

Chapter 2
FOLLOWING THE YELLOW BRICK ROAD—A PEEK BEHIND THE
CURTAIN AT FEDERAL AGENCY RULEMAKING

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§ 2.01 Introduction* **

The era of comprehensive environmental and natural resource legislation is over. As the shifting sands of technological innovation, global economics, environmental awareness, and national and local politics continue to push decades-old federal regulatory regimes and policies into obsolescence, the natural resource agencies are scrambling to keep pace. For better or worse, this means new rules, more rules, and bigger rules.

In the last two years alone, the bureaus of the U.S. Department of the Interior (DOI), including the Bureau of Land Management (BLM), Bureau of Ocean Energy Management (BOEM), Bureau of Safety and Environmental Enforcement (BSEE), U.S. Fish and Wildlife Service (FWS), Bureau of Indian Affairs, and Office of Natural Resources Revenue (ONRR) have initiated or completed over a dozen major rulemaking initiatives that will remake the regulatory landscape for mineral development in the United States and on the Outer Continental Shelf (OCS) for many years to come. Through these rulemakings, the DOI is redesigning decades-old regulatory programs to manage contemporary natural resource issues, such as climate change, hydraulic fracturing, Arctic oil and gas exploration, offshore oil spill and blowout prevention, methane capture, seismic surveys and marine mammals, critical species habitat designations, bald and golden eagle protection, renewable energy zoning, tribal control over mineral development, modern mineral valuation, royalty and revenue collection, civil penalties, and increasingly important access to administrative appeals.

When finalized, these regulatory initiatives will become “legislative rules,” binding on the industry and agencies alike. Yet the processes by which these rules and regulations are created are often arcane and idiosyncratic. This chapter will attempt to demystify the internal bureaucratic rulemaking process and explain how federal agency regulations are formulated, developed, vetted, and finalized. It will also highlight how stakeholders can better participate in the rulemaking process to achieve desired outcomes and, if necessary, challenge regulations.

§ 2.02 Background: What Are Rules and What Is Rulemaking?

[1] The Need for Regulations and Rulemaking Processes

As the issues confronting American society grew more complex in the 1930s and 1940s, Congress increasingly delegated its legislative authority to expert regulatory agencies to govern the

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conduct of both industry and the populace. As the size and power of the regulatory state grew, Congress became concerned about the accountability of this new “fourth branch” of government. Hence, Congress enacted the Administrative Procedure Act (APA)¹ to bring regularity, predictability, and transparency to federal agency conduct. As the legislative history of the APA states:

[T]he powers that are committed to these regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited powers these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administrative law must be developed, and that with us is still in its infancy, crude, and imperfect.²

The APA was intended to balance the need for federal agencies to efficiently carry out their regulatory duties with the need to protect the public from the arbitrary exercise of legislative and judicial power by government officers who are neither elected legislators nor judges.³ The rulemaking procedures of the APA are accordingly designed to ensure public notice of, and participation in the formulation of, regulations that would govern both personal and economic activity.

[2] What Are Rules?

“A ‘rule’ is an agency statement designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”⁴ For the most part, rules are intended to apply generally, that is, they are intended to address a class or category of situations or persons rather than a named individual. “A rule may be prospective, retroactive, or both, but an agency may not issue a retroactive rule . . . unless it has express authorization from Congress.”⁵

As discussed in further detail in § 2.03[5], below, there are a number of types of rules, including legislative rules, interpretive rules, procedural rules, and general statements of policy. The most significant of these, and the primary subject of this chapter, is legislative rules. Once finalized, legislative

¹ 60 Stat. 237 (1946).

² Legislative History of the Administrative Procedure Act, S. Doc. No. 248, at 350 (1946) (APA Legislative History) (testimony of Rep. Walter before the House of Representatives, May 25, 1946) (quoting address of Elihu Root, former U.S. Senator, 1916).

³ *Id.* at 349.

⁴ Section of Admin. Law & Regulatory Practice of the Am. Bar Ass’n, “A Blackletter Statement of Federal Administrative Law,” 54 *Admin. L. Rev.* 1, 31 (2002).

⁵ *Id.*; see Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 49–58 (4th ed. 2006) (explaining the various aspects of a rule).

rules bind the conduct of both the agency and the public, giving these rules “the force and effect of law.”⁶ The rulemaking provisions of the APA, particularly the notice-and-comment provision of section 553, are intended primarily to prescribe the means by which legislative rules are created and finalized.

There are two basic methods for creating legislative rules: “formal rulemaking” and “informal rulemaking.” Formal rulemaking is less common and limited to certain federal agencies, and is only required when a statute requires a rule to “be made on the record after opportunity for an agency hearing.”⁷ Because the formal rulemaking process is infrequently used outside certain ratemaking and public communications proceedings, this chapter will focus instead on the more typical informal rulemaking process.⁸

Most legislative rules are promulgated through the informal rulemaking process, more commonly known as the notice-and-comment rulemaking process. Informal rulemaking is governed by the procedures laid out in section 553 of the APA, which require:

- (1) publication by the agency of a notice of proposed rulemaking (NPRM) in the *Federal Register*;
- (2) an opportunity for public participation in the rulemaking process by submission of written comments in response to the notice; and
- (3) publication of the final rule, including a statement of basis and purpose as well as responses to all “significant” comments, not less than 30 days before the rule’s effective date.⁹

In sum, section 553 requires that, with certain exceptions, agencies notify and permit interested parties to submit their views for consideration before issuing regulations that have the force and effect of

⁶ *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979) (quoting *Attorney General’s Manual on the Administrative Procedure Act* 30 n.3 (1947)).

⁷ 5 U.S.C. § 553(c); see Lubbers, *supra* note 5, at 58–60 (distinguishing formal from informal rulemaking). Examples of formal rulemaking include Federal Energy Regulatory Commission ratemaking proceedings and Federal Communications Commission rulemaking proceedings.

⁸ On occasion, agencies will engage in “negotiated rulemaking” pursuant to the Negotiated Rulemaking Act, 5 U.S.C. §§ 561–570. In a negotiated rulemaking, an agency convenes a committee under the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2 §§ 1–16, comprised of various affected interest groups to negotiate the provisions of a rule. However, the agency will still follow notice-and-comment procedures to obtain public input on the proposal resulting from the negotiated rulemaking process. See, e.g., *Indian Oil Valuation Amendments*, 80 Fed. Reg. 24,794 (May 1, 2015) (codified at 30 C.F.R. pts. 1206, 1210) (effective July 1, 2015).

⁹ 5 U.S.C. § 553(b), (c).

law. These procedural requirements are based on the premise that rulemaking is a deliberate, quasi-legislative undertaking, and must be fully informed to achieve good outcomes.¹⁰ Accordingly, the informal rulemaking process provides a mechanism for the regulated community to provide the agency with information regarding factual, legal, or policy aspects of proposed regulations, and to present new ideas, objections, or alternate regulatory approaches for consideration.

[3] The Burden of Notice-and-Comment Rulemaking

Although benefits of governance through rules are apparent—clearly identifying expectations and obligations up front for all to see, and providing certainty, fairness, and predictability for government, the regulated community, and the public—there are a number of reasons why agencies may choose an alternative to the APA’s rulemaking procedures where possible.

First, promulgating regulations under section 553’s public notice-and-comment provisions is costly and time consuming. Although there is considerable variation among agencies, promulgating a legislative rule can take anywhere from 1 to 13 years, with the average federal rulemaking taking about 4 years.¹¹ That represents a significant amount of staff time and associated expense. The advent of electronic public comment submission systems¹² has only increased the number of comments agencies receive on their regulatory proposals, which has, in turn, increased the amount of time and effort required to review and respond to comments before finalizing the regulation. Overwhelming agency resources with public comments is a phenomenon commonly referred to as “regulatory ossification.”¹³

¹⁰ According to the APA’s legislative history:

An administrative agency . . . is not ordinarily a representative body. . . . Its deliberations are not carried on in public and its members are not subject to direct political controls as are legislators. . . . Its knowledge is rarely complete, and it must always learn the . . . viewpoints of those whom its regulations will affect. . . . [Public] participation . . . in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford safeguards to private interests.

APA Legislative History, *supra* note 2, at 19–20 (alteration in original) (quoting Administrative Procedure in Government Agencies, S. Rep. No. 77-8, at 101–03 (1941)).

¹¹ U.S. Gov’t Accountability Office (GAO), “Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews,” at 19 (Apr. 2009).

¹² See, e.g., <http://www.regulations.gov>.

¹³ See Richard J. Pierce, Jr., “Rulemaking Ossification Is Real: A Response to *Testing the Ossification Thesis*,” 80 *Geo. Wash. L. Rev.* 1493 (2012).

The highest level of public input is predictably associated with highly controversial regulatory initiatives, costing the agency ever-increasing amounts of time and money as it reviews and responds to hundreds of thousands or even millions of public comments. For example, vigorous public response required the BLM, over a period of three years, to review and respond to over 1.3 million comments before ultimately finalizing its hydraulic fracturing rule in March 2015.¹⁴ Agencies are acutely aware of the enormous amount of time, effort, and resources required to promulgate regulations like these.

Second, regulations tend to be inflexible and relatively permanent. Final regulations must be sufficiently clear and particular to inform the regulated community of all the rules of the game.¹⁵ Once a rule is finalized, its provisions can only be altered by a subsequent rulemaking, with all the associated time and expense that legislative rulemaking entails. Moreover, an agency may not simply change an existing standard based on whim; it must provide as good a rationale to change a rule as it had to adopt the rule in the first instance.¹⁶

At least in part because promulgating new regulations is so time-consuming and expensive, existing regulations tend to stay on the books unchanged for extended periods of time. This is particularly true when it comes to the DOI's minerals program regulations, most of which have not been revised in decades.¹⁷ Regulations that remain on the books too long can become outdated, their once-current

¹⁴ See Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015) (to be codified at 43 C.F.R. pt. 3160) (effective June 24, 2015). For more information on the rulemaking process for this regulatory initiative, see the docket at <http://www.regulations.gov> (search "BLM-2013-0002").

