



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Memorandum

To: Committee on Judicial Review
From: Stephanie Tatham, Staff Counsel
Date: April 13, 2015
Re: Draft Recommendation – Issue Exhaustion

The following draft recommendation is based on Special Counsel Jeffrey Lubbers’ report, “Fail to Comment at Your Own Risk: Does Exhaustion of Administrative Remedies Have a Place in Judicial Review of Rules” and was informed by the Committee’s discussion at its April 1, 2015 meeting. This draft is intended to facilitate the Committee’s discussion at its April 17, 2015 public meeting, and not to preempt Committee discussion and consideration of recommendations. In keeping with Conference practice, a draft preamble has also been included. The aim of the preamble is to explain the problem or issue the recommendation is designed to address, and the Committee should feel free to revise it as appropriate.

Issue Exhaustion in Preenforcement

Commented [BP1]: This term should be defined; we assume it means a challenge to a rule on its face and these recommendations do not apply to challenges based on individual enforcement action.

Judicial Review of Administrative Rulemaking

1 The requirement that parties exhaust their administrative remedies (“remedy exhaustion”)
2 is a familiar feature of U.S. administrative law. Remedy exhaustion bars a party from appealing
3 an agency action to a court until it exhausts prescribed avenues for relief before the agency.¹ ~~It~~
4 ~~ordinarily applies only~~ One type of issue exhaustion applies to administrative adjudications where
5 an agency has established a mandatory appeals process.² The related “issue exhaustion” doctrine
6 would bar a petitioner for judicial review from raising issues it had not raised before the agency in

Commented [BP2]: This characterization seems too limiting, see recommended change.

¹ Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938).

² Darby v. Cisneros, 509 U.S. 137 (1993).



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7 litigation, even if the petitioner had exhausted administrative remedies.³ As with remedy
8 exhaustion, the issue exhaustion doctrine arose in the context of agency adjudication.⁴

9 Congress required parties to raise objections before adjudicatory agencies in several
10 judicial review provisions adopted during the 1930s, prior to the advent of modern rulemaking
11 under the Administrative Procedure Act of 1946. Federal courts continue to enforce these
12 provisions today. The typical statute applies to agency adjudications, contains an exception for
13 “reasonable grounds” or “extraordinary circumstances,” and permits the court to require an agency
14 to take new evidence under certain conditions.⁵ Only two statutes were identified as explicitly
15 requiring issue exhaustion for review of agency rules—the Clean Air Act and the Securities
16 Exchange Act of 1934.⁶ Both provisions were adopted in the 1970s, when Congress enacted
17 numerous regulatory statutes with significant rulemaking provisions.⁷ Since that time, appellate
18 courts have increasingly applied issue exhaustion when reviewing agency rules.

19 Judicial application of the issue exhaustion doctrine is often prudential, particularly in
20 rulemaking cases. Courts reviewing agency adjudications have inferred support for application of
21 the issue exhaustion doctrine from remedy exhaustion statutes⁸ or from agency regulations

³ See, e.g., *FiberTower Spectrum Holdings, LLC v. Fed’l Comm. Comm’n*, No. 14-1039 slip. op. at 9 (D.C. Cir. Apr. 3, 2015) (“Because FiberTower failed to present its § 309(j)(4)(B) argument to the Commission, the Commission never had an opportunity to pass on it, and FiberTower thereby failed to exhaust its administrative remedies.”).

⁴ See JEFFREY S. LUBBERS, FAIL TO COMMENT AT YOUR OWN RISK: DOES EXHAUSTION OF ADMINISTRATIVE REMEDIES HAVE A PLACE IN JUDICIAL REVIEW OF RULES? at 2-3 (DRAFT April 10, 2015) (Report to the Administrative Conference of the U.S.) [hereinafter Lubbers Report].

⁵ E.g., 15 U.S.C. § 77i(a); 29 U.S.C. § 160(e); 42 U.S.C. § 1320a-8(d).

⁶ 42 U.S.C. § 7607(d)(7)(B); 15 U.S.C. § 78y(c)(1). Provisions governing agency “orders” have been held to apply to judicial review of rules. See discussion in *Citizens Awareness Network v. U.S.*, 391 F. 2d 338, 345-47 (1st Cir. 2004). See also *Investment Co. Inst. v. Bd. of Govs.*, 551 F.2d 1270, 1276-77 (D.C. Cir. 1977); *American Public Gas Ass’n v. Federal Power Comm’n*, 546 F.2d 983, 986-88 (D.C. Cir. 1976). Issue exhaustion may be enforced when rules are reviewed under these provisions. See, e.g., *ECEE, Inc. v. FERC*, 611 F.2d 554, 559-66 (5th Cir. 1980).

