modify the evidence in the record. The first requirement of separation of functions is similar to the requirements of Section 402(b) for presiding officers. The second requirement, relating to augmenting, diminishing, or modifying the evidence in the record, is based upon 1981 MSAPA Section 4-213(b)(ii).

Subsection (e) is new and provides an exception for communications about a pending contested case between an agency employee or representative and the agency head acting as a presiding officer or final decisions maker in that case. The exception is limited by the conditions stated in subsections (e)(1), and (2). Subsection (e)(1) requires that the employee or representative (a) not have served as an investigator, prosecutor or advocate in the contested

case, and (b) not have had an ex parte communication that would be improper for the agency head acting as presiding officer or final decision maker to make or receive. Subsection (e)(1)(A)is based upon 1981 MSAPA Section 4-214(a). Subsection (e)(1)(B) is based upon 1981 MSAPA Section 4-213(b)(i). Subsection (e)(2) is based upon 1981 MSAPA Section 4-213(b)(ii). Subsections (e)(2)(A)(B) and (C) are new and provide alternative descriptions of types of communications that are allowed under this exception. Subsections (e)(2)(A)(B)(C) were added based on a compromise reached by the drafting committee after lengthy discussion. The opposing positions on the issue of whether there should be an ex parte communications exception for agency head communications with employees are 1) no exception for agency head communications with employees, and thus no subsection (e); and 2) an exception for agency head communications with employees with subsection (e)(2) but not subsections (e)(2) (A),(B), or (C). The first alternative was supported by the National Conference of Administrative Law Judges, a section of the Judicial Division of the American Bar association. The second alternative was supported by the Section on Administrative Law and Regulatory Practice of the American Bar Association. The current compromise is more restrictive than (e)(2) because a communication has to satisfy one of the alternatives under (e)(2)(A)(B)(C) in addition to meeting the (e)(2) requirements of not augmenting, diminishing, or modifying the evidence in the agency hearing record.

Subsection (f) is based upon 1981 MSAPA Section 4-213(e).

Subsection (g) is a revised version of 1981 MSAPA Section 4-213(e). The major differences are that subsection (g) provides for a 15 day time period after notice for a party to respond in writing to the prohibited communication and under subsection (g) the presiding officer must find that there is good cause shown to permit additional testimony in response to the prohibited communication.

The first sentence of subsection (h) is a revised version of 1961 MSAPA Section 13(1) and of the first clause of 1981 MSAPA Section 4-213(b). The second sentence of subsection (h) is new and prohibits ex parte communications between the presiding officer and the agency head or other person or body to whom the power to hear or decide is delegated. This sentence is based upon California Govt. Code Section 11430.80. The third sentence of subsection (h) is new.

Subsection (i) is a revised version of 1981 MSAPA Section 4-213(f).

SECTION 409. INTERVENTION.

(a) A presiding officer shall grant a timely petition for intervention in a contested case, with notice to all parties, if:

(1) the petitioner has a statutory right under law of this state other than this [act] to initiate or to intervene in the case; or

(2) the petitioner has an interest that may be adversely affected by the outcome of

the case and that interest is not adequately represented by existing parties.

(b) A presiding officer may grant a timely petition for intervention in a contested case, with notice to all parties, if the petitioner has a permissive statutory right to intervene under law of this state other than this [act] or if the petitioner's claim or defense is based on the same transaction or occurrence as the case.

(c) A presiding officer may impose conditions at any time on an intervener's participation in the contested case.

(d) A presiding officer may permit intervention provisionally and, at any time later in the contested case or at the end of the case, may revoke the provisional intervention.

(e) On request by the petitioners or a party or by action of the presiding officer, the presiding officer may hold a hearing on the intervention petition.

(f) A presiding officer shall promptly give notice of an order granting, denying, or revoking intervention to the petitioner for intervention and to the parties. The notice must allow parties a reasonable time to prepare for the hearing on the merits.

Comment

Section 409 is based on 1981 MSAPA Section 4-209, and on Federal Rule of Civil Procedure Rule 24 (intervention of right under Rule 24(a), and permissive intervention under Rule 24(b)). Subsection (a) is a revised version of 1918 MSAPA Section 4-209(a). Subsections (a) (1),(2) are adapted from Rule 24(a), intervention of right in the Federal Rules of Civil Procedure. Under subsection (a) a petition for intervention must be timely. Under ordinary circumstances a timely petition would be filed far enough in advance of the contested case hearing so that the intervener would be able to prepare for that hearing, and the existing parties would have time to respond to the intervener's petition.

Subsection (b) is a revised version of 1981 MSAPA Section 4-209(b). Subsection (b) is also based upon Rule 24(b), permissive intervention in the Federal Rules of Civil Procedure.

Subsection (c) is a revised version of the first sentence of1981 MSAPA Section 4-209(c).

Subsection (d) is new and allows for provisional intervention.

Subsection (e) is new and allows the presiding officer to schedule a hearing on the intervention petition on request of the interveners, or existing parties, or the presiding officer's

decision.

Subsection (f) is a revised version of 1981 MSAPA Section 4-209(d). Subsection (f) provides for notice suitable under the circumstances to enable parties to anticipate and prepare for changes that may be caused by the intervention.

SECTION 410. SUBPOENAS.

(a) On a request in a record by a party in a contested case, the presiding officer or any other officer to whom the power to issue a subpoena is delegated pursuant to law, on a showing of general relevance and reasonable scope of the evidence sought for use at the hearing, shall issue a subpoena for the attendance of a witness and the production of books, records, and other evidence.

(b) Unless otherwise provided by law or agency rule, a subpoena issued under subsection (a) shall be served and, on application to the court by a party or the agency, enforced in the manner provided by law for the service and enforcement of a subpoena in a civil action.

(c) Witness fees shall be paid by the party requesting a subpoena in the manner provided by law for witness fees in a civil action.

Comment

Section 410 is similar to 1981 MSAPA Section 4-210. Subsection (a) authorizes the presiding officer upon request by a party to issue subpoenas for the attendance of witnesses and the production of books, records, and other evidence for use at the contested case hearing upon a showing of general relevance and reasonable scope of evidence. This provides a stricter standard for subpoena issuance than the provisions of 1981 MSAPA Section 4-210(a) which authorizes the presiding officer to issue subpoenas and other orders based on a request by a party or based on the presiding officer's own motion.

Subsection (b) is based on Arizona administrative procedure act Section 41-1062A.4.

Subsection (c) is based upon California Government Code Section 11450.40.

SECTION 411. DISCOVERY.

(a) In this section, "statement" includes a record of a person's written statement signed

by the person and a record that summarizes an oral statement made by the person.

(b) Except in an emergency hearing under Section 407, a party, on written notice to another party at least [30] days before an evidentiary hearing, unless otherwise provided by agency rule under subsection (g), may:

(1) obtain the names and addresses of witnesses the other party will present at the hearing to the extent known to the other party; and

(2) inspect and copy any of the following material in the possession, custody, or control of the other party:

(A) statements of parties and witnesses proposed to be called by the other party;

(B) all records, including reports of mental, physical, and blood examinations, and other evidence the other party proposes to offer;

(C) investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the adjudication;

(D) statements of expert witnesses proposed to be called by the other party;

(E) any exculpatory material in the possession of the agency; and

(F) other materials for good cause.

(c) Parties to a contested case have a duty to supplement responses provided under subsection (b) to include information thereafter acquired, to the extent that the information will be relied on in the hearing.