¹⁵ See *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (stating that excessively vague regulations raise due process concerns because "regulated parties should know what is required of them so they may act accordingly"); *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000); see also Charles H. Koch, Jr., *Administrative Law and Practice* § 4:43(b) (3d ed. 2010) (reviewing judicial specificity standards for various types of rules under due process).

¹⁶ *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

¹⁷ For example, in the first quarter of 2015, the BLM initiated the process of updating its bonding regulations for the first time since the 1960s, and ONRR proposed the first significant update to its gas and coal valuation rules in over 25 years. See *Oil and Gas Leasing; Royalty on Production, Rental Payments, Minimum Acceptable Bids, Bonding Requirements, and Civil Penalty Assessments*, 80 Fed. Reg. 22,148 (Apr. 21, 2015) (advance notice of proposed rulemaking); *Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform*, 80 Fed. Reg. 608 (proposed Jan. 6, 2015) (to be codified at 30 C.F.R. pts. 1202, 1206).

requirements overtaken by a new generation of legal, practical, social, business, or technological developments.¹⁸

Although the Executive Branch has undertaken a number of initiatives directed at reforming or streamlining the rulemaking process over the years,¹⁹ the time and administrative burden associated with promulgating rules has only grown. Now that the electronic public comment system is a universally accepted method for submitting public comments, participation in the rulemaking process—and hence the time and expense associated with reviewing and responding to comments—is on the rise.²⁰ Consequently, agencies strive to find alternate methods of achieving their policy and administrative goals.

One method agencies frequently employ is to issue “interpretive” rather than legislative rules under section 553(b)(3)(A) of the APA. Interpretive rules are “issued . . . to advise the public of the

¹⁸ For example, BOEM’s offshore air regulations, originally promulgated in 1980 and last updated in 1988, contain pollutant “significance” criteria that were intended to mirror the National Ambient Air Quality Standards (NAAQS) under the Clean Air Act, 42 U.S.C. §§ 7401–7671q. 30 C.F.R. §§ 550.303(d), .304(c); *see* 43 U.S.C. § 1334(a)(8) (requiring promulgation of regulations to ensure compliance with the NAAQS); *see also* Oil and Gas and Sulfur Operations in the OCS, 44 Fed. Reg. 27,449 (proposed May 10, 1979), *as amended by* 45 Fed. Reg. 15,128 (Mar. 7, 1980) (previously codified at 30 C.F.R. § 250.2 (repealed 1988)); OCS Minerals and Rights-of-Way Management, General and OCS Orders for all Regions of the OCS, 51 Fed. Reg. 9316 (proposed Mar. 18, 1986), *as amended by* 53 Fed. Reg. 10,596 (Apr. 1, 1988) (codified at 30 C.F.R. pts. 250, 256). However, because the text of the regulations includes the numeric NAAQS criteria that existed in 1988, BOEM’s regulations are no longer consistent with the NAAQS criteria, which are updated periodically by the U.S. Environmental Protection Agency (EPA). *See* 40 C.F.R. pt. 50. Any efforts by BOEM to update this regulation must be done through the promulgation of a new regulation.

¹⁹ *See* Improving Regulation & Regulatory Review, Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011); Regulatory Planning & Review, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); *see also* President Bill Clinton & Vice President Albert Gore, Jr., Presentation at the White House: Federal Regulatory Reform (Feb. 21, 1995).

²⁰ In addition to the BLM hydraulic fracturing rule, other notable recent regulatory initiatives have prompted overwhelming public interest. For example, EPA’s proposal to limit greenhouse gas emissions from existing power plants has received over 4.3 million public comments to date. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60); *see also* <http://www.regulations.gov> (search “EPA-HQ-OAR-2013-0602-0001”).

agency's construction of the statutes and rules which it administers,"²¹ and include general statements of policy and guidance documents.²² These "rules" do not require notice-and-comment rulemaking because, at least in theory, they "do not have the force and effect of law."²³ BOEM's Notices to Lessees and Operators (NLT), which interpret and clarify existing rules but do not themselves impose new regulatory requirements, are examples of interpretive rules, although the agency has on occasion attempted, without much success, to use NLTs to impose substantive new requirements.²⁴ One can reasonably expect to see agencies increasingly turn to guidance and other methods of informal rulemaking to stretch the boundaries of their existing regulatory authority without engaging in the notice-and-comment rulemaking process.²⁵

²¹ *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979)).

²² See Lubbers, *supra* note 5, at 73–104 (containing a complete discussion on distinguishing among legislative rules, interpretive rules, and policy statements).

²³ *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (quoting *Shalala*, 514 U.S. at 99); *see id.* at 1211 (Scalia, J., concurring) ("An agency may use interpretive rules to *advise* the public by explaining its interpretation of the law. But an agency may not use interpretive rules to *bind* the public by making law . . .").

²⁴ See *EnSCO Offshore Co. v. Salazar*, No. 10-1941, 2010 WL 4116892, at *5 (E.D. La. Oct. 19, 2010) (holding that NLT No. 2010-N05 was invalid because it was in fact a substantive rule in the guise of interpretive guidance, and was not promulgated in accordance with the notice-and-comment procedures of the APA). In the years following the 2010 Deepwater Horizon accident, BOEM has been reevaluating its NLTs, and rescinding or re-drafting those that could be mistaken for legislative rules. Compare Minerals Mgmt. Serv., NLT No. 2008-G04, "Information Requirements For Exploration Plans and Development Operations Coordination Documents," at 6 (effective May 1, 2008) (exempting certain lessees from providing blowout scenario and worst-case discharge information otherwise required by regulation), with BOEM, NLT No. 2010-N06, "Information Requirements for Exploration Plans, Development and Production Plans, and Development Operations Coordination Documents on the OCS," at 1 (effective June 18, 2010) (expressly rescinding the blowout scenario and worst-case discharge information exemptions, and clarifying that the NLT does not alter any regulatory requirements).

²⁵ Until very recently, changing an interpretive rule or long-standing agency interpretation of its rules required adherence to the APA's notice-and-comment rulemaking requirements. See *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). However, the Supreme Court

Even in cases where agencies adhere to the public notice-and-comment requirements of section 553, they sometimes may seek to minimize the time and expense associated with the public comment process. Sometimes agencies characterize the nature of major regulatory proposals in such a way that it is unclear whether such proposals are significant new regulatory proposals or mere “clarifications” of, or “technical corrections” to, existing regulations.²⁶ Agencies also may sometimes cast the scope or characterize the subject of a regulatory proposal such that affected parties may have no cause to read or comment on a rule that, when finalized, would apply to them.²⁷

§ 2.03 The Rulemaking Process—What Goes On Behind the Curtain

[1] The Path to a Proposal

[a] Who Is Involved in the Formulation of a Regulatory Proposal?

When a federal resource management agency determines that a rulemaking is necessary, the effort is most commonly spearheaded by the program office with the relevant subject matter expertise or jurisdiction. If the rule concerns rangeland health, for example, the regulatory effort would most likely be led by BLM’s Division of Forest, Rangeland, Riparian, and Plant Conservation. If, on the other hand, the proposal concerns the regulation of air emissions associated with offshore oil and gas operations, BOEM’s Physical and Chemical Sciences Branch or Environmental Assessment Division might take the lead.

Rules originating at the DOI are frequently the result of interbureau or interoffice collaboration. For example, BOEM, which is responsible for offshore oil and gas planning, leasing, and environmental assessment, and BSEE, which is responsible for regulatory and environmental enforcement issues associated with offshore oil and gas, frequently work together on regulatory initiatives.²⁸ For regulations

recently decided that, because interpretive rules do not have the force and effect of law, agencies are free to change them without engaging in notice-and-comment rulemaking. *See Perez*, 135 S. Ct. at 1207.

²⁶ *See, e.g.*, Amendments to Civil Penalty Regulations, 79 Fed. Reg. 28,862 (proposed May 20, 2014) (to be codified at 30 C.F.R. pt. 1241) (characterizing a major overhaul of 30-year-old royalty-related civil penalty regulations as a clarification and simplification of existing requirements).

²⁷ *See* Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections, 79 Fed. Reg. 59,022 (proposed Sept. 30, 2014) (to be codified at 43 C.F.R. pts. 2800, 2880) (also containing regulations overhauling the process for issuing and administering oil and gas pipeline rights-of-way in spite of the proposal’s title).

²⁸ *See, e.g.*, Oil and Gas and Sulphur Operations in the OCS—Requirements for Exploratory Drilling on the Arctic OCS, 80 Fed. Reg. 9916 (proposed Feb. 24, 2014) (to be codified at 30 C.F.R. pts. 250, 254, 550).

concerning onshore oil and gas emissions, such as venting and flaring, the effort would likely be led by BLM's Division of Fluid Minerals with the cooperation of the air quality office in BLM's Division of Environmental Quality and Protection. Further substantive input on regulatory initiatives is regularly provided by various subject matter experts (SME), agency and departmental management, attorneys, policy officials, and financial professionals.

The involvement of the agency's upper management and political infrastructure tends to vary depending on the nature and significance of the proposal either politically or policy-wise. The extent to which the proposal is controversial, marks a departure from existing policy, or would have significant economic or political ramifications is usually the same extent to which high-level agency officials take an active hand in crafting a regulation. The involvement of political appointees in high-profile or important regulatory initiatives informs the policy aspects of the final rule and brings perspectives to the table from outside the agency's career culture.

