

# Petitions for Rulemaking

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(\*Please do not cite without permission. Feedback welcome.)

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## I. Introduction

This study examines how executive and independent federal agencies handle formal requests from the general public to undertake rulemakings. This introduction describes the study's methodology and scope, and previews the structure of the report.

### I.A. Methodology and Participants

This study follows in the footsteps of Prof. William V. Luneburg's 1986 report for ACUS on petitions for rulemaking.<sup>2</sup> Luneburg's report greatly informs this study, even where not specifically cited.

Besides standard legal research (including advanced searches of the U.S. Code, the Code of Federal Regulations, *Federal Register* notices, case law, and legal journals) and online research (including advanced searches of agency websites and rulemaking dockets), this study relies heavily on interviews. A written questionnaire (see Appendix A) was distributed to all government members and liaisons to ACUS, as well as to the relevant legal or policy offices of any other agencies with active petition processes. Several agencies replied with complete or partial responses, including some quantitative data. During repeated follow-up contacts, agencies were also given the option to participate by informal phone interviews and by expressing the opinions of individual officials rather than preparing official agency responses. Many more agencies opted for the informal phone interview. Other key government officials involved in the rulemaking process were also identified for phone interviews.

Stakeholders in the regulatory process, including businesses, trade associations, unions, public interest groups, and even a few individual petitioners, were also identified for phone conversations. An initial open call for comments on the research project, sent by e-mail to a long list of stakeholders culled from recent petitions available online and from a contact database maintained by the Institute for Policy Integrity, produced few responses. Instead, follow-up contacts with a representative sample of stakeholders led to general phone conversations on their experience with petitions for rulemaking. Four stakeholders requested a set of written questions in advance of the phone conversation, but all conversations with stakeholders took the form of an unstructured discussion and did not follow any standard set of questions.

The authors are tremendously grateful to all the participants in this study for being so generous with their time and insights.

A list of the general affiliations of all the participants in this study can be found in **Appendix A**. Multiple individuals from a single organization or agency may have participated. The views expressed during conversations with the participants and in response to the written questionnaire reflect a mix of personal and institutional opinions.

Participants were given the option of sharing their views anonymously, and a majority preferred that arrangement. Consequently, most findings in this study will be reported without attribution to a specific agency or stakeholder. For example, rather than listing the names of every petitioner who has or has not received regular status updates on their petitions from specific agencies, this study will convey the relevant information by generalizing (in this case, by noting that most petitioners report hearing infrequently, if at all, from most agencies). Where a certain agency practice is a matter of public record or is particularly successful and should be emulated, such practices will be attributed to the agency. Rather than including repetitious footnotes citing "anonymous conversations," readers should assume that any description of agency or stakeholder views not

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<sup>2</sup> William V. Luneburg, *Petitions for Rulemaking: Federal Agency Practice and Recommendations for Improvement*, 1986 ACUS 493, 500 (1986) [hereinafter "Luneburg"]; see also William V. Luneburg, *Petitioning Federal Agencies for Rulemaking*, 1988 WIS. L. REV. 1 (1988).

otherwise attributed came from answers to the written questionnaire or from conversations the authors conducted with participants.

## I.B. The Study's Scope Mirrors the APA's Scope

This study examines how executive and independent federal agencies handle formal requests from the general public to undertake rulemaking. Though the study addresses several sources of various rights to petition for rulemaking, the study focuses on the general grant contained in the Administrative Procedure Act (APA). Accordingly, but with some exceptions, the study's scope largely mirrors the scope of the APA's right (see *infra* Part II on the scope of the APA's right). In particular:

- The study is not limited by subject matter.
- In addition to petitions seeking legislative rules of general applicability, the study covers requests for non-legislative rules or regulatory waivers, when such information was relevant and available. However, some agencies do not consider requests for guidance documents or for exemptions to fall in the same category as "petitions for rulemaking," so this report's discussion of agency practices may not fully capture the handling of such requests. ACUS's previous research on petitions did not give much attention to petitions for non-legislative rules.<sup>3</sup>
- Similarly, this study covers any petition for issuance, amendment, or repeal of a rule, even though some agencies treat requests to modify or rescind existing rules under a distinct process of retrospective review. Where relevant, this study covers public suggestions for rules made under agencies' retrospective review processes, but research on those processes is largely left to ACUS's separate, ongoing investigation.<sup>4</sup> Some agencies also distinguish between petitions generally and "petitions for reconsideration" of recently finalized rules, while other agencies treat them the same. Consequently, this report's discussion of agency practices may not fully capture the handling of petitions for reconsideration.
- This study does not cover petitions for adjudication (including petitions for declaratory orders),<sup>5</sup> investigation, or enforcement.<sup>6</sup>
- The study focuses on formal requests made in writing. Though the APA's scope may technically extend to more informal or oral requests for a regulatory change, no participant

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<sup>3</sup> See Luneburg, *supra* note 2, at 497 (noting that the exclusion of petitions for waivers and ratemakings was "artificial and based on time and resource considerations").

<sup>4</sup> ACUS Project on Retrospective Review of Agency Rules, *available at* <http://www.acus.gov/research-projects/retrospective-review-agency-rules>. This study does not cover the concept of petitions for cost-benefit analyses of existing rules, which ACUS has previously studied. ACUS consultant Sidney Shapiro concluded such petitions would be duplicative and disruptive. Forcing an agency to conduct or re-conduct a cost-benefit analysis within tight deadlines on any number of existing rules would disrupt a more orderly retrospective review process conducted on the agency's own timelines. Shapiro, *Agency Review of Existing Regulations*, 1994-1995 ACUS 407, 423. This should be contrasted with the more favorable idea of letting the public request cost-benefit analyses on certain proposed, still pending rules, which some U.S. states allow. See Jason A. Schwartz, *52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemakings* 87, 111-113 (Policy Integrity Report No. 3, 2010).

<sup>5</sup> *E.g.*, *City of Arlington, Texas v. FCC*, 668 F.3d 229, 241 (5th Cir. 2012) (deferring to the agency's choice to handle a petition for declaratory ruling under the APA's processes for informal adjudications instead of by rulemaking), *cert. granted in part*, 133 S.Ct. 421 (2012) & 133 S.Ct. 524 (2012) and *aff'd*, 133 S.Ct. 1863 (2013).

