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# Rulemaking

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## Chapter 8 Rulemaking\*

### PART I. JUDICIAL DEVELOPMENTS

#### A. The Rulemaking Process

##### 1. *Consideration of Comments*

Those unhappy with the outcome of a rulemaking are quick to assume, and assert, that their comments were ignored. Such objections usually fail, and the past year's cases were no exception.<sup>1</sup> Indeed, in one Ninth Circuit case the agency actually *lost* the submissions of four commenters, failing to refer or respond to them and not listing them in the docket. The court did hold that this was error, but found it harmless because the issues raised in the missing comments were duplicative.<sup>2</sup> In addition, the D.C. Circuit implicitly held that an agency can ignore comments directed to the constitutionality of the underlying *statute*, though not of the proposed regulation itself.<sup>3</sup> In at least one case, however, a court of appeals set aside a rule because the agency had failed to adequately address comments.<sup>4</sup>

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1. *See, e.g., City of Waukesha v. EPA*, 320 F.3d 228 (D.C. Cir. 2003) (quickly dismissing claim that agency had offered only a "general and generic" response to comments on proposed Safe Drinking Water Act standard).
2. *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144 (9th Cir. 2002) (rejecting garden-variety challenge because agency adequately considered comments and explained its decision).
3. *Nebraska v. EPA*, 331 F.3d 995, 997 (D.C. Cir. 2003) (finding that petitioners, who had *not* participated in the notice-and-comment rulemaking, had waived their constitutional challenge to arsenic regulation promulgated under the Safe Drinking Water Act but not their challenge to the Act itself).
4. *Louisiana Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1080-81 (D.C. Cir. 2003).

## 2. *Logical Outgrowth Requirement*

A final rule must be the “logical outgrowth” of the proposal; otherwise, interested parties are effectively denied notice and so an opportunity to comment.<sup>5</sup> An interesting refinement of the basic principle occurred in Judge Posner’s opinion in *Alto Dairy v. Veneman*.<sup>6</sup> This was a challenge by dairies to amendment of milk marketing orders, established through formal rulemaking, asserting inadequate notice. The lengthy opinion consists primarily of potshots at milk regulation and an in-depth consideration of whether Congress had precluded judicial review. But three paragraphs at the end consider the logical outgrowth issue. The court’s blackletter statements are familiar: “[n]otice is adequate if it apprises interested parties of the issues to be addressed in the rulemaking proceeding with sufficient clarity and specificity to allow them to participate in the rulemaking in a meaningful and informed manner.”<sup>7</sup> Were the agency unable to shift its position, the whole exercise would be pointless.

As always, the particular determination is quite fact-bound, but the court emphasizes the need for agency flexibility. The most interesting feature of the opinion is its holding that the adequacy of notice is *subjective*. Judge Posner expressly states that the technical terms used in the preamble to the proposed rule are “gobbledygook to an outsider.”<sup>8</sup> However, the petitioning dairies were insiders; they would have understood the terms of art. So *they* had notice, even if you and I did not. (This subjective approach finds support in section 553(b)’s allowance of actual notice of proposed rulemaking in lieu of publication in the *Federal Register*.)

*City of Waukesha v. EPA*<sup>9</sup> concerned radionucleide standards issued un-

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5. See, e.g., *id.* at 1081-82 (finding that final rule that made changes that were less sweeping than had been proposed satisfied the logical outgrowth requirement because it was a “natural subset” of the proposal and the agency had never indicated that it would take an “all or nothing” approach); *Env’tl Def. Ctr. v. EPA*, 319 F.3d 398, 448 (9th Cir. 2003) (final rule satisfied logical outgrowth test where preamble to proposed regulation indicated that EPA was considering approach it ultimately adopted).
  6. 336 F.3d 560 (7th Cir. 2003). This case is also discussed herein in *Agriculture* (*infra* 173-75).
  7. *Id.* at 569 (quoting *Am. Med. Ass’n v. United States*, 887 F.2d 760, 767 (7th Cir. 1989)).
  8. *Id.* at 570.
  9. 320 F.3d 228 (D.C. Cir. 2003). This case is also discussed herein in *Environmental and Natural Resources Regulation* (*infra* 324).

der the Safe Drinking Water Act. The Act requires a cost-benefit analysis (CBA), and EPA ran the numbers for possible standards of 20, 40, and 80 micrograms per liter (mg/L). It took comments thereon, then promulgated a standard of 30 mg/L, contemporaneously issuing a CBA for it. That analysis drew on the same underlying data as the ones previously issued. The petitioners argued that they had not had the opportunity to comment on the CBA for 30 mg/L. Viewed as a logical outgrowth argument, this claim is simply goofy; absent unusual circumstances, a final rule splitting the difference between two proposals is a classic example of something that is the logical outgrowth and was entirely predictable. What made the argument somewhat stronger was that the Act expressly requires that an opportunity be provided to comment on the cost-benefit analysis; literally, that had not occurred. Nonetheless, the court upheld the rule.

Two aspects of its ruling are of general interest. First, it held that the familiar APA logical outgrowth test applies even where another statute has its own independent notice-and-comment requirements.<sup>10</sup> Second, the petitioners were unable to identify anything they would have said about the CBA for the final standard that they had not said regarding the CBAs on which EPA did take comment. The court did not hold that this inability *in itself* established that the final rule was the logical outgrowth of proposal, but it did, appropriately, find it relevant to that conclusion.

### 3. A Rule's "Effective Date" under the Congressional Review Act

Both actual practice and case law under the Congressional Review Act<sup>11</sup> remain quite underdeveloped. An interesting question about the Act's collateral consequences was raised in *Liesegang v. Secretary of Veterans Affairs*.<sup>12</sup> The Agent Orange Act provided that certain regulations issued thereunder "shall be effective on the date of issuance,"<sup>13</sup> which the agency read to mean the date of publication in the *Federal Register*. However, the Congressional Review Act states that no major rule "shall take effect" until 60 days after it is presented to Congress or published in the *Federal Register*.<sup>14</sup> Here the Department, struggling to meet a statutory deadline that it missed by about a month, got a final rule into the May 8, 2001 *Federal Register*. Because the Department published

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10. *Id.* at 245.

11. 5 U.S.C. §§ 801-808 (2000).

12. 312 F.3d 1368 (Fed. Cir. 2002).

13. 38 U.S.C. § 1116(c)(2) (2000).

14. 5 U.S.C. § 801(a)(3)(A) (2000).

the rule without first laying it before Congress, it made its effective date July 9, 2001, to accommodate the CRA's 60-day waiting period. The selection of the effective date mattered to certain beneficiaries; the statute allowed them to receive benefits for the period before they filed a claim, but not before the effective date of the new regulation. Accordingly, the effective date of the regulation marked the date from which their benefits would run.

With reasoning resonant with nineteenth century formalism, the court held that the 60-day waiting period mandated by the CRA delays a rule's *operative* date but not its *effective* date. Thus, a rule's effective date is not the date that it "takes effect." The CRA delayed the latter until July 9; but once the rule had become operative, it allowed benefits to begin on May 8, because, under the Agent Orange Act, its effective date was the date of publication in the *Federal Register*.

This is a rather inconsequential setting with sympathetic facts—"deserving" beneficiaries, an agency that required congressional prodding and had missed a deadline, a result in keeping with the overall statutory goal. But the overformal distinction drawn by the court really amounts to the authorization of retroactive rulemaking. It is impossible to read the CRA itself and its reference to the rule's "taking effect" as the sort of explicit congressional authorization that the Supreme Court has said retroactive rulemaking requires.<sup>15</sup> The case may be an aberration or prove limited to its facts. But on its face it seems to eliminate the delay resulting from the 60-day requirement, permitting an agency to publish a final rule without waiting for congressional review, wait 60 days, then proceed as if the rule had been in place all along.<sup>16</sup>

#### **4. Publication**

The APA requires that final rules be published and forbids enforcement of an unpublished rule against anyone lacking "actual and timely notice of the terms" of the regulation.<sup>17</sup> Actual notice cases are few and far between, but the First Circuit recently decided one. On April 26, 2001, the Coast Guard issued a regulation establishing a temporary security zone off the island of Vieques. The regulation was published in the May 3, 2001 *Federal Register*. On April 28, two fishermen entered into the prohibited area, skirt-

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15. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).