Agency management may also convene a panel of bipartisan stakeholders, called advisory committees, under the Federal Advisory Committee Act (FACA)²⁹ to provide input, expertise, and consensus-building around issues central to an upcoming regulatory proposal.³⁰ Management also regularly consults the regulated community on important regulatory matters, and the content of these interactions can find their way into regulatory proposals.

Although agencies typically promulgate regulations in two stages, first as a proposed rule and then as a final rule, for significant or novel proposals, bureaus may publish in the *Federal Register* an advance notice of proposed rulemaking (ANPR) to solicit public input on the scope and content of the contemplated regulation.³¹ SMEs are also frequently in contact with local communities that might be

²⁹ 5 U.S.C. app. 2 §§ 1–16.

³⁰ Federal agencies frequently seek advice and guidance on any number of issues by convening committees comprised of members of the public, including industry leaders, special interest groups, and academia. Motivated by the desire to ensure that the input provided by these groups is objective, non-partisan, and accessible to the public, Congress enacted FACA, which formalizes the process for “establishing, operating, overseeing, and terminating” these committees. U.S. Gen. Servs. Admin., “Federal Advisory Committee Act (FACA) Management Overview,” <http://www.gsa.gov/faca>. The Committee Management Secretariat at the U.S. General Services Administration is charged with monitoring agency compliance with FACA. See Transfer of Certain Advisory Committee Functions, Exec. Order No. 12,024, 42 Fed. Reg. 61,445 (Dec. 5, 1977).

³¹ See Risk Management, Financial Assurance and Loss Prevention, 79 Fed. Reg. 49,027 (Aug. 19, 2014) (ANPR).

affected by the rule as well as industry stakeholders, and may seek informal public input regarding the scope, design, and effect of the rule being formulated early in the process.

[b] Moving the Proposal Up the Administrative Ladder

At the DOI, the originating bureau's regulatory office is generally responsible for shepherding the regulation through the rulemaking process and for keeping all offices and bureaus involved in the rulemaking apprised of important developments. The Office of the Solicitor (SOL) provides legal review of the regulatory proposal, usually (although not always) throughout the rule's development. The DOI's Office of the Executive Secretariat and Regulatory Affairs (OES) oversees the entire rulemaking process and coordinates the effort among the various bureaus, departmental leadership, and outside agencies, and with the Office of Management and Budget (OMB) in the Executive Office of the President.³²

When initiating the regulatory process, the lead bureau's regulatory office must prepare a regulatory action alert to notify interested parties in the DOI that a rulemaking will occur.³³ This alert is given to the OES, which in turn distributes it among the various DOI bureaus and secretariats, who in turn distribute it internally to potentially interested offices and divisions.³⁴ The OES will ensure that the regulatory initiative is included in the next semiannual regulatory agenda,³⁵ and may convene an interbureau meeting for the purposes of identifying major issues that cross bureau jurisdictional lines and attempting to reach consensus on how the regulation should be developed.

The originating regulatory office must also conduct a preliminary assessment of whether the rule is "significant" for the purpose of Executive Order No. 12,866³⁶ and whether it is "major" for the purpose

³² See DOI, *Departmental Manual* 318 DM 1, § 1.6 (Aug. 28, 2013), for a more detailed description of the OES's responsibilities.

³³ See DOI, *How to Prepare Regulations and Federal Register Notices Handbook*, 318 DM HB § 2.2 (Sept. 23, 2013) (*Reg. & Notice Handbook*).

³⁴ *Id.* § 2.3.

³⁵ The semiannual regulatory agenda is the colloquial term for the Unified Agenda of Federal Regulatory and Deregulatory Actions, a list of all ongoing federal regulatory efforts published by the Regulatory Information Service Center semiannually in the *Federal Register*. See Office of Info. & Regulatory Affairs (OIRA), "Current Unified Agenda of Regulatory and Deregulatory Actions," <http://www.reginfo.gov/public/do/eAgendaMain>, for the current agenda and more information about the process.

³⁶ Exec. Order No. 12,866, *supra* note 19.

of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).³⁷ The OES will submit this information to the OMB for consideration.

Although the procedure for reviewing, finalizing, and approving a regulatory proposal varies from agency to agency, at the DOI it is referred to as the “surname” process. The surname process is a means of documenting that all appropriate offices have “signed off” on a regulatory proposal, i.e., that all relevant offices have reviewed the proposal and approve of its content to the extent of their expertise and authority. Although the participants in the surname process vary based on the originating bureau or office and the subject matter or nature of the proposal, generally the SOL, Office of Policy Analysis (OPA), OES, bureau director, bureau regulatory contact, bureau information collection clearance officer, and any other bureau or office officially involved in the development of the rule must sign off on its contents before submission to a Secretarial Officer (the Secretary, the Deputy Secretary, the Solicitor, or the appropriate Assistant Secretary) for signature.³⁸

Although the OES encourages early engagement with the SOL and the OPA with respect to the formulation of rules, the originating office does not always do so, and in some cases the SOL and the OPA may not be aware of the regulatory proposal until it arrives in the office for surname. Accordingly, the surname process can be iterative in nature, involving a significant amount of back-and-forth between departmental and bureau offices as the particulars of a regulatory proposal are hashed out. Even where regulatory efforts are well coordinated, it is not unusual for a proposal to be revised significantly during the surname process to reflect the various technical, policy, and legal priorities of the various bureaus, bureau divisions/offices, and departmental offices.

The surname of each office has its own significance. For example, the surname of the SOL signifies that the regulation is legally sufficient. It does not signify that the rule is consistent with policy or constitutes an optimal exercise of rulemaking authority. Similarly, the surname of the OPA signifies consistency with departmental policies but not necessarily with other statutory or regulatory requirements.

Ultimately, only a Secretarial Officer may sign a regulatory proposal.³⁹ The Assistant Secretary for Land and Minerals Management (ASLM) is the Secretarial Officer most commonly responsible for

³⁷ 5 U.S.C. §§ 801–808; *see Reg. & Notice Handbook, supra* note 33, at 9 (Form DI 3460—Regulatory Action Alert Form).

³⁸ *Reg. & Notice Handbook, supra* note 33, § 6.2.

³⁹ *Id.* § 6.6. Exceptions to this rule and to the surnaming process in general include (1) actions by the Office of Surface Mining, Reclamation and Enforcement to approve, disapprove, or supersede amendments to state and tribal programs; (2) rules signed by the FWS Director to list, delist, or reclassify

signing minerals-related regulations. Although the ASLM is generally apprised of the regulatory proposals moving through the bureaus, it is not always aware of the proposal's particulars until briefed by the agency or until the actual proposal arrives for signature.

After a rule is signed by a Secretarial Officer, the bureau's regulatory office forwards it to the Secretary's office for final review. If the OES determines that the rule is "significant" for the purpose of Executive Order No. 12,866, it will forward the proposal to the OMB for further review. If not, the proposal is forwarded to the *Federal Register* for publication.

[c] OMB and OIRA—Policy Gatekeeper

The Office of Information and Regulatory Affairs (OIRA), a component of the OMB, has a significant, and often determinative, effect on virtually all major regulatory initiatives. Created by the Paperwork Reduction Act of 1980 (Paperwork Reduction Act),⁴⁰ OIRA reviews all "significant" regulatory proposals and has the authority to approve, modify, or reject any proposed regulation.⁴¹ OIRA acts as the White House's regulatory gatekeeper; it ensures that all regulations are consistent with applicable law and the President's priorities, and that the decisions made by one agency do not conflict with policies or actions taken by another. As a result of OIRA's review, many draft rules are changed significantly prior to publication in the *Federal Register*, withdrawn before review is complete, or returned to the originating agency because certain aspects of the rule are inconsistent with presidential priorities or the policies of another agency. OIRA frequently exercises its authority to modify regulatory proposals, and exerts great influence over the form and content, as well as timing, of new regulatory initiatives. It also plays a significant role in shaping the administration's regulatory agenda.⁴² Consequently, engagement with OIRA as well as the originating agency is important to many industries with cross-cutting issues or in cases where the regulation would have significant impacts on the regulated community.

Although various deadlines apply to OIRA's review of a proposed regulation,⁴³ in practice, these deadlines are a fiction. Because OIRA sets the regulatory agenda as much as it reviews and clears

a species; and (3) BLM State Director decisions to issue "supplementary rules" pursuant to 43 C.F.R. § 8365.1-6. *Reg. & Notice Handbook*, *supra* note 33, § 6.6.

⁴⁰ Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501–3521).

⁴¹ Exec. Order No. 12,866, *supra* note 19.

⁴² For more information on OIRA and its functions, see GAO, "Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews" (Sept. 2003).

⁴³ For example, if the regulatory proposal being sent to OIRA is a preliminary rulemaking document such as an ANPR, the OMB has 10 work days to approve or disapprove publication. *See Reg.*

regulatory proposals, for important rules, OIRA is usually already informally involved in the rulemaking process by the time the rule arrives in its offices. Issues such as the timing of the proposal, regulatory approach and content, assessment of regulatory “significance,” and required economic analyses are all usually resolved between OIRA and the agency before the rule is submitted for review. Put differently, OIRA generally will not accept a proposal for review unless all these issues have been resolved to its satisfaction. After receiving a regulatory proposal, the OMB can approve the proposal for publication, modify it, or return it to the agency for further consideration.⁴⁴

[2] The Notice of Proposed Rulemaking

Section 553(b) of the APA requires that an agency first present its proposed rule for public review in a “[g]eneral notice of proposed rule making . . . published in the Federal Register.”⁴⁵ This NPRM identifies the legal authority on which the rulemaking is based, contains a “preamble” discussing the intent and effect of the rule, and generally identifies the proposed regulatory provisions. The NPRM will also provide for a comment period and contain instructions for submitting comments and public participation in the rulemaking process.