<sup>6</sup> *E.g.*, 40 C.F.R. § 122.26(f)(2) (allowing any person to petition EPA to require a permit for stormwater discharge); *Fl. Power & Light Co. v. Lorion*, 470 U.S. 729 (1985) (reviewing denial of a petition to revoke a license).

in this study specifically indicated that oral requests would or should be treated as “petitions.”

- In covering statutes besides the APA, this study focuses on rights to petition afforded generally to the public, and tries to exclude provisions that allow only regulated entities<sup>7</sup> or local governments<sup>8</sup> to request a rulemaking or waiver. Some agencies, however, would group requests made under such narrower rights together with public petitions for rulemaking, and so some of the statistics or practices discussed in this study may inadvertently include petitions submitted under such narrower rights.

## I.C. Outline of this Report

Part II examines the legal requirements placed on agencies by the general right to petition for rulemakings, and the limitation of those requirements. After tracing the right back to the country’s founding and Constitution, the Part focuses on exploring the right to petition for rulemaking granted by the APA. Drawing from the statutory text, legislative history, and case law, Part II discusses the extent and limits of the legal requirements: Do agencies have to adopt procedures for handling petitions? Do agencies have to issue a response on the merits of every petition, and what constitutes adequate grounds for denial? How quickly must agencies process petitions? Can all petitioners sue if unsatisfied with the agency’s response?

Part III turns to more specific rights or processes allowing the public to petition for rulemaking. Section A contrasts the general APA right with various subject matter-specific statutes that provide for petitions, which reflect congressional experiments with features like deadlines and decisionmaking structures. Section B studies some non-binding executive branch initiatives that facilitate petitions for rulemaking, including President Obama’s popular online petition platform, *We the People*.

Part IV explores current practices on petitions for rulemaking. Agency regulations, guidelines, websites, and online petitions dockets are compared, and conversations with this study’s participants are synthesized. Unusual and best practices are highlighted. Part IV also describes the connection between petitions and the “sue and settle” controversy.

Part V makes recommendations for reform. To the greatest extent possible, reforms are designed to benefit both agencies and stakeholders. While acknowledging some counterarguments to the suggested reforms, this Part tries to justify the balance it strikes between the potentially competing values of democratic accountability and public-private collaboration, on the one hand, and an efficient and rational administrative state, on the other. However, those values may not be in tension as often as some may assume.

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<sup>7</sup> E.g., 15 U.S.C. § 2603 (“A person intending to manufacture or process a chemical substance . . . may petition the Administrator to prescribe standards for the development of test data for such substance.”).

<sup>8</sup> E.g., 42 U.S.C. § 4905.

## II. General Legal Requirements: the Constitution, the APA, and Case Law

The public's right to petition the government is rooted in the Constitution and branches out in various more specific statutes, but it most fully flowers in the APA. This Part focuses on the legal requirements under the APA—and on their limits. It concludes that agencies must facilitate submissions of petitions for rulemaking, but no specific procedure is required, and agencies will retain some discretion to impose submission and content prerequisites on petitioners. After receipt, agencies must consider and respond to petitions for rulemaking, but they again retain some discretion on how quickly to respond and how thoroughly to explain final decisions. Whether denials must address the petition's substantive merits, or whether an agency's limited resources provide sufficient grounds for denial, remains an active controversy. Final agency actions on petitions are judicially reviewable, but under a rather deferential standard.

### II.A. The First Amendment: to Speak, Not Necessarily to Be Heard

Given that the United States was born in part out of frustration over the repeated denial of the colonists' petitions sent to their government in England,<sup>9</sup> it is not surprising that the right to petition is guaranteed in the First Amendment to the Constitution:

Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.<sup>10</sup>

The Supreme Court has praised this right both as “an assurance of a particular freedom of expression” that is “cut from the same cloth” as the other essential First Amendment rights, as well as a right implicit in “[t]he very idea of government, republic in form,” and possessing “value . . . beyond question” as an “important aspect of self-government.”<sup>11</sup> In fact, the Constitution implies that the public already and inherently possesses the right, and so it merely prohibits the government from interfering with petitions.

Constitutional scholar Akhil Amar emphasizes “the Amendment explicitly guarantees ‘the right of *the people*’ to petition—a formulation that decisively signals its connection to popular sovereignty theory.”<sup>12</sup> Drawing from the work of Stephen Higginson, Amar sees the right as serving at least two distinct and essential purposes. First, it protects individuals and minority groups, by “giving extraordinary power to even a single individual.”<sup>13</sup> Second, the right is also a “collective and popular” one, aimed at the “danger of attenuated representation.”<sup>14</sup> Part of the purpose was for petitioners to inform their government representatives (who were unlikely to be experts in all

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<sup>9</sup> *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2499 (2011) (“The Declaration of Independence of 1776 arose in the same tradition. After listing other specific grievances and wrongs, it complained, ‘In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.’ The Declaration of Independence ¶ 30.”). The English right to petition traces back to the Magna Carta. *Id.*

<sup>10</sup> U.S. Const. amend. I.

<sup>11</sup> *McDonald v. Smith*, 472 U.S. 479, 482-83 (1985). *See also* *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967) (“We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press. ‘All these, though not identical, are inseparable.’”).

<sup>12</sup> Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1155-56 (1991) (emphasis added).

<sup>13</sup> *Id.* Amar believes the “extraordinary” right carries an obligation for the government to respond; but see below on the Supreme Court’s contrary interpretation.

<sup>14</sup> *Id.*

matters) about local conditions and needs. Amar concludes that if a majority of Americans—*the people*—ever petitioned the government to act, the government may have no choice but to act.<sup>15</sup>

The Supreme Court has interpreted the right as not literally confined to demands for “redress of grievances,” but as more broadly encompassing requests for the exercise of government power.<sup>16</sup> Similarly, the Court has found the right clearly applies to petitioning administrative agencies.<sup>17</sup> Thus, the First Amendment protects the public’s right to petition agencies (among other government actors) for rulemakings (among other actions).