(d) On petition, the presiding officer may issue a protective order for any material for which discovery is sought under this section which is exempt, privileged, or otherwise made confidential or protected from disclosure by law of this state other than this [act] and material the

disclosure of which would result in annoyance, embarrassment, oppression, or undue burden or expense to any person.

(e) On petition, the presiding officer shall issue an order compelling discovery for refusal to comply with a discovery request unless good cause exists for refusal. Failure to comply with the order may be enforced according to the rules of civil procedure.

(f) On petition and for good cause, the presiding officer shall issue an order authorizing discovery in accordance with the rules of civil procedure.

(g) An agency may provide by rule that some or all discovery procedures under this section do not apply to a specified program or category of cases if it finds that:

(1) the availability of discovery would unduly complicate or interfere with the hearing process in the program or cases, because of the volume of the applicable caseload and the need for expedition and informality in that process; and

(2) alternative procedures for the sharing of relevant information are sufficient to ensure the fundamental fairness of the proceedings.

Comment

1981 MSAPA Section 4-210(a) authorized the presiding officer to issue discovery orders and protective orders in accordance with the rules of civil procedure. Presiding officers were required to follow and apply the discovery rules used in the civil courts in the state in which the contested case proceeding was held. Section 411 does not follow that approach. Under Section 411, mandatory disclosure of party and witness statements and documents is provided for in subsection (b), with protective orders and orders compelling discovery provided for in subsections (c), and (d). Under subsection (e), a presiding officer can issue an order, for good cause shown, authorizing discovery in accordance with the rules of civil procedure. This order could authorize taking of depositions, interrogatories, medical examinations, production of documents, and requests for admissions. Finally, in subsection (f), an agency can provide by rule for good cause that specific programs or a category of cases are exempt from some or all of the discovery procedures provided in Section 411. Contested case proceedings can vary widely in the length and complexity of the issues to be decided. Providing a range of options for discovery procedures will allow for flexibility. Under subsection (f), presiding officers in high volume short duration cases would not use discovery procedures if their agency exempted those cases by rule. . In contrast, presiding officers in complex and lengthy contested case proceedings could authorize more extensive discovery than provided in subsection (b). Presiding officers in contested case proceedings that do not fit either of the above categories could rely upon the

discovery requirements provided for in subsection (b).

Subsection (a) provides a definition of the term statement for purposes of subsection (b) (2). Subsection (a) is a revised version of the definition of statements taken from California Government Code Section 11507.6.

Subsection (b) is new and provides for disclosure by a party to a contested case of the items listed in subsections (b) (1), and (2) upon written notice of another party unless the contested case proceeding is an emergency hearing under Section 407, or unless the proceeding has been exempted from discovery by agency rule under subsection (f). Subsection (b) (1) is based upon California Government Code Section 11507.6(1). Subsection (b)(2) is based upon California Government Code Section 11507.6(2). Subsections (b)(2)(A) to (F) are a revised version of California Government Code Section 11507.6(2) (a)to (f). Subsection (b)(3) is new and requires parties to contested case proceedings to supplement responses to include after acquired information relied on at the hearing.

Subsection (c) is new and authorizes the presiding officer to issue protective orders for material sought to be discovered that is protected by confidentiality laws, recognized privileges, or material the disclosure of which would result in annoyance, embarrassment, oppression or undue burden or expense.

Subsection (d) is new and authorizes the presiding officer to issue orders compelling discovery for refusal to comply with a discovery request unless good cause for refusal exists. Failure to comply with the discovery order is enforceable under the rules of civil procedure. The presiding officer has the authority to apply the discovery sanctions rules in the state in which the contested case proceeding is held.

Subsection (e) is new and authorizes the presiding officer, for good cause shown, to issue an order authorizing discovery in accordance with the rules of civil procedure.

Subsection (f) provides that an agency can provide by rule that some or all of the discovery procedures authorized in section 411 do not apply to a specified program or a category of cases when the agency finds for good cause that the provisions of subsection 9f)(1) and (2) are satisfied.

SECTION 412. DEFAULT.

(a) Unless otherwise provided by law of this state other than this [act], if a party without good cause fails to attend or participate in a prehearing conference or hearing in a contested case, the presiding officer may issue a default order.

(b) If a default order is issued, the presiding officer may conduct any further proceedings necessary to complete the adjudication without the defaulting party and shall determine all issues

in the adjudication, including those affecting the defaulting party.

(c) A recommended, initial, or final order issued against a defaulting party may be based on the defaulting party's admissions or other evidence that may be used without notice to the defaulting party. If the burden of proof is on the defaulting party to establish that the party is entitled to the agency action sought, the presiding officer may issue a recommended, initial, or final order without taking evidence.

(d) Not later than [15] days after notice to a party subject to a default order that a recommended, initial, or final order has been rendered against the party, the party may petition the presiding officer to vacate the recommended, initial, or final order. If good cause is shown for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If good cause is not shown for the party's failure to appear, the presiding officer shall deny the motion to vacate.

Comment

Section 412 is based upon 1981 MSAPA Section 4-208. Under this section, the presiding officer has the power to enter a default order against a party to a contested case proceeding.

Subsection (a) is a revised version of 1981 MSAPA Section 4-208(a).The major difference is that the presiding officer may issue a default order for the parties' failure to attend or participate in a hearing or prehearing conference unless good cause is shown. This simplifies the procedures for determining a default compared to the 1981 MSAPA Section 4-208(a) requirement of a written notice of a proposed default order.

Subsection (b) is a revised version of the second sentence of 1981 MSAPA Section 4-208(b).

Subsection (c) is a revised version of California Government Code Section 11520(a).

Subsection (d) is a revised version of California Government Code Section 11520(c).

SECTION 413. ORDERS: RECOMMENDED, INITIAL, OR FINAL.

(a) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(b) Except as otherwise provided by law of this state other than this [act], if the presiding officer is not the agency head and has not been delegated final decisional authority, the presiding officer shall issue a recommended order. If the presiding officer is not the agency head and has been delegated final decisional authority, the presiding officer shall issue an initial order that becomes a final order [30] days after issuance, unless reviewed by the agency head on its own initiative or on petition of a party.

(c) A recommended, initial, or final order must be served in a record on each party and the agency head not later than [90] days after the hearing ends, the record closes, or memoranda, briefs, or proposed findings are submitted, whichever is latest. The presiding officer may extend the time by stipulation, waiver, or for good cause.

(d) A recommended, initial, or final order must separately state findings of fact and conclusions of law on all material issues of fact, law, or discretion, the remedy prescribed, and, if applicable, the action taken on a petition for a stay. The presiding officer may permit a party to submit proposed findings of fact and conclusions of law. The order must state the available procedures and time limits for seeking reconsideration or other administrative relief and must state the time limits for seeking judicial review of the agency order. A recommended or initial order must state any circumstances under which the order, without further notice, may become a final order.

(e) Findings of fact must be based exclusively on the evidence and matters officially noticed in the hearing record in the contested case.

Alternative A

(f) Hearsay evidence may be used to supplement or explain other evidence, but on timely objection, is not sufficient by itself to support a finding of fact unless it would be admissible over objection in a civil action.

Alternative B

(f) Hearsay evidence is sufficient to support a finding of fact if it constitutes reliable, probative, and substantial evidence.

End of Alternatives

(g) An order is issued under this section when it is signed by the agency head, presiding officer, or an individual authorized by law of this state other than this [act] to sign the order.

(h) A final order is effective [30] days after all parties are notified of the order unless reconsideration is granted under Section 416 or a stay is granted under Section 417.

