



Statement # 19 (2015) **MORRISON COMMENTS** [DRAFT – August 10, 2015]

**Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking**

1 The doctrine of issue exhaustion generally bars a litigant challenging agency action from  
2 raising issues in court that were not raised with the agency. Although the doctrine originated in  
3 the context of agency adjudication, it has been extended to judicial review of challenges to  
4 agency rulemakings. Scholars have observed that issue exhaustion cases “conspicuously lack  
5 discussion of whether, when, why, or how [the issue] exhaustion doctrine developed in the  
6 context of adjudication should be applied to rulemaking.”<sup>1</sup> The Administrative Conference has  
7 studied the issue exhaustion doctrine in ~~an effort order~~ to bring greater clarity to the rationale  
8 for its application in the context of preenforcement review of agency rules.<sup>2</sup> The Conference  
9 believes ~~that the statement may it would~~ be useful ~~by to setting~~ forth a series of factors that  
10 courts ~~SHOULD~~ may consider when examining issue exhaustion in that context. [I WOULD MOVE  
11 NOTE 2 TO END OF PARAGRAPH.]

12 **Evolution of the Issue Exhaustion Doctrine**

13 The requirement that parties exhaust their administrative remedies (“remedy  
14 exhaustion”) is a familiar feature of U.S. administrative law. This doctrine generally bars a party  
15 from appealing a final agency action to a court until it exhausts prescribed avenues for relief

---

<sup>1</sup> JEFFREY S. LUBBERS, FAIL TO COMMENT AT YOUR OWN RISK: DOES ISSUE EXHAUSTION HAVE A PLACE IN JUDICIAL REVIEW OF RULES? 11 (May 5, 2015) (Report to the Administrative Conference of the U.S.) [hereinafter Lubbers Report] (citing PETER L. STRAUSS, ET AL, GELLHORN AND BYSE’S ADMINISTRATIVE LAW 1246 (10th ed. 2003)); *see also* Koretoff v. Vilsack, 707 F.3d 394, 399 (D.C. Cir. 2013) (Williams, J., concurring) (joining a decision to preclude preenforcement review of new issues but writing separately “primarily to note that in the realm of judicial review of agency rules, much of the language of our opinions on ‘waiver’ has been a good deal broader than the actual pattern of our holdings”).

<sup>2</sup> This Statement does not address the application of the doctrine in the context of a challenge to a rule in an agency enforcement action, where the passage of time and new entrants may complicate the inquiry. The Conference has previously identified issues that Congress should not ordinarily preclude courts from considering when rules are challenged in enforcement proceedings. *See* Admin. Conf. of the U.S., Recommendation 82-7, *Judicial Review of Rules in Enforcement Proceedings* (Dec. 17, 1982), <http://www.acus.gov/82-7>.



16 before the agency.<sup>3</sup> ~~Remedy exhaustion ordinarily applies only to administrative~~  
17 ~~adjudications.~~<sup>4</sup>

Formatted: Font: Bold

18 The related but distinct concept of “issue exhaustion” prevents a party from raising issues  
19 in litigation that were not raised before the agency, even if the petitioner **fully** participated in the  
20 administrative process.<sup>5</sup> As with remedy exhaustion, the issue exhaustion doctrine initially arose  
21 in the context of agency adjudications.<sup>6</sup> Unlike remedy exhaustion, however, issue exhaustion  
22 has often been applied by courts reviewing agency rulemakings.

Commented [ABM1]: This seems backwards. The point is to preclude someone from raising an issue even if the person did not participate at all. Much less reason to allow if participated FULLY.