On the other hand, the Court has also imposed a significant limitation on the constitutional right, twice refusing to find any guarantee of consideration or response by the government. In two cases involving state-level petitions, the Court found that “the First Amendment does not impose any affirmative obligation on the government to listen, to respond.”<sup>18</sup> According to the case law, the First Amendment seemingly guarantees nothing more than the right for the public “to make a clamor.”<sup>19</sup>

Yet many scholars argue that textual and historical evidence in fact supports a clear right to a government response to petitions under the First Amendment.<sup>20</sup> If the right to petition means nothing more than the right to “make a clamor” and does not carry any obligation of response, it may be difficult to distinguish the petition right from the more general right to free political speech. In a recent concurrence, Judge Rogers of the D.C. Circuit noted that seven law review articles cited compelling evidence that, at the time of and immediately following the Amendment’s passage, the right to petition was understood to entail a right to a response; even critics of this view seem to reluctantly acknowledge “an emerging consensus of scholars.”<sup>21</sup> Though Rogers ultimately felt bound by Supreme Court precedent, she indicated the historical evidence “would present an interesting question” and wondered whether it would “have resonance with the Supreme Court” were the matter ever properly presented again.<sup>22</sup>

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<sup>15</sup> *Id.* (in particular, if such a petition called on Congress for a constitutional convention).

<sup>16</sup> *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) (“The right of petition [for the passage of laws] is one of the freedoms protected by the Bill of Rights.”). *See also* *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) (“The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship.”) (emphasis added).

<sup>17</sup> *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (“The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive).”); *see also* *Cruikshank*, 92 U.S. at 552 (“or for anything else connected with the powers or the duties of the national government”).

<sup>18</sup> *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979); *accord* *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 292 (1984) (“Nothing in the First Amendment or in this Court’s case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals’ communications on public issues.”). *See also* *We the People Found. Inc. v. United States*, 485 F.3d 140, 143 (D.C. Cir. 2007) (continuing to apply those two Supreme Court precedents).

<sup>19</sup> *Lunenburg*, *supra* note 2, at 500 (1986).

<sup>20</sup> *E.g.*, James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U.L. REV. 899, 905 (1997) (“[M]ost scholars agree that the right to petition includes a right to some sort of considered response.”). *See also* Amar, *supra* note 12, arguing from a textual perspective.

<sup>21</sup> *We the People Found.*, 485 F.3d at 147 (Rogers, J., concurring).

<sup>22</sup> *Id.* at 149.



## II.B. The APA: Action-Forcing and Priority-Setting, but with Limits

In 1946, Congress passed the APA, which codified the right to petition federal agencies for rulemakings, at 5 U.S.C. § 553(e):

Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.<sup>23</sup>

A narrow reading may suggest that this statutory provision simply duplicates the basic constitutional right already contained in the First Amendment, obligating agencies to receive (but not necessarily to consider) petitions. Indeed, during a congressional debate over the original act, Representative Francis E. Walter explained, “This subsection confirms that [constitutional] right where Congress has delegated legislative powers to administrative agencies”<sup>24</sup>—and perhaps the statute did no more than that. Yet even if the statutory right were entirely superfluous, its inclusion in the APA still indicates that Congress wanted to ensure that petitions would have an essential role in the rulemaking process. Rep. Walter’s statement continued to define the subsection as being of “the greatest importance” and “a most useful instrument of both improving the public relations of administrative agencies and protecting the public by affording interested persons a legal and regular means of securing the issuance, change, or rescission of a rule.”<sup>25</sup>

Besides indicating that agencies should give a certain level of attention to public petitions for rulemakings, the statutory right is distinct from the constitutional right in some key ways that may obligate agencies to consider and respond to petitions as well as receive them. The courts, however, have limited some of these obligations and generally grant agencies substantial discretion in the handling and disposition of petitions. This section proceeds with a close reading of § 553(e), supplemented with other statutory text, legislative history, and case law.

## II.C. “Each agency...”—Includes Both Executive and Independent Agencies

Starting with a very straightforward but important feature, the statutory right to petition for rulemaking applies to both executive branch agencies and independent agencies.<sup>26</sup> While consistent with the broad scope of the constitutional right, it stands in contrast to some additional executive branch initiatives designed to encourage public petitions, which may be more limited to executive branch agencies and which are explored below (see Section III.B).

## II.D. “...shall give...”—Requires Some Facilitation, but No Specific Procedures

Whereas the First Amendment assumes that the public’s power to petition the government already exists and simply protects that freestanding right from government interference, the APA tells agencies they must “give” the public the right, perhaps revealing the creation of some new aspect of the right. Though scholars have stopped short of interpreting the APA as requiring agencies to

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<sup>23</sup> Relevant excerpts from the Administrative Procedure Act are provided in Appendix D. Nearly all U.S. states have adopted similar petition rights in their State Administrative Procedure Acts. See Jason A. Schwartz, *supra* note 4, at 51, 144.

<sup>24</sup> *Proceedings in the House of Representatives May 24 and 25, 1946 & Proceedings in the Senate of the United States March 12 and May 27, 1946* [hereinafter “*Proceedings*”], in *Administrative Procedure Act, Legislative History*, Sen. Doc. No. 248, 79<sup>th</sup> Cong. 2d Sess., at 359 [hereinafter “*Legislative History*”].

<sup>25</sup> *Id.*

<sup>26</sup> 5 U.S.C. § 551(1) (“‘agency’ means each authority of the Government of the United States . . .”).

actively encourage petitions,<sup>27</sup> the plain text does suggest agencies must at least devote some resources to facilitating the submission of petitions for rulemaking.

