Caught Between Action and Inaction: Public Participation in Voluntary Approaches to Environmental Policy under the Administrative Procedure Act

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I. Introduction

Mandatory controls on greenhouse gases were noticeably absent from the climate change policy that President Bush announced in 2002, which instead placed heavy reliance on private voluntary efforts. [1] Specifically, Bush directed the Environmental Protection Agency (EPA) to establish a program called "Climate Leaders" to encourage companies to voluntarily reduce greenhouse gas emissions and directed the Department of Energy (DOE) to improve the effectiveness of an already existing voluntary greenhouse gas registry.[2] Agencies implementing environmental policy have been employing voluntary approaches such as these for over a decade, but the Bush Administration has elevated this type of approach to a new status of importance by often relying principally on voluntary efforts in response to significant environmental concerns. Critics have questioned the environmental effectiveness of voluntary approaches,[3] yet it

* J.D., Harvard Law School, 2004. I am very grateful to Professor David Barron for his assistance in developing and refining the concept of this Paper and for other helpful suggestions.

[1] Andrew C. Revkin, *Bush Offers Plan for Voluntary Measures to Limit Gas Emissions*, N.Y. TIMES, Feb. 15, 2002, at A6.

[2] THE WHITE HOUSE, GLOBAL CLIMATE CHANGE POLICY BOOK (2002), http://www.whitehouse.gov/news/releases/2002/02/climatechange.html.

[3] *See, e.g*, JAN MAZUREK, PROGRESSIVE POLICY INSTITUTE, BACK TO THE FUTURE: HOW TO PUT ENVIRONMENTAL MODERNIZATION BACK ON TRACK 9 ("In [seeking voluntary commitments], the administration is not giving industry what it needs – clear economic incentives and a firm regulatory scheme to make massive investments with certainty."), 20 ("Perhaps the most important lesson demonstrated by EPA's voluntary pilots is that it is very difficult for EPA to make any voluntary, non-statutory program work.") (2003), http://www.ppionline.org/documents/Enviro_BacktotheFuture_0403.pdf; Natural Resources Defense Council, *Voluntary Greenhouse Gas Reduction Programs Are Not Enough*

is unclear whether the Administrative Procedure Act (APA) provides interested members of the public the right to voice concerns and challenge agency decisions related to voluntary approaches through rulemakings and judicial review. If the APA does not provide public participation rights when agencies decide to use voluntary approaches, important environmental policy decisions may be shielded from public comment and judicial review, and a turn to widespread use of voluntary approaches may produce a deficit of public participation in environmental policymaking.

This Paper analyzes the application of the APA to voluntary approaches in environmental policy. In choosing a voluntary approach, agencies deliberately decide not to issue mandatory regulations but instead to rely on voluntary participation in furtherance of the agency's goals, often providing various types of incentives to facilitate the voluntary efforts. One long-standing exampleof a voluntary approach is the Energy Star program, a voluntary labeling scheme established by the EPA in 1992 that encourages the use of energy-efficient products.[4] Although voluntary approaches have been used for many years, until recently agencies had generally used them as complements or precursors to mandatory regulations. In contrast, the Bush Administration has in many circumstances promoted reliance on voluntary efforts as a preferred alternative to mandatory regulation. The climate change policy is one example in which the Administration has responded to environmental concerns principally by looking towards voluntary approaches. In addition, the Department of the Interior has often favored its "cooperative conservation" programs, in which the agency provides

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(2001), *at* http://www.nrdc.org/globalWarming/avoluntary.asp; Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1286-87 (1995).

[4] U.S. Environmental Protection Agency, *History of Energy Star*, *at* http://www.energystar.gov/index.cfm?c=about.ab_history.

incentives for voluntary conservation efforts, over the use of regulatory controls to achieve conservation goals.[5]

Voluntary approaches raise new and complex administrative law issues, which are important to address given the rising importance of these approaches in environmental policy. Caught between conceptions of agency action and inaction, voluntary approaches blur the legal categories used to apply the APA's public participation requirements. Agencies might be viewed as taking "action" through the implementation of voluntary approaches in that the agency identifies and acknowledges issues of concern, signals to private actors that action is desired, provides incentives to encourage voluntary efforts, measures progress towards objectives, and commits staff, funding, and other resources to the endeavor. However, decisions to use voluntary approaches might alternatively be viewed as "inaction" because they are after all a deliberate choice by an agency to refrain from regulating. They do not create any restrictions on private action, ultimately leaving control in the hands of private actors and taking the risk that no progress will be achieved greater than if the agency had done nothing at all.

The application of the APA's rulemaking and judicial review provisions to voluntary approaches will produce different results depending upon how these approaches are characterized. The APA requires that agencies hold rulemakings when they create "rules" but provides certain exceptions to this requirement, notably for "general statements of policy," which lack binding force on the publicand the agency.[6] Although voluntary approaches by definition do not bind the public, the agency could

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[5] *See* John Tierney, *Trying for Balance at Interior Dept.*, N.Y. TIMES, June 9, 2003, at A26; U.S. Department of the Interior, *Strengthening Citizen Stewardship and Cooperative Conservation*, http://www.doi.gov/initiatives/conservation.html

[6] Administrative Procedure Act, 5 U.S.C. §§ 551(5), 553(b)(A); Pac. Gas & Elec. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (A general statement of policy…does not establish a "binding norm.").

conceivably bind itself in some way through its implementation of the approach. The presence of a binding norm, however, would seem to not be possible unless there is at least some "action" to which the agency can be bound. Therefore, the characterization of the agency's decision to use a voluntary approach as action or inaction has implications for whether the decision is classified as a policy statement under the APA, and thus for the right to a rulemaking. In addition, the APAexpressly applies different standards for substantive judicial depending on whether action or inaction is being challenged, and the Supreme Court has also held that under some circumstances agency inaction is presumptively committed to agency discretion by law.[7] The legal characterization of these approaches thus has important consequences for public participation rights under the APA, yet so far the question seems to have escaped courts and scholarship.

The tension over the appropriate legal characterization of voluntary approaches is further complicated by the political debate over these approaches. Agencies often highlight voluntary programs to show the public that action is being taken in response to environmental concerns. President Bush and agency officials such as Secretary of the Interior Gale Norton have portrayed voluntary approaches as genuine, effective responses to significant environmental concerns such as climate change and habitat destruction. Such manifestations would support a conclusion that voluntary approaches should be considered agency "action." Conversely, environmentalists often challenge voluntary approaches as lacking in substance and incapable of effectively addressing environmental problems, which would suggest that that these approaches are closer to "inaction" than action. These positions may result in paradoxes for both environmentalists wishing to challenge the programs and agencies wishing to defend the programs. Environmental

[7] Administrative Procedure Act, 5 U.S.C. §706; Heckler v. Chaney, 470 U.S. 821, 831 (1985).

advocates will more effectively be able to argue that they are entitled to rulemakings and judicial review under the APA by showing that agencies are taking action through voluntary approaches, contrary to what environmentalists may claim as a substantive matter. And agencies wishing to avoid rulemakings and receive deference in judicial review will find it useful to take a position that, contrary to their public manifestations, decisions to use voluntary approaches are essentially the equivalent of inaction.

Given the unresolved legal status of voluntary approaches to environmental policy, this Paper suggests that it will often be appropriate for courts to look to the agency's public portrayal of the approach to determine its legal characterization for purposes of the APA -- specifically, to determine whether the approach qualifies as action or inaction to determine whether judicial review is available, and whether the agency has created a binding norm to determine whether a rulemaking is required. Otherwise, agencies may ironically escape the APAprocesses designed to make them accountable based on a position that is contrary to the political message they send to the public. The result would further be a shielding of important and often controversial environmental issues from public scrutiny. The public would lose the right to participate in or challenge the significant decisions by agencies to use voluntary approaches rather than mandatory regulation, which will benefit the targets of regulation, who will usually prefer voluntary policies, while disadvantaging the beneficiaries of regulation. Other important implementation decisions as well, such as the level of environmental improvement sought and the incentives granted to encourage voluntary efforts, will not be subject to the APA. Even more fundamentally, a large-scale shift towards voluntary approaches would have

the potential to produce a deficit of public participation in environmental policy, with the real losers being environmental public interest advocates.

Part II of this Paper describes the voluntary approach paradigm that is the focus of the Paper, traces the history of the federal government's use of voluntary programs in environmental policy, discusses possible rationales for the use of voluntary approaches, and explores the agency's role in facilitating voluntary efforts. Part III discusses the application of the APA's rulemaking and judicial review provisions to voluntary approaches. Part IV discusses how looking to the agency's public portrayal of voluntary approaches can resolve the tension over the proper legal characterization and alleviate accountability concerns.

II. Voluntary Approaches in Federal Environmental Policy

The voluntary approaches that are the focus of this Paper have three characteristics: 1) reliance on voluntary actions taken by private parties, rather than actions mandated by regulation, 2) government involvement facilitating voluntary efforts, and 3) no direct relation to existing legal requirements. The first element emphasizes that these approaches impose no mandatory controls on private action and rely solely on voluntary private efforts over which the agency exercises no regulatory control. The second element distinguishes these programs from the many purely private initiatives that seek to further environmental goals through voluntary actions. Examples of such private initiatives include the Chemical Manufacturer Association's Responsible Care Program, which governs the products and practices of the industry's members, and the ISO 14000 series, a set of international environmental management standards under which

companies may voluntarily become certified.[8] In contrast, the federal government administers the programs discussed in this Paper.

Finally, the last element is meant to distinguish voluntary programs from approaches thatrelease regulated parties from mandatory requirements in return for compliance with alternative agreements negotiated with the government. Examples of such "contractarian" approaches include Project XL, an experimental program launched by the EPA under the Clinton administration that allowed regulated parties to negotiate alternatives to pollution control requirements, and Habitat Conservation Plans (HCPs) carried out under the Endangered Species Act, which immunize landowners from prosecution for "incidental takes" of endangered species in return for agreements to implement conservation plans on their land.[9] These types of approaches, which scholars have referred to as "contractarian regulation"[10] and "regulatory penalty default" rules,[11] may seem similar to the approaches that are the focus of this Paper. Participation in both types of approaches is voluntary, and both may seek to encourage "beyond compliance" behavior. The crucial difference, however, is that approaches such as Project XL and HCPs have regulatory defaults that provide the incentive for regulated parties to participate in the program, whereas in purely voluntary programs, there is no relaxation of mandatory standards in exchange for efforts, making participation truly "voluntary."

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[8] *See* Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 831-32 (2000) (describing the Responsible Care Program and ISO 14000 series). *See generally* Errol Meidinger, *Environmental Certification Programs and U.S. Environmental Law: Closer Than You May Think*, 31 ENV. L. REP. 10162 (2001) (highlighting the trend towards private environmental initiatives).