Comment

This section is based upon 1981 MSAPA Section 4-215. This section also draws on useful provisions from several states. E.g. see: Alabama, Ala.Code 1975 Section 41-22-16; Iowa, I.C.A. Section 17A.15; Kansas, K.S.A. Section 77-526; Michigan, M.C.L.A. 24.281; Montana, MCA 2-4-623; Washington, RCWA 34.05.461. See Section 102(12) for the definition of "final order" Section 102(16) for the definition of initial order, and section 102 (28) of this act for the definition of "recommended order". Emergency orders are issued under the provisions of Section 408, not this section.

Subsection (a) is based on 1981 MSAPA Section 4-215 (a), and provides that if the presiding officer is the agency head, the presiding office shall render a final order.

Subsection (b) is new and varies from the provisions of 1981 MSAPA Section 4-215(b). Subsection (b) provides for both recommended orders, and initial orders. Initial orders are issued by presiding officers who are not the agency head but who have been delegated final decisional authority. Recommended orders are issued by presiding officers who are not the agency head but who have not been delegated final decisional authority. The three types of orders are recognized in this section, but which type of order, initial, final, or recommended, will apply to which type of decision is based on law other than this act, usually the organic statute that the agency is responsible for administering or enforcing.

Subsection (c) is a revised version of 1981 MSAPA Section 4-215(g),(h).

Subsection (d) is a revised version of 1981 MSAPA Section 4-215(c).

Subsection (e) is based on the first sentence of 1981 MSAPA Section 4-215(d).

Subsection (f), Alternative A, adopts the legal residuum rule, and provides that hearsay evidence may be used to supplement or explain other evidence but would not be sufficient to support a fact finding unless admissible over objection in a civil action. The legal residuum rule is followed in many states. States that follow the legal residuum rule include California

(California Government Code Section 11513(d)), Wisconsin (Gehin v. Wisconsin Group Insurance Board 278 Wisc.2d 111, 692 N.W.2d 572 (Wisc. 2005)), Utah, (McMillen v. Matheson 741 P.2d 960 (Utah, 1987)) , and New Mexico (Trujillo v. Employment Sec. Commission of New Mexico 94 N.M. 343, 610 P. 2d 747 (N.M., 1981)).

Subsection (f), Alternative B is based on the second sentence of 1981 MSAPA Section 4-215(d). Alternative B provides that hearsay evidence can be sufficient to support fact findings if the hearsay evidence is sufficiently reliable. This provision is based on the federal A.P.A. provision, 5 U.S.C. Section 556 (d), Richardson v. Perales, (1971) 402 U.S. 389, and the 1981 MSAPA Section 4-215(d). (reasonably prudent person standard for reliability). States that follow the reliability standard include Oregon (Reguero v. Teacher Standards and Practices Commission 822 P. 2d 1171 (Ore.1991)), Pennsylvania (Commonwealth, Unemployment Compensation Board of Review v. Ceja 493 Pa. 588, 427 A. 3d 631 (Pa. 1981),Vermont (Watker v. Vermont Parole Board, 157 Vt. 72, 596 A.2d 1277 (Vt., 1991), and New York (300 Gramaton Avenue Associates v. State Division of Human Rights 45 N.Y.2d 156, 379 N.E.2d 1183.

Subsection (g) is new and defines when an order is issued under this section as the time when an order is signed by the agency head, presiding officer, or other authorized individual.

Subsection (h) is new and provides for the effective date of a final order.

SECTION 414. AGENCY REVIEW OF INITIAL ORDER.

(a) An agency head may review an initial order on its own initiative.

(b) A party may petition an agency head to review an initial order. On petition by a party, the agency head may review an initial order.

(c) A petition for review of an initial order must be filed with the agency head or with any person designated for this purpose by agency rule not later than [15] days after notice to the parties of the order. If the agency head decides to review an initial order on its own initiative, the agency head shall give notice in a record to the parties that it intends to review the order. The notice must be given not later than [15] days after the parties are notified of the order. If a petition for review is not filed or the agency head does not elect to review the initial order within the prescribed time limit, the initial order becomes a final order.

(d) The period in subsection (c) for a party to file a petition or for the agency head to notify the parties of its intention to review an initial order is tolled by the submission of a timely

petition under Section 416 for reconsideration of the order. A new [15]-day period begins on disposition of the petition for reconsideration. If an order is subject both to a timely petition for reconsideration and a petition for review by the agency head, the petition for reconsideration must be disposed of first, unless the agency head determines that action on the petition for reconsideration has been unreasonably delayed.

(e) When reviewing an initial order, the agency head shall exercise the decision-making power that the agency head would have had if the agency head had conducted the hearing that produced the order, except to the extent that the issues subject to review are limited by law of this state other than this [act] or by order of the agency head on notice to the parties. In reviewing findings of fact in an initial order, the agency head shall consider the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The agency head shall consider the hearing record or parts of the record designated by the parties.

(f) If an agency head reviews an initial order, the agency head shall issue a final order disposing of the proceeding not later than 120 days after the decision to review the initial order or remand the matter for further proceedings with instructions to the presiding officer who issued the initial order. On remanding a matter, the agency head may order such temporary relief as is authorized and appropriate.

(g) A final order or an order remanding the matter for further proceedings must identify any difference between the order and the initial order and must state the facts of record that support any difference in findings of fact, the law that supports any difference in legal conclusions, and the policy reasons that support any difference in the exercise of discretion. Findings of fact must be based exclusively on the evidence and matters officially noticed in the hearing record in the contested case. A final order under this section must include, or incorporate by express reference to the initial order, the matters required by Section 413(d). The

agency head shall deliver the order to the presiding officer and notify the parties of the order.

Comment

Subsection (a) is a revised version of 1981 MSAPA Section 4-216(a).

Subsection (b) is a revised version of 1981 MSAPA Section 4-216(a).

Subsection (c) is a revised version of the first two sentences of 1981 MSAPA Section 4-216(b).

Subsection (d) is a revised version of the last two sentences of 1981 MSAPA Section 4-216(b).

The first sentence of subsection (e) is based on the 1981 MSAPA Section 4-216(d). the second sentence of subsection (e) is based upon provisions of the Washington Administrative Procedure Act (R.C.W. Section 34.05.464(4)). The third sentence of subsection (e) is new and requires the agency head to consider the hearing record or parts of the record designated by the parties.

Subsection (f) is based upon 1981 MSAPA Section 4-216(g).

Subsection (g) is a revised version of 1981 MSAPA Section 4-216(i),(j).

SECTION 415. AGENCY REVIEW OF RECOMMENDED ORDER.

(a) An agency head shall review a recommended order pursuant to this section.

(b) When reviewing a recommended order, the agency head shall exercise the decision-making power that the agency head would have had if the agency head had conducted the hearing that produced the order, except to the extent that the issues subject to review are limited by law of this state other than this [act] or by order of the agency head on notice to the parties. In reviewing findings of fact in a recommended order, the agency head shall consider the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The agency head shall consider the hearing record or parts that are designated by the parties.

(c) An agency head may render a final order disposing of the proceeding or remand the matter for further proceedings with instructions to the presiding officer who rendered the

recommended order. On remanding a matter, the agency head may order such temporary relief as is authorized and appropriate.

(d) A final order or an order remanding the matter for further proceedings must identify any difference between the order and the recommended order and must state the facts of record that support any difference in findings of fact, the law that supports any difference in legal conclusions, and the policy reasons that support any difference in the exercise of discretion. Findings of fact must be based exclusively on the evidence and matters officially noticed in the hearing record in the contested case. A final order under this section must include, or incorporate by express reference to the recommended order, the matters required by Section 413(d). The agency head shall deliver the order to the presiding officer and notify the parties of the order.

