



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 27 2015

Chairman Paul Verkuil
Administrative Conference of the United States
1120 20th St NW, Suite 706 South
Washington, DC 20036

OFFICE OF
GENERAL COUNSEL

Re: Comments from Federal Agencies on “Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking”

Dear Chairman Verkuil,

Thank you for the opportunity to comment on the draft Recommendation of the Committee on Judicial Review entitled “Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking.” This is a topic of considerable interest to federal agencies, such as ours, that regularly engage in rulemaking to carry out our statutory programs.

Judicial review of agency actions is an indispensable part of U.S. governance and one of the accountability mechanisms for which the United States is justly celebrated around the world. Similarly celebrated is our robust public participation process and the elegant dialogue between agencies and the public to resolve policy differences and to develop regulatory outcomes that maximize the public interest among competing points of view.

We understand and appreciate the work of the Consultant and the Committee on Judicial Review regarding Issue Exhaustion. Even though regulatory agencies rely on the comments of an engaged and opinionated citizenry in order to make wise decisions, we recognize that there are extraordinary circumstances where there are true barriers to participation. For example, in recognition of these barriers with regard to Tribal communities, Executive Order 13175 mandates consultation with Indian Tribes when agencies develop regulations with Tribal implications. But in our view, the draft Recommendations go too far in exposing agencies to objections raised for the first time in litigation.

Therefore, the undersigned five federal agencies submit this letter to express our significant concerns with a number of the draft Recommendation’s provisions. These agencies are the U.S. Environmental Protection Agency, the U.S. Department of Homeland Security, the U.S. Department of Justice, the U.S. Department of Transportation, and the U.S. Department of Agriculture. We also propose the attached line edits to the draft Recommendation, for which we request discussion during the June 4 Plenary.

In addition to these five federal agencies, we also submit this letter and these proposed edits on behalf of a sixth agency, the U.S. Department of Commerce, whose ACUS Government Member (cc’d below) has asked us to convey the Department’s general support for the positions taken in the attached comments.

Summary of Our Comments

Our concerns about the draft Recommendation go to the heart of agency rulemaking procedures. In our view, the draft Recommendation as written would, among other things:

- compromise the integrity of the notice and comment process by rewarding litigants who choose (under fairly broad circumstances) not to raise objections to agencies during the comment period;
- impair -- rather than promote -- citizen-agency dialogue during the rulemaking process, which is a hallmark of the American system of administrative law;
- foster unfairness and inefficiency, by denying agencies the opportunity to consider and address objections or mistakes before promulgating a rule; and
- impair judicial economy, by expecting courts to adjudicate factual or legal issues for the first time in litigation, without the benefit of the agencies' considered judgment and without a robust administrative record.

Indeed, our comments are guided by ACUS' statutory purpose, which include responsibilities to:

- (1) Develop recommendations so that "private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest";
- (2) "promote more effective public participation and efficiency in the rulemaking process"; and
- (3) "reduce unnecessary litigation in the regulatory process."

5 U.S.C. § 591(1)-(3).

Our line edits are designed to promote fairness, efficiency and economy for all concerned and to advance ACUS's purpose and values. In our view, the draft Recommendation falls short of these important goals. Our line edits are also designed to align the draft Recommendation with the case law, which countenances exceptions to issue exhaustion only under extraordinary circumstances. In short, based on our study of the Consultant's report and our observation of Committee proceedings, we do not perceive a problem that warrants the disruptive remedy offered in the current draft Recommendation.

Conclusion

We appreciate the extensive research and analysis performed by the Consultant and the Committee on Judicial Review. The work of the Consultant and the Committee helpfully clarifies the history and modern application by courts of the issue exhaustion doctrine in judicial

review of rulemaking. In our line edits, we suggest revisions to the draft Recommendation that we believe would better reflect the presumption of issue exhaustion in the context of rulemakings and the narrowness of any judicial exceptions. We believe our suggested revisions would also better honor the core administrative law values animating ACUS.

Thank you for considering these comments. We look forward to discussing them at the upcoming Plenary.

Sincerely,



Carol Ann Siciliano
Government Member
U.S. Environmental Protection Agency

Christina E. McDonald
Government Member
U.S. Department of Homeland Security

Elena J. Tyrangiel
Government Member
U.S. Department of Justice

Kathryn B. Thomson
Government Member
U.S. Department of Transportation

Carrie F. Ricci
Government Member
U.S. Department of Agriculture

Attachment

Cc: Justin S. Antonipillai
Government Member
U.S. Department of Commerce

Ronald M. Levin, Chair, Committee on Judicial Review
Shawne McGibbon, General Counsel, ACUS
David Pritzker, Deputy General Counsel, ACUS
Stephanie Tatham, ACUS
Emily Bremer, ACUS
Professor Jeffrey Lubbers, American University Washington College of Law