A well-written preamble that explains how a particular regulatory provision is intended to function is extremely helpful. It often becomes necessary to visit the preamble years after a rule is issued to obtain a clear understanding of how the rule was originally intended to function.

The NPRM will also include in the preamble a number of regulatory and economic analyses required under a panoply of statutes and executive orders, intended to ensure that the agency considers the economic, societal, environmental, and governmental impact of its regulatory proposals.

Under the National Environmental Policy Act of 1969 (NEPA),⁴⁶ agencies must consider and disclose the reasonably foreseeable impacts of their actions on the environment in either an environmental

 & Notice Handbook, *supra* note 33, at 9 (Form DI 3460—Regulatory Action Alert Form). Ostensibly, if the regulation is one that the OMB has not previously reviewed (e.g., a proposed rule), the OMB has 90 calendar days to review it, and can obtain an extension for 30 additional days to complete its review. *See* Exec. Order No. 12,866, *supra* note 19, § 6.

⁴⁴ Unrelated to the process of approving significant regulations, the OMB also must review each collection of information contained in a proposed rule under the Paperwork Reduction Act. *See* 44 U.S.C. § 3504. This process is similarly coordinated by each bureau’s information collection clearance officer with the OMB prior to submission. A final rule cannot be published until the OMB approves all information collections required in the rule.

⁴⁵ 5 U.S.C. § 553(b).

⁴⁶ 42 U.S.C. §§ 4321–4347.

assessment or, if the impacts are anticipated to be significant, in an environmental impact statement.⁴⁷ These analyses are generally too large to be included in the preamble itself. Instead, the preamble will state whether a separate NEPA analysis was prepared analyzing the environmental impacts of the proposal, and identify where it is located.

Under Executive Order No. 13,211,⁴⁸ agencies must submit a statement of energy effects for any proposed significant energy action. “Significant energy action” means any action by an agency that (1) is a “significant regulatory action” under Executive Order No. 12,866; (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action.⁴⁹

Under Executive Order No. 12,988,⁵⁰ the agency must determine whether the proposed rule would unduly burden the justice system.

Under the SBREFA, the agency must either certify that the proposed rule would have no “major impacts” affecting a substantial number of “small” entities (including small businesses, non-profits, and government jurisdictions) or, where the impact is anticipated to be major, publish an initial regulatory flexibility analysis in the *Federal Register* and seek recommendations from the affected small entities regarding less burdensome alternatives.⁵¹

Under the Unfunded Mandates Reform Act of 1995,⁵² the agency must prepare a statement, in the nature of a regulatory impact analysis, for any proposed rulemaking that is likely to result in the expenditure by the private sector in excess of \$100 million in any fiscal year. It also requires the agency to give special consideration to any regulatory proposal that would impose burdens on state, local, or tribal entities.

⁴⁷ *Id.* § 4332(2)(C); 40 C.F.R. §§ 1501.4, 1508.9; see Steven K. Imig, “Maintaining a Seat at the Table in Permitting and NEPA Analyses,” 60 *Rocky Mt. Min. L. Inst.* 25-1, 25-6 (2014).

⁴⁸ Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use, Exec. Order No. 13,211, 66 Fed. Reg. 28,355 (May 18, 2001).

⁴⁹ *Id.* at 28,355–56.

⁵⁰ Civil Justice Reform, Exec. Order No. 12,988, 61 Fed. Reg. 4729 (Feb. 5, 1996).

⁵¹ 5 U.S.C. § 804(2).

⁵² 2 U.S.C. §§ 1501–1571.

Agencies must also consider and analyze the effect the proposed rule may have on individual property rights. Executive Order No. 12,630,⁵³ requires that an agency must indicate in the NPRM that the proposed rule does not involve an unconstitutional taking of private property.

Under Executive Order No. 13,132,⁵⁴ agencies are not permitted to promulgate regulations with “federalism implications” that impose substantial direct costs on state and local governments unless the agency provides funds to pay for state and local compliance costs. The executive order also prohibits agencies from promulgating regulations with federalism implications that preempt state or local law, unless the agency consults with the affected state or local government officials in advance of the rulemaking process. “Federalism implications” means having substantial direct effects on states or local governments, on the relationship between the federal government and the states, or on the distribution of power and responsibilities among the various levels of government.⁵⁵ The preamble to the NPRM must contain a federalism summary impact statement demonstrating compliance with the executive order’s requirements.

The requirements of Executive Order No. 13,175⁵⁶ substantially mirror those of Executive Order No. 13,132, except it applies to Indian tribal governments rather than state and local governments.

Under the Information Quality Act (IQA),⁵⁷ the agency must ensure that it has relied on accurate, reliable, and unbiased information as the basis for its proposal.⁵⁸

Under the Paperwork Reduction Act, an NPRM must include a statement indicating that OMB has approved all information collection requirements contained in the rule, and provide control numbers for the forms that the rule will require regulated entities to submit. OMB’s review under the Paperwork Reduction Act is designed to assess the administrative burden the rule would impose on the government

⁵³ Governmental Actions & Interference with Constitutionally Protected Property Rights, Exec. Order No. 12,630, 53 Fed. Reg. 8859, § 5 (Mar. 15, 1988).

⁵⁴ Federalism, Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

⁵⁵ *Id.* § 1.

⁵⁶ Consultation & Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

⁵⁷ See Independent Agencies Appropriations Act, 2001, Pub. L. No. 106-554, app. C, tit. V, § 515, 114 Stat. 2763 (2000) (codified at 44 U.S.C. § 3516 note) (also known as the Data Quality Act).

⁵⁸ See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002) (final guidelines); see also Jim B. Butler & Constance L. Rogers, “Balancing Transparency, Confidentiality, Deliberation, and Sound Science in Public Land Decision Making,” 60 *Rocky Mt. Min. L. Inst.* 21-1, 21-19 (2014).

and the regulated community, and to ensure that the gathering of information from the public is consistent with the provisions of the Act.⁵⁹

Executive Order No. 12,866⁶⁰ and Executive Order No. 13,563⁶¹ require agencies to send to OIRA for review any significant regulatory action. “Significant regulatory actions” are those that:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs . . . ; or
- (4) Raise novel legal or policy issues⁶²

If the proposal is determined by the agency or OIRA to be “economically significant,” then the agency must undertake a cost-benefit analysis of the rule and provide the analysis or a citation to the location of the analysis in the regulatory preamble.

Agencies generally incorporate discussions germane to each of these statutes and executive orders in the preambles to both their proposed and final regulations.⁶³ With the exception of NEPA,⁶⁴ SBREFA,⁶⁵ and the Regulatory Flexibility Act,⁶⁶ an agency’s compliance with these statutes is not reviewable in court. Although the language of the IQA is silent with respect to judicial review, some courts have held that agency compliance with the IQA is unreviewable, while others appear to have left open the possibility for review.⁶⁷ Generally, an agency’s compliance with an executive order is not judicially reviewable.⁶⁸

⁵⁹ 44 U.S.C. § 3506(c)(2)(B).

⁶⁰ Exec. Order No. 12,866, *supra* note 19.

⁶¹ Improving Regulation & Regulatory Review, Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan 18, 2011).

⁶² Exec. Order No. 12,866, *supra* note 19, § 3(f).

⁶³ See Lubbers, *supra* note 5, ch. 2 (containing a complete discussion of required regulatory analysis and incorporation into the regulatory preamble).

⁶⁴ See *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008).

⁶⁵ See *Montanans for Multiple Use v. Barbouletos*, 542 F. Supp. 2d 9 (D.D.C. 2008).

⁶⁶ 5 U.S.C. §§ 601–612; see *Thompson v. Clark*, 741 F.2d 401 (D.C. Cir. 1984).

⁶⁷ Compare *Salt Inst. v. Thompson*, 345 F. Supp. 2d 589, 602–03 (E.D. Va. 2004) (unreviewable), with *Ams. for Safe Access v. Dep’t of Health & Human Servs.*, 399 F. App’x 314, 316 (9th Cir. 2010) (potentially reviewable).

[3] Public Participation—the Notice-and-Comment Process

From the beginning, Congress envisioned public comment as a central component of agency rulemaking, based on the premise that rulemaking must be fully informed to ensure good outcomes and to inject fundamental fairness into a regulatory process that would purport to govern private conduct. The public comment process of the APA therefore provides a formalized mechanism for interested parties to supply agencies with information concerning factual, legal, or policy aspects of proposed regulations, and to present new ideas, objections, or alternate regulatory approaches for consideration.⁶⁹

[a] The Comment Period

When an NPRM is published in the *Federal Register*, the agency will specify a public comment period. Although the APA does not prescribe a minimum time for public comment, the agency must provide notice “sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument.”⁷⁰ Absent exigent circumstances, federal agencies will usually provide a minimum 30-day public comment period.

The DOI generally requires its bureaus to provide a minimum 60-day public comment period, and encourages a longer comment period for regulations “involving complex issues,” or where the affected public likely has limited access to the *Federal Register*.⁷¹ Bureaus may only have a shorter comment period in cases where more timely action is required, and must explain the reason for the shorter comment period in the regulatory preamble.⁷²

⁶⁸ See *Ctr. for Biological Diversity*, 538 F.3d at 1211.

⁶⁹ 5 U.S.C. § 553(c) (if “notice [is] required,” the agency must “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments”).