At the time of the APA's enactment, both Congress and the Attorney General expected that agencies, in fulfilling their obligations under § 553(e), would "establish and publish . . . procedural rules governing the receipt, consideration, and disposition of petitions."<sup>28</sup> Luneburg's 1986 study further cites a seemingly applicable requirement from the Freedom of Information Act:

Each agency shall separately state and currently publish in the *Federal Register* for the guidance of the public—(A) descriptions of . . . the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions; (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available; (C) rules of procedures . . . and instructions as to the scope and content of all . . . examinations.<sup>29</sup>

Statutory text and legislative history thus point in the direction of requiring the adoption of procedures. Nevertheless, the Seventh Circuit has insisted that, because "[t]he APA does not detail procedures for petitions made pursuant to § 553(e)," an agency "does not violate the APA by not having detailed procedures governing petitions to begin rulemakings."<sup>30</sup> That court specifically rejected reading into the statute any requirement for notice-and-comment type procedures to resolve petitions for rulemaking, fearing that imposing procedural requirements would force agencies to "constantly engage[ ] in considering endless § 553(e) petitions."<sup>31</sup>

When agencies have nevertheless adopted procedures (see Sections IV.B. and V. on current and best practices), courts ordinarily defer to an agency's interpretations of its own regulations, including its own regulations on the handling of petitions.<sup>32</sup> However, as Luneburg noted, at times a review of procedural errors can be even more rigorous than substantive challenges are.<sup>33</sup> For example, in one 2003 case, the Ninth Circuit explained that "we need not accord any deference to an unreasonable construction that does not conform with the wording and purpose of the regulation." In that case, the court found that NHTSA's interpretation of the word "issued" in its regulations, which was crucial to determining when petitions for reconsideration could be appealed to a court after the agency's denial, was at odds with the regulation's stated goal of "inform[ing] the public of the procedures following in response to [rulemaking] petitions," and so was not entitled to deference.<sup>34</sup> On the whole, though, such cases would presumably be both rare and rarely successful.

## II.E. "...an interested person..."—Low Bar to Petition, Higher Bar for Standing

On its face, the phrase "an interested person" seems to narrow the right down from the broad constitutional guarantee given to "the people." Rep. Walter indicated that the right was "designed

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<sup>27</sup> Luneburg, *supra* note 2, at 500.

<sup>28</sup> U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act*, ch.III (1947) [hereinafter "AG's Manual"]; accord. *Proceedings in Legislative History*, *supra* note 24, at 359 (statement of Rep. Walter) ("Every agency possessing rule-making authority will be required to set up procedures.").

<sup>29</sup> Luneburg, *supra* note 2, at 502-03 (citing 5 U.S.C. § 552).

<sup>30</sup> *Wisconsin Elec. Power Co. v. Costle*, 715 F.2d 323, 328 (7th Cir. 1983). Note that the APA does specify some procedures, namely prompt notice of denial, with a brief explanation, 5 U.S.C. § 555(e). But admittedly, that requirement is fairly general, and no "detailed" procedures are specified in the statute.

<sup>31</sup> *Id.* at 329; *see also generally* *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

<sup>32</sup> *See e.g.*, *Spano v. U.S. Nuclear Regulatory Comm'n*, 293 F. App'x 91, 93 (2d Cir. 2008).

<sup>33</sup> Luneburg, *supra* note 2 (citing *ITT World Communications v. FCC*, 699 F.2d 1219 (D.C. Cir. 1983)).

<sup>34</sup> *Pub. Citizen Inc. v. Mineta*, 343 F.3d 1159, 1166-67 (9th Cir. 2003).

to afford every *properly interested person* statutory authority to petition.”<sup>35</sup> Similarly, the Attorney General’s 1947 *Manual on the APA* stated that it would “be proper for an agency to limit this right to persons whose interests are or will be affected by the issuance, amendment, or repeal of a rule,”<sup>36</sup> perhaps to conserve agency resources.<sup>37</sup> Those historical interpretations do not, however, indicate exactly how narrowly to construe the “proper interest.”

Meanwhile, the plain text strongly suggests that any requirement of “interest” should be a low bar. Though the APA does not define “interested person,” a “person” is defined broadly to include any “individual, partnership, corporation, association, or public or private organization other than an agency.”<sup>38</sup> An equivalent phrase, “interested persons,” appears in 5 U.S.C. § 553(c) in defining the right to comment on regulatory proposals, a right that agencies routinely afford to everyone.<sup>39</sup> And, of course, the First Amendment itself indicates “the people” in general share the right to petition. Though agencies may choose to inquire about petitioners’ interests, to provide the agency with useful information, the phrase does not seem to impose any substantial restrictions on the right to petition.<sup>40</sup> In fact, in implementing § 553(e), many agency regulations specify that “any person” may petition for rulemakings (see Section IV.B. on current agency practices and regulations).

The same rationale behind the liberalization of the doctrine of standing would further suggest the right to petition should be broadly available. “[Judicial review’s] dominant purpose is no longer the prevention of unauthorized intrusions on private autonomy, but the assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies.”<sup>41</sup> Nevertheless, courts have not found that any petitioner will automatically have legal standing to challenge the denial of an APA-based petition for rulemaking; standing must derive from some other concrete, substantive injury.<sup>42</sup> Challenges for unreasonable delay in responding to a petition may follow a more lenient approach to standing. (See Sections II.F. and II.J.)

## II.F. “...the right...”—The Limited Requirements to Consider and Respond

Congress clearly intended that, under the APA, agencies would consider and respond to public petitions for rulemaking. What type of consideration and response satisfies those obligations is less clear, but courts have generally been deferential to agencies.

First, in terms of consideration, Congress intended to bar agencies from receiving petitions “in a merely pro forma manner,”<sup>43</sup> lest they frustrate the fundamental goal of § 553(e). Instead, agencies were expected to “fully and promptly consider” petitions.<sup>44</sup> Another APA provision may further

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<sup>35</sup> *Proceedings*, in Legislative History, *supra* note 24, at 359 (emphasis added).

<sup>36</sup> AG’s Manual, *supra* note 28.

<sup>37</sup> Luneburg, *supra* note 2, at 504.

<sup>38</sup> 5 U.S.C. § 551(2). See Appendix D for an excerpt.

<sup>39</sup> There is no reason to believe the plural “interested persons” should be read with a significantly different definition than the singular “interested person.”

<sup>40</sup> Luneburg, *supra* note 2, at 503-04.