[9] David A. Dana, *The New "Contractarian" Paradigm in Environmental Regulation*, 2000 U. ILL. L. REV. 35, 38-42 (2000)**;** Bradley C. Karkkainen, *Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism*, 87 MINN. L. REV. 943, 970-75 (2003).

[10] Dana, *supra* note 9, at 36 (Under the contractarian approach, "regulators contractually commit not to enforce some requirements that are formally applicable to the regulated entities in return for the regulated entities' contractual commitments to take measures not required under existing formal law.").

[11] Karkkainen, *supra* note 9, at 944 ("A regulatory penalty default is a harsh or quasi-punitive regulatory requirement that applies as the default rule if parties fail to reach a satisfactory alternative arrangement.").

Drawing such a distinction is necessary because the release of parties from existing regulatory requirements raises different legal issues than purely voluntary programs.

The voluntary approach paradigm seems yet to have been studied in depth by scholarship, perhaps because the environmental benefits of these approaches have been considered "marginal."[12] Other scholarly paradigms encompass some types of voluntary approaches but do not require voluntariness as an essential characteristic.[13] It has become important, however, to examine voluntary approaches in their own right more closely, due to their recently elevated status in federal environmental policy and the unique legal issues they raise. This section will therefore attempt to fill in part of the gap in the scholarship by tracing the history of the federal government's use of voluntary approaches in environmental policy, exploring the various rationales agencies may have in choosing voluntary approaches, and discussing the roles of agencies in facilitating voluntary efforts.

A. A Short History of Voluntary Approaches in Federal Environmental Policy

In 1991, the EPA for the first time experimented with a program that sought purely voluntary efforts in furtherance of an environmental goal.[14] EPA's first voluntary

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[12] *See* MAZUREK, *supra* note 3, at 7 ("As a number of organizations and researchers have concluded, EPA's voluntary programs for the most part are 'marginal' to the command-and-control system").

[13] The paradigms discussed in environmental law scholarship that seem most related to voluntary government programs include "reflexive law," "collaborative governance," "self-regulation," and "environmental stewardship." However, although these models may encompass voluntary programs, they are not limited to purely voluntary approaches. *See* Orts, *supra* note 3, at 1252-55 (describing reflexive law model), 1284-87 (discussing "voluntary government-sponsored programs"); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 22 (1997) (describing collaborative governance model); Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, HARV. ENVTL. L. REV. 103, 104 (1998) (describing self-regulation model); David W. Case, *The EPA's Environmental Stewardship Initiative: Attempting to Revitalize a Floundering Regulatory Approach*, 50 EMORY L.J. 1, 12 (describing environmental stewardship initiative), 65-59 (discussing voluntary programs in context of stewardship initiative) (2001).

[14] U.S. ENVIRONMENTAL PROTECTION AGENCY, ACHIEVEMENT THROUGH PARTNERSHIP: A PROGRESS REPORT THROUGH 2000 2 (2002), http://www.epa.gov/partners/resource/PartnershipReport.pdf [hereinafter ACHIEVEMENT THROUGH PARTNERSHIP].

initiative, known as the "33/50 Program," invited selected companies to participate in the program by pursuing emission reductions in seventeen high-priority toxic chemicals of thirty-three percent by 1992 and fifty percent by 1995.[15] Although opinions differed on the success of the program,[16] this first experimental venture has since evolved into a diverse array of over forty voluntary programs sponsored by the EPA in which over 11,000 organizations participate.[17] The DOI and DOE have also been facilitating voluntary environmental efforts for over a decade. The DOI established its "Partners for Fish and Wildlife" program in 1987, and this program is now one of several "cooperative conservation" initiatives administered by the agency.[18] The Energy Policy Act of 1992 required the DOE to establish a voluntary greenhouse gas registry, and the agency is currently in the process of revising guidelines for the registry through notice-and-comment procedures as part of Bush's climate change policy.[19]

The ascendancy of voluntary programs occurred as part of much larger reform effort in environmental law. By the 1990s, many had come to agree that the "first generation" of environmental law, which functioned mainly through a patchwork of command-and-control statutes , suffered from significant flaws and was incapable on its

[15] *Id.*; Orts, *supra* note 3, at 1284.
[16] Orts, *supra* note 3, 1284-85.
[17] U.S. Environmental Protection Agency, *Partners for the Environment, at* http://www.epa.gov/partners/; U.S. Environmental Protection Agency, *Partners for the Environment: List of Programs, at* http://www.epa.gov/partners/programs/index.htm (listing over forty voluntary partnership programs). *See also* MAZUREK, *supra* note 3, at 20 (graph illustrating growth of participation in EPA voluntary programs).
[18] U.S. Fish & Wildlife Service, *Partners for Fish and Wildlife Program—Our Partners, at* http://partners.fws.gov/What_we_do/overview.html; .U.S. Department of the Interior, *supra* note 5.
[19] General Guidelines for Voluntary Greenhouse Gas Reporting, 68 Fed. Reg. 68,204, (proposed Dec. 5, 2003) (to be codified at 10 C.F.R. pt. 300) [hereinafter Guidelines for Voluntary Reporting].

own to carry environmental progress to the next level.[20] Richard Stuart aptly summarizes the by now familiar criticisms of command-and-control:

> It has been criticized on the grounds that it is unduly rigid, cumbersome, and costly; fails to accommodate and stimulate innovation in resource-efficient means of pollution prevention; fails to prioritize risk management wisely; is patchwork in character, focusing in an uncoordinated fashion on different environmental problems in different environmental media and often ignoring functional and ecosystem interdependencies; and relies on a remote centralized bureaucratic apparatus that lacks adequate democratic accountability.[21]

Responding to the push for change, the Clinton administration initiated an effort to "reinvent" the federal government's environmental policy.[22] This initiative resulted in the release of a report in 1995 entitled "Reinventing Environmental Regulation" that highlighted the need for a more collaborative approach to environmental policy [23] EPA proceeded to experiment with a dizzying number of "reinvention" initiatives,[24] but voluntary programs were not a main focus of these efforts. Instead, the"cornerstones" of reinvention were the Common Sense Initiative and Project XL,[25] which both operated under the shadow of existing regulatory requirements. The innovation of these programs was to allow for more flexible compliance by giving regulated entities the opportunity to design alternatives to existing mandatory requirements.[26]

Still, new voluntary programs quietly continued to spring up, even if they were not the main thrust of the reinvention effort. "Green Lights," a program encouraging

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[20] Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 21 (2001); Case, *supra* note 13, at 3 (2001).
[21] Stewart, *supra* note 20, at 21. For discussions of the debate over command-and-control regulation in environmental law, *see id*. at 27-38; Case, *supra* note 13, at 27-32; Steinzor, *supra* note 13, at 113-118.
[22] Case, *supra* note 13, at 33-34.
[23] *Id*. at 39-40.
[24] In 1995, the EPA announced a set of twenty-five reinvention efforts. Robert W. Hahn et al., *Environmental Regulation in the 1990s: A Retrospective Analysis*, 27 HARV. ENVTL. L. REV. 377, 397 (2003). In 2001, one author estimated that more than sixty reinvention actions were in progress. Case, *supra* note 13, at 40.
[25] Case, *supra* note 13, at 41.
[26] *Id*. at 41-44.

businesses to voluntarily install energy-efficient lighting soon followed the 30/50 program in 1991.[27] In 1992, two new programs began that have enjoyed sustained success into the present day, namely, "Energy Star" and "Design for the Environment."[28] Energy Star uses a voluntary labeling scheme to promote use of energy-efficient products, while under Design for the Environment, partners work with the EPA to integrate designs that reduce pollution into industry practices.[29] The growth in voluntary programs during the Clinton administration continued with the introduction of programs such as "Waste Wise" and "Water Alliances for Voluntary Efficiency" (WAVE), resulting in the establishment of over twenty-five EPA partnership programs by 1998.[30]

Voluntary approaches took on a higher profile in reinvention efforts with the release of a new report in 1999 by a federal government task force formed to reinvigorate the "floundering" reinvention agenda.[31] The "Aiming for Excellence" report outlined an environmental stewardship initiative calling for renewed efforts towards facilitation of voluntary actions.[32] The stewardship initiative contained two main goals – one was to increase compliance assistance, but the primary emphasis was on the goal of encouraging organizations to voluntarily exceed regulatory standards.[33] One proposed way to promote beyond-compliance behavior was through the use of incentives and voluntary programs; the report highlighted the need to continue experimentation in search of effective

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[27] Orts, *supra* note 3, at 1285.
[28] U.S. ENVIRONMENTAL PROTECTION AGENCY, ENERGY STAR—THE POWER TO PROTECT THE ENVIRONMENT THROUGH ENERGY EFFICIENCY 1 (2003), http://www.energystar.gov/ia/partners/downloads/energy_star_report_aug_2003.pdf; U.S. Environmental Protection Agency, *Design for the Environment: Program History*, *at* http://www.epa.gov/dfe/about/history.htm [hereinafter DfE Program History].
[29] U.S. Environmental Protection Agency, *supra* note 4; DfE Program History, *supra* note 28.
[30] Elizabeth Glass Geltman & Andrew E. Skroback, *Reinventing the EPA to Conform with the New American Environmentality*, 12 COLUM. J. ENVTL. L. 1, 18-20 (1998) (listing EPA voluntary programs established to date).
[31] Case, *supra* note 13, at 5.
[32] *Id*. at 4-5, 65-69.
[33] *Id*. at 60.

incentives and to "improve the accessibility and increase the potential" of the EPA's voluntary partnership programs.[34]

Use of voluntary approaches has continued from the Clinton administration into the current Bush administration, but these policy instruments seem to have been elevated to a new status since Bush has taken office. Until the past few years, voluntary approaches were essentially used as complements or precursors to mandatory regulations, and as such their use was not controversial.[35] Policymakers in the Bush administration, however, instead have sometimes relied on voluntary approaches as the primary approach for addressing environmental issues. Agency officials have promoted voluntary approaches as solutions to particular problems, such as climate change, as well as more universally as a generally preferable policy approach.

With the announcement of a climate change policy that rejected mandatory controls and instead relied on voluntary effortsto curb greenhouse gas emissions , Bush seemed to usher in a new era of unprecedented importance for voluntary programs. Presented with a compelling environmental concern, intense controversy over whether legal controls were necessary, and strong national and international pressures, Bush did not respond with decisive intention either to enact mandatory regulations or refrain from action, but instead took the position thatreliance on voluntary efforts was an appropriate response. The EPA-sponsored program "Climate Leaders" was one specific initiative launched by the climate change policy.[36] Under this program, participating companies

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[34] *Id.* at 65, 68.