Formatted: Font: Bold

23 As the Supreme Court has recognized, “administrative issue-exhaustion requirements are  
24 largely creatures of statute.”<sup>7</sup> ~~In several judicial review provisions adopted during the 1930s,~~  
25 ~~prior to the advent of the Administrative Procedure Act of 1946,~~ Congress expressly required  
26 parties to raise all their objections to agency action before adjudicatory agencies ~~in several~~  
27 ~~judicial review provisions adopted during the 1930s, prior to the advent of the Administrative~~  
28 ~~Procedure Act of 1946.~~ Since that time, Congress has included issue exhaustion provisions in  
29 many statutes governing review of administrative adjudications and agency orders.<sup>8</sup> The typical

Commented [ABM2]: Reads better reversing clauses.

<sup>3</sup> Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

<sup>4</sup> ~~See Darby v. Cisneros, 509 U.S. 137, 146 (1993).~~

<sup>5</sup> See FiberTower Spectrum Holdings, LLC v. FCC, No. 14-1039, slip. op. at 9 (D.C. Cir. Apr. 3, 2015). Issue exhaustion statutes may not always be jurisdictional. *E.g.*, EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1602-03 (2014) (“A rule may be ‘mandatory,’ yet not ‘jurisdictional,’ we have explained. Section 7607(d)(7)(B), we hold, is of that character. It does not speak to a court’s authority, but only to a party’s procedural obligations.”) (citations omitted); see also Advocates for Highway and Auto Safety v. FMSCA, 429 F.3d 1136, 1148 (D.C. Cir. 2005) (“as a general matter, a party’s presentation of issues during a rulemaking proceeding is not a *jurisdictional* matter”) (emphasis in original).

<sup>6</sup> See Lubbers Report, *supra* note 1, at 2-3.

<sup>7</sup> Sims v. Apfel, 530 U.S. 103, 107 (2000) (plurality opinion).

<sup>8</sup> See Lubbers Report, *supra* note 1, at 4-6.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

30 statute contains an exception for “reasonable grounds” or “extraordinary circumstances” and  
31 permits the court to require an agency to take new evidence under certain conditions.<sup>9</sup>

32 Courts have also imposed issue exhaustion requirements in the adjudication context in  
33 the absence of an underlying statute or regulation requiring it. The Supreme Court early on  
34 characterized the “general rule that courts should not topple over administrative decisions unless  
35 the administrative body not only has erred but has erred against objection made at the time  
36 appropriate under its practice” as one of “simple fairness,” emphasizing that issue exhaustion  
37 promotes orderly procedure and good administration by offering the agency an opportunity to  
38 act on objections to its proceedings.<sup>10</sup> But questions about the common law application of the  
39 doctrine were later raised in *Sims v. Apfel*, where the Court held that a judicial issue exhaustion  
40 requirement was inappropriate on review of the Social Security Administration’s informal, non-  
41 adversarial adjudicatory benefit determinations, reasoning that “the desirability of a court  
42 imposing a requirement of issue exhaustion depends on the degree to which the analogy to  
43 normal adversarial litigation applies in a particular administrative proceeding.”<sup>11</sup>

44 Although the issue exhaustion doctrine originated in the adjudication context, it has been  
45 extended to preenforcement review of agency rulemakings. Two statutes have been identified  
46 by the Conference as explicitly requiring issue exhaustion for review of agency rules—the Clean  
47 Air Act and the Securities Exchange Act of 1934.<sup>12</sup> Both statutes were amended to incorporate

---

<sup>9</sup> *E.g.*, 15 U.S.C. § 771(a); 29 U.S.C. § 160(e); 42 U.S.C. § 1320a-8(d)(1).

<sup>10</sup> *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (reviewing an adjudicative order issued by the Interstate Commerce Commission after an adversarial hearing); *see also* *Advocates for Highway and Auto Safety v. FMSCA*, 429 F.3d 1136, 1149 (D.C. Cir. 2005) (applying the same rationale to rulemaking).

<sup>11</sup> *Sims v. Apfel*, 530 U.S. 103, 108-12 (2000) (plurality opinion).

