

ARTICLES

PETITIONING FEDERAL AGENCIES FOR RULEMAKING: AN OVERVIEW OF ADMINISTRATIVE AND JUDICIAL PRACTICE AND SOME RECOMMENDATIONS FOR IMPROVEMENT*

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Federal regulatory agencies increasingly promulgate policies more often by rulemaking than by adjudication. In light of this trend, the process by which agencies review petitions for rulemaking deserves closer scrutiny. The receipt, consideration and disposition of such petitions are governed by the Administrative Procedure Act, other statutes and the first amendment. In some instances, Congress intends that an agency develop substantive policy largely in response to outside proposals; in other cases, Congress is indifferent with regard to where the regulatory initiative should rest. These divergent situations have produced various petition procedures.

In this Article, Professor William V. Luneburg examines existing petition procedures and recommends improvements based on his study. Luneburg's recommendations address agency elaboration of statutory requirements, the judiciary's role in policing agency disposition of petitions, and the way petitions fit within the general framework of policy development by rulemaking. The author concludes that refinement of the petition process can ensure meaningful public involvement in federal regulation.

I. INTRODUCTION: A CASE OF RAW MILK

This Article examines federal agency processes for the consideration and disposition of rulemaking petitions. An appropriate way to begin is with a detailed description of the history of one such petition. The following story illuminates both the importance of this mode of influencing an agency's regulatory agenda and the problems that a peti-

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tioner may encounter along the way. In addition, it raises many of the issues that will be the focus of this Article.

Raw milk is milk that has not undergone pasteurization, in which harmful bacteria are destroyed by heating the product to a point below boiling. In 1973, the Food and Drug Administration (FDA) adopted a regulation requiring pasteurization of all milk moving in interstate commerce.¹ On the objection of a producer of what is known as "certified" raw milk, a product processed under standards different from those applicable to raw milk generally, the FDA in 1974 stayed the pasteurization requirement for "certified" raw milk.² The objecting producer argued that such milk was safe and that the agency lacked the legal authority to establish a standard of identity solely for health reasons. Most raw milk is produced and consumed locally (mainly in Georgia and California), and interstate sales of the product were and are modest. At the time of the stay, however, the FDA Commissioner indicated that there were serious safety problems associated with certified raw milk and that a hearing would be held to examine them.

No hearing followed for many years, however, despite the fact that between 1974 and 1982 the FDA accumulated evidence linking certified raw milk with various human diseases.³ These diseases occasionally result in death. By 1982, the agency began drafting a proposed regulation banning all interstate sales of raw milk and raw milk products. In April 1983, the Secretary of Health and Human Services (HHS) received the proposed regulation from the FDA Commissioner, who indicated that raw milk presented a significant public health problem. Also in 1983, the Director of the Centers for Disease Control stated that raw milk was "inherently unsafe," and that a "wealth of evidence" associated its consumption with disease. The Secretary of HHS was advised in 1984 by her Assistant Secretary that the consumption of raw milk was a "serious public health risk" and that a ban on interstate sales was "most advisable." However, the proposed rule was not published.

The Health Research Group of Public Citizen, a non-profit public interest organization formed by Ralph Nader, filed a formal petition for rulemaking with the FDA on April 10, 1984 asking the Secretary of HHS to adopt a regulation banning all interstate and intrastate sales of raw milk and raw milk products. Two months later, the petitioner was informed that the matter was "under active consideration," but there was no indication when the agency would make a final decision. On September 4, 1984, the agency refused Public Citizen's request for an indication when a resolution would be forthcoming, though it had in

1. 38 Fed. Reg. 27,924 (Oct. 10, 1973).

2. 39 Fed. Reg. 42,351 (Dec. 5, 1974).

3. Specifically, these included campylobacteriosis and salmonellosis.

August announced a public hearing, partly in response to the petition, to consider a raw milk ban.

Public Citizen filed a lawsuit in the United States District Court for the District of Columbia on September 19, 1984 for the purpose of compelling action on its petition. Subsequently, the FDA held the long-promised hearing on October 11 and 12, 1984. The hearing resulted in a 330-page transcript and 300 comments. Even opponents of a total ban acknowledged reports associating consumption of raw milk with the onset of disease. These opponents argued, however, that a clear causal link had yet to be demonstrated.

On January 14, 1985, the district court held that the FDA unreasonably delayed action on the rulemaking petition of Public Citizen and ordered the Secretary of HHS to publish within sixty days a proposed rule reflecting her decision on the petition and to proceed expeditiously in completing any ensuing rulemaking proceeding. On January 29, 1985, the FDA again urged the Secretary of HHS to require pasteurization of all milk and transmitted to her a proposed rule to that effect. The Secretary rejected this recommendation and directed the FDA to deny the Public Citizen petition. The denial came on March 15, 1985 in a letter which acknowledged that raw milk was a vehicle for the transmission of numerous diseases. FDA based its denial on various factors: most unpasteurized milk products were marketed only in intrastate commerce; most illnesses associated with raw milk were caused by products thus marketed; there was no reason to believe that unpasteurized milk marketed in interstate commerce represented a greater source of risk than unpasteurized milk marketed intrastate; HHS did not have legal authority to prohibit the intrastate marketing of milk and, even if it did, the problems created by unpasteurized milk were more appropriately dealt with at the state and local level; and banning raw milk from interstate commerce would have a minimal effect on the public health.⁴

Public Citizen, along with other organizations, then sued again in the District Court for the District of Columbia. Finding that denial of a rulemaking petition was reviewable agency action and that the rulemaking record was sufficient for a searching review of the legality of the agency action, the court reversed the petition denial, finding that it was arbitrary and capricious.⁵ The court noted that the record presented "overwhelming evidence of the risks associated with the consumption of raw milk,"⁶ that "[f]ederal regulation is warranted regardless of the

4. See *Public Citizen v. Heckler*, 602 F. Supp. 611 (D.D.C. 1985).

5. See *Public Citizen v. Heckler*, 653 F. Supp. 1229 (D.D.C. 1986).

6. *Id.* at 1238.

absolute volume of certified raw milk sold interstate,”⁷ that “[n]othing in the record supports a conclusion that state regulation would be superior to federal regulation,”⁸ and that “[a] remand to the agency for further proceedings would serve no purpose and would only add to the delay already encountered.”⁹ Accordingly, the court ordered the FDA to promulgate a regulation prohibiting the interstate sale of certified raw milk and certified raw milk products.¹⁰ Six weeks later, on the government’s motion to amend the judgment on the basis that the Administrative Procedure Act (APA)¹¹ generally required an opportunity for public comment prior to adoption of a final rule,¹² the court ordered the FDA to solicit comments on a proposed rule banning the interstate sale of all raw milk and complete all rulemaking proceedings within ninety days of the court order.¹³ Later, the court gave the FDA an additional ninety days to promulgate a final rule in accordance with its earlier opinion.¹⁴

On June 11, 1987, the FDA published a notice of proposed rulemaking.¹⁵ Numerous comments, both favoring and opposing the raw milk ban, were received. Finally, noting the “known documented health risks associated with the consumption of raw milk,”¹⁶ that raw milk was not being wrongly singled out for regulation,¹⁷ that the product might be unsafe regardless of how carefully it might be prepared,¹⁸ that there were no feasible alternatives to the ban,¹⁹ and that the use of federal authority and resources in eliminating health problems caused by raw milk was justifiable,²⁰ the agency adopted a regulation mandating pasteurization for all milk and milk products delivered into interstate commerce and intended for human consumption.²¹ The Secretary of HHS and the FDA Commissioner signed the final regulation on August 6, 1987, within the final judicially-imposed time frame.

The history just related does not typify the course of rulemaking petitions. Indeed, in some respects it departs substantially from the norm, most importantly in that the petitioner ultimately obtained a ju-

7. *Id.* at 1240.

8. *Id.* at 1241.

9. *Id.*

10. *Id.* at 1242.

11. 5 U.S.C. §§ 551-59 (1982).

12. *Id.* § 553(b), (c).

13. *Heckler*, 653 F. Supp. at 1242.

14. *Id.*

15. See 52 Fed. Reg. 22,340 (June 11, 1987).

16. 52 Fed. Reg. 29,511 (Aug. 10, 1987).

17. *Id.* at 29,512.

18. *Id.*

19. *Id.* at 29,513.

20. *Id.*

21. *Id.* at 29,514.

dicial order that the agency adopt as a final rule the proposal made in the petition. In other ways, the story is a familiar one in federal petition practice, including the delays encountered in obtaining final agency action.

The story touches on a host of issues relevant to all types of rule-making petitions and to all federal agencies that handle such petitions. For example, what exactly are agency obligations in terms of receipt, consideration and disposition of rulemaking petitions? Is the source of these obligations constitutional, statutory or some other authority? How have agencies attempted to reduce the time required for the final disposition of petitions and, if they have been unsuccessful, why? To what extent does or should the petition process control the regulatory agenda of an agency? Who uses the various petition processes and who tries avoiding them in their efforts to obtain an agency's attention, and why? To what extent are the petition processes valuable to agencies in either originating viable regulatory options or spurring action on issues already under active consideration within the agency? Finally, to what extent can and should the courts control an agency's rejection of a regulatory proposal presented in a petition?

The discussion that follows does not attempt to provide a comprehensive answer to all of these questions. Nevertheless, it provides a firm basis upon which recommendations can be made for improvement in the rulemaking petition process.

II. OVERVIEW

An agency's regulatory agenda reflects internal initiatives along with commands, requests and suggestions from the outside. Congress and the various components of the Executive Branch often constitute the primary external agenda directors. Statutory mandates and timetables are enacted, oversight and appropriations hearings air congressional dissatisfaction with the direction or pace of agency action, informal conferences with the White House or the officials of other agencies subtly or not so subtly indicate new avenues for agency policy development, and the regulatory planning process prescribed by Executive Order affords the Office of Management and Budget a formal opportunity for reviewing and urging "reconsideration" where appropriate.²²

Regulated and beneficiary groups, along with the general public, also have direct opportunities for formal and informal input. In many instances, the constant contact in person, through correspondence or over the telephone, between agency staff and outsiders provides a sizeable portion of the grist for the policy making mill. Regulatory propos-

22. See *infra* text accompanying notes 219-34.

als of great significance may have clear roots in such informal communications. In other instances, the origins of a particular regulatory initiative, whether internal or external, may be entirely obscured.

Outsiders who supply factual data, along with arguments of law or policy, may fill gaps in the agency's reservoir of information, confirm tentative conclusions already arrived at, or contradict prevailing assumptions. Particularly in areas where technology is fast-changing, an agency may depend upon its contacts with its "constituency" for news of recent developments that may affect well-established policies or suggest new avenues for regulatory development.

Even if they wanted to—which they generally do not—federal administrative agencies are prevented by the first amendment²³ from denying the public the opportunity to present to them proposals for regulatory change. However, the constitutional right to petition is only a right of presentation; it does not require that government policy makers listen or respond to the communications by individuals or groups on public issues.²⁴ In other words, it is little more than the right to make a clamor.

Despite the usual incentives that agencies possess for paying attention to outsiders when the latter are seeking to communicate their proposals for agency action, Congress has seen fit to go beyond the first amendment's strictures and require that the bureaucracy listen to, consider, and act with reasonable promptness on such proposals. The APA,²⁵ along with other statutes,²⁶ create rights to petition for the issuance, amendment and repeal of "rules."²⁷

In view of the fact that policy development by rulemaking, rather than by adjudication, has increasingly become the norm on the federal level, these various petition processes deserve a more extensive examination than they have received to date. Specifically, close scrutiny is required regarding the existing procedural framework for the petition processes, including agency elaboration of statutory requirements, the manner in which those processes fit within the general scheme of policy making by rule, the judicial role in policing agency discretion in the

23. U.S. CONST. amend. 1.

24. See *Minnesota Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984); *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979). For a historical examination and critique of this constricted view of the scope of the first amendment's protection, see Higginson, *A Short History of the Right to Petition for the Redress of Grievances*, 96 *YALE L.J.* 142 (1986).

25. 5 U.S.C. §§ 551-59 (1982).

26. See *infra* text accompanying notes 72-111.

27. The APA provision is 5 U.S.C. § 553(e) (1982). That statute defines "rules" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." *Id.* § 551(4).

disposition of petitions, and finally, the various criticisms levelled at the operation of petition processes and recommended changes to them.

The petition framework established by the APA functions as a residual process to cover instances in which Congress has not otherwise addressed the matter of rulemaking petitions. Using that framework, persons outside an agency may formally request broad (or narrow) policy making changes in many areas falling within an agency's regulatory jurisdiction. The APA may be implemented by a particular agency with the adoption of a set or sets of regulations applicable to all or only certain types of rulemaking petitions. These regulations may be elaborate or skeletal. In addition, other statutes establish petition processes different from and sometimes more detailed than the APA. These alternative processes apply to particular substantive areas, such as petitions for establishing marketing quotas for agricultural commodities²⁸ and export controls.²⁹

In dealing with federal petitions for rulemaking, four situations must be distinguished according to where the initiative for action rests. The first of these is where Congress intends with regard to a particular substantive program that agency rulemaking action, if any, occur largely in response to outside initiative by petition. An example is the establishment by the Food and Drug Administration of the conditions under which a food additive may be used.³⁰ Secondly, Congress may intend that the agency assume the primary initiative in establishing the regulatory framework, modifications to which might be sought by petition from regulated or beneficiary groups. The air and water pollution programs³¹ administered by the Environmental Protection Agency fall into this category. Thirdly, Congress may contemplate that the agency and the public will share more or less equally in setting the regulatory agenda. The establishment of motor vehicle safety standards by the National Highway Traffic Safety Administration³² has followed this pattern in practice,³³ though there may be some question whether this faithfully conforms to the original legislative intent.³⁴ Finally, Congress may give no attention to this matter or may be indifferent with regard to where the regulatory initiative should rest.

28. See 7 U.S.C. §§ 1311-1359 (1982).

29. See 50 U.S.C. app. § 2406(c) (1982).

30. See 21 U.S.C. § 348(b)(1) (1982). *But see id.* § 348(d).

31. See 33 U.S.C. §§ 1251-1376 (1982); 42 U.S.C. §§ 7401-7642 (1982).

32. See 15 U.S.C. §§ 1381-1431 (1982).

33. See Luneburg, *Petitions for Rulemaking: Federal Agency Practice and Recommendations for Improvement*, in 1986 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES RECOMMENDATIONS AND REPORTS 493, 538 [hereinafter ACUS RULEMAKING PETITION REPORT].

34. Cf. Mashaw & Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257 (1987) (noting the obligation for rulemaking imposed on NHTSA by Congress in 1966).

This categorization of the various rulemaking petition processes has significant implications for agency priority in the consideration and disposition of petitions and the scope of judicial review of petition denials. The more the petition process is envisioned by Congress as a determinant of the agency's regulatory agenda, the more the agency should (and generally does) devote resources to the well-considered and expeditious disposition of petitions. Moreover, judicial tolerance of petition denials and inaction with regard to petitions based on resource allocation considerations may be justifiably less where Congress determines that external initiative should be a primary engine of regulatory design.³⁵ Congress may also considerably narrow agency discretion by the imposition of detailed substantive standards for grant or denial.³⁶

For reasons to be discussed below,³⁷ where the first and third situations described above exist, it is likely that a relatively detailed petition process will be established by statute or by the agency itself. Petitions will be relatively frequent. In the second situation, the petition process may often be governed only by the APA and perhaps also by rather sparse agency elaboration on the APA and may be infrequently invoked for fashioning agency policy.

Even where Congress has intended that the primary initiative for regulatory action rest with the agency, and where the APA constitutes the sole statutory basis for petitioning for rulemaking, it is nevertheless clear that Congress intended that agencies should assign some significant priority to the handling of these petitions. These petitions must be given serious and expeditious consideration.³⁸ Although an agency may not be required by law to put petition processing ahead of other specific matters on which it may or must expend its efforts (other than response to informal suggestions from the public for rulemaking changes), consideration and disposition of rulemaking petitions is one of an agency's important responsibilities. This responsibility has a legitimate claim to an agency's time and other resources and should not be given short shrift in decisions allocating these resources. Even where a reviewing court cannot force an agency to grant a petition, the court may ensure that there are no unreasonable delays or unreasoned denials and, to this extent, have a permissible effect on agency resource allocation.

The discussion below examines the existing framework for agency consideration and disposition of rulemaking petitions, including the statutory components and their procedural elaboration by agencies.

35. See *infra* text accompanying note 288.

36. See, e.g., 42 U.S.C. § 6297(b) (1982).

37. See *infra* text accompanying notes 115-16.

38. See *infra* text accompanying notes 40-46, 60-65.

This is followed by an analysis of the petition process in the evolution of regulatory policy, including the impact of the regulatory planning process currently mandated by Executive Order. Judicial review of petition denials is discussed next, with an emphasis on the standards of review and certain apparent misconceptions regarding those standards. Finally, various observations and criticisms of the existing rulemaking petition processes are set forth along with suggestions for change.

III. THE STATUTORY PETITION PROCESSES

A. *The Administrative Procedure Act*

Section 553(e) of the APA mandates that “[e]ach agency . . . give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”³⁹ Unlike the constitutional right to petition, the APA forces action. Both the Senate and House Reports on the bill that was ultimately enacted in 1946 emphasize that agencies have the obligation under this statute to receive and consider petitions for rulemaking.⁴⁰ Moreover, section 555(b)⁴¹ requires final disposition by grant or denial. This section directs an agency to “proceed to conclude” matters presented to it “within a reasonable time.”⁴² Finally, where it denies a petition for rulemaking, the agency must, according to section

39. 5 U.S.C. § 553(e) (1982). It is generally assumed that the § 553(e) right to petition is subject to the exceptions found in § 553(a) (military and foreign affairs functions and matters relating to agency management, personnel or public property, loans, grants, benefits, or contracts). Arguably, this conventional view is incorrect. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 506-08.

40. See ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 21, 201, 260, 359, 409 (1946) [hereinafter LEGISLATIVE HISTORY].

41. 5 U.S.C. § 555(b) (1982).

42. The requirement that an agency act to conclude matters in a timely fashion immediately follows a sentence in § 555(b) which provides: “[s]o far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function.” This qualified statutory right of presentation should be contrasted with the unqualified right to petition for rulemaking contained in § 553(e). It might be contended, therefore, that the statutory obligation to act within a reasonable time—which is contained in the next sentence—is limited in its applicability. The courts have not, however, viewed it that way. See, e.g., *Public Citizen v. Heckler*, 602 F. Supp. 611, 613 (D.D.C. 1985). Moreover, the legislative history of the APA suggests, though somewhat ambiguously, that the mandate that an agency act with reasonable promptness was seen as a general proposition of good administrative practice. See LEGISLATIVE HISTORY, *supra* note 40, at 205, 264. See also UNITED STATES DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 65 (1947) (“This provision merely restates a principle of good administration.”) [hereinafter ATTORNEY GENERAL’S MANUAL]. But see LEGISLATIVE HISTORY, *supra* note 40, at 204, 263 (“Agencies are to proceed with reasonable dispatch to conclude any matter so presented. . . .”) See also *infra* note 44.