16. This approach would, of course, still be limited by the APA requirement that a rule cannot take effect until 30 days after publication unless it grants or recognizes an exemption or relieves a restriction, or for good cause. 5 U.S.C. § 553(d)(1), (2) (2000).

ing clearly marked Coast Guard vessels that attempted to stop them by waving their arms, using hand signals, and shouting, “Security zone, stop your boat.” It is a federal crime to enter a military security zone, and the fishermen were convicted. On appeal they challenged the validity of the regulation that established the security zone, which was only published almost week after the incident. The court held that the defendants received actual notice via the Coast Guard’s efforts to keep them out of the security zone.<sup>18</sup> This is a somewhat generous reading of the exception, potentially subject to abuse, and of borderline constitutionality; the result should be read in light of the setting and the deference so often granted the military.<sup>19</sup>

## B. Exceptions to Notice-and-Comment Requirements

“[I]nterpretative rules, general statements of policy, or rules of agency organization, procedure, or practice” are exempt from the APA’s notice-and-comment requirements.<sup>20</sup> During the past year, as usual, courts struggled to figure out just what these things were,<sup>21</sup> while in general exhibiting a great wariness—perhaps too great a wariness—about agencies circumventing procedural requirements.

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17. 5 U.S.C. § 552(a)(1) (2000).

18. *United States v. Ventura-Melendez*, 321 F.3d 230 (1st Cir. 2003).

19. The defendants also argued that the regulation was invalid because it had not been subject to notice and comment; the court ruled that the rulemaking fell within the military functions exception in section 553(a)(1). That exception, of course, applies only to the requirements of section 553, not the publication requirement of section 552(a)(1).

20. 5 U.S.C. § 553(b)(A) (2000).

21. Or didn’t struggle. *See, e.g., Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899 (9th Cir. 2003) (holding that EPA rule about what constitutes an air quality area for purposes of certain Clean Air Act programs clarified but did not change existing requirements and so was an interpretive rule exempt from notice and comment); *Perez v. Ashcroft*, 236 F. Supp. 2d 899 (N.D. Ill. 2002) (unreasonable agency “interpretation” of existing regulation was a substantive rule requiring notice and comment); *Caplan v. Dep’t of Transp.*, 51 Fed. Appx. 320 (D.C. Cir. 2002) (DOT general enforcement policy did not require notice and comment); *Beverly Health & Rehab Servs., Inc. v. Thompson*, 223 F. Supp. 2d 73 (D.D.C. 2002) (agency protocol a procedural rule excepted from notice-and-comment requirements).

## 1. *Categories of Rules*

The Supreme Court offered some meager guidance with respect to the distinctions, though not in the context of exceptions to section 553. Whether an agency statement is a legislative rule, an interpretive rule, a general statement of policy, or something else matters for at least three reasons: whether notice and comment is required, whether the statement is ripe or has caused an injury sufficient for standing purposes, and what degree of deference a reviewing court affords it. In *National Park Hospitality Association v. Department of the Interior*,<sup>22</sup> the Court had before it a rule, issued pursuant to notice and comment by the National Park Service (NPS). The rule expressed the Park Service's view that the Contract Disputes Act (CDA) does not govern agreements between the Service and park concessionaires. In an opinion by Justice Thomas, the Court held that the rule "cannot be a legislative regulation with the force of law" because the NPS lacks delegated rulemaking authority under the CDA. Nor was it an interpretive rule, because the Park Service has no particular authority to administer the CDA, which is a generally applicable statute covering all federal agencies and overseen by the Administrator of the Office of Federal Procurement Policy in the Office of Management and Budget. Therefore, the regulation was, in the words of the Court, "nothing more than a 'general statement of policy' designed to inform the public of NPS's views on the proper application of the CDA."<sup>23</sup> The Court held that as such, the rule was not ripe for review,<sup>24</sup> a potentially important, and questionable, decision regarding reviewability. But the opinion is likely to have ripple effects with regard to the exceptions to section 553. The distinction between interpretive rules and statements of policies is not important for that purpose, since both are

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22. 123 S. Ct. 2026 (2003). This case is also discussed herein in *Judicial Review* (*supra* 94-95) and *Environmental and Natural Resources Regulation* (*infra* 325-26).

23. *Id.* at 2031 (quoting 5 U.S.C. § 553(b)(3)(A)).

24. The NPS had followed notice-and-comment procedures, and petitioners did not make a procedural challenge. The Court held that because the rule lacked the force of law, it had no meaningful, immediate adverse effects on the concessionaires; if and when a particular concessionaire finds itself in a contract dispute with the NPS, it can seek to take advantage of the CDA. Should the NPS stick to its position that the CDA is inapplicable (which it is not legally obligated to do), the legal battle can take place then. Justice Stevens concurred; he thought the rule was ripe for review but that the petitioners lacked standing because they had not suffered an injury in fact. Justice Breyer, joined by Justice O'Connor, dissented, arguing that the ripeness and standing requirements were both satisfied.

exempt. What is important is the heavy emphasis on the congressional assignment of rulemaking or interpretive authority.

## 2. *Invalid Legislative Rules*

Several decisions found that rules that the agency had characterized as interpretive were invalid for failure to follow notice and comment. For example, in *Sprint Corp. v. FCC*,<sup>25</sup> the D.C. Circuit set aside an FCC order governing the method for compensating pay-phone service providers for coinless calls made from pay phones. The court found that the FCC was not merely clarifying earlier rules but flatly altering existing payment arrangements. The court expressed concern about eviscerating notice-and-comment requirements, either through a broad understanding of the exception for interpretive rules or through a broad understanding of the harmless error standard, concluding that a showing of actual prejudice to the telephone companies was not required.

Similarly, in *Hemp Industries Association v. Drug Enforcement Administration*,<sup>26</sup> the Ninth Circuit declared invalid a Drug Enforcement Administration "interpretive rule." THC is listed as a banned substance on Schedule I under the Controlled Substances Act. After examining the legislative and regulatory history of Schedule I, the court concluded that Schedule I covered only synthetic THC. A Drug Enforcement Administration interpretive rule purported to read Schedule I to apply to naturally occurring THC as well. The court relied on the well-known D.C. Circuit opinion in *American Mining Congress v. Mine Safety & Health Administration*<sup>27</sup> to determine whether the rule had "the force of law" and therefore was a legislative rule requiring notice and comment. Of the factors the *American Mining* court had identified (whether enforcement action would be possible absent the rule, whether the agency explicitly invoked its general rulemaking authority, and whether the rule amends a prior legislative rule), the Ninth Circuit focused on the third. The DEA's rule was flatly inconsistent with, and therefore effectively amended, an existing legislative regulation. Accepting the court's reading of the statute and regulations,<sup>28</sup> the court's decision is clearly correct. However, as always

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25. 315 F.3d 369 (D.C. Cir. 2003).

26. 333 F.3d 1082 (9th Cir. 2003). This case is also discussed herein in *Agriculture* (*infra* 182-83).

27. 995 F.2d 1106 (D.C. Cir. 1993).