⁷⁰ APA Legislative History, *supra* note 2, at 200; see Lubbers, *supra* note 5, at 297; *Global Van Lines, Inc. v. Interstate Commerce Comm’n*, 714 F.2d 1290, 1298 (5th Cir. 1983); see, e.g., *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 772 (D.C. Cir. 1988) (upholding a 15-day comment period as reasonable given the circumstances); *Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 534 (D.C. Cir. 1982) (upholding a 30-day comment period given the industry’s familiarity with problem addressed by regulatory proposal).

⁷¹ *Reg. & Notice Handbook*, *supra* note 33, § 5.4.

⁷² *Id.* § 5.4(A).

Agencies may, and frequently do, extend comment periods at the request of the public to allow sufficient time for interested parties to digest the regulations and provide meaningful feedback. This is effectuated by publishing a notice of extension of the comment period in the *Federal Register*.⁷³

[b] Agency Consideration of Comments

Agencies must consider and respond to all significant comments received during the public comment period.⁷⁴ However, agencies are not required to respond to the same form letter over and over, nor are they required to consider non-substantive comments of support or criticism. Well-crafted comments can—and frequently do—have a profound influence on an agency’s thinking on a regulatory matter. It is not uncommon for agencies to significantly revise their regulatory proposals in response to stakeholder input.⁷⁵

[c] Written Comments

Although agencies can and sometimes do hold public hearings for the purpose of gathering additional public input, the submission of written comments is generally preferred. This is because written comments are a good method for building a record that will support the final rule. Under basic principles of administrative law, if the rule is rationally based on the contents of the record, the regulation likely will be insulated from legal challenge.⁷⁶

⁷³ See, e.g., Oil and Gas and Sulphur Operations on the OCS—Requirements for Exploratory Drilling on the Arctic OCS, 80 Fed. Reg. 21,670 (Apr. 20, 2015) (extending public comment period on proposed rule by 30 days in response to public comment requests); Rights-of-Way on Indian Land, 79 Fed. Reg. 47,402 (Aug. 13, 2014) (extending public comment period on proposed rule by 45 days in response to requests for extension).

⁷⁴ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

⁷⁵ For example, the BLM’s proposed hydraulic fracturing regulations changed considerably between drafts in response to industry comments. Compare Oil & Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27,691 (proposed May 11, 2012), with Oil & Gas; Hydraulic Fracturing on Federal and Indian Lands, 78 Fed. Reg. 31,636 (proposed as amended May 24, 2013). Had industry not provided such robust input, it would likely now be faced with a final regulation that looks similar to the less balanced proposed rule. See Oil & Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015) (to be codified at 43 C.F.R. pt. 3160) (effective June 24, 2015).

⁷⁶ See *Citizens to Preserve Overton Park*, 401 U.S. at 420–21. Because a challenge to a regulation is usually based strictly “on the record” that was before the agency at the time it issued its regulation, if the record provides a rational basis for the regulation, the regulation will most likely be affirmed.

From a commenter's perspective, providing written comments not only favorably influences regulatory outcomes, in many cases it also preserves the ability of the commenter to challenge the regulation in court. Failure to preserve comments by submitting them in writing during the comment period might preclude challenging the regulation at a later date. Generally, courts will only consider challenges to the validity of a rule if the issues raised in the challenge were presented to the agency during the rulemaking process.⁷⁷ Without the written comments, there is no evidence that the agency had the opportunity to consider the comment, and therefore could not have been expected to consider or act on it before finalizing the regulation.⁷⁸ Accordingly, it is critical that the regulated community provide written comments on any significant regulatory proposal that would purport to govern its conduct or affect its interests.

Comments should not be limited to criticism of the proposed rule. It is equally important for commenters to identify proposed provisions they support to assist the agency in building its administrative record. Supportive comments also may help balance the record as there may be some commenters who file negative comments on the same provisions.

Crafting effective comments based on the particulars of the regulatory proposal is key to achieving desired outcomes. Bald statements of support or derision, comments exaggerating the importance of an issue or the severity of a regulatory impact, or letters of general political posturing are unlikely to merit an agency's attention. To the contrary, submitting such comments only gives an agency license to dismiss them. Instead, comments should reflect a thorough understanding of the problem the agency intends to address and its legal authority to do so, demonstrate familiarity with how the proposal is intended to function, contain analysis sufficient to explain how the proposal will or will not achieve the

⁷⁷ *E.g.*, *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 828–29, 829 n.10 (5th Cir. 2003); *Small Bus. in Telecomms. v. FCC*, 251 F.3d 1015, 1026 (D.C. Cir. 2001) (failure to raise Regulatory Flexibility Act issue during rulemaking precluded judicial review of the issue); *Military Toxics Project v. EPA*, 146 F.3d 948, 956 (D.C. Cir. 1998) (“[N]either the [Military Toxics Project] nor anyone else commented during the rulemaking process that the Rule as drafted would permit the [Department of Defense] unilaterally to free itself from the strictures imposed by the [Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6987]. The [Military Toxics Project] has thus waived the argument and may not raise it for the first time upon appeal.”); *Nat’l Ass’n of Mfrs. v. DOI*, 134 F.3d 1095, 1111 (D.C. Cir. 1998) (the National Association of Manufacturers (NAM) “failed to raise this argument in the rulemaking proceedings below, and we find no reason to excuse NAM’s failure to exhaust its administrative remedies”).

⁷⁸ *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

regulatory objective, and, where possible, offer suggestions for alternate courses of action, including—if appropriate—alternative regulatory approaches.

Well-founded comments can help an agency understand possible unintended consequences of its proposal and, in many cases, how these consequences can be addressed. They can highlight ambiguities or flaws in the proposal that need to be addressed before the rule can become final. They can provide important information to the agency concerning industry practice, technological developments, and financial arrangements that might change or prompt the abandonment of a potentially unnecessary regulation. Ultimately, the key to effective comments is credibility: if the agency believes that comments are based on thorough knowledge of the subject, thoughtful consideration of the issues, and a willingness to participate constructively in the rulemaking process, it will likely consider them carefully in its decision-making process.

[d] Electronic Comments

Although the means for submitting comments will be specified in the NPRM, almost all agencies accept comments submitted electronically. The government originally intended the electronic submission and posting of comments to spark public discourse and an exchange of ideas on a regulatory matter. In theory, commenters would be able to view and consider the comments of other participants in their responses to the regulatory proposal. In practice, however, commenters almost universally wait until the end of the comment period before hitting the “send” button, resulting in a last-minute comment deluge.

[e] Ex-parte Communications

An ex-parte communication is “an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given”⁷⁹ In the context of legislative rulemaking, ex-parte communications usually take place as informal or oral discussions between outside parties and agency decision makers before, during, or after the comment period. An ex-parte communication could also take the form of a written communication received after the close of the comment period, such that no other commenter would have had the opportunity to see it and comment on it. Although commenters have voiced various good-governance and administrative record-related concerns in connection with ex-parte communications, section 553 of the APA places no restrictions on ex-parte communications in connection with notice-and-comment rulemaking.⁸⁰

⁷⁹ 5 U.S.C. § 551(14).

⁸⁰ *See* *Sierra Club v. Costle*, 657 F. 2d 298, 400–01 (D.C. Cir. 1981). In contrast, the APA prohibits ex-parte communications between outsiders and the decision maker in the context of formal rulemaking and formal adjudication. 5 U.S.C. § 557(d)(1).

The issue of ex-parte communications is very controversial in the halls of federal agencies, however. High-level agency officials who are advocates of open and transparent government tend to favor ex-parte communication, keeping a perpetual “open door” to anyone interested in providing input on a regulatory proposal. Opponents of ex-parte communication tend to be concerned with building a reviewable administrative record and with avoiding any impression that, despite the notice-and-comment process, regulations are really developed in secret by those with access to high-level government officials.

The DOI recommends that its employees refrain from engaging in or accepting ex-parte communications.⁸¹ Although this policy is not a strict bar, it serves to ensure that potentially crucial information that might influence agency thinking about the rule is included in the record.

[4] Finalizing the Regulation

[a] Creating the Final Rule

The APA places no specific limit on the time an agency may take when considering comments or on the time period between the close of the comment period and the promulgation of a final rule. Once the comment period closes, the agency begins its review of the comments received, a process that could take anywhere from weeks to months to years.⁸² The appropriate subject matter experts (SME) will analyze and, where appropriate, craft responses to the major comments received. Section 553 of the APA requires that these comment responses be included in the preamble to the final rule.

After considering all of the comments received, the agency may choose to finalize the regulation as is, change certain aspects of the proposal, or abandon the regulatory effort altogether. If the agency chooses to modify the proposal, the question becomes whether the modified proposal needs to be re-circulated for public comment or can be finalized as is. There are limitations to the degree of change that can be made to a rule between its proposed and its final form. Generally, the more significant the changes to the rule, the more likely that the agency will be required to re-propose the regulation for comment.

At bottom, the issue is whether the revised rule is only a slightly modified version of the regulation that was proposed, or whether some aspects of it have changed so much—and perhaps so unexpectedly for those who commented on the original—that the altered version is really a different rule than originally proposed. Accordingly, the altered rule may be finalized if the changes are a “logical outgrowth” of the original proposal.⁸³ If the altered version of the rule presents no significant issues that

⁸¹ *Reg. & Notice Handbook*, *supra* note 33, § 5.10.

⁸² Naturally, the longer the agency take to promulgate the final rule, the more likely the information on which it is relying will become “stale.”

