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Exhaustion Doctrine Should Not Be a Doctrine with Exceptions

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THE EXHAUSTION DOCTRINE SHOULD NOT BE A DOCTRINE WITH EXCEPTIONS

I. INTRODUCTION

> The retention of discretion in the application of the rule [requiring exhaustion of administrative remedies] constitutes a continuing invitation to litigation. It is this factor more than any other, which has resulted in an incrustation of case-law about an essentially simple rule. Were the exhaustion requirement rigorously applied in each instance, much of this wasteful litigation would soon be

cut off at the source.[1]

Sixty-two years later, these words cannot be more true. Since the time this statement was written, the doctrine of exhaustion of administrative remedies has continued to be plagued with difficulty in its application. Courts still struggle with when and how the doctrine should be applied.

The exhaustion doctrine forbids a plaintiff from filing an action for judicial review before going through the appropriate administrative process.[2] If Congress has not clearly provided for exhaustion, courts have discretion in determining whether to require parties to exhaust administrative remedies before allowing judicial review.[3] To make such a determination, courts look to the policies underlying the exhaustion doctrine as well as the congressional intent behind the applicable statute.[4] This process becomes flawed when courts try to apply the many court-made exceptions to the doctrine. In two recent opinions from the United States District Court for the Southern District of West Virginia, Judges Haden and Chambers have held that plaintiffs need not exhaust their administrative remedies when they seek relief under the citizen suit provision of the Surface Mining and Reclamation Act.[5] Both of these cases demonstrate the struggle trial courts have in determining whether to require a plaintiff to exhaust their administrative remedies before seeking judicial review.

The first part of this note examines the principles behind the exhaustion doctrine and the court made exceptions to the doctrine. As will be discussed, these exceptions create the inconsistent application of the doctrine. Part two looks at how courts apply those exceptions when Congress has not clearly articulated an exhaustion requirement.

II. THE EXHAUSTION DOCTRINE

There are several ways individuals may participate in the administrative process. One way is to challenge proposed rules and regulations during the agency rulemaking process.[6] Another is to ask the agency to hold a hearing on the

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1 Raoul Berger, *Exhaustion of Administrative Remedies*, 48 YALE L. J. 981, 1006 (1938).

2 *See* McKart v. U.S., 395 U.S. 185, 193 (1969).

3 *See* McCarthy v. Madigan, 503 U.S. 140, 144 (1992).

4 *See* Patsy v. Board of Regents of Florida, 457 U.S. 496, 501-502 (1982).

5 *See* 30 U.S.C. § 1270 (2000). *See also* Bragg v. Robertson, No. 2:98-0636, 1998 U.S. Dist. LEXIS 22077 (S.D. W. Va. October 9, 1998); Ohio River Valley Envtl. Coalition v. Castle, No. 3:00-0058 (S.D. W. Va. May 1, 2000) (order denying motion to dismiss for lack of subject matter jurisdiction).

6 *See* Marcia P. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 6 (1984). Agency rulemaking refers to the formal process where individuals are given notice and opportunity to submit information regarding a proposed rule which the agency then considers in promulgating a final rule. *See generally* 5 U.S.C. §553.

contested issue.[7] If the individual is not satisfied with the decision of the agency at the hearing level, the individual may appeal to an appellate body within the agency.[8]

A. Early Decisions That Shaped the Exhaustion Doctrine

The exhaustion doctrine is a creation of the judiciary applied to cases that involve administrative process.[9] The doctrine grew out of several cases in which plaintiffs sought equitable relief.[10] Some of these cases contained language similar to the underlying principles that now provide the foundation for the exhaustion doctrine. For example, the Supreme Court, in *Federal Trade Commission v. Claire Furnace Co.*,[11] denied plaintiffs the right to an injunction because there was an adequate right to appeal through the administrative process. This case involved the Federal Trade Commission's ("FTC") issuance of an order requiring a number of companies in coal, steel, and related industries to file documents related to their business.[12] The companies did not comply with the order but instead filed suit in district court seeking an injunction to stop the FTC from enforcing the order.[13] The Court noted that orders issued by the FTC are subject to review by the Attorney General and once he acts, the companies have the opportunity to contest the legality of any proceeding against them.[14] Because this right is adequate, the companies were not entitled to an injunction and therefore would have to challenge the FTC's order through the administrative process before seeking judicial review.[15]

Another early case is *Lawrence v. St. Louis-San Francisco Ry. Co.*[16] where

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7 *See* Gelpe, *supra* note 6, at 5.

8 *See* Gelpe, *supra* note 6, at 6.

9 *See* McKart v. United States, 395 U.S. 185, 193 (1969).

10 *See* United States v. Sing Tuck, 194 U.S. 161 (1904) (The statutes regarding citizenship provide "a mode of procedure which must be followed before there can be a resort to the courts."); Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908); United States v. Abilene & S. Ry. Co., 265 U.S. 274 (1924); United States v. Illinois Cent. R. Co., 291 U.S. 457 (1934) (The statute provided steps to be taken which "constitute parts of the administrative process which must be completed before the extraordinary powers of a court of equity may be invoked."); Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300 (1937). One article commented that the exhaustion doctrine was shaped by "the need for orderly procedure, the requirements of comity, and the tendency to assimilate the doctrine to the rule that a litigant has no standing in equity where he has an adequate remedy at law." Berger, *supra* note 1, at 983.

11 274 U.S. 160 (1927).

12 *See id.*

13 *See id.*

14 *See id.* at 173. The Court also recognized that this process of allowing the Attorney General to review the Trade Commission's orders provided a "sifting out of the mass of inquiries" which would relieve the courts and prevent unnecessary deliberation on these issues. *Id.*

15 *See id.*

16 274 U.S. 588 (1927).

the Supreme Court referred to "irreparable injury,"[17] an exception to the current exhaustion doctrine.[18] This case concerned the validity of a state statute that gave the state's Corporation Commission authority to remove certain railway stations.[19] Citizens against the removal filed a motion with the Commission requesting a hearing on the decision to remove a station in their town.[20] Before the Commission could hold a hearing, the railway brought suit seeking injunctive relief to prohibit the Commission from compelling the railway to submit to the jurisdiction of the Commission.[21] The court entered an injunction that prohibited the Commission from taking any action on the citizens' motion.[22] The Supreme Court reversed the lower court's order finding that there was no evidence that the railway would suffer irreparable injury by submitting to the administrative process, as a prerequisite to issuing an injunction.[23]

The Supreme Court in *Myers v. Bethlehem Shipbuilding*[24] for the first time formally referred to the rule requiring exhaustion. *Myers* involved a challenge to the National Labor Relations Board's ("NLRB") authority to hold a hearing on whether an employer was engaged in unfair labor practices.[25] Upon an allegation that the company was engaging in unfair labor practices, the NLRB filed a complaint against Bethlehem Shipbuilding and notified the company that the matter had been set for a hearing.[26] Bethlehem filed two bills of equity in district court seeking temporary and permanent injunctive relief to prohibit the NLRB from holding the hearing.[27] The First Circuit Court of Appeals held that the district court had jurisdiction to grant the requested injunction.[28] The NLRB then appealed to the Supreme Court.[29]

Justice Brandeis delivered the opinion of the Court in which he stated "the long-settled rule of judicial administration [is] that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed *administrative remedy*

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17 *Id.*

18 *See infra* Part II.C.5.