28. Bill Jordan has suggested that the meaning of the statute and regulations was not as clear as the court believed, and that the court ought to have deferred to the agency interpretation. See William S. Jordan III, *News from the Circuits*, 29 ADMIN & REG. L. NEWS at 19, 20 (Fall 2003).



in these sorts of cases, the court need not have found that the regulation was “an invalid legislative rule”; it could simply have said that the interpretation was unreasonable and stopped there.<sup>29</sup>

More striking, and troubling, was *CropLife America v. EPA*.<sup>30</sup> This was a challenge to an EPA directive, announced in a press release, concerning reliance on human studies in evaluating the safety of pesticides. Historically, the agency had relied on human studies; it had then shifted to a case-by-case approach, which it confirmed in October 2001. Then, in mid-December of that year, it announced that it would not consider or rely on third-party human studies pending review by the National Academy of Sciences of the ethical issues they pose. The decision pleased environmental groups and upset pesticide manufacturers, several of whom challenged the new policy in the D.C. Circuit. The court set aside the new policy, characterizing it as a “binding regulation that is directly aimed at and enforceable against petitioners”<sup>31</sup> that required notice and comment. It ordered EPA to return to its prior case-by-case policy.<sup>32</sup>

This decision is questionable in two respects. First, it was rather quick to dismiss the agency’s claim that the press release was merely a “policy statement,” adopting a strikingly broad understanding of which regulations are “binding” and “enforceable” and therefore legislative. The new approach was a moratorium, pending further investigation and consultation, on a practice that the agency had come to see as highly problematic. Requiring the agency to conduct a notice-and-comment rulemaking before adopting such a policy denies the agency important flexibility.

Second, the court did not even consider whether (and, as far as one can tell from the opinion, the agency did not argue that) the new policy was a

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29. See generally William Funk, *When Is a “Rule” a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659, 663-67 (2001) (arguing that courts should not invalidate “legislative rules” that were not promulgated pursuant to notice and comment, but should instead simply not allow agencies to enforce them as if they had the force of law).

30. 329 F.3d 876 (D.C. Cir. 2003). This case is also discussed herein in *Environmental and Natural Resources Regulation* (*infra* 340-41).

31. *Id.* at 881.

32. While the case was pending, EPA issued an ANPRM for purposes of undertaking notice and comment rulemaking on its use of human testing in general, not limited to pesticides. See *Human Testing; Advance Notice of Proposed Rulemaking*, 68 Fed. Reg. 24,410 (May 7, 2003).

procedural rule. After all, it did not limit or constrain the use of any pesticide or set substantive standards for doing so. Rather, it established an evidentiary practice that would be employed when the agency made substantive decisions. While some substantive impact might be expected—obviously, the petitioners thought the new approach would make it harder to establish their products' safety—the EPA announcement certainly looks like a rule of agency procedure. The court was preoccupied with the question of whether the press release was “binding,” which is irrelevant to the question whether it was a procedural rule. Procedural rules bind the agency, but, like this press release, they do not govern primary behavior or dictate substantive outcomes.<sup>33</sup>

### 3. *Valid Nonlegislative Rules*

A mine operator challenged the validity of “guidelines” (the statutory term), issued by the Mine Safety & Health Administration (MSHA) without notice and comment, that call for bi-monthly inspections. In *Chao v. Rothermel*,<sup>34</sup> the Third Circuit ruled that the guidelines are not substantive or legislative rules. Oddly, it did not say exactly what they *are*, treating “interpretive” and “procedural” as synonyms. It emphasized that the guidelines do not regulate the actual operation of mines. They only set a schedule and specify procedures for inspections; they are for use by agency employees rather than compliance by regulated entities. The agency had argued that Congress had indicated that notice and comment was not required simply by its use of the word “guidelines” rather than, say, “regulations.” The court rejected this argument; it thought that a statutory reference to “regulations” or “standards” might implicitly *require* notice and comment, but a reference to “guidelines” does not implicitly exempt it. However, these particular guidelines did not constitute a substantive rule.

All in all, this was not a hard case. Indeed, the clearest category of nonlegislative rules consists of agency enforcement policies. I would call those policy documents (staff manuals), not “interpretive” or “procedural” rules, as the court here does, but its conclusion is correct.

Somewhat similar, though with an added twist, was *Utility Air Regulatory Group v. EPA*.<sup>35</sup> There an industry group challenged a provision of EPA's *Instruction Manual for Permit Application Forms*, which guided agency

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33. The decision is in significant tension with *Utility Air Regulatory Group v. EPA*, discussed *infra*.

34. 327 F.3d 223 (3d Cir. 2003).

35. 320 F.3d 272 (D.C. Cir. 2003).

officials considering applications for Clean Air Act permits. The interpretation had to do with what sort of monitoring requirements can be included in permits. The court found that the Manual was a policy statement, not a binding regulation.<sup>36</sup> It did not bind the agency or regulated entities but only indicated the policy the agency hoped to implement in future rulemakings or adjudications. This understanding of the Manual seems fair; it reflected a view policy or legal view that was to be implemented in individual adjudications. I would only note that exactly the same thing could have been said of the press release set aside in *CropLife*.

What is most striking about the *Utility Air Regulatory Group* decision is not this fairly straightforward characterization of the Manual, but its consequence. The petitioners were bringing a substantive rather than a procedural challenge. Thus, the court's reasoning did *not* lead to the conclusion that notice and comment was not required. Rather, the court held that because the Manual was not binding, the petitioners had not been injured and, therefore, *lacked standing* to bring the challenge, which was also unripe. The Supreme Court reached a similar result in *National Park Hospitality Association*.<sup>37</sup>

Read for all they are worth, these decisions could mean that items covered by section 553(b)(3)(A) are not only exempt from notice-and-comment procedures, but may also be effectively immune from judicial review because they do not bind the agency and therefore do not injure anyone. Such an outcome would conflict with both good sense<sup>38</sup> and existing case law (although the possible non-reviewability of interpretive rules has usually been analyzed in terms of ripeness and finality rather than standing).<sup>39</sup>

These decisions are in sharp contrast with one of the weirder cases of the year, the Eighth Circuit's decision in *South Dakota v. Ubbelohde*,<sup>40</sup> which is

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36. The Manual in fact rested on an interpretation of EPA's regulations, which received significant attention from the court. Therefore, it might better have been characterized an interpretive rule.

37. 123 S. Ct. 2026 (2003); *see supra* notes 22-24 and accompanying text.

38. *See* Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 817-22 (2001).

39. *See, e.g.*, *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) (reviewing interpretive rule); *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971) (holding that advisory letters from the Administrator of the Wage & Hour Administration of the Department of Labor were ripe for review even though they were interpretive rules).

40. 330 F.3d 1014 (8th Cir. 2003).

one part of extensive multi-district litigation over the allocation of water in the Missouri River by the U.S. Army Corps of Engineers. The Corps found itself subject to a set of conflicting injunctions from various district courts, many (but not all) of which were consolidated on appeal to the Eighth Circuit. The Corps argued that the allocation decision was committed entirely to its discretion and that its decisions were not judicially reviewable. The Eighth Circuit found otherwise, discovering “law to apply” in the Corps’ “Master Manual.” The Manual, which is an internal document adopted without full-fledged notice and comment, provides criteria for allocation decisions. Strikingly, the court did not just reason that a failure to explain abandonment of a policy set out in the Manual would be arbitrary and capricious, it treated the Manual as absolutely binding on the Corps. While the Corps tried to characterize the Manual as a nonbinding policy statement, the court treated it as a legislative rule. It emphasized that the Manual’s language was mandatory, full of “shalls” and “wills”; that it was adopted through a species of notice and comment, and that the agency itself had treated it as binding. Thus, the court seems to treat the Manual as a legislative rule, judicially enforceable under the principle that an agency is bound by its own regulations.

This reasoning is just the opposite of that found in cases in Part 2, *supra*. In those cases, an agency sought to *rely on* an interpretive rule and the court said the rule was procedurally invalid. Here the agency sought to *avoid* a policy statement and the court held the agency to it, even though the APA’s requirements for legislative rules had not been complied with. If the Manual really is a substantive rule, it is a procedurally invalid one.

#### 4. A Failed Effort to Limit Alaska Professional Hunters

In *Alaska Professional Hunters Association v. FAA*,<sup>41</sup> the D.C. Circuit held that when an agency alters its interpretation of its own long-standing regulation, the change requires notice and comment. (This rule differs from the *American Mining Congress* holding in that it involves the abandonment of one permissible interpretation of an existing regulation for another, not a spurious “interpretation” of an existing rule that actually is inconsistent with, and so changes, that rule.) The principle has been much criticized,<sup>42</sup> and continues to

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41. 177 F.3d 1030 (D.C. Cir. 1999).