[35] The EPA stated in 2000 that its partnership programs were "not a substitute for well-designed regulations and vigilant enforcement, but they are an important complement to regulations that enable EPA to work with those who wish to improve their environmental performance beyond what is required by regulations." ACHIEVEMENT THROUGH PARTNERSHIP**,** *supra* note 14, at 3. *See* MAZUREK, *supra* note 3, at 19 (discussing voluntary programs as "pilot programs" to "improve how EPA manages pollution.").

[36] THE WHITE HOUSE, *supra* note 2

agree to complete a company-wide inventory of greenhouse gas emissions, report inventory data annually, and enter into discussions with the EPA to develop an "aggressive" emissions reduction goal to be achieved over five to ten years.[37] Another initiative involved enhancing the voluntary greenhouse gas registry already established under 1605(b) of the Energy Policy Act, which had seen limited participation.[38] DOE published proposed revised guidelines for the voluntary registry in the Federal Register on December 5, 2003 and is currently soliciting public comment as of this writing.[39]

Beyond the specific context of climate change as well, the words and actions of high-ranking officials in the Bush administration have brought voluntary approaches to the forefront of environmental policy. Under what President Bush and Secretary of the Interior Gale Norton call the "new environmentalism," the favored approach is encouraging local cooperation in voluntary conservation efforts through the use of incentives, rather than governing through mandatory regulations.[40] For example, Secretary Norton has promoted the benefits of restoring wetlands through "cooperative conservation efforts, partnerships, and voluntary programs" in which the federal government provides funds and technical assistance to private parties to rehabilitate wetlands, as opposed to protection through traditional regulation of wetlands under the Clean Water Act.[41] Similarly, the EPA has sought to replace previously mandatory

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[37] U.S. Environmental Protection Agency, *Climate Leaders: Partnership Agreement*, http://www.epa.gov/climateleaders/pdf/agreement.pdf (contains commitments required of program participants).
[38] THE WHITE HOUSE, *supra* note 2.
[39] Guidelines for Voluntary Reporting, *supra* note 19.
[40] Tierney, *supra* note 5. *See also*, Gale A. Norton, *Helping Citizens Conserve Their Own Land—and America's*, N.Y. TIMES, Apr. 20, 2002, at A17.
[41] Gale Norton and Ann Veneman, *There's More Than One Way to Protect Wetlands*, N.Y. TIMES, Mar. 12, 2003, at A25.

controls with reliance on voluntary efforts,[42] and recently appointed EPA Administrator Michael Leavitt has proclaimed collaboration with private interests to be his preferred approach.[43]

B. Rationales of Voluntary Approaches

1. Environmental Goals

Agencies may rely on private voluntary efforts to pursue a variety of environmental goals. Voluntary efforts may produce direct environmental benefits, such as pollution reduction or habitat restoration. Reduction of greenhouse gas emissions, for instance, is a direct environmental benefit that the EPA encourages through the Climate Leaders program. As of April 2004, 54 companies have joined the program, including General Motors, Gap Inc., and IBM, and some have set reduction goals.[44] The DOI's cooperative conservation projects also seek to achieve direct environmental benefits by providing incentives for voluntary conservation efforts on private lands through cost-share grants.[45] DOI administers the funds through a number of programs, ranging from newer initiatives such as the Landowner Incentive Program[46] and the Private Stewardship Grants Program[47] to more established programs such as "Partners for Fish and Wildlife,"

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[42] *See* Editorial Desk, *New Threats to Clean Water*, N.Y. TIMES, Aug. 21, 2003, at A16 (noting that proposed changes to Clean Water Act regulation would stress "voluntary efforts.")
[43] Michael Janofsy, *Nominee for E.P.A. Defends His Job as Utah Governor*, N.Y. TIMES, Aug. 14, 2003, at A1.
[44] U.S. Environmental Protection Agency, Climate Leaders Partners, http://www.epa.gov/climateleaders/partners.html#agreement.
[45] U.S. Department of the Interior, *supra* note 5.
[46] U.S. Department of the Interior, Promoting Partnerships for Conservation: The Landowner Incentive Program, http://www.doi.gov/news/landincent.pdf.
[47] U.S. Fish and Wildlife Service, Private Stewardship Grants Program, http://endangered.fws.gov/grants/private_stewardship/index.html.

which since 1987 has been offering technical and financial assistance to private landowners to voluntarily restore fish and wildlife habitats on their land.[48]

Agencies may also aim through voluntary approaches to heighten environmental consciousness in business practices and consumer purchases. Under the Energy Star program, the EPA and DOE accomplish this goal by increasing awareness of energy efficiency among industries and consumers.[49] Since the beginning of the program in 1992, the agencies have established standards for displaying the Energy Star label for 35 product categories.[50] Private actors may participate in Energy Star through manufacturing, marketing, or selling products with the Energy Star label and by promoting energy efficiency through other efforts.[51] The EPA claims that in 2002, Energy Star prevented greenhouse gas emissions equivalent to those from 14 million vehicles.[52]

For almost all environmental issues, uncertainty exists regarding the extent of the risk and the most effective approach for responding to the concern. Agencies may use voluntary approaches to collect information and experiment with new approaches in order to produce more informed and innovative environmental policy solutions. Under voluntary partnerships, agencies and private entities can collaborate to perform research, experiment with new approaches, or share information on best environmental practices. In EPA's "Design for the Environment" program, for example, the agency collaborates with private industries to design products, production processes and technologies that will

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[48] From 1987 to 2002, Partners for Fish and Wildlife restored over 600,000 acres of wetlands and over one million acres of prairie and other uplands, providing restored habitat for many species of wildlife. U.S. Fish & Wildlife Service, *supra* note 18.
[49] U.S. Environmental Protection Agency, *supra* note 4
[50] *Id*.
[51] *See* U.S. Environmental Protection Agency, Energy Star Partner Resources, *at* http://www.energystar.gov/index.cfm?c=partners.pt_index.
[52] U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 28at 1.

reduce pollution and waste fewer resources.[53] To accomplish their goals, Design for the Environment partnerships identify pollution prevention opportunities, evaluate the costs and benefits of these alternative approaches, disseminate the information produced to the entire industry, and encourage the use of this information to further environmental improvement.[54]

2. Theoretical Models

Agencies may also turn to voluntary approaches based on particular theories of how environmental policy goals are best achieved. The search for "next generation" environmental solutions has given rise to a prolific amount of scholarship proposing alternatives to the conventional command-and-control structure.[55] Although there seem to be no suggested theoretical models that require the exclusive use of voluntary approaches or look upon them as sufficient on their own to sustain environmental progress, some models may still provide theoretical justifications for the use of voluntary approaches.

Underlying many of the "next generation" approaches to environmental policy is an emphasis on collaboration between the government and various stakeholders.[56] Environmental policymaking generally takes place in a highly adversarial atmosphere, perhaps even "the most combative regulatory arena in American politics."[57] While raising complicated accountability issues, collaborative approaches may produce benefits by harnessing expertise outside of the government and instilling a greater ethic of private

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[53] Dennis D. Hirsch, *Symposium Introduction: Second Generation Policy and the New Economy*, 29 CAP. U. L. REV. 1, 7-8.
[54] U.S. Environmental Protection Agency, *About DfE*, *at* http://www.epa.gov/dfe/about/index.htm.
[55] For a comprehensive summary of "next generation" environmental scholarship, *see generally***,** Stewart, *supra* note 20.
[56] *See* Case, *supra* note 13, at 36.
[57] *Id*. at 16. *See id.* at 16-26 (describing the adversarial nature of environmental politics).

responsibility for environmental protection than could be achieved through merely requiring regulated entities to follow mandates which they had no role in creating.[58] Under the model of "collaborative governance," interested and affected parties work together in developing solutions, with the agency serving to facilitate collaboration among stakeholders by providing incentives for participation and information sharing, technical resources, and funding.[59] The outcomes reached through collaborative negotiations are not necessarily voluntary for compliance purposes, but the notion of collaboration is often a strong force driving voluntary programs. The EPA has noted that "enforcement actions…by their very nature often result in adversarial relationships with limited trust," while "[i]n a non-regulatory program, the regulatory agency and regulated community typically work more closely together to achieve a common goal."[60] Secretary Norton has been a strong proponent of collaborative approaches, promoting what she refers to as the "four C's" – "communication, consultation, and cooperation, all in the service of conservation."[61]

The "reflexive law" model provides another possible rationale for the use of voluntary approaches. Under reflexive law theory, the purpose of the law is to encourage organizations to internalize environmental norms rather than to directly control their external actions.[62] Rather than issuing mandatory regulations, therefore, a reflexive law approach views organizations as essentially self-regulating and focuses instead on ways

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[58] *See id*., at 36.
[59] Freeman, *supra* note 13, at 22.
[60] Approaches to an Integrated Framework for Management and Disposal of Low-Activity Radioactive Waste: Request for Comment, 68 Fed. Reg. 65,120-01, 65,149 (Nov. 18, 2003) [hereinafter Approaches to an Integrated Framework].
[61] Tierney, *supra* note 5.
[62] Stewart, *supra* note 20, at 127. *See also*, Orts, *supra* note 3, at 1232.

for the government to provide incentives and support for the internalization of norms.[63] Exchange of information is essential under reflexive law, because knowledge of actions and their consequences leads to dialogue among stakeholders that furthers the internalization of environmental norms.[64] Thus, one significant contribution the government can make is to ensure that the relevant information is generated and exchanged among stakeholders.[65] Voluntary programs can promote reflexive law's aims by encouraging companies to consider the environmental impact of their actions and share information about their environmental performance with the government and the public.[66] For example, reporting schemes such as the voluntary registry for greenhouse gas emissions established pursuant to 1605(b) of the Energy Policy Act can serve reflexive law purposes because the release of such information encourages dialogue between the companies and larger society over the optimal level of environmental performance. Environmental labeling schemes such as Energy Star are another type of voluntary reflexive law strategy.[67] One important caveat, however, is that even supporters of reflexive law do not view it as a complete substitute for command-and-control but rather as an important complementary approach.[68]

Voluntary programs may also respond to the criticisms that have been weighed against the predominant command-and-control structure of environmental policy. They may mitigate problems stemming from the uncertainty inherent in environmental problems and the inefficiencies associated with command-and-control by allowing more

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[63] *See* Stewart, *supra* note 20, at 127-28.
[64] *Id*. at 131.
[65] *Id*.
[66] *See* Orts, *supra* note 3, at 1284-86 ("Voluntary programs are in some important ways reflexive" although they "do not go far enough.").
[67] *Id*. at 1271-72.
[68] Stewart, *supra* note 20, at 133-34; Orts, *supra* note 3, at 1234.

flexibility than would be possible under pure command-and-control regulation. Continuous adaptation in environmental policy is necessary due to the uncertainties involved, yet one of the prime complaints that has emerged from "next generation" scholarship is that the current command-and-control structure chills innovation.[69] Voluntary approaches may respond to uncertainty by keeping efforts flexible and open to experimentation in the face of scientific, technological, and regulatory uncertainties, with the possibility of moving towards mandatory controls in the future. Consistent with this purpose, voluntary programs have often been used as "pilots" to forward the development of more permanent policies.[70] Another frequent criticism of command-and-control is that by mandating in detailed manner the steps regulated parties must take to satisfy environmental law requirements, command-and-control regulations force parties to comply with standards in ways that might not be cost-efficient and may preclude the possibility of less costly compliance that accomplishes the same or even superior environmental performance.[71] Voluntary approaches may serve to address such concerns; with no legal requirements in place, the parties will obviously have unlimited flexibility in meeting the desired goals. Choosing a voluntary approach based solely on promoting compliance flexibility is of questionable logic, however, since the flexibility concern could also be addressed simply by setting mandatory environmental standards and allowing regulated entities as much flexibility as appropriate in meeting those goals. This was in fact the theory behind Project XL and other "contractarian" approaches that provided regulated parties additional flexibility in meeting requirements.