Comment

Section 415 provides for a review procedure for recommended orders. The agency is required to review a recommended order.

Subsection (a) is new and provides for mandatory review of a recommended order by an agency head.

The first sentence of subsection (b) is based on the 1981 MSAPA Section 4-216(d). the second sentence of subsection (b) is based upon provisions of the Washington Administrative Procedure Act (R.C.W. Section 34.05.464(4)). The third sentence of subsection (b) is new and requires the agency head to consider the hearing record or parts of the record designated by the parties.

Subsection (c) is based upon 1981 MSAPA Section 4-216(g).

Subsection (d) is a revised version of 1981 MSAPA Section 4-216(i),(j).

SECTION 416. RECONSIDERATION.

(a) A party, not later than [15] days after notice to the parties that a final order has been issued, may file a petition for reconsideration that states the specific grounds on which relief is requested. The place of filing and other procedures, if any, must be specified by agency rule and

must be stated in the final order.

(b) If a petition for reconsideration is timely filed, and if the petitioner has complied with the agency's procedural rules for reconsideration, if any, the time for filing a petition for judicial review does not begin until the agency disposes of the petition for reconsideration as provided in Section 503(d).

(c) Not later than [20] days after a petition is filed under subsection (a), the decision maker shall issue a written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further proceedings. If the decision maker fails to respond to the petition not later than [30] days after filing, or a longer period agreed to by the parties, the petition is deemed denied. The petition may be granted only if the decision maker states findings of facts, conclusions of law, and the reasons for granting the petition.

Comment

This section provides a right to seek reconsideration of a final order of an agency. This section is based in part on the Washington APA, West's RCWA 34.05.470, and in part on 1981 MSAPA Section 4-218.

Subsection (a) is based upon the Washington APA, R.C.W. 34.05.470(1).

Subsection (b) is based upon the Washington APA, R.C.W. 34.05.470(3).

Subsection (c) is based upon the 1981 MSAPA Section 4-218(3).

SECTION 417. STAY. Except as otherwise provided by law of this state other than this [act], a party, not later than [seven] days after the parties are notified of the order, may request the agency to stay a final order pending judicial review. The agency may grant the request for a stay pending judicial review if the agency finds that justice requires. The agency may grant or deny the request for stay of the order before, on, or after the effective date of the order.

Comment

This section is based upon 1961 MSAPA Section 15(c), and on 1981 MSAPA Section 4-217. The first and third sentences of this section are based upon 1981 MSAPA Section 4-217. The second sentence of this section is based on the first sentence of Section 705 of the federal administrative procedure act, 5 U.S.C. Section 705.

SECTION 418. AVAILABILITY OF ORDERS; INDEX.

(a) Except as otherwise provided in subsections (b) and (c), an agency shall create an index of all final orders in contested cases and make the index and all final orders available for public inspection and copying, at cost, in its principal offices.

(b) Except as otherwise provided in subsection (c), final orders that are exempt, privileged, or otherwise made confidential or protected from disclosure by [the public records law of this state] are not public records and may not be indexed. The final order may be excluded from an index and disclosed only by order of the presiding officer with a written statement of reasons attached to the order.

(c) If the presiding officer determines it is possible to redact a final order that is exempt, privileged, or otherwise made confidential or protected from disclosure by law of this state other than this [act] so that it complies with the requirements of that law, the redacted order may be placed in the index and published.

(d) An agency may not rely on a final order adverse to a party other than the agency as precedent in future adjudications unless the agency designates the order as a precedent, and the order has been published, placed in an index, and made available for public inspection.

Comment

This section is entirely new. This section continues the concept, seen earlier in connection with rules, of preventing earlier decisional law known only to agency personnel from constituting the basis for decision in a disputed case. Subsection (d) is based in part on the provisions of California Government Code Section 11425.60. If the agency wishes to use a case as precedent in the future, it must make the order and decision in that case available to the public. The only situations in which an agency may rely on a contested case as precedent without indexing and making that decision and order available to the public are described in subsection (c) of this section.

In some states there have been attacks on agency adjudications on the basis that the proceeding should be conducted under the provisions for rulemaking. In the case of SEC v. Chenery Corp., 332 U.S. 194 (1947) the United States Supreme Court held that the choice of whether to proceed by rulemaking or adjudication is left entirely to the discretion of the agency, because not every principle can be immediately promulgated in the form of a rule. In the words of the Supreme Court "Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations." Most states follow Chenery. See Illuminating a Bureaucratic Shadow World: Precedent Decisions under California's Revised Administrative Procedure Act, 21 J. Nat'l A. Admin. L. Judges 247 (2001) at n. 68.

This section makes clear that the choice between rulemaking and adjudication is entirely in the discretion of the agency. However, in order to prevent law to which the public does not have access from constituting the basis for decision, final orders must be indexed and available to the public. See also the California administrative procedure act at West's Ann. Cal. Gov. Code, § 11425.60.

Most states have public records act that require disclosure of government documents and records to the public unless particular documents are exempt from disclosure under that act. Subsection (b) refers to those acts, and to exempt decisions under those acts. Subsection (c) is broader than subsection (b) and refers to law of this state other than this act. Law is defined in section 102(18).

SECTION 419. LICENSES.

(a) If a licensee has made timely and sufficient application for the renewal of a license or a new license for any activity of a continuing nature, the existing license does not expire until the agency takes final action on the application and, if the application is denied or the terms of the new license are limited, until the last day for seeking review of the agency order or a later date fixed by the reviewing court.

(b) A revocation, suspension, annulment, or withdrawal of a license is not lawful unless, before the institution of agency proceedings, the agency notifies the licensee of facts or conduct that warrants the intended action, and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that imminent peril to public health, safety, or welfare requires emergency action and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for

revocation or other action. These proceedings must be promptly instituted and concluded.

Comment

Section 419 is based on Section 14 of the 1961 MSAPA. Subsection (a) is based on Section 14(b), 1961 MSAPA. Subsection (b) is based on Section 14(c), 1961 MSAPA. Section 401 of this [act] governs licensing proceedings when the licensee has a right to notice and an opportunity to be heard before the agency action granting, denying, or renewing a license becomes final agency action. More specific provisions of organic statutes governing specific types of licenses are controlling over the general provisions of this section.

[ARTICLE] 5

JUDICIAL REVIEW

SECTION 501. RIGHT TO JUDICIAL REVIEW; FINAL AGENCY ACTION REVIEWABLE.

(a) In this [article], "final agency action" means an act of an agency which imposes an obligation, grants or denies a right, confers a benefit, or determines a legal relationship as a result of an administrative proceeding. The term does not include agency action that is a failure to act.

(b) Except to the extent that a statute of this state other than this [act] limits or precludes judicial review, a person that meets the requirements of this [article] is entitled to judicial review of a final agency action.

(c) A person entitled to judicial review under subsection (b) of a final agency action is entitled to judicial review of an agency action that is not final if postponement of judicial review would result in an inadequate remedy or irreparable harm that outweighs the public benefit derived from postponing judicial review.

(d) A court may compel an agency to take action that is unlawfully withheld or unreasonably delayed.

Comment

Section 501 is similar to the judicial review provisions of Florida (West's F.S.A. Section 120.68), Iowa (I.C.A. Section17A.19), Virginia (Va. Code Ann. Section 2.2-4026) and Wyoming (W.S.1977 Section 16-3-114). Under this section, the person seeking review must meet all of the requirements of this article, which include standing (Section 505), exhaustion of remedies (Section 506), and time for filing (Section 503). The definition of "agency action" is found in Section 102(4).

