Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking

Committee on Judicial Review

Proposed Recommendation | June 4, 2015

Comments of U.S. Environmental Protection Agency, U.S. Department of Homeland Security, U.S. Department of Justice, U.S. Department of Transportation, and U.S. Department of Agriculture (May 27, 2015)

The requirement that parties exhaust their administrative remedies ("remedy exhaustion") is a familiar feature of U.S. administrative law. This doctrine bars a party from appealing a final agency action to a court until it exhausts prescribed avenues for relief before the agency.[1] Remedy exhaustion ~~ordinarily applies~~ originally applied only to administrative adjudications where an agency has established a mandatory appeals process by regulation or statute.[2] The related but distinct concept of "issue exhaustion" ~~would~~ bars a ~~petitioner for judicial review~~ litigant from raising issues in court it had not raised before the agency, even if the petitioner had exhausted administrative remedies.[3] As with remedy exhaustion, the issue

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

[2] Darby v. Cisneros, 509 U.S. 137, 146 (1993) (holding that, "[w]hile federal courts may be free to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review, [5 U.S.C. § 704] [], by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates").

[3] *See, e.g.*, FiberTower Spectrum Holdings, LLC v. FCC, 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.")

exhaustion doctrine initially arose in the context of agency adjudications.[4] Unlike remedy exhaustion, however, issue exhaustion can be applied by courts reviewing agency rulemakings. It does not preclude consideration of ~~issues~~ specific objections that were raised by participants in the rulemaking other than the litigant.[5]

Congress expressly required parties to raise all their objections before adjudicatory agencies in several judicial review provisions adopted during the 1930s, prior to the advent of modern rulemaking under the Administrative Procedure Act of 1946. Federal courts continue to enforce these provisions today,[6] although they may not always be jurisdictional.[7] The typical statute applies to agency adjudications, contains an exception for "reasonable grounds" or "extraordinary circumstances," and permits the court to require an agency to take new evidence under certain conditions.[8] Only two statutes were identified as explicitly requiring issue exhaustion for review of agency rules—the Clean Air Act and the Securities Exchange Act of 1934.[9] Both provisions were adopted in the 1970s, when Congress enacted numerous regulatory

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[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] *See e.g.*, Portland General Elec. Co. v. Bonneville Power Admin., 501 F.3d 1009, 1024 (9th Cir. 2007).

[6] *E.g.*, Operative Plasterers' & Cement Masons' Int'l Ass'n v. NLRB, 547 Fed. Appx. 812 (9th Cir. 2013) (enforcing 29 U.S.C. § 160(e)); Hill v. FCC, 496 Fed. Appx. 396 (5th Cir. 2012) (applying 47 U.S.C. § 405).

[7] *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).

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

[9] 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.

statutes with significant rulemaking provisions.[10] Since that time, appellate courts have increasingly applied issue exhaustion when reviewing preenforcement challenges to agency rules.[11]

Judicial application of the issue exhaustion doctrine is often discretionary, particularly in rulemaking cases. Courts reviewing agency adjudications have inferred support for application of the issue exhaustion doctrine from remedy exhaustion statutes[12] or from agency regulations requiring issue exhaustion in administrative appeals.[13] Courts have also imposed issue exhaustion requirements in the absence of an underlying statute or regulation, such as in the Supreme Court's 1952 decision in *United States v. L.A. Tucker Truck Lines, Inc.*, which reviewed an adjudicative order issued by the Interstate Commerce Commission.[14] In this case, the Supreme Court described the "general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice" as one of "simple fairness."[15] It also said that issue

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Fed. 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).

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

[11] *E.g.*, 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); 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* Lubbers Report, *supra note* 4, at 26-30 (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).

[12] *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).

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

[14] 344 U.S. 33, 37 (1952).