<sup>41</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1712 (1975).

<sup>42</sup> See *Brown v. FBI*, 793 F.Supp.2d 368,375 (D.C. Cir. 2011); *Gettman v. DEA*, 290, F.3d 430, 433 (D.C. Cir. 2002).

<sup>43</sup> *Proceedings* in Legislative History, *supra* note 24, at 359 (statement of Rep. Walter).

<sup>44</sup> H.Rep. No. 1980 (1946), in Legislative History, *supra* note 24, at 260; *accord*. Appendix to Attorney General’s Statement, *reprinted* in S. Rep. No. 752 (1945), in Legislative History, *supra* note 24, at 226 (“requires reception and consideration”); see also *Mendoza v. DOJ*, 89-cv-1979 (D.D.C. 1990) (explaining in dicta that “agencies are obligated to fully and promptly consider rulemaking petitions and provide a petitioner with a prompt reply”) (emphasis added).

bolster this requirement to consider petitions. 5 U.S.C. § 555(b) states:

So far as the orderly conduct of public business permits, an interested person may appear . . . for the presentation, adjustment, or *determination of an issue, request, or controversy in a proceeding . . . or in connection with an agency function.*<sup>45</sup>

That section has been read broadly to confer “procedural rights . . . which may be incidental to rulemaking . . . or the exercise of any other agency authority,” and is not limited to matters in connection with specific agency proceedings.<sup>46</sup> Courts have repeatedly found that the procedural rights in § 555(b) apply to petitions for rulemaking.<sup>47</sup> According to the Attorney General’s 1947 *Manual*, the language that provides an opportunity to appear “means that any person should be given an opportunity to confer or discuss . . . matters in which he is properly interested . . . with an official of such status that he knows the agency’s policy and is able to bring unusual or meritorious cases to the attention of the officials who shape the policy.”<sup>48</sup>

However, it seems unlikely that a court would find the APA requires any specific agency official to follow any specific procedure in considering petitions, perhaps relying on the limiting preamble: “so far as the orderly conduct of public business permits.”<sup>49</sup> Most case law on petitions focuses on the agency’s ultimate response and not the preliminary consideration, but courts generally find no statutory requirement for any particular form of consideration—in particular, an agency is “not statutorily required to conduct an exhaustive study or to revise its data-gathering systems in response to a request for rulemaking.”<sup>50</sup> And, as already noted above, agencies need not conduct notice-and-comment-type proceedings to consider and dispose of petitions.<sup>51</sup>

In terms of the required response, the statute is somewhat more specific. 5 U.S.C. § 555(e) states:

Prompt notice shall be given of the denial in whole or in part of a written application, *petition*, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.<sup>52</sup>

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<sup>45</sup> Emphasis added. See Appendix D for statutory excerpts.

<sup>46</sup> AG’s *Manual*, *supra* note 28.

<sup>47</sup> *E.g.*, In re. Natural Resources Defense Council, 645 F.3d 400, 406 (D.C. Cir. 2011) (applying 5 U.S.C. § 555(b) to an FDA citizen’s petition); Fund for Animals v. Norton, 294 F.Supp.2d 92, 112 (D.C. Cir. 2003) (applying 5 U.S.C. §§ 555(b) and 706(1) to review agency delay in responding to a petition); Nat’l Parks Conserv. Ass’n v. Interior, 794 F.Supp.2d 39, 44-45 (D.D.C. 2011) (citing 5 U.S.C. §§ 553(e), 555(b), and concluding “an agency ‘is required to at least definitively respond to . . . [a] petition’”); *accord*. Families for Freedom v. Napolitano, 628 F.Supp.2d 535,540 (S.D.N.Y 2009) (concluding the same).

<sup>48</sup> AG’s *Manual*, *supra* note 28.

<sup>49</sup> See Lunenburg, *supra* note 2, at 585 n.90 (citing the limiting preamble and explaining the Legislative History suggests a “narrow compass” for this provision).

<sup>50</sup> O’Keefe’s, Inc. v. U.S. Consumer Prod. Safety Comm’n, 92 F.3d 940, 943 (9th Cir. 1996) (citing right to petition under both § 553(e) and 15 U.S.C. § 2058(j)). See also Legislative History, *supra* note 24, at 201, 259 (explaining that the agency’s explanation of denial should “relate to the data so presented,” possibly implying that no additional data need be collected).

<sup>51</sup> See *supra* note 30.

<sup>52</sup> Emphasis added. Though the statutory language could be read to apply only to a “petition . . . made in connection with any agency proceeding” and not to any petition for rulemaking concerning a matter not already under consideration as part of a “proceeding,” the courts have read the language to apply more broadly to any petition for rulemaking. See *infra* note 54 and Section II.F.2.

That provision follows more general instructions in § 555(b):

With due regard for the convenience and necessity of the parties . . . and within a reasonable time, each agency *shall proceed to conclude a matter presented to it*.<sup>53</sup>

Citing various combinations of §§ 553(e), 555(b), and 555(e), courts have repeatedly found that agencies must at least “respond” to petitions for rulemaking.<sup>54</sup> The Seventh Circuit has further concluded that, for judicial review of petitions for rulemaking to be meaningful (see Section II.J. on the right to judicial right), the requirement for a response “may be implicit in the Administrative Procedure Act’s structure.”<sup>55</sup>

The form of the required response is slightly less clear. According to legislative history, an “agency may either grant the petition, undertake public rulemaking proceedings, . . . or deny.”<sup>56</sup> Some courts suggest that only two basic options are available: “either deny or grant.”<sup>57</sup> Still, the meaning of “grant” is unclear, particularly because Congress seemed to distinguish in the legislative history a “grant” from initiating a rulemaking. Whether an agency must issue a final rule to “grant” the petition, or whether some intermediate measure can be considered to fully resolve the petition, is an issue very connected to the question of what constitutes “final agency action” for the purposes of judicial review, and so is explored more below in Sections II.H. and J.

The questions of how quickly agencies must respond to petitions and how fully they must explain their decisions are examined in the next two subsections on timeliness and rationality.