555(e),⁴³ give “prompt notice”⁴⁴ and, “[e]xcept in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for the denial.”⁴⁵ The legislative history indicates that the notice of denial must inform the petitioner personally of the action taken and reasons for that action.⁴⁶

The influential *Attorney General's Manual on the Administrative Procedure Act*⁴⁷ suggests that it would “be proper for an agency to limit this right [to petition] to persons whose interests are or will be affected by the issuance, amendment, or repeal of a rule.”⁴⁸ Whatever limitation on the right to petition this was intended to suggest, as a legal matter the class of persons with standing to petition appears far broader than the class generally entitled to judicial review of agency action or inaction.⁴⁹ Such an interpretation of section 553(e) finds support in legislative history explaining that the first amendment’s right to petition provided the inspiration for section 553(e).⁵⁰ Moreover, the

43. The requirements of § 555(e) are expressly limited to petitions “made in connection with any agency proceeding,” suggesting that they may not apply unless a proceeding is pending at the time of the filing of the petition. *Cf.* *Belton Elec. Corp. v. FTC*, 402 F. Supp. 590, 596-97 (N.D. Ill. 1975). That situation obviously does not exist in those instances in which the agency has not commenced rulemaking and a party files a petition for the purpose of initiating agency action. However, the legislative history of § 553(e) indicates that Congress did not intend to limit the requirement for notice and explanation of the grounds of a denial in this way. *See* LEGISLATIVE HISTORY, *supra* note 40, at 201, 260.

44. The legislative history of § 555(e) seems to suggest that the requirement of prompt decision on petitions, as opposed to prompt notification of decisions made, should be found in that provision. *See* LEGISLATIVE HISTORY, *supra* note 40, at 206, 265. However, only in § 555(b) is there express language mandating decision in a timely fashion. The reporting committees’ discussion of § 555(e) confirms, however, an intention that agencies act promptly in disposing of petitions. *See also supra* note 42. This intention is reiterated in the committees’ discussion of § 553(e) itself. *See* LEGISLATIVE HISTORY, *supra* note 40, at 201, 260.

45. The statement of grounds “should . . . be sufficient to apprise the party of the basis of the denial and any other or further administrative remedies or recourse he may have.” LEGISLATIVE HISTORY, *supra* note 40, at 206, 265. The “concise general statement” of the “basis and purpose” of a rule, which is required of the agency upon the rule’s adoption by 5 U.S.C. § 553(c), was described by the committees in similar terms: “[t]he required statement of the basis and purpose of rules issued should not only relate to the data so presented but with reasonable fullness explain the actual basis and objectives of the rule.” *Id.* at 201, 259. *See also* ATTORNEY GENERAL’S MANUAL, *supra* note 42, at 32 (“the statement is intended to advise the public of the general basis and purpose of the rules.”).

The Department of Justice construed § 555(e) to mean that the required notice of denial might be given in writing or orally. *Id.* at 70.

46. *See* LEGISLATIVE HISTORY, *supra* note 40, at 201, 206, 260, 265, 268.

47. *See supra* note 42.

48. ATTORNEY GENERAL’S MANUAL, *supra* note 42, at 38.

49. *See, e.g., Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (standing under APA confined to those persons injured “in fact” by agency action, which injury is to an “interest . . . arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”).

50. *See* SENATE COMM. ON THE JUDICIARY, 79TH CONG., 1ST SESS. (Comm. Print 1945), *reprinted in* LEGISLATIVE HISTORY, *supra* note 40, at 21 (“One agency objects to the statutory statement of a right of petition on the ground that it would ‘force’ a ‘tremendous’ number of hearings.

constitutional and prudential factors that elsewhere limit judicial scrutiny of Executive Branch policy making are absent when the question is whether a person may petition an agency and receive consideration and disposition of his or her request. While the obligations imposed on an agency by the APA petition provisions are consequential in terms of resource allocation,⁵¹ formal disposition of petitions even from persons only “abstractly interested” is unlikely to undermine an agency’s ability to carry out its other functions. As noted below, an agency can impose format requirements for petitions which may deter those persons not serious enough about their proposals to make the effort to comply.⁵² Moreover, the agency can create decisional frameworks that quickly, without extensive resource commitments, cull frivolous petitions from those that deserve more extensive consideration.⁵³ Finally, as a practical matter, since good ideas for regulation (or deregulation) may be proposed by those with only an “abstract” or “academic” interest in a particular area, agencies should not—and in fact generally do not⁵⁴—reject petitions on the basis of technical requirements of “standing.”

The APA does not require a written section 553(e) petition. Any request for rulemaking, however communicated, addressed or delivered to an agency and in whatever form, may qualify as a statutory petition triggering the requirements for receipt, consideration, and expeditious disposition. However, the *Attorney General’s Manual* takes the position that an agency can formulate reasonable procedural rules prescribing, for example, the format for petitions⁵⁵ and thereby limiting to a degree the agency’s statutory obligations under sections 553(e), 555(b) and 555(e). Moreover, the Department of Justice indicates that agencies “should establish . . . procedural rules governing the receipt, consideration and disposition of petitions. . . .”⁵⁶ Further, the publication requirements of the APA⁵⁷ apparently require an agency to provide some

The alternative implied is that no one should have right of petition, leaving action or inaction to the initiative of the agency concerned. Even Congress, under the Bill of Rights, is required to accord the right of petition to any citizen.”)

In explaining the House bill, Congressman Walter noted: “[t]he right of petition is written into the Constitution itself. This subsection confirms that right where Congress has delegated legislative powers to administrative agencies.” *Id.* at 359. *See also id.* at 78 (statement of Carl McFarland before House Judiciary Committee).

The first amendment’s protection of the right “to petition the Government for a redress of grievances” is not by its terms limited to “interested” persons but extends to “the people.” *Cf.* *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-86 (1978) (first amendment protection not limited to persons with economic “interest” in subject matter under discussion).

51. *See infra* text accompanying notes 60-65.

52. *See infra* text accompanying notes 55-59.

53. *See, e.g., infra* text accompanying note 157.

54. *See, e.g.,* ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 522, 525-26, 533.

55. ATTORNEY GENERAL’S MANUAL, *supra* note 42, at 38.

56. *Id.*

57. *See* 5 U.S.C. § 552(a)(1) (1982).

minimal, publicly available written description of its petition process.⁵⁸ Many agencies have adopted at least some written statement of their petition processes, though some of these statements are sketchy at best.⁵⁹

The APA refers specifically to only one type of possible final disposition of a petition—a denial.⁶⁰ Agencies differ in their construction of Sections 553(e) and 555 with regard to the stage in their consideration of a petition at which a “grant” (that is, a final affirmative disposition) occurs. Some take the position that it comes no later than the issuance of a notice of proposed rulemaking (NPRM).⁶¹ Others, seemingly in the minority, view a “grant” of a petition as occurring only with the issuance of a final rule which adopts in some degree the proposal of the petitioner.⁶²

These differing constructions have various ramifications. With regard to statistics concerning actions on petitions, an agency’s reported time for processing petitions will be considerably shorter if the agency deems that a grant occurs at the NPRM stage or earlier, rather than if the grant is deemed to occur only when a final rule is issued. As a legal matter, if the agency deems that final affirmative disposition occurs prior to formal issuance, amendment or repeal of the rule, the requirement under section 555(b) that the agency “proceed to conclude a matter presented to it” within a reasonable time may not in some circumstances attach to a rulemaking proceeding commenced with the issuance of an NPRM in response to a petition and may not even limit agency discretion regarding when to formally commence rulemaking.⁶³

58. *Id.* § 552(a)(1)(A)-(C).

59. *See infra* text accompanying notes 112-14.

60. *See* 5 U.S.C. § 555(e) (1982).

61. *See, e.g.*, 47 C.F.R. § 1.407 (1986) (Federal Communications Commission); 49 C.F.R. § 211.11(b) (1987) (Federal Railroad Administration).

62. This is true at, for example, the Federal Energy Regulatory Commission and the Nuclear Regulatory Commission. *See* ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 531, 546.

63. Having “granted” the petition, the agency has arguably concluded “the matter presented to it.” Even if this rather literalistic reading of § 555(b) were accepted, however, the power of a reviewing court to “compel agency action . . . unreasonably delayed” pursuant to 5 U.S.C. § 706(1) (1982) may imply a general supervisory power independent of § 555 and other specific statutes for the purpose of ensuring that agency proceedings are not unduly prolonged. *See, e.g.*, *Caswell v. Califano*, 583 F.2d 9, 15-16 (1st Cir. 1978) (“Under both general equitable powers and powers granted under the APA, courts can insure that statutory rights are not denied by agency inaction.”). *Cf. supra* note 42.

At least one court has held that § 706(1) “complements” § 555(b). *See* *Public Citizen Health Research Group v. Aucter*, 702 F.2d 1150, 1154 (D.C. Cir. 1983). The courts do not, however, interpret § 555(b) in an overly cramped fashion. *See, e.g.*, *Oil, Chem. & Atomic Workers Int’l Union v. Zegeer*, 768 F.2d 1480 (D.C. Cir. 1985) (where a court reviewed alleged unreasonable delay in a rulemaking commenced in part on the initiative of the agency even though § 555(b) talks in terms of concluding matters “presented” to the agency, language that could be taken to suggest that § 555(b) might not apply if the agency acts on its own initiative). This suggests either that

Moreover, on this view of a “grant,” if the agency ultimately terminates a petition-initiated rulemaking following issuance of an NPRM without issuance of a final rule, neither of the applicable sections, 553(c) and 555(e), requires an agency statement of explanation, though during any judicial proceeding that follows the court may demand some type of explanation. Most importantly, if grant of a petition does not refer to the final stage of the rulemaking, a letter merely acknowledging receipt of a petition and thanking the petitioner for a good idea could be considered a full discharge of any requirements under the APA for consideration and disposition of the petition. Such an interpretation does not necessarily ensure that the agency will give serious consideration to suggestions for regulatory change.

There is, unfortunately, nothing in the text or legislative history of the APA that unequivocally indicates which construction represents the intent (if any) of Congress in 1946 on this matter. The minority view, however, that a “grant” occurs only with rule adoption, appears more consistent with these materials.⁶⁴ Subsequent congressional action in enacting various specific petition processes gives some comfort to the partisans of each interpretation.⁶⁵

The right extended by APA section 553(e) applies to petitions for a “rule,” that is, “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”⁶⁶ Therefore, the APA petition process encompasses not only so-called “legislative” or “substantive” rules (those that are intended by the agency to have a legally

courts would likely construe the word “conclude” in § 555(b) in the manner suggested at *supra* text accompanying note 62 or that, even if they did not, they would willingly police the time an agency takes in completing a rulemaking commenced in response to a petition by finding that § 555(b) applies once the agency initiates the rulemaking proceeding.

64. Both the Senate and House Reports indicate that agencies must “fully” consider petitions (LEGISLATIVE HISTORY, *supra* note 40, at 201, 206); that “[t]he agency may either grant the petition, undertake public rulemaking proceedings . . . or deny the petition” (*id.*); and that “[t]he mere filing of a petition does not require an agency to grant it, or to hold a hearing, or engage in any other public rulemaking proceedings” (*id.* at 201). The latter two statements might be taken as supporting the proposed interpretation since a “grant” is apparently seen as distinct from the public procedures leading to the issuance of a final rule. In explaining the House version of the bill, Congressman Walter stated that, under § 553(e), “[n]o agency may receive such petitions in a merely pro forma manner.” *Id.* at 359.

In commenting on what is now § 553(e), the *Attorney General's Manual* noted that “[i]f the agency is inclined to grant the petition, the nature of the proposed rule would determine whether public rulemaking proceedings under section 4(a) and (b) are required.” ATTORNEY GENERAL'S MANUAL, *supra* note 42, at 39. If a grant occurs prior to the issuance of a final rule, it would seem that the reference would be to “grant,” not “inclined to grant.”

Finally, it is somewhat difficult to understand why Congress would have gone to the trouble of including a provision like § 553(e) if the alternative interpretation is the correct one.

65. See *infra* text accompanying notes 77-82.

66. 5 U.S.C. § 551(4) (1982).

binding effect pursuant to law)⁶⁷ but also procedural rules, interpretative rules and general statements of policy.⁶⁸ The latter two, while lacking “legal effect,” are still “rules” within the APA definition.⁶⁹ Because the APA does not require that the initial agency adoption of rules—other than legislative rules—be preceded by public notice and comment,⁷⁰ the right to petition serves a distinctive purpose regarding these other statements of agency position. In this context, sections 553(e) and 555 require agencies to receive, consider, and respond to the views and information of interested persons who may suggest the need for reconsideration.⁷¹

B. Other Statutes

Over the years, but particularly since 1970, Congress has enacted a variety of statutory provisions dealing with the right to petition for the issuance, amendment and repeal of specific types of rules. Congress has chosen not to rely solely on the APA petition process, in part because in many instances it perceives needs for strict time deadlines for agency action,⁷² for procedures in addition to those expressly mandated by the APA,⁷³ and for imposing specific substantive criteria for directing the grant or denial of petitions.⁷⁴ Congress wanted to promote, or at least allow an opportunity for, citizen participation in the administration of programs for public health and safety. These desires are evidenced elsewhere in the legislation of the 1970s⁷⁵ and find expression in many of these special petition provisions.

Rather than writing on a clean slate, some of these statutes expressly build on the right to petition created by APA section 553(e). In some instances, their language may give support to the view that a “grant” of an APA petition occurs at some point prior to issuance of a final rule.⁷⁶ To the extent Congress purported to construe (and not

67. See, e.g., *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986).

68. See ATTORNEY GENERAL'S MANUAL, *supra* note 42, at 38.

69. See, e.g., *Thomas v. State of New York*, 802 F.2d 1443, 1446-47 (D.C. Cir. 1986) (noting some confusion in the cases in this regard).

70. See 5 U.S.C. § 553(b)(A) (1982).

71. See Bonfield, *Military and Foreign Affairs Function Rule-making Under the APA*, 71 MICH. L. REV. 221, 310 (1972); Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, 600-01 (1970).

72. See *infra* text accompanying notes 83-86.

73. See *infra* text accompanying notes 96-104.

74. See, e.g., 42 U.S.C. § 6297(b) (1982).

75. See, e.g., *id.* § 7604 (citizen suits under Clean Air Act).

76. For example, 49 U.S.C. § 10,326(a) (1982) (petitions to Interstate Commerce Commission relating to rail carrier transportation) refers to an APA § 553(e) petition “to begin a rule-making proceeding” (emphasis added.) If the ICC grants it, the agency must “begin an appropriate proceeding.”

amend) the APA in the process of enacting these statutes after 1946, its views regarding the meaning of section 553(e) may be persuasive but are not dispositive of this issue.

Moreover, various statutes have been enacted which create rights to petition independent of the APA. Some are phrased in terms of petitions to “commence”⁷⁷ or “initiate”⁷⁸ a rulemaking proceeding. It is clear from the legislative language in these statutes that the grant is deemed to occur no later than the formal beginning of the rulemaking.⁷⁹ The language of APA section 553(e) differs significantly from these schemes, referring rather to petitions “for the issuance, amendment, or repeal of a rule.”⁸⁰ These differences in drafting lend some support to the argument that the grant of an APA petition should be deemed to occur no earlier than the conclusion of a rulemaking.⁸¹

One of the consistent complaints levelled at rulemaking petition processes, both those established by the APA and those existing under the authority of other statutes, is the delay encountered in final disposition of petitions.⁸² Rather than providing that an agency act with reasonable promptness on a petition, as is the case with the APA, Congress has imposed strict timetables for agency action regarding certain petitions, which apply without exception to all petitions of the designated type.⁸³ However, it is noteworthy that as to some,⁸⁴ though not all,⁸⁵ special petition statutes, the grant of a petition legally occurs with, or

77. *See, e.g.*, 15 U.S.C. § 1410a(a) (1982) (petitions to establish federal motor vehicle safety standards).

78. *See, e.g.*, 30 U.S.C. § 1211(g)(1) (1982) (petitions to issue rules relating to surface mining and reclamation).

79. *See* 15 U.S.C. § 1410a(d) (1982); 30 U.S.C. § 1211(g)(4) (1982).

80. 5 U.S.C. § 553(e) (1982).

81. One of the noteworthy aspects of the various petition statutes is the variety of ways in which Congress has described the obligations of an agency following the filing of a petition where the agency is favorably inclined toward the proposal. In some instances the filing of a petition must be followed by the “prescription” of a rule (with no discussion of a “grant”) (*see, e.g.*, 42 U.S.C. § 6297(b) (1982) (supersession of state energy efficiency standards)), or “prescription” of a rule following a “grant” (*see, e.g.*, 15 U.S.C. § 2603(g) (1982) (standards for development of test data in chemical substances area)), or publication of “proposed” regulations (*see, e.g.*, 42 U.S.C. § 4905(f) (1982) (noise pollution standards)), or “issuance” of a regulation (*see, e.g.*, 21 U.S.C. § 348(c)(1) (food additive regulations)). Some of these statutes support the statement in the text, though it is unclear whether the very diversity in the statutory verbiage undercuts heavy reliance on nuances of language to construe the APA regarding the issue of when a “grant” occurs.

82. *See* ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 569.

83. *See, e.g.*, 15 U.S.C. § 1410a(d) (1982) (120 days to grant or deny petition for motor vehicle safety standard); 15 U.S.C. § 2620(b)(3) (1982) (90 days to grant or deny petition for rules relating to toxic substances); 30 U.S.C. § 1211(g)(4) (1982) (90 days to grant or deny petition for rule relating to surface mining and reclamation).

84. *Id.*

85. *See, e.g.*, 42 U.S.C. § 6297(b)(4) (1982) (six months to deny or “prescribe” requested rule superseding state energy efficiency standard, though delays permissible in some instances); 21 U.S.C. § 348(c)(1), (2) (1982) (within 180 days food additive petition must be denied or granted by issuance of a rule).

prior to, the commencement of the rulemaking, not at its conclusion. This avoids problems that would be created by requiring an agency to complete its disposition of often complex factual and policy issues within an overly-definite time frame.

However, mandating that a "first-cut" with regard to all petitions of a certain type occur within the same specifically limited period presents various difficulties of its own. In that case, commencement or completion of any rulemaking in response to a petition may not be subject to the requirement of reasonable promptness found in section 555(b) of the APA.⁸⁶ Explanation of the reasons for ultimately rejecting petitioner's proposal may also not be required by section 555(e).⁸⁷ In fact, even where these statutory deadlines exist, they are often not met by the agency because, to the extent Congress contemplated that a grant or denial should be preceded by more than cursory examination, they may be unrealistic in view of the difficult issues raised by some petitions.⁸⁸ To the extent the agency tries meeting the deadline in most cases, its ability to pursue its own regulatory agenda may be substantially undermined. If the deadlines are met, it may only be because the agency considers that a grant involves no more than a polite "thank you" for an idea that may be worthy of further consideration, without any legal obligation for the agency to formally commence a rulemaking by the issuance of an NPRM.⁸⁹ The grant may seem to be the least risky course to follow since a denial may prompt the disappointed petitioner to seek judicial review. However, the agency may opt for a summary dismissal where judicial review seems unlikely and the agency considers meeting the statutory deadline to be more important than evaluating the merits of the petition to the degree which it may deserve.⁹⁰ In neither case does the statutory deadline necessarily accomplish much in forcing an agency to consider seriously an outside proposal.