<sup>12</sup> 42 U.S.C. § 7607(d)(7)(B); 15 U.S.C. § 78y(c)(1). However, provisions governing some agencies’ “orders” have been held to apply to judicial review of rules. *See* *Citizens Awareness Network v. U.S.*, 391 F.3d 338, 345-47 (1st Cir. 2004); *see also* *Inv. Co. Inst. v. Bd. of Govs.*, 551 F.2d 1270, 1276-77 (D.C. Cir. 1977); *American Public Gas Ass’n v. Fed. Power Comm’n*, 546 F.2d 983, 986-88 (D.C. Cir. 1976).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

48 issue exhaustion provisions in the 1970s, when Congress enacted numerous regulatory statutes  
49 with significant rulemaking provisions.<sup>13</sup>

50 The doctrine has also been extended to the rulemaking context through common law.  
51 Despite *Sims*' focus in the adjudication context on the extent to which the underlying  
52 administrative proceeding resembled adversarial litigation for purposes of determining whether  
53 the doctrine applied, appellate courts have increasingly applied the doctrine in the absence of a  
54 statute requiring it when reviewing preenforcement challenges to agency rules enacted via  
55 notice-and-comment proceedings.<sup>14</sup> And at least two appellate courts have applied the doctrine  
56 to review of administrative rulemaking after specifically considering *Sims*,<sup>15</sup> although *Sims* was  
57 recently cited by the Ninth Circuit as militating against issue exhaustion in an informal rulemaking  
58 issued without notice-and-comment procedures.<sup>16</sup>

59 Relying on their equitable authority, courts have also fashioned exceptions to the issue  
60 exhaustion doctrine, and have even read such exceptions into statutes where they were not

---

<sup>13</sup> Lubbers Report, *supra* note 1, at 4, 11, 13.

<sup>14</sup> *E.g.*, *Koretov v. Vilsack*, 707 F.3d 394, 401 (D.C. Cir. 2013) (Williams, J., concurring) (“[g]enerally speaking, then, the price for a ticket to facial review is to raise objections in the rulemaking”); *City of Portland, Or. v. EPA*, 507 F.3d 706, 710 (D.C. Cir. 2007); *Military Toxics Project v. EPA*, 146 F.3d 948, 956-57 (D.C. Cir. 1998); *see also* Lubbers Report, *supra* note 1, at 27-30 (describing application of the doctrine as well as varied precedent in appellate courts other than the U.S. Court of Appeals for the D.C. Circuit). No cases were identified that applied the issue exhaustion doctrine in the context of new issues raised during enforcement challenges to rules.

<sup>15</sup> *Advocates for Highway and Auto Safety v. FMSCA*, 429 F.3d 1136, 1148-49 (D.C. Cir. 2005); *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1020 (9th Cir. 2004).

<sup>16</sup> *See Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1080 (9th Cir. 2013) (describing a Surface Transportation Board (STB) exemption proceeding as a rulemaking but applying the *Sims* rationale to it because the STB's procedures were informal and public comments were not sought).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

61 expressly prescribed.<sup>17</sup> The Conference commissioned a consultant’s report to identify and  
62 articulate the scope of these exceptions in federal appellate case law, as well as to examine the  
63 general arguments for or against the doctrine in the rulemaking context.<sup>18</sup> Without endorsing  
64 every conclusion expressed therein, the Conference believes that the report of its consultant can  
65 provide guidance to courts considering the application of the doctrine as it pertains to  
66 preenforcement review of administrative rulemaking.