19 *See Lawrence*, 274 U.S. at 590.

20 *See id.*

21 *See id.*

22 *See id.*

23 *See id.* at 592.

24 303 U.S. 41 (1938).

25 *See id.*

26 *See id.*

27 *See id.*

28 *See id.* The Supreme Court noted that at the time the First Circuit determined it had jurisdiction over the issue, every other circuit court had held to the contrary. *See id.* at 44.

29 *See Myers*, 303 U.S. at 41.

has been exhausted."[30] Although the rule had never been stated in such a fashion, Justice Brandeis cited a long list of equity opinions in which he stated the rule had been most frequently applied.[31] Justice Brandeis went further stating that "the rules requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless or that the . . . prescribed administrative hearing would result in irreparable damage."[32]

Although Justice Brandeis's opinion in *Myers* seemed to say that exhaustion requirements are to be universally applied,[33] the rule has since been modified to allow judicial discretion.[34] Exhaustion requirements are controlled by congressional intent.[35] If Congress has not clearly required exhaustion in legislation, courts must use their discretion in determining whether exhaustion should apply.[36] "In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion."[37] This balancing is done by looking at the policies underlying exhaustion and the congressional intent behind the applicable statute.[38] However, the Supreme Court "has long acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts."[39]

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30 *Id.* at 50-51 (emphasis added).

31 *See id.* at 51 n.9. *See, e.g.*, Pittsburgh Ry. v. Board of Pub. Works, 172 U.S. 32 (1898); Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908); Dalton v. State Corp. Comm'n, 236 U.S. 699 (1915); Gorham Mfg. Co. v. State Tax Comm'n, 266 U.S. 265 (1924); Federal Trade Comm'n v. Claire Furnace Co., 274 U.S. 160 (1927); Lawrence v. St. Louis-San Francisco Ry. Co., 274 U.S. 588 (1927); Chicago, M., St. P. & R.R. Co. v. Risty, 276 U.S. 567 (1928); St. Louis-San Francisco Ry. Co. v. Alabama Pub. Serv. Comm'n, 279 U.S. 560 (1929); Porter v. Investors' Syndicate, 286 U.S. 461 (1932); U.S. v. Illinois Central Ry. Co., 291 U.S. 457 (1934); Hegeman Farms Corp. v. Baldwin, 293 U.S. 163 (1934). In the same footnote, Justice Brandeis noted that "because the rule is one of judicial administration - - not merely a rule governing the exercise of discretion - - it is applicable to proceedings at law as well as suits in equity." *Meyers*, 303 U.S. at 51 n.9. Thus began the doctrine's use in cases not only involving cases in equity but also in cases containing issues of law.

32 *Id.*

33 *See id.*

34 *See* McKart v. U.S., 395 U.S. 185, 193 (1969); McCarthy v. Madigan, 503 U.S. 140, 144 (1992).

35 Patsy v. Board of Regents of Florida, 457 U.S. 496, 501-502 (1982).

36 *See McCarthy*, 503 U.S. at 193. Judicial discretion does not apply to cases brought pursuant to the Administrative Procedures Act because of the Supreme Court's decision in Darby v. Cisneros, 509 U.S. 137 (1993). In *Darby* the Court held that "with respect to actions brought under the APA, Congress effectively codified the doctrine of exhaustion of administrative remedies." *Id.* at 153. The Court also noted that judicial discretion still governs cases not governed by the APA. *Id.* at 153-154.

37 Volvo v. United States, 118 F.3d 205, 209 (4th Cir. 1997).

38 *See Patsy*, 457 U.S. at 502.

39 *McCarthy*, 503 U.S. at 145.

B. Policies Favoring Exhaustion of Administrative Remedies

Policies favoring exhaustion can be broken into four general categories.[40] The first two categories concern administrative interests. These include agency autonomy and allowing the agency to apply its expertise to the issue.[41] The second two categories involve judicial interests. These include promoting judicial economy and aiding judicial review.[42] The Supreme Court summed up the policies behind the exhaustion doctrine best when it stated:

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.[43]

1. Agency Autonomy

The exhaustion doctrine respects administrative autonomy by allowing the agency to resolve an issue without involving the courts. The exhaustion doctrine recognizes that agencies, not courts, should have the primary responsibility for the programs which Congress has charged them to administer.[44] This view reinforces the notion that agencies are separate entities vested with powers and duties in which courts should not interfere until the agency has completed its action or

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40 According to Professor Davis, a well respected authority on administrative law, there are six policies favoring exhaustion: (1) an agency is created for the purpose of applying a statutory scheme to particular factual situations by developing facts, applying its expertise, and exercising discretion, (2) allowing the agency to perform its functions without interruption is more efficient than permitting judicial intervention at each phase, (3) agency autonomy, (4) judicial review is aided by allowing the agency to develop the facts of a particular case, (5) the agency is allowed to correct its own mistakes so that court appeals may be reduced, (6) Finally, without requiring exhaustion parties may be encouraged to circumvent the process which would reduce the efficiency of the agency. KENNETH CULP DAVIS AND RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE §15.2, at 309 (3d ed. 1994).

41 *See* Gelpe, *supra* note 6, at 10-11.

42 *See* Gelpe, *supra* note 6, at 11.

43 Far Eastern Conference v. United States, 342 U.S. 570, 574-575 (1952).

44 *See McCarthy*, 503 U.S. at 145. *See also* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

clearly exceeded its jurisdiction.[45] Therefore, courts should not undercut the agency's authority by stepping into actions that should properly be resolved through the administrative process.[46] Agency autonomy is particularly important where the agency has been vested with certain discretionary powers.[47]

2. Agency Expertise

Exhaustion also allows the administrative agency "to act within the sphere of its special competence, to apply its expertise, and to correct its own errors."[48] Congress delegates to agencies the power to oversee special areas in which the agency has special knowledge. By requiring individuals to exhaust their administrative remedies, agencies may apply this knowledge and expertise.

For example, the Circuit Court of Appeals for the District of Columbia supported this policy by applying agency expertise when it upheld a district court ruling that plaintiffs must exhaust administrative remedies when seeking tribal recognition from the Department of Interior.[49] The court reasoned that the Department of Interior had established a division composed of historians, anthropologists and genealogists to determine whether groups seeking tribal recognition actually constituted Indian tribes and that the special division had reviewed numerous petitions and had gained much experience in this area.[50]

The court examined a prior ruling by the First Circuit Court of Appeals in a similar case where that court held that individuals seeking tribal recognition need not defer to administrative expertise.[51] The D.C. Circuit, however, noted that at the time of the prior decision, the Department of Interior had not instituted final regulations nor developed any special expertise in the area.[52] Since the agency had subsequently developed expertise on the issue, the agency should be given the opportunity to apply its expertise before courts would grant review.[53]

Allowing agencies to apply their expertise also allows them to correct their own mistakes.[54] "When an agency has the opportunity to correct its own errors, a

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45 *See* McKart v. U.S., 395 U.S. 185, 193 (1969).