⁸³ *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 851 (9th Cir. 2003); *Nat’l Exchange Carrier Ass’n v. FCC*, 253 F.3d 1, 4 (D.C. Cir. 2001).

are different from those presented in the proposed rule, then it can be finalized as amended.⁸⁴ If, on the other hand, the altered regulation raises new issues that were not presented for comment in the proposed rule, the amended rule must be re-proposed for comment.⁸⁵

[b] Rinse and Repeat

The internal agency review for final rules is almost identical to that for proposed rules, and includes the entire sunaming process. If the final version of the regulation is similar to the original proposal, the review process tends to be faster. In cases where the rule has changed significantly from the original version or where the preamble contains voluminous responses to comments, internal review of the final rule can take even longer than it did for the proposed rule. As with proposals for “significant” regulations, “significant” final rules are also submitted to the OMB for review. The OMB has 45 days to complete its review of final rules that are substantially similar to the proposed versions. Once the OMB approves the final rule, the regulation can be sent to the *Federal Register* for publication, where it will be published in one to three business days.

Under the Congressional Review Act,⁸⁶ agencies must also deliver copies of each major rule to Congress and the Government Accountability Office (GAO) on or before the rule’s publication date in the *Federal Register*. A major rule cannot become effective until at least 60 days after copies have been delivered to the Congress and the GAO.⁸⁷

⁸⁴ See *Natural Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1243 (D.C. Cir. 1988).

⁸⁵ See *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (“a final rule is a ‘logical outgrowth’ of a proposed rule only if interested parties ‘should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period’” (internal quotation marks omitted) (quoting *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004))); *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) (“[t]he notice of proposed rulemaking contains nothing, not the merest hint” of the provisions contained in the final rule); see also *Fertilizer Inst. v. EPA*, 935 F.2d 1303 (D.C. Cir. 1991) (the fact that comments on regulatory proposal raised issues that appeared in final rule does not present adequate public notice of prospective change and does not abrogate agency’s duty to re-propose rule for comment before finalizing); *Koch*, *supra* note 15, § 4:43[3] (explaining permissible variance between proposed and final rules).

⁸⁶ 5 U.S.C. §§ 801–808.

⁸⁷ *Id.* § 801(a)(3)(A).

[c] Delayed Effective Date

Under section 553(d) of the APA, final rules cannot become effective until 30 days after their publication in the *Federal Register*. This is sometimes referred to as the 30-day delayed effective date rule. The purpose of the delay is to allow those potentially subject to the rule to prepare for compliance or make other arrangements.⁸⁸

Section 553(d) of the APA contains exceptions to the delayed effective date rule. Interpretive rules and policy statements are not subject to the delayed effective date requirements, nor are rules for which the agency finds “good cause” for dispensing with the requirement.⁸⁹ Additionally, “a substantive rule which grants or recognizes an exemption or relieves a restriction” is exempt from the delayed effective date requirement.⁹⁰ Because the primary purpose of the delayed effective date rule is to give the regulated community a reasonable time to prepare to comply with the rule, there is little point in delaying the effectiveness of a rule that grants those affected a forbearance from regulation or otherwise relieves them of a regulatory burden.⁹¹

[5] Exemptions to the Notice-and Comment Requirements

Sections 553(a) and (b)(3)(A) of the APA contain a number of partial and complete exemptions to the notice-and-comment rulemaking requirements. In carving out these exemptions, the drafters of the APA sought to balance the need for public input with competing social interests favoring the efficient and expeditious conduct of certain governmental affairs.⁹² Although the use of exemptions has been “narrowly construed and only reluctantly countenanced” by the courts,⁹³ the GAO estimates that approximately one-third of all federal rules are promulgated under one or more of these exemptions from the notice-and-comment requirements.⁹⁴

⁸⁸ Lubbers, *supra* note 5, at 123.

⁸⁹ See § 2.03[5], *infra*, for a discussion of the “good cause” exemptions.

⁹⁰ 5 U.S.C. § 553(d)(1).

⁹¹ See *Indep. U.S. Tanker Owners Comm. v. Skinner*, 884 F.2d 587 (D.C. Cir. 1989).

⁹² See *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (“The reading of the § 553 exemptions that seems most consonant with Congress’ purposes in adopting the APA is to construe them as an attempt to preserve agency flexibility in dealing with limited situations where substantive rights are not at stake.”).

⁹³ *Am. Fed’n of Gov’t Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (quoting *N.J. Dep’t of Env’tl. Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)).

⁹⁴ GAO, “Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments” (Dec. 2012).

Two categories of rules are exempted from all the requirements of section 553 notice-and-comment rulemaking: (1) rules dealing with the military or foreign affairs; and (2) rules dealing with agency management or personnel or with federal property, loans, grants, benefits, or contracts.⁹⁵ Section 553(a)(1) makes all of the APA’s rulemaking procedures inapplicable when a “military or foreign affairs function of the United States” is involved. This exemption is not limited to activities of the Departments of State and Defense; courts have applied it in the context of rules implementing international agreements.⁹⁶ In the natural resources context, this exemption could come into play if BOEM and BSEE promulgate regulations implementing the recent agreement between the United States and Mexico concerning transboundary hydrocarbon reservoirs in the Gulf of Mexico.⁹⁷

Section 553(a)(2) of the APA also provides an exemption for all rules relating to “public property, loans, grants benefits, or contracts.” Although this so-called “proprietary” exemption appears to have a broad scope, it applies “only where an agency action ‘clearly and directly’ involves one of the exempted matters,” such as entry onto federal property where no other statute controls.⁹⁸ Similarly, section 553(a)(2) of the APA exempts all matters “relating to agency management of personnel” from all of the APA’s rulemaking requirements.

Other types of rules, such as those dealing with agency organization, procedure, and practice, interpretive rules, policy statements, and procedural rules, also enjoy broad exemptions from the notice-and-comment requirements. “[R]ules of agency organization, procedure, or practice” are exempted from the notice-and-comment requirements of section 553, but are not exempt from the publication requirements.⁹⁹ This exemption generally covers matters such as agency rules governing the conduct of agency administrative proceedings and rules delegating authority or duties within the agency hierarchy.

⁹⁵ 5 U.S.C. § 553(a); *see* Lubbers, *supra* note 5, at 61.

⁹⁶ *See* Int’l Bhd. of Teamsters v. Peña, 17 F.3d 1478, 1486 (D.C. Cir. 1994) (“The rule at issue here, at least in the aspect challenged by the union, did no more than implement an agreement between the United States and Mexico.”); *see also* Lubbers, *supra* note 5, at 66–67.

⁹⁷ *See* Agreement Between the United States of America and the United Mexican States Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico, U.S.-Mex., Feb. 20, 2012, 14 T.I.A.S. 718; *see also* Fact Sheet, Office of the Spokesperson, U.S. Dep’t of State, “U.S.-Mexico Transboundary Hydrocarbons Agreement” (May 2, 2013).

⁹⁸ Lubbers, *supra* note 5, at 62 (citing *Clipper Cruise Line, Inc. v. United States*, 855 F. Supp. 1, 3 (D.D.C. 1994) (holding DOI rule governing permitting process for cruise ships entering national park is exempt from notice and comment because it is a “matter relating to public property”)).

⁹⁹ 5 U.S.C. § 553(b)(3)(A); *see* *Batterton v. Marshall*, 648 F.2d 694, 707 n.68 (D.C. Cir. 1980).

Application of this family of exemptions is generally based on differentiating between “procedural” rules (which do not require notice-and-comment) and “substantive” rules (which require notice-and-comment), a vague distinction that historically has been unevenly applied.¹⁰⁰ Although the law in this area is far from settled, generally, if the application of a regulation affects the substantive rights or interests of regulated parties, notice and comment is likely required regardless of whether or not an agency labels it procedural.¹⁰¹ If, on the other hand, the regulation is merely agency “housekeeping” or does not itself alter the rights or interests of outside parties, it is more likely to be exempt from the notice-and-comment requirements.¹⁰²

As briefly discussed in § 2.02[2], above, “interpretive rules” and “general statements of policy” are also exempt from the APA’s notice-and-comment requirements.¹⁰³ Moreover, under section 553(d)(2) of the APA, they can be made effective immediately upon publication in the *Federal Register*. “The function of the interpretive rule exemption is ‘to allow agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings.’”¹⁰⁴ The exemption for general policy statements, on the other hand, “is designed ‘to allow agencies to announce their tentative intentions for the future . . . without binding themselves [or outside parties].’”¹⁰⁵

¹⁰⁰ See *Nat’l Motor Freight Traffic Ass’n v. United States*, 268 F. Supp. 90, 96 (D.D.C. 1967).

¹⁰¹ See *Air Transp. Ass’n of Am. v. Dep’t of Transp.*, 900 F.2d 369 (D.C. Cir. 1990) (where procedural rules “substantially affect . . . defendants’ ‘right to avail [themselves] of an administrative adjudication,’” notice and comment is required (alteration in original) (quoting *Nat’l Motor Freight Traffic Ass’n*, 268 F. Supp. at 96)), *remanded*, 498 U.S. 1077 (1991), *vacated as moot*, 933 F.2d 1043 (D.C. Cir. 1991).

¹⁰² See *id.*; *JEM Broad. Co. v. FCC*, 22 F.3d 320 (D.C. Cir. 1994) (because regulation compelling rejection of noncompliant radio license applications without opportunity to correct was deemed “procedural” and did not change a “substantive standard,” notice and comment was not required); *James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000) (“the critical feature of a rule that satisfies the so-called ‘procedural exception is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency’” (internal quotation marks omitted) (quoting *JEM Broad. Co.*, 22 F.3d at 326)).

¹⁰³ 5 U.S.C. § 553(b)(3)(A).

¹⁰⁴ Lubbers, *supra* note 5, at 74 (quoting *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987)).

¹⁰⁵ *Id.* (internal quotation marks omitted) (quoting *Am. Hosp. Ass’n*, 834 F.2d at 1046).

