



Petitions for Rulemaking

Committee on Rulemaking

Draft Recommendation | October 23, 2014

1 Under the Administrative Procedure Act (APA), federal agencies are required to “give . . .
2 interested person[s] the right to petition for the issuance, amendment, or repeal of a rule.”¹ The
3 statute generally does not establish procedures agencies must observe in connection with
4 petitions for rulemaking. It does, however, require agencies to respond to petitions for
5 rulemaking “within a reasonable time,”² and to give petitioners “prompt notice” when a petition
6 is denied in whole or in part, along with “a brief statement of the grounds for denial.”³ Beyond
7 the APA’s general right to petition, Congress has occasionally granted more specific rights to
8 petition under individual statutes, such as the Clean Air Act.⁴ Although agency denials of
9 petitions for rulemaking are subject to judicial review, the “courts have properly limited their
10 scope of review in this context.”⁵ One consequence of this judicial deference is that, if an agency
11 chooses to invite public comment on a petition for rulemaking, it does not thereby undertake a
12 legal obligation to respond to all comments in its disposition of that petition.⁶

¹ 5 U.S.C. § 553(e).

² 5 U.S.C. § 555(b).

³ 5 U.S.C. § 555(e). The APA exempts agencies from the requirement of providing a “brief statement of denial” when it is “affirming a prior denial or when the denial is self-explanatory.” *Id.*

⁴ *See, e.g.*, 42 U.S.C. §§ 7671a(c)(3), 7671e(b), 7671j(e). Statutory petition provisions such as these may impose additional procedural requirements beyond those contained in the APA or identify substantive requirements that must be met before the agency can act.

⁵ Admin. Conf. of the United States, Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43,109 (Aug. 18, 1995).

⁶ In general, courts do not require agencies to respond to every individual issue raised in a petition (let alone every issue raised in comments on petitions), so long as the administrative record demonstrates a reasoned response on the whole. *Cf. WildEarth Guardians v. Salazar*, 741 F. Supp. 2d 89, 104 n.21 (D.D.C. 2012); *Nader v. FAA*, 440 F.2d 292, 294 (D.C. Cir. 1971). In *Connecticut v. Daley*, a district court raised the “question whether the [agency] must



13 The Administrative Conference has previously recommended basic procedures to ensure
14 that agencies meet the APA’s minimum requirements and respond promptly to petitions for
15 rulemaking.⁷ An Administrative Conference study of agency procedures and practices with
16 respect to petitions for rulemaking has revealed, however, that further improvement is possible.⁸
17 Nearly thirty years after the Administrative Conference first examined this issue, few agencies
18 have in place official procedures and sound practices for accepting, processing, and responding
19 to petitions for rulemaking.⁹ How petitions are received and treated varies across—and even
20 within—agencies. In some cases, agency personnel do not even know what their agency’s
21 procedures are for handling petitions. Although the petitioning process can be a tool for
22 addressing rulemaking’s democratic deficit, in practice, most petitions are filed by sophisticated,
23 repeat players and not by other interested members of the public. Petitioners report that it is
24 usually difficult to know the status of a previously filed petition, agency communication
25 throughout the process is poor, response times are slow, and agency explanations for denials
26 tend to be minimal and predominantly non-substantive.¹⁰

respond in detail to each and every comment received, or if [it] is only required to respond to what was raised in the actual petition for rule making.” 53 F. Supp. 2d 147, 170 (D. Conn. 1999). Although the court did not resolve that question, it noted that 5 U.S.C. § 555(e) requires agencies to briefly explain only why a “petition” was denied, impliedly not extending the required response to comments on petitions (citing WWHT, Inc. v. FCC, 656 F.2d 807, 813 (D.C. Cir. 1981) (emphasis added by D. Conn.)). However, it is good policy for an agency to explain in a request for comments on a petition that it will consider the comments but may not respond to all of them.

⁷ See Admin. Conf. of the United States, Recommendation 86-6, *Petitions for Rulemaking*, 51 Fed. Reg. 46,988 (Dec. 30, 1986); see also Admin. Conf. of the United States, Recommendation 95-3, ¶ VI(B) (“Agencies should establish deadlines for their responses to petitions; if necessary, the President by executive order or Congress should mandate that petitions be acted upon within a specified time.”).