### 67 **Factors For Courts to Consider in Applying the Issue Exhaustion Doctrine**

68 The Administrative Conference believes that stakeholders, agencies, and courts benefit  
69 when issues are raised during rulemaking proceedings with sufficient specificity to give the  
70 agency notice and a fair opportunity to address them prior to judicial review.<sup>19</sup> Many of the  
71 justifications for applying the doctrine in judicial review of agency adjudicatory decisions apply  
72 squarely to review of rulemakings. The doctrine promotes active public participation, creates  
73 orderly processes for resolution of important legal and policy issues raised in agency proceedings,  
74 ensures fully informed decisionmaking by administrative agencies, provides a robust record for  
75 judicial review, and lends certainty and finality to agency decisionmaking. Application of the

---

<sup>17</sup> *E.g.*, *Washington Ass’n for Television and Children (“WATCH”) v. FCC*, 712 F.2d 677, 681-82 (D.C. Cir. 1983) (“[Our] cases assume that § 405 contains implied exceptions without explaining why. We understand these cases, however, as implicitly interpreting § 405 to codify the judicially-created doctrine of exhaustion of administrative remedies, which permits courts some discretion to waive exhaustion.”) (footnotes omitted).

<sup>18</sup> See generally Lubbers Report, *supra* note 1.

<sup>19</sup> *Nat’l Ass’n of Mfrs. v. U.S. Dep’t of the Interior*, 134 F.3d 1095, 1111 (D.C. Cir. 1998); see also *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 602 (D.C. Cir. 2015) (holding on review of an agency adjudicatory decision that “the question in determining whether an issue was preserved, however, is not simply whether it was raised in some fashion, but whether it was raised with sufficient precision, clarity, and emphasis to give the agency a fair opportunity to address it”).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

76 doctrine spares courts from hearing ~~objections~~issues that could have been cured at the  
77 administrative level and reduces the need for agencies to create post-hoc rationalizations.<sup>20</sup>

78 On the other hand, the Conference also recognizes some practical and doctrinal concerns  
79 with uncritically applying issue exhaustion principles developed in the context of formal  
80 adversarial agency adjudications to the context of preenforcement rulemaking review.<sup>21</sup>  
81 Overbroad application of the doctrine to rulemaking proceedings could serve as an undue barrier  
82 to judicial review for persons or firms who reasonably do not find it worthwhile to engage in  
83 continuous monitoring of the agency in question.<sup>22</sup> Issue exhaustion requirements may also  
84 contribute to the burdens of participating in a rulemaking proceeding, by exerting pressure on  
85 commenters to raise at the administrative level every issue they might later seek to invoke on  
86 judicial review.<sup>23</sup> These and other concerns have led some observers to question the value of  
87 the doctrine as applied to rulemaking, or at least to call for limitations on its scope.

88 The Conference has compiled a list of factors that courts ~~SHOULD~~could consider when  
89 deciding how far to limit the general principle that precludes litigants from raising issues for the  
90 first time during preenforcement review of agency rules. Some of these factors may be

---

<sup>20</sup> The argument for judicial application of the doctrine may be especially strong where the challenged issue concerns the factual basis of a rule, the agency's evaluation of alternatives, or the agency's failure to exercise its discretion in a particular manner. Judicial evaluation of the reasonableness of an agency's action in such cases under an arbitrary and capricious standard of review may depend heavily on the administrative record and on the agency's analysis of those issues. See generally *Gage v. Atomic Energy Comm'n*, 479 F.2d 1214, 1217-19 (D.C. Cir. 1973).

<sup>21</sup> See William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since Darby*, 18 PACE ENVTL. L. REV. 1, 17 (2000) (“[u]nfortunately, some courts have ignored the specific statutory origin for [issue exhaustion] and have applied a similar exhaustion requirement in cases totally unrelated to that statute, while citing cases involving application of that statute”).

<sup>22</sup> The impact of such barriers can fall most heavily on persons or entities whose interests are not in close alignment with the interests that have been advanced most forcefully by other participants in a given proceeding. See *Koretzoff v. Vilsack*, 707 F.3d 394, 401 (D.C. Cir. 2013) (Williams, J., concurring).