46 *See id.* "[F]requent and deliberate flouting of administrative process could weaken the effectiveness of an agency by encouraging people to ignore its procedures." *Id.*

47 *See id.* at 194. *See also* JAFFE, *supra* note 44, at 425.

48 Mullins Coal Co. v. Clark, 759 F.2d 1142, 1145 (4th Cir. 1985). *See also* Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645, 654 (1973) (stating "[t]hreshold questions within the particular expertise of an administrative agency are appropriately routed to the agency, while the court stays its hand.").

49 *See* James v. U.S. Dep't of Health and Human Serv., 824 F.2d 1132, 1139 (D.C. Cir. 1987).

50 *See id.* at 1138.

51 *See id.*

52 *See id.* (*citing* Mashpee v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979)).

53 *See id.*

54 *See* McKart v. United States, 395 U.S. 185, 195 (1969).

judicial controversy may well be mooted, or at least piecemeal appeals may be avoided."[55] If citizens were allowed to go directly to federal court without affording agencies an opportunity to correct mistakes, there would be premature interference with the agency's process which could prevent the agency from operating efficiently in the long term.[56]

There are several advantages to allowing agencies to correct their own mistakes. First, self-correction promotes public faith in the agency.[57] This is important because of the agency's regulatory role. If citizens do not believe that the agency can reach correct decisions, then they will not want to put their trust into the administrative process.[58] Second, exhaustion provides the benefits of obtaining less expensive administrative relief rather than relying on more expensive judicial relief.[59] Finally, self-correction causes the agency to be better informed as to how its own decisions affect citizens.[60]

3. Judicial Economy

The exhaustion doctrine also promotes judicial economy because the controversy is left with the agency and not taken to court.[61] If the complainant gets a satisfactory decision with the agency process, then the issue is resolved.[62] Conversely, if the complainant is not satisfied with the agency's decision, then the court gets the benefit of the agency's record and factual findings.[63] Courts will generally defer to the agency's findings of fact, as well as the agency's decision if administrative exhaustion is followed.[64] This leads to more accurate decisions by upholding the application of the agency's expertise especially to complex factual issues.[65]

4. Judicial Review

Exhaustion aids judicial review because the agency, through the

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55 *See id.*

56 *See id.* at 193-194.

57 *See* Gelpe, *supra* note 6, at 16.

58 *See id.*

59 *See id.*

60 *See McKart*, 395 U.S. at 195.

61 *See id.*

62 *See id.*

63 *See id.* at 195.

64 *See* Gelpe, *supra* note 6, at 12.

65 *See id.* at 22.

administrative process, will have developed a record for the court to review.[66] To that end, agencies serve as factfinders.[67] Some would argue that without the exhaustion requirement some disputes might result in an incomplete factual record.[68] This is even more likely to occur in situations involving complex factual determinations or where the dispute involves the agency's special expertise.[69] Further, the agency's experts can review the material more efficiently and can evaluate the information more accurately than courts because of agency expertise in the subject matter.[70]

C. *Exceptions to the Exhaustion Doctrine*

Although exhaustion of administrative remedies is generally preferred, there are exceptions to the doctrine. In *McCarthy v. Madigan*, the Supreme Court recognized three circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion.[71] McCarthy was a federal prisoner who filed suit alleging violation of his Eighth Amendment rights by four prison employees[72] pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*.[73] The District Court dismissed the suit because McCarthy failed to exhaust prison administrative remedies.[74] The Court of Appeals for the Tenth Circuit affirmed the District Court's dismissal observing that *Bivens* actions are creations of the judiciary, which in turn allows courts to impose reasonable conditions upon them.[75] The Supreme Court, in reversing the ruling of the Court of Appeals, noted three general areas where parties are not required to exhaust their administrative remedies before seeking judicial relief.[76] The first three exceptions listed below are those given by the Supreme Court in *McCarthy*. The Supreme Court recognized the additional two exceptions in other cases.

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66 *See* Robert Power, *Help is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. ILL. L. REV. 547, 555 (1987).

67 *See id.*

68 *See id.*

69 *See id.*

70 *See* Gelpe, *supra* note 6, at 16.

71 *See* McCarthy v. Madigan, 503 U.S. 140, 146-49 (1992).

72 *Id.* at 142

73 403 U.S. 388, 396 (1971) (stating that a federal law cause of action for money damages could be inferred from the Fourth Amendment).

74 *See McCarthy*, 503 U.S. at 142.

75 *See id.* at 143.

76 *See id.* at 146-49.

1. Prejudice to Subsequent Judicial Review

Individuals are not required to exhaust administrative remedies where resort to those remedies may prejudice a subsequent judicial challenge of the agency action.[77] Cases involving this exception focus on the delay to the claimant in obtaining relief.[78]

2. Inadequate Administrative Remedy

Individuals are not required to exhaust administrative remedies when the agency's remedy may be inadequate "because of some doubt as to whether the agency was empowered to grant effective relief."[79] The focus on whether a remedy would be inadequate is whether the administrative remedy is "calculated to give relief commensurate with the claim."[80] This may occur where there is doubt as to whether the agency can grant effective relief.[81] For example, a claimant who produces purely factual questions is not required to exhaust his or her administrative remedies where those remedies "expressly forbid the examination and cross-examination of witnesses."[82] Inadequate remedy may also occur when the claimant challenges the validity of an agency regulation.[83] A claim that an administrative procedure is inadequate or unavailable must be shown by clear evidence.[84]

3. Agency Bias

If the administrative remedy would be inadequate because the administrative agency is shown to be biased or to have otherwise predetermined the issues before it, exhaustion is not required.[85] An example of agency bias is where the adjudicator has a pecuniary interest in the legal proceedings.[86] In *Gibson v.*

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77 *See id.* at 146-147 (stating that prejudice could be found from unreasonable or indefinite timeframe from an administrative action).

78 *See id.* at 147, (citing Gibson v. Berryhill, 411 U.S. 564, 575 (1973)).

79 *See McCarthy*, 503 U.S. 140, 147 (holding that exhaustion was not required in this case because the administrative remedy would be inadequate).

80 *See* JAFFE, *supra* note 44, at 426.

81 *See id.*

82 *See* Plano v. Baker, 504 F.2d 595, 598 (2nd Cir. 1974).

83 *See id.*

84 United States v. Anthony Grace & Sons, Inc., 384 U.S. 424, 430 (1966). Clear evidence means highly probable or reasonably certain. BLACK'S LAW DICTIONARY 577 (7th ed. 1999).

85 *See McCarthy*, 503 U.S. at 148.

86 *See* Gibson v. Berryhill, 411 U.S. 564, 579 (1973).