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[69] Steinzor, *supra* note 13, at 118.
[70] *See* MAZUREK, *supra* note 3 at 6-7.
[71] Stewart, *supra* note 20, at 31 ("[A] serious problem with the existing regulatory system is that it is highly inefficient and wastes vast amounts of scarce societal resources.").

3. Legal and Political Constraints

In pursuing voluntary approaches, agencies may also be responding to legal or political constraints on their authority to issue mandatory regulations. Congress may not have granted legal authority to the agency to issue mandatory regulations, or legal authority may be controversial. For example, the EPA currently takes the position the Clean Air Act (CAA) does not give it authority to regulate greenhouse gases.[72] At the same time that the EPA denied a petition for a rulemaking to introduce mandatory controls, however, it emphasized its separate authority to pursue non-binding approaches:

> Lack of CAA authority to impose GHG control requirements does not leave the Federal Government powerless to take sensible measured steps to address the global climate change issue….The CAA and other statutes…authorize, and EPA and other agencies have established, *nonregulatory programs* that provide effective and appropriate means of addressing global climate change while scientific uncertainties are addressed.[73]

As another example, the DOI would not have the authority under the Endangered Species Act to mandate many of the conservation plans on private lands it achieves through collaboration with landowners.[74]

When legal authority does exist, agencies may still face political constraints and pursue voluntary efforts out of a reluctance to impose the economic cost of mandatory regulations. There may be a judgment that new regulations or increasing standards in response to a particular problem would not be desirable or efficient. Perhaps the risk is small, thought to be predominantly managed by existing regulation or considered too

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[72] Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922-02, 52,925 (Sept. 8, 2003) (denial of petition for rulemaking) (hereinafter Control of Emissions). EPA's claim that it lacks CAA authority to regulate greenhouse gases is highly contested; almost 50,000 comments were submitted on the petition for rulemaking. *Id*. at 52924.

[73] *Id*. at 52,931 (emphasis added). A description of the federal government's non-regulatory efforts to address climate change follow this quote. *Id*. at 52,931-52,933.

[74] Section 9 of the ESA provides authority only to prevent "takes" on private lands. Endangered Species Act, 16 U.S.C. § 1538(a)(1).

costly to regulate in a uniform and binding manner.[75] Certain entities may be positioned to make improvements at relatively little cost, while imposing new obligations on entire industries would come at a large price. In those types of circumstances, it may make policy sense for the agency to avoid mandatory controls but use voluntary programs to provide incentives encouraging companies that can meet heightened standards relatively easily to do so,.

C. Agency Roles in Facilitating Voluntary Efforts

One might ask what the purpose of agency involvement is in voluntary approaches, since private parties are obviously free to take positive environmental actions even without official government encouragement. .If the role of agencies is considered insignificant, voluntary approaches might well be characterized as inaction for legal purposes. An understanding of the roles agencies play in facilitating voluntary efforts therefore is important in considering the legal status of voluntary approaches.

Priority setting is one role agencies serve in voluntary approaches. At the outset in establishing voluntary programs, the agency identifies an area in which voluntary actions would be beneficial. Agencies are in a better position than private companies to determine environmental priorities because they have the expertise to know what environmental needs exist that are not currently addressed by mandatory regulations and to set voluntary standards at appropriate levels. In addition, agencies are more likely to center voluntary initiatives around issues that are of concern to the public; even if agencies do not hold rulemakings to solicit public comment on their decisions to use voluntary approaches, they are still indirectly accountable through the President and

[75] *See* STEPHEN BREYER, BREAKING THE VICIOUS CYCLE 11-19 (1993) (discussing inefficiencies of regulating small risks).

Congress. In contrast, when corporations make environmental efforts without government involvement, they are more likely to respond to market pressures without systematically evaluating the greatest environmental needs. Corporations can certainly make positive environmental contributions by setting goals independent of government recommendations, but agencies are in a better position to determine priorities for widespread voluntary initiatives.

After the program is established, the agency continues to contribute through its role as a central figure. Many voluntary programs require more than just isolated voluntary efforts to be workable; there are often important organizational and coordinating functions that the agency must undertake. As central figures, agencies may perform various tasks such as collecting information, developing guidelines and standards, measuring performance, tracking progress towards goals, and modifying approaches when necessary. These types of agency actions will be especially important in collaborative efforts such as Design for the Environment and in programs that require coordinating the efforts of a large number of participants, such as the 1605(b) greenhouse gas registry.

The devotion of resources by agencies is also important. The tasks that agencies perform to encourage voluntary efforts require a substantial investment of time, staff and funding. Environmental non-profits usually do not have the resources to devote to such comprehensive efforts, and private companies will often not consider the investment to unilaterally develop new environmental approaches worth the cost. Agencies thus can serve an important function by devoting the resources necessary to create “ready-made” voluntary approaches for companies to follow and by continuing to measure results and

modify approaches when appropriate. Such an allocation of resources will encourage private entities to engage in voluntary efforts by making such efforts less costly. In addition to providing resources for the development of approaches, agencies may also sometimes directly fund the environmental improvements, as in the DOI's cooperative conservation programs. In 2003, DOI awarded $12.9 million in grants to fund projects ranging from invasive species eradication to habitat restoration, involving 749 "partners."[76]

The risk of voluntary approaches is obviously that private parties may not "volunteer" to the necessary extent.[77] Importantly then, agencies also provide incentives for participation in voluntary programs. In promoting its voluntary partnership programs, the EPA appeals to the direct benefits companies can receive from participation – mainly cost savings, public recognition and technical assistance.[78] Public recognition is an important incentive that agencies have a large role in facilitating. Agencies may simply recognize companies as program participants, or may establish minimum of criteria for recognition. For companies wishing to gain a more advantageous market position as a result of their environmental efforts, agencies can establish consistent criteria for making comparisons among companies, measure the performance of participants to ensure their adherence to standards, and provide the credibility to substantiate environmental claims

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[76] U.S. Department of the Interior, *supra* note 5.

[77] For an in-depth discussion of this issue, *see* Steinzor, *supra* note 13, at 150-168.

[78] *See e.g.*, U.S. Environmental Protection Agency, *Partners for the Environment: Boosting Your Bottom Line*, http://www.epa.gov/partners/boosting. Some scholars still remain skeptical that the government by itself is capable of creating a context in which corporations will voluntarily seek higher standards, arguing that the government cannot easily replicate that the factors that motivate superior environmental performance. One commentator has concluded:

> the most extraordinary examples of corporate environmentalism are initiated at the highest levels in a corporation by people who possess far-sighted vision of how to position their firms strategically in response to social and economic trends….[I]t is beyond the capacity of government to consciously produce such leadership, as grateful it may be when such people emerge.[78] Steinzor, *supra* note 13, at 163.

by companies of which consumers might otherwise be skeptical.. Agencies also provide avenues for sharing the achievements of program participants with the public. When the recognition relates to specific products, as in Energy Star, the endorsement can come in the form of a label displayed on the product, or when the goal is to recognize the company as a whole, the recognition may come through press releases and posting of information on agency web sites, among other possible methods.[79] Another incentive that agencies commonly provide through voluntary programs is technical assistance. Environmental improvements, such as waste reduction, water conservation, or increased energy efficiency, may result in cost savings to companies.[80] Through their expertise, agencies can assist companies in achieving their environmental goals.[81] Technical assistance may range from providing information on waste reduction techniques to developing a methodology for recording greenhouse gas emissions.[82]

III. Application of the APA to Voluntary Approaches

A. Application of the APA's Rulemaking Requirements

[79] For example, the Climate Leaders program issues press releases and gives participants recognition on the agency's web page. *See e.g.*, Press Release, U.S. Environmental Protection Agency, *Ten Major Corporations Pledge Greenhouse Gas Reductions* (Jan. 13, 2004), http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/df3979e129d138c485256e1a0060e213?OpenDocument; U.S. Environmental Protection Agency, Partner GHG Goals, http://www.epa.gov/climateleaders/goals.html.

[80] *See* U.S. Environmental Protection Agency, *Partners for the Environment: Why Join?*, *at* http://www.epa.gov/partners/benefits/index.htm.

[81] *Id*.

[82] U.S. Environmental Protection Agency, *Waste Wise: Preserving Resources, Preventing Waste, at* http://www.epa.gov/epaoswer/non-hw/reduce/wstewise/index.htm (provides links to information on EPA's Waste Wise program, which assists companies with waste reduction efforts); U.S. Environmental Protection Agency, *Climate Leaders: Overview, at* http://www.epa.gov/climateleaders/overview.html (stating that program provides companies with "technical assistance to develop a greenhouse gas inventory and develop an inventory management plan").

When issuing rules, agencies must conduct a "rule making" in accordance with Section 553 of the APA.[83] Specifically, agencies must publish notice of the proposed rulemaking, provide opportunity for interested parties to participate in the rulemaking through submission of written comments, and incorporate a statement of basis and purpose in the rules adopted.[84] These requirements are jointly known as "notice-and-comment" procedures. A rule promulgated through notice-and-comment procedures is considered a "legislative" rule and is given the same force of law as statutes.[85] A strikingly large proportion of agency rules, however, escape APA rulemaking requirements; rulemaking in fact is "in relative terms a rare occurrence" compared with the volume of agency rules not issued through notice-and-comment.[86] To illustrate, according to one anecdote the Federal Aviation Administration rules issued through rulemakings occupied about two inches of shelf space, while the corresponding guidance materials not produced through rulemakings took up over forty feet, and such a ratio is typical.[87] This reality exists because the APA provides a fair number of exceptions that exempt rules from the rulemaking requirements.