42. See, e.g., Jon Connolly, *Note: Alaska Hunters and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 COLUM. L. REV. 155 (2001); Jordan, *supra* note 28, at 20 (calling this case and its progeny a “virus that . . . continues to mutate doctrinally and expand geographically”).

pose problems. A nice-try-but-no-cigar effort to limit the case occurred in *Iynegar v. Barnhart*.<sup>43</sup> In general, the Social Security Administration will issue Social Security numbers (SSNs) to legal aliens only when they are allowed to work in the United States. Under a long-standing regulation, however, an alien not permitted to work can still obtain an SSN if needed “for a valid nonwork purpose.” A 1980 agency manual gave as an example of “valid nonwork purpose” applying for a state driver’s license. That example recurred in various internal manuals over the years, and it was the agency’s practice to provide SSNs to legal aliens who needed them to obtain a driver’s license. Then in March 2002 the agency revised its Record Maintenance manual and listed obtaining a driver’s license as an *invalid* nonwork purpose, stating that the agency “will not assign an SSN solely for these purposes.” In *Iynegar*, Judge Huvelle ruled that the change was invalid because it was not made pursuant to notice-and-comment procedures, relying on *Alaska Professional Hunters* and its progeny. The agency had directly reversed a definitive and long-standing interpretation of the regulation.

The government argued that the *Alaska Professional Hunters* rule applies only when the agency has changed its interpretation as a result of a policy change implemented by a new presidential administration. Judge Huvelle observed that nothing in the D.C. Circuit’s decisions said this, and that it did not really help the government on the facts here. Still, it is an interesting theory. It is really the direct opposite of then-Justice Rehnquist’s famous dissent in *State Farm*.<sup>44</sup> He had argued that precisely because the withdrawal of the passive restraints rule was obviously the result of the arrival of a new administration, it required no more explanation than that. The majority did not respond to Rehnquist directly, but implicitly it required *at least* as full an explanation when a shift in administrations lies behind a shift in regulatory requirements. So here one might read *Alaska Hunters* as requiring fuller process when the political explanation is so prominent, but only then. Judge Huvelle would have none of it, but this argument might resurface.

## 5. *Good Cause*

Good-cause cases are, in their nature, highly fact-bound; courts repeat a steady mantra that the inquiry “proceeds case-by-case, sensitive to the totality of the factors at play.”<sup>45</sup> Thus, the National Marine Fisheries Service (NMFS)

43. 233 F. Supp. 2d 5 (D.D.C. 2002).

44. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., dissenting).

45. *Natural Res. Def. Council v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003).

recently found itself winning one and losing one in quite similar circumstances.<sup>46</sup>

*The Ocean Conservancy v. Evans*<sup>47</sup> involved annual quotas set by NMFS limiting the commercial catch of sharks in the Atlantic Ocean and the Gulf of Mexico. In late 2001 the Service promulgated a rule establishing the 2002 quota, invoking the good-cause exception to excuse the absence of notice and comment. The district court accepted the Service's explanation that it had had to await the completion of various scientific studies, that it was necessary to get a rule out for the start of the fishing season on January 1, 2002, and that any delay would have meant leaving in place a lower, more restrictive quota that could have had significant economic impacts. On the other hand, much the same factors were found not to add up to good cause in *Natural Resources Defense Counsel v. Evans*.<sup>48</sup> Here the challenge was to an NMFS rule establishing specifications and management measures for the Pacific Coast Groundfish Fishery. "[G]ood cause requires some showing of exigency beyond generic complexity of data collection and time constraints; notice and comment must interfere with the agency's ability to fulfill its statutory mandate to manage the fishery."<sup>49</sup> This is not a bad formulation; it at least provides a hierarchy—the need to fulfill the substantive statutory mandate trumps the need to fulfill procedural requirements.

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46. While these cases appear to arise on very similar facts, they are not necessarily inconsistent. Given the fact-intensive, totality-of-the-circumstances nature of the good-cause inquiry, there will always be considerations that do not make it into the opinion but legitimately affect the decision. One attorney familiar with these cases points out that the NFS relies on the good-cause exception in as much as one-third of its rulemakings and that the argument for the exemption in the Florida case was particularly strong in light of the long history of the litigation and the possibility that further delay there might have led to a contempt citation. Personal communication from Daniel Cohen, U.S. Dep't of Commerce, Nov. 3, 2003.

47. 260 F. Supp. 2d 1162 (M.D. Fla. 2003).

48. 316 F.3d 904 (9th Cir. 2003). This case is also discussed herein in *Environmental and Natural Resources Regulation* (*infra* 330).

49. *Id.* at 906. *Cf.* *Bohner v. Daniels*, 243 F. Supp. 2d 1171 (D. Or. 2003) (rejecting reliance on good-cause exception where the agency had not explicitly invoked the exception or explained why it applied at the time it issued "interim rule"); *Air India v. Brien*, 261 F. Supp. 2d 134 (E.D.N.Y. 2003) (rejecting agency reliance on good-cause exception).

### C. Rulemaking, Adjudication, and the Eleventh Amendment

Two years ago, in *Federal Maritime Commission v. South Carolina State Ports Authority (FMC)*,<sup>50</sup> the Supreme Court continued its expansion of the states' immunity from federal adjudications, holding that a federal agency, like a federal court, cannot adjudicate a claim by a private party against a non-consenting state. The agency itself can pursue administrative enforcement against the state, but private parties cannot. The decision might be an impetus, if a marginal one, away from adjudication and toward rulemaking. One recent decision indicates a model for such a move while also helping define the limits of *FMC*.

The Federal Hazardous Materials Transportation Act<sup>51</sup> contains an unusual provision regarding the preemption of state law. Any person directly affected by a state requirement can apply to the Secretary of Transportation for a determination as to whether the state provision is preempted.<sup>52</sup> The Secretary must publish notice of the application in the *Federal Register* and, under DOT's regulations, receive and consider comments.<sup>53</sup> The Secretary's decision is judicially reviewable. Alternatively, any person can bypass the Secretary altogether and seek a judicial ruling on preemption directly.<sup>54</sup>

A Tennessee trade association sought a determination from the Secretary that Tennessee's annual fee on persons with hazardous waste transportation permits was preempted. After the required notice and comment, the Secretary concluded the fee was preempted. The state sought judicial review, arguing, among other things, that it was immune from this administrative process under *FMC*. In *Tennessee v. U.S. Department of Transportation*,<sup>55</sup> the Sixth Circuit disagreed. It emphasized that (1) the decisionmaker was the Secretary himself, an administrator carrying out an executive task, rather than a neutral, apolitical, judicially immune ALJ, and (2) the preemption determination does not finally determine the rights and responsibilities of individual parties or produce an enforceable order; it is only a prospective agency legal interpretation. Thus, unlike the standard agency adjudication, this did not "walk, talk, and squawk like a lawsuit"; it was essentially a rulemaking, and so did not trigger state immunity.

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50. 535 U.S. 743 (2002).

51. 49 U.S.C. §§ 5101-5127 (2000).

52. *Id.* § 5125(d)(1).

53. Notice, 49 C.F.R. § 107.205 (2003).

54. 49 U.S.C. §§ 5125(d)(3), (f) (2000).

55. 326 F.3d 729 (6th Cir. 2003).

The decision seems correct. To be sure, this apparently unique mechanism does have an adjudicatory flavor; it involves the application of general legal principles to a specific setting (though, oddly, not a factual setting but a legal one), the applicant must serve a copy of the application on the state, the final determination must “include[] a written statement setting forth the relevant facts and the legal basis for the determination,”<sup>56</sup> and it involves a determination that might easily otherwise be made in an adjudication (for example, where a permit-holder who refused to pay the fee relied on preemption as a defense in an enforcement action). However, this is really the issuance of an interpretive rule, one with no consequences unless and until relied on in an actual adjudication. Were the court to have ruled otherwise, it would seem to immunize states from the application of interpretive rules by federal agencies. The Sixth Circuit rightly steered clear of such an unfortunate and unjustified extension of the *FMC* immunity.