⁷ Lubbers Report at 13.

⁸ E.g., *Sola v. Holder*, 720 F.3d 1134, 1135 (9th Cir. 2013) (interpreting 8 U.S.C. § 1252(d)(1)—which states that “A court may review a final order only if — (1) the alien has exhausted all administrative remedies”—to require issue exhaustion).



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22 requiring issue exhaustion in administrative appeals.⁹ Courts have also imposed issue exhaustion
23 requirements in the absence of an underlying statute or regulation. However, questions about the
24 general applicability of the doctrine were raised by the Supreme Court’s decision in *Sims v. Apfel*,
25 which held that jurisprudential application of an issue exhaustion requirement was inappropriate
26 on review of the Social Security Administration’s non-adversarial agency adjudications.¹⁰ Lower
27 courts have inconsistently grasped this distinction, and scholars have since observed that issue
28 exhaustion “cases conspicuously lack discussion of whether, when, why, or how exhaustion
29 doctrine developed in the context of adjudication should be applied to rulemaking.”¹¹

30 Many of the justifications for application of the issue exhaustion doctrine in judicial review
31 of agency adjudicatory decisions apply squarely to review of rulemakings. The Supreme Court
32 has described the “general rule that courts should not topple over administrative decisions unless
33 the administrative body not only has erred but has erred against objection made at the time
34 appropriate under its practice” as one of “simple fairness.”¹² Issue exhaustion is said to promote
35 orderly procedure and good administration by offering the agency an opportunity to act on
36 objections to its proceedings.¹³ The argument for prudential application of the doctrine in
37 rulemaking is especially strong in challenges under an arbitrary and capricious standard of review,
38 such as to the factual basis or alternatives of a rule, where judicial evaluation of the reasonableness
39 of an agency’s action may depend heavily on what contentions were presented to the agency during
40 the rulemaking. Application of the doctrine in such cases spares courts from hearing issues that
41 could have been cured at the administrative level and avoids agency post hoc rationalizations. It

⁹ See *Sims v. Apfel*, 530 U.S. 103 (2000) (citing examples from the Fourth and Ninth Circuit Courts of Appeals).

¹⁰ *Id.* at 108-12 (“the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding”); see also *Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 626 (9th Cir. 2008) (declining to apply issue exhaustion in the inquisitorial ERISA context where a claimant was not notified of any issue exhaustion requirement).

¹¹ Lubbers Report, *supra* note 4 at 40 (citing PETER L. STRAUSS, ET AL., GELLHORN AND BYSE’S ADMINISTRATIVE LAW 1246 (10th ed. 2003)); see also William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since Darby*, 18 PACE ENVTL. L. REV. 1, 17 (2000) (“Unfortunately, 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.”).

¹² *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); see *Advocates for Hwy. & Auto Safety v. FMCSA*, 429 F.3d 1136, 1149 (D.C. Cir. 2005) (applying the same rationale to rulemaking).

¹³ *Id.*



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42 is also compelling in challenges to rulemakings of particular applicability or more formal
43 rulemakings, such as those that include a right to a hearing. Even in informal rulemakings, litigants
44 may have some responsibility to comment (if they are able) on a rule they seek to challenge prior
45 to its enforcement. This responsibility may be greater. Public comment may be especially
46 important where a rule is likely to involve complex procedures or highly technical issues, or to
47 impose substantial and immediate costs due to the need for prompt compliance.

Commented [BP3]: Not aware of any case law that excuses commenting simply because of an inability to do so. .

Commented [BP4]: Is there any existing case law that the type or complexity of a regulation imposes greater obligations to comment?

48 Conversely, agencies have an affirmative responsibility to adequately explain the basis and
49 purpose of the rule, and necessarily examine key assumptions and issues, as well as to raise and
50 decide issues that will affect persons who may not be represented in a rulemaking proceeding.
51 Many agencies have adopted extensive procedures for obtaining input on their rulemakings from
52 all interested stakeholders. The widespread use of Regulations.gov and other Internet- and social
53 media-based outlets for public involvement have made access to government rulemaking even
54 more widespread and accessible.¹⁴ While some have In addition, some judges have raised concerns
55 that application of the exhaustion doctrine to rulemakings could serve as a barrier to judicial review
56 for under-resourced non-participants in rulemaking.¹⁵ It may or that it may also induce rulemaking
57 participants to try to comment on every possible issue, resulting in voluminous administrative
58 records that raise further apprehensions regarding information overload or ossification of
59 rulemaking.¹⁶ there There is no lack of empirical evidence demonstrating that issue exhaustion
60 contributes to these potential problems. As noted above, many administrative agencies have taken
61 affirmative steps to address the former issue and have not generally experienced the latter.