Subsection (a) defines "final agency action" for purposes of Article 5. This definition is based on state and federal cases. See State Bd. Of Tax Comm'rs v. Ispat Inland, 784 N.E.2D 477 (Ind., 2003); District Intown Properties v. D.C. Dept. Consumer and Regulatory Affairs, 680 A.2d 1373 (Ct. Apps. D.C. 1996); Texas Utilities Co. v. Public Citizen, Inc, 897 S.W.2d 443 (Tex. App. 1995); Bennet v. Spear, 520 U.S. 154, 117 S.Ct. 1154 (1997); Mobil Exploration and Producing Inc. v. Dept. Interior, 180 F.3d 1192, 1197 (10th Cir. 1999). The last sentence of subsection (a) is new. Agency action that is a failure to act is not final agency action for purposes

of Section 501. See subsection (d) which recognizes a reviewing court's authority to compel agency action that is unlawfully withheld or unreasonably delayed.

Subsection (b) of this section provides a right of judicial review of final agency action by appropriate parties. Under subsection (b), final agency action includes a final order in a contested case and a final rule. The exception in subsection (b) for statutes that limit or preclude judicial review applies to limit or preclude judicial review of final agency action when a statute of the state other than this Act limits or precludes judicial review of that type of action. See the laws of the following states: Wyoming (W.S.A. Section 16-3-114(a)); New York (McKinney's' Civil Service law Section 76.3; New York City Dept. of Environmental Protection v. New York City Civil Service Com'n, 78 N.Y.2d 318, 579 N.E.2d 1385 (N.Y., 1991); and the District of Columbia (District of Columbia v. Sierra Club, 670 A2d. 354 (D.C., 1996).

Subsection (c) is based on 1981 MSAPA Section 5-103 and it creates a limited right to review of non-final agency action.

Subsection (d) is based on the federal A.P.A., 5 U.S.C. Section 706(1). Agency failure to act is not judicially reviewable unless agency action is unlawfully withheld or unreasonably delayed. Agency action is defined in section 102(4), and includes in subsection (4)(B), the failure to issue an order or rule, and in subsection (4)(C), failure to perform, duties, functions, activities, or determinations required by law.

SECTION 502. RELATION TO OTHER JUDICIAL REVIEW LAW AND RULES.

(a) Except as otherwise provided by law of this state other than this [act], judicial review of final agency action may be taken only as provided by rules of [appellate] [civil] procedure [of this state]. The court may grant any type of legal and equitable remedies that are appropriate.

(b) This [article] does not limit use of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law of this state other than this [act]. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is available under this [article] or under law of this state other than this [act], final agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

Comment

This section places appeals from final agency action within the existing state rules of appellate procedure. Such action may be preferred by some states because of constitutional provisions or because of the existence of rules of appellate procedure that the legislature may not

wish to change. This practice was followed under the 1961 MSAPA, and is followed in a number of states today. See e.g.: Alaska (AS 44.62.560), California (West's Ann. Cal. Gov. Code Section 11523), Delaware (29 Del. C. Section 10143), Florida (West's F.S.A. Section 120.68), Iowa (I.C.A. § 17A.20), Michigan (M.C.L.A. 24.302), Minnesota (M.S.A. § 14.63) (Appeal integrated with state appellate rules), Virginia (Va. Code Ann. Section 2.2-4026), Wyoming (W.S.1977 § 16-3-114).

The first sentence of subsection (b) is based on the second sentence of Section 15a of the 1961 MSAPA. The second sentence of (b) is based on the last sentence of Section 703, federal Administrative Procedure Act, 5 U.S.C. Section 703.

SECTION 503. TIME TO SEEK JUDICIAL REVIEW OF AGENCY ACTION; LIMITATIONS.

(a) Judicial review of a rule on the ground of noncompliance with the procedural requirements of this [act] must be commenced not later than [two] years after the effective date of the rule. Judicial review of a rule or guidance document on other grounds may be sought at any time.

(b) Judicial review of an order or other final agency action other than a rule or guidance document must be commenced not later than [30] days after the date the parties are notified of the order or other agency action.

(c) The time for seeking judicial review under this section is tolled during any time a party pursues an administrative remedy before the agency which must be exhausted as a condition of judicial review.

(d) A party may not petition for judicial review while seeking reconsideration under Section 416. During the time a petition for reconsideration is pending before an agency, the time for seeking judicial review in subsection (b) is tolled.

Comment

The first sentence of subsection (a) is based on 1961 Model State Administrative Procedure Act, section (3)(c), and on Section 3-113(b) of the 1981 Model State Administrative Procedures Act. The scope of challenges permitted for noncompliance with procedural requirements under Section 314 includes all applicable requirements of article 3 for the type of

rule being challenged.

Subsection (b) is based on 1981 MSAPA Section 5-108(2).

Subsection (c) is based on 1981 MSAPA Section 5-108(3).

Subsection (d) is new and provide for tolling of the time to seek judicial review while a reconsideration petition is pending before an agency. Tolling in subsections (c) and (d) suspends the running of the 30 day time limit under subsection (b) but does not start a new 30 day time period after completion of administrative remedies in subsection (b), or denial of the petition for reconsideration in subsection (c).

SECTION 504. STAYS PENDING APPEAL. A petition for judicial review does not automatically stay an agency decision. A challenging party may request the reviewing court for a stay on the same basis as stays are granted under the rules of [appellate] [civil] procedure [of this state], and the reviewing court may grant a stay regardless of whether the challenging party first sought a stay from the agency.

Comment

This provision for stay permits a party appealing agency final action to seek a stay of the agency decision in the court. The first sentence of this section is based upon 1961 MSAPA Section 15(c). See also 1981 MSAPA Section 5-111 which governs stays. Unlike the 1981 MSAPA Section 5-111, this section authorizes the granting of a stay by the reviewing court but not by the agency.

SECTION 505. STANDING. The following persons have standing to obtain judicial review of a final agency action:

(1) a person aggrieved or adversely affected by the agency action; and

(2) a person that has standing under law of this state other than this [act].

Comment

Standing requirements are contained in the first sentence of 1961 MSAPA Section 15(a), and 1981 MSAPA Section 5-106.

Subsection (1) is a revised version of 1981 MSAPA Section 5-106(a)(5), and is also based on the first sentence of Section 702 of the federal Administrative Procedure Act, 5 U.S.C. Section 702.

Subsection (2) is a revised version of 1981 MSAPA Section 5-106(a)(4). This subsection confers standing that arises under any other provision of law. Examples of this type of standing are statutes that expressly confer standing in general language such as, for example, "any person may commence a civil suit in his own behalf... to enjoin... an agency... alleged to be in violation of this chapter. . . ." 16 U.S.C.A. § 1540, explained in Bennett v. Spear, 520 U.S. 154, 117 S.Ct. 1154(1997). Another example is standing recognized in judicial decision or common law.

Most states have established case law detailing the standing requirements for that particular jurisdiction. Section 505 is drafted broadly but generically so that existing state law on standing will be compatible with this section.

SECTION 506. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

(a) Subject to subsection (d) or law of this state other than this [act] which provides that a person need not exhaust administrative remedies, a person may file a petition for judicial review under this [act] only after exhausting all administrative remedies available within the agency the action of which is being challenged and within any other agency authorized to exercise administrative review.

(b) Filing a petition for reconsideration or a stay of proceedings is not a prerequisite for seeking judicial review.