Disaggregating legislative rules from interpretive rules and policy statements is an “extraordinarily case-specific endeavor.”¹⁰⁶ Generally, if a rule explaining a statute makes new law instead of interpreting existing law, then the rule is legislative and is subject to the APA’s notice-and-comment procedures.¹⁰⁷ Courts tend to find rules legislative when they “impos[e] a standard of conduct, create an exemption from a general standard of conduct, establish a new regulatory structure, or otherwise complete an incomplete statutory design.”¹⁰⁸ Where the agency intends to “create new law, rights or duties” that are binding on itself and the regulated community, it has created a legislative rule.¹⁰⁹

An interpretive rule, on the other hand, explains the agency’s interpretation of a statute or existing rule and “only ‘reminds affected parties of existing duties.’”¹¹⁰ If a regulation merely fills in the blanks left by a statute or regulation, or is a logical extension of an existing regulation, it is also generally considered interpretative. For example, where an applicant is required by statute or regulation to submit a location plat, a regulation requiring that the plat be submitted in a particular format and contain certain information that is normally associated with a location plat would likely be considered an interpretative rule rather than a legislative rule. At bottom, whether a rule is legislative or interpretive turns on whether the rule is truly interpretative of existing statutory or regulatory rights and obligations, or whether it effects a legally binding substantive change from the status quo.¹¹¹

General statements of policy are issued by an agency to advise the public of the manner in which it proposes to exercise its discretionary authority in the future. If a policy statement purports to create a “binding norm” or impose a new requirement on the regulated community, then it is in fact a legislative rule, and must be issued in accordance with the APA’s notice-and-comment requirements.¹¹² If, on the

¹⁰⁶ *Am. Hosp. Ass’n*, 834 F.2d at 1045.

¹⁰⁷ Lubbers, *supra* note 5, at 79 (citing *Cabais v. Egger*, 690 F.2d 234, 239 (D.C. Cir. 1982)).

¹⁰⁸ *Id.*; *see, e.g.*, *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561 (D.C. Cir. 1984).

¹⁰⁹ *Gen. Motors Corp.*, 742 F.2d at 1565.

¹¹⁰ *Id.* (internal quotation marks omitted) (quoting *Citizens to Save Spencer Cnty. v. EPA*, 600 F.2d 844, 876 n.153 (D.C. Cir. 1979)).

¹¹¹ *See Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87 (1995).

¹¹² *See Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013–14 (9th Cir. 1987) (a purported statement of policy is legislative “to the extent that [it] ‘narrowly limits administrative discretion’ or establishes a ‘binding norm’ that ‘so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule’s criterion’” (emphasis omitted) (quoting *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983))); *Ensco Offshore Co. v. Salazar*, No. 10-1941, 2010 WL 4116892, at *4–5 (E.D. La. Oct. 19, 2010) (holding that NTL No. 2010-N05, characterized by

other hand, the policy “merely provides *guidance* to agency officials [or the regulated community] in exercising their discretionary power while preserving their flexibility and their opportunity to make ‘individualized determination[s],’ it constitutes a general statement of policy.”¹¹³

Pursuant to section 553(b)(3)(B), the APA’s notice-and-comment procedures do not apply in circumstances where the agency, for “good cause,” finds them “impracticable, unnecessary, or contrary to the public interest.” Congress defined each of these terms in the legislative history:

“Impracticable” means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. “Unnecessary” means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. “Public interest” supplements the term, “impracticable” or “unnecessary”; it requires that public rule-making procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure.¹¹⁴

Generally, agencies invoke these so-called good cause exemptions when (1) immediate action is necessary to minimize or avoid harm to human health, property, or the environment; (2) agency inaction will disrupt governmental or marketplace functions; (3) the regulation is very minor or technical in nature; or (4) the agency believes that the rule will be noncontroversial. Additionally, a statutorily imposed deadline to promulgate regulations may provide justification for the agency to abbreviate, or even eliminate, opportunity for public notice and comment.¹¹⁵ When claiming a good cause exemption, the agency must articulate its “finding and a brief statement of reasons therefor in the rules issued.”¹¹⁶

the agency as nonbinding “guidance,” was in fact a legislative rule because it imposed new, nondiscretionary requirements on a class of offshore operations); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946–48 (D.C. Cir. 1987) (“policy statements” establishing “permissible” aflatoxin levels and providing for “exceptions” to this level were binding legislative rules and not “nonbinding statements of enforcement policy”).

¹¹³ *Mada-Luna*, 813 F.2d at 1013 (second alteration in original) (quoting *Guardian Fed. Sav. & Loan Ass’n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 667 (D.C. Cir. 1978)); see *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986) (holding that, because mine safety “guidelines” contained no mandatory language requiring that the agency or the regulated community undertake any particular action, they were a policy statement exempt from notice-and-comment requirements).

¹¹⁴ APA Legislative History, *supra* note 2, at 200; see *Lubbers*, *supra* note 5, at 107.

¹¹⁵ See *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1236 (D.C. Cir. 1994).

¹¹⁶ 5 U.S.C. § 553(b)(3)(B).

In many cases, agencies issuing rules without notice and comment following a good cause finding refer to the rules as “interim-final rules,” and indicate in the *Federal Register* that they will modify the rules, as appropriate, following post-promulgation comment.¹¹⁷

Where the agency believes the rule to be routine or noncontroversial, it may engage in so-called “direct-final” rulemaking.¹¹⁸ In a direct-final rulemaking, the agency will publish a rule in the *Federal Register* with a statement that, unless a significant adverse comment is received within a specific time period (usually 15 days or more), the rule will automatically become effective on a date certain (at least 30 days after the end of the comment period). If a significant adverse comment is received on a direct-final rulemaking, the agency must withdraw the rule and propose it under the normal notice-and-comment procedure.¹¹⁹

Although employment of these exemptions is becoming ubiquitous, reviewing courts tend to apply these good-cause exemptions narrowly.¹²⁰

§ 2.04 Challenging an Agency Regulation

[1] Availability of Judicial Review

Absent controlling statutory language, judicial review of a regulatory action is available to anyone adversely affected by it.¹²¹ Importantly, in the context of rulemaking, organizations also have standing to challenge agency regulations on behalf of their affected members.¹²²

¹¹⁷ *E.g.*, Transportation of Federal Air Marshalls, 50 Fed. Reg. 27,924 (July 8, 1985) (showing an example of a final rule with request for comments, a Federal Aviation Administration “emergency” rule promulgated in response to hijackings and terrorist attacks requesting comment and promising future changes if warranted by public input).

¹¹⁸ *See* Ronald M. Levin, “Direct Final Rulemaking,” 64 *Geo. Wash. L. Rev.* 1, 4–6 (1995).

¹¹⁹ *See* Lubbers, *supra* note 5, at 114 (citing Adoption of Recommendations, 60 Fed. Reg. 43,110 (Aug. 18, 1995)); *see also* Sw. Pa. Growth Alliance v. Browner, 144 F.3d 984, 987 (6th Cir. 1998); Sierra Club v. EPA, 99 F.3d 1551, 1554 n.4 (10th Cir. 1996).

¹²⁰ *See* Action on Smoking & Health v. Civil Aeronautics Bd., 713 F.2d 795 (D.C. Cir. 1983); United States v. Gavrilovic, 551 F.2d 1099 (1977).

¹²¹ *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971); 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992); Massachusetts v. EPA, 549 U.S. 497 (2007) (explaining the requirements for establishing standing to challenge agency regulations). However, in the D.C. Circuit it has become increasingly difficult for industry groups to demonstrate standing to challenge

However, under section 704 of the APA, only “final agency actions” are ripe for review.¹²³ Consequently, before asserting jurisdiction over a regulatory challenge, a court must be certain that it is not interfering in an agency decision making that is not yet complete:

As a general matter, two conditions must be satisfied for agency action to be “final”: First, the action must mark the “consummation” of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which “rights or obligations have been determined,” or from which “legal consequences will flow.”¹²⁴

Accordingly, final rules are final agency actions subject to challenge, while proposed rules are not yet ripe for review.¹²⁵ Policy statements and agency guidance can also be final agency actions if they purport to bind the regulated community with the force of law.¹²⁶

Plaintiffs are also usually required to exhaust their administrative remedies before bringing suit, which means that plaintiffs must go through all the stages of the rulemaking and administrative process before challenging the rule in court. This generally means that petitioners who fail to first bring their issues to the agency’s attention during the rulemaking’s comment period waive their right to challenge the agency’s final rule in court.¹²⁷

agency rules. *See, e.g.,* Delta Constr. Co. v. EPA, 783 F.3d 1291 (D.C. Cir. 2015) (denying standing based on causation and redressability); Grocery Mfrs. Ass’n v. EPA, 693 F.3d 169 (D.C. Cir. 2012) (denying standing because petitioners were outside the “zone of interests” the Clean Air Act, 42 U.S.C. §§ 7401–7671q, was intended to protect); Alliance of Auto. Mfrs. v. EPA, 582 F. App’x 1 (D.C. Cir. 2014) (per curiam) (denying standing because group was not directly regulated by rule and could not demonstrate injury-in-fact).

¹²² This is known as “organizational standing.” *Int’l Union United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 288–90 (1986); *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333 (1977); *see* *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972).

¹²³ 5 U.S.C. § 704.

¹²⁴ *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted) (quoting *Port of Boston Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970)).

¹²⁵ *See In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015).

¹²⁶ *See* *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45 (D.C. Cir. 2000) (holding EPA “guidance” final and ripe for review because it was the functional equivalent of a legislative rule).