1. Requirement of a "Rule"

A rulemaking can be required in the first place only if the agency reaches some decision that rises to the level of a "rule."[88] The APA definition of a "rule" includes "the

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[83] Administrative Procedure Act, 5 U.S.C. § 553. Rulemakings carried out under § 553 are referred to as "informal" rulemakings. When a statute requires that a rule be made "on the record," a "formal" rulemaking is conducted under § 556 and § 557 instead. *Id*. § 553(c).
[84] *Id*. § 553(b)-(c).
[85] *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1322 (stating requirements for a rule to qualify as "legislative"), 1327-28 (1992).
[86] Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1468-69 (1992).
[87] *Id*. at 1469.
[88] Administrative Procedure Act, 5 U.S.C. § 551(5) (defines "rule making" as process for formulating, amending, or repealing a rule").

whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."[89] Courts have generally construed this definition broadly "to include nearly every statement an agency may make."[90] The rule definition encompasses even seemingly informal agency products, such as staff instructions, manuals, question-and-answer bulletins, and press releases.[91]

The broad scope of the "rule" definition has at times been controversial, however, with suggestions that at least a certain level of formality is required for an agency statement to qualify as a rule. In a recent concurring opinion in a D.C. Circuit case, Judge Silberman questioned the usual breadth accorded to the definition.[92] He quoted a statement by then-Professor Scalia opining that the lack of any meaningful limiting factor in the rule definition is "absurd" and that therefore "the only responsible judicial attitude toward this central APA definition is one of benign disregard."[93] Silberman's own opinion was that "[n]ot every utterance, not every speech" by an agency "legitimately can be described as a rule," and "Congress surely meant that an agency statement that serves the purpose of a rule is a rule….But any agency statement which does not authoritatively seek to answer an underlying policy or legal issue does not fit that criteria."[94] As a practical matter, however, not much turns on the designation of rules since courts instead

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[89] *Id*. § 551(4). The definition also specifically designates certain agency statements to be classified as rules: "approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." *Id*.
[90] Batterton v. Marshall, 648 F.2d 694, 700 (D.C. Cir. 1980).
[91] Anthony, *supra* note 85, at 1320.
[92] Tozzi v. U.S. Dept. of Health and Human Services, 271 F.3d 301, 312-13 (D.C. Cir. 2001) (Silberman, J., concurring).
[93] *Id*. at 313 (quoting Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 383).
[94] *Id*.

tend to focus on whether one of the express APA exceptions apply and often ignore the rule issue altogether.[95]

Despite the lack of guidance from courts, it seems fairly certain that agency decisions to pursue voluntary approaches qualify as rules. Both decisions to take action and refrain from taking action can fall within the rule definition provided that they rise to at least a minimal level of formality in the way they are communicated, so decisions to implement voluntary approaches may be considered rules whether or not as a substantive matter they are considered action. In establishing voluntary approaches, the agency still makes a deliberate decision to "implement, interpret, or prescribe law or policy" in a certain manner; a choice of a voluntary approach reflects thatthe agency has made a choice at least for the present time among the different policy options, ranging from regulation to inaction, for addressing a particular issue.

2. Exceptions to Rulemaking Requirements

When an agency creates a rule, the APA still provides a range of exceptions that may exempt the rule from rulemaking requirements. The exceptions fall into three broad categories: exceptions based on the subject matter of the rule, exceptions based on the form of the rule, and a flexible "good cause" exception. The subject matter exceptions exempt rules that involve military or foreign affairs, agency management or personnel, public property, loans, grants, benefits, or contracts.[96] The exceptions based on the form of the rule apply to "interpretive rules," "rules of agency organization, procedure, or

[95] *See e.g.*, Lincoln v. Vigil, 113 S.Ct. 2024 (1993) (concluding that the court did not need to determine whether the agency statement was a "rule" because it found the statement to be exempt from notice-and-comment procedures as a "general statement of policy"); Appalachian Power Co. v. EPA, 208 F.3d 1015, 1021 n.13 (D.C. Cir. 2000) (attempting to reconcile authorities on "rule" definition but ultimately leaving the issue unresolved, concluding "nothing critical turns on whether we initially characterize the Guidance as a 'rule.'").

[96] Administrative Procedure Act, 5 U.S.C. § 553(a).

practice," and importantly for purposes of this paper, "general statements of policy."[97] Finally, the "good cause" exception allows agencies to exempt rules when "the agency for good cause finds…that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[98]

"General statements of policy" are probably the most important exception for the purpose of analyzing voluntary approaches. This exception is not defined by the APA, but courts have developed a doctrine that focuses on the presence of a binding norm to determine whether statements fall under the policy statement exception. One leading case, *Pacific Gas & Electric Co. v. Federal Power Commission*, described policy statements in this way:

> A general statement of policy…does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed….A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.[99]

Commentators have described the doctrine that has developed surrounding the policy statement exception as "tenuous," "fuzzy," "blurred," "baffling," and "enshrouded in considerable smog," but some general observations still seem possible.[100] Importantly for the purpose of analyzing voluntary programs, courts have held that the "binding norm" may apply not only to the public but also to the agency itself.[101] In determining whether the policy statement contains a norm that binds the agency or the public, courts

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[97] *Id*. 5 U.S.C. § 553(b)(A).
[98] *Id*. 5 U.S.C. § 553(b)(b).
[99] Pac. Gas & Elec. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974).
[100] Anthony, *supra* note 85 at 1321.
[101] *See* CropLife Am. v. E.P.A., 329 F.3d 876, 883 (D.C. Cir. 2003) (court should determine "whether the agency action binds private parties or the agency itself with the 'force of law'"), *quoting*, Gen. Elec. v. E.P.A., 197 F.3d 543, 545 (D.C. Cir. 1999).

have looked to both the intent of the agency as expressed in the statement, as well as to any practical binding effect the agency gives the statement.[102]

Given that the lack of a binding norm is the essential characteristic of a policy statement, voluntary approaches might at first glance seem by their very definition to be policy statements, but a closer analysis shows that the question is uncertain. Clearly, voluntary approaches by definition do not contain norms that bind the public, but if agencies are found to bind themselves through voluntary approaches, they will not qualify for the policy statement exception. The most commonly followed test for determining whether an agency statement contains a binding norm seems to come from the D.C. Circuit's decision in *American Bus Association v. United States* which set out two criteria: 1) whether a statement acts prospectively, and 2) "whether a purported statement genuinely leaves the agency and its decision-makers free to exercise discretion."[103] However, this test will not even have relevance if the agency is viewed as not taking any action at all through voluntary approaches. Then the statement could have neither present nor prospective effect, and there could be no binding of the agency's discretion because the agency would not be taking any action. If the agency is seen as taking no action, then there is nothing to which the agency can be bound, and the policy statement exception applies due to the lack of a binding norm. But if the agency is seen as taking action, then it becomes possible that the agency may bind itself in how it carries

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[102] The D.C. Circuit in 2003 recognized that "case law reflects two related formulations for determining whether a challenged action constitutes a regulation or merely a statement of policy." "One line of analysis focuses on the effects of the agency action, while "[t]he second line of analysis focuses on the agency's expressed intentions." *Id*.

[103] William Funk, *When is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659, 662 (2002) (observing that case seems to be most generally followed); *American Bus Association v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980).

out that action, such that a binding norm will exist and the policy statement exception will not apply.

There are different types of agency decisions related to voluntary approaches that might be considered action, including the initial choice to encourage voluntary efforts in furtherance of a particular environmental policy objective, the formulation of specific approaches for facilitating voluntary efforts, and the granting of incentives to participants. If the choice to pursue a voluntary approach is viewed as action, it could conceivably have a binding effect upon the agency. When agencies announce to the public that they will pursue voluntary approaches, they apparently commit themselves at least for an indefinite period to the use of that policy approach in furtherance of the environmental objective and to taking the actions necessary to implement the approach, such as allocating resources to the program and providing incentives. If the program is intended to be immediately established, there is a prospective effect, and the agency's discretion is also bound at least in a practical sense by its commitment to administer the program.

Decisions made by agencies in the course of implementing voluntary approaches may also have a prospective effect and bind the agency's discretion. For example, the rulemaking currently underway to amend the DOE's voluntary registry would meet these criteria, since once completed, the agency will follow those guidelines and apply them consistently to entities reporting emissions. The administration of incentives by agencies may also have the effect of binding the agency, depending on how concrete the benefits are and how consistently the agency applies them. For example, one could imagine that if a company's product meets the Energy Star standards, yet the agency denies a label,

the company might argue that the agency is bound by its standards. A prospective effect and a binding of the agency discretion with respect to incentives will sometimes be necessary again to attract participants, since they will want to be assured of the benefits they will receive in return for voluntary efforts. Consistency will also sometimes be necessary to achieve the environmental objectives of the program. For example, in order for the Energy Star label to have meaning to consumers, agencies must adhere to consistent standards in allowing the label to be displayed. Other times, however, voluntary programs may provide benefits that do not carry such specific expectations in their application, such as public recognition through press releases or opportunities for cooperative efforts, that would not translate easily into policies that bind the agency.

Further insight on the application of the policy statement exception to voluntary approaches may come from the Supreme Court's decision in *Lincoln v. Vigil*, which found an agency's decision to be subject to the policy statement exception in circumstances similar to those that that occur when voluntary programs are established.[104] This case concerned review of a decision by the Indian Health Service to terminate a program that provided services to handicapped Indian children in the Southwest in order to reallocate resources to a national program.[105] The Court unanimously found that the agency's decision to terminate the program was "surely" a "general statement of policy" and therefore not subject to notice-and-comment requirements.[106] The court characterized the action as an "announcement…that an agency will discontinue a discretionary allocation of unrestricted funds from a lump-sum appropriation" and cited a previous case, *Citizens to Preserve Overton Park, Inc. v. Volpe*, for the proposition that

[104] Lincoln v. Vigil, 113 S.Ct. 2024 (1993).
[105] *Id*. at 2026.
[106] *Id*. at 2034.