(c) A petitioner for judicial review of a rule need not have participated in the rulemaking proceeding on which the rule is based or have filed a petition to adopt a rule under Section 318.

(d) The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies to the extent the administrative remedies are inadequate or the requirement would result in irreparable harm.

Comment

The first clause of the first sentence of subsection (a) is based upon 1981 MSAPA Section 5-107(2). The remaining language in subsection (a) is based upon the first sentence of 1981 MSAPA Section 5-107.

Subsection (b) is based upon the second sentence of 1981 MSAPA Section 4-218(1).

Subsection (c) is based upon 1981 MSAPA Section 5-107(1).

Subsection (d) is a revised version of 1981 MSAPA Section 5-107(3).

SECTION 507. AGENCY RECORD ON JUDICIAL REVIEW; EXCEPTIONS.

(a) If an agency was required by [Article] 3 or 4, or by law of this state other than this [act], to maintain an agency record during the proceeding that gave rise to the action under review, the court review is confined to that record and to matters arising from that record.

(b) In any case to which subsection (a) does not apply, the record for review consists of the unprivileged materials that agency decision makers directly or indirectly considered, or which were submitted for consideration by any person, in connection with the action under review, including information that is adverse to the agency's position. If the agency action was ministerial or was taken on the basis of a minimal or no administrative record, the court may receive evidence relating to the agency's basis for taking the action.

(c) The court may supervise an agency's compilation of the agency record. If a challenging party makes a substantial showing of need, the court may allow discovery or other evidentiary proceedings and consider evidence outside the agency record to:

(1) ensure that the agency record is complete as required by this [act] and other applicable law;

(2) adjudicate allegations of procedural error not disclosed by the record; or

(3) prevent manifest injustice.

Comment

This section establishes a default closed record for judicial review of adjudication and rulemaking. It is well established in most states and in federal administrative procedure that, in case of adjudication, judicial review is based on that evidence which was before the agency on the record. Otherwise, the standards of judicial review could be subverted by the introduction of additional evidence to the court that was not before the agency. See *Western States Petroleum Ass'n v. Superior Court*, 888 P.2d 1268 (Cal. 1995). For rulemaking, the record for judicial review is defined in Section 302 of this Act. The section contains an exception to the closed record on review where petitioner alleges error, such as ex parte contacts, that does not appear in

or is not evident from the record. Other examples of error that do not appear or are not evident from the record are: improper constitution of the decision making body, grounds for disqualification of a decision maker, or unlawful procedure. However, the standard for opening the record on appeal is high.

Subsection (a) is a revised version of 1961 MSAPA Section 15(f).

Subsection (b) is new and defines the record for review in any case that is not a contested case.

SECTION 508. SCOPE OF REVIEW.

(a) Except as provided by law of this state other than this [act], in judicial review of an agency action, the following rules apply:

(1) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity.

(2) The court shall make a ruling on each material issue on which the court's decision is based.

(3) The court may grant relief only if it determines that a person seeking judicial review has been prejudiced by one or more of the following:

(A) the agency erroneously interpreted the law;

(B) the agency committed an error of procedure;

(C) the agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(D) an agency determination of fact in a contested case is not supported by substantial evidence in the record as a whole; or

(E) to the extent that the facts are subject to a trial de novo by the reviewing court, the action was unwarranted by the facts.

(b) In making a determination under this section, the court shall review the agency record or the parts designated by the parties and shall apply the rule of harmless error.

Comment

Subsection (a) (1) is based upon 1981 MSAPA Section 5-116(a)(1). Subsection (a)(2) is based upon 1981 MSAPA Section 5-116(b). They are substantially similar to the general scope of review provisions of the Federal APA, 5 U.S.C. Section 706.

Judicial review is essential and exists in all states. Section 508 follows the approach that scope of review is notoriously difficult to capture in verbal formulas, and its application varies depending on context. For that reason, Section 508(3) follows the shorter, skeletal formulations of the scope of review, similar to the 1961 MSAPA Section 15(g), and the Federal APA, 5 U.S.C. Section 706(2). See Ronald M. Levin, Scope of Review Legislation, 31 Wake Forest L. Rev. 647 (1996) at 664-66. William D. Araiza, In Praise of a Skeletal APA, 56 Admin. L. Rev. 979 (2004). (Judiciary, not legislature, appropriate body to evolve specific standards for review, because of great variety of agency action and contexts, and inability to describe how general standards of review should apply to many of them).

Most states have established bodies of law governing judicial review of agency rules and orders. Section 508(a)(3) has been drafted generally to make it easier for states to adopt Article Five because state specific understandings of the scope of review of agency action can be more easily accommodated with general standards of review.

The first clause of subsection (a)(3) is based on 1981 MSAPA Section 5-116(c). Subsection (a)(3) (A) includes, but is not limited to, violations of constitutional or statutory provisions and actions that are in excess of statutory authority from Section 15(g)(1), and (2) of the 1961 MSAPA, and includes 1981 MSAPA Section 5-116 subsections (c) (1), (2) and (4). The subsection includes challenges to the facial or applied constitutionality of a statute, challenges to the jurisdiction of the agency, erroneous interpretation of the law, and may include erroneous application of the law. This section is not intended to preclude courts from according deference to agency interpretations of law, where such deference is appropriate. Subsection (a)(3)(B) includes violations of procedures required by law from 1961 MSAPA Section 15(g)(3) and includes 1981 MSAPA Section 5-116 subsections (c)(5) and (6). Subsection (a)(3)(C) includes discretionary decisions of agencies that are judicially reviewable from 1961 MSAPA Section 15(g)(6) and 1981 MSAPA Section 5-116(8), and federal A.P.A. Section 706 (2)(A). Section (a)(3)(D) includes the fact determinations in contested cases form 1981 MSAPA Section 5-116(c)(7) and the federal APA Section 706(2)(E). Section (a)(3)(E) includes fact determinations that are not made in contested cases and is based upon the Federal APA Section 706(2)(F). Subsection (b) is based upon the federal APA section 706, last sentence.

[ARTICLE] 6

OFFICE OF ADMININISTRATIVE HEARINGS

SECTION 601. CREATION OF OFFICE OF ADMINISTRATIVE HEARINGS.

(a) In this [article], "office" means the [Office of Administrative Hearings].

(b) The [Office of Administrative Hearings] is created in the executive branch of state government [within the [ ] agency].

Comment

Section 601 is based on Section 1-2(a) of the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997). Twenty five states (including the District of Columbia) have established central panel agencies. Representative state statutes creating a central panel include Alaska statutes, section 44.64.010, California Government Code Section 11370.2, Louisiana: statutes, Section 49.991, and Washington Administrative Procedure Act, Section 34.12.010. Article Six has been drafted to include the necessary minimum provisions for a state that wants to adopt a central panel hearing agency. For states that adopt this act, Article Four procedures for contested cases would be followed by administrative law judges who work for the Office of Administrative Hearings. States that adopt Article Six would provide for a separate hearing agency and would ensure impartiality and fairness in contested cases by separating the adjudication function from the prosecution and investigative functions. Administrative law judges that work for the Office of Administrative Hearings would not be subject to command influence from the agency head whose contested cases the administrative law judge is presiding over.

SECTION 602. CHIEF ADMINISTRATIVE LAW JUDGE; APPOINTMENT; QUALIFICATIONS; TERM; REMOVAL.

(a) The office is headed by a chief administrative law judge appointed by [the Governor] [with the advice and consent of the Senate].