[15] *Id.*; *see* Advocates for Hwy. & Auto Safety v. FMCSA, 429 F.3d 1136, 1149 (D.C. Cir. 2005) (applying the same rationale to rulemaking).

exhaustion promotes orderly procedure and good administration by offering the agency an opportunity to act on objections to its proceedings.[16]

However, questions about common law application of the doctrine were raised by the Supreme Court's more recent decision in *Sims v. Apfel*, which held that judicial application of an issue exhaustion requirement was inappropriate on review of the Social Security Administration's informal, non-adversarial adjudicatory benefit determinations.[17] While at least two appellate courts have continued to apply the doctrine on review of administrative rulemaking after considering *Sims*, courts have inconsistently adhered to this distinction.[18] Scholars have since observed that issue exhaustion "cases conspicuously lack discussion of whether, when, why, or how exhaustion doctrine developed in the context of adjudication should be applied to rulemaking."[19]

As set forth below, the Administrative Conference's research identified competing claims about the advisability of the doctrine. Its Recommendation urges courts to recognize that issue

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[16] *Id.*; *see also* Ctr. for Sustainable Econ. v. Sally Jewell, Civ. No. 12-1431, slip. op. at 22 (D.C. Cir. Mar. 6, 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.").

[17] *Sims*, 530 U.S. at 108-12 ("[T]he 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").

[18] *See* Advocates for Hwy. & Auto Safety v. FMCSA, 429 F.3d at 1148-49; Universal Health Servs., Inc. v. Thompson, 363 F.3d 1013, 1020 (9th Cir. 2004). *But see* Alaska Survival v. Surface Transp. Bd., 705 F.3d 1073 (9th Cir. 2013) (describing a Surface Transportation Board (STB) exemption as a rulemaking but applying the *Sims* rationale to it because "the STB's procedures were informal and provided no notice to interested parties that to later challenge the STB's decision one must submit comments during the exemption process.").

[19] 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* 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, and that that pattern itself may unfairly disadvantage parties that are generally not well represented by interest groups").

exhaustion principles developed in the context of adversarial agency adjudications may not always apply in the context of preenforcement review of rulemaking, but also recognizes that courts generally should not resolve issues litigants did not raise during the administrative rulemaking proceeding. It identifies circumstances where common law application of an issue exhaustion requirement may not be appropriate, and urges agencies to pursue an issue exhaustion defense in litigation only when they have a good faith belief that none of the exceptions would apply.

Regardless of whether an issue exhaustion requirement applies, the Conference believes that stakeholders and agencies typically benefit when issues are raised at the agency level prior to judicial review. It is advisable for participants in a rulemaking to raise even constitutional issues, which the Conference recommends should generally not be subject to an issue exhaustion requirement. In some cases, this will give the agency an opportunity to adjust its rule to eliminate the constitutional objection or at least to explain why its rule does not raise constitutional concerns.

Although the Administrative Conference recommends that statutes should, to the extent possible, be read to include the exceptions it sets forth in the Recommendation, it did not consider whether Congress should enact new statutory issue exhaustion requirements. The Recommendation is limited in scope to preenforcement review of agency rulemaking, where litigants seek direct review of a rule prior to its application to particular persons in enforcement proceedings.[20]

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[20] The passage of time and new entrants may complicate the inquiry in cases where a rule is challenged in response to an agency enforcement action. The Conference 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), *available at* www.acus.gov/82-7.

Support for an Issue Exhaustion Requirement in Preenforcement Review of Administrative Rulemaking

Many of the justifications for application of the issue exhaustion doctrine in judicial review of agency adjudicatory decisions apply squarely to review of rulemakings. Issue exhaustion is said to promote active public participation in rulemaking proceedings, create orderly processes for resolution of important legal and policy issues raised in rulemakings, ensure fully informed decisionmaking by administrative agencies and a robust record for judicial review, and provide a certainty and finality to rulemakings that conserves the resources of agencies, courts, and the regulated parties. There is also a concern that, without issue exhaustion, agencies may feel the need to try to anticipate new arguments in court that were not brought to their attention earlier, thus producing problematic delays and overburdening agencies.