"decisions to expend otherwise unrestricted funds are not, without more, subject to the notice-and-comment requirements of § 553."[107] The factual setting of the case is similar to that which occurs when agencies establish voluntary programs-- as in *Lincoln v. Vigil* the agency makes a decision to use its resources for a program that will promote particular objectives in a manner that does not impose obligations on regulated parties. Although the court focused on the allocation of resources as the significant aspect of the agency's action, the agency's decision contained real substantive content in that significant benefits to Indian children were withdrawn and redistributed. The benefits administered through the program terminated had a much more direct and substantive impact on certain parties than do the incentives of most voluntary programs, which might suggest that voluntary approaches are even stronger candidates for the policy statement exception. However, important differences also exist between the decision to reallocate funds in this case and decisions to establish voluntary approaches. In *Lincoln v. Vigil*, the agency was not changing its commitment towards a particular policy objective (helping handicapped Indian children) or the essential manner in which it furthered that objective (providing direct services to children); the agency only decided to change the scope of the action. Therefore, an agency's decision to pursue a particular environmental policy objective and its choice of approach for pursuing the objective might be considered to establish a new binding norm, unlike the agency action in *Lincoln v. Vigil*.

In addition to the policy statement exception, the subject matter exceptions under the APA that exempt agencies from rulemakings may also have relevance to voluntary approaches. The "grants" and "benefits" exceptions have the potential to apply the most frequently. For example, the DOI's conservation initiatives provide grants to fund

[107] *Id*., *citing*, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

voluntary efforts. These programs would seem to straightforwardly qualify for the grants exception. Analysis of the benefits exception, however, may prove more complicated. The non-grant incentives that agencies give to facilitate voluntary efforts might seem to qualify as "benefits." But benefits that have been traditionally encompassed by the exception seem to comprise mostly of monetary payments provided to persons based on their personal status, such as government employment benefits and Social Security benefits, rather than the types of incentives employed by voluntary programs.[108] There would also be a question of how tangible the benefit must be in order to qualify for the exception. Even if the right to display an Energy Star label is considered a benefit, what about unspecified assurances of public recognition of greenhouse gas reductions? Furthermore, the benefits and grants exception has been justified on the ground that, "[i]f the government wishes to impose restrictions, the recipients can avoid restrictions by not accepting the grant or benefit; and if the government wishes to terminate the grant or benefit, the recipient had no right to it and thus is not entitled to a voice in whether it is terminated."[109] If this is therationale behind the exception, exempting benefits programs because the public has no "right" to the benefit would seem unpersuasive in the context of voluntary approaches where achieving environmental goals, rather than providing benefits to participants, is the primary purpose of the program. The effect of applying the exception in such circumstances would be to deny the public participation in decisions on how to address environmental policy concerns because the approach incidentally included incentives that rose to the level of "benefits."

3. Agency Practice

[108] *See* Arthur Earl Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, 566 (1970).
[109] Vigil v. Andrus, 667 F.2d 931, 935-36 (10th Cir. 1982).

It is worth asking how agencies themselves view their obligations to hold rulemakings for voluntary approaches. Agency statements frequently reflect an assumption that rulemakings are not necessary for "voluntary" or "non-regulatory" approaches to implement policy. For example, a recent Federal Register notice stated, "we are considering best how to accomplish this through actions that do not involve rulemaking or other regulatory methods," and a list of example "non-regulatory" programs followed that included such programs as Energy Star and Project XL (which is not even a purely voluntary program as defined by this Paper).[110] Another recent statement in the Federal Register announced, "Instead of a rulemaking, the Coast Guard will proceed with establishing this voluntary experimental approval program using a Coast Guard circular," while another queried, "Should the Agency initiate rulemaking to adopt the guidelines as regulations or will the guidelines be sufficiently effective if they are only voluntary?"[111] These statements came from such diverse agencies as the EPA, Department of Homeland Security, and Department of Agriculture.

Rulemakings to implement voluntary approaches do still occur. One noteworthy example is the rulemaking currently being held by the Department of Energy to revise the voluntary greenhouse gas reporting system under Section 1605(b) of the Energy Policy

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[110] Approaches to an Integrated Framework, *supra* note **Error! Bookmark not defined.**, at 65,149-65,150.
[111] Approval for Experimental Shipboard Installations of Ballast Water Treatment Systems: Notice of Withdrawal, 69 Fed. Reg. 1078-01, 1078 (Jan. 7, 2004); FSIS Safety and Security Guidelines for the Transportation and Distribution of Meat, Poultry, and Egg Products; Notice of Availability, 68 Fed. Reg. 45789-01, 47590 (Aug. 4, 2003). *See also*, Atlantic Highly Migratory Species Fisheries; Implementation of ICCAT Recommendations, 65 Fed. Reg. 77523-01, 77524 (Dec. 12, 2000) ("ICCAT adopted a number of recommendations and resolutions…that will not require rulemaking, but will require management action on the part of NMFS….NMFS intends to implement these measures through non-regulatory actions…"); Combustible Gun Control in Containment, 68 Fed. Reg. 54123-01, 54125 (Sept. 15, 2003) ("The result of this process necessitates a fundamental reevaluation…rather than the development of a voluntary alternative approach to rulemaking.").

Act, as directed by President Bush's climate change policy.[112] A reasonable inference is perhaps that agencies are more likely to hold rulemakings when they are implementing specific statutory mandates, such as in 1605(b), as opposed to when they are creating voluntary programs pursuant to broad statutory authority. For example, in contrast to 1605(b)'s specific mandate, Section 103 of the Clean Air Act directs the EPA to "develop, evaluate, and demonstrate non regulatory strategies and technologies for air pollution prevention."[113] These two statutes also provide arguably different public participation requirements: 1605(b) of the Energy Policy Act requires "opportunity for public comment," while Section 103 of the Clean Air Act instead requires "opportunities for participation by industry, public interest groups, scientists, and other interested persons."[114]

Rulemakings, of course, are not the entire universe of ways in which agencies can facilitate public participation. There are many other methods agencies can use that are less formal than the notice-and-comment process. Both the EPA and DOI have policies that encourage agency decision makers to provide meaningful public participation opportunities above and beyond statutory requirements.[115] Actions serving those purposes may take a variety of forms, including press releases, mailings, public meetings, hearings, workshops, and informal communications.[116] The informal public

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[112] Guidelines for Voluntary Reporting**,** *supra* note 19.
[113] Clean Air Act, 42 U.S.C. § 7403(g).
[114] Energy Policy Act of 1992, 42 U.S.C. § 13385(b); Clean Air Act, 42 U.S.C. § 7403(g).
[115] U.S. ENVIRONMENTAL PROTECTION AGENCY, PUBLIC INVOLVEMENT POLICY OF THE ENVIRONMENTAL PROTECTION AGENCY 5 (2003), http://www.epa.gov/stakeholders/policy2003/policy2003.pdf [hereinafter EPA PUBLIC INVOLVEMENT POLICY] ("Whenever feasible, Agency officials should strive to provide increased opportunities for public involvement above and beyond the minimum regulatory requirements."); U.S. DEPARTMENT OF THE INTERIOR, DEPARTMENTAL MANUAL Part 301, 2.1, 2.4(C) (1978), http://elips.doi.gov/app_dm/index.cfm?fuseaction=home [hereinafter DOI MANUAL].
[116] *See* EPA PUBLIC INVOLVEMENT POLICY, *supra* note 115, at 15-17; DOI MANUAL, *supra* note 115, at Part 301, 2.6(G).

participation actions may serve a variety of purposes, ranging from one-way sharing of information by the agency to the solicitation and incorporation of public opinion into the decision-making process. Therefore, the public may still be involved in the implementation of voluntary programs even when no rulemaking takes place For example, the Climate Leaders program has issued press releases, made its Draft Protocols available for public comment, and held meetings with corporations who have signed on as partners.[117] When the APA requirements do not apply, however, the level of public participation that occurs is subject to the complete discretion of the agency.[118] Agency decision makers may choose whether public participation is desirable or feasible at all considering the nature of the action and budget and time constraints, and if so, which actions or decisions to open to the public, what level of participation to allow, and which parties to allow to participate.

B. Application of Substantive Judicial Review Requirements

In addition to participation in the creation of policy through rulemakings, members of the public may also seek to influence agency decision making through substantive judicial review pursuant to Section 702 of the APA. Parties might challenge agency decisions related to voluntary approaches for a variety of reasons. They might disagree with the choice to refrain from issuing mandatory regulations or take issue with a decision made in the course of implementing the program, such as the goals or standards established. Program participants might seek to challenge the agency's decision not to award benefits thought to be due in return for voluntary efforts. A

[117] U.S. Environmental Protection Agency, *Climate Leaders: Draft Protocols for Comments, at* http://www.epa.gov/climateleaders/draft.html; U.S. Environmental Protection Agency, *Climate Leaders: News & Events, at* http://www.epa.gov/climateleaders/news.html.

[118] *See* EPA PUBLIC INVOLVEMENT POLICY, *supra* note 115, at 3-4 (stating that the Policy is not binding and that there may be circumstances that limit the desirability of public involvement).

competitor of companies participating in the program might seek to invalidate the entire program in order to prevent the participating companies from gaining a market edge as a result of agency recognition.

The characterization of voluntary approaches as "action" or "inaction" has important implications for the availability of substantive judicial review. If the decision to use a voluntary approach is viewed as inaction, then the availability of substantive judicial review under the APA is limited to "compel agency action unlawfully withheld or unreasonably delayed."[119] A court would therefore only be able to provide a remedy when the agency's failure to issue a mandatory rule directly violates a statutory directive, so judicial review will rarely be available. If the entire program is considered inaction, other decisions made in the course of implementing the program will also be sheltered from judicial review. In contrast, if there is found to be agency "action," then courts have broader authority to review for agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[120]

Furthermore, the Supreme Court has ruled that at least one type of agency inaction is committed to agency discretion by law. The Court established a presumption in *Heckler v. Chaney* that decisions not to take enforcement action are immune from judicial review under Section 701(a)(2) of the APA.[121] The concurrence to the case also established several caveats to the presumption against reviewability, observing that the Court did not hold that review was not available in cases where, rather than declining to enforce in a single case, an agency claims it has no statutory jurisdiction to enforce, "engages in a pattern of nonenforcement of clear statutory language," or refuses to

[119] Administrative Procedure Act, 5 U.S.C. § 706(1)
[120] *Id*. §706(2)(A).
[121] Heckler v. Chaney, 470 U.S. 821, 829-32 (1985); Administrative Procedure Act, 5 U.S.C. § 701(a)(2).

enforce a regulation in effect.[122] However, the issue of agency enforcement analyzed in *Chaney* is different from the type of inaction involved in decisions to use voluntary approaches, since the very decision not to enforce requires that there must have already been some mandatory controls in place. Non-enforcement may be a practical issue when the complaint is that the agency has relied on voluntary approaches rather than enforcing mandatory laws and regulations already created,[123] but plaintiffs will not be able to directly challenge an agency's pattern of non-enforcement by challenging the agency's choice to use a voluntary approach.