### II.F.1. The Requirement of Timeliness

Section 555(e) specifies that notice of denial must be given “promptly,” but that may only mean after the agency has already reached its final decision. The standard for how quickly an agency must come to that decision is found in another APA section, 5 U.S.C. § 555(b):

With due regard for the convenience and necessity of the parties . . . and *within a reasonable time*, each agency *shall proceed to conclude a matter presented to it*.<sup>58</sup>

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<sup>53</sup> Emphasis added.

<sup>54</sup> *E.g.*, *Horne v. USDA*, 494 Fed. Appx. 774 (9th Cir. 2012) (“USDA responded to the Hornes’ rulemaking petition—as it must under the Administrative Procedure Act”); *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 813 (D.C. Cir. 1981) (“an agency must receive and *respond* to petitions for rulemaking”) (emphasis added); *Nat’l Parks Conserv. Ass’n v. Interior*, 794 F.Supp.2d 39, 44-45 (D.D.C. 2011) (“[A]n agency ‘is required to at least definitively respond to . . . [a] petition—that is, to either deny or grant the petition.’”); *Families for Freedom v. Napolitano*, 628 F.Supp.2d 535,540 (S.D.N.Y. 2009) (concluding the same and noting “DHS conceded this point at oral argument”); *but see Brown v. FBI*, 793 F.Supp.2d 368, 375 (D.C. Cir. 2011) (observing, in the context of reviewing petitioner’s standing, that “the APA is less than crystal-clear on plaintiff’s statutory right to a response,” though simultaneously citing *WWHT*, “an agency must receive and respond”). *See also* Richard J. Pierce, *Administrative Law Treatise* 517 (5th ed. 2013) (“At a minimum, the right to petition for rulemaking entitles a petitioning party to a response to the merits of the petition.”).

<sup>55</sup> *Wisconsin Elec. Power Co. v. Costle*, 715 F.2d 323, 328 (7th Cir. 1983).

<sup>56</sup> H.Rep. No. 1980, *in* Legislative History, *supra* note 24, at 260.

<sup>57</sup> *Nat’l Parks Conserv. Ass’n v. Interior*, 794 F.Supp.2d 39, 44-45 (D.D.C. 2011) (“[A]n agency ‘is required to at least definitively respond to . . . [a] petition—that is, to either deny or grant the petition.’”); *accord. Families for Freedom v. Napolitano*, 628 F.Supp.2d 535,540 (S.D.N.Y. 2009) (concluding the same and noting “DHS conceded this point at oral argument”).

<sup>58</sup> 5 U.S.C. § 555(b) (emphasis added). When first enacted, the APA contained slightly different language: “shall proceed with reasonable dispatch to conclude any matter.” Reflecting on that original language, the AG’s Manual, *supra* note 28, observed that “[t]his provision merely restates a principle of good administration.”

Furthermore, under 5 U.S.C. § 706(1), courts may compel “unreasonably delayed” agency actions. Courts have repeatedly cited §§ 555(b) and 706(1), either together or separately, to apply a standard of reasonableness to review delayed responses on petitions for rulemaking.<sup>59</sup>

Some stakeholders and legal scholars comment that the standard of review in an unreasonable delay case varies between jurisdictions, is ever evolving, is not always crystal clear, and is based on so many vague factors as to allow courts to support “virtually any conclusion they want to reach.”<sup>60</sup> Several jurisdictions follow the D.C. Circuit’s six-prong test for reviewing unreasonable delay under Section 706(1) of the APA, as developed in *Telecommunications Research & Action Center (TRAC) v. FCC*:

- (1) The time agencies take to make decisions must be governed by a “rule of reason”;
- (2) Where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
- (3) Delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
- (4) The court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
- (5) The court should also take into account the nature and extent of the interests prejudiced by delay; and
- (6) The court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.<sup>61</sup>

However, the D.C. Circuit “has never attempted to explain the relationship between the factors, their comparative importance, or if any factors are absolutely necessary or independently sufficient.”<sup>62</sup> The court has indicated that the first *TRAC* factor may be the “most important”<sup>63</sup> and is essential to maintaining the credibility of regulatory regimes.<sup>64</sup> The third factor (human health and welfare) may sometimes tip the scales, but is not supposed to dominate the test, especially since some agencies’ entire dockets involve health and welfare issues.<sup>65</sup> The courts are reluctant to force

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<sup>59</sup> See cases cited *supra* note 47 and *infra* notes 70 through 82. See also *Mendoza v. DOJ*, 89-cv-1979 (D.D.C. 1990) (explaining in dicta that “agencies are obligated to fully and promptly consider rulemaking petitions and provide a petitioner with a prompt reply”) (emphasis added).

<sup>60</sup> See Michael D. Sant’Ambrogio, *Agency Delays: How A Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1413-14 (2011).

<sup>61</sup> *TRAC*, 750 F.2d 70, 80 (D.C. Cir. 1984). No court has rejected *TRAC*’s reasoning. *Pierce*, *supra* note 54, at 1069. See, e.g., *Shinnecock Indian Nation v. Kempthorne*, 2008 U.S. Dist. LEXIS 75826 (E.D.N.Y. 2008) (following *TRAC*); but see *Karimushan v. Chertoff*, 2008 U.S. Dist. LEXIS 47167 (E.D. Pa. 2008) (following a slightly different four-part test for unreasonable delays established by the Third Circuit).

<sup>62</sup> Sant’Ambrogio, *supra* note 60, at 1412. Though as to the last factors, “[w]here the agency has manifested bad faith . . . , the agency will have a hard time claiming legitimacy for its priorities.” *In re Barr Labs*, 930 F.2d 72, 76 (D.C. Cir. 1991) (determining that “utter indifference to congressional deadlines” or “singling out a party for bad treatment” will undermine an agency’s argument that it was prioritizing its actions).

<sup>63</sup> *In re Core Communs., Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008).

<sup>64</sup> See *MCI Telecommunications Corp. v. F.C.C.*, 627 F.2d 322, 340 (D.C. Cir. 1980) (finding that the FCC’s delay in setting rates can undermine the credibility of regulation and deprive regulated entities and the public of their rights and economic opportunities without due process).