Berryhill,[87] independent practitioners of optometry filed charges with the Alabama Board of Optometry alleging that other optometrists employed by Lee Optical Company had engaged in unprofessional conduct in violation of the Alabama optometry statute and, therefore, were practicing their profession unlawfully.[88] Because of a change in the applicable statute, the complainants contended that the practice of optometry by individuals of business corporations was no longer permissible in Alabama and that the alleged violators were in violation of the ethics of their profession.[89]

The alleged violators filed suit in district court seeking an injunction against the administrative hearings alleging that the Board was biased.[90] During the course of trial, it was discovered that the Alabama Board of Optometry was composed solely of optometrists in private practice and that the aim of the Board was to revoke the licenses of all optometrists in the state who were employed by business corporations.[91] A three-judge panel entered judgment for the plaintiffs enjoining the Board from conducting the hearing and from revoking the plaintiffs' licenses.[92] Although the Supreme Court vacated the District Court's judgment, the Court noted that "those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes."[93]

4. Futility

Exhaustion is also not required where administrative remedies would be futile.[94] The futility exception is based on the principle that requiring exhaustion would not serve the underlying principles of the doctrine.[95] Evidence of futility can be found in several forms including "bad faith on the part of the agency, past patterns of an agency's decision making, the agency's position on the merits of a case in litigation over exhaustion, or other statements by the agency on the issue."[96] Futility should not be found when there is an unfavorable past pattern of decision

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87 411 U.S. 564 (1973).

88 *See id.* at 567.

89 *See id.*

90 *See id.* at 569-570.

91 *See id.* at 578.

92 *See Gibson*, 411 U.S. at 570.

93 *Id.* at 579 (citing Tumey v. Ohio, 273 U.S. 510(1927)).

94 *See Mullins Coal Co.*, 759 F.2d at 1146.

95 *See* Gelpe, *supra* note 6, at 20.

96 *See id.* at 40. Another area in which a court might find futility occurs is when a party challenges an agency's procedures based on constitutional claims. The argument here would be that the agency is not authorized or competent to resolve constitutional questions. However, exhaustion on this issue should not be given lightly because the agency could resolve other issues that could moot the constitutional issue. *See id.*

making on the part of the agency.[97] The rationale for this is that a litigant cannot forum shop if one forum has ruled unfavorably on the same issue in the past.[98] Some courts have found futility when the agency is committed to denying relief due to precedent, regulation, or policy.[99] Courts however have taken both sides on this issue.[100]

5. Irreparable Injury to the Complainant

Another exception to the exhaustion doctrine arises when exhaustion would cause irreparable injury to the complainant.[101] To constitute irreparable injury, the injury must be both unusual and not capable of being corrected through later review.[102] The harm therefore must be great and more importantly permanent.[103] Courts usually do not apply this exception.[104] One reason is that irreparable injury focuses on the hardship of the plaintiff which leads to a narrow construction of the exception.[105] Another reason is the court's reluctance to excuse exhaustion.[106]

The Supreme Court, on more than one occasion, has held that the mere expense of participation in the administrative process does not constitute irreparable injury.[107] For example in *Federal Trade Commission v. Standard Oil Co. of California*,[108] Standard Oil argued that it would be irreparably harmed by the expense and disruption of defending itself in administrative proceedings.[109] The Federal Trade Commission ("FTC") issued a complaint against Standard Oil

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97 *See id.* at 40.

98 *See id.*

99 *See* Power, *supra* note 66, at 581.

100 *See id.* at 581. "Courts may view challenges to regulations as definitely futile or not futile, and the same court may seem to take a strict view in some cases and a lenient one in others."

101 *See id.* at 590.

102 *See id.* at 591. Loss of employment without more is insufficient to constitute irreparable injury. Sampson v. Murray, 415 U.S. 61 (1974). *See also* Andrade v. Lauer, 729 F.2d 1475 (D.C. Cir. 1984).

103 *See id.* at 592. "Obviously, the rules requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage." *Myers*, 303 U.S. at 51.

104 *See* Power, *supra* note 66, at 590.

105 *See id.* at 592.

106 *See id.* at 594.

107 *See* Myers v. Bethlehem, 33 U.S. 41 (1938). *See also* Renegotiation Bd. v. Bannercraft Clothing Co., Inc., 415 U.S. 1, 24 (1974); Petroleum Exploration, Inc. v. Public Serv. Comm'n, 304 U.S. 209, 222 (1938) ("[T]he expense and annoyance of litigation is 'part of the social burden of living under government.").

108 449 U.S. 232 (1980).

109 *See id.* at 244.

alleging that it was participating in methods of unfair competition or deceptive acts or practices in commerce in violation of the Federal Trade Commission Act.[110] Standard Oil brought suit in federal court alleging that the FTC issued the complaint without the necessary "reason to believe" that it was violating the Act.[111] Standard Oil sought an order to have the complaint declared unlawful which would require it to be withdrawn.[112] To excuse its nonperformance in the administrative process, Standard Oil argued that it would suffer irreparable injury if required to submit to the administrative process.[113] The Court held that irreparable injury does not result even if the expense would be substantial or unrecoverable.[114]

D. Criticism of Exceptions to the Exhaustion Doctrine

Although the Supreme Court announced a seemingly clear doctrine in *Myers*, when it stated that "no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted,"[115] exceptions to the exhaustion doctrine have created a conflict of when and how to apply the doctrine. Two fundamental problems arise when approaching an exhaustion question. One problem occurs in how courts apply the balancing approach to an exhaustion issue and the other problem arises in how courts apply the other closely related judicial doctrines of ripeness and finality.

1. Balancing Approach

The balancing tests used by courts when Congress has not specifically required exhaustion lead to inconsistent treatment of the doctrine.[116] As stated previously, courts balance the interests of the individual against the policies favoring exhaustion.[117] One law review article noted, "the current trend in the law is to go beyond recognizing stated . . . exceptions, and instead determine whether to require exhaustion by weighing various considerations as applied to a particular case."[118] Admittedly, some exceptions to the exhaustion doctrine are required for those cases that are clearly unique. However, the exceptions themselves have led to inconsistent application of the exhaustion doctrine, which creates uncertainty about

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110 *See id.* at 234.

111 *See id.* at 235.

112 *See id.*

113 *See Standard Oil*, 449 U.S. at 244.

114 *See id. See also Myers*, 303 U.S. 41; *Renegotiation Bd.*, 415 U.S. 1; *Petroleum Exploration, Inc.*, 304 U.S. 209.

115 *Myers*, 303 U.S. 41.

116 *See* Gelpe, *supra* note 6, at 26.

117 *See Volvo*, 118 F.3d at 209

118 Gelpe, *supra* note 6, at 26.

whether exhaustion requirements apply in turn increasing litigation over whether exhaustion is necessary.[119] The irony is that the agency must go to court and argue that the plaintiff should be required to exhaust, and if exhaustion is not required, that the plaintiff should lose on the merits of his or her claim.[120] The litigation itself then would create futility.[121] Nonetheless, the courts adhere in some form or another to the court made exceptions.

Another problem with the balancing test used by the courts is the fact that the exceptions are not readily and fully defined.[122] The Supreme Court uses terms such as "futility," "irreparable injury," "inadequate remedy," or "agency bias," yet, most of the time the Court does not define what these terms mean. This allows lower courts to easily bypass the doctrine without addressing the underlying policies the doctrine is supposed to protect.