86. See *supra* text accompanying note 63. However, where a "grant" is deemed to occur prior to the issuance of a final rule, the specific petition statute usually requires at least that the agency "promptly" commence a rulemaking proceeding. See, e.g., 15 U.S.C. § 2620(b)(3) (1982) (toxic substance petitions); 15 U.S.C. § 1410a(d) (1982) (federal motor vehicle safety standard petitions). However, these statutes do not specifically impose a time limit on completion of the rulemaking.

87. See *supra* text following note 63. Having already "granted" a petition, it might seem a bit odd to suggest that later agency action terminating a rulemaking constituted a "denial" within the meaning of § 555(e).

88. Interview with Barry Felrice, Associate Administrator for Rulemaking, National Highway Traffic Safety Administration (July 9, 1986) [hereinafter Felrice Interview].

89. *Id.* See also Tomlinson, *Report on the Experience of Various Agencies with Statutory Time Limits Applicable to Licensing or Clearance Functions and to Rulemaking*, in 1978 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES RECOMMENDATIONS AND REPORTS 119, 214-15 (describing former National Highway Traffic Safety Administration practice).

90. This is apparently a rare case. See Tomlinson, *supra* note 89, at 130.

As other studies demonstrate, specific deadlines for agency action may be an effective management tool but are of questionable value when enacted into law.⁹¹ Some agencies now employ, and others can profitably be urged to adopt, uniform or individually negotiated target deadlines for disposition of petitions.⁹² These deadlines may be more realistic than uniform statutory time limits. Though failure to adhere to such self-imposed restrictions is hardly a rare phenomenon,⁹³ it may be somewhat effective in expediting action.⁹⁴ Arguably, violation of agency targets may undermine respect for the authority of law less than frequent disregard of statutory mandates.

Other than specific time deadlines for action on petitions, various procedures not required by APA section 553(e) may be imposed by these special petition statutes, including public notice (by means of the *Federal Register* or otherwise) of the filing of the petition for the apparent purpose of soliciting comments that may help the agency in its decision to grant or deny the petition,⁹⁵ public hearings⁹⁶ (usually at the option of the agency⁹⁷), publication in the *Federal Register* of notice of denial of a petition,⁹⁸ and a "detailed" statement of reasons for the action taken.⁹⁹ Unlike section 553, some petition statutes expressly require the agency to adopt implementing guidelines, procedures and criteria applicable to the petition process,¹⁰⁰ which may have to be open to public comment prior to their adoption.¹⁰¹ Others expressly indicate what types of information petitions should include¹⁰² and may expressly provide for judicial review of agency action or inaction with regard to these special petitions.¹⁰³

91. See, e.g., *id.* at 122-23.

92. The National Highway Traffic Safety Administration and the Nuclear Regulatory Commission are prominent examples. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 538-40, 543-49.

93. Again, the National Highway Traffic Safety Administration and the Nuclear Regulatory Commission are examples.

94. The time for disposition of petitions at the National Highway Traffic Safety Administration has improved over the last few years, even though its self-imposed deadlines may not be routinely met. Felrice Interview, *supra* note 88.

95. See, e.g., 42 U.S.C. § 6297(b) (1982) (supersession of state energy efficiency standards).

96. See, e.g., 30 U.S.C. § 1211(g)(3) (1982) (surface mining and reclamation).

97. *Id.*

98. See, e.g., 42 U.S.C. § 6297(b)(4) (1982) (supersession of state energy efficiency standards).

99. See, e.g., 42 U.S.C. § 4905(f) (1982) (noise standards).

100. See 42 U.S.C. § 6974(b) (1982) (hazardous substance petitions); 16 U.S.C. § 1533(g) (1982) (endangered species).

101. See 16 U.S.C. § 1533(g) (1982).

102. See 21 U.S.C. § 348(b)(2) (1982) (food additive petitions).

103. See 42 U.S.C. § 6976 (1982) (hazardous substance regulations); 15 U.S.C. § 2620(b)(4) (1982) (toxic substance regulations); 49 U.S.C. § 10,326(b) (1982) (rail carrier regulations).

The proliferation of special petition provisions is of doubtful value in many instances. Where these statutes do not apply, the APA imposes minimum requirements on the petition processes of almost all federal agencies that are not unduly burdensome and leave considerable room for agency innovation where suggested by the peculiar needs of the substantive programs which the agencies administer. At least in those cases in which agencies are confronted by substantial petition business, they have sometimes fashioned procedures in addition to the APA minimum when they deemed it appropriate.¹⁰⁴ Even where relatively few petitions are filed, some agencies have adopted rather elaborate frameworks for decisionmaking on APA petitions.¹⁰⁵

The procedural mandates of many of the special petition statutes narrow this area of discretion in questionable ways. For example, whether or not required by statute, solicitation of public comments on a petition prior to the issuance of an NPRM may elicit some useful information. At the same time, it may result in only a few comments—some adding little to what is already known by the agency—while the final disposition may be delayed for a month or more.¹⁰⁶ If an agency issues an NPRM in response to a petition, opposition to the proposal (or supporting arguments and data) can be offered at that time.

Of course, mandatory comment periods may reflect a legislative judgment that, with discretion for soliciting public input, agencies will often mistakenly or intentionally avoid seeking the views of outsiders where they may contribute something of value to the decisionmaking process. Alternatively, delay may be the intended result of legislatively-mandated comment periods where Congress believes that the regulatory program should move in a particularly cautious fashion.¹⁰⁷ The latter is a matter of substantive legislative judgment and, accordingly, may be difficult to fault. However, there should be more than speculation supporting additional constraints on administrative discretion.

A requirement that a notice of receipt of a petition be published in all cases is also of questionable value. Generally, assuming a comment process can be justified on the basis of the information it may elicit, those most likely to possess both the desire to comment and helpful data and views may sometimes be informed of the pendency of the petition in ways less cumbersome and expensive than through the *Federal Register*. In other instances, publication notice may simply not reach

104. The Federal Communications Commission is an example of this. See ACUS RULE-MAKING PETITION REPORT, *supra* note 33, at 525-30.

105. The Nuclear Regulatory Commission is an example. *Id.* at 542-51.

106. See *id.* at 564 and *infra* text accompanying notes 168-69.

107. Cf. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 251 (1986).

those who should know of the petition.¹⁰⁸ Yet, the agency might rely upon the statutory mandate for publication to excuse its failure to do more where appropriate. Agency discretion regarding the means of conveying notice, therefore, seems to be the preferable approach.

Requiring publication of notice of all petition denials is even less defensible. In some instances, publication or other more effective means of public notice can educate interested persons regarding the direction of agency policy, thereby focusing subsequent petition activity in more profitable areas.¹⁰⁹ Where this is not the case, and there are not good reasons for expending scarce resources on publication, interested persons should be required to contact the agency or consult the petition file to determine the disposition of the petition. Statutory provisions indicating that the agency, within its discretion, may hold a hearing or other investigatory proceeding for considering a petition generally add nothing to existing agency authority. After all, there is no reason to think that an agency would not have the power, without the petition statute, to do those very things.

A statutory description of the required contents of a petition, including where it is to be filed and what type of information should be included or what issues should be addressed, is more appropriately left to the agency. The agency is in the best position, through its experience with a particular program, for determining what it needs in this regard. If the purpose of such a description is to lay down in whole or part the substantive criteria for agency decision on petitions, there are certainly more direct ways for accomplishing that result.

Even absent many of these special petition provisions, the *United States Code* is hefty enough in its bulk and presents ample challenges of statutory interpretation without these additional problems in the petition area.¹¹⁰ The value to the public of a body of statutory law is not enhanced by the use of "elegant" variation, introduced at least in part by the diffusion of power among different congressional committees whose drafting conventions and styles may differ.¹¹¹ Accordingly, unless there are good reasons to believe that a specialized petition proce-

108. See generally ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION REGARDING PUBLIC PARTICIPATION IN ADMINISTRATIVE HEARINGS, 1 C.F.R. § 305.71-6 (1986) (part E in particular).

109. See Letter from David C. Vladek, Staff Attorney, Public Citizen Litigation Group, to author (Aug. 27, 1986).

110. The vagueness of some petition statutes, whether intentional or not, can be fertile ground for litigation. For example, under the Resource Conservation and Recovery Act of 1976, the Environmental Protection Agency's Administrator, in response to a rulemaking petition, must "take action with respect to such petition" within a reasonable time. 42 U.S.C. § 6974(a) (1982). It is not clear what type of "action" is required: a polite "thank you," issuance of an NPRM, issuance of the final rule (if no denial), or something else. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 553-54.

111. See *supra* note 81.

dures is required by the nature of the substantive area at issue and is suitable for most cases falling within the statute, and further, that the agency probably will not adopt appropriate procedures, Congress should generally eschew more legislation and allow the APA to perform its assigned task of imposing minimum requirements and the duty to act with reasonable promptness.

IV. AGENCY WRITTEN ELABORATION OF THE PETITION PROCESS

Even where Congress enacts a special statute dealing with specific types of rulemaking petitions, only the general outlines of the petition process are usually prescribed—as is also true with regard to sections 553(e) and 555 of the APA. Many agencies have responded by adopting written statements of petition procedures, some of which may apply to the process established by the APA and others to special petition statutes.¹¹² Where such written statements exist, they vary from repetition of the applicable statutory provisions¹¹³ to very extensive prescription and description of every stage in the petition process from filing to final action.¹¹⁴

As a general rule, the greater the number of petition filings, or the more time an agency generally devotes to the consideration and disposition of petitions even if those are relatively few in number, the more likely it is that an agency has adopted some written petition framework and that such a framework will be rather detailed.¹¹⁵ This is true whether or not the APA or some other statute establishes the petition mechanism. The reasons for this are not difficult to discern. Where an agency has had little experience in handling rulemaking petitions, it is less able to make an educated judgment regarding the optimal procedures for petition processing and thus less willing to commit its thoughts to writing. Moreover, the fewer the number of petition filings, the less likely the agency is to view the drafting of petition regulations as

112. For the purposes of the study that resulted in the *ACUS Rulemaking Petition Report*, a questionnaire was sent to obtain certain basic information regarding federal agency petition practice. The addressees included the major executive departments, or certain of their components, as well as the independent commissions. The response rate was very high; only five of the 51 surveyed furnished no response at all. More than 13 of the responding agencies did not at the time of the survey have procedural regulations specifically governing rulemaking petitions. See *ACUS RULEMAKING PETITION REPORT*, *supra* note 33, at 518 and *infra* notes 121-22. Moreover, while an agency might have adopted some written statement of petition procedures, the coverage of that statement in terms of the rulemaking authority of the agency might be incomplete in varying degrees. See *ACUS RULEMAKING PETITION REPORT*, *supra* note 33, at 515.

113. See, e.g., 7 C.F.R. § 1.28 (1987) (Office of the Secretary, Department of Agriculture).

114. See, e.g., 21 C.F.R. §§ 10.20, 10.30 (1987) (Food and Drug Administration); National Highway Traffic Safety Administration Orders 800-1 (Feb. 2, 1977), 800-2 (Nov. 20, 1978), 800-3 (July 26, 1983).

115. See *ACUS RULEMAKING PETITION REPORT*, *supra* note 33, at 518-19.

an important part of agency business given other matters demanding its attention. As petitions increase, the need for a clearly established—sometimes elaborate—routine becomes evident for the purposes of saving agency resources and ensuring expeditious disposition of the petitions.

However, while the volume of petition filings is relevant to the content of an agency's written prescription or description of its process for considering petitions, the lack of substantial petition business does not generally obviate the need for some basic statement of that process which exceeds the statutory prescription of procedures. The reasons for this are both legal and practical.

An agency's written statement of the petition process assists both the prospective petitioner and the agency itself. The statement dispels the petitioner's uncertainty regarding how, where, and in what form the proposal should be submitted if the petitioner wants the proposal treated as a petition for rulemaking, and wishes it to be afforded the special status which the statutes attach to petitions over informal suggestions for regulatory change emanating from the general public.¹¹⁶ At the same time, such statements save the agency's time in answering questions by prospective petitioners regarding these and other matters (including what issues should or may be addressed and what types of factual support are required of petitioners). Moreover, an "ad hoc" petition process can produce unequal treatment of similarly situated petitioners. The existence of clear written guidance regarding the handling of petitions may also expedite their disposition by eliminating confusion among staff members regarding the internal flow of the decision-making process. Further, a set of regulations can remind staff that expeditious and well-considered disposition of petitions is an important part of the agency's business.

Obviously, the larger the number of petition filings, the more costs are imposed on an agency's resources by the absence of a written statement of its petition process. However, some of the advantages described above remain even if an agency can expect few petition filings. In such a case, a minimal written statement by the agency of the petition process which goes beyond the statutorily prescribed procedures may, accordingly, be appropriate. As described below, in 1986 the Administrative Conference of the United States adopted recommendations for the contents of such a statement.¹¹⁷ Its proposal is particularly relevant to those grants of rulemaking authority where the APA is the only statutory source for the petition process.

116. See *supra* text accompanying note 55.

117. See *infra* text accompanying notes 353-57.

While neither section 553(e) nor section 555 of the APA expressly requires an agency statement of the petition process, the legislative history of the APA clearly indicates that agencies are expected to establish petition procedures.¹¹⁸ Moreover, as noted earlier, the *Attorney General's Manual* suggests that agencies adopt procedural rules governing the receipt, consideration and disposition of rulemaking petitions. Such rules might require, for example, "a statement of the rulemaking action which the petitioner seeks, together with any data available in support of his petition, a declaration of the petitioner's interest in the proposed action, and compliance with reasonable formal requirements."¹¹⁹ Where agency statements of petition procedures exist, many adopt at least these specific suggestions.¹²⁰

A 1986 survey of federal agencies conducted in conjunction with this Article indicates that at least thirteen of the forty-six responding agencies did not have any set of procedural regulations specifically governing rulemaking petitions.¹²¹ If an explanation was offered, the one most frequently advanced was the lack of any, or substantial, petition business. Some responses indicated that the ease of informal communication of suggestions to the agency from outsiders was a reason for the dearth of petitions and the consequent lack of need for petition regulations. Another reason given was that other agency business had a "higher priority."¹²²

Arguably, those agencies without written statements are in violation of the provisions of the original APA which require that "[e]ach agency. . . separately state and currently publish in the Federal Register for the guidance of the public—(A) descriptions of . . . the established places at which . . . and the methods whereby, the public may . . . make submittals or requests. . . ; (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available; (C) . . . instructions as to the scope and contents of all papers. . . ."¹²³

At a minimum, these APA provisions apparently require the agency to make some very basic decisions regarding the petition process, commit them to writing and publish them. Such statements would of necessity add to the skeletal framework of the petitioning process

118. See LEGISLATIVE HISTORY, *supra* note 40, at 260, 359.

119. ATTORNEY GENERAL'S MANUAL, *supra* note 42, at 38.

120. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, Appendix C.

121. See *supra* note 112.

122. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 518.

123. 5 U.S.C. § 552(a)(1)(A)-(C) (1982).

expressly established by APA section 553(e).¹²⁴ As noted above, some statutes other than the APA more explicitly require written guidelines with respect to a particular petition process.¹²⁵ Non-compliance with these statutes is not unheard of, however.¹²⁶

The potential beneficial effects of written statements of an agency's petition processes do not hinge on whether these statements are called "rules," "guidelines," "internal orders," or something else. What is important is that the requirements for filing a petition be easily accessible to petitioners, which generally means publication in the *Federal Register* or *Code of Federal Regulations*. Notice of the general outlines of the actions the agency may take in response to the petition, such as issuance of *Federal Register* notice of receipt, is also important. Regardless of whether or not the APA itself requires this, as a matter of fairness and good public relations, petitioners and the public at large should not be kept in the dark regarding such matters.

The issue of adequate notice to prospective petitioners regarding petition procedures has further ramifications. On occasion, an agency has adopted regulations but did not make clear whether they were intended to govern rulemaking petitions. This appears to be true, for example, at the Federal Energy Regulatory Commission¹²⁷ and the Federal Trade Commission.¹²⁸ One experienced Federal Energy Regulatory Commission practitioner indicated that he was unaware that the agency had any petition regulations, while an attorney in the General Counsel's Office indicated that certain general procedural regulations were in fact applicable. Doubtless, the confusion of the inexperienced practitioner is likely to be at least as great. Another aspect of this problem is illustrated by experiences at the Federal Trade Commission, where certain regulations have been understood by some petitioners as applying to rulemaking petitions when the agency did not intend such coverage.¹²⁹ Only after a conference with agency staff may such misunderstandings be resolved. Somewhat similar problems may arise where those agency regulations specifically applicable to the petition

124. For example, § 553(e) does not specify the contents of a petition or the place(s) of filing. See 5 U.S.C. § 553(e) (1982).

125. See *supra* text accompanying notes 100-01.

126. Under the Clean Water Act, the Environmental Protection Agency is directed to encourage and assist public participation in the development and revision of rules and to publish regulations specifying minimum guidelines for public participation. The regulations implementing 33 U.S.C. § 1251(e) (1986) (see 40 C.F.R. Part 25 (1986)) cover rulemaking activities of the agency without mention of the petition process. (40 C.F.R. § 25.10 (1986)). The Environmental Protection Agency readily admits that it has not adopted any set of regulations implementing the APA petition process, which is the principal petition process applicable to the agency's administration of the Clean Water Act. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 555.

127. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 530-33.

128. *Id.* at 533.

129. *Id.*

process are scattered in various parts of the *Code of Federal Regulations* without any cross references.¹³⁰ The moral of this story is that an agency must be as clear as possible regarding which procedures apply to rulemaking petitions. This avoids misleading or otherwise confusing both the experienced and inexperienced petitioner and undermining the value of a written statement of the petition process.

An agency should solicit public comments before adopting those parts of its written statement which affect the obligations and rights of petitioners. This is advisable even when the agency is not required by statute to do so¹³¹ because the written statement is considered a procedural rule exempt from notice-and-comment rulemaking.¹³² Because various statutory petition processes are mandated means of access to agency decisionmakers, the persons for whose benefit the processes exist and who will rely on them may have some valuable suggestions that should be taken into account in the ultimate design of the petition framework.

On the assumption that some agency statement of the various petition processes must exist as a matter of law and has much to recommend it for other reasons, the question arises of how detailed and elaborate the processes should be. As with other procedural matters, each agency is generally in the best position to determine the needed scope and nature of procedural elaboration. The agency must consider, among other things, the substantive mandates of the statutes which it administers, the nature of the sector of the public which it serves or regulates, and the degree to which uniqueness may characterize the matters raised in petitions in light of the considerations suggesting that the agency should (or should not) commit its petition process to writing. For example, if the organic statute creating the program the agency administers requires that the agency make designated findings of law or scientific fact before adopting a particular standard, a requirement that the petitioner submit certain specific types of technical information or address certain issues of law or fact may expedite processing the petition and save agency resources along the way.¹³³

Although an agency is permitted considerable variation in fashioning the contours of its petition process, it should avoid overly-technical format requirements for the petition itself. While compliance with these may reasonably be expected by the more sophisticated petitioners, not all petitions will be prepared by such persons. After all, the petition process is open to everyone or at least to all "interested persons." The

130. *Id.* at 543 (Nuclear Regulatory Commission).