(b) A chief administrative law judge serves a term of [five] years and until a successor is appointed and qualifies for office, is entitled to the salary provided by law, and may be reappointed.

(c) At the time of appointment, the chief administrative law judge must have been admitted to the practice of law in this state for at least five years and have substantial experience

in administrative law.

(d) A chief administrative law judge:

(1) must take the oath of office required by law before beginning the duties of the office;

(2) shall devote full time to the duties of the office and may not engage in the private practice of law; and

(3) is subject to the code of conduct for administrative law judges adopted pursuant to Section 604(7).

(e) A chief administrative law judge may be removed from office only for cause and only after notice and an opportunity for a contested case hearing.

Comment

Section 602 is based on Section 1-4 of the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997).

SECTION 603. ADMININSTRATIVE LAW JUDGES; APPOINTMENT; QUALIFICATIONS; DISCIPLINE.

(a) The chief administrative law judge shall appoint administrative law judges pursuant to the [state merit system].

(b) In addition to meeting other requirements of the [state merit system], to be eligible for appointment as an administrative law judge, an individual must have been admitted to the practice of law in this state for at least [three] years.

(c) An administrative law judge:

(1) shall take the oath of office required by law before beginning duties as an administrative law judge;

(2) is subject to the code of conduct for administrative law judges adopted

pursuant to Section 604(7);

(3) is entitled to the compensation provided by law; and

(4) may not perform any act inconsistent with the duties and responsibilities of an administrative law judge.

(d) An administrative law judge:

(1) is subject to the administrative supervision of the chief administrative law judge;

(2) may be disciplined pursuant to the [state merit system law];

(3) except as otherwise provided in paragraph (4), may be removed from office only for cause and only after notice and an opportunity for a contested case hearing; and

(4) is subject to a reduction in force in accordance with the [state merit system law].

(e) On [the effective date of this [act]], administrative law judges employed by agencies to which this [article] applies are transferred to the office and, regardless of the minimum qualifications imposed by this [article], are administrative law judges in the office.

Comment

Section 603 is based on Sections 1-2(b), and 1-6 of the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997).

SECTION 604. CHIEF ADMINISTRATIVE LAW JUDGE; POWERS; DUTIES. The chief administrative law judge has the powers and duties specified in this section. The chief administrative law judge:

(1) shall supervise and manage the office;

(2) shall assign administrative law judges in a case referred to the office;

(3) shall assure the decisional independence of each administrative law judge;

(4) shall establish and implement standards for equipment, supplies, and technology for administrative law judges;

(5) shall provide and coordinate continuing education programs and services for administrative law judges and advise them of changes in the law concerning their duties;

(6) shall adopt rules pursuant to this [act] to implement [Article] 4 and this [article];

(7) shall adopt a code of conduct for administrative law judges;

(8) shall monitor the quality of adjudications conducted by administrative law judges;

(9) shall discipline [pursuant to the state merit system law] administrative law judges who do not meet appropriate standards of conduct and competence;

(10) may accept grants and gifts for the benefit of the office; and

(11) may contract with other public agencies for services provided by the office.

Comment

Section 604 is based on Section 1-5 of the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997).

SECTION 605. COOPERATION OF AGENCIES.

(a) Every agency shall cooperate with the chief administrative law judge in the discharge of the duties of the office.

(b) Subject to Section 402, an agency may not reject a particular administrative law judge for a particular hearing.

Comment

Section 605 is based on Section 1-7(a) of the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997). There are similar provisions in Alaska statutes, Section 44.64.080. Agencies should cooperate with the office of administrative hearings by providing information and coordinating schedules for contested case hearings.

SECTION 606. ADMINISTRATIVE LAW JUDGES; POWERS; DUTIES; DECISION MAKING AUTHORITY.

(a) In a contested case, unless the hearing is conducted by a presiding officer assigned under Section 402(a) other than an administrative law judge, an administrative law judge must be assigned to be the presiding officer. If the administrative law judge is delegated final decisional authority, the administrative law judge shall issue a final order. If the administrative law judge is not delegated final decisional authority, the administrative law judge shall issue to the agency head a recommended order in the contested case.

(b) Except as otherwise provided by law of this state other than this [act], if a contested case is referred to the office by an agency, the agency may not take further action with respect to the proceeding, except as a party, until a recommended, initial, or final order is issued. [This subsection does not prevent an appropriate interlocutory review by the agency or an appropriate termination or modification of the proceeding by the agency when authorized by law of this state other than this [act].]

(c) In addition to acting as the presiding officer in contested cases under this [act], subject to the direction of the chief administrative law judge, an administrative law judge may perform duties authorized by law of this state other than this [act].

Comment

Section 606 is based generally on Section 1-10(c) of the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997).

Subsection (a) is new. The first sentence of subsection (a) provides for the assignment of an administrative law judge from the Office of Administrative Hearings to be the presiding officer in a contested case for agencies that are not exempt from Article 6 in states that have an Office of Administrative Hearings unless the agency head assigns another presiding officer under Section 402(a). The second sentence of subsection (a) recognizes that agency heads may delegate final order authority to an administrative law judge from the Office of Administrative Hearings, and the administrative law judge shall issue a final order. The third sentence of subsection (a)

provides that the administrative law judge shall issue a recommended order in cases in which final decisional authority has not been delegated by the agency head. The provisions of Article 4 governing contested cases are applicable to administrative law judges working for the Office of Administrative Hearings who are assigned to be presiding officer in a contested case. See Section 413 for Orders: Recommended, Initial, or Final.

Section 606(b) is based on Section 1-10(c) of the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997).

Subsection (c) authorizes administrative law judges to perform other authorized duties subject to the direction of the chief Administrative Law Judge.

SECTION 607. AGENCIES EXCLUDED. [This [article] does not apply to the following agencies: [list agencies exempted]].

Comment

This section lists the agencies that are exempted from the State Administrative Procedure act.

[[ARTICLE] 7

RULES REVIEW

SECTION 701. [LEGISLATIVE RULES REVIEW COMMITTEE]. There is created a standing committee of the [Legislature] designated the [rules review committee].

Legislative Note: *States that have existing rules review committees can incorporate the provisions of Sections 701 and 702, using the existing number of members of their current rules review committee. Because state practice varies as to how these committees are structured, and how many members of the legislative body serve on this committee, as well as how they are selected, the act does not specify the details of the legislative review committee selection process. Details of the committee staff and adoption of rules to govern the rules review committee staff and organization are governed by law other than this act including the existing law in each state.*

Comment

This section is based on the first sentence of 1981 MSAPA Section 3-203.

SECTION 702. REVIEW BY [RULES REVIEW COMMITTEE].

(a) An agency shall file a copy of an adopted rule with the [rules review committee] at the same time it is filed with the [publisher]. An agency is not required to file an emergency rule adopted under Section 309 with the [rules review committee].

(b) The [rules review committee] may examine each rule in effect and each newly adopted rule to determine whether the:

(1) rule is a valid exercise of delegated legislative authority;

(2) statutory authority for the rule has expired or been repealed;

(3) rule is necessary to accomplish the apparent or expressed intent of the specific statute that the rule implements;

(4) rule is a reasonable implementation of the law as it applies to any affected class of persons; and

(5) agency complied with the regulatory analysis requirements of Section 305 and the analysis properly reflects the effect of the rule.

(c) The [rules review committee] may request from an agency information necessary to exercise its powers under subsection (b). The [rules review committee] shall consult with standing committees of the [Legislature] with subject matter jurisdiction over the subjects of the rule under examination.