2. Closely Related to Other Judicial Doctrines

Courts also struggle in applying the exhaustion doctrine because it is closely associated to other doctrines related to timing of judicial relief, namely ripeness and finality.[123] The ripeness doctrine is "used to determine whether a statute or rule is susceptible to judicial review before it is enforced and to determine whether an announcement of an agency position in a relatively informal document is appropriate for judicial review."[124] Like the exhaustion doctrine, the ripeness doctrine looks at similar factors in determining the availability of review including the court's interest in avoiding unnecessary litigation, the agency's concern over forming its policy before a regulation is subject to review, and the petitioner's interest in timely review of an agency action.[125] However, the focus of the ripeness doctrine is on the institutional relationship between the court and agency and the competence of the court to decide the issue without further agency review, while the focus of the exhaustion doctrine is on the position of the party seeking review.[126]

The doctrine of final agency action focuses on the conclusion of activity by the agency.[127] This doctrine often overlaps with failure to exhaust administrative

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119 *See id.* at 27.

120 *See id.*

121 *See id.* at 30.

122 *See id.* at 26.

123 *See* DAVIS, *supra* note 40, at 305.

124 *Id.* at 306.

125 *See* Ticor Title Ins. Co. v. FTC, 814 F.2d 731, 735 (D.C. Cir. 1987).

126 *See id.*

127 *See* Bethlehem Steel Corp. v. Environmental Protection Agency, 669 F.2d 903, 908 (3rd Cir. 1982). Many cases depend upon whether particular actions of the agency are final. *See* Mathews v. Eldridge, 424 U.S. 319 (1976); Franklin v. Massachusetts, 505 U.S. 788 (1992) (Informal opinion letter of the

remedies.[128] If the issue does not involve a final action by the agency, then the petitioner has not exhausted his or her administrative remedies.[129] While both doctrines may be similar, they are analytically distinct in the sense that "[o]ne requirement may [be] applicable even when the other is not."[130] For example, a party may pursue all administrative steps available, yet not receive a final agency order.[131] Similarly, an agency order may be final for purposes of appeal, but the party has not pursued his or her administrative remedies to the end.[132]

A perfect example of how a court struggled in deciding which doctrine to apply is *Ticor Title Ins. Co. v. FTC*.[133] In *Ticor*, three members of the D.C. Circuit Court of Appeals wrote three separate opinions that all came to the same conclusion, yet their conclusions were based on one of the three distinct doctrines.[134] The plaintiffs in *Ticor* filed suit seeking a declaration that section 5(b) of the Federal Trade Commission Act[135] is unconstitutional and an injunction against the prosecution against them initiated by the FTC.[136] The district court dismissed the claim holding that it was not ripe for adjudication.[137] The plaintiffs appealed to the D.C. Circuit Court of Appeals.[138]

On appeal, the D.C. Circuit Court of Appeals affirmed the district court's ruling, however, each judge based his or her decision on a different doctrine.[139] Judge Edwards held that the plaintiffs failed to exhaust their available administrative remedies and therefore could not raise their constitutional claims until the administrative process was complete.[140] Judge Edwards noted that the plaintiffs raised a constitutional challenge with the court, while at the same time had other nonconstitutional defenses to the complaint brought by the FTC that were

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Secretary of Commerce sent to President regarding the census is not a final agency action since the Secretary's opinion is not binding upon the President.). A few Circuit Courts of Appeals have held that an order to suspend an action is not a final agency action. *See* Nor-Am Agric. Products, Inc. v. Hardin, 435 F.2d 1151 (7th Cir. 1970); Dow Chemical Co. v. Ruckelshaus, 477 F.2d 1317 (8th Cir. 1973); Pax Co. of Utah v. United States, 454 F.2d 93 (10th Cir. 1972).

128 *See* DAVIS, *supra* note 40, at 306.

129 *See id.*

130 Association of Nat'l Adver. v. FTC, 627 F.2d 1151, 1177 (D.C. Cir. 1979) (Leventhal, J., concurring).

131 *See Bethlehem Steel Corp.*, 669 F.2d at 908.

132 *See id.*

133 814 F.2d 731 (D.C. Cir. 1987).

134 *See id.*

135 15 U.S.C. §45(b) (1982).

136 *See Ticor*, 814 F.2d at 732.

137 *See id. See also* Ticor Title Ins. Co. v. FTC, 625 F. Supp. 747 (D. D.C. 1986).

138 *See id.*

139 *See id.*

140 *See id.*

ongoing through the administrative process.[141] Because the plaintiffs did not present facts sufficient to fit into any of the recognized exceptions to the exhaustion doctrine, the plaintiffs had to wait until their administrative remedies were exhausted before raising their constitutional challenge in federal court.[142]

Judge Williams, on the other hand, based his opinion on the doctrine of finality.[143] Judge Williams noted that courts have often mingled the doctrines of administrative exhaustion, finality, and ripeness, but that each doctrine is analytically distinct.[144] "While exhaustion is directed at the steps a litigant must take, finality looks to the conclusion of activity by the agency."[145] Judge Williams noted that under the circumstances of the case, the plaintiffs could not seek judicial review because the agency had not issued a final order.[146] A final order imposes an obligation or denies a right.[147] Because the plaintiffs constitutional challenge did not arise from an administrative order that imposed some obligation on the plaintiffs or denied them a legal right, the decision of the district court should be upheld.[148]

Judge Green, however, based her opinion on the ripeness doctrine.[149] The ripeness doctrine looks at the "fitness of the issues for judicial determination and the hardship to the parties that would result from granting or denying review."[150] The test to be applied in a ripeness inquiry is twofold: a court must evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[151] In this case, plaintiffs' constitutional claim was fit for review, but the plaintiffs failed to show any hardship that would occur if the court did not review their claim.[152] Therefore in Judge Green's opinion, the district court's decision to dismiss the case as unripe should be affirmed.[153]

Although courts attempt to consider the doctrines of administrative exhaustion, finality and ripeness distinctly, *Ticor* shows how courts struggle with applying these doctrines to particular cases. All three doctrines focus on the timing

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141 *See Ticor*, 814 F.2d at 732.

142 *See id.* at 743.

143 *See id.* at 745 (Williams, J., concurring).

144 *See id.*

145 *Id.* at 746.

146 *See Ticor*, 814 F.2d at 746.

147 *Id.*

148 *Id.* at 750.

149 *Id.* (Green, J., concurring).

150 *Id.* at 735.

151 *See Ticor*, 814 F.2d at 736 (*citing* Abbott Lab. v. Gardner, 387 U.S. 136 (1967)).

152 *Id.* at 756.

153 *Id.*

of judicial review and all three may deny judicial relief. However, courts sometimes use them interchangeably. The problem is magnified when a court using the exhaustion doctrine must look to whether a particular case fits into a recognized exception. To resolve the confusion regarding exhaustion, courts should move more towards requiring exhaustion in all cases with no exceptions.

III. CITIZEN SUITS UNDER THE SURFACE MINING AND RECLAMATION ACT

In two recent cases before the United States District Court for the Southern District of West Virginia, two different classes of plaintiffs brought suit under the citizen suit provision of the Surface Mining and Reclamation Act ("SMCRA") challenging permitting decisions made by the West Virginia Division of Environmental Protection ("WVDEP").[154] SMCRA is a comprehensive statute that was enacted to oversee mining operations nationwide.[155] As part of the statute, a state could implement its own program and assume exclusive jurisdiction over the regulation of surface mining.[156]

SMCRA established a detailed administrative process in which coal operators and citizens may challenge an agency action.[157] For example, operators have the opportunity to challenge the issuance of a cessation order which requires operators to stop mining.[158] Citizens have the opportunity to challenge the issuance of permits by submitting written objections with the agency and requesting a conference with the agency.[159] In both examples, either the operator or concerned citizen is entitled to an administrative hearing if not satisfied with the results.[160]

In both cases filed with the United States District Court for the Southern District of West Virginia, the plaintiffs brought suit without first submitting to the administrative process.[161] Had these cases been dismissed for failure to exhaust administrative remedies, the plaintiffs would have been sent back to a state agency to seek relief before heading to court.

