ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

[COMBINED COMMENTS: Morrison, Fuchs, Siciliano, Starr (no edits—only comments), Kouzoukas]

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

Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking

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

Commented [GB1]: Meredith Fuchs suggested the following change:

The Conference believes it would be useful to ~~set forth a series of~~ summarize factors that courts have and may consider when examining issue exhaustion in that context.

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

[1] 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").

[2] 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.

15 from appealing a final agency action to a court until it exhausts prescribed avenues for relief
16 before the agency.[3] ~~Remedy exhaustion ordinarily applies only to administrative
17 adjudications.[4]~~

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

23 As the Supreme Court has recognized, "administrative issue-exhaustion requirements are
24 largely creatures of statute."[7] **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.[8] The typical

Commented [ABM2]:
Alan B. Morrison commented as follows:

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.

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Commented [ABM3]:
Alan B. Morrison commented as follows:

Reads better reversing clauses.

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[3] Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

~~[4] *See* Darby v. Cisneros, 509 U.S. 137, 146 (1993).~~

[5] *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).

[6] *See* Lubbers Report, *supra* note 1, at 2-3.

[7] Sims v. Apfel, 530 U.S. 103, 107 (2000) (plurality opinion).

[8] *See* Lubbers Report, *supra* note 1, at 4-6.

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.[9]

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.[10] 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."[11]

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.[12] Both statutes were amended to incorporate

[9] *E.g.*, 15 U.S.C. § 77i(a); 29 U.S.C. § 160(e); 42 U.S.C. § 1320a-8(d)(1).

[10] 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).

[11] Sims v. Apfel, 530 U.S. 103, 108-12 (2000) (plurality opinion).

[12] 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).

48 issue exhaustion provisions in the 1970s, when Congress enacted numerous regulatory statutes
49 with significant rulemaking provisions.[13]

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.[14] And at least two appellate courts have applied the doctrine
56 to review of administrative rulemaking after specifically considering *Sims*,[15] 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.[16]

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~~

[13] Lubbers Report, *supra* note 1, at 4, 11, 13.

[14] *E.g.*, Koretoff 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.

[15] 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).

[16] *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).

61 ~~expressly prescribed.[17]~~. 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.[18] 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.[19] 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. **By ensuring an orderly**
76 **process, issue exhaustion avoids the potential for significant disruption to months or years of**
77 **work by the agency if an issue is raised only during judicial review, after the entire rule has**
78 **been developed.** Application of the doctrine also spares courts from hearing objections~~issues~~

~~[17] *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).~~

[18] *See generally* Lubbers Report, *supra* note 1.

[19] 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").

Commented [GB4]:
Carol Ann Siciliano proposed the same deletion and added the following comment:

These edits, and the suggested insert at lines 92-94, are to ensure it is clear that these factors should not be applied where a statute sets out an issue exhaustion requirement, especially in the rulemaking context. Where there is a statutory issue exhaustion requirement, Congressional intent controls, and nothing in the draft Statement analyzes the consistency of its recommendations with Congressional intent in adopting statutory issue preclusion requirements in the rulemaking context.

79 that could have been cured at the administrative level and reduces the need for agencies to
80 create post-hoc rationalizations.[20]

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

Commented [GB5]: Carol Ann Siciliano commented as follows:

We don't believe there is an "undue burden." Agency actions can be easily followed directly on the web or through trade associations, etc. Recommend striking or qualifying this sentence. To qualify it, we would appreciate if you could add back the material shown below in the footnote, which is language from ACUS's earlier draft.

[20] 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).

[21] *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").

[22] 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* Koretoff v. Vilsack, 707 F.3d 394, 401 (D.C. Cir. 2013) (Williams, J., concurring). **On the other hand, potential commenters may have some responsibility to raise an issue that they may later invoke to challenge the rule in court. See Id. ("[g]enerally speaking, then, the price for a ticket to facial review is to raise objections in the rulemaking"). Many agencies have adopted procedures for obtaining input on their rulemakings from interested stakeholders and the widespread use of electronic rulemaking dockets and other Internet- and social media-based outlets for public involvement have increased the public's access to the government rulemaking process. See, e.g., Admin. Conf. of the U.S., Recommendation 2011-8, Agency Innovations in E-Rulemaking (Dec. 9, 2011) (describing observations of a variety of innovative public engagement practices at federal agencies), available at www.acus.gov/2011-8.**

89 judicial review.[23] These and other concerns have led some observers to question the value of
90 the doctrine as applied to rulemaking, or at least to call for limitations on its scope.

91 The Conference has compiled a list of factors that courts ~~could~~ should consider when
92 deciding ~~how far~~ whether to limit the general principle that precludes litigants from raising issues
93 for the first time during preenforcement review of agency rules. Because statutory issue
94 exhaustion requirements are delimited by Congress, these factors are only intended to apply
95 to prudential issue exhaustion requirements. Some of these factors may be dispositive in
96 particular cases, and by compiling a list of such factors, the Conference does not intend to
97 suggest that courts should give equal weight to all of them. Specifically, except where a statute
98 directs otherwise, courts ~~could~~ should consider whether:

99 - The issue was raised by a participant in the rulemaking other than the litigant.[24]

100 - The issue was addressed by the agency on its own initiative in the rulemaking.[25]

[23] *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.

[24] *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.").

[25] *Id.*

Commented [GB6]:
Carol Ann Siciliano commented as follows:

We are not aware why a commenter should be allowed to put off its decision whether to pursue a particular issue until the judicial stage, contrary to the orderly notice and comment process established in the APA, and to the detriment of the agency, which invests months or years on a rule, only to be confronted with a possible new criticism of the rule after the fact. It seems in the interest of commenters themselves, as well as agencies and courts, to have all of the issues raised in the comment period, particularly those that are severe enough to potentially warrant a lawsuit against the rule. ACUS should clarify what it means here, or alternatively we recommend adding to the footnote that others find this concern not well-taken, for these reasons.

Commented [SJ7]:
Judith Starr commented as follows:

I'm not convinced this is a problem. Why is this a worse outcome than having issues raised for the first time on judicial review? If an issue is important enough to bring to a court (and important enough for a court to determine that it should decide the issue) what should we not require it to be raised before the agency? By definition, we are talking about issues that go to a rule's ultimate validity, not minutiae. This appears to be a concern more theoretical than real.

Commented [SJ8]:
Judith Starr commented as follows:

One way to balance the concerns underlying the pro and con positions is to be more precise about what the remedy is. Per my comments to note 31 and accompanying text infra, if a really important issue somehow wasn't addressed in the rulemaking, remanding to the agency addresses both the concerns of public participation and agency consideration, as well as those expressed in this paragraph. Letting the court have first crack keeps these interests in opposition (or exalts the latterconcerns over the former). My point is the remedy can be as important as the standard for requiring/not requiring issue exhaustion in terms of serving the underlying interests and therefore should not be relegated to a footnote at the end.

Commented [GB9]:
Carol Ann Siciliano proposed the following, very similar language, and referred back to her comment on line 60:

Because statutory issue exhaustion requirements are delimited by Congress, these factors are only applicable to prudential issue exhaustion requirements.

101 • The agency failed to address an issue that was so fundamental to the
102 rulemaking proceeding or to the rule's basis and purpose that the agency had an
103 affirmative responsibility to address it.[26]

104 • The issue involves an objection that the rule violates the U.S. Constitution.[27]

105 • It would have been futile to raise the issue during the rulemaking proceeding.[28]

106 • The issue could not reasonably be expected to have been raised during the
107 rulemaking proceeding because of the procedures used by the agency.[29]

108 • The basis for the objection did not exist at a time when rulemaking participants
109 could raise it in a timely comment.[30]

Commented [GB10]:
Carol Ann Siciliano commented as follows:

We believe the agency's failure to address a "fundamental" issue at all is what this bullet is intended to cover. Not intended to cover where the agency did address a "fundamental" issue, and may have addressed comments on it, but a party at the judicial stage wants to raise a different issue about it. Edited here for clarity.

Commented [SJ11]:
Judith Starr commented as follows:

Is there an example of what futility would encompass? I can't think of any. Commenters frequently ask agencies to reexamine their own precedent and agencies are not subject to stare decisis, so that would not be futile. The futile comments I have seen from time immemorial involve asking the agency to do something the statute won't allow. Since the courts can't do that either, this type of fuitility does not suffice here. If we can't come up with a realistic scenario in which a comment would be futile (on an objective basis) we should delete this.

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[26] This is a narrow exception to the general issue exhaustion requirement. [this is language from the prior ACUS draft] *See* NRDC v. EPA, 755 F.3d 1010, 1023 (D.C. Cir. 2014) (EPA's conclusion that it had statutory authority to include a certain exemption in a rule was a "key assumption" that EPA would have needed to justify even if no one had objected during the comment period. [but this was apparently dicta, since the court found that EPA had in fact considered and explained the statutory authority issue; so you may want a different case cite here] "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).

[27] *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.

[28] *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").

[29] *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).

[30] *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).

110 • **Subsequent to or contemporaneous with the rulemaking, the agency issued
111 guidance or otherwise interpreted or clarified the rule as it relates to the
112 issue.**

113 • **The issue arises from a change in circumstances in the regulated
114 environment or the petitioner's activities or business.**

Commented [GB12]:
Demetrios Kouzoukas commented as follows:

The first bullet is particularly important given the potential impact of applying administrative exhaustion in these circumstances in light of Mortgage Bankers and Auer.

115 If an issue exhaustion question arises in litigation, litigants should be given an opportunity
116 to demonstrate that some participant adequately raised the issue during the rulemaking or that
117 circumstances exist to justify not requiring issue exhaustion. And if a court declines to apply issue
118 exhaustion principles to preclude review of new issues, the agency should be given an
119 opportunity to respond to new objections on the merits.[31] Where application of the issue
120 exhaustion doctrine forecloses judicial review, the Administrative Procedure Act, 5 U.S.C. §
121 553(e), can provide a procedural mechanism for the public to raise new issues that were not
122 presented to the agency during a rulemaking proceeding: the right to petition agencies for
123 amendment or repeal of rules.

Commented [SJ13]:
Judith Starr commented as follows:

This paragraph and footnote 31 umderstate the depth of the problem with the administrative record and scope of judicial review. We are positing here a situation where there is no record on an issue and the agency has not had an opportunity to address it at all. Stating that "in appropriate circumstances" the court would permit the agency to brief the issue implies there are circumstances in which it would not. How could a court perform the proper review under the APA without the agency's views and a record? Not only would such a circumstance lead to de novo review but also a non-adversarial proceeding. Permitting the agency to brief should be the absolute minimum a court would have to do to conduct a review in accordance with APA – remand to build a record would be more consistent with the APA's standard of judicial review and the interests underlying issue exhaustion, both pro and con.

[31] 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.