<sup>65</sup> See *Sierra Club v. Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987) (“[T]his factor alone can hardly be considered dispositive when, as in this case, virtually the entire docket of the [EPA] involves issues of this type”).

agencies to act on one particular petition when the result would simply move the litigant's petitions to the "head of the queue" and "move all others back one space [producing] no net gain."<sup>66</sup> More generally, courts give agencies discretion to determine the optimal allocation of their own resources and to prioritize their dockets.<sup>67</sup>

The D.C. Circuit has generalized that while there is "no per se rule as to how long is too long" to wait for agency action,<sup>68</sup> a reasonable time for agency action is "typically counted in weeks or months, not years."<sup>69</sup> In reality though, because unreasonable delay cases are so fact-specific and the criteria are so malleable, rulings from the various circuits on petitions for rulemaking are all over the map. At one extreme, a delay of essentially five months has been found unreasonable when the agency already seemed to be procrastinating on an urgent health matter; on the other hand, a delay of upwards of six years has been found reasonable, given the agency's steady progress, limited resources, and scientific uncertainty. More typically, it takes several years before a court will likely find a delay to be unreasonable, and about decade or more before a finding of unreasonableness is a near certainty. The following selection of rulings on unreasonable delay on petitions for rulemaking (or other similar kinds of petitions judged under the same standard of § 555(b)) demonstrates how unpredictable the results can be:

- **5 month delay**—only five months had elapsed between submission of the formal petition to regulate raw milk and filing of litigation, but given the agency had been studying the issue for two years and already found that raw milk was unsafe, the court found the delay to be "**lame at best and irresponsible at worst**" and ordered the agency to decide on the petition within 60 days.<sup>70</sup>
- **1 year delay**—found **reasonable** by the D.C. Circuit. Judge Tatel reported he was unable to find any instance of a court issuing mandamus after a delay of just a year.<sup>71</sup>
- **1.5 year delay**—a Ninth Circuit district court **ordered the agency to respond** to a petition requesting the repeal of regulatory exemptions for certain sources of marine pollution, though the agency obtained a stay from the Court of Appeals.<sup>72</sup>
- **20 month delay**—though "disturbing," the delay was "**not yet**" **unreasonable**, according to the D.C. Circuit.<sup>73</sup>
- **2.5 year delay**—found **unreasonable** by the Southern District of New York. Given the human lives and welfare potentially at stake in a petition relating to Homeland Security's

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<sup>66</sup> In re Barr Labs, 930 F.2d at 75; *see also* Mashpee Wampanoag Tribal Council v. Norton, 336 F.3d 1094 (D.C. Cir. 2003) (though district court had found unreasonable a six-year delay on a petition for tribal recognition, under the 5 U.S.C. § 555(b) standard, the circuit court remanded for re-consideration of whether the petitioner would just be moving to the head of the queue).

<sup>67</sup> *See* In re Barr Labs, Inc., 930 F.2d 72, 76 (D.C. Cir. 1991).

<sup>68</sup> In re Int'l Chem. Workers Union, 958 F.2d 1144, 1149 (D.C. Cir. 1992).

<sup>69</sup> In re Am. Rivers & Idaho Rivers United, 372 F.3d 413, 419 (D.C. Cir. 2004) (quoting Midwest Gas Users Ass'n v. FERC, 833 F.2d 341, 359 (D.C.Cir.1987) ("[T]his court has stated generally that a reasonable time for an agency decision could encompass 'months, occasionally a year or two, but not several years or a decade.'").

<sup>70</sup> Public Citizen v. Heckler, 602 F.Supp. 611, 613 (D.D.C. 1985).

<sup>71</sup> D.C. Circuit Order, No. 03-1361, June 26, 2008 (Tatel, J., concurring and dissenting).

<sup>72</sup> Nw. Env'tl. Advocates v. U.S. E.P.A., 537 F.3d 1006, 1013 (9th Cir. 2008).

<sup>73</sup> Nat'l Tank Truck Carriers, Inc. v. Fed. Highway Admin., 96-1339, 1997 WL 150088 (D.C. Cir. Feb. 27, 1997).



detention centers, such a delay “saps the public's confidence in an agency's ability to discharge its responsibilities,” and therefore runs afoul of the APA.”<sup>74</sup>

- **3 year delay**—the D.C. Circuit judged that the competing priorities cited by the agency were not more important than the petition to safeguard workers’ health and safety. In this case, the agency had justified denying a petition by promising to conclude a different but related rulemaking, yet had still not finalized that rulemaking after more than three years. The court found the delay to be “**simply too long**.”<sup>75</sup>
- **4 year delay**—“**does not exhibit bad faith**,” according to the Eastern District of California.<sup>76</sup>
- **5 year delay**—“smacks of **unreasonableness on its face**,” according to D.C. Circuit district court. The agency’s claims of continuing research, complexity, and competing priorities “are not without merit,” but ultimately do not balance out the failure to respond to “pressing” health and environmental concerns or to live up to the statutory mandate for conservation.<sup>77</sup>
- **Over 6 year delay**—found to be “nothing less than **egregious**” by the D.C. Circuit; this case concerned a petition for the Federal Electricity Regulatory Commission to consult with environmental agencies under the Endangered Species Act, but the court was still interpreting the relevant standard for prompt consideration of all petitions under 5 U.S.C. § 555(b).<sup>78</sup>
- **Over 6 year delay—reasonable**, according to the Third Circuit.<sup>79</sup> Here, the agency was petitioned for an emergency rulemaking; in denying the request, the agency promised to commence a regular proposed rulemaking within two years; the agency later pushed the target date back by over four years. The court found that given competing priorities, limited resources, and the need for scientific research, the delay was not unreasonable.
- **9 year delay**—“**objectively extreme**,” because “[w]hile competing policy priorities might explain slow progress, they cannot justify indefinite delay and recalcitrance in the face of an admittedly grave risk to public health.”<sup>80</sup>
- **10 year delay**—the delay was “apparently **unnecessary and surely lamentable**,” according to the Third Circuit, **but** given that the agency responded to the complaint for judicial review by denying the petition, and given the denial was not arbitrary, the court could not act.<sup>81</sup>
- **20 year delay**—“The petition to vacate the rules has been pending since 1980, and less stalwart petitions might have abandoned their effort to obtain relief long ago. **If these**

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<sup>74</sup> *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535, 540 (S.D.N.Y. 2009).