131. *But see supra* text accompanying notes 100-01.

132. *See* 5 U.S.C. § 553(b)(A) (1982).

133. *See, e.g.*, 50 Fcd. Reg. 46,825-28 (Nov. 13, 1985).

agency should make every effort to facilitate, or at least to avoid discouraging, participation in its policy making by means of petition.

In any event, it appears that agencies often overlook non-compliance with many format requirements, particularly in the case of inexperienced petitioners.¹³⁴ Where an agency does not intend to enforce uniformly what purports to be a requirement, however, reformulating the "requirement" as a "recommendation" would often be the better course of action.¹³⁵ This avoids the need to judge when compliance with what is called a "requirement" can reasonably be expected (a decision susceptible to less-than principled distinctions), as well as the specter of the agency saying one thing and doing another.

V. THE PLACE OF THE PETITION PROCESS IN RULEMAKING

The APA defines "rulemaking" as the "agency process for formulating, amending, or repealing a rule."¹³⁶ The first step in this process procedurally regulated by the APA is the issuance of some notice, usually published in the *Federal Register*, of proposed rulemaking (NPRM).¹³⁷ Increasingly, in recent years, agencies on their own have issued so-called advance notices of proposed rulemaking (advance NPRMs), which describe in more general or tentative terms the type of policy making contemplated by the agency and may seek public reaction to the issues raised.¹³⁸ Yet the roots of a particular rulemaking reach much further back in time than the issuance of such notices and further down in the agency than its administrative chief. The roots may even reach outside the agency ranks. From its origin, for example, with a particular staff member or as a formal petition, the proposal changes in substance and form, sometimes minutely, often in great degree. This occurs as staff from other agency offices contribute to the proposal, as the idea percolates up the agency decision making ladder, as other parts of the executive branch give their reactions, and as agency staff digest and react to comments to the public notices. The agency may submit a particular proposal to three or more formal public proposal stages prior to final rule adoption¹³⁹ and, with each, changes may be made.

A rulemaking petition may contain an idea altogether new to the agency. The petition may also, however, relate to or duplicate regula-

134. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 522-23, 526.

135. This is the case at the Consumer Product Safety Commission. See 16 C.F.R. § 1051.5 (1987).

136. 5 U.S.C. § 551(5) (1982).

137. *Id.* § 553(b).

138. See generally ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, A GUIDE TO FEDERAL AGENCY RULEMAKING 103-04 (1983) [hereinafter ACUS GUIDE].

139. See, e.g., 16 C.F.R. §§ 1.9-1.12 (1987) (Federal Trade Commission; advance, initial, and final notices of proposed rulemaking).

tory action currently being considered within the agency, where perhaps an NPRM has already been issued.¹⁴⁰ The petition may be entirely silly or wrong-headed. It may, on the other hand, present an eminently sensible solution to a problem facing the agency. It may be considered an unwelcome distraction from more important ongoing investigations and policy making, or a welcome excuse to engage in regulatory change which, for political or other reasons, the agency was loath to institute on its own initiative.

Whether well-received or not, the agency must by law take action disposing of the petition in some manner. Assuming the petitioner has complied with applicable procedural requirements relating to filing and format,¹⁴¹ the agency must consider the merits of the petition¹⁴² and decide what action to take in response. The agency may issue a summary denial, request public comments, hold a hearing, fold the petition into an ongoing rulemaking, or immediately issue a final rule if legally permissible and appropriate. Resources perhaps needed for other tasks must at some point be diverted for disposition of the petition in a timely and well-considered fashion.

The petition may, and sometimes does, contain a substantial amount of supporting information and argumentation. The agency may itself possess the same or other information that supports or undercuts the proposal made in the petition. That information may be located in a particular agency file or the accumulated expertise of staff members. On the other hand, the petition may be largely barren of the type of data needed for adequately evaluating the merits. It is this latter situation which may present a particularly difficult issue for the policy maker. The agency (or more accurately some responsible official) must decide whether and to what extent it will try to collect information deemed necessary for disposition of the petition on the merits in an informed manner. At times, a public comment period may elicit what the agency needs. In other cases, studies—some extensive and expensive—may have to be done by the agency or its contractors.

Where a proposal for regulatory change is internally generated, the agency may, consistent with the strictly procedural mandates of the APA, reject it without a public whisper prior to the NPRM stage for lack of supporting information or for other reasons. It can do so on the basis that it simply does not have the financial or other resources for

140. Often agencies fold petitions into ongoing rulemakings. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 549, 555.

141. See *supra* text accompanying notes 55-59.

142. See *National Org. for Reform of Marijuana Laws v. Ingersoll*, 497 F.2d 654, 659 (D.C. Cir. 1974) (quoting *Municipal Light Bds. v. Federal Power Comm'n*, 450 F.2d 1341, 1345 (D.C. Cir. 1971)) (petition filing may be rejected only in "the clear case of a filing that patently is either deficient in form or a substantive nullity").

generating the necessary factual data, or, what may be a different conclusion, that those resources are better spent elsewhere in view of the possible benefits achieved by pursuing the proposal. By the same token, the APA does not require that an agency undertake any studies or other investigations outside the four corners of a rulemaking petition in considering the merits of the petition.

Moreover, the United States Supreme Court held in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*¹⁴³ that, unless statutes other than the APA or the agency's own regulations require investigation beyond the matters contained in the petition, judicial reversal of an agency's petition denial for failure to investigate by any particular methods will not be tolerated. Accordingly, the courts can no longer require a formal solicitation of public comments on a petition or data gathering by other means.¹⁴⁴ Both the limited availability and purportedly "narrow" scope of judicial review of the merits of rulemaking petition denials are explained in part by the courts as attempts to avoid improper intrusion upon agency resource allocation decisions.¹⁴⁵ The *Vermont Yankee* decision was similarly motivated.¹⁴⁶

However, even after the *Vermont Yankee* decision, a court can remand an agency decision for lack of an "adequate" explanation for a petition denial or for lack of a record supporting the action.¹⁴⁷ Therefore, if, for example, an agency rejects a petition because the data submitted by the petitioner are incorrect or misleading, the agency must

143. 435 U.S. 519 (1978), *rev'g* *Natural Resources Defense Council, Inc. v. NRC*, 547 F.2d 633, 653 (D.C. Cir. 1976) (where court reversed agency and suggested use of "procedural devices [including research] for creating a genuine dialogue on these issues.").

144. See *Wisconsin Elec. Power Co. v. Costle*, 715 F.2d 323, 328-29 (7th Cir. 1983).

145. See *infra* text accompanying notes 264-65, 286-89.

146. In *Heckler v. Chaney*, 470 U.S. 821 (1985), where the Court found the FDA's refusal to take certain enforcement actions in response to a petition unreviewable, Justice Rehnquist wrote:

The reasons for this general unsuitability [for judicial review of agency decisions to refuse enforcement] are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.

470 U.S. at 831-32 (referencing *Vermont Yankee*, 435 U.S. at 519).

147. See *infra* text accompanying notes 271-76. See generally *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 45-46 (1983); *Vermont Yankee*, 435 U.S. at 549.

explain this conclusion to some degree.¹⁴⁸ In developing the required explanation, it may have to search its files and accumulated expertise. If the data in support of the petition appear overwhelming, the agency may, as a practical matter, have to conduct some study of its own to refute or at least cast doubt upon the reliability of the petitioner's information.¹⁴⁹ On occasion, some agencies have had studies prepared and conducted investigations on their own for determining the merits of rulemaking petitions. For instance, this has occurred at the National Highway Traffic Safety Administration, the Nuclear Regulatory Commission, and the Consumer Product Safety Commission.¹⁵⁰

Moreover, as noted above, some statutes other than the APA expressly require public comment periods on certain types of rulemaking petitions and further require that the agency consider any comments received in its decision on the petition.¹⁵¹ In several instances, published notice of the receipt of a petition for soliciting comments is, in essence, an NPRM.¹⁵² While the APA does not expressly require such solicitation or a formal opportunity to comment at the pre-NPRM stage, it is an open question whether, if comments on a petition are submitted without being requested, the agency can refuse to receive or consider them in the disposition of the petition to which they relate.¹⁵³

In surveying federal agencies it appears that, outside those instances where a statute requires a comment period on a petition, practices vary regarding the extent and manner in which comments on a rulemaking petition are solicited prior to issuance of an NPRM or advance NPRM. Some agencies rarely, if ever, engage in a formal comment process until the NPRM or advance NPRM stage (assuming a petition is not summarily dismissed prior to that time), though they may accept and consider comments if they are filed. The Federal Trade Commission's petition process fits this pattern.¹⁵⁴ Other agencies, such

148. See, e.g., *infra* text accompanying notes 306-08. See also 5 U.S.C. § 555(e) (1982).

149. Cf. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 52 ("the agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made. . . .' Generally, one aspect of that explanation would be a justification for rescinding the regulation before engaging in a search for further evidence" (citation omitted)).

150. See, e.g., Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32 (1982).

151. See *supra* text accompanying note 95.

152. See, e.g., 21 U.S.C. § 348(b), (c) (1982) (food additive regulations).

153. If such comments support some rulemaking action, even if not the same advocated by the petitioner, they arguably could be considered "petitions for rulemaking" as to which § 553(e) and § 555 impose duties of receipt, consideration and timely disposition. Comments opposing the issuance, amendment or repeal of a rule might not be considered as such. However, as to those, the qualified right to presentment, consideration and disposition found in § 555(b) may apply. See *supra* note 42.

154. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 534.

as the Nuclear Regulatory Commission¹⁵⁵ and the Federal Aviation Administration,¹⁵⁶ almost always solicit comments. A third group, which includes the Federal Communications Commission, provides for a pre-NPRM formal comment process only if a petition survives summary dismissal.¹⁵⁷ Once past this point, however, the Federal Communications Commission process is particularly formal, permitting a thirty-day comment period¹⁵⁸ followed by a separate fifteen-day period during which reply comments can be submitted.¹⁵⁹ A fourth pattern is represented by the practice at the Food and Drug Administration: its regulations expressly permit the filing of comments by all “interested persons”¹⁶⁰ —which are publicly available in its docket room. Only infrequently, however, is a formal attempt made to solicit comments through notice in the *Federal Register* or other such notice.¹⁶¹

Where the petition process formally provides for comments on a petition, agencies approach the problem of public notice of the filing of a petition in a variety of ways. The Food and Drug Administration puts the petition on public display¹⁶² and prepares an index of pending petitions.¹⁶³ Although usually no further action is taken by the agency to publicize the pendency of the petition, an active trade press keeps a close watch on recent filings and notifies readers of them. Sometimes a group may issue a press release at the time it files its petition to generate public interest. The Federal Communications Commission issues a “public notice” of the filing of a petition¹⁶⁴ which is somewhat like a press release, and, as in the case of the Food and Drug Administration, the trade press or various subscription services communicate word of the filing to interested persons. On the other hand, the Nuclear Regulatory Commission¹⁶⁵ and the Federal Aviation Administration¹⁶⁶ rely primarily on the *Federal Register* for notifying the public of the pendency of petitions.

In terms of the form for soliciting comments, some agencies, such as the Federal Energy Regulatory Commission, utilize an APA NPRM where the petition survives summary dismissal. Others merely provide

155. *Id.* at 545.

156. 14 C.F.R. § 11.27(b) (1987).

157. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 526. Such a dismissal follows where a petition is deemed “moot, premature, repetitive, frivolous, or . . . plainly do[es] not warrant consideration by the Commission.” 47 C.F.R. § 1.401(e) (1987).

158. See 47 C.F.R. § 1.405(a) (1987).

159. *Id.* § 1.405(b).

160. 21 C.F.R. § 10.30(d) (1987).

161. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 323-24.

162. See 21 C.F.R. § 10.20(j) (1987).

163. *Id.* § 10.30(i).

164. See 47 C.F.R. § 1.403 (1986).

165. See 10 C.F.R. § 2.802(e) (1987).

166. See 14 C.F.R. § 11.27(b) (1987).

notice of the filing of the petition in the *Federal Register* or otherwise, generally or specifically describe the contents of the petition, and ask for comments. A survey of the practices of nine agencies¹⁶⁷ indicated that, while there are instances where pre-NPRM comment periods on rulemaking petitions may generate a significant number of comments—as when the petitioner itself urges that interested persons contact the agency in support of its proposal—in a substantial number of cases few comments are received and these may contain little information that assists the agency.¹⁶⁸

A pre-NPRM comment process can, of course, be employed for more than collecting factual data the agency needs in its decision-making. The process can convey the impression of openness to the public and regulated entities. The response to a request for comments can be used for gauging the tenor of public opinion and, if a petition generates much interest (even if little factual data), proceeding further with consideration of the proposal may prove worthwhile.¹⁶⁹

An agency may resist serious consideration of even meritorious proposals that do not originate within the agency and that threaten internally established agendas or are inconsistent with prevailing agency “wisdom.”¹⁷⁰ Arguably, therefore, an agency should be required to solicit some public input before denying a petition for rulemaking, even though such solicitation is not statutorily mandated prior to an agency’s rejection of an internally-generated proposal. In this way, the agency may be forced to look more deeply at matters and perhaps change its collective “mind.” From an agency’s point of view, soliciting comments may make summary rejection of a petition a more risky proposition since, where comments are submitted and there is later judicial review of the denial of a petition, the court will no doubt expect some reasoned response to comments containing arguments and data supporting the petition.¹⁷¹

However, in the final analysis, though it is a close question, the fact that comment periods often generate a minimal response or unhelpful information suggests that agencies should retain discretion under the

167. The Food and Drug Administration, Federal Communications Commission, Federal Energy Regulatory Commission, Federal Trade Commission, National Highway Traffic Safety Administration, Nuclear Regulatory Commission, Environmental Protection Agency, Federal Aviation Administration, and Department of the Interior.

168. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 564.

169. One practitioner expressed his concern that where an agency solicits comments prior to issuance of an NPRM, well-organized groups can “bury” a meritorious proposal with adverse comments so that the petition never gets serious consideration by the agency.

170. See J. O’REILLY, ADMINISTRATIVE RULEMAKING 332 (1983); Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 263 (1986) (“public participation has deterred the agencies from straying too far from their assigned missions”).

171. Cf. ACUS GUIDE, *supra* note 138, at 202.

APA for judging when and how to employ a formal comment process. Comment periods can be a source of significant delay in final disposition of petitions, or impose resource costs, all of which may not be justified by the benefits received. After all, petitioners often have some access to means for publicizing the filing of their petitions and requesting comments supporting their proposals—comments which the agency must arguably receive and consider.¹⁷² Moreover, a petitioner may have access to all the significant information prospective commentators possess. At any rate, the burden of conducting the search for that information may be fairly imposed on the petitioner prior to filing its petition.

Whether or not public reaction to the proposal contained in a petition is sought by one means or another, the agency may have to present a record to a court reviewing its action on a petition (generally a denial). This suggests that the agency should make a special effort to collect, as they are gathered or produced, all of the documents that may be considered in the decision on the petition. This will also facilitate use of the file by the decisionmakers themselves.¹⁷³

Where public interest in a rulemaking petition is considered likely, or is in fact encouraged by notice or otherwise, this file—or as much as is feasible and appropriate considering the needs for candor and other concerns—should be available for public inspection in a central location and maintained in such a fashion so that it is easily accessible. This is, unfortunately, not always agency practice.¹⁷⁴ Moreover, where an agency solicits public views, maintenance of an indexed public file can be an invaluable adjunct. In this way, interested commentators can easily find documents to which they may wish to reply. Several agencies follow such a practice.¹⁷⁵ Public petition files commonly include, at a minimum, the original or a copy of the petition and attachments to it, any comments received, and the final disposition document. They may also contain, among other documents, *Federal Register* and other notices soliciting comments and informing the public of the disposition of a petition, correspondence from the agency to the petitioner and others relating to the petition, memoranda of meetings with outsiders relating to the merits of the petition, hearing transcripts, and some internal staff documents, including agency studies of relevance.

Maintenance of a list (chronological or otherwise) of pending and recently disposed petitions may be important and is in fact found in

172. See *supra* text accompanying note 153.

173. See generally ACUS GUIDE, *supra* note 138, at 150-54.

174. This practice is not followed for APA rulemaking petitions filed with the Environmental Protection Agency. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 555.

175. Such as the Food and Drug Administration and the Federal Communications Commission. *Id.* at 523, 526-27.

some agencies.¹⁷⁶ From the agency's point of view, such an index may, depending on its content and organization, facilitate response to public inquiries regarding the status of petitions. For the public, it may alert interested persons to the existence of a petition to which comments may be filed. Where the agency's community of interested persons (or their representatives or trade press) is in the habit of visiting the docket room, the public availability of such a list can go a long way toward publicizing the petition and soliciting comments.¹⁷⁷

A decision not to deny a petition but, instead, to commence a rule-making proceeding by the issuance of an NPRM or advance NPRM signifies only that the agency deems the proposal worthy of further consideration. It does not necessarily suggest that any rule will be adopted or that, if adopted, the final rule will mirror the petitioner's proposal. To the extent that the NPRM is based in part on the petition and associated documents, an agency will generally fold the agency's petition file, or at least the relevant factual materials contained therein, into the rulemaking record.¹⁷⁸ Indeed, agency discretion for excluding the petition file or parts of it from the rulemaking record may be very limited.¹⁷⁹

The launching of rulemaking by public notice may be followed by changes in the proposal that originated in the petition. The agency must issue a denial and explanation under APA section 555(e) at that point in the APA petition process at which the agency has "finally" rejected parts of the petitioner's proposal, though it may intend to proceed with the issuance of some type of related rule.¹⁸⁰ The fluidity of the process of rulemaking means, however, that what may have been rejected at one stage can re-emerge at another as the result of new information or revised evaluations by agency staff. This aspect of the process cautions against early judicial intervention.¹⁸¹ For the purposes of avoiding arguments that a denial has occurred and warding off potential judicial review and the delays and other costs that review may impose, however, an agency may represent that it has not arrived at a final decision—though in effect it may have—until the entire rulemaking has been terminated either by the issuance of a rule or by the refusal to issue one.

176. Such as the Food and Drug Administration (*see* 21 C.F.R. § 10.30(l) (1987)) and the Nuclear Regulatory Commission (*see* 10 C.F.R. § 2.802(g) (1987)).

177. *See supra* text accompanying notes 162-64.

178. *See, e.g.*, 21 C.F.R. § 10.40(g)(1) (1987) (FDA).

179. *See, e.g.*, *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977). *See also* R. PIERCE, S. SHAPIRO, & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 324-25 (1985).

180. *See also supra* text accompanying notes 60-65.

181. *See generally* *Public Citizen Health Research Group v. Commissioner*, 740 F.2d 21 (D.C. Cir. 1984). *See also infra* text accompanying notes 245-47.