Instead, the type of "inaction" likely to be at issue in review of voluntary approaches is the failure of the agency to issue mandatory regulations. Parties who are dissatisfied with agency reliance on voluntary efforts could petition the agency to hold a rulemaking to consider the need for mandatory regulations under Section 553(e) of the APA which provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."[124] The right to petition is available without regard to the nature of the action being sought or actions that the agency has already taken, but the APA provides the right only to petition the agency and does not require that agencies carry out the petition's request or even respond to the petition. Petitioners may seek judicial review of agency denials of petitions for rulemaking, but courts have extended a great deal of deference to agencies in such cases. D.C. Circuit opinions have observed the "extremely limited, highly deferential scope" of review of agency refusals to hold rulemakings, a deference that is so broad as to "make

[122] Heckler v. Chaney, 470 U.S. 821, 839.
[123] For example, environmentalists might complain that the Interior Department, rather than enforcing the Endangered Species Act diligently, has instead diverted attention and resources to the voluntary conservation approaches.
[124] Administrative Procedure Act, 5 U.S.C. §553(e).

the process akin to non-reviewability."[125] Such deference stems from a policy that agencies rather than courts are best suited to determine how to allocate their limited resources in furtherance of their mission. The D.C. Circuit has held that *Chaney* presumption against review of agency inaction does not extend to review of agency refusals to hold rulemakings, although it observed that *Chaney* reinforced the highly deferential standard applied in reviewing agency decisions to not hold rulemakings.[126]

Even if an agency decision to rely on voluntary efforts is conceived of as "action," the unique characteristics of these approaches will still present further hurdles to parties seeking judicial review. The APA makes reviewable only "final" agency action and not "preliminary, procedural, or intermediate" action.[127] Whether the finality requirement is satisfied will depend on which "action" the court looks to in making its determination. If the action is considered to be the agency's initial decision to establish a voluntary program, the finality requirement will probably be satisfied, since there will be no further steps necessary to complete that decision. Decisions rendered by an agency respecting the administration of incentives in individual cases also would also likely be considered final after the benefit is granted or once the agency indicates that the decision not to grant a benefit is no longer open for discussion. However, those challenging general aspects of the approach might find it more difficult to satisfy the finality requirement. Given the experimental purpose of many voluntary approaches, they will be constantly adapting and changing, and it therefore might not easily follow thatan agency's precise original conception of the approach would be considered "final." In

[125] Nat'l Customs Brokers & Forwarders Assoc. of Amer., Inc. v. U.S., 883 F.2d 93, 96 (D.C. Cir. 1989); Cellnet Communication, Inc. v. FCC, 965 F.2d 1106, 111 (D.C. Cir. 1992).
[126] Amer. Horse Protection Assoc., Inc. v. Lyng, 812 F.2d 1, 3-6 (D.C. Cir. 1987).
[127] Administrative Procedure Act, 5 U.S.C. § 704.

addition, if the agency action is viewed as a decision to pursue a voluntary rather than a mandatory approach, this decision may be difficult to characterize as "final" since the agency can claim that it is still keeping an open mind to mandatory regulation and the decision to pursue a voluntary approach will have no bearing on that decision.

Courts may also find that decisions establishing voluntary approaches are "committed to agency discretion by law" under the meaning of Section 701(a)(2). The Court held in *Chaney* held that enforcement decisions generally fall into this category of immunity, but other types of agency decisions may also be sheltered from judicial review. Specifically, decisions allocating funds from lump-sum appropriations are another category that courts have traditionally considered as committed to agency discretion that may have implications for voluntary approaches. This was the basis for the court's conclusion in *Lincoln v. Vigil* that the agency's decision to terminate funding for a regional program in favor of a national one was committed to the agency's discretion, since such decisions are viewed as "peculiarly" within the agency's expertise.[128] The commitment of budgetary decisions to agency discretion may have implications for the establishment of voluntary programs, because one of most important choices an agency make is the devotion of resources to facilitating the voluntary efforts. However, as discussed above with respect to *Lincoln v. Vigil*, the agency is making other important decisions in addition to budgetary allocation, such as the decisions to pursue a particular environmental policy objective and to use a voluntary approach for that purpose, so the designation of resources alone probably should not cause the agency's decision to be unreviewable.

[128] Lincoln v. Vigil, 113 S.Ct. 2024, 2032 (1993).

Standing requirements under the APA may also be a significant obstacle. The Supreme Court has held that the minimum constitutional requirements of standing consist of three elements: the plaintiff must show a particularized "injury in fact," a "causal connection" between the injury and the defendant's conduct, and the redressability of the injury by a favorable court decision.[129] These requirements may cause difficulty for plaintiffs challenging voluntary approaches, especially for environmental plaintiffs. The Supreme Court has strictly interpreted the particularized injury requirement in environmental cases, holding, for example, that a plaintiff did not suffer a particularized injury from agency action impacting an area that the plaintiff had visited and planned to return to at some unspecified time.[130] The injury and causal connection to the agency's conduct will be even more difficult to show in challenges by environmental plaintiffs to voluntary approaches. First, plaintiffs will likely need to show thatthey are being personally injured by the environmental harm that the voluntary approach seeks to address. But voluntary environmental efforts will not themselves injure anyone, so plaintiffs would further have to show that they would have been better off had the agency adopted some different approach. The redressability requirement will also create complications because it is not clear what remedy the court could provide that would directly address the proffered injury -- simply invalidating the voluntary program would not address the injury, but the court will probably not go as far as to tell the agency which approach to adopt. Participants in voluntary programs who seek to challenge not the agency's policy decision but rather individualized decisions regarding the conferral of incentives will likely find it easier than environmental plaintiffs to satisfy standing

[129] Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).
[130] *Id*. at 563-64.

requirements. If the agency denies a benefit to a program participant, for example, the injury involved to the plaintiff is more direct and can be easily redressed by a court ordering the agency to confer the benefit.

IV. Resolving the Paradox: Ensuring Appropriate Public Participation for Voluntary Approaches

The legal characterization of voluntary approaches still remains an open question, and the resolution of that question will have important consequences for public participation rights under the APA. For those that view mandatory regulation as the only true type of agency "action" for addressing environmental problems, voluntary approaches are the equivalent of inaction. Yet agencies have devoted time and resources to these efforts and asked the public to place faith in them as responses to important environmental issues. This section argues that in characterizing these approaches under the APA, courts should resolve ambiguities by looking towards the agency's public portrayal of the voluntary program, which will often lead to a finding of agency "action." Similarly, when determining whether the agency's action contains a "binding norm," courts should look to the political binding effects of the agency's action as well as the private effects. These resolutions are logical adaptations of the current doctrine to the unique characteristics of voluntary approaches, will allow appropriate public participation in important policy choices, and will alleviate accountability concerns by ensuing that agencies take consistent positions in public and in court.

A. The Importance of Public Participation for Voluntary Approaches

The issue of how voluntary approaches should be characterized for purposes of the public participation rights provided by the APAcarries important consequences . Rulemakings serve to legitimate decisions by unaccountable agencies through a replication of the legislative process in which all affected constituencies have the opportunity to express their views.[131] Accountability concerns are thus raised when important environmental policy decisions are not subject to notice-and-comment requirements. The diverse perspectives and careful deliberation that result from rulemakings also serve to increase the quality of agency decisions, and bypassing this process on important issues may result in agency decisions that are one-sided or not adequately considered. Substantive judicial review of agency decisions also is an important means of public participation. Through judicial review, members of the public may enlist the courts to ensure that agencies do not act in ways that are arbitrary, abusive of their discretion, or contrary to law.[132]

The DOE's rulemaking to amend guidelines for the voluntary reporting of greenhouse gases provides a real-world example of the potential value of public participation for voluntary approaches. As of March 2004, over one hundred parties had responded to the DOE's request for comments, encompassing a wide range of entities such as the Natural Resources Defense Council, the World Resources Institute, the Competitive Enterprise Institute, General Motors, the American Petroleum Institute, and the Business Council for Sustainable Energy.[133] The comments submitted also include a diverse range of views and topics, from rejection of a voluntary approach for addressing

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[131] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1712 (1975).
[132] Administrative Procedure Act, 5 U.S.C. § 706(2)(A).
[133] U.S. Department of Energy, *Proposed Comments on the Proposed Revised General Guidelines, December 2003 to Present*, https://ostiweb.osti.gov/pighg/ghgb0202.idc.

climate change altogether to many narrower suggestions for making the reporting scheme more workable.[134] The DOE rulemaking brings to light the range of purposes that rulemakings for voluntary approaches may serve, such as the opportunity for parties to express the view that a mandatory approach is preferable, broad representation in the setting of goals for the initiative, and the sharing of knowledge on how to increase the effectiveness of the program.

Concerns associated with a lack of public participation for voluntary approaches arise with respect to individual policy choices and more broadly, to the potential void in public participation that may result from a large-scale shift to voluntary approaches. Not every government action to encourage voluntary environmental effortsraises policy concerns, and in fact most actions will not. To the extent that agencies may be useful in facilitating beyond-compliance behavior, this is obviously a positive environmental good and should be encouraged rather than burdened through expensive, time-consuming rulemakings and litigation. The experimental, innovative value of these programs would indeed be substantially hindered if agencies were forced to lock in certain approaches that could only be changed through further rulemakings, and the burden of rulemaking requirements would seem disproportionate to the value of most of the relatively small-scale projects, deterring agencies from initiating such efforts in the first place. The most significant policy concern instead arises when agencies utilize voluntary approaches as comprehensive responses to environmental problems to the exclusion of mandatory approaches, even where there is legal authority to exercise regulatory control, and this

[134] *See e.g.*, Natural Resources Defense Council comments, https://ostiweb.osti.gov/pighg/ghgb0201.idc (rejecting voluntary approach altogether); World Resources Institute/WBCSD Comments, https://ostiweb.osti.gov/pighg/ghgb0201.idc; American Petroleum Institute comments, https://ostiweb.osti.gov/pighg/attachments/greco1.pdf.

decision to favor a voluntary over a mandatory approach is not subject to notice-and-comment or judicial review. The use of voluntary approaches may then serve to shield controversial environmental issues from public scrutiny; the Administration will be able to claim that it is taking action on issues through voluntary approaches, but the spotlight on particular agency actions that normally ensues from rulemakings will be avoided and judicial review will not be possible.