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154 *See* Bragg v. Robertson, 72 F. Supp.2d 642 (S.D. W. Va. 1999), *rev'd* No. 99-2443, 2001 WL 410382, (4th Cir. 2001); Ohio River Valley Envtl. Coalition v. Castle, No. 3:00-0058 (S. D. W. Va. filed Jan. 20, 2000) (hereinafter "*OVEC*").

155 *See* H.R. REP. 95-218 (1977).

156 30 U.S.C. § 1253; West Virginia has an approved state program and has promulgated laws regulating mining that mirror the requirements of the Surface Mining and Reclamation Act. West Virginia's mining laws are codified at W. VA. CODE §22-3-1 to -32 (1998).

157 *See generally* 30 U.S.C. §§ 1201-1328 (1994).

158 30 U.S.C. § 1275.

159 30 U.S.C. § 1263.

160 30 U.S.C. §§ 1275 and 1263.

161 *See* Defendant Castle's Motion to Dismiss for Lack of Subject Matter Jurisdiction, OVEC v. Castle, (S.D. W. Va. 2000) (No. 3:00-0058).

A. Bragg v. Robertson

In the first case, *Bragg v. Robertson*,[162] a group of plaintiffs filed suit alleging among other things that the Director of the WVDEP had engaged in a pattern and practice of violating non-discretionary duties under SMCRA regarding buffer zone regulation.[163] The WVDEP argued that the suit should be dismissed because the plaintiffs failed to exhaust administrative remedies.[164] After reviewing the Supreme Court's decisions on the exhaustion doctrine, the court looked to the relevant portions of SMCRA to determine whether the Act required exhaustion.[165] The Court first examined 30 U.S.C. § 1276, which governs judicial review of actions by the state program.[166] Section 1276(e), states:

> Action of the state regulatory authority pursuant to an approved state program shall be *subject to judicial review by a court of competent jurisdiction* in accordance with state law, but the availability of such review shall not be construed to limit the operation of the rights established in Section 1270 of this title except as provided therein.[167]

Section 1270, the citizen suit provision of SMCRA, requires 60 day written notice before a complaint can be filed.[168] Concentrating on the second half of section

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162 Bragg v. Robertson, No. 2:98-0636, 1998 U.S. Dist. LEXIS 22077 (S.D. W. Va. October 9, 1998).

163 *Id.* Plaintiffs named as a defendant, Michael Miano, Director of the WVDEP. Additionally, Plaintiffs named the U.S. Army Corps of Engineers and several officers with the Corps. The scope of this article only focuses on how the court's opinion interpreted SMCRA and how it affects the WVDEP.

164 *Id.* The Defendants, also, argued that the suit should be dismissed because the complaint did not state a claim for which relief could be granted, lack of jurisdiction, and that the statute of limitations had run. Defendant Miano also argued that the suit should be dismissed because the Eleventh Amendment prevented the Plaintiffs from suing an agency of the state. *Id.*

165 The court limited its review to the citizen suit provision and did not address other suits arising under SMCRA. *See Bragg*, 1998 U.S. Dist. LEXIS at *17 n.7.

166 *Id.*

167 30 U.S.C. § 1276(e) (emphasis added).

168 *Id.* Section 1270 states in relevant part:

(a) Civil action to compel compliance with this chapter

Except as provided in subsection (b) of this section, any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter

(2) against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this chapter which is not discretionary with the Secretary or with the appropriate State regulatory authority.

(b) Limitation on bringing of action.

No action may be commenced –

(1) Under subsection (a)(1) of this section –

1276, the Court interpreted the statute as carving out an exception to the exhaustion requirement.[169]

The Court determined that Congress had provided the citizen suit option not only to offer citizens relief, but to also supplement agency regulation.[170] The Court's analysis, however, rests only on statutory interpretation and congressional intent and did not address any of the policies behind the exhaustion doctrine.[171]

The Court focused primarily on three things to excuse exhaustion. First, the Court found that Congress had rejected a bill that would eliminate the citizen suit provision.[172] Second, Congress did not prohibit collateral attacks[173] filed against the governing agency, even though collateral attacks were prohibited on permits.[174] The Court noted that by reading the congressional history, Congress's clear intent was to prevent collateral attacks only on permits.[175] The Court then assumed that Congress contemplated and did not object to collateral attacks on permits filed against the agency.[176]

Third, the plaintiffs were not challenging particular permits as alleged by the defendants.[177] The Court relied heavily on the fact that the plaintiffs were challenging several permits.[178] The Court stated that requiring plaintiffs to challenge each permit through the agency would almost be impossible to bring to

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(A) prior to sixty days after the Plaintiff has given notice in writing of the violation (i) to the Secretary, (ii) to the State in which the violation occurs, and (iii) to any alleged violator; or

(B) if the Secretary or the State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the provisions of this chapter, or any rule, regulation, order, or permit issued pursuant to this chapter, but in any such action in a court of the United States any person may intervene as a matter of right; or

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice in writing of such action to the Secretary, in such manner as the Secretary shall by regulation prescribe, or to the appropriate State regulatory authority, except that such action may be brought immediately after such notification in the case where the violation or order complained of constitutes an imminent threat to the health or safety of the plaintiff or would immediately affect a legal interest of the plaintiff.

169 *See* Bragg v. Robertson, No. 2:98-0636, 1998 U.S. Dist. LEXIS 22077 (S.D. W. Va. October 9, 1998).

170 *Id.*

171 *See* Bragg v. Robertson, No. 2:98-0636, 1998 U.S. Dist. LEXIS 22077 (S.D. W. Va. October 9, 1998).

172 *Id.*

173 A collateral attack challenges a judgment entered in a different proceeding by bringing a separate action. BLACK'S LAW DICTIONARY 255 (7th ed. 1999).