The argument for judicial application of the doctrine in rulemaking may be especially strong in challenges under an arbitrary and capricious standard of review, such as where the challenge is to the factual basis of the rule or a claim is made that reasonable alternatives should have been adopted, or to an agency's failure to exercise its discretion in a particular manner. In those cases, judicial evaluation of the reasonableness of an agency's action may depend heavily on the administrative record or on contentions that were presented to the agency during the rulemaking. Application of the doctrine in such cases spares courts from hearing issues that could have been cured at the administrative level and reduces the need for agencies to create post-hoc rationalizations.

Judicial application of the issue exhaustion doctrine is arguably also compelling in challenges to rulemakings of particular applicability or more formal rulemakings, such as those that include a right to an evidentiary hearing. Even in informal rulemakings, potential commenters may have some responsibility to raise an issue that they may later invoke to

challenge the rule in court.[21] 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.[22] Moreover, the Administrative Procedure Act, 5 U.S.C. § 553(e), provides a procedural mechanism for addressing issues that were not presented to the agency during a rulemaking proceeding—the public's right to petition agencies for amendment or repeal of rules. Additionally, several statutes containing issue exhaustion requirements, including the Clean Air Act and the Federal Communications Act, specifically provide for an agency reconsideration process.[23]

Concerns with an Issue Exhaustion Requirement in Preenforcement Review of Administrative Rulemaking

Nonetheless, some scholars and practitioners argue that courts should not uncritically apply issue exhaustion principles developed in the context of adversarial agency adjudications to the distinguishable context of rulemaking.[24] They query whether judicial precedent that fails to make such distinctions strongly supports general application of the doctrine in judicial review of

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[21] *See Koretoff*, 707 F.3d at 401 (Williams, J., concurring) (commenting that "[g]enerally speaking, then, the price for a ticket to facial review is to raise objections in the rulemaking").

[22] *See, e.g.,* Transparency in EPA's Operations, Memorandum from Lisa P. Jackson, Administrator to All EPA Employees (Apr. 2009); *see also* Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking* (Dec. 5, 2013), *available at* www.acus.gov/2013-5; *see also* 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.

[23] *E.g.,* 42 U.S.C. 7607(d)(7)(B); 47 U.S.C. 405(a).

[24] *See* William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since* Darby, 18 PACE ENVTL. L. REV. 1, 17 (2000) (offering examples to support the argument that "[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").

administrative rulemaking. Critics of a prudential issue exhaustion requirement also cite the presumption of reviewability for final agency actions established by Administrative Procedure Act.[25] Some would go so far as to say that issue exhaustion should generally not apply in the absence of an authorizing statute, particularly in light of the high level of deference given to agencies on judicial review.

Those who are wary of generally applying the doctrine in review of administrative rulemaking also offer some policy arguments against its application. They point out that administrative agencies have an affirmative responsibility in rulemaking proceedings to adequately explain the basis and purpose of the rule, and to necessarily raise and decide issues that will affect persons who may not be represented. Some fear that overbroad application of the doctrine to rulemakings could serve as a barrier to judicial review for persons or firms whose interests are not in close alignment with those persons or firms dominating the associations representing group viewpoints and who reasonably do not find it worthwhile to engage in continuous monitoring of the agency in question.[26]

There is also a concern that issue exhaustion requirements may induce rulemaking participants to try to comment on every possible issue, or to save their comments for the last minute.[27] Some scholars fear that issue exhaustion requirements import the threat of litigation into administrative rulemakings, resulting in voluminous administrative records that raise further apprehensions regarding information overload or regulatory ossification.[28] Although some

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[25] 5 U.S.C. §§ 702, 704.

[26] *Koretoff*, 707 F.3d at 401 (Williams, J., concurring).

[27] *See* Lubbers Report, *supra* note 4, at 38-40.

[28] *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1363-64 (2010).

degree of foresight may fairly be expected, stakeholders may not be able to predict and comment on every contingency.

Exceptions

Both sides agree that, even where statutes prescribe issue exhaustion, the case law recognizes certain exceptions.[29] ~~For example~~Specifically, courts have relied on their equitable authority to read extraordinary circumstances exceptions, such as those traditionally applicable in remedy exhaustion cases, into statutes where they were lacking.[30] The Conference recognizes that courts applying the issue exhaustion doctrine prudentially retain some discretion to waive its application.[31] The following Recommendation seeks to offer guidance to the judiciary and agencies regarding when exceptions to application of the doctrine in review of administrative rulemaking may be appropriate. Because statutory issue exhaustion requirements are delimited by Congress, this Recommendation is only applicable to prudential issue exhaustion requirements.

RECOMMENDATION

1. Courts should recognize that issue exhaustion principles developed in the context of adversarial agency adjudications may not always apply in the context of preenforcement rulemaking review.

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[29] Washington Ass'n for Television and Children 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).

[30] *Id.* (collecting cases); *see generally* Lubbers Report, *supra* note 4.

[31] When a court declines to apply issue exhaustion principles to preclude review of new issues, the agency must be given an opportunity to respond to that issue on the merits. 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.

2. As a general principle, in preenforcement review of administrative rulemaking, courts should not resolve issues that were not raised with sufficient specificity in the rulemaking proceeding to give the agency an opportunity to address them. This is particularly true for challenges to the factual support for the rule in the administrative record or to an agency's failure to exercise its discretion in a particular manner.

3. Issue exhaustion should not preclude consideration of issues that were raised with sufficient specificity in the rulemaking proceeding by the petitioner or any other participant.

4. Except where a statute directs otherwise, judicial consideration of previously unstated objections in an administrative rulemaking proceeding may be warranted, for example, under the following circumstances:

(a) The agency, on its own initiative, addressed the ~~issue~~ litigant's specific objection in the rulemaking proceeding.

(b) Extraordinary circumstances excuse the failure to raise the objection in the rulemaking proceeding. Such extraordinary circumstances include the following:

~~(b)~~ i. The issue was so fundamental to the rulemaking proceeding or the rule's basis and purpose that the agency had a responsibility to address it. This is a narrow exception that applies only where the issue is related to matters of such central relevance to the rule and is so serious that the agency might have significantly changed its rule if it had considered the issue. ~~may include:~~

~~i. basic obligations of rulemaking procedure, such as well-recognized requirements of the Administrative Procedure Act or other government-wide procedural statutes, governing statutes, or regulations; or~~

~~ii. unambiguous limitations on the agency's statutory authority; or~~

~~iii. explicit or well-established substantive criteria or requirements prescribed by applicable statutes or regulations.~~

~~(c)~~ ii. The agency specifically stated that it would not entertain comments on or objections to a particular issue that is of central relevance to the rule; therefore, raising the issue during the rulemaking proceeding would have been futile. ~~The litigant has demonstrated that the agency's established position on the issue would have made raising the issue in the rulemaking proceeding futile. Futility should not be lightly presumed.~~

~~(d)~~ iii. The issue could not have been raised during the rulemaking proceeding~~,~~ ~~such as~~ because the procedures used by the agency precluded it.

~~(e)~~ (c) ~~This issue is~~ Extraordinary circumstances excuse the failure to raise an objection that the rule violates the U.S. Constitution~~.~~

~~(f)~~ (d) Other extraordinary circumstances excuse the failure to raise the objection in the rulemaking proceeding.

5. ~~Agencies should consider the foregoing circumstances when deciding whether to assert issue exhaustion as a litigation defense.~~

6. Reviewing courts should allow litigants challenging administrative rulemakings to have a full opportunity to demonstrate that they did in fact raise an issue first with the agency or that any of the above circumstances—militating against application of the issue exhaustion doctrine—are present.

7. Agencies should be given an opportunity to defend the merits of a rulemaking against new objections raised in the judicial review proceeding.

8. ~~To the extent possible, statutory requirements for issue exhaustion should be construed and applied in accordance with the foregoing recommendations.~~ New statutory issue exhaustion requirements for rulemaking, if any, should also adhere to these recommendations.