As noted above, delay in final disposition of petitions is one of the consistent complaints levelled at the various petition processes.¹⁸² Delay occurs even where statutory deadlines for action exist. Some agencies have uniform, self-imposed deadlines for actions on petitions.¹⁸³ In others, time schedules are individually negotiated within the agency.¹⁸⁴ If the action under the time constraint involves little more than a status report, the compliance rate with regard to the applicable limitation may be impressive.¹⁸⁵ Where the action requires substantially more, delays can be correspondingly more frequent and lengthy.¹⁸⁶

Delays in the petition process are attributable to a number of factors, including, in some cases, the complexity of the issues raised, a desire to postpone a controversial decision as long as possible and/or the hope that the problem raised by the petition will disappear or that the petitioner will lose interest. A self-study by the Nuclear Regulatory Commission in 1977 suggested other possible sources for the delay experienced both there and at other agencies: the failure to delegate the power for acting on petitions from the top of the agency when such delegation is appropriate; the lack of information needed for deciding the petition on the merits, a defect that may require further discussions with the petitioner or an investigation by the agency itself; requiring or permitting repetitive review of decisional documents by the same office within the agency where not necessary, or, alternatively, allowing sequential review of matters where simultaneous review would work just as well; unnecessarily long periods for public comment on a petition; the folding of a petition into an ongoing rulemaking; the need for coordinating final action with other agencies; and failure to assign significant priority to the final disposition of petition requests.¹⁸⁷

With respect to delegation, instances can be found where decision-making power regarding action on rulemaking petitions is assigned to officials other than the top administrators of an agency. At the Food and Drug Administration, for example, Center Directors¹⁸⁸ can issue so-called "tentative responses,"¹⁸⁹ though these may be no more than

182. See, e.g., *supra* text accompanying note 82.

183. The National Highway Traffic Safety Administration is an example. See NHTSA Order 800-3 (July 26, 1983). See also 21 C.F.R. § 10.30(e)(2) (1987) (FDA; 180 days to give interim response).

184. The Federal Communications Commission is an example. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 528.

185. This is true at the Food and Drug Administration. *Id.* at 523.

186. This is true at the National Highway Traffic Safety Administration (*id.* at 542) and the Nuclear Regulatory Commission (*Id.* at 549).

187. See NUCLEAR REGULATORY COMM'N PAPER SECY-77-526 (Oct. 7, 1977).

188. Much of the substantive regulatory work of the Food and Drug Administration is conducted through four centers: Devices and Radiological Health, Drugs and Biologics, Food Safety and Applied Nutrition, and Veterinary Medicine.

189. See 21 C.F.R. § 5.31(e) (1987).

status reports. At both the Federal Communications Commission and the Nuclear Regulatory Commission, some petitions may be denied by officials other than the Commissioners.¹⁹⁰ Granting of petitions is another matter, however. Since grant generally connotes at least the formal launching of a rulemaking by the issuance of an NPRM and in some instances the actual issuance of a final rule, the top levels of an agency usually must sign off on decisions of this nature.

The experience at the Nuclear Regulatory Commission indicates how intractable the delay problem can be. Despite rather extensive consideration in 1977 of the time lags experienced in disposing of rulemaking petitions, and after subsequent attempts at redesigning the petition process, the agency found itself again in 1986 considering ways to cut down processing time. The agency reformulated deadlines and increased oversight of the status of pending petitions by its Executive Director for Operations.¹⁹¹ The complexity of many of the issues presented by petitions, legislative changes, and judicial decisions have all played some part over the years in introducing delays into the petition process at this and, no doubt, other agencies.

Tracking systems for determining where a petition is within the agency and what action has been taken in finally disposing of it vary from agency to agency. They may be very elaborate and involve the use of computer technology¹⁹² or as simple as a card catalogue.¹⁹³ The form of tracking does not appear as important a factor in reducing delay as do efforts for periodically ascertaining the status of work on a petition and requiring explanation for delays where they have occurred. In some instances, agencies may tie performance ratings for purposes of pay and promotion to an employee's compliance with applicable deadlines.¹⁹⁴

The APA¹⁹⁵ and other petition statutes¹⁹⁶ impose a duty on agencies to explain the reasons for denial of rulemaking petitions. The for-

190. See 47 C.F.R. §§ 0.251(d), 1.401(e) (1987) (FCC; summary denial of moot, premature, repetitive, frivolous and other petitions not deserving Commission consideration); 10 C.F.R. § 1.40(o) (1987) (NRC Executive Director has authority to deny petition of a minor or non-policy nature).

191. See Memorandum from Victor Stello, Jr., Executive Director for Operations, NRC, Regarding Timely Resolution of Petitions for Rulemaking (PRM) (Aug. 13, 1986); Letter from John Phillips, Chief, Rules and Procedures Branch, Division of Rules and Records, Office of Administration, NRC, to author (Oct. 15, 1986).

192. This exists at the National Highway Traffic Safety Administration. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 541.

193. An example is the system used within the Food and Drug Administration's Center for Veterinary Medicine. See *generally id.* at 523.

194. See Nat'l Highway Traffic Safety Admin. Order 800-3 (July 26, 1983).

195. See 5 U.S.C. § 555(e) (1982).

196. See, e.g., 30 U.S.C. § 1211(g)(4) (1982) (surface mining and reclamation).

mer requires only a "brief statement of the grounds for the denial."¹⁹⁷ Some statutes and agency regulations¹⁹⁸ mandate publication of denials.¹⁹⁹ The APA does not, but requires at the least notice to the individual petitioner.²⁰⁰ In some instances, a terse explanation for a denial may be entirely adequate and the need for public notice of final disposition entirely unnecessary unless mandated by statute. However, more elaborate explanations and their wider distribution may be called for in other cases.

Detailed explanations are, at times, appropriate because they assist the petitioner. For example, the agency could indicate what types of information or data are required for more favorable consideration of the petitioner's proposal. Unfavorable action may be more acceptable to a petitioner if it knows that the agency gave its request more than summary treatment and seriously considered the issues presented. The presence of only a terse explanation may mean, if there is judicial review, that the matter will be remanded to the agency for further consideration.²⁰¹ Alternatively, it may open the possibility of party discovery for determining the reasons for the agency's action.²⁰² These results are not necessarily in the agency's or the public's interest.

With regard to publication of the final decision and the underlying reasoning, there may be instances in which the agency can use this for educating interested persons regarding the direction of agency policy. This may focus subsequent petition activity in areas where it is more profitable for all concerned.²⁰³

VI. THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE OVERSIGHT OF THE PETITION PROCESS

Under the Regulatory Flexibility Act (RFA),²⁰⁴ the regulatory agendas published in October and April each year²⁰⁵ must list certain agency actions that are expected in response to rulemaking petitions. Each agenda must contain, among other things,²⁰⁶ "a brief description

197. 5 U.S.C. § 555(e) (1982). *But see* 42 U.S.C. § 4905(f) (1982) ("detailed" explanation for denial of noise pollution standards petition).

198. *See, e.g.*, 14 C.F.R. § 11.27(f) (1987) (FAA).

199. *See, e.g.*, 49 U.S.C.A. § 10,326(a) (West Supp. 1987) (petition related to rail carrier transportation).

200. *See supra* text accompanying note 46.

201. *See* American Horse Protection Ass'n, Inc. v. Lyng, 812 F.2d 1, 6, 8 (D.C. Cir. 1987); *see also infra* notes 296-316 and accompanying text.

202. *See* Camp v. Pitts, 411 U.S. 138, 142-43 (1973).

203. *See* Letter from David C. Vladeck, Staff Attorney, Public Citizen Litigation Group, to author (July 27, 1986).

204. *See* 5 U.S.C. §§ 601-12 (1982).

205. *See id.* § 602(a).

206. *Id.* § 602(a)(1)-(3).

of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities."²⁰⁷ NPRMs and expected final rules in response to petitions must, therefore, be included in the agendas while denials of petitions, as such, are not required to be listed.²⁰⁸ Similarly, whether a grant of a petition is deemed to occur when an NPRM is issued or when a final rule is adopted,²⁰⁹ regulatory flexibility analyses must be prepared at those stages.²¹⁰ These analyses are not required for a denial as such²¹¹ or if a "grant" suggests merely that the agency thinks the idea is a good one but the agency does not issue an NPRM in response to the petition.

To the extent that denial of petitions for rulemaking, particularly petitions for amending or revising existing rules, are not covered by the RFA, the purposes of that statute in focusing agency concern on the burdens of regulation imposed on small business entities²¹² may not be fully achieved in some instances. Certainly cases exist in which a petition from a small business may suggest alternative types of regulation (or deregulation) which may reduce the aggregate cost of the regulatory program for the public and the government. An agency might reasonably be required to undertake an analysis similar to that mandated prior to proposing regulations in the first place.²¹³

Moreover, Executive Order 12,291²¹⁴ requires the preparation of preliminary and final regulatory impact analyses, transmittal to and review of rules by the Office of Management and Budget (OMB), and consultation with OMB's director. These requirements apply only at the NPRM and final rule stages.²¹⁵ The requirements do not vary depending on whether the NPRM or final rule have their origins in the petitions process. Apparently, these requirements do not apply if a petition "grant" connotes no more than "thank you for your good idea, we will consider it," unless the agency also plans to issue an NPRM. Denials of petitions for rulemaking are not, as such, expressly subject to the requirements of this Executive Order, though an NPRM or final rule may in fact constitute a denial of a petition to the extent it differs from

207. *Id.* § 602 (a)(1).

208. To the extent the proposed or final rule mirrors an APA § 553(e) petition in some particulars but departs from it in others, there is a denial of which the Office of Management and Budget is, if not in such terms, informed.

209. *See supra* text accompanying notes 60-65.

210. 5 U.S.C. §§ 603, 604.

211. *But see supra* note 208.

212. *See* Pub. L. No. 96-354, 94 Stat. 1164, § 2 (Sept. 19, 1980) (codified at 5 U.S.C. § 601 (1982)).

213. *See also* 5 U.S.C. § 610(a) (1982) (periodic agency review of rules).

214. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601 app. at 136 (1982).

215. Exec. Order No. 12,291, *supra* note 214, § 3.

the petitioner's request.²¹⁶ Like the RFA, the underlying purposes and approach of this Executive Order²¹⁷ suggest that the failure to include all denials should perhaps be remedied. Finally, the regulatory agendas called for by the Executive Order include regulations the agency "expects to issue"²¹⁸ and thus encompasses rules whose initial impetus was a petition.

Executive Order 12,498²¹⁹ establishes a "regulatory planning process" which covers the petition process in a far more encompassing manner than that of the RFA and Executive Order 12,291. The head of each agency must annually submit to the OMB director "such information concerning all significant regulatory actions of the agency, planned or underway, including actions taken to consider whether to initiate rulemaking; requests for public comment; and the development of documents that may influence, anticipate, or could lead to the commencement of rulemaking proceedings at a later date, as the Director deems necessary. . . ." ²²⁰ Therefore, the pre-NPRM publication of a petition for comments is an action concerning which OMB could require information if the subject matter of the petition were deemed "significant." Even the mere filing of such a petition, to the extent it inevitably triggers some intra-agency consideration of the merits, seems within the literal purview of Order 12,498.

The obligation to advise OMB and submit an action to it for review is not, however, limited to the time when an agency prepares its yearly regulatory plan.²²¹ The obligation continues following submission of that plan where the agency head proposes regulatory action not previously submitted for review or an action "that is materially different from the action described in the agency's Final Regulatory Program."²²² In that instance, unless, for example, a statute imposes a deadline for action, the agency must refrain from taking the action until OMB review is completed.²²³ The head of each executive agency is, furthermore, directed to ensure that all regulatory actions are consistent with both the goals of the agency and of the Administration.²²⁴

216. See *supra* note 208.

217. Exec. Order No. 12,291, *supra* note 214, § 2.

218. *Id.* § 5(a).

219. Exec. Order No. 12,498, 3 C.F.R. 323 (1986), *reprinted in* 21 WEEKLY COMP. PRES. Doc. 11 (Jan. 7, 1985).

220. Exec. Order No. 12,498, *supra* note 219, § 2(a).

221. *Id.* § 3.

222. *Id.* § 3(c).

223. *Id.*

224. *Id.* § 1(b).

OMB Bulletin 85-9²²⁵ elaborates on Executive Order 12,498. It defines a "prerulemaking action" in part as "any important action taken to consider whether to initiate, or in contemplation of, rule-making; publication of advance [NPRMs] and all similar notices, publications, and requests for public comment. . . .,"²²⁶ a definition obviously broad enough to encompass much of the petition process. A pre-rulemaking action is considered a "significant regulatory action" if it would be a step toward adoption of a rule that is or would be, *inter alia*, a "major rule" as defined by Executive Order 12,291, a priority of the agency head, subject to a statutory deadline, of unusual public interest, or would be likely to establish an important new policy.²²⁷ Each agency must submit to OMB a draft and final annual regulatory program, including specified information for each "significant regulatory action [which includes pre-rulemaking actions] that the agency proposes to pursue" during the year.²²⁸ These requirements are aimed at involving agency heads earlier in the regulatory management process when policy options are broadest and ensuring that "agency resources will not be expended on regulatory actions that are not consistent with the regulatory goals of the agency head and of the President."²²⁹ Once the Administration's regulatory program is in place, agency heads must submit to OMB, for review, proposed significant regulatory actions (including pre-rulemaking activity) not previously submitted or materially different from those described in the agency's final regulatory program.²³⁰ Except in the case where a statutory deadline prevents it, an agency must refrain from taking the proposed action pending OMB review.²³¹ OMB may return such actions to the agency for "reconsideration."²³²

In sum, agency investigation of the merits of certain petitions along with issuance of notices soliciting comments would appear within the purview of this "regulatory planning process," though OMB has the authority for providing exemptions from coverage.²³³ Nevertheless, some doubt appears on the part of certain agency officials regard-

225. OMB Bull. No. 85-9, *The Administration's Regulatory Program 1985* (Jan. 10, 1985), reprinted in ACUS, *FEDERAL ADMINISTRATIVE PROCEDURE SOURCE BOOK* 43-49 (1985).

226. OMB Bull. No. 85-9, *supra* note 225, at 44, § 5(a).

227. *Id.* at 45, § 5(c). This would seem to include special petition statutes imposing strict deadlines on the grant or denial of a petition.

228. *Id.* at 46-48, §§ 6(b), 9(d).

229. *Id.* at 47, § 7.

230. *Id.* at 48, § 10(a).

231. Exec. Order No. 12,498, *supra* note 219, § 3(c); OMB Bull. No. 85-9, *supra* note 225, § 10(b).

232. Exec. Order No. 12,498, *supra* note 219, § 3(d); OMB Bull. No. 85-9, *supra* note 225, § 10(e).

233. Exec. Order No. 12,498, *supra* note 219, § 1(a), 2(c); OMB Bull. No. 85-9, *supra* note 225, § 11.

ing how far back into the petition process Executive Order 12,498 reaches.²³⁴ Where that order applies, OMB comments may be influential (or crucial) in the decision respecting the petition's disposition and in determining whether or not a particular step should be taken in consideration of a petition. Regardless of its effect on the disposition of the merits of a petition, OMB's review can introduce delay into the proceeding.

234. In February 1988, the American Bar Association's House of Delegates adopted a resolution dealing with rulemaking petitions. One of the ABA's recommendations is that the Annual Regulatory Program prepared pursuant to Executive Order 12,498 list pending rulemaking petitions, in part at least as a means to exert some pressure on agencies to dispose of petitions expeditiously. See *infra* note 367.

More than forty years ago, a distinguished committee appointed by President Roosevelt made a somewhat similar proposal which was not, however, enacted into law: annually, each agency was to transmit to Congress a report which would include "a statement concerning the nature and disposition of petitions received requesting the formulation, amendment, or repeal of rules." See ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT: ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 231-32 (1941). See also *id.* at 195. The Committee explained this proposal in the following way:

Congress and the public are, however, entitled to know of the rulemaking activities of administrative agencies. The progress of the law which these agencies are developing should be recorded and submitted for information and criticism in such a way as to give an over-all view of what is being done, rather than mere information of isolated instances. Not only new regulations adopted but unaccepted proposals for change in existing regulations or for additions to them, emanating from outside the agencies, are of importance. It has been charged that in the present large aggregate of Federal regulations are some that cannot be justified. The Committee does not and cannot pass judgment upon this charge. But a means of throwing light upon existing regulations and upon requests for changes or additions is desirable.

To secure attention for requests for changes in regulations and to provide a report of rulemaking activity to Congress, the Committee recommends that each agency be required by statute to make an annual report of its rulemaking during the preceding year, embracing both the regulations adopted and a summary of the proposals, emanating from outside the agency, that were not acted upon or were rejected. Administrative agencies exercise a delegated power, for the wise use of which they are responsible to the legislature and the people as a whole and also, in a very real sense, to those upon whom their activity directly bears and those members of the legislature who take a special interest in their work. Aside from any question of possible abuse, those interested should know and understand the reasons for administrative determinations, negative as well as affirmative, rulemaking as well as adjudicatory.

In the decision of cases, findings and reasoned opinions afford the needed information; in rulemaking an annual survey and report would do the same. Each agency should undertake to give one, charging a ranking staff member or a member of the board or commission with definite responsibility for it. In this way, if the legislature should conclude that it wished to undo anything the agency had done or to compel changes in its regulations, it could act on the basis of full information.

Id. at 120-21.

VII. JUDICIAL REVIEW AND THE PETITION PROCESS

A. Standing

Standing to obtain judicial review of agency action regarding rule-making petitions, including the failure to act, may be treated somewhat differently depending on the petition scheme at issue. Under the Toxic Substances Control Act,²³⁵ for example, the right to petition is given to “any person.”²³⁶ The right to judicial review of the merits of a petition denial, which is expressly provided for, appears to be as expansively available.²³⁷ This statute might be seen as creating a legal right, “the invasion of which creates standing even though no injury would exist without the statute.”²³⁸

The situation with regard to the APA is seemingly more complex. The right to petition is given to “interested” persons.²³⁹ If an individual or organization qualifies as such, it has an unquestionable legal right to have its petition received, considered, disposed of within a reasonable time and, where a denial is forthcoming, to have “a brief statement of the grounds” therefor.²⁴⁰ Such persons would clearly have standing to sue to enforce these requirements.

The legislative history of the statute is not clear, however, regarding whether an “interested person” includes an individual having only an “academic” or “abstract” interest concerning issues presented by a rulemaking petition. That the first amendment was part of the inspiration for section 553(e) would suggest that the requirement of an “interest” was not intended as a substantial restriction on the right to petition.²⁴¹ The prevailing administrative practice is consistent with this view.²⁴²

Assuming that Congress gave the right to petition even to those only abstractly interested, it is not clear whether, if an agency denies a petition by such a person and accompanies the denial with a “brief statement” of explanation, the court will review to any extent the sub-

235. 15 U.S.C. §§ 2601-2629 (1982).

236. *Id.* § 2620(a).

237. *Id.* § 2620(b)(4)(A).

238. *See, e.g.,* Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

239. *See* 5 U.S.C. § 553(e) (1982).

240. *See supra* text accompanying notes 39-46.

241. That the first amendment gives a right to petition “for a redress of grievances” does not necessarily suggest that the petitioner must be personally “injured” in a tangible way to fall within the protection of this provision. *See also supra* note 50.