<sup>75</sup> *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1158 (D.C. Cir. 1983).

<sup>76</sup> *Organic Pastures Dairy Co., LLC v. Sebelius*, 1:12-CV-02019-SAB, 2013 WL 4648548 (E.D. Cal. Aug. 29, 2013).

<sup>77</sup> *The Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 113 (D.D.C. 2003) *motion for relief from judgment granted* *Fund for Animals v. Norton*, 323 F. Supp. 2d 7 (D.D.C. 2004) *and enforcement denied*, 390 F. Supp. 2d 12 (D.D.C. 2005).

<sup>78</sup> *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). *See also* *In Re ICWU*, 958 F.2d 1144 (D.C. Cir. 1992) (finding that a 6 year delay likely would have been unreasonable but for the fact that the court accepted the agency’s proposed 5-month timeline to resolve the petition).

<sup>79</sup> *Oil, Chem. & Atomic Workers Union v. Occupational Safety & Health Admin.*, 145 F.3d 120, 124 (3d Cir. 1998)

<sup>80</sup> *Public Citizen Health Research Grp. v. Chao*, 314 F.3d 143, 154, 158 (3d Cir. 2002).

<sup>81</sup> *Int’l Union v. Chao*, 361 F.3d 249, 256 (3d Cir. 2004).



**circumstances do not constitute agency action unreasonably delayed, it is difficult to imagine circumstances that would.”<sup>82</sup>**

Agencies often counter a petitioner’s initiation of unreasonable delay litigation by issuing a response (usually a denial), and courts have typically found that such action moots the unreasonable delay complaint.<sup>83</sup> However, in one case on a petition relating to a ratemaking, where the agency had taken seven years to deny the petition and, at one point, had lost part of the petitioner’s file, the court found the delay to be “per se unreasonable” and ordered the agency to set aside any interest payments the petitioner had accumulated during the seven-year wait.<sup>84</sup>

## **II.F.2. The Requirement of a Rational Explanation**

If an agency grants a petition and initiates a rulemaking proceeding, the reams of case law on the requirements for rational rulemakings, which are beyond the scope of this study, will apply. The special case of the agency initiating a proceeding based on a petition but later abandoning the rulemaking will be discussed below in Section II.H. But what is required of an agency when denying a petition for rulemaking? Section 555(e) explains that:

Prompt notice shall be given of the denial in whole or in part of a . . . petition . . . Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

Section 706(2)(A) specifies that courts can review and set aside final agency actions found “arbitrary” or “capricious.”<sup>85</sup> Taken together, agencies must usually issue a brief but rational explanation of any denial, though exceptions are made for duplicative petitions requiring repetitious denials or when the grounds for denial are obvious.<sup>86</sup> Legislative history suggests that, though “concise,” the statement of denial should “with reasonable fullness explain the *actual* basis.”<sup>87</sup>

In terms of required content, a 1975 D.C. Circuit case succinctly presented a sliding standard, based on the fundamental principle that a call for agencies to articulate the factors of their decisions was “neither novel nor onerous”:

Naturally, the expansiveness of the Administrator’s articulation of reasons depends on the complexity and substantiality of the issues raised. We are by no means demanding comprehensive responses to frivolous petitions, but nor are we sanctioning summary dismissals of meritorious claims.<sup>88</sup>

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<sup>82</sup> Radio-Television News Directors Ass’n v. FCC, 229 F.3d 269, 272 (D.C. Cir. 2000).

<sup>83</sup> *E.g.*, United Transp. Union Local 418, Burlington Sys. Div. of the Bhd. of Maint. of Way Employes v. Boardman, C07-4100-MWB, 2008 WL 2600176 (N.D. Iowa June 24, 2008) (following the practice of First and D.C. Circuits); Natural Res. Def. Council, Inc. v. U.S. Food & Drug Admin., 872 F. Supp. 2d 318, 330 (S.D.N.Y. 2012) rev’d, 12-2106-CV L, 2014 WL 3636283 (2d Cir. July 24, 2014); Int’l Union v. Chao, 361 F.3d 249, 256 (3d Cir. 2004).

<sup>84</sup> Estate of French v. FERC, 603 F.2d 1158, 1167-68 (5th Cir. 1979).

<sup>85</sup> While this section will generally focus on judicial review standards under the APA, because courts have interpreted the review standards under the Clean Air Act to be effectively the same, and because many important petition cases fall under the Clean Air Act, such decisions will also feature prominently. *See, e.g.*, Allied Local and Regional Mfrs. Caucus v. EPA, 215 F.3d 61, 68 (D.C. Cir. 2000) (“To determine whether EPA’s rules are ‘arbitrary and capricious,’ we apply the same standard of review under the Clean Air Act as we do under the Administrative Procedure Act.”).

<sup>86</sup> Legislative History, *supra* note 24, at 206, 265 (explaining the statement “should . . . be sufficient to apprise the party of the basis of the denial and any other or further administrative remedies or recourse he may have”).

<sup>87</sup> *Id.* at 201, 259 (emphasis added).

<sup>88</sup> Oljato Ch. of Navajo Tribe v. Train, 515 F.2d 654, 666-67 & n.19 (D.C. Cir. 1975).

More recently, the D.C. Circuit has affirmed that a “brief” explanation can “easily satisfy” the requirement, so long as agencies “draw ‘a rational connection between the facts found and the choice made.’”<sup>89</sup> Responding to every individual issue or question raised in a potentially lengthy petition for rulemaking is not required so long as the record, on whole, demonstrates reasoned decisionmaking.<sup>90</sup>

On the other hand, “bare conclusions,” such as simply asserting that existing rules are adequate, will be found “not responsive”: where a petition raises alternative regulatory options, it “merit[s] some brief explanation of why the agency did not find it desirable to consider those alternatives.”<sup>91</sