



Petitions for Rulemaking

Committee on Rulemaking

Proposed Recommendation | December 4-5, 2014

Proposed Amendments

This document displays manager’s amendments (with no marginal notes) and additional amendments from Conference members (with the source shown in the margin).

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 petitions

¹ 5 U.S.C. § 553(e). This provision ensures that the people’s right to petition the government, which is protected by the First Amendment, *see* U.S. Const. amend. I, is also an important part of the rulemaking process. Although certain matters are exempt from the requirements of 5 U.S.C. § 553, *see* U.S.C. § 553(a), the Administrative Conference has previously taken the position that public participation in agency rulemaking on these matters, including through petitions for rulemaking, may be beneficial. *See* Administrative Conference of the United States, Recommendation 86-6, *Petitions for Rulemaking*, 51 Fed. Reg. 46,988 n.2 (Dec. 30, 1986).

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.



9 for rulemaking are subject to judicial review, the “courts have properly limited their scope of
10 review in this context.”⁵

11 The Administrative Conference has previously recommended basic procedures to help
12 agencies meet the APA’s minimum requirements and respond promptly to petitions for
13 rulemaking.⁶ An Administrative Conference study of agency procedures and practices with
14 respect to petitions for rulemaking has revealed, however, that further improvement is
15 warranted.⁷ Nearly thirty years after the Administrative Conference first examined this issue,
16 few agencies have in place official procedures for accepting, processing, and responding to
17 petitions for rulemaking.⁸ How petitions are received and treated varies across—and even
18 within—agencies. In some cases, agency personnel do not even know what their agency’s
19 procedures are for handling petitions. Although the petitioning process can be a tool for
20 enhancing public engagement in rulemaking, in practice most petitions for rulemaking are filed

⁵ Administrative Conference of the United States, Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43,109 (Aug. 18, 1995). 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. *Nader v. FAA*, 440 F.2d 292, 294 (D.C. Cir. 1971); *WildEarth Guardians v. Salazar*, 741 F. Supp. 2d 89, 104 n.21 (D.D.C. 2012). In *Connecticut v. Daley*, a district court raised the “question whether the [agency] must 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.)).

⁶ See Administrative Conference of the United States, Recommendation 86-6, *Petitions for Rulemaking*, 51 Fed. Reg. 46,988 (Dec. 30, 1986); see also Administrative Conference 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.”).

⁷ See Jason A. Schwartz & Richard L. Revesz, *Petitions for Rulemaking*, [Draft-Final Report to the Administrative Conference of the United States \(Sept. 2-Nov. 5, 2014\)](http://www.acus.gov/report/petitions-rulemaking-draftfinal-report), available at <http://www.acus.gov/report/petitions-rulemaking-draftfinal-report>.

⁸ 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; others 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”).



21 by sophisticated, **repeat players stakeholders** and not by other interested members of the public.
22 **Some p**etitioners report that it can be difficult to learn the status of a previously filed petition,
23 agency communication throughout the process can be poor, response times can be slow, and
24 agency explanations for denials can be minimal and predominantly non-substantive.⁹

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

37 Greater transparency, improved communication between agencies and petitioners, and
38 more prompt and explanatory **denials of** petition **responses** may **do much help** to balance these
39 competing interests.¹⁰ Agencies should educate the public about how petitions fit with the other
40 (often more informal) mechanisms through which agencies receive feedback from regulated and
41 other interested persons on regulatory priorities and related issues. Petitioners and agency
42 personnel alike would also benefit from greater clarity as to how petitions can be filed, what
43 information should be included to make a petition more useful and easier for the agency to

⁹ See Schwartz & Revesz, *supra* note 7, at 40-64.

¹⁰ See generally *id.*



44 evaluate,¹¹ whether or when public comment will be invited, and how long it will may take to
45 resolve a petition. Better internal coordination may reduce the possibility that a petition will be
46 forgotten or will not reach the appropriate agency office for decision. Encouraging
47 communication between prospective or current petitioners and the agency can provide an
48 efficient way to improve the quality of petitions and the overall experience for all participants in
49 the process. Readily available information on the status of pending petitions and more prompt
50 disposition of petitions may ease tensions improve understanding between the agency and the
51 public and reduce the likelihood of litigation.

52 This recommendation seeks to ensure that the public’s right to petition is a meaningful
53 one, while still respecting the need for agencies to retain decisional autonomy. Building upon
54 the Administrative Conference’s previous work, it provides more guidance to agencies,
55 identifying best practices that may make the petitioning process more useful for agencies,
56 petitioners, and other members of the public. Moreover, electronic rulemaking dockets and
57 agency websites provide new opportunities for agencies to achieve these goals in a cost-effective
58 manner.¹² This recommendation should help agencies reevaluate and revise their existing
59 policies and procedures to make the petitioning process work better for all.

RECOMMENDATION

60 Agency Policy on Petitions for Rulemaking

61 1. Each agency that has rulemaking authority should have procedures, embodied in a
62 written and publicly available policy statement or procedural rule, explaining how the agency

¹¹ 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.

¹² See, e.g., Administrative Conference of the United States, Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2257, 2264-65 (Jan. 17, 2012).



63 receives, processes, and responds to petitions for rulemaking filed under the Administrative
64 Procedure Act.

65 (a) If an agency also has more specific regulations ~~governing that govern~~ petitions
66 filed under other statutes or that ~~are applicable~~ apply to specific sub-agencies, the
67 agency's procedures should cross-reference those regulations.