242. *See supra* text accompanying note 54.

stantive adequacy of the agency's statement.²⁴³ Those petitioners who meet the usual APA standing test can apparently obtain such review.²⁴⁴

B. Timing

Determining when to intervene for review of agency action or inaction pursuant to specific statutory review authority or in non-statutory proceedings²⁴⁵ requires a delicate balancing of numerous factors. Ascertaining when an agency's response to a petition for rulemaking is "final" and otherwise appropriate for judicial intervention is not unique in this regard. Obviously, if an agency has unequivocally rejected all of a petitioner's proposal and has stated its intent not to proceed further, agency action is ripe for review. At the other extreme, an agency initially may react negatively to some of the petitioner's suggestions but, at the same time, issue an NPRM modelled verbatim on others and announce its willingness to consider comments regarding the advisability of pursuing the remainder of the petitioner's request. Here the court should stay its hand. Other cases may not be so clear cut, particularly those involving alleged unreasonable delay in acting on a petition. The variations are so numerous and the balancing so context-specific and necessarily subtle that a statement of more than general guidelines is impossible.

Inquiries with respect to the timing of judicial intervention invoke the test applied in other administrative contexts, that of *Abbott Laboratories v. Gardner*.²⁴⁶ However, it has been noted that some modification

243. The argument would be that § 555(e) requires a "brief statement of the grounds for a denial," a purely "procedural" requirement that can be satisfied without regard to the substantive sufficiency of the agency's decision. Compare statement in text with *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972), which suggests that while a basis and purpose statement accompanying the promulgation of a rule might satisfy 5 U.S.C. § 553(e), it might not be elaborate enough to permit adequate judicial review.

244. See, e.g., *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1042-43 (D.C. Cir. 1979). The usual test is "injury in fact" to an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" (see *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970)), where the injury can be "fairly traced" to the agency "action" complained about and will be redressable by the court. See *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39, 41-43 (1976). Even with regard to this test, however, it might be argued that agency denial of a rulemaking petition is not the "cause" of the petitioner's harm; rather the injury results from the actions of private actors whose conduct the petition may seek to have regulated. For an argument that standing should nonetheless be found in non-implementation cases, see Note, *Judicial Review of Agency Inaction*, 83 COLUM. L. REV. 627, 648-50 (1983). Both the *Natural Resources Defense Council* case and that Note focus on "redressability" and not "traceability."

245. Non-statutory review refers to those instances in which Congress has not provided for judicial review by a specific statute. Rather, subject matter jurisdiction is based, for example, on 28 U.S.C. §§ 1331, 1337 (1982). See ALUS GUIDE, *supra* note 138, at 239-42.

246. 387 U.S. 136 (1967) (the Court examined, inter alia, the nature of the issue and record for review, the definitiveness of the agency pronouncement, hardship on the parties of

may be appropriate in the rulemaking petition context since the original focus of the *Abbott* analysis was on the interests of the agency and the regulated entities, not those persons who are intended (or arguably intended) beneficiaries of the regulatory scheme at issue.²⁴⁷ However, such a change would appear to be easily adaptable to the broadly phrased and flexible approach of the Court in *Abbott*.

C. Reviewability

Probably one of the most difficult hurdles a petitioner must overcome is the argument that agency denial of a rulemaking petition is unreviewable, having been "committed to agency discretion by law."²⁴⁸ That exception to judicial review was recently applied by the United States Supreme Court in *Heckler v. Chaney*,²⁴⁹ where the Court found review of certain nonenforcement decisions of an agency barred (the FDA). Some commentators²⁵⁰ have suggested that several of the factors that the Court relied upon in that case for justifying a presumption of unreviewability²⁵¹ are found in the rulemaking area.

The specific result in *Chaney* was not based solely on the lack of standards against which courts could measure the agency's exercise of discretion.²⁵² At the same time, even where one or more of these other factors are not present in the petition context, in searching for "law to apply" in limiting discretion, the APA provides no substantive criteria to cabin decisions for denying petitions for rulemaking; if they exist,

refusing review, and detriment to the government of permitting review). See also *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232 (1980). See generally Note, *The Scope of Review of Agencies' Refusals to Enforce or Promulgate Rules*, 53 GEO. WASH. L. REV. 86 (1985).

247. See, e.g., *Public Citizen Health Research Group v. Commissioner*, 740 F.2d 21, 30-34 (D.C. Cir. 1984). See also *Office of Commun. of the United Church of Christ v. FCC*, 826 F.2d 101, 110 (D.C. Cir. 1987) (Wald, J., dissenting) (arguing "hardship" to person seeking review is not an independent requirement of ripeness if institutional interests of court and agency favor immediate review, but also noting need to define "hardship" in a way to allow review by statutory beneficiaries).

248. 5 U.S.C. § 701(a)(2) (1982).

249. 470 U.S. 821 (1985).

250. See, e.g., Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 680-81 (1985). The Court in *Heckler* expressly noted that the case did not involve the question of agency discretion not to invoke rulemaking proceedings. See *Chaney*, 470 U.S. at 825 n.2.

251. See, e.g., *supra* note 146.

252. While the *Chaney* Court reiterated the "no law to apply" gloss on 5 U.S.C. § 701(a)(2) found in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) and construed that as referring to the lack of judicially "meaningful" and/or "manageable" standards (see *Chaney*, 470 U.S. at 830), it found the enforcement decisions at issue nonreviewable, in part, because the non-action did not threaten an individual's liberty or property rights in the same manner as did agency action and did not result in a clear focus for judicial review. *Chaney*, 470 U.S. at 832. To the extent nonenforcement determinations involve resource allocation decisions (see, e.g., *supra* text accompanying note 144), nonreviewability was directly tied to the "no law to apply" test.

such criteria must be found, for example, in other statutes or agency policy statements. However, when a court denies review because such criteria do not exist, this, in effect, amounts to a determination that the petition denial did not transgress any applicable legal constraints.²⁵³ Therefore, whether the agency decision is left standing as “unreviewable” or affirmed on the merits may not be a matter of great moment. Moreover, the fact that agency “inaction,” rather than agency “action,” is the subject of review does not change the nature of the inquiry regarding the search for applicable standards for limiting discretion, though in certain contexts such limits probably will not be identified with an agency’s refusal to act.²⁵⁴

In one recent case,²⁵⁵ a panel of the Court of Appeals for the District of Columbia Circuit found that *Chaney* did not bar review of a rulemaking petition denial.²⁵⁶ According to that case, one of the three features of nonenforcement decisions relied upon in *Chaney* to justify unreviewability—the similarity of agency nonenforcement to prosecutorial decisions not to indict, which are traditionally beyond judicial oversight²⁵⁷—was not involved in the petition context presented.²⁵⁸ The court noted that “refusals to institute rulemaking proceedings are distinguishable from other sorts of nonenforcement decisions insofar as they are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.”²⁵⁹

Empirical data collected in connection with this Article confirms that for many agencies, petitions for rulemaking are only infrequently filed.²⁶⁰ Since petition denials constitute an even smaller class (though they appear to outnumber grants for many agencies), there is support for the court’s first distinction, which presumably is deemed relevant because of the resource cost imposed on both agencies and courts by frequent judicial intervention. Though there is always the possibility that the availability of judicial review and the chance of reversal may encourage the filing of more petitions, the number of petition filings today is still generally modest despite the number of instances in recent years in which the courts have permitted judicial review. The degree of deference to administrative decisions to deny petitions, which has been

253. See Sunstein, *supra* note 250, at 659.

254. See *infra* text preceding note 285.

255. *American Horse Protection Ass’n, Inc. v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987).

256. *Accord Public Citizen v. Heckler*, 653 F. Supp. 1229, 1236 (D.D.C. 1986).

257. See *Chaney*, 470 U.S. at 832.

258. *Horse Protection*, 812 F.2d at 4.

259. *Id.*

260. See *infra* text accompanying notes 323-40.

stressed in the written decisions of reviewing courts,²⁶¹ no doubt acts as a deterrent to petitioners' pursuing their judicial remedies.

With regard to the second distinction between *Chaney* and the petition context—that “legal,” not “factual” analysis is the more common basis for the agency decision—it should be noted that some petition denials are based to a great degree on the agency's analysis of available factual materials. If an adequate record for review of factual determinations exists, there is no reason why reviewability should be denied in the petition context on the basis that the court must review factual findings.²⁶² Where, moreover, the record is so sparse that the reviewing court is prevented from conducting a meaningful review, it may make little difference whether the court affirms a petition denial on the merits or finds the agency action unreviewable.

Finally with regard to the third factor mentioned by the court of appeals—the need for something focusing the review—petition denials constitute discrete and identifiable exercises of discretion which, unless self-explanatory, must, as a matter of law, be accompanied by some formal explanation, though it may be brief.²⁶³ To the extent that petition denials may often be explained on the basis of scarce agency resources and other priorities, the lack of judicially-discoverable and manageable standards for scrutinizing the legality of such determinations often means that reviewability of petition denials will be questionable.²⁶⁴ However, a denial of reviewability or affirmance on the merits may amount to the same thing in this context.²⁶⁵

Before leaving the discussion of reviewability, it should be noted that some statutes expressly grant the right to review in the case of both denials of petitions for rulemaking and inaction on petitions.²⁶⁶ Obviously, *Chaney* does not stand in the way of review in those contexts.

D. Standard (Scope) of Review under the APA²⁶⁷

In denying rulemaking petitions, an agency makes the same general types of determinations that underlie the formulation of rules adopted on its own initiative: choices between the rulemaking and the

261. See *infra* text accompanying notes 280-81.

262. Ironically, the court in *Horse Protection* reviewed the merits of the agency's factual determinations. *Horse Protection*, 812 F.2d at 5-6.

263. See 5 U.S.C. § 555(e) (1982).

264. See Sunstein, *supra*, note 250, at 674.

265. See *supra* text following note 253.

266. See, e.g., 15 U.S.C. § 2620(b)(4) (1982).

267. In some statutes Congress has not relied on the APA to define the scope of review. See, e.g., *id.* § 2620(b)(4)(B); 49 U.S.C. § 10,326(b) (1982). For a case examining the relationship between the APA scope and that provided in one of these special statutes, see *Environmental Defense Fund v. Thomas*, 657 F. Supp. 302 (D.D.C. 1987) (Toxic Substance Control Act “de novo” standard).

adjudicatory modes for elaborating agency policy; interpretations of relevant statutory provisions; resolution of disputed factual and quasi-factual issues; substantive decisions such as whether and how thoroughly to regulate, including allocation of scarce agency resources among competing agency and congressional priorities; and judgments regarding technological and other developments and the availability of needed data, some of which may suggest when the time to act is ripe. Agency discretion concerning whether, when and how to react to an alleged problem area may be tightly hedged or expansively drawn by Congress. Ascertaining the bounds of that discretion, if they exist, presents the same type of inquiry, whether purely "legal" or otherwise, conducted in the same general fashion and focusing on the same type of materials, whether or not the agency action occurs in response to a rulemaking petition. The deceptiveness of a clear distinction for purposes of scope of judicial review between an agency's denial of a rulemaking petition and its adoption on its own initiative of a rule is demonstrated by the fact that in some circumstances agency adoption of a rule in response to a petition can constitute a denial of that petition.²⁶⁸

As a legal matter, therefore, the degree of deference²⁶⁹ given agency determinations and the extent to and manner in which the court

268. This would be the case where, upon filing of the petition, the agency issues a notice of proposed rulemaking mirroring exactly the terms of the rule requested in the petition but ultimately adopts a rule which to a greater or lesser degree is inconsistent with the petitioner's proposal.

269. In discussing "scope" or "standard" of review, three general issues, not always distinct, are presented to the reviewing tribunal: what set of materials and what form should the court require for the discharge of its reviewing function; what are the statutory standards which limit the court's authority for overturning the agency; and, finally, to what degree (if any) the court should give particular weight to agency determinations, because they are agency determinations but not because of specific expressions of congressional intent.

An example may be helpful here. The APA directs that reviewing courts overturn agency action found to be, *inter alia*, "arbitrary" or "capricious." See 5 U.S.C. § 706(2)(A) (1982). The Interstate Commerce Act mandates that the court of appeals overturn denial of rulemaking petitions in the rail carrier area "if the court finds that the action requested . . . is necessary and failure to take that action will result in the continuation of practices that are not consistent with the public interest. . . ." See 49 U.S.C. § 10,326(b)(2) (1982). These statutory formulae purport to define the scope of judicial authority for overturning an agency decision. Reviewing courts should determine the statutes' meaning on their own since they are directions addressed to the judiciary, not the administrative agency.

As generally construed, the "arbitrary" and "capricious" formula itself mandates that the reviewing courts give considerable weight to certain agency determinations, though how much weight in particular contexts is not clearly indicated. Given the vagueness of the verbal formula constraining judicial discretion, the precise meaning is more properly viewed as a matter of judicial lawmaking which is responsive to the underlying reasons for the establishment by Congress of agencies, congressional concerns regarding the need for "adequate" control of the bureaucracy, judicial perceptions of the "appropriate" balances between the branches of government, and the courts' sense of their own adequacy in contributing to the policy making process, among other things. Both judicial policies and these more general considerations suggest varying degrees to which the reviewing court should give "weight" to administrative determinations, with the weight

should scrutinize the agency action for legal, factual and other errors should not vary merely because a court reviews the denial of a rule-making petition. Once the court determines that an agency action is reviewable, distinction from the "normal" standard and reviewing function exercised in the case of agency-initiated action simply cannot be justified. The distinction between "negative" and "affirmative" orders, as a touchstone for the purposes of judicial review, was rejected by the Supreme Court as long ago as 1939.²⁷⁰

While APA section 555(e) requires only a "brief statement of the grounds for denial" of a petition, suggesting minimal duties of explanation, APA section 553(c)'s requirement of a "concise general statement" of the basis and purpose for the adoption of rules has not prevented reviewing courts, even after *Vermont Yankee*, from obtaining the extent of elaboration of the reasons for agency rulemaking decisions deemed appropriate under the circumstances.²⁷¹ A terse rejection of a comment filed in response to an agency-initiated rulemaking, like a succinct disposition of a rulemaking petition, may be acceptable in some cases and not in others based on the nature of the factual record.²⁷² Indeed, some agencies treat rulemaking petitions as "comments" to ongoing, agency-initiated rulemakings.

From the perspective of a reviewing court, if uniqueness characterizes scrutiny of rulemaking petition denials, it rests largely in the nature of the record presented for judicial review,²⁷³ the shape of which is largely beyond judicial control after *Vermont Yankee*.²⁷⁴ A petition record contains at a minimum the petition and any agency statement of denial. It may also contain comments at the pre-NPRM stage,²⁷⁵

in a specific case being determined by a variety of factors, some of which are articulated in opinions and some of which are not.

To say an administrative determination will be given some "weight" by a reviewing court, whether because of clear statutory direction or otherwise, means that a judicial disposition to make a different determination of the issue is to some degree put aside. The so-called "presumption of regularity" which attaches to administrative decisions is merely a generalized reference to the phenomenon of a court giving "weight" to an administrative determination. As noted above, it is the giving of special "weight" to administrative determinations (either because of specific legislative command or otherwise) that is generally known as "deference" and the term is so used in this Article.

270. See *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939).

271. See generally R. PIERCE, S. SHAPIRO, & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 327 (1985).

272. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973); *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 666 n.19 (D.C. Cir. 1975). But see Note, *supra* note 246, at 113.

273. See, e.g., *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1052 (D.C. Cir. 1979).

274. 435 U.S. 519 (1978) (reviewing court may not impose on the agency its own notions of what procedures are "best").

275. See, e.g., *WWHT, Inc. v. FCC*, 656 F.2d 807, 817-18 (D.C. Cir. 1981).

though they may be few in number or unhelpful. Moreover, the petition itself may not contain necessary factual data and may only vaguely pinpoint the relevant issues and type of agency action requested. In response, an agency in its denial statement may have no choice but to match the submission in its lack of specificity. In the face of such a record, a court can only affirm regardless of any factual or other errors that may underlie the agency's decision and that would, if revealed by a more elaborate record, otherwise be subject to judicial correction. While one may speak of the court being particularly deferential in these circumstances, it seems more accurate to say that the court has done the best it could in exercising its ordinary reviewing function given the circumstances.

To the extent the petitioner submits a petition which includes substantial supporting data, asks for a rule of a specific content, and otherwise clearly focuses the issues for decision by the agency, the reviewing court should expect a detailed response from the agency. As a result of the detailed petition and response, the court will be in a better position for identifying and reviewing alleged errors committed by the agency. Moreover, once a rulemaking has been commenced in response to a petition, the supplementation of the record by comments and the inevitable focus on certain issues will result in a judicial expectation of a relatively elaborate and specific agency explanation. The nature of such a record will help the court determine whether the agency action is supportable where the rulemaking culminates in a petition denial.²⁷⁶ In other words, the more advanced the stage in a rulemaking at which a denial occurs, the more likely the record will disclose errors in the agency's decisional process which require a remand.

In *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,²⁷⁷ the United States Supreme Court did not confront the meaning of the "arbitrary and capricious" standard in the context of agency refusal to act.²⁷⁸ The Court made a point of distinguishing agency rescission of a rule from a refusal to act in the first place. Therefore, because of that distinction, some commentators have suggested that a "narrower" scope of review should (or does) apply when an agency denies a petition for rulemaking.²⁷⁹

276. Compare *Natural Resources Defense Council, Inc. v. SEC.* (petition denial after public rulemaking proceedings) with *WWHT v. FCC* (petition denial with only an opportunity to comment on the petition).

277. 463 U.S. 29 (1983).

278. *Id.* at 41.

279. See Note, *supra* note 246, at 108-09.

Other courts²⁸⁰ and some commentators²⁸¹ have also indicated that a particularly "narrow" or "limited" scope of review applies or should apply to agency actions denying rulemaking petitions. The meaning of such statements is not always clear. By statute an agency may have very substantial, or total, discretion not to act, or, when acting, to act in particular ways. Decisions may be controlled largely by determinations and judgments of a type which courts feel compelled, either by law or by a feeling of their own limitations, to accept. But the same types of determinations are required when an agency acts on its own in adopting or changing rules, and statutory limits on discretion may exist regardless of whether action or inaction is at issue. Accordingly, if courts and commentators are suggesting that an agency's refusal to act is a type of administrative behavior deserving "more deference," or warranting less judicial probing, or by different methods than in cases where an agency adopts a rule on its own initiative, they are mistaken. Such a distinction could produce judicial abstention when judicial action reversing and remanding is called for. The very ambiguity of some judicial statements²⁸² may unintentionally produce confu-

280. See, e.g., *Arkansas Power & Light Co. v. ICC*, 725 F.2d 716, 723 (D.C. Cir. 1984); *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1220 (D.C. Cir. 1983); *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981); *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1052 (D.C. Cir. 1979).

281. See, e.g., Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507, 515 & n.48, 563 (1985); Note, *supra* note 246, at 87, 107; Note, *Judicial Review of Rescission of Rules: A "Passive Restraint" on Deregulation*, 53 GEO. WASH. L. REV. 252, 276-77 (1985).

282. The first case that elaborately discusses the problem of "scope of review" in the context of a petition denial, *Natural Resources Defense Council, Inc. v. SEC*, includes a discussion of the subject in terms that are unexceptional in the era of "hard look" judicial review. See, e.g., 606 F.2d at 1049-50, 1053. Along with this, however, are suggestions that, when the court is reviewing a decision not to adopt a rule, it has "a particularly narrow scope of review" and should give "special deference." *Id.* at 1052. The same ambiguity afflicts subsequent decisions, including *WWHT v. FCC* and *Professional Drivers Council v. Bureau of Motor Carrier Safety*. See 656 F.2d at 817-19; 706 F.2d at 1218 n.2, 1220-22.