<sup>23</sup> See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1363-64 (2010); Lubbers Report, *supra* note 1, at 38-40.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

91 dispositive, and by compiling a list of such factors, the Conference does not intend to suggest  
92 that courts should give equal weight to all of them. Specifically, except where a statute directs  
93 otherwise, courts ~~could~~ SHOULD consider whether:

- 94 • The issue was raised by a participant in the rulemaking other than the litigant.<sup>24</sup>
- 95 • The issue was addressed by the agency on its own initiative in the rulemaking.<sup>25</sup>
- 96 • The issue was so fundamental to the rulemaking proceeding or to the rule's basis  
97 and purpose that the agency had an affirmative responsibility to address it.<sup>26</sup>
- 98 • The issue involves an objection that the rule violates the U.S. Constitution.<sup>27</sup>
- 99 • It would have been futile to raise the issue during the rulemaking proceeding.<sup>28</sup>

---

<sup>24</sup> See *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007) (“In general, we will not invoke the waiver rule in our review of a notice-and-comment proceeding if an agency has had an opportunity to consider the issue. This is true even if the issue was considered sua sponte by the agency or was raised by someone other than the petitioning party.”).

<sup>25</sup> *Id.*

<sup>26</sup> See *NRDC v. EPA*, 755 F.3d 1010, 1023 (D.C. Cir. 2014) (declining to apply issue exhaustion because “even if a party may be deemed not to have raised a particular argument before the agency, EPA retains a duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a nonarbitrary, non-capricious rule . . . .”) (internal quotation marks omitted).

<sup>27</sup> *Cf.*, *Noel Canning v. NLRB*, 705 F.3d 490, 497 (D.C. Cir. 2013), *aff’d* *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (invoking “extraordinary circumstances” exception in statutory provision requiring issue exhaustion to address constitutional issue not raised with the NLRB because the issue went to the very power of the agency to act and implicated fundamental separation of powers concerns). It is worth emphasizing that regardless of whether the issue exhaustion doctrine would apply, participants in a rulemaking should raise constitutional issues during the rulemaking proceeding to give the agency an opportunity to adjust its rule to eliminate the constitutional objection or at least to explain in the administrative record why its rule does not raise constitutional concerns.

<sup>28</sup> *Cf. WATCH v. FCC*, 712 F.2d 677, 682 (D.C. Cir. 1983) (remarking that “[a] reviewing court . . . may in some cases consider arguments that it would have been futile to raise before the agency,” but cautioning that “[f]utility should not lightly be presumed”).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

100 • The issue could not reasonably be expected to have been raised during the  
101 rulemaking proceeding because of the procedures used by the agency.<sup>29</sup>

102 • The basis for the objection did not exist at a time when rulemaking participants  
103 could raise it in a timely comment.<sup>30</sup>

104 If an issue exhaustion question arises in litigation, litigants should be given an opportunity  
105 to demonstrate that some participant adequately raised the issue during the rulemaking or that  
106 circumstances exist to justify not requiring issue exhaustion. And if a court declines to apply issue  
107 exhaustion principles to preclude review of new issues, the agency should be given an  
108 opportunity to respond to new objections on the merits.<sup>31</sup> Where application of the issue  
109 exhaustion doctrine forecloses judicial review, the Administrative Procedure Act, 5 U.S.C. §  
110 553(e), can provide a procedural mechanism for the public to raise new issues that were not  
111 presented to the agency during a rulemaking proceeding: the right to petition agencies for  
112 amendment or repeal of rules.

---

<sup>29</sup> See *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073 (9th Cir. 2013) (declining to apply issue exhaustion because the agency's procedures were informal and "never provided direct notice of or requested public comment" on challenged issue).

<sup>30</sup> Cf. *CSX Transp., Inc., v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-81 (D.C. Cir. 2009) (declining to apply issue exhaustion to a litigant's argument that the final rule was not a logical outgrowth of the noticed rule).

<sup>31</sup> Courts have a variety of options for soliciting the agency's views. In appropriate circumstances, these may include permitting the agency to brief the issue or supplement the administrative record, or ordering a remand for the limited purpose of soliciting the agency's views.