Commented [BP5]: This should be tied to APA requirement to explain basis and purpose of the rule. The "key assumptions" doctrine has been applied by only a few courts and is a narrow one.

Commented [BP6]: It is problematic to imply here that an agency has an affirmative responsibility to raise and decide all possible issues that affected persons might find with a rule. Agencies will try to anticipate a rule's ramifications, but can't be held to predict all issues that people may see fit to raise. Notice and comment is the vehicle to bring issues to the agency's attention that it may not have considered.

Commented [BP7]: We wonder how widespread a concern this is beyond the remarks in this case, and whether it is judged difficult to monitor the Federal Register for rulemakings.

Commented [BP8]: The cited case does not support this point. In context, the note in *Bonneville* contends that arguments should not be waived if they were in fact considered by the agency, such that each commenter is not responsible for raising every issue. *Bonneville* does not claim that issue exhaustion itself will "induce rulemaking participants to try to comment on every possible issue."

¹⁴ See e.g. *Transparency in EPA's Operations*. Memorandum from Lisa P Jackson, Administrator to All EPA Employees (April 2009) ("In all its programs, EPA will provide for the fullest possible public participation in decision-making. This requires not only that EPA remain open and accessible to those representing all points of view, but also that EPA offices responsible for decisions take affirmative steps to solicit the views of those who will be affected by these decision. This includes [those]...who have been historically underrepresented in EPA decision-making.")

¹⁵ See *Koretov v. Vilsack*, 707 F.3d 394, 401 (2013) (Williams, J., concurring) ("Firms filling niche markets, for example, as appellants appear to be, may be ill-represented by broad industry groups and unlikely to be adequately lawyered-up at the rulemaking stage.")

¹⁶ See *Portland General Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 n. 13 (9th Cir. 2007) ("If we required each participant in a notice-and-comment proceeding to raise every issue or be barred from seeking judicial review of the agency's action, we would be sanctioning the unnecessary multiplication of comments and proceedings before the administrative agency. That would serve neither the agency nor the parties.")



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62 At the same time, the exhaustion doctrine also promotes active public participation in
63 rulemaking, provides a robust record for fully-informed agency decision-making and judicial
64 review, and provides certainty and finality to the rulemaking process. There is also a
65 concern~~counterargument~~ that, without issue exhaustion, agencies may feel the need to try to
66 anticipate new arguments in court that were not brought to their attention earlier, thus producing
67 equally problematic delays and overload for agencies. The Administrative Conference did not try
68 to resolve these competing claims—but the concerns do lend additional support for a careful
69 delineation of the circumstances in which issue exhaustion is most appropriately enforced on
70 review of agency rulemaking.

Commented [BP9]: We are unaware of any evidence that this is a problem. This is the status quo, and has not presented unworkable or practical obstacles at EPA in terms of considering all significant comments and completing rulemakings.

71 Even where statutes prescribe issue exhaustion, exceptions may exist. For example, the
72 Supreme Court recently held that the Clean Air Act’s statutory issue exhaustion provision was not
73 “jurisdictional.”¹⁷ And courts have relied on their equitable authority to read good cause
74 exceptions, such as those traditionally applicable in remedy exhaustion cases, into statutes where
75 they were lacking.¹⁸ Courts applying the issue exhaustion doctrine prudentially retain some
76 discretion to waive its application.¹⁹ The following Recommendation seeks to ~~offer~~ summarize
77 the case law guidance to the judiciary regarding when exceptions to application of the doctrine on
78 review of rulemaking might be appropriate, while recognizing that judicial application of the
79 doctrine is inherently discretionary and flexible where it is not statutorily compelled.

Commented [BP10]: Recommend adding language to clarify that these recommendations are not intended to alter established case law, but reflect the general principle that issue exhaustion is required, with the understanding that exhaustion may be excused in certain extraordinary circumstances. See change in paragraph below.