¹²⁷ *See* § 2.03[3][c], *supra*. However, aggrieved parties may still retain the right to bring a challenge when an agency *applies* the rule to them in a so-called “as-applied” challenge. *See* *Murphy Exploration & Prod. Co. v. DOI*, 270 F.3d 957 (D.C. Cir. 2001) (producer’s failure to challenge rule

[2] Scope of Judicial Review

The scope of judicial review is the standard by which a court will determine the validity of the rule. Unless the enabling statute for a particular regulatory program specifies otherwise, the APA will control. Section 706 requires courts, among other things, to:

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]
 - (D) without observance of procedure required by law¹²⁸

Section 706(2)(B) and (D) are the most self-evident, and require a court to invalidate a regulation if (1) it is unconstitutional (e.g., it effectuates a taking of property without due process of law); or (2) the agency did not follow the necessary procedures (e.g., notice-and-comment rulemaking) when it was required to do so.

[a] The “Arbitrary and Capricious” Test

Section 706(2)(A) of the APA is commonly known as the “arbitrary and capricious” test, which is the traditional standard applied by courts in reviewing agency regulations.¹²⁹ Courts consider the following three factors when determining whether a rule should be invalidated as arbitrary and capricious: (1) whether the *record* supports the factual conclusions upon which the rule is based; (2) the *rationality* or *reasonableness* of the policy conclusions underlying the rule; and (3) the extent to which the agency has *adequately articulated the basis* for its conclusions.¹³⁰

Although courts will invalidate regulations that fail to meet these standards, courts are generally unwilling to substitute their opinion for that of the agency.¹³¹ So long as conclusions underlying the regulation are “within the bounds of reasoned decisionmaking” and the record shows that the agency “considered the relevant factors and articulated a rational connection between the facts found and the

while participating in rulemaking proceedings did not stop it from challenging rule in separate proceeding where the agency was applying it).

¹²⁸ 5 U.S.C. § 706.

¹²⁹ See *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677 (D.C. Cir. 1984).

¹³⁰ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42–45 (1983); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971).

¹³¹ See *Citizens to Pres. Overton Park*, 401 U.S. at 416.

choice made,” the regulation will likely survive legal attack under the arbitrary and capricious test.¹³² So while courts can and do invalidate agency rules as arbitrary and capricious,¹³³ they tend to uphold agency rules when applying this highly deferential standard.¹³⁴

[b] Chevron Deference

Under section 706(2)(C) of the APA, agencies are barred from promulgating regulations “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”¹³⁵ This means that an agency’s rules must be within the scope of the authority delegated to it by Congress. Under the U.S. Supreme Court’s decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,¹³⁶ the agency’s interpretation of statutory provisions receives great deference. If Congress has not “directly spoken to the precise question at issue,”¹³⁷ then the agency’s interpretation (via rule) controls so long as its interpretation is “based on a *permissible* construction of the statute.”¹³⁸ Similar to the arbitrary and capricious standard, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by . . . an agency.”¹³⁹ Given this strong *Chevron* deference, courts rarely set aside statutory interpretations made by agencies.¹⁴⁰

¹³² *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 104–05 (1983); *see* *Sierra Club v. Costle*, 657 F.2d 298, 410 (D.C. Cir. 1981) (“We have . . . on close questions given the agency the benefit of the doubt out of deference for the terrible complexity of its job. We are not engineers, computer modelers, economists or statisticians, although many of the documents in this record require such expertise and more.”).

¹³³ *See* *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 948–49 (D.C. Cir. 2004); *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 56 (2d Cir. 2003); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1043–44 (D.C. Cir. 2002); *Nat’l Mining Ass’n v. Babbitt*, 172 F.3d 906, 909–11 (D.C. Cir. 1999); *Int’l Ladies’ Garment Workers’ Union v. Donovan*, 722 F.2d 795, 815 (D.C. Cir. 1983).

¹³⁴ *See* *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1370 (D.C. Cir. 1985) (upholding rule reducing minimum performance standards for vehicle bumpers because agency’s conclusions were “within the range of those that a reasonable person could derive from the evidence presented”).

¹³⁵ 5 U.S.C. § 706(2)(C).

¹³⁶ 467 U.S. 837 (1984).

¹³⁷ *Id.* at 842.

¹³⁸ *Id.* at 843 (emphasis added).

¹³⁹ *Id.*; *see* *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (“[b]efore a judicial construction of a statute, whether contained in a precedent or not, may trump an agency’s, the court must hold that the statute unambiguously requires the court’s construction”).

[c] **Compelling Agency Action Unlawfully Withheld or Unreasonably Delayed**

Under section 706(1) of the APA, a court may also compel any agency action that has been “unlawfully withheld or unreasonably delayed.”¹⁴¹ This issue usually arises in one of three situations: (1) agency failure to initiate rulemaking, (2) agency delay in ongoing rulemaking, and (3) agency abandonment of a rulemaking effort.¹⁴² These cases are generally very difficult for plaintiffs because courts are extremely deferential to agencies’ discretion to act and the time they need to do so.¹⁴³ In order to prevail, a plaintiff must show that the agency failed to take a “discrete agency action that it [was] required to take,” and that the specific action is “demanded by law.”¹⁴⁴

Nevertheless, the APA mandates that all agency actions—including the issuance of a rule—must be made “within a reasonable time.”¹⁴⁵ Generally, courts will consider the following four factors in assessing claims of delay in agency rulemakings: (1) the length of time that has elapsed since the agency came under a duty to act; (2) the reasonableness of the delay in light of the authorizing statute and its deadlines, if any, for rulemaking; (3) the consequences of the delay and whether it poses a threat to human health or safety; and (4) administrative error, administrative convenience, practical difficulty in carrying out the legislative mandate, or the agency’s need to prioritize given limited resources.¹⁴⁶

¹⁴⁰ See *Nat’l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 417 (1992) (as long as “the agency interpretation is not in conflict with the plain language of the statute, deference is due”).

¹⁴¹ 5 U.S.C. § 706(1).

¹⁴² See *Lubbers*, *supra* note 5, at 544–56 (expounding on the three types of agency inaction that may be compelled).

¹⁴³ See *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987) (“Because ‘a court is in general ill-suited to review the order in which an agency conducts its business,’ we are properly hesitant to upset an agency’s priorities by ordering it expedite one specific action, and thus give it precedence over others.” (quoting *Env’tl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970))).

¹⁴⁴ *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64–65 (2004) (emphasis omitted); see *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1189–90 (10th Cir. 1998) (“the distinction between agency action ‘unlawfully withheld’ and ‘unreasonably delayed’ turns on whether Congress imposed a date-certain deadline on agency action”); *Sierra Club*, 828 F.2d at 794–95.

¹⁴⁵ 5 U.S.C. § 555(b).

¹⁴⁶ *In re Int’l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (finding six-year delay in issuance of health standard unreasonable and imposing deadline for final rulemaking); see *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000) (identifying six factors to consider under so-called “rule of reason” including nature and extent of interests prejudiced by agency delay); *Pub. Citizen*

Applying these factors is fact-intensive and remedies tend to be determined on a case-by-case basis.¹⁴⁷ In the rare instances where a court finds a rulemaking unreasonably delayed or unlawfully withheld, the court may order that a rulemaking be completed by a certain date, request that the agency propose a deadline to impose on itself, or retain jurisdiction until the agency action is finalized.¹⁴⁸

§ 2.05 Conclusion

Although this chapter highlights the general rulemaking process and regulatory procedure at the DOI, each agency's regulatory process is unique. Even the processes used by the various DOI bureaus are not uniform and are somewhat idiosyncratic. It is important to understand each individual agency's rulemaking process to identify opportunities to meaningfully participate.

Because we now live and do business in a largely regulatory state, participation in the regulatory process provides a significant opportunity for the governed to directly influence policies and obligations

Health Research Grp. v. FDA, 740 F.2d 21, 35 (D.C. Cir. 1984) (“In deciding whether the pace of the decision is unreasonably delayed, the court should consider the nature and extent of the interests prejudiced by delay, the agency justification for the pace of decision, and the context of the statutory scheme out of which the dispute arises.”).

¹⁴⁷ Compare Pub. Citizen Health Research Grp. v. Chao, 314 F.3d 143 (3d Cir. 2002) (finding a nine-year delay in adopting new standard for human chromium exposure was excessive and not justified by scientific uncertainty of agency's competing priorities), and Pub. Citizen, 740 F.2d at 35–36 (finding unreasonable delay in issuing rule requiring health warnings on aspirin bottles), with Nat'l Customs Brokers & Forwarders Ass'n v. United States, 883 F.2d 93 (D.C. Cir. 1989) (deferring to agency's denial of petition for rulemaking and distinguishing economic regulation from cases involving “grave” health and safety violations), and W. Fuels-Ill., Inc. v. Interstate Commerce Comm'n, 878 F.2d 1025, 1027, 1030 (7th Cir. 1989) (acknowledging “heavy burden” plaintiff must meet to demonstrate necessity of rulemaking ordered when issue involves railroad regulation).

¹⁴⁸ *Int'l Chem. Workers*, 958 F.2d 1144 (imposing deadline for final rulemaking); *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 553–56 (D.C. Cir. 1999) (refusing to compel Mine Safety and Health Administration to promulgate rules long after statutory deadline had passed yet retaining jurisdiction to monitor compliance); *Bluewater*, 234 F.3d at 1315–16 (granting petitioners writ of mandamus where Oil Pollution Act required Coast Guard to promulgate regulations by particular date and that date had been missed); cf. Pub. Citizen Health Research Grp. v. Brock, 823 F.2d 626 (D.C. Cir. 1987) (chastising agency for failing to comply with court order to promulgate rule and warning that failure to meet self-imposed schedule would constitute “unreasonable delay”).

that would otherwise be thrust upon them. Although the ability to participate in the rulemaking process has become akin to a critical right, getting results requires some degree of sophistication.

The good news is that agencies listen, and credible and thoughtful input from stakeholders frequently finds its way into the final regulations. For this reason, the regulated community should take advantage of opportunities to engage the agencies at every point in the process to optimize the regulatory outcome.