#### D. The Choice between Rulemaking and Adjudication

It is hornbook law that agencies can choose between rulemaking and adjudication for making policy. But, like all general propositions of administrative law, this one is subject to any specific provision to the contrary. Such a provision was at issue in *Ethyl Corporation v. EPA*.<sup>57</sup>

The Clean Air Act and EPA regulations limit tailpipe emissions from new cars; section 206 of the Act requires EPA to test new cars to ensure they will comply with the standards throughout their “useful life.” The section specifically states that EPA “shall *by regulation* establish methods and procedures for making tests under this section.”<sup>58</sup> EPA conducted a notice-and-comment rulemaking, issuing a regulation establishing a “Compliance Assurance Program,” or “CAP 2000,” under which each individual manufacturer would propose a particular testing methodology to EPA, and EPA would approve or disapprove these submissions on a case-by-case basis. The regulation set out general requirements for the tests but did not specify particular tests or procedures. In short, the EPA set up a *de facto* informal adjudication process for determining the particular testing procedures that each manufacturer would use for its vehicles.

The D.C. Circuit held that EPA had failed to comply with the statutory mandate to establish testing methods and procedures “by regulation.” The

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56. Determination, 49 C.F.R. § 107.209(b) (2003).

57. 306 F.3d 1144 (D.C. Cir. 2002).

58. 42 U.S.C. § 7525(d) (2000) (emphasis added).



court found the case easy; EPA's determination that open rulemaking procedures would be administratively burdensome, and its concern over protecting trade secrets of individual manufacturers, had to yield to the plain congressional directive. There is also just a hint of suspicion over the lack of transparency and openness that would result from "short-circuit[ing]" the rulemaking process and substituting "a cluster of closed bargaining sessions."<sup>59</sup> So, when Congress says something must be done by regulation, it must be done by regulation.

### E. "Formal Notice and Comment"

A striking and meaningful change in the terminology of rulemaking, evident for some time, was more on display than ever during the past year: the use of the term "formal" to describe section 553 notice-and-comment rulemaking. The Supreme Court has done it,<sup>60</sup> and it is in good company. A LEXIS search in the federal courts library for the (one would have thought oxymoronic) phrase "formal notice and comment" turned up 38 instances during the five-year period from 1999 to 2003; 18 instances from 1989 to 1993; eight instances from 1979 to 1983; and zero from 1969 to 1973. This new usage reflects three things, I think. First, traditional "formal rulemaking," that is, rulemaking pursuant to sections 556 and 557, has virtually disappeared; therefore, that phrase does not have a technical meaning readily available to generalists. Second, agencies increasingly rely on non-legislative rules. As a result, in the real world the two categories of rulemaking are notice and comment or nothing. As between those two, notice and comment is the more formal, all the more so with the growth of analytic requirements and "ossification" of what was originally a bare-bones process. The third factor is the developing law of *Chevron*, *Christensen*, and *Mead*, which invite discussion of the "formality" with which an agency has adopted a regulation in considering the appropriate level of deference.<sup>61</sup>

Thus, in rulemaking, as in dress codes, yesterday's informal is today's formal. I neither lament nor celebrate this shift, but merely report it.

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59. *Id.* at 1150.

60. *Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003) (noting that "[w]hile these administrative interpretations [embodied in agency's Operations Manual] are not products of formal rulemaking, they nevertheless warrant respect").

61. See the discussion of these three well-known cases in *Administrative Law Discussion Forum*, 54 ADMIN. L. REV. 565-882 (2002).

## PART II. ADMINISTRATIVE DEVELOPMENTS

### A. E-Rulemaking

For some years, agencies have been shifting toward electronic rulemaking. There has been no single watershed event or year in this transformation. But the past year saw a sort of “knee of the curve,” in which electronic rulemaking became very much the norm.<sup>62</sup> Dozens of federal agencies now accept comments on proposed regulations in electronic format and maintain an electronic docket containing copies of comments and other relevant material; under the E-Government Act, all agencies are to have electronic dockets in place by March 2004—at least, “to the extent practicable.” At many agency Web sites, it is a relatively simple matter to learn the status of pending rulemakings and, in some cases, to search the titles or even the text of materials that have been docketed.<sup>63</sup> A dozen or more agencies also maintain subject- or docket-specific listservs, so that subscribers receive e-mail notices of submissions, deadlines, or agency actions.<sup>64</sup> While improvement is needed in user-friendliness, the shift to e-rulemaking has undeniably made it far easier to learn about agency rulemakings, obtain relevant materials, and submit comments.

In addition to the growth of e-rulemaking efforts within individual agencies, a coordinated, government-wide undertaking made significant progress during the last year. In July 2001, the Office of Management and Budget (OMB) established an E-Government Task Force, headed by the newly created Associate Director for Information Technology and E-Government.<sup>65</sup>

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62. A valuable collection of information and monographs concerning e-rulemaking is available (online, of course) at <http://www.ksg.harvard.edu/cbg/rpp/erulemaking/home.htm> (last visited Nov. 21, 2003). For an excellent general discussion, see Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Civil Infrastructure*, 54 ADMIN. L. REV. 1421 (2002).

63. Individual agencies' e-rulemaking sites can be accessed from links at the Web site of the Federal Register. See [http://www.archives.gov/federal\\_register/public\\_participation/rulemaking\\_sites.html](http://www.archives.gov/federal_register/public_participation/rulemaking_sites.html) (last visited Nov. 21, 2003).

64. See [http://www.archives.gov/federal\\_register/public\\_participation/rulemaking\\_email.html](http://www.archives.gov/federal_register/public_participation/rulemaking_email.html) (providing links to agency rulemaking listservs) (last visited Nov. 21, 2003).

65. See Memorandum from Mitchell E. Daniels, OMB Director, to Heads of Executive Departments and Agencies (July 18, 2001). The initial appointee, Mark Forman, left in August 2003 and was replaced by Karen Evans, who had been Chief Information Officer at the Department of Energy.

The E-Government Act thereafter created within OMB an Office of Electronic Government, headed by a presidentially appointed Administrator.<sup>66</sup>

In October, the President's Management Council approved a set of recommendations from the Task Force, leading finally to the publication in February 2002 of a document entitled "E-Government Strategy." The Strategy, a revised version of which was released in April 2003,<sup>67</sup> identified 24 projects, of which one is "Online Rulemaking Management." The Department of Transportation was originally the "managing partner" for the initiative; EPA took over in late 2002. The first, easy step was to include links to individual agency e-dockets from *www.firstgov.gov*. The much harder second step was to create a single Web site from which individuals could find, review, and submit comments on proposed rules from all federal agencies. That site, *www.regulations.gov*, went online on January 23, 2003. The *regulations.gov* portal is built on notices of proposed rules that are submitted to the Office of the Federal Register. Users can search by keyword, topic, or agency. A search produces an entry for each pending proposal that fits the search criteria; the entry identifies the agency, subject matter, affected section of the *Code of Federal Regulations (CFR)*, date of proposal, date by which comments are due, a link to the text of the *Federal Register* notice (in both pdf and html format), and a link for the submission of comments. The site also links to the up-to-date text of the *CFR*. The site was one of 20 winners of a 2003 "E-Government Pioneer Award" from the FCW Media Group, host of "e-gov.com."<sup>68</sup>

*Regulations.gov* has been a mixed success.<sup>69</sup> On the one hand, a lot of

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66. 44 U.S.C.A. § 3602(a) (2003). The Administrator of this office and the Associate Director are the same person.

67. EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, IMPLEMENTING THE PRESIDENT'S MANAGEMENT AGENDA FOR E-GOVERNMENT: E-GOVERNMENT STRATEGY (2003), available at <http://www.whitehouse.gov/omb/inforeg/egovstrategy.pdf> (last visited Nov. 21, 2003) [hereinafter E-GOVERNMENT STRATEGY].