68 (b) If an agency rarely receives petitions for rulemaking, its procedures may simply
69 designate an agency contact who can provide guidance to prospective petitioners.

70 (c) The procedures should explain how petitions relate to the various other options
71 available to members of the public for informally engaging with agency personnel on the
72 need to issue, amend, or repeal rules.

73 2. The procedures should indicate how the agency will coordinate the consideration of
74 petitions with other processes and activities used to determine agency priorities, such as the
75 Unified Agenda and retrospective review of existing rules.

76 3. The procedures should explain what type of data, argumentation, and other
77 information make a petition more useful and easier for the agency to evaluate. ~~As appropriate,~~
78 ~~the~~ procedures should also identify any information that is statutorily required for the agency
79 to act on a petition.

80 **Receiving and Processing Petitions**

81 4. Agencies should accept the electronic submission of petitions, via email or through
82 Regulations.gov or their existing online docketing system.

83 5. Agencies should designate ~~a particular person or office to receive and distribute all~~
84 ~~petitions for rulemaking a single point of distribution~~ to ensure that each petition for rulemaking
85 is expeditiously directed to the appropriate agency personnel for consideration and disposition.
86 This designation may be especially important for agencies that have multiple regions or offices.



87 **Communicating with Petitioners**

88 6. Agencies should encourage and facilitate communication between agency personnel
89 and petitioners, both prior to submission and while petitions are pending disposition. For
90 example, agencies should consider asking petitioners to clarify requests or submit additional
91 information that will make the petition easier to evaluate. Agencies should consider also alerting
92 petitioners to recent developments that may warrant a petition’s modification or withdrawal.

93 7. Agencies should provide a way for petitioners and other interested persons to learn
94 the status of previously filed petitions. Agencies should:

- 95 (a) Use online dockets to allow the public to monitor the status of petitions; and
- 96 (b) Designate a single point of contact authorized to provide information about the
97 status of petitions.

98 **Soliciting Public Comment on Petitions**

99 8. Agencies should consider inviting public comment on petitions for rulemaking by
100 either:

101 (a) ~~Adopting a default rule that Soliciting public comment will be solicited~~ on all
102 petitions for rulemaking; or

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

- 106 (i) A petition addresses a question of policy or of general interest; or
- 107 (ii) Evaluating a petition’s merits may require the agency to consider
108 information the agency does not have, or the agency believes that the
109 information provided by the petitioner may be in dispute or is incomplete.

Commented [CMA1]: Siciliano Amendment



110 9. If an agency anticipates that it will consider but not respond to all comments on a
111 petition for rulemaking, it should say so in its request for comments.

112 **Responding to Petitions for Rulemaking**

113 10. ~~To the extent appropriate and feasible (considering, for example, agency resources~~
114 ~~and the volume of petitions filed), a~~ Agencies should provide a reasoned explanation of the merits
115 of each decision and should docket each decision with the petition to which it responds. Agencies
116 should not reflexively use denials that cite only resource constraints or competing priorities.

Commented [CMA2]: Herz Amendment

117 11. Agencies ~~should must~~ respond to petitions within a reasonable time. To that end,
118 each agency should ~~consider~~:

Commented [CMA3]: Herz Amendment

Commented [CMA4]: Siciliano Amendment

119 (a) Adopting in its procedures a commitment to responding to all petitions for
120 rulemaking within a stated period (e.g., within 6, 12, or 18 months of submission); and/or

Commented [CMA5]: Siciliano Amendment

121 (b) ~~Within a reasonable period of time after a petition for rulemaking has been filed,~~
122 ~~e~~Establishing and making publicly available an individual target timeline for responding
123 to ~~each that~~ petition ~~for rulemaking~~.

Commented [CMA6]: Morrison Amendment

Commented [CMA7]: Siciliano Amendment

124 12. If an agency is unable to ~~dispose of respond to~~ a petition by the target timeline it has
125 established, it should provide the petitioner and the public with a brief explanation for the delay,
126 along with a reasonable new target timeline. The explanation may include a request for new or
127 additional information if the agency believes ~~it would benefit from that or~~ the facts or
128 circumstances relevant to the petition may have changed while the petition was pending.

129 **Providing Information on Petitions for Rulemaking**

130 13. Agencies should maintain a summary chart listing all pending petitions, the date ~~they~~
131 ~~each was were~~ received, and the target timeline for disposition (where necessary, this should
132 include the brief explanation for any delay in disposition and the reasonable new target timeline).
133 The chart should be described in the agency's procedures (see ¶ 1) and made publicly available



134 on the agency's website. It should be updated at least semi-annually (to include information on
135 petitions that have been both filed and **disposed of/resolved** since the previous report).

136 14. The Office of Information and Regulatory Affairs should request that agencies include
137 in their annual regulatory plan information on petitions for rulemaking that have been resolved
138 during that year or are still pending.

139 **Using Electronic Tools to Improve the Petitioning Process**

140 15. Agencies should use available online platforms, including their websites and
141 Regulations.gov, to implement this recommendation as effectively and efficiently as possible,
142 including by informing the public about the petitioning process, facilitating the submission of
143 petitions, inviting public comment, providing status updates, improving the accessibility of
144 agency decisions on petitions, and annually providing information on petitions for rulemaking
145 that have been resolved or are still pending.