An example of what appears to be scope of review "boilerplate" found in D.C. Circuit opinions is this elaborate "restatement" of the law:

We have noted that the arbitrary and capricious standard is not a "fixed template to be imposed mechanically on every case," but instead requires calibration in accordance with the nature and context of the challenged action. Where an agency promulgates rules, our standard of review is "diffident and deferential," but nevertheless requires a "searching and careful" examination of the administrative record to ensure that the agency has fairly considered the issues and arrived at a rational result. Where, as here, *an agency chooses not* to engage in rulemaking, our level of scrutiny is even more deferential: "It is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking." This added measure of deference, however, is appropriate only where the rejected proposal is addressed to matters within the agency's broad policy discretion. Where a rulemaking petition challenges an agency's compliance with substantive and procedural norms, on the other hand, our standard of review must perforce be "exacting" to ensure that the agency has "scrupulously" followed the law.

sion and onward results,²⁸³ though to date in actually reviewing the substance of agency decisions on petitions the courts appear not to have departed from the "hard look" norm.²⁸⁴

Of course, it is always possible that Congress has given an agency more discretion not to act when the need for action is suggested by a petition than when the need becomes evident to the agency's own officials through other means. However, to say that the legal limits on discretion are less in one case than another does not suggest that the functioning of judicial review should depart from that exercised in other rulemaking contexts. If the ultimate agency decision not to act is less likely to be reversed than the case in which the agency acts affirmatively, that should be attributable to differences in scope of discretion conferred by statute and not to naked distinctions between "action" and "non-action."²⁸⁵

The lack of agency resources may be a reason offered as the basis for the denial of a rulemaking petition.²⁸⁶ For example, an agency may refuse to grant a substantively meritorious petition because of resource limitations which prevent it from fully investigating issues raised, con-

ITT World Commun., Inc. v. FCC, 699 F.2d 1219, 1245-46 (D.C. Cir. 1983) (footnotes omitted and emphasis in original).

283. Commentators have identified two senses in which the term "discretion" may be used by courts and lawyers. In some contexts, it may refer to authority for choosing among alternatives unconstrained by standards against which the choice actually made can be criticized as "incorrect." In others, the term may refer to authority for making an incorrect decision. In this second sense, standards exist against which the actual choice made can be judged. See Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747, 748-49. In the administrative context, some minimal standard of substantive rationality is a bottom line constraint on the exercise of authority, though this constraint may in fact be so minimal that in some instances the distinction between the two senses in which the term "discretion" is used may disappear for all practical purposes. *Id.* at 751.

Deference, as the term is used in this Article (*see supra* note 269) and as, I think, it is generally used in the administrative context, has most meaning in relation to the second sense of the term "discretion." In other words, the reviewing court may believe that there are standards against which the "correctness" of the agency decision should be judged and, if Congress had allocated decisionmaking responsibility to the judicial rather than the administrative process, the court would likely come to a different conclusion than the agency. However, the court's inclination in this regard is tempered by the "weight" attributed to the administrative determination.

Accordingly, to the extent the courts in the petition context are suggesting, or may be taken by other courts as suggesting, that more "deference" in the sense used in this Article is due to administrative determinations in the petition context, agencies will have more leeway to be "wrong." As the text attempts to point out, there is no basis for assuming that Congress has given agencies more authority to be "wrong" in dealing with petitions than in deciding, without outside suggestion, to adopt a particular rule.

284. See, e.g., *Horse Protection* (discussed *infra* text accompanying notes 296-313); *Public Citizen v. Heckler* (discussed *supra* text accompanying notes 5-14).

285. See, e.g., *Chaney*, 470 U.S. at 850-51 (Marshall, J., dissenting). See also Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 280 (1986) ("These factors suggest that administrative inaction should not always be treated the same as action; but they do not undermine the basic conclusion that threats to statutory programs have been generated by inaction and deregulation as well as by regulation.").

286. See, e.g., 21 C.F.R. § 10.30(e)(1)(i) (1987).

ducting the rulemaking, and/or administering and enforcing adequately any rule that might be issued.²⁸⁷ In such instances, the agency has presumably balanced the costs and benefits of proceeding in one direction rather than another, which is the typical decision that courts should respect absent demonstrated irrationality or inconsistency with ascertainable congressional intent.

However, where Congress has established a particular program intending that the initiative for regulation come to a great degree from outside the agency,²⁸⁸ the denial of petitions (or delay in acting) based on resource grounds may mean that the regulatory program will not be brought to life at all. Here explanations based on resources alone should be more vulnerable to reversal. At the same time, given the fact that an agency often administers several programs, all of which compete for limited time, funds and personnel, the courts should still be wary of disturbing an agency's resource allocation determinations in the absence of clear statutory limits on discretion, such as funding authority made specifically applicable to the program at issue.

When a reviewing court is confronted with an agency denial of a petition based at least in part on resource considerations, a difficult question is the extent of elaboration that should be expected of the agency in its explanation. Accepting a conclusory statement, such as "other regulatory priorities," renders judicial review a meaningless charade. On the other hand, forcing the agency to set forth in detail the specific items of agency business deemed more important than additional consideration of the merits of the petition, why they are deemed more important, and why resources are inadequate to fund all of these projects may be asking too much, at least in many instances. Some intermediate form of explanation should be expected in most cases.²⁸⁹

Sometimes an agency may deny a petition specifically because the regulatory problem cannot be captured within the bounds of a meaningful verbal formula, and therefore, case-by-case adjudication is necessary for solving the problem. Alternatively, the agency may lack sufficient experience in an area and case-by-case adjudication will be

287. See, e.g., RESPONSE TO PETITIONS FOR RULEMAKING IN FTC OPERATING MANUAL, ch. 7, § 3.3 (1983).

288. See *supra* text accompanying notes 30-36. Compare statement in text with Note, *Judicial Review of Agency Inaction*, 83 COLUM. L. REV. 627, 670 (1983) ("Under statutes that envision comprehensive regulatory involvement in primary private activity, an agency's refusal to regulate or to enforce regulations would run counter to that congressional design. Thus the agency's nonimplementation should be accorded less deference on review.").

289. See *Public Citizen Health Research Group v. Aucther*, 702 F.2d 1150, 1158 (D.C. Cir. 1983) (court reviewed status of ongoing rulemakings in other areas before it ordered the agency to expedite its rulemaking efforts in response to a petition). Cf. *Motor Vehicle Manufacturers*, 463 U.S. at 52 ("Recognizing that policymaking in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions.").

deemed necessary before broad formulation of policy can profitably be undertaken. These are two of the situations envisioned in the second *Chenery* case,²⁹⁰ in which the Supreme Court suggested that an agency could validly proceed by adjudication rather than rulemaking.²⁹¹ They are not necessarily the only ones, and, as long as the agency can clearly articulate the reasons for its preference for adjudication, and its explanation makes some sense, the courts should affirm.²⁹²

Where, however, an agency is ultimately ordered to institute a rule-making proceeding, the content of any rule proposed or ultimately adopted may to a great degree be beyond judicial control because of the extent of discretion statutorily vested in the agency.²⁹³ Similarly, whether the agency statement ultimately adopted is issued as a legislative rule, a general statement of policy or an interpretative rule would appear to be entirely up to the agency absent statutory provisions to the contrary.²⁹⁴ Moreover, the core meaning of *Vermont Yankee* is that decisions about pre-adoption procedures (including the choice to have none in the case of the issuance of an interpretative rule or general statement of policy)²⁹⁵ are generally for the agency, and not the reviewing court, absent constitutional or statutory constraints.

E. Judicial Review of Petition Denials after *Chaney*

Recently, one panel of the United States Court of Appeals for the District of Columbia Circuit handed down an opinion reversing an agency's denial of a rulemaking petition. The decision, *American Horse Protection Association, Inc. v. Lyng*,²⁹⁶ is significant for a variety of reasons, including the prominent role the District of Columbia Circuit played in the development of administrative law generally and in the rulemaking petition area in particular; the fact that this was one of the

290. SEC v. *Chenery Corp.*, 332 U.S. 194, 202-03 (1947).

291. *Id.* at 203.

292. See, e.g., *Arkansas Power & Light Co. v. ICC*, 725 F.2d 716, 723 (D.C. Cir. 1984).

293. But see *Public Citizen v. Heckler*, 653 F. Supp. 1229 (D.D.C. 1986).

294. The APA itself provides no limiting standards here.

295. See, e.g., 5 U.S.C. § 553 (1982). By conventional understanding, only "legislative rules" are subject to the notice and comment procedures of § 553. See *id.* § 553(b)(A). The APA itself provides no standards limiting agency discretion in choosing whether to announce a policy in one form rather than another.

The *Chenery II* issue—the choice by an agency between the "rulemaking" and "adjudicatory" mode for announcing agency policy—is, in essence, a problem concerning when an agency can permissibly announce and at the same time apply a new policy in an adjudicatory proceeding. In other words, it is a question of what is the appropriate occasion for policy elaboration. In no sense is it a question of what procedures must accompany policy elaboration.

For an illuminating discussion of the *Chenery II* issue, see *Berg, Re-Examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149 (1986).

296. 812 F.2d 1 (D.C. Cir. 1987).

first post-*Chaney* instances²⁹⁷ in which a court declared the continued viability of judicial review of rulemaking petition denials; and the nature of reasoning used in supporting reversal which clearly shows that in practice the scope of judicial review of petition denials today approaches or duplicates that found when an agency adopts a regulation on its own initiative. The *Horse Protection* case arose as follows.

In 1969, Congress enacted, and in 1976, amended the Horse Protection Act,²⁹⁸ which was designed to end the practice of deliberately injuring show horses to improve their performance in the ring ("soring"). Exercising its rulemaking power under the statute, the Secretary of Agriculture adopted regulations prohibiting the use of soring devices and other soring methods in both general and specific terms with certain limitations. The Department itself commissioned a study (the Auburn study) to determine whether these limitations should be deleted. The Auburn study was completed several years after the initial promulgation of the soring regulations and indicated the need for further restrictions. Even before this study was completed, the Department itself seemingly admitted that serious gaps existed in the regulatory framework which it had established. It therefore considered modifying the existing regulations. However, when the American Horse Protection Association expressly requested that changes be made in the regulations to ban all soring methods, the Department balked. In refusing, the Deputy Administrator of Veterinary Services reviewed the Auburn study along with other materials presented by interested groups outside the agency.

Finding that *Chaney* did not change the law of petition reviewability,²⁹⁹ the court in the *Horse Protection* case followed its earlier decisions which indicated that the appropriate standard of review was the "arbitrary and capricious" test of APA section 706(2)(A). The panel first noted that this "tag line" included "a range of levels of deference to the agency" and that the intensity of review of petition denials "is at the high end of the range."³⁰⁰ "However," the court continued, "as in more typical reviews . . . we must consider whether the agency's decisionmaking was 'reasoned.'"³⁰¹ The court followed these general observations with, first, a citation³⁰² to another D.C. Circuit opinion which combines language characteristic of "normal" review with refer-

297. See also *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613 (D.C. Cir. 1987) (opinion and judgment later vacated as moot); *Public Citizen v. Heckler*, 653 F. Supp. 1229 (D.D.C. 1986) (discussed *supra* text accompanying notes 5-14). The factual similarities between *Horse Protection* and *Heckler* are striking.

298. See 15 U.S.C. §§ 1821-1831 (1982).

299. *Horse Protection*, 812 F.2d at 3-4. See also *supra* text accompanying notes 255-63.

300. *Horse Protection*, 812 F.2d at 4-5.

301. *Id.* at 5.

302. *Id.*

ences to the “circumscribed scope” of review in the petition denial context,³⁰³ and then, a *cf.* citation³⁰⁴ to *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,³⁰⁵ a case in which the Supreme Court took a “hard look” at an agency’s rescission of a rule and reversed for lack of an adequate explanation.

In the *Horse Protection* opinion, professions of utmost deference were combined with verbal formulae and citations suggesting a “normal” scope of review. Moreover, when it came to actual examination of the factual basis for the Department’s decision, the panel reversed, finding the Department’s explanation “conclusory,” again with a citation to *Motor Vehicle Manufacturers*.³⁰⁶ If the deference shown the Department here was any more than in the “typical” case of administrative review of rulemaking, neither the crucial reasoning³⁰⁷ nor the result showed it.³⁰⁸ This was not a case where the facts relating to the petition were unknown to the petitioner and the Department and where the court was, accordingly, confronted with an agency explanation which was incontrovertible on the basis of the record compiled. Rather, the Department’s own study indicated that the petition had merit.

303. *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1220-21 (D.C. Cir. 1983).

304. *Horse Protection*, 812 F.2d at 5.

305. 463 U.S. 29 (1983).

306. *Horse Protection*, 812 F.2d at 6. The court noted that the agency’s explanation for the petition denial did not demonstrate “that the agency’s refusal to act was the product of reasoned decisionmaking.” *Id.* (citing *Motor Vehicle Manufacturers*, 463 U.S. at 52). The court continued: “There is no articulation of ‘the factual and policy bases for [the] decision.’” *Horse Protection*, 812 F.2d at 6 (quoting *Professional Drivers*, 706 F.2d at 1221).

307. A litigation affidavit submitted by the agency to the court for the purposes of review included “statistics indicating that the agency wrote up a generally diminishing number of alleged violations over the period beginning in 1979 and ending in 1984, although the number of horses exhibited and examined did not generally decline.” *Horse Protection*, 812 F.2d at 5. In examining this document “under even the most charitable view” the court noted:

Nor do the figures on reduced findings of violations suffice. These are apparently intended to suggest that soiling is being eliminated by dint of agency efforts. Litigation affidavits of Association members suggest, however[,] that soiling continues to be widespread.

Id. at 6. The court discounted the agency’s interpretation of this data, the type of determination which normally receives “deference” but which under a “restricted” scope of review would presumably receive even more respect.

308. In *Public Citizen v. Heckler*, 653 F. Supp. 1229 (D.D.C. 1986), the court acknowledged the references in cases to the “very narrow” and “deferential” review applicable to rulemaking petition denials. *Id.* at 1239. Its analysis, however, indicated awareness that it was the nature of the agency determinations implicated in the action (e.g., statutory interpretation, resource allocation) that should dictate the degree of deference, not the naked distinction between “action” and “non-action.” *Id.* at 1239-40. This is the position urged *supra* in the text accompanying notes 269-72, 286. The *Heckler* court then engaged in the type of “arbitrary and capricious” review described in the *Motor Vehicle Manufacturers* case, and the agency’s denial of the rulemaking petition was set aside. *Heckler*, 653 F. Supp. at 1240, 1241-42.

The reversal of the agency petition denial rested on more than a “factual” error. As an alternative basis for its decision, the court found that the Department’s action was bottomed on a “belief that the Act was a sort of compromise between industry proponents of soring and persons who regarded the practice as barbarous.”³⁰⁹ This was, according to the panel, inconsistent with congressional intent: “[w]e see nothing ambiguous in the Act’s treatment of soring methods. The Act was clearly designed to end soring.”³¹⁰ The court could have cited *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*³¹¹ at this point to support reversal, because the Department’s decision disregarded clear congressional intent and, therefore, could not stand. If clarity of statement is the touchstone of judicial reversal of administrative interpretations of statutes, such clarity—if it exists—is unlikely in most instances to lie hidden awaiting further factual development. In this case it was evident without the need for a more elaborate record.

As a basis for its petition denial, the Department did not rely on its lack of resources or other regulatory priorities. No doubt the weakly explained vacillation of the agency in first pursuing rule changes and then retreating, along with the apparent admission at one point by an agency official that the existing regulations were inconsistent with the Act and with the Auburn study, were important determinants of the end result in this review proceeding.³¹² The apparent shift in the Department’s direction provides an analogy to the facts in *Motor Vehicle Manufacturers*³¹³ and suggests, moreover, that reliance on a general distinction between agency action and inaction to dictate scope of review is misguided.

309. *Horse Protection*, 812 F.2d at 6.

310. *Id.*

311. 467 U.S. 837 (1984). In a discussion which almost instantly was taken as one of the principal statements (or restatements) of the scope of judicial review of questions of “law,” the Court noted:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

Id. at 842-43.

312. *Horse Protection*, 812 F.2d at 6.

313. *Motor Vehicle Manufacturers*, 463 U.S. at 41-42 (“an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”).

In the *Horse Protection* case, the Department was given "a reasonable opportunity to explain [its] decision or to institute a new rule-making proceeding."³¹⁴ A judicial order directing the latter was deemed appropriate only in "rare" and "compelling" circumstances,³¹⁵ though failure to render an adequate explanation on remand would presumably leave the court with few, if any options, other than issuing such an order.³¹⁶

VIII. SOME CONCLUDING PERSPECTIVES ON THE RULEMAKING PETITION PROCESS

In discussing the petition process, a considerable number of practitioners who regularly engage in administrative practice indicated that currently there are more effective ways of influencing an agency's regulatory agenda than filing rulemaking petitions, such as informal contact or litigation, and that they would be loath to file a petition because of the delays they expect in the final disposition of their requests. This rather low opinion of the petition process was not, however, shared by all of the practitioners surveyed. Some viewed it as an important avenue for influencing agency action and believed that some existing petition frameworks are well-designed and operate in an acceptable fashion.

Occasionally, persons seeking to influence the regulatory agenda of federal agencies resort to filing petitions for rulemaking when all other efforts at informal persuasion have proved fruitless. A filing may be accompanied by press releases and other efforts using publicity to force the agency to act where more subtle pressures have proved unavailing. A party may file a petition before suing an agency so the agency cannot argue that the petitioner failed to exhaust its administrative remedies.³¹⁷ However, agency action disposing of a petition may take so long that the party seeking regulatory change may try bypassing the petition route and structure its legal action and arguments in a way which avoids this exhaustion defense.

Existing empirical data regarding the use and operation of the various petition processes are skimpy. The data compiled for the Administrative Conference of the United States indicate that often-regulated entities are the primary users.³¹⁸ In the case of the National Highway Traffic Safety Administration, for example, vehicle and equipment manufacturers submit approximately one-half of the petitions, with

314. *Horse Protection*, 812 F.2d at 7-8.

315. *Id.* at 7.

316. The court in *Public Citizen v. Heckler*, went so far as to compel the adoption of a rule largely mirroring the petition. *Heckler*, 653 F. Supp. at 1242.