68. See Press Release, E-Gov 2003 Awards Innovations in E-Government, available at [http://www.e-gov.com/events/2003/egov/for\\_press/press\\_room.asp](http://www.e-gov.com/events/2003/egov/for_press/press_room.asp) (last visited Nov. 21, 2003). Oddly, EPA's own E-Docket site was also given an award, but as a "trailblazer" rather than a "pioneer." The nuanced distinction between a trailblazer and a pioneer (not to mention the third category, "explorer") is beyond the scope of this chapter.

69. A useful, somewhat critical assessment, based on the first three months of the site's operation, is U.S. General Accounting Office, *Electronic Rulemaking: Efforts to Facilitate Public Participation Can Be Improved* (Sept. 2003) (GAO-03-901), available at [http://www.senate.gov/~govt-aff/\\_files/d03901gao.pdf](http://www.senate.gov/~govt-aff/_files/d03901gao.pdf) (last visited Nov. 15, 2003).

people are looking at it: in the first three months or so of operation, it had millions of hits.<sup>70</sup> On the other hand, most electronic commenters rely on the agencies' own Web sites. For example, during the first three months of operation EPA received only eight comments through *regulations.gov* and the Department of Transportation only 21 (while receiving 16,000 electronic comments at its own Web site).<sup>71</sup> This is not a surprise, since the agency sites tend to have more information and will be known to most, and familiar to many, of those interested enough to submit a comment. According to the GAO, not all proposed regulations have in fact been available on *regulations.gov*; at the same time, some proposals have been available only there and not on the relevant agencies' own sites.

The administration's e-government strategy envisions an integrated, government-wide docket system that goes beyond *regulations.gov*. At present, that site allows the user to access the *Federal Register* notice for a proposed rule, but not the full docket, which can only be accessed via the agency's own Web site. The plan ultimately is to eliminate the agency-specific dockets, migrating all into the single, government-wide Web site. This is supposed to be done as a trial run for five agencies by September 2004.<sup>72</sup>

The future of this initiative, and of e-rulemaking generally, is hard to predict. It is easy to oversell the transformations to be worked by e-rulemaking.<sup>73</sup> Thus far, e-rulemaking represents a new and improved format for what is still recognizably the section 553 notice-and-comment process. The transformation that e-rulemaking promises, and so far has not accomplished, would be to make notice and comment a truly dialogic or deliberative process. A simple step in this direction that e-rulemaking facilitates would be to include a rebuttal period as a matter of course, allowing all participants to respond to all other participants after the close of the primary comment period.<sup>74</sup> More ambitiously, some have envisioned electronic rulemaking as a

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70. Just how many is unclear. OMB states that in its first three months, the site had 2.6 million unique visitors. E-GOVERNMENT STRATEGY, *supra* note 67, at 4, 12.

71. General Accounting Office, *supra* note 69, at 23-24.

72. E-GOVERNMENT STRATEGY, *supra* note 67, at 26.

73. For example, E-GOVERNMENT STRATEGY asserts that "with the implementation of the E-Rulemaking initiative, businesses will no longer need the assistance of a lawyer or lobbyist to participate in the regulatory process." *Id.* at 9. This may be literally true, but *meaningful* participation, effective and sophisticated commenting, and private meetings will still require professional assistance.

74. See Brandon & Carlitz, *supra* note 62, at 1429-30 & nn.32-33.

bona fide “dialogue” that becomes truly deliberative, shaping the participants’ views in the process and leading to real consensus.<sup>75</sup> That happy day remains in the distant future, however.

The move to e-rulemaking has produced, or seems likely to produce, several noteworthy shifts. First, it has saved some money, if only in reduced storage needs and personnel to handle all the paper. If the government-wide docket is ever put in place, there will be some additional, modest economies of scale.<sup>76</sup> E-rulemaking has probably also marginally increased public participation and transparency as well. However, no one has convincingly demonstrated this to be the case.

A second consequence has been to help entrench the idea of an informal rulemaking “docket.” The APA does not provide for such a thing, and historically it was an incoherent concept, since notice and comment was not an on-the-record proceeding. Over the last generation—largely as a result of the reconception of notice and comment as involving a “paper hearing,” both by courts and in some specific statutes, such as the Clean Air Act—it has become more common to think of informal rulemaking as involving a docket and a record. That language and that conception permeate the world of e-rulemaking. Thus, the E-Rulemaking Act requires agencies to “make publicly available online . . . materials that by agency rule or practice are included in the rulemaking docket under section 553(c)”<sup>77</sup> (even though there is no such thing as a “rulemaking docket under section 553(c)”). EPA’s e-rulemaking system is known as “E-Docket”; the Department of Transportation has the “Docket Management System,” etc.

The third shift concerns the nature of public comment and is more subtle. In an e-rulemaking world, because so many people are aware of pending rulemakings and commenting is so easy, agencies can be quickly swamped with thousands, or hundreds of thousands, of comments. This is the flip side of “transparency” and “increased participation.” What can realistically be expected of an agency dealing with a million comments, thousands of which duplicate one another? The old model of careful individual consideration is

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75. See, e.g., THOMAS C. BEIERLE, *DISCUSSING THE RULES: ELECTRONIC RULEMAKING AND DEMOCRATIC DELIBERATION* (2003) (Resources for the Future Discussion Paper 03-22).

76. OMB anticipates an \$8 million cost savings, plus \$3 million in cost avoidance, from decommissioning five agency-specific e-docket systems. E-GOVERNMENT STRATEGY, *supra* note 67, at 26.

77. E-Rulemaking Act § 206(d)(2)(B).

inapplicable. Unavoidably, the agency will start to do what, for example, members of Congress do: avoid the subtleties and keep a running tally with the grossest sort of division—basically “for” or “against.” Many people have had the experience of laboring over a well-thought-out, carefully researched, elegantly written, heartfelt letter to a member of Congress, one which, in the writer’s view, must surely sway any reasonable reader—only to receive a form letter response that suggested that the letter was unread and misunderstood.

Three sorts of consequences can be expected. The first is purely doctrinal. Much of what reviewing courts have said about the need to consider and respond to comments will have to be modified. An agency cannot respond to a million comments other than generally and generically.<sup>78</sup>

Second, the expected savings of time, money, and resources are likely to prove elusive. There may be other gains, of course, but the new systems are likely to lead to “information overload” that could disable agencies or at least slow their decisionmaking.<sup>79</sup>

The third point goes to the nature of the process. Letter-writing to Congress is seen as a sort of proxy for elections. Voters indicate their preferences; the fact that someone wrote a letter is not important so much for its content but for the signal it gives about the salience of the issue to the letter-writer. Historically, notice-and-comment rulemaking has reflected a different model, in which what mattered was the substance of the comments.<sup>80</sup> However, as the comments received on proposed rules increase by orders of magnitude, and as they increasingly take the form of hundreds of thousands of identical e-mails organized by trade associations or nonprofits, one would expect both

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78. There is one important caveat, however. To the extent that the comments are duplicative, the burden of responding is not increased.

79. Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 329 (1998); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW L. REV. 173, 224-28 (1997).