80 This Recommendation is limited to pre-enforcement review of agency rulemaking. The
81 passage of time and new entrants may complicate the inquiry in cases where a rule is challenged
82 in response to an agency enforcement action. Further, the Administrative Conference’s

¹⁷ 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. Fed. Motor Carrier Safety Admin.*, 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).

¹⁸ *Washington Ass’n for Television and Children v. FCC*, 712 F.2d 677, 681-82 (D.C. Cir. 1983).

¹⁹ *Id.* (“[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).



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83 recommendations do not take a position on whether Congress should enact new statutory issue
84 exhaustion requirements.

RECOMMENDATION

85 1. The principle of exhaustion, as applied to rulemaking, promotes active public
86 participation in rulemaking proceedings, creates orderly processes for resolution of important legal
87 and policy issues raised in rulemakings, ensures fully informed decisionmaking by administrative
88 agencies and a robust record for judicial review, and provides a certainty and finality to
89 rulemakings that conserves the resources of agencies, courts, and the regulated parties. If a party
90 has objections to a rule that it did not raise to the agency during the rulemaking proceeding, courts
91 should first consider whether the objections should be raised through a petition for reconsideration
92 or amendment of the rule. At the same time, there are important exceptions to the principle of
93 exhaustion that have been recognized by the courts. Courts should take care to ensure that they do
94 not uncritically extend issue exhaustion principles developed in the context of adversarial agency
95 adjudications to the frequently distinguishable context of rulemaking review.

96 2. As a general principle, courts should not resolve entertain issues the agency was not
97 given an opportunity to address during a rulemaking proceeding because no participant raised them
98 with sufficient precision, clarity, or emphasis. This is particularly true for challenges to the factual
99 support for the rule in the administrative record or to an agency's failure to exercise its discretion.
100 However, the case law demonstrates that judicial consideration of previously unstated objections
101 to a rule may be warranted under some circumstances: including where:

102 (a) The agency addressed the issue on its own initiative in the rulemaking proceeding or
103 in response to a comment submitted by another participant in the proceeding.

104 (b) The issue was so fundamental to the rulemaking proceeding rule's basis and purpose
105 that the agency can fairly be said to have known about the issue during the rulemaking
106 proceeding or the rule's basis and purpose that the agency had a responsibility to address it
107 regardless of whether any participant in the proceeding asked it to do so. This narrow
108 exception may include:

Commented [BP11]: Recommend starting with a statement that as a general matter, issue exhaustion does apply to judicial review of agency rules, for reasons of fairness, creating an orderly process and one with finality and certainty. Then continue with acknowledging that there are exceptions. Suggested language provided

Commented [BP12]: This does not harmonize with the language of the preamble, which states that "Many of the justifications for application of the issue exhaustion doctrine in judicial review of agency adjudicatory decisions apply squarely to review of rulemakings."

Commented [BP13]: Resolve seemed ambiguous in that it could be interpreted as the courts should remand so the agency can address the issue which would hinder finality of the administrative process.

Commented [BP14]: There is already several catchall provisions at the end.

Commented [BP15]: We are not sure what is intended to be covered by this clause or subsection (i) regarding "obligations of rulemaking procedure." What specifically are the obligations that a party should be able to challenge even where the party did not question the agency's handling of these procedures during the rulemaking?

Commented [BP16]: Assume this paragraph is meant to reflect the "key assumptions" case law, which is, in fact, rarely invoked and very limited. As written, however, this recommendation is overly vague/broad.

We cannot think of a situation in which these three "exceptions" are not already covered by existing administrative law.

Replace broadly worded provision with text intended to summarize key assumptions case law.



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- 109 i. ~~basic obligations of rulemaking procedure, such as requirements of the~~
110 ~~Administrative Procedure Act or the governing statute or regulations;~~
111 ii. ~~explicit or well established criteria prescribed by the agency's governing statute~~
112 ~~or regulations; or~~
113 ~~iii. i. key assumptions that were central to the rulemaking.~~

Commented [BP17]: See comment above; we are not sure what this is getting at. It may be covered already by (d)(ii)

Commented [BP18]: Similar comment here.