⁸ See Jason A. Schwartz & Richard L. Revesz, *Petitions for Rulemaking*, Draft Report to the Administrative Conference of the United States (Sept. 25, 2014), available at <http://www.acus.gov/report/petitions-rulemaking-draft-report>.

⁹ See *id.* at 46; see also William V. Luneburg, *Petitions for Rulemaking: Federal Agency Practice and Recommendations for Improvement*, 1986 ACUS 493, 510 (1986) (observing that, with respect to agency procedures governing petitions for rulemaking, “[s]ome have none; other largely mirror, without elaborating much on, statutory procedures; and still others have adopted rather detailed requirements . . . going considerably beyond the procedures expressly mandated by statute”).

¹⁰ See Schwartz & Revesz, *supra* note 8, at 40-64.



27 Agencies and the public seem to agree on the importance and value of the right to
28 petition. But making the process work well requires a difficult balancing of competing interests.
29 On the one hand, the APA grants to the public the right to petition for rulemaking and requires
30 agencies to provide a decision on the merits within a reasonable period of time. To be sure,
31 agencies often receive suggestions for new regulations and feedback regarding needed changes
32 to existing regulations via informal channels, such as through meetings with regulated parties
33 and stakeholders or interactions during inspections or other enforcement activities. Petitions
34 provide another important avenue for such input—one that in theory is more broadly accessible
35 to interested persons who do not regularly interact with agency personnel. Nonetheless,
36 petitions for rulemaking may threaten an agency’s ability to control its agenda and make
37 considered, holistic judgments about regulatory priorities, particularly in the face of limited
38 resources. And thoughtfully evaluating petitions and defending denials on judicial review may
39 consume already scarce agency resources.

40 Greater transparency, improved communication between agencies and petitioners, and
41 more prompt and explanatory denials of petitions may do much to balance these competing
42 interests.¹¹ Agencies should educate the public about how petitions fit with the other (often
43 more informal) mechanisms through which agencies receive feedback from regulated and other
44 interested persons on regulatory priorities and related issues. Petitioners and agency personnel
45 alike would also benefit from greater clarity as to how petitions can be filed, what information
46 should be included to make a petition useful and reviewable,¹² whether or when public comment
47 will be invited, and how long it will take to resolve a petition. Better internal coordination may
48 reduce the possibility that a petition will be forgotten or will not reach the appropriate agency
49 office or official for processing and decision. Encouraging consultation between prospective or
50 current petitioners and the agency can provide an efficient way to improve the quality of

¹¹ See generally Schwartz & Revesz, *supra* note 8.

¹² This could be similar to the information some agencies provide on their websites to help the public understand the characteristics of an effective rulemaking comment.



51 petitions and the overall experience for all participants in the process. Readily available
52 information on the status of pending petitions and more prompt disposition of petitions may
53 ease tensions between the agency and the public and reduce the likelihood of litigation.

54 This recommendation seeks to ensure that the public's right to petition is a meaningful
55 one, while still respecting the need for agencies to retain decisional autonomy. Building upon
56 the Administrative Conference's previous work, it provides more guidance to agencies,
57 identifying best practices that may make the petitioning process more useful for agencies,
58 petitioners, and the public. Moreover, electronic rulemaking dockets and agency Internet
59 websites provide new opportunities for agencies to achieve these goals in a cost-effective
60 manner.¹³ This recommendation should help agencies reevaluate and revise their existing
61 policies and procedures to make the petitioning process work better for all.

RECOMMENDATION

62 **Agency Policy on Petitions for Rulemaking**

63 1. Each agency that has rulemaking authority should have a written policy explaining how
64 the agency receives, processes, and responds to petitions for rulemaking filed under the APA. If
65 an agency also has more specific regulations governing petitions filed under other statutes or to
66 specific sub-agencies, the agency's general policy should cross-reference those regulations.

67 2. If an agency rarely receives petitions for rulemaking, its written policy may simply
68 designate an agency contact who can provide guidance to prospective petitioners.

69 3. The agency policy should indicate how the agency will coordinate petitions with other
70 processes and activities used to determine agency priorities, such as the Unified Agenda and
71 retrospective review of existing rules.

¹³ See, e.g., Admin. Conf. of the United States, Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2257, 2264-65 (Jan. 17, 2012).