80. As Judge Posner wrote in *Alto Dairy*, discussed *supra* at notes 6-8, “[t]he purpose of a rulemaking proceeding is not merely to vote up or down the specific proposals advanced before the proceeding begins, but to refine, modify, and supplement the proposals in the light of evidence and arguments presented in the course of the proceeding.” *Alto Dairy v. Veneman*, 336 F.3d 560, 569 (7th Cir. 2003).

participants and observers to tend toward a more “political” understanding of the process.<sup>81</sup>

As many have pointed out, there are two dominant models of the administrative process. Under the “expertise” model, the agency is a neutral, apolitical, technocratic expert. Problems of public policy have right and wrong answers, and the chances of identifying and implementing the right one are increased if the agency is kept out of the political process. Under the “politics” model, what legitimates agency decisions is not their objective correctness according to experts, but their consistency with popular preferences. Policy decisions are more about values than facts, and agencies *ought* to be subject to political influences. Neither model has ever triumphed, though the overall trend has been away from the expertise model and toward the politics model.<sup>82</sup>

E-rulemaking can only accelerate this trend. Consider just one recent example. After a relatively rapid rulemaking and Environmental Impact Statement (EIS)-writing process, the U.S. Forest Service issued the so-called “roadless rule” in the waning days of the Clinton Administration. The rule restricts road construction in almost 60 million acres of Forest Service land. The rule has generated a number of legal challenges, with several district judges finding defects in the process,<sup>83</sup> and the Bush Administration is considering diluting its protections in Alaska. Comments on the proposed rule and/or the Draft EIS, and on the current Alaska proposals, numbered in the millions and have been overwhelmingly in favor of stringent protections. Press coverage has overwhelmingly treated the comment process as a sort of vote.<sup>84</sup> This conception

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81. See BEIERLE, *supra* note 75, at 11 (lamenting that e-rulemaking produces, “at worst, a cacophony of unreflective comments [that] tempts rule writers to lapse into preference aggregation, counting up support and disagreement in an inappropriate application of a voting model”); Randolph J. May, *Under Pressure: Campaign-style tactics are the wrong way to influence agency decisions*, LEGAL TIMES, July 7, 2003, at 44 (noting, and lamenting, shift from an expertise model to a politics model, of which efforts to bombard rulemaking agencies with duplicative comments are an aspect); Rossi, *supra* note 79, at 238-41.

82. For one useful general description, see Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745 (1996).

83. See, e.g., Wyoming v. United States Dep’t of Agric., 277 F. Supp. 2d 1197 (D. Wy. 2003); Kootenai Tribe v. Veneman, 142 F. Supp. 2d 1231 (D. Idaho 2001), *rev’d*, 313 F.3d 1094 (9th Cir. 2002).

84. For example, an item in the Sierra Club’s newsletter was subtitled, “What part of 1 million comments didn’t they understand?” Kim Todd, *Roadless Rule Redux*, THE PLANET NEWSLETTER, Sept. 2001, at 1.

can also be seen in an amicus brief submitted to the Ninth Circuit in *Kootenai Tribe* by the Montana Attorney General. The brief's basic point had nothing to do with legality, but came down to this: "Hey, Montanans overwhelmingly support this rule, as shown by tabulating our comments during the process." Emphasizing that 67 percent of commenters in Montana (and 96 percent nationwide) favored stronger protections than were anticipated in the Draft EIS, and that the Forest Service responded by strengthening protections, the brief concludes that the rule is "the product of public rulemaking at its most effective."<sup>85</sup> What's more, the Ninth Circuit placed some weight on this argument.<sup>86</sup>

In short, the new technology is forcing agencies toward a particular model of the process and function of rulemaking, as opposed to enabling agencies to better function under the model chosen independent of that technology.

## B. IMPLEMENTATION OF THE DATA QUALITY ACT

The Data Quality Act (DQA) requires OMB to issue "Government-wide guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies."<sup>87</sup> Agencies must then produce their own guidelines to achieve those information-quality goals; the agencies must also establish a mechanism by which affected persons may seek and obtain correction of information disseminated by the agency.<sup>88</sup> OMB issued its information-quality guidelines on September 28, 2001; most agencies produced their own guidelines by the statutory deadline of October 1, 2002.<sup>89</sup>

Whether and/or how the DQA applies to rulemakings remains a matter of debate.<sup>90</sup> The dominant agency reading, reflecting OMB's Guidelines, is

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85. Brief of Amicus Curiae, Montana Attorney General at 5, 6, *Kootenai Tribe v. Veneman*, 313 F.3d 1094 (9th Cir. 2002) (Nos. 01-3547-2, 01-35539, 01-3547-6).

86. *Kootenai Tribe*, 313 F.3d at 1116 n.19.

87. Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 515(a), 114 Stat. 2763, 2763A154 (2000). This issue is also discussed herein in *Environmental and Natural Resources Regulation (infra)*.

88. *Id.* § 515(b)(2)(A).

89. The OMB web site links to all agency guidelines from [http://www.whitehouse.gov/omb/inforeg/agency\\_info\\_quality\\_links.html](http://www.whitehouse.gov/omb/inforeg/agency_info_quality_links.html) (last visited Nov. 21, 2003).

90. For opposing views, compare Memorandum from Scott Slaughter to the Center for Regulatory Effectiveness, Federal Agency Authority to Create



that there is no per se exemption for rulemaking but that allowances must be made on two basic issues, as discussed below.

### 1. *Dissemination*

Does rulemaking involve the “dissemination” of “information” by the rulemaking agency? Much of what makes it into a rulemaking docket is not produced, or vouched for, by the agency; rather, it hunts down this material or receives it from commenters. If everything in the rulemaking docket must satisfy the requirements of quality, objectivity, utility, and integrity that apply to agency documents, and if the agency must field requests for correction from anyone who feels that something in the docket does not meet those standards, then the DQA has the potential to significantly disrupt the rulemaking process and/or to limit the materials on which the agency can rely in that process.

While mere acceptance of information submitted to the rulemaking docket does not constitute the “dissemination,” the DQA does apply to information that the agency endorses or relies upon.<sup>91</sup> Reviewing their varying provisions in the agency guidelines is well beyond the scope of this chapter. However, a pending dispute involving EPA nicely highlights the central issues.

EPA is conducting a rulemaking regarding the land application of biosolids (i.e., sewage sludge). Responding to an EPA Notice of Data Availability, the Natural Resources Defense Council (NRDC) submitted comments about the health risks caused by dioxin in biosolids. The Center for Regulatory Effectiveness (CRE), the driving private force behind the DQA, objected to the scientific validity of these comments.<sup>92</sup> CRE asserts that NRDC’s comments

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Exemptions from the Data Quality Guidelines (May 29, 2002) (arguing that the statute allows for no exceptions, including for rulemaking), and James W. Conrad, Jr., *The Information Quality Act – Antiregulatory Costs of Mythic Proportions?*, 12 KAN. J.L. & PUB. POL’Y 521, 539-46 (2003) (same), with Center for Progressive Regulation, *Comments on EPA Draft Data Quality Guidelines* (May 31, 2002) (arguing that the notice-and-comment rulemaking process itself satisfies any applicable DQA requirements), and Paul Noe, *Learning to Live with the Data Quality Act*, 33 ENVTL. L. REP. 10,224 (2003) (remarks of Professor Sidney Shapiro) (same).

91. See EPA, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Environmental Protection Agency*, § 5.3 (Dec. 2002).

92. See Letter from William G. Kelly, Jr., Center for Regulatory Effectiveness, to Docket Clerk, U.S. EPA (Feb. 27, 2003).

fail to meet the information-quality standards of the DQA. The letter is not itself a request for correction; rather, it concludes that “[u]se by EPA of the NRDC information and assertions would violate Data Quality requirements and would lead to filing of Request for Correction by CRE and ultimately the need to reject those positions.”<sup>93</sup> The CRE letter produced a lengthy response from the Center for Progressive Regulation (CPR), the most active DQA-skeptic among nonprofits.<sup>94</sup> The CPR letter takes the strong position that the DQA simply does not apply to rulemaking, and asks EPA and OMB (or at least the former) to do the same.

## 2. Requests for Correction

Under the Act and OMB’s Guidelines, agencies must establish administrative mechanisms through which affected persons can obtain correction of agency information that does not comply with the Act’s requirements. Notice-and-comment rulemaking can be seen as itself constituting such a mechanism, in which case agencies satisfy the DQA in the rulemaking context by satisfying section 553, the National Environmental Policy Act, or other notice-and-comment regime. Here again, specific agency responses have varied, but most if not all have sought to rely on existing mechanisms. For example, DOT’s Guidelines state that when it seeks comment on information, it will ordinarily respond to a request for correction to that information only in the “next document we issue in the matter,” such as the preamble to the final rule.<sup>95</sup> In addition, it may reject a request for correction to information when the request could have been made in the context of the rulemaking proceeding.