174 *Id.*

175 *Id.*

176 Bragg v. Robertson, No. 2:98-0636, 1998 U.S. Dist. LEXIS 22077 (S.D. W. Va. October 9, 1998).

177 *Id.*

178 *Id.*

the attention of the courts.[179] However, this analysis fails to take into consideration the burden on the agency, which the Court should have addressed before rendering its decision. Taken together, the Court held that "[p]laintiffs need not exhaust administrative remedies before filing a citizen suit complaint alleging agencies have engaged in a pattern and practice of violations."[180]

B. Ohio River Valley Environmental Coalition v. Castle

Similar to *Bragg*, plaintiffs in *Ohio River Valley Environmental Coalition v. Castle*[181] brought suit claiming that Director Castle engaged in a pattern and practice of violating non-discretionary duties imposed by SMCRA.[182] Specifically, plaintiffs alleged that Michael Castle, Director of the WVDEP,[183] failed to conduct cumulative hydrologic impact assessments (CHIA)[184] for proposed mining permits before approving such permits.[185]

Director Castle filed a motion to dismiss the suit arguing that the court did not have subject matter jurisdiction because the plaintiffs failed to exhaust administrative remedies.[186] He argued that exhaustion is important in the CHIA process because of the complex science involved in evaluating the probable hydrologic consequences of proposed mining operations.[187] Director Castle further argued that the duty to conduct a cumulative hydrologic impact assessment and how that assessment is conducted is a discretionary duty left to the Director.[188]

Relying entirely on Judge Haden's opinion in *Bragg*, Judge Chambers held that plaintiffs are not required to exhaust their administrative remedies before filing suit.[189] The court noted that similar to *Bragg*, plaintiffs in this case were challenging several permits.[190] Just like *Bragg*, Judge Chambers opinion does not

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179 *Id.*

180 *Id.*

181 OVEC v. Castle, No. 3:00-0058 (S. D. W. Va. filed Jan. 20, 2000).

182 *Id.*

183 Michael Castle replaced former Director Michael Miano prior to the filing of this lawsuit.

184 State regulations require the director to make an assessment of the "probable cumulative impacts of all anticipated coal mining on the hydrologic balance in the cumulative impact area", and determine "that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area." *See* W. VA. CODE ST. R. tit. 38.

185 Plaintiff's First Amended Complaint, OVEC v. Castle, (S.D. W. Va. 2000) (No. 3:00-0058).

186 Defendant's Motion to Dismiss, OVEC v. Castle, OVEC v. Castle, (S.D. W. Va. 2000) (No. 3:00-0058).

187 *Id.*

188 *Id.*

189 OVEC v. Castle, No. 3:00-0058 (S.D. W. Va. May 1, 2000) (order denying motion to dismiss for lack of subject matter jurisdiction).

190 *Id.* at 7. The Court stated that "[p]ursuing these allegations in the administrative review of each

discuss the policies underlying the exhaustion doctrine as part of his decision that the plaintiffs are not required to exhaust their administrative remedies before seeking judicial review.[191]

The Court in addressing Director Castle's argument that the CHIA determination is discretionary commented that although the Director is vested with certain discretion as to the final decision on a permit, he must consider certain matters and put them in writing.[192] The Court further commented that "[w]hile the assessment of hydrologic impact and a finding that no material damage will result may be discretionary conclusions in a permitting discussion, the process by which those conclusions are reached, the information to be considered, and the detail and substantiation of the final written approval are not."[193] Judge Chambers concluded that the process of reporting a CHIA determination on proposed mining permits is a nondiscretionary duty and, therefore, not subject to exhaustion.[194]

C. *Why The Exhaustion Doctrine Should Have Been Applied*

1. Adequate Administrative Remedies Were Available

Both of these decisions fail to address the administrative remedies available under SMCRA.[195] Specifically, both courts failed to address 30 U.S.C. §§1263 and 1264. Under sections 1263 and 1264, any person with an interest in the issuance of a mining permit has three options.[196] First, an individual can file written objections to a proposed permit with the West Virginia Division of Environmental Protection (WVDEP).[197] Second, an individual can attend informal conferences

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permit decision would be insurmountable obstacle to access to a federal judicial forum." *Id.* Judge Chambers seems to be saying that the plaintiffs would not be able to get adequate relief from the administrative process or that the agency is biased against plaintiffs' argument. However, this is not clear from the opinion.

191 *Id.*

192 OVEC v. Castle, No. 3:00-0058 (S.D. W. Va. June 15, 2000) (order denying motion to dismiss for failure to state a claim).

193 *Id.*

194 *See id.*

195 *See generally* 30 U.S.C. §§ 1201-1328. Although West Virginia has an approved state program and has promulgated laws similar to the federal SMCRA that regulate mining, both Courts maintained that the federal SMCRA created federal question jurisdiction. Therefore, this section only examines those portions of the federal SMCRA that provide adequate administrative remedies. West Virginia has adopted similar administrative remedies to SMCRA which are codified at W. VA. CODE § 22-3-20 (requiring public notice, written objections, public hearings and informal conferences for mining permits); W. VA. CODE § 22-3-21 (If an informal conference is held, the Director must give written finding granting or denying permit); W. VA. CODE § 22B-1-7 (Appeals to Board); W. VA. CODE § 22B-1-9 (General provisions for judicial review).

196 *See* 30 U.S.C. §§1263–1264 (1994).

197 *See* 30 U.S.C. §1263(b).

conducted by the WVDEP in the area of the proposed mining.[198] Finally, an individual can request a formal administrative hearing within thirty days of a final decision by the WVDEP regarding a permit application.[199]

Section 1264(f) requires an individual to submit to the administrative process before judicial review becomes available.[200] Section 1264(f) provides in pertinent part:

> Any applicant or any person with an interest which is or may be adversely affected *who has participated in the administrative proceedings as an objector*, and who is aggrieved by the decision of the regulatory authority . . . shall have the right to appeal.[201]

The exception to this section comes into play only if the agency fails to process a permit application or any objections to an application made within the time frame provided by the Act.[202] Therefore, this section makes clear that individuals must participate in the administrative process before obtaining judicial review of a permitting decision.

By allowing plaintiffs to bypass this detailed process, the decisions in *Bragg* and *OVEC* have effectively usurped the WVDEP's ability to issue mining permits. Essentially, a potential plaintiff need only challenge a number of permits to bypass the administrative process prescribed by the Act.[203] The plaintiffs in both *Bragg* and *OVEC* did not administratively challenge any of the alleged defective permits before bringing suit in district court.[204] Had they been required to participate in the administrative process, WVDEP may have corrected some of the alleged errors raised by the lawsuits or at least been made aware that there may be a problem with its permitting requirements.

Additionally, the congressional history of SMCRA is not as clear as both opinions suggest it to be. When explaining the citizen suit provision, Congress stated: "This section is not intended to override the specific provisions of this bill which provide more precise requirements for citizen participation in the permit application and performance bond proceedings."[205] This illustrates that both courts should have looked more closely to the policies behind the exhaustion doctrine

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198 *See id.*

199 *See* 30 U.S.C. §1264(c).

200 *See* 30 U.S.C. §1264(f).

201 *Id.* (emphasis added).

202 *See id.*

203 Brief for Appellant at 48, Bragg v. West Virginia Coal Ass'n, No. 99-443, 2001 WL 410382 (4th Cir. 1999).

204 *See* Defendant Castle's Motion to Dismiss for Lack of Subject Matter Jurisdiction, OVEC v. Castle, (S.D. W. Va. 2000) (No. 3:00-0058).

205 S. REP. NO. 95-128, at 88 (1977).

before rendering their decisions.