317. See, e.g., *Hoffmann-LaRoche, Inc. v. Harris*, 484 F. Supp. 58, 60 (D.D.C. 1979).

318. See also Schwartz, *supra* note 150, at 54; Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. Rev. 899, 951-52 (1982).

trade associations, interest groups and private citizens accounting for the remainder.³¹⁹ At the Nuclear Regulatory Commission, licensees have filed fifteen of the forty-one petitions presented since 1980; environmental and other public interest groups have filed nine; private citizens have filed seven; the federal government has filed one; trade associations have filed two; and a state government has filed one.³²⁰ Between 1981 and 1986, the Federal Trade Commission received nine rulemaking petitions, four from industry and the rest from public interest organizations.³²¹

The number of rulemaking petition denials often exceeds the number of affirmative dispositions. Also, delay in the disposition of petitions is a common problem, though reported processing time may be deceptive in view of the fact that some agencies consider that the final affirmative disposition of a petition occurs with the issuance of a final rule while others—the majority—consider the issuance of an NPRM or advance NPRM as the final disposition of a petition, if a denial has not earlier occurred.³²²

Available statistics can convey only a general sense of where petition filings are most common. The following is a listing of some of the busiest agencies, along with the approximate number of petitions filed each year for the last several years:

- Agricultural Marketing Service (Department of Agriculture)
(256)³²³
- Food and Drug Administration (Health and Human Services)
(more than 200)³²⁴
- Environmental Protection Agency (more than 200)³²⁵

319. ACUS Questionnaire Response under cover letter from Erika Z. Jones, Chief Counsel, National Highway Traffic Safety Administration, to author (June 6, 1986).

320. ACUS Questionnaire Response under cover letter from Martin G. Malsch, Acting General Counsel, United States Nuclear Regulatory Commission, to author (dated June 26, 1986).

321. ACUS Questionnaire Response under cover letter from Marcy J.K. Tiffany, Acting General Counsel, Federal Trade Commission, to author (July 3, 1986).

322. *See supra* text accompanying notes 60-65.

323. ACUS Questionnaire Response under cover letter from Robert L. Broussard, Office of the General Counsel, Department of Agriculture, to author (undated) [hereinafter Broussard Letter].

324. The Food and Drug Administration's records regarding so-called "citizen petitions" do not separate petitions for rulemaking from other types of citizen petitions. *See* ACUS Questionnaire Response under cover letter from Linda R. Horton, Deputy Chief Counsel for Regulations and Hearings, FDA, to author (Aug. 21, 1986). The total quoted in the text is therefore approximate only, but it includes at least 62 food additive petitions and 10 color additive petitions received by the Food and Drug Administration in 1985. Letter from Linda R. Horton, Deputy Chief Counsel for Regulations and Hearings, to Michael W. Bowers, ACUS (Oct. 28, 1986).

325. This number includes an average of three petitions under the Toxic Substances Control Act, 100 petitions for tolerances under the Federal Food, Drug, and Cosmetic Act, two petitions under the Clean Water and Safe Drinking Water Acts and more than 100 delisting petitions under the Resource Conservation and Recovery Act. ACUS Questionnaire Response

Federal Grain Inspection Service (Department of Agriculture) (150)³²⁶
 Federal Communications Commission (72)³²⁷
 National Highway Traffic Safety Administration (Department of Transportation) (20-25)³²⁸
 Interstate Commerce Commission (fewer than 20)³²⁹
 Department of Energy (more than 17)³³⁰
 Federal Aviation Administration (Department of Transportation) (15)³³¹
 Department of the Interior (15)³³²
 Federal Highway Administration (Department of Transportation) (10-15)³³³
 Bureau of Alcohol, Tobacco and Firearms (Department of the Treasury) (12)³³⁴
 Federal Energy Regulatory Commission (fewer than 12)³³⁵
 Veterans Administration (fewer than 10)³³⁶
 Food Safety and Inspection Service (Department of Agriculture) (8)³³⁷

under cover letter from Gerald H. Yamada, Deputy General Counsel, EPA, to author (Aug. 29, 1986).

326. Broussand Letter, *supra* note 323.

327. Letter from Jack D. Smith, General Counsel, Federal Communications Commission to author (June 13, 1986).

328. ACUS Questionnaire Response under cover letter from Erika Z. Jones, Chief Counsel, National Highway Traffic Safety Administration, to author (June 6, 1986).

329. Letter from Jane F. Mackall, Director, Office of Proceedings, Interstate Commerce Commission, to author (May 23, 1986). The figure represents the average number of rulemakings instituted each year but available records do not disclose how many of these are traceable to petitions.

330. This number largely represents the average number of petitions filed under 42 U.S.C. § 6297(b) (1982). ACUS Questionnaire Response under cover letter from Stanford O. Bardwell, Jr., Deputy General Counsel, Legislation and Regulations, Department of Energy, to author (Sept. 26, 1986).

331. Letter from E. Tazewell Ellett, Chief Counsel, Federal Aviation Administration, to author (June 9, 1986).

332. ACUS Questionnaire Response under cover letter from Ralph W. Tarr, Solicitor, Department of the Interior, to author (June 11, 1986). This number includes petitions related to endangered species and surface mining and reclamation.

333. Letter from Anthony J. McMahon, Chief Counsel, Federal Highway Administration, to author (June 5, 1986).

334. Letter from Marvin J. Dessler, Chief Counsel, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, to author (Oct. 27, 1986). This number represents five petitions for designations of viticultural areas and seven petitions related to tax matters, all filed in 1986.

335. ACUS Questionnaire Response under cover letter from William H. Satterfield, General Counsel, Federal Energy Regulatory Commission, to author (June 13, 1986).

336. ACUS Questionnaire Response under cover letter from Donald L. Ivers, General Counsel, Veterans Administration, to author (June 6, 1986). This number represents "informal submissions," treated as correspondence, which propose rule changes. *Id.*

337. Broussand Letter, *supra* note 323.

Consumer Product Safety Commission (6)³³⁸
 Nuclear Regulatory Commission (4-6)³³⁹
 Occupational Safety and Health Administration (Department
 of Labor) (4-6)³⁴⁰

One conclusion from the available data is that the scope of rule-making petition activity is generally not great, with the exception of certain programs involving specialized rulemaking. Moreover, while the regulatory agendas of many agencies seemingly are influenced only minimally, if at all, by the petition process, some agencies are primarily dependent on that process for large portions of their rulemaking docket. This is true today, for example, at the National Highway Traffic Safety Administration.³⁴¹ Of course, an inter-agency comparison of the numbers of petitions alone is somewhat deceptive. Such a comparison does not necessarily indicate how much agency time and resources are expended on the processing of petitions since the nature of the issues raised, among other things, can make the decisionmaking process very complex and resource-intensive for some agencies and not for others.

The dearth of petitions at various agencies revealed by the existing data is apparently due to a variety of factors, including the availability of an "exceptions" process for individual relief at the Department of Energy³⁴² and the current deregulatory climate, or a history of recent congressional hostility to agency rulemaking, as in the case of the Federal Trade Commission, which creates a perception by potential petitioners that their requests for more (rather than less) regulation will not be favorably acted upon.³⁴³ As noted earlier,³⁴⁴ expected delay in agency action on petitions and the availability of other means for influencing agency action, including informal contacts and lawsuits, account for the lack of petition activity in other cases.

Moreover, the experience of the Environmental Protection Agency suggests that petition activity will likely be limited during the period of time that the agency is exercising newly granted rulemaking power and filling out the major substantive elements of a regulatory scheme re-

338. ACUS Questionnaire Response under cover letter from Stephen Lemberg, Assistant General Counsel, Consumer Product Safety Commission, to author (June 4, 1986).

339. ACUS Questionnaire Response under cover letter from Martin G. Malsch, Acting General Counsel, Nuclear Regulatory Commission, to author (June 26, 1986).

340. ACUS Questionnaire Response transmitted under cover memorandum from Marshall A. Deutsch, Department of Labor, to author (Sept. 17, 1986).

341. Felrice Interview, *supra* note 88.

342. See Letter from Stanford O. Bardwell, Jr., Deputy General Counsel, Legislation and Regulations, Department of Energy, to author (Sept. 26, 1986).

343. See also Schwartz, *supra* note 150, at 54 ("In addition, some potential petitioners doubtless lost their incentive to file petitions as it became evident that the Commission would undertake few proceedings to ban products or set safety standards.")

344. See *supra* text following note 316.

cently enacted by Congress. At that point, both agency attention and that of the regulated and beneficiary groups is consumed by other matters, including actions for judicial review of agency action. Matters that might otherwise be the subject of petitions may be disposed of through litigation settlements or in other ways.³⁴⁵

Some agencies have given much thought to the design of their petition processes. Such is the case, for example, at the National Highway Traffic Safety Administration³⁴⁶ and the Nuclear Regulatory Commission.³⁴⁷ In fact, at several points over the last few years the Nuclear Regulatory Commission has instituted self-evaluation studies for determining the best and fastest ways of handling rulemaking petitions.³⁴⁸ The imposition of specific timetables for agency action was in part the result of somewhat similar concerns at the National Highway Traffic Safety Administration during the late 1970s.³⁴⁹

The consideration given to the design of an appropriate petition framework may mirror an agency's perception that it can learn much from petitioners. For example, in many areas the Federal Communications Commission relies on petition activity for helping it keep abreast of changing technology.³⁵⁰ On the other hand, some staff members at the Food and Drug Administration, an agency which has a relatively elaborate petition framework, expressed doubts whether the petition process has served, at least recently, as a significant source for general policy initiatives that were not already under consideration somewhere in the agency.³⁵¹

345. Interview with Mark Greenwood, Assistant General Counsel, Solid Waste and Emergency Management Division, EPA (July 10, 1986); interview with Susan Lepow, Acting Associate General Counsel for Water, and Lee Schroer and Margaret Silver, Attorneys, Water Division, Office of General Counsel, EPA (July 10, 1986).

346. See ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 537-42.

347. *Id.* at 542-51.

348. *Id.* at 547-49.

349. *Id.* at 538.

350. *Id.* at 529-30.

351. *Id.* at 525. The FDA petition framework may, however, have been designed at a time when high hopes were held for the value of the process in serving as an avenue for new regulatory initiatives. Alternately, the desire to appear particularly open to the public may have contributed to the extent of the written elaboration of the process. Or, recognizing that it would receive a considerable number of rulemaking requests, the agency may have concluded that efficiency demanded a detailed process for disposing of petitions. With regard to the FDA, it should be noted that the petition regulations apply to many different types of programs, some of which are not of the general rulemaking type but which contribute significantly to agency workload. For example, food and color additive petitions totalled 62 and 10 respectively.

See also Merrill, *CPSC Regulation of Cancer Risks in Consumer Products: 1972-1981*, 67 VA. L. REV. 1261, 1274 (1981) ("Consumer Product Safety Commission officials insist that the petitions were not the primary impetus for any of the agency's actions [with respect to carcinogens], asserting that its staff was evaluating each of the substances when the petitions were filed."). But see Schwartz, *supra* note 150, at 54 ("In recent years petitions have alerted the Commission to a number of risks [other than those involving carcinogens] which it otherwise might not have recognized as quickly. . . .").

Even where the petition process is not a significant source of new ideas, petitions may spur action that might not otherwise occur or occur as quickly. It was suggested by various Food and Drug Administration staff members, that, absent initiatives apparently coming from the outside, the agency might in some cases be reticent in proposing on its own either increased or reduced regulation.

Recognizing the value that Congress has placed on public participation in the agency rulemaking process³⁵² and its own past acknowledgements of the benefits flowing both from such participation and the publication of the means for participating,³⁵³ the Administrative Conference of the United States adopted recommendations in 1986 applicable to the rulemaking petition process.³⁵⁴ Specifically, the Conference suggested that agencies "should establish by rule basic procedures for the receipt, consideration and prompt disposition of petitions,"³⁵⁵ including:

- (a) specification of the address(es) for the filing of petitions and an outline of the recommended contents of the petition, such as the name, address, and telephone number of the petitioner, the statutory authority for the action requested, and a description of the rule to be issued, amended or repealed;
- (b) maintenance of a publicly available petition file; and
- (c) provision for prompt notification to the petitioner of the action taken on the petition, with a summary explanatory statement.³⁵⁶

As noted earlier, many agencies have adopted some regulations implementing the various statutory petition processes.³⁵⁷ The first and third elements described above generally appear in these and the second is often found. The procedural framework established by an agency may, however, go into considerable detail regarding these and other parts of the petition process.

The Conference also recognized that more than this skeletal elaboration may be called for in some cases. Therefore, the Conference recommended that, where "appropriate and feasible," agencies should, *inter alia*, provide guidance regarding "the type of data, argumentation, or other information" needed for consideration of petitions, "develop

352. See *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1046 n.18 (D.C. Cir. 1979).

353. See, e.g., Recommendation No. 69-8, Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 C.F.R. § 305.69-8 (1987).

354. Recommendation No. 86-6, Petitions for Rulemaking, 1 C.F.R. § 305.86-6 (1987).

355. *Id.*

356. *Id.*

357. See *supra* text accompanying notes 112-14.

effective methods for providing notice to interested persons that a petition has been filed and identify the agency office or official to whom inquiries and comments should be made," and "establish internal management controls to assure the timely processing of petitions for rulemaking, including deadlines for completing interim actions and reaching conclusions on petitions and systems to monitor compliance with those deadlines."³⁵⁸ The Conference felt, however, "that, beyond this basic level, uniform specification of agency petition procedures would be undesirable because there are significant differences in the number and nature of petitions received by agencies and in the degree of sophistication of each agency's community of interested persons."³⁵⁹

In formulating its final recommendations, the Conference took into account the fact that, while soliciting views regarding petitions may be valuable in some cases, a comment period imposes various costs that may not be justified by the benefits received. Accordingly, the Conference suggested that agencies implement comment periods "where appropriate and feasible."

Concern was expressed during committee deliberations that asking an agency to provide potential petitioners with guidance regarding the data and issues needed for a decision on a petition might be interpreted as requiring the agency to do the work for the petitioner in formulating issues and determining exactly what data are required for affirmative action. The final recommendation was drafted in a way which avoids that result.

The Conference eschewed any attempt at defining in detail the contents of the public petition file. The Conference left open the option of one file for the agency's use in its decision making (a file that could later be the focus for judicial review), and another file for public examination during the pendency of the petition and any later rulemaking proceeding. Moreover, a proposal that agencies maintain up-to-date public indices indicating the subject matter, status and disposition of petitions was not adopted in the final version of the recommendation.

The establishment of the content of an agency's regulatory agenda is a question of substantive policy judgment. The Conference did not consider any recommendation regarding criteria for determining which petitions should be accorded priority in their consideration and final disposition. In another context, however, the Conference has indicated that at least one agency, OSHA, should expose its preliminary judgments regarding regulatory priorities (including topics suggested by rulemaking petitions) for public comment.³⁶⁰

358. Recommendation No. 86-6, Petitions for Rulemaking, 1 C.F.R. § 305.86-6 (1987).

359. *Id.*

360. *See, e.g.*, Recommendation No. 87-1, Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration, 52 Fed. Reg. 23,629 (1987) (to be codified at 1 C.F.R. § 305.87-1).

Some agencies have, on their own, adopted internal orders classifying various types of petitions. These classifications include the complexity of the subject matter, the time necessary for their consideration, and the clear merit of the proposals.³⁶¹ Classifications trigger various procedural steps for the internal processing and public consideration of the proposals made by petitioners. As an initial sorting device, such systems have some potential for expediting final disposition of petitions, though the agencies adopting them have still experienced delays in their petition processes.³⁶² Even when such a system works, it does not necessarily assure that the most important regulatory proposals are given the highest priority in the use of agency resources. Its principal effect (and perhaps the only one intended) may be to move noncontroversial proposals along to an earlier resolution than may have otherwise occurred. In addition, it may be feasible and desirable in some instances for an agency to establish its own substantive criteria in determining the priority accorded both the processing of petitions and their disposition.³⁶³ Such a decisionmaking framework must, however, ensure that the agency's own agenda is not unduly disrupted.³⁶⁴

From an agency's point of view, the statutory rights to petition for rulemaking may be a mixed blessing. Petitions have been and continue to be a source of some valuable ideas for regulatory change, though this may vary from agency to agency and over time. Yet they can impose a strain on already tight agency budgets and can be perceived as an undesirable disruption of internally-established regulatory priorities. On occasion, the resources and attention focused on the disposition of rulemaking petitions have severely undermined an agency's ability to formulate or pursue internally generated proposals for regulation.³⁶⁵

361. This is the case at both the National Highway Traffic Safety Administration (*see* ACUS RULEMAKING PETITION REPORT, *supra* note 33, at 539) and the Nuclear Regulatory Commission (*id.* at 544-46).

362. *Id.* at 542, 547-49.

363. *Cf., e.g.,* MCGARITY & SHAPIRO, REPORT FROM THE OFFICE OF THE CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, TO THE ASSISTANT SECRETARY FOR OCCUPATIONAL SAFETY AND HEALTH ON OSHA RULEMAKING PROCEDURES x-xi (1987) (criteria to include "(1) the degree of hazard; (2) the quality of the data indicating hazard; (3) the administrative resources required to undertake the new project; (4) the match between the expertise required for the project and the expertise available to the agency; (5) whether the proposed project would result in greater protection for workers than projects currently at the top of the list; and (6) other important public policies.").

364. *See, e.g., Id.*

365. The classic case is the Consumer Product Safety Commission. *See* Merrill; *supra* note 351; Schwartz, *supra* note 150.

The fact that an agency may not be able to pursue its own regulatory agenda because of the demands of the petition process may be entirely consistent with congressional intent. There may even have been an intent to hobble the agency through the petition process. On the other hand, an agency's responsiveness to the consideration of petitions and/or the availability of judicial review of petition denials may threaten to undermine the scheme of regulation contemplated by Congress. *Cf. Mashaw & Harfst, supra* note 34. It is no small task for an agency to design methods that

Of course, if an agency does not establish a regulatory agenda of its own, the petition process may fill the gap, though the lack of some overall conception of where the agency is going, even if Congress did not intend otherwise, will likely create substantial problems down the road.

Demonstrating the cost-effectiveness of a statutory right to petition for rulemaking may be impossible. Nonetheless, this opportunity to petition, which exceeds what the first amendment otherwise requires, has a firm foundation in democratic values. As Judge Patricia Wald has noted:

Under our system of government the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives and upon whom their commands must fall.³⁶⁶

Improvement of the petition processes can facilitate, and thereby encourage, further use of this mechanism for influencing the content of regulatory agendas and ensure an opportunity for meaningful public involvement in the policy making process.³⁶⁷

optimally integrate internal rulemaking proposals and those originating from the outside into an agenda of regulatory priorities of appropriate flexibility.

366. See *Sierra Club v. Costle*, 657 F.2d 298, 400-01 (D.C. Cir. 1981) (footnote omitted).

367. In February 1988, after this Article had been completed, the American Bar Association, through its House of Delegates, adopted a resolution addressing rulemaking petitions that is, at least in some respects, more ambitious than the recommendations of the Administrative Conference. The ABA resolution provides:

BE IT RESOLVED THAT the American Bar Association recommends that administrative agencies implement the right to petition for rulemaking, secured by Section 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553(e), and other applicable provisions of law, by:

(1) providing clear written guidance that describes where petitions for agency rulemaking should be filed and what they should include;

(2) soliciting comments on such petitions from interested persons (including the public) where the agency believes such comments may assist it in disposing of the petition, and maintaining such comments and petitions in a public file;

(3) setting out in advance timetables and deadlines within which such petitions will be expeditiously disposed of;

(4) in the event of a denial, issuing an explanatory statement, where feasible and appropriate, that is detailed and making it publicly available; and

(5) including in the Annual Regulatory Program of the President a list of pending petitions for rulemaking.