72 4. The policy should explain how petitions fit within the various other options available to
73 members of the public for informally engaging with agency personnel on the need to issue,
74 amend, or repeal rules.

75 5. Agencies should use available online platforms, including their websites and
76 Regulations.gov, to educate the public about petitions for rulemaking, facilitate the submission
77 of petitions, invite public comment (as appropriate under ¶ 11, below), provide status updates,
78 and improve the accessibility of agency decisions on petitions.

79 6. Agencies should accept the electronic submission of petitions, via email or through an
80 online docket (e.g., through Regulations.gov).

81 **Receiving and Processing Petitions**

82 7. Agencies should provide the public with guidance on the type of data, argumentation,
83 and other information that make a petition more useful and easier for the agency to evaluate.
84 As appropriate, this guidance should also identify any information statutorily required for the
85 agency to act on a petition.

86 8. Agencies with multiple regions or offices should designate a single point of contact who
87 can direct each petition for rulemaking to the appropriate agency personnel for consideration
88 and disposition.

89 **Communicating with Petitioners**

90 9. Agencies should encourage and facilitate consultation between agency personnel and
91 petitioners, both prior to submission and while petitions are pending disposition. For example,
92 agencies can ask petitioners to clarify requests or submit additional information that will make
93 the petition easier to review. Agencies can also alert petitioners to recent developments that
94 may warrant a petition's modification or withdrawal.



95 10. Agencies should provide a way for petitioners and other interested persons to know
96 the status of previously filed petitions. Agencies should:

97 (a) Use online dockets to allow the public to monitor the status of petitions; and

98 (b) Designate a single point of contact authorized to provide information about the
99 status of petitions.

100 **Soliciting Public Comment on Petitions**

101 11. Agencies should consider inviting public comment on petitions for rulemaking by
102 either:

103 (a) Adopting a default rule that public comment will be solicited on all petitions for
104 rulemaking; or

105 (b) Retaining discretion to decide, on a case-by-case basis, whether to solicit public
106 comment on petitions for rulemaking. Inviting public comment may be particularly
107 appropriate when:

108 (i) A petition addresses a policy question, rather than a purely technical issue.

109 (ii) Evaluating a petition's merits may require the agency to consider
110 information the agency does not have, or the agency believes that the
111 information provided by the petitioner may be in dispute or is incomplete.

112 **Responding to Petitions for Rulemaking**

113 12. Because the right to petition the government is fundamental, and petitions deserve
114 thoughtful and timely consideration, agencies should respond to all petitions for rulemaking on
115 the merits within a reasonable period of time. At a minimum, under the APA, the agency must
116 provide a brief statement of the grounds for denial unless it is affirming a prior denial or the
117 denial is self-explanatory. To the extent appropriate and feasible, and depending upon the



118 volume of petitions filed, agencies should try to provide a reasoned explanation of the merits of
119 its decision. Agencies should not reflexively use boilerplate denials that cite only resource
120 constraints or competing priorities.

121 13. An agency should either:

122 (a) Adopt in its written policy a commitment to disposing of all petitions for
123 rulemaking within 12 to 18 months of submission; or

124 (b) Establish and make publicly available a realistic but expeditious date of expected
125 disposition for each petition for rulemaking.

126 14. If an agency is unable to dispose of a petition by the target timeline it has established,
127 it should provide the public with a very brief explanation for the delay, along with a realistic but
128 expeditious new date of expected disposition. This may include a request for new or additional
129 information if the agency believes that new research may have become available or facts or
130 circumstances relevant to the petition may have changed during the delay.

131 **Collecting Statistics on Petitions for Rulemaking**

132 15. Agencies should maintain a summary chart listing all pending petitions, the date they
133 were received, and a realistic but expeditious estimated date of disposition (where necessary,
134 this should include a very brief explanation for any delay in disposition and a realistic but
135 expeditious new estimated date of disposition). The chart should be described in the agency's
136 petitions policy (see ¶ 1) and made publicly available on the agency's website. It should be
137 updated quarterly or semi-annually (to include information on petitions that have been both filed
138 and disposed of since the previous report).

139 16. The Office of Information and Regulatory Affairs (OIRA) should require both executive
140 branch and independent agencies to include in their annual regulatory plan summary statistics
141 of petitions for rulemaking that have been recently resolved or are still pending.