2. Other Courts Have Required Exhaustion Under Other Sections of the Act

Other courts have required exhaustion under other provisions of SMCRA. In *Mullins Coal Co. v. Clark*,[206] the Fourth Circuit held "section 1276 clearly requires that judicial review be limited to the administrative record."[207] A notice of violation had been issued against Mullins Coal Company for a landslide in a fill bank that had extended beyond the permit area.[208] After the abatement period had expired, the inspector issued a cessation order for failure to correct the violation.[209] Mullins Coal Company simultaneously filed an appeal with the agency as well as a complaint with the district court.[210]

The Fourth Circuit recognized that allowing plaintiffs to bypass the administrative process would frustrate the legislative purpose, in turn rendering section 1275 unnecessary.[211]

The Court noted that Congress had taken into account the serious effect a cessation order would have on the industry and people employed by the industry as well as the effect on the environment if mining operations were allowed to continued unabated.[212] SMCRA balances both of these needs.[213] The court also noted that section 1276 "clearly requires that judicial review be limited to the administrative record and that a company first pursue administrative relief before seeking judicial review."[214]

The Third and Sixth Circuits have also come to the same conclusion. In *Graham v. Office of Surface Mining Reclamation and Enforcement*,[215] the Third Circuit held that section 1268(c)[216] of SMCRA required exhaustion of the

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206 759 F.2d 1142 (4th Cir. 1985).

207 *Id.* at 1146.

208 *See id.*

209 *See id.*

210 *See id.* Section 1275 provides permittees and other persons who may be affected by a notice or order to apply for review of the order or notice. Upon application, the Secretary is required to conduct an investigation and hold a hearing on the notice or order. In addition, an applicant can request temporary relief pending resolution of the review.

211 *See Mullins*, 759 F.2d at 1145.

212 *See id.*

213 *See id.*

214 *Id* at 1146.

215 722 F.2d 1106 (3d Cir. 1983).

216 Section 1268(c) provides:

> Upon the issuance of a notice or order charging that a violation of this chapter has

administrative appeal process.[217] In *Graham*, the plaintiffs challenged the constitutionality of section 1268(c) which requires an operator who has been sanctioned with a penalty by the Office of Surface Mining to pay the proposed amount of the penalty into escrow to preserve his right to appeal with the Office of Surface Mining and ultimately through the courts.[218]

The Third Circuit held that SMCRA provides an operator with sufficient opportunity to challenge a proposed penalty without prepayment into escrow so that it does not offend due process.[219] The Court pointed to the three stages of review by the Office of Surface Mining that allows an operator to challenge a proposed penalty.[220] First, an operator can seek review when a notice of violation has been issued.[221] Second, an operator may seek review when a cessation order has been issued.[222] Finally, an operator can seek review of the proposed assessment of a penalty.[223]

Similarly, the Sixth Circuit, in *Shawnee Coal Company v. Andrus*,[224] stressed the administrative system provided in SMCRA. Shawnee Coal Company sought injunctive and declaratory relief in response to the Secretary's issuance of cessation orders against its tipple operations.[225] The Court examined section 1275 in detail.[226] It noted that a person adversely affected by a notice or order may apply for administrative review by the Secretary.[227] If the application for review involves a cessation order, the Secretary must issue a written decision within thirty days.[228]

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occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account. If through the administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Secretary shall within thirty days remit the appropriate amount to the person, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

217 *See id.*

218 *See id.*

219 *See id.*

220 *See id.*

221 *See Graham*, 722 F.2d at 1110.

222 *See id.*

223 *See id.*

224 661 F.2d 1083 (6th Cir. 1981).

225 *See id.*

226 *See id.*

227 *See id.*

228 *See id.*

Any notice or order that has not been decided within thirty days expires.[229] Further, an operator may apply for temporary relief that requires a decision within five days, and if relief is denied, the operator may seek immediate relief with the district court.[230]

The Court held that "[i]n the Surface Mining Act, Congress provided a well-defined administrative system for resolution of enforcement actions stemming from cessation orders."[231]

> Bypassing the administrative remedies would impair the expeditious resolution of disputes and result in the forfeiture of administrative expertise. By circumventing the proscribed procedures, quick resort to the district court could easily preclude the Secretary from building a factual record, from clarifying or narrowing the dispute, or from resolving the controversy altogether so as to obviate the necessity of judicial intervention.[232]

The Court recognized that agency expertise is especially important when applying or interpreting a statute.[233]

In the *Bragg* and *OVEC* decisions review was limited to whether the exhaustion requirement applies to a citizen suit and did not address other suits arising under SMCRA.[234] These opinions should have considered the application of SMCRA in other types of cases. Thus exhaustion would have been required, which in turn would permit a consistent application of SMCRA.

3. Opinions Did Not Address The Policies Of The Exhaustion Doctrine

Both decisions also failed to adequately address the aforementioned policies of exhaustion. Even though in *Bragg* the court quoted a portion of the Supreme Court's opinion in *Bowen v. City of New* York,[235] in which the Supreme Court stated "the ultimate decision of whether to waive exhaustion . . . should be guided by the policies underlying the exhaustion requirements,"[236] the Southern

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229 *See Shawnee Coal Co.*, 661 F.2d at 1087.

230 *See id.*

231 *Id.* at 1093.

232 *Id.* at 1091.

233 *See Shawnee Coal Co.*, 661 F.2d at 1093. "[T]he Interior Board of Surface Mining Appeals is an activity connected with a surface coal mining operation depends on the particular factual circumstances of each case." *Id.*

234 *See* Bragg v. Robertson, No. 2:98-0636, 1998 U.S. Dist. LEXIS 22077 (S.D. W. Va. October 9, 1998).

235 476 U.S. 467 (1986).

236 *Id.* at 484.

District Court's opinion in *Bragg* gave cursory treatment to those policies as applied to the facts of the case.[237] As stated before, courts prefer the exhaustion requirement.[238] A fair interpretation of the citizen suit provision[239] would be to require individuals to meet a high standard, before allowing parties to sidestep exhaustion requirements. However, the *Bragg* and *OVEC* decisions gave the doctrine cursory treatment by determining there was another exception to the exhaustion doctrine, besides those already acknowledged by the courts.

An important piece in the exhaustion analysis is the injury to the plaintiff. If exhaustion would substantially limit that person's availability of relief, then that person is entitled to judicial review.[240] In the *Bragg* and *OVEC* cases, the plaintiffs alleged a WVDEP pattern and practice of violating non-discretionary duties under SMCRA. In those circumstances, there was not a present injury, only a threat of injury through the continued pattern and practice alleged in the complaints. The plaintiffs, therefore, could have been required to exhaust their administrative remedies first without experiencing irreparable harm and at the same time retain their access to judicial review.

IV. CONCLUSION

The purpose of the exhaustion doctrine is to provide a mechanism for promoting the administrative process while allowing individuals to seek judicial review of agency decisions. This purpose of the doctrine is best served if applied stringently because of the benefits of the administrative process. Judicially developed vague exceptions to the exhaustion doctrine have led to an inconsistent application of the doctrine by the courts. Although exceptions may be necessary, the exceptions as applied lead to uncertainty and increased litigation. Until the exceptions to the exhaustion doctrine are clarified, courts will continue to struggle in applying the doctrine and the parties involved undoubtedly will suffer.

Rebecca L. Donnellan[•]

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237 *See* Bragg v. Robertson, No. 2:98-0636, 1998 U.S. Dist. LEXIS 22077 (S.D. W. Va. October 9, 1998).

238 *See* McCarthy v. Madigan, 502 U.S. 140, 144 (1992).

239 *See* 30 U.S.C. §1270.

240 *See supra* Part II.C.

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