(d) The [rules review committee] shall:

(1) maintain oversight over agency rulemaking; and

(2) exercise other duties assigned to it under this [article].

Comment

This section adopts a rules review committee process that is widely followed in state administrative law as a method for legislative review of agency rules. States that have rules review committees include Texas, TX GOVT § 2001.032, Iowa, I.C.A. § 17A.8, Utah, U.C.A. 1953 § 63G-3-501, Wisconsin, W.S.A. 227.26 and Montana, MCA § 2-4-402.

The first sentence of subsection (a) requires the agency to file a copy of an adopted rule with the [rules review committee] at the same time it is filed with the publisher. Section 316 requires the agency to file adopted rules with the publisher. The second sentence of subsection (a) exempts emergency rules adopted under Section 309 from the rules review process. Emergency rules take effect upon adoption and are effective for a short period of time.

Subsection (b) allows the legislative rules review committee to review currently effective rules and newly adopted rules. The rules review committee may establish priorities for rules review including review of newly adopted or amended rules, and may manage the rules review process consistent with committee staff and budgetary resources. If the content of the rule changes because of legislative amendments, the agency will be required to file the amended rule with the publisher, and the amended rule will replace the original rule that was filed with the publisher. The rules review process applies to rules adopted following the requirements of Sections 304 to 307. This process does not apply to emergency rules adopted under Section 309 nor to direct final rules adopted under Section 310.

Subsection (b)(1) requires the [rules review committee] to determine whether the rule is a valid exercise of delegated legislative authority. Subsection (b)(2) requires the [rules review committee] to determine whether the statutory authority for the rule has expired or been repealed Subsection (b)(3) requires the [rules review committee] to determine whether the rule is necessary to accomplish the apparent or expressed intent of the specific statute that the rule implements. Subsection (b)(4) requires the [rules review committee] to determine whether the rule is a reasonable implementation of the law as it applies to any affected class of persons. Subsection (b)(5) requires the [rules review committee] to determine whether the agency complied with the regulatory analysis requirements of Section 305and the analysis properly reflects the effect of the rule. See section 305 for the regulatory analysis requirements agencies are required to undertake as part of the rulemaking process.

The first sentence of subsection (c) permits the [rules review committee] to request from the adopting agency information necessary to make the determinations under subsection (2). The second sentence of subsection (c) directs the [rules review committee] to consult with the standing committees of the legislature with subject matter authority over the subjects of the rule in question.

SECTION 703. [RULES REVIEW COMMITTEE] PROCEDURE AND POWERS.

(a) Not later than [30] days after receiving a copy of an adopted rule from an agency under Section 702, the [rules review committee] may:

(1) approve the adopted rule;

(2) disapprove the rule and propose an amendment to the adopted rule; or

(3) disapprove the adopted rule.

(b) If the [rules review committee] approves an adopted rule or does not disapprove and propose an amendment under subsection (a)(2) or disapprove under subsection (a)(3), the adopted rule becomes effective on the date specified in Section 317.

(c) If the [rules review committee] proposes an amendment to an adopted rule under subsection (a)(2), the agency may make the amendment and resubmit the rule, as amended, to the [rules review committee]. The amended rule must be one that the agency could have adopted on the basis of the record in the rulemaking proceeding and the legal authority granted to the agency. The agency shall provide an explanation for the amended rule as provided in Section 313. An agency is not required to hold a hearing on an amendment made under this subsection. If the agency makes the amendment, it shall give notice to the [publisher] for publication of the rule, as amended, in the [administrative bulletin]. The notice must include the text of the rule as amended. If the [rules review committee] does not disapprove the rule, as amended, or propose a further amendment, the rule becomes effective on the date specified under Section 317.

(d) If the [rules review committee] disapproves the adoption of a rule under subsection

(a)(3), the adopted rule becomes effective on adjournment of the next regular session of the [Legislature] unless before adjournment the [Legislature] [adopts a [joint] [concurrent] resolution] [enacts a bill] sustaining the action of the committee.

(e) Before the effective date specified in Section 317, the agency may withdraw the adoption of a rule by giving notice of the withdrawal to the [rules review committee] and to the [publisher] for publication in the [administrative bulletin]. A withdrawal under this subsection terminates the rulemaking with respect to the adoption but does not prevent the agency from initiating new rulemaking for the same or substantially similar adoption.]

Legislative Note: *The 30-day time period in subsection (a) is the same as the 30-day period in Section 317. State constitutions vary as to whether or not a joint resolution is a valid way of disapproving an agency rule. In some states, the Legislature must use the bill process with approval by the Governor. In other states, the joint resolution process is proper. States should use the alternative that complies with their state constitution.* ***.*** *State constitutions vary on the federal constitutional issue decided by the U.S. Supreme Court in I.N.S. v. Chadha (1983) 462 U.S. 919, 103 S.Ct. 2764. The U.S. Supreme Court held that the one house legislative veto provided for in Section 244(c)(2) violated the Article I requirement that legislative action requires passage of a law by both Houses of Congress (bicameralism) and presentation to the President for signing or veto (presentation requirement). Those state constitutions that require presentation to the Governor need an additional step, presentation of the joint resolution to the Governor for approval or disapproval. With state constitutions that do not require presentation of a resolution to the Governor, the rules review process can be completed with legislative adoption of a joint resolution.*

Comment

This is a type of veto that provides for cooperation between the Legislature and the Governor, and attempts to avoid the I.N.S. v. Chadha (1983) 462 U.S. 919, 103 S.Ct. 2764. problem of unconstitutionality by delaying the effective date of the rule until the legislature has the opportunity to enact legislation to annul or modify it. The governor may veto the act by which the legislature seeks to annul or modify the rule. This type of veto provision is widely used in the states. For example the following states have legislative review statutes as part of their state administrative procedures act: Texas, TX GOVT § 2001.032, Iowa, I.C.A. § 17A.8, Utah, U.C.A. 1953 § 63G-3-501, Wisconsin, W.S.A. 227.26 and Montana, MCA § 2-4-402.

For disapproval of a rule to be effective, the legislature as a whole must adopt a joint resolution, and in many states the governor must by presented with the joint resolution for approval or disapproval. While the rules review committee can recommend disapproval, the committee recommendation must be approved by the legislature by joint resolution. In some states, the legislature must comply with the legislative process for enacting a bill including presentation to the governor to exercise the power of legislative veto over an agency regulation.

In at least one state use of a joint resolution without the governor's participation violates the state constitution. State v. A.L.I.V.E. Voluntary (Alaska, 1980) 606 P.2d 769. The rules review committee has the power to temporarily suspend an agency rule pending enactment of a permanent suspension by action of both houses of the state legislature, and presentation to the governor. Martinez v. Department of Industry, Labor, & Human Relations (Wisconsin, 1992) 165 W.2d 687, 478 N.W.2d 582 (temporary suspension statute held not to violate state constitution separation of powers doctrine).

[ARTICLE] 8

MISCELLANEOUS PROVISIONS

SECTION 801. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Comment

The federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et. seq., was enacted in summer of the year 2000. It precludes States from denying enforceability to an electronic record or an electronic signature solely because the record or signature is electronic, rather than in writing. The Electronic Signatures Act applies to cases where a state (or federal) law requires a writing or a written signature in order to have a particular effect. The Electronic Signatures Act allows state law to modify, limit or supersede its effect by laws consistent with it that are technologically neutral and that refer specifically to the Electronic Signatures Act.

SECTION 802. REPEALS. [The State Administrative Procedure Act] is repealed.

SECTION 803. EFFECTIVE DATE. This [act] takes effect [ ]… .