114 (c) ~~The agency expressly stated in the rulemaking proceeding, such as in the preamble to~~
115 ~~the proposal, that circumstances make it clear that the agency's established position on the~~
116 ~~issue would have made the issue would not be addressed in the rulemaking, thus raising~~
117 ~~the issue in the rulemaking proceeding would be futile. Futility should not, however, be~~
118 ~~lightly presumed.~~

Commented [BP19]: As originally worded, this clause on futility is problematic, in the agencies' view. The agency will always consider a different viewpoint urged by stakeholders during the rulemaking. It is hard to conceive of a position announced by the agency, however strongly, that a court could validly conclude would be unchangeable at the agency. Senior officials may always take a different position or view than the one the agency may have previously taken. We recommend eliminating this clause, or at the very least, editing as here.

119 (d) The challenging party ~~did~~ not ~~reasonably have been expected an opportunity to~~
120 raise the issue during the rulemaking proceeding, because:

- 121 i. ~~the final rule was not a logical outgrowth of the proposal, and as a result, the~~
122 ~~basis for the challenger's objection did not exist during the proceeding, such as~~
123 ~~issues arising from an unforeseeable variance between the proposed and final~~
124 ~~rule; or~~
125 ii. ~~the procedures used by the agency precluded otherwise created an impediment~~
126 ~~to raising the issue, such as where rules were promulgated without an~~
127 ~~opportunity for public participation; or~~
128 iii. ~~other circumstances have materially changed since the rule was issued.~~

Commented [WC20]: OK if limited to logical outgrowth case law

Commented [WC21]: "created an impediment" is very broad – might include simple cases like a failure to extend a comment period

Commented [BP22]: We thought this document is now limited to pre-enforcement review situation, thus this clause is not needed at all.

129 ~~(e) (e) Exceptional circumstances necessitate a strong public interest favors judicial~~
130 ~~resolution of the issue, such as when a central aspect of the rule is clearly unconstitutional~~
131 ~~or patently in excess of statutory authority. Such issues are likely purely legal in nature,~~
132 ~~so that the agency's perspective would not be entitled to significant deference or weight.~~
133 ~~Examples may include objections that the rule is:~~

Moreover, if circumstances have changed since the conclusion of the rulemaking that warrant a different rule, then the APA remedy is a petition to modify the rule. The change in circumstances should not be a license to challenge and potentially upset an entire established regulatory scheme years after a rule is issued. We are particularly concerned that this clause would allow parties to wait until some unspecified future time to challenge a rule, simply because their own circumstances have changed and the rule now affects them. This would dash the concepts of procedural orderliness and finality that the APA is designed to protect.

134 ~~(f) unconstitutional;~~

Commented [BP23]: This concern does not belong together with the rest of this paragraph, and at any rate it is captured by the catchall provision at the end.

135 ~~(g) patently in excess of the agency's statutory authority; or~~



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136 ~~(h)(e) in violation of an unambiguous statutory requirement.~~

137 ~~(f) other extraordinary circumstances excuse the failure to raise the objection in the~~
138 ~~rulemaking proceeding below.~~

139 3. Reviewing courts should allow litigants challenging rules to have a full opportunity to
140 demonstrate that they did in fact raise the issue first with the agency or that any of the above
141 circumstances—militating against application of the doctrine—are present.

142 4. Agencies should consider the foregoing when deciding whether to~~not~~ assert issue
143 exhaustion as a litigation defense ~~in the foregoing limited circumstances.~~

144 5. Agencies should be given an opportunity to defend the merits of a rulemaking against
145 new objections raised in the judicial review proceeding. ~~A remand to the agency may be~~
146 ~~appropriate where the new issue is capable of administrative resolution.~~

147 6. To the extent possible, statutory requirements for issue exhaustion should be construed
148 and applied in accordance with the foregoing recommendations.

149 7. If Congress adopts new statutory issue exhaustion requirements, it should include an
150 extraordinary circumstance ~~or reasonable grounds~~ exception.

Commented [BP24]: These all raise concerns, because we believe the agency should always be given a chance to get input and proceed in an informed manner, even on issues such as constitutional issues; the agency should have a chance to correct itself if necessary. Also, item (ii) is very problematic because EPA and other agencies routinely gets challenges that they have exceeded statutory authority, and often these are Chevron step 2 issues where the agency does get deference.

Commented [WC25]: Not clear if this is necessary given the previous paragraph, which is also a catchall

Commented [BP26]: These recommendations should not advise the agencies on which defenses to assert. Where the agency has a different view from the litigant that the circumstance does not exist that would waive issue exhaustion, the agency should be able to defend that.

Commented [WC27]: Unnecessary. A new issue should most often be addressed thru a petition for reconsideration or amendment of the rule, not thru a remand

Commented [WC28]: Not consistent with the foregoing set of recommendations.