## PART III. LEGISLATIVE DEVELOPMENTS

### A. E-Government Act of 2002

With grand aspirations but uncertain effects, the E-Government Act of

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93. *Id.* at 12.

94. Letter from Sidney Shapiro & Rena Steinzor, Member Scholars, Center for Progressive Regulation, to Christine Whitman, U.S. EPA, and John Graham, OIRA (May 19, 2003).

95. U.S. Dep’t of Transp., Information Dissemination Quality Guidelines, §§ VIII.e(6), VIII.h (2002), available at <http://dmses.dot.gov/submit/DataQualityGuidelines.pdf> (last visited Nov. 14, 2003).

2002,<sup>96</sup> signed into law in December 2002, aims to bring the federal government into the electronic age. The Act established a new Office of Electronic Government, headed by a Senate-approved Administrator, within OMB<sup>97</sup> and requires or encourages government use of the Internet in a wide variety of settings. Section 206, entitled “Regulatory Agencies,” has two effects on rulemaking. First, it requires agencies to post on the Web “all information about that agency required to be published in the *Federal Register* under paragraphs (1) and (2) of section 552(a).”<sup>98</sup> At a minimum, this means that final rules that must be published in the *Federal Register* under 552(a)(1) must also be posted to the Web. Whether (a)(2) material must also be posted is unclear. On the one hand, the section does refer to (a)(2); on the other hand, it requires posting only of information “required to be published in the *Federal Register* under paragraph[] . . . 2 of section 552(a).” There is no such information, since (a)(2) does not require *anything* to be published in the *Federal Register*.<sup>99</sup> On the other hand, section 206 requires, “to the extent practicable,” agencies engaged in notice-and-comment rulemaking to allow submission of comments in electronic form and to provide an electronic docket in notice-and-comment rulemakings.<sup>100</sup> As discussed in Part II, *supra*, federal agencies have overwhelmingly already taken these steps.

## B. Pending Bills

Several bills with a meaningful chance of passage would make significant changes to the rulemaking process.<sup>101</sup>

96. E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (2002).

97. *Id.* § 101 (to be codified at 44 U.S.C. § 3602).

98. *Id.* § 206 (b) (to be codified at 44 U.S.C. § 3501 note).

99. For a fuller discussion of the Act’s ambiguities with regard to what must be posted to agency Web sites under both section 206 and section 207, see Michael B. Gerrard & Michael Herz, *Harnessing Information Technology to Improve the Environmental Impact Review Process*, 12 NYU ENVTL. L.J. (forthcoming 2003).

100. E-Government Act §§ 206 (c) (“To the extent practicable, agencies shall accept submissions under section 553(c) of title 5, United States Code, by electronic means.”), (d) (requiring, “to the extent practicable,” that agencies maintain an electronic docket that includes all submitted comments as well as “other materials that by agency rule or practice are included in the rulemaking docket”).

101. As would one with next to no chance of passage but which merits mention because the proposal is bold. As he has done in prior Congresses, Rep. J.D.

### 1. *H.R. 2432, Paperwork and Regulatory Improvements Act*

This proposed amendment to the Paperwork Reduction Act aims to increase regulatory accounting and evaluation. Section 5 of the bill would make permanent an existing pilot project under which the General Accounting Office (GAO) is to respond to congressional requests for an evaluation of proposed regulations. The theory seems to be that congressional oversight of the rulemaking process, whether through oversight hearings, new legislation, the Congressional Review Act, or direct participation in the notice-and-comment process, would be enhanced by an “independent” evaluation of agency regulations. Second, the bill contains a number of provisions to promote “regulatory accounting.” Most important, it would (a) require agencies to submit annual estimates of the costs and benefits resulting from their rules and (b) set up “pilot projects in regulatory budgeting” at five agencies (Labor, Transportation, EPA, and two others selected by OMB).

### 2. *H.R. 1772, Small Business Advocacy Improvement Act*

In the 107th Congress, both the House and the Senate passed versions of

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Hayworth (R-AZ) has introduced a bill that would require congressional enactment for *any* agency rule (except for those exempted from section 553’s notice-and-comment requirements) to be effective. *See* the Congressional Responsibility Act, H.R. 110, 108th Cong. (2003). A Senate version is not currently pending, although in years past Sen. Sam Brownback (R-KS) has introduced one. *See, e.g.*, S. 908, 107th Cong. (2001); *see also* Legislative Oversight of Significant Regulations Act of 2003, H.R. 1654, 108th Cong. (2003) (similar proposal requiring that any significant agency regulation be embodied in a joint resolution before it could take effect).

Rep. Hayworth’s bill would establish a fast-track, limited debate procedure for considering agency regulations in the form of a bill. As its title indicates, the bill purports to be a response to familiar concerns with the Congress’s delegation of legislative authority to the agencies, aiming to ensure more democratic and accountable policymaking. It seems highly unlikely that it would have any such effect in the real world. Rather, the bill’s most important effects would be (a) an overall reduction in regulatory activity, and (b) the elimination of judicial review of agency rulemaking under the APA. The latter consequence is implicit in the fact of enactment of regulations as statutes, and explicit in section 7 of the bill, which states that a regulation contained in an enacted bill would not constitute “agency action” under the APA.

a bill aimed at increasing the strength and independence of the Small Business Administration's Office of Advocacy (Advocacy).<sup>102</sup> Such legislation was reintroduced in the 108th Congress, and a "Small Business Advocacy Improvement Act of 2003" passed the House on June 24, 2003. The bill's findings assert that "[e]xcessive regulations continue to burden the Nation's small businesses" and that "[f]ederal agencies continue to propose regulations that impose disproportionate burdens on small businesses."<sup>103</sup> The legislation would increase the rank, staffing, and budget of the Office and make its funding a specific line item in the federal budget. While the goal seems to be to empower an anti-regulatory watchdog within the government, the legislation would not make meaningful substantive changes to Advocacy's authority or statutory duties.

### 3. *H.R. 338, Defense of Privacy Act*

This bill would add a new section 553a to the Administrative Procedure Act, requiring agencies to prepare initial and final "privacy impact statements" as part of any notice-and-comment rulemaking. The bill is modeled closely on the Regulatory Flexibility Act, which requires agencies to consider the impacts of regulations on small businesses. Indeed, it comes close to just substituting "the privacy of individuals" for every occurrence of "small businesses" in the Regulatory Flexibility Act. Thus, the bill would not directly limit the gathering, use, or disclosure of personal information about individuals; rather, it trusts that forcing the agency to stop and think about, and to make public, its decisions in this regard will induce the appropriate level of respect for individual privacy.

It does not appear that this bill is on the verge of being enacted. However, an earlier version did pass the House in the 107th Congress.<sup>104</sup> The bill has strong supporters from distant places on the political spectrum. It was introduced by the conservative Rep. Steve Chabot (R-OH) but is co-sponsored by the liberal Jerrold Nadler (D-NY), and at a House hearing in July 2003, strong support was offered by both the American Conservative Union and the American Civil Liberties Union. Thus, it may have some political viability. Nonetheless, in the administrative law community there is a general consensus that the last thing the rulemaking process needs is yet another

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102. See DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2001-2002 166-67 (Jeffrey S. Lubbers ed., 2003).

103. H.R. 1772, §§ 2(a)(1), (2), 108th Cong. (2001).

104. H.R. 4561, 107th Cong. (2002), 148 Cong. Rec. H7033 (Oct. 7, 2002).

analytic or impact statement requirement. A 1992 ABA House of Delegates policy questions the value of such analyses and urges restraint in requiring them. Consistent with that policy, in 2002, the ABA took a reasonably firm, though just slightly hedged, position opposing the then-pending version of this legislation.<sup>105</sup>

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105. See Letter from Robert D. Evans, ABA Government Affairs Director, to Rep. Robert Barr (May 7, 2002), available at [http://www.abanet.org/adminlaw/policy\\_letters/fappaletter.html](http://www.abanet.org/adminlaw/policy_letters/fappaletter.html) (last visited October 31, 2003).