If the reverse were occurring, that is, if agencies were considering mandatory regulations, parties would almost always have the opportunity through rulemakings to offer their view that the agency should utilize a voluntary approach instead. In fact, there is one circumstance in which consideration of non-regulatory approaches as possible alternatives to mandatory regulation actually is *required*. Executive Order 12,866, more generally known as President Clinton's reform of the regulatory process, directs agencies to "identify and assess available *alternatives to direct regulation*, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public."[135] In other words, the Order generally requires agencies to consider non-regulatory alternatives when developing convention regulation. But no corresponding legal obligation exists for the development of non-regulatory approaches, which agencies may implement without ever considering whether "direct regulation" would better address the issue of concern. A stark asymmetry thus exists in which the law implicitly favors non-regulatory

[135] Exec. Order No. 12866, Sec. 1(b)(3), 58 Fed. Reg. 51735 (Oct. 4, 1993) (emphasis added). The agency should adhere to this principle "to the extent permitted by law and where applicable." *Id*. at Sec. 1(b). For examples of agencies considering non-regulatory approaches pursuant to the Executive Order's requirement, *see* Safety Standards for Steel Erection, 66 Fed. Reg. 5196-01, 5253, 5263 (Jan. 18, 2001); Energy Conservation Program for Consumer Products; Central Air Conditioners and Heat Pumps Energy Conservation Standards, 66 Fed. Reg. 38822-01, 38841 (July 25, 2001). *See also*, Labor Organization Annual Financial Reports, 58374, 58419 (Oct. 9, 2003) (commentator asserting that agency failed to comply with Exec. Order No. 12866's requirement to consider non-regulatory alternatives).

approaches: comparison of mandatory and voluntary approaches is required before agencies can promulgate mandatory regulations, but not only is such a comparison not required before the implementation of voluntary approaches, the public has no right to even bring such an issue to the attention of the agency through a rulemaking.[136]

An absence of public participation in decisions establishing voluntary approaches will generally benefit targets of regulation and disadvantage beneficiaries of regulation. The optimal outcome for regulated parties will usually be an agency decision in favor of voluntary standards. That is the outcome that would automatically occur if no rulemaking takes place, so environmental advocates in favor of mandatory regulations would have nothing to lose and everything to gain by arguing their position in a rulemaking or in court. Without allowing public participation in decisions to enact voluntary policies, the regulated parties in a sense have it both ways – when there is a possibility of mandatory requirements being imposed, they will generally be assured of a rulemaking because a "binding norm" will be created, but when the agency is inclined to use voluntary approaches instead, the public has no right to challenge that choice.

Concerns would also be raised if decisions made in the course of implementing the policy are excluded from public participation. One important decision, for example, would be the goals in pollution reduction or other measures of environmental benefits that the program seeks to attain. Such goals, although non-binding, are important both because they affect the level of action that the agency will encourage program participants to take and because the success of the program will be measured against these goals. For example, President Bush's climate policy set a goal of reducing the

[136] There will of course, be circumstances in which there is no statutory authority to implement mandatory regulations, so that the voluntary approach is the agency's only option.

"greenhouse intensity" of the United States economy by eighteen percent over the next ten years, a goal that environmental advocates have vehemently protested as misleading and inadequate.[137] It may seem as though participation in setting such standards is insignificant, since there is no real legal fore behind them, but when voluntary approaches are substituted for mandatory approaches based on the assumption that they will be just as effective, then it must also be accepted that the goals set by these program are just as important as the standards set in mandatory regulations.

Even more fundamentally, the largest concerns arise when looking beyond isolated decisions by agencies to pursue voluntary approaches to the much broader picture of what may happen in light of the overall trend in environmental policy towards use of voluntary approaches. Such a shift has the potential to create a huge deficit in public participation. Since the cooperation of the parties with the potential to inflict environmental damage is necessary to the success of voluntary approaches, the real losers from the lack of rulemaking requirements would be the public interest advocates. The agency will out of necessity be in constant contact with the private entities to sustain their participation in voluntary efforts. The cooperation of the private entities is essential to the success of voluntary programs, while involvement from public interest representatives is not. Over time, without legal requirements that the agency consider views of public interest representatives, a two-dimensional relationship between the agency and private interests is likely to emerge in which public interest representatives are shut out, raising heightened agency capture concerns. The quality of environmental policy decisions will also suffer from the lack of a diverse range of views presented to

[137] CLIMATE CHANGE POLICY, *supra* note 2(stating reduction goal). *See e.g.*, Natural Resources Defense Council, *Untangling the Accounting Gimmicks in White House Global Warming, Pollution Plans*, http://www.nrdc.org/globalwarming/agwcon.asp.

agencies. Most important, the rulemaking process will not serve its important function of legitimizing the decisions of unaccountable agencies through democratic dialogue, courts will not be able to check agency discretion, and major constituencies will have a role in environmental policy decisions only when agencies decide to allow their participation.

B. Proposed Principle of Interpretation

Rather than leaving a large vacuum in public participation rights as the voluntary approach paradigm continues to gain ground, the law must respond to the open question of how voluntary approaches should be characterized for purposes of the APA. The greatest threat to accountability would occur if voluntary approaches are characterized as "inaction" for purposes of public participation under the APA, even while the Administration contradicts this position by maintaining that it is taking genuine action to address environmental problems through voluntary approaches. The Administration and agency officials have often promoted voluntary approaches as genuine, substantive answers to pressing environmental concerns such as climate change and habitat conservation. It would be hypocritical for proponents of these programs to suggest that they are equivalent to complete inaction. Agencies should therefore not have the option of taking a contradictory position thatallows them to receive the political benefits of publicly proclaiming solutions to environmental problems yet avoid the public scrutiny of their policy choices that would come from rulemakings. Therefore, when agencies publicly portray voluntary approaches as "action" the government is taking in response to environmental problems, the voluntary approach should be also considered as action for purposes of the APA.

Looking towards the agency's portrayal of the voluntary approach will provide guidance in determining whether the agency decision in question is a policy statement and thus exempt from rulemaking requirements. As discussed previously, although the lack of a "binding norm" is the essential characteristic of a policy statement, the question cannot even be asked unless there is some action to which the agency could potentially bind itself. If according to the agency's portrayal there was no action, then the analysis will end there with the conclusion that the decision is a policy statement exempt from rulemaking requirements. If there is found to be action, however, the analysis may proceed to the question of whether the action establishes a binding norm on the agency.

In the doctrine surrounding the policy statement exception, courts have given weight to whether the agency expressed an intention to create a binding norm, but have also been willing to look beyond the agency's intent to any practical binding effects of the agency statement.[138] By not subjecting its decision to notice-and-comment, it may be inferred that the agency did not intend to create a binding norm, but in this context also the court should also look beyond the agency's subjective intent. The analysis of whether there has been a practical binding effect should acknowledge that the decision to pursue a voluntary approach may have an important binding effect on the agency – a political effect. When courts consider whether the agency has bound itself, it is typically considering this issue with respect to the agency's legal control over private parties. For example, if the agency established a policy for under which circumstances it would enforce a legal requirement, a private party that was the target of enforcement in circumstances other than what was indicated in the policy might argue that the agency is bound to its policy. Participants in rulemakings, however, are of much broader

[138] CropLife Am. v. E.P.A., 329 F.3d 876, 883 (D.C. Cir. 2003).

composition than only the members of the public directly affected by the regulation. The effect of a binding normacts as a legal hook which triggers a rulemaking requirement that allows all interested parties to participate in the formulation of the policy. Important policy choices made by agencies affect more than the would-be targets of regulation. This is why both the targets of regulation and the beneficiaries of regulation, such as environmental public interest advocates, regularly participate in rulemakings, and rulemakings are rightly open to all "interested persons."[139] The APA protects the right of participation by more than those who are directly bound by the proposed regulation, yet since most agency decisions do affect private rights, this tension does not usually arise. Voluntary approaches bring this tension to the forefront – individual rights will often not be legally affected by voluntary approaches, yet the interest in public participation is still present.

There sometimes will in fact be practical binding effects on agencies with respect to private parties when the agency administers incentives, but when these types of effects are not significant enough, the doctrine should broaden to recognize that other practical binding effects are created in a political sense. For example, a decision to establish a voluntary approach is also a decision that private parties will *not* be bound. This can be just as significant a decision for parties fearful of regulation as a decision to regulate. While in theory an agency could still decide to regulate parties soon after the establishment of a voluntary policy, the practical effect often is to send a political signal that the Administration has decided not to regulate. For example, by announcing his climate change policy publicly and as a comprehensive set of initiatives, President Bush gave the impression that the Administration had made a definitive choice regarding its

[139] Administrative Procedure Act, 5 U.S.C. §553(c).

policy for addressing climate change and would not be revisiting the issue any time soon. The agency also often binds itself politically in other ways through the announcement of voluntary approaches by acknowledging that there is an environmental issue of concern, expressing its decision that a voluntary approach is the appropriate way to respond, and committing itself to taking certain actions towards facilitating voluntary efforts. The same policy issues that bring environmental advocate to rulemakings are implicated from this type of agency binding as when the agency binds itself with respect to private parties. Sometimes, however, the agency will not have bound itself through the establishment of a voluntary approach, because it will be clear that the program is being used merely as a temporary or experimental approach, with the possibility that it may at any time be superseded by a different approach. In such cases, when voluntary programs are merely used as stepping stones for gathering information or developing policy, the agency will not have politically bound itself to any particular approach, and it is justifiable to treat the decision as a policy statement.

In the judicial review context, the characterization of the decision related to a voluntary approach as action or inaction will largely depend upon how the plaintiff chooses to frame the issue. If the injury claimed is the failure of the agency to carry out an action such as issuing mandatory regulations or holding a rulemaking, then the issue is properly treated as review of inaction under Section 706(1).[140] If instead, the party is challenging an "action" actually carried out in the course of implementing the approach, such as the decision to grant a benefit or the choice of approach itself, then review should take place under the broader Section 706(2) standard.[141] There are, however, some

[140] *Id*. §706(1).
[141] *Id*. §706(2).

caveats that should be observed related to the agency's portrayal of the approach in judicial review cases. If a party challenges the agency decision as action, and the agency has itself publicly portrayed the approach as action as described above, then the agency should not be able to claim as a defense in court that the approach is the equivalent of inaction. Another special circumstance also would arise if a party challenges the inaction of the agency's refusal to undertake a rulemaking. When agencies have portrayed action to the public, then the decision not to hold a rulemaking should not be analyzed as inaction but as a "rule" already created, with the court's analysis instead focusing on whether that rule was subject to rulemaking requirements. Although review of agency decisions not to hold rulemakings is generally highly deferential, such deference would be misplaced when the court's assumption that it is reviewing agency inaction rather than action when that assumption is contradicted by the agency's publicportrayal of the approach.

Broader awareness of the public participation concerns associated with voluntary approaches also is necessary. Agencies have a role to play. They may mitigate the public participation concern by making efforts to use genuinely inclusive public participation procedures when deciding to use voluntary approaches, even if rulemakings are not used. In the broader policy debate over voluntary approaches as well, more efforts are necessary to incorporate public participation concerns. Both critics and advocates of voluntary approaches should expand their analysis beyond the environmental effectiveness of these approaches to consideration of the public participation issues they raise.