



## Petitions for Rulemaking

### Committee on Rulemaking

#### Proposed Recommendation | December 4-5, 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.”<sup>1</sup> 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,”<sup>2</sup> 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.”<sup>3</sup> 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.<sup>4</sup> Although agency denials of petitions  
9 for rulemaking are subject to judicial review, the “courts have properly limited their scope of  
10 review in this context.”<sup>5</sup>

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<sup>1</sup> 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).

<sup>2</sup> 5 U.S.C. § 555(b).

<sup>3</sup> 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.*

<sup>4</sup> *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.

<sup>5</sup> 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



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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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  
21 by sophisticated, repeat players and not by other interested members of the public. Petitioners  
22 report that it can be difficult to learn the status of a previously filed petition, agency  
23 communication throughout the process can be poor, response times can be slow, and agency  
24 explanations for denials can be minimal and predominantly non-substantive.<sup>9</sup>

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

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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.)).

<sup>6</sup> 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.”).

<sup>7</sup> 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>.

<sup>8</sup> 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”).

<sup>9</sup> See Schwartz & Revesz, *supra* note 7, at 40-64.



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 petitions may do much to balance these competing  
39 interests.<sup>10</sup> Agencies should educate the public about how petitions fit with the other (often  
40 more informal) mechanisms through which agencies receive feedback from regulated and other  
41 interested persons on regulatory priorities and related issues. Petitioners and agency personnel  
42 alike would also benefit from greater clarity as to how petitions can be filed, what information  
43 should be included to make a petition more useful and easier for the agency to evaluate,<sup>11</sup>  
44 whether or when public comment will be invited, and how long it will take to resolve a petition.  
45 Better internal coordination may reduce the possibility that a petition will be forgotten or will  
46 not reach the appropriate agency office for decision. Encouraging communication between  
47 prospective or current petitioners and the agency can provide an efficient way to improve the  
48 quality of petitions and the overall experience for all participants in the process. Readily available  
49 information on the status of pending petitions and more prompt disposition of petitions may  
50 ease tensions between the agency and the public and reduce the likelihood of litigation.

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<sup>10</sup> See generally *id.*

<sup>11</sup> 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           This recommendation seeks to ensure that the public’s right to petition is a meaningful  
52 one, while still respecting the need for agencies to retain decisional autonomy. Building upon  
53 the Administrative Conference’s previous work, it provides more guidance to agencies,  
54 identifying best practices that may make the petitioning process more useful for agencies,  
55 petitioners, and the public. Moreover, electronic rulemaking dockets and agency websites  
56 provide new opportunities for agencies to achieve these goals in a cost-effective manner.<sup>12</sup> This  
57 recommendation should help agencies reevaluate and revise their existing policies and  
58 procedures to make the petitioning process work better for all.

## RECOMMENDATION

### 59 **Agency Policy on Petitions for Rulemaking**

60           1. Each agency that has rulemaking authority should have procedures, embodied in a  
61 written and publicly available policy statement or procedural rule, explaining how the agency  
62 receives, processes, and responds to petitions for rulemaking filed under the Administrative  
63 Procedure Act.

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

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

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

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<sup>12</sup> 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).



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

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

79   **Receiving and Processing Petitions**

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

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

86   **Communicating with Petitioners**

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

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

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



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

97 **Soliciting Public Comment on Petitions**

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

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

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

105 (i) A petition addresses a question of policy or of general interest; or

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

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

111 **Responding to Petitions for Rulemaking**

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

116 11. Agencies should respond to petitions within a reasonable time. To that end, each  
117 agency should:



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

120 (b) Establish and make publicly available an individual target timeline for responding  
121 to each petition for rulemaking.

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

127 **Providing Information on Petitions for Rulemaking**

128 13. Agencies should maintain a summary chart listing all pending petitions, the date they  
129 were received, and the target timeline for disposition (where necessary, this should include the  
130 brief explanation for any delay in disposition and the reasonable new target timeline). The chart  
131 should be described in the agency's procedures (*see* ¶ 1) and made publicly available on the  
132 agency's website. It should be updated at least semi-annually (to include information on  
133 petitions that have been both filed and disposed of since the previous report).

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

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

138 15. Agencies should use available online platforms, including their websites and  
139 Regulations.gov, to implement this recommendation as effectively and efficiently as possible,  
140 including by informing the public about the petitioning process, facilitating the submission of  
141 petitions, inviting public comment, providing status updates, improving the accessibility of



- 142 agency decisions on petitions, and annually providing information on petitions for rulemaking
- 143 that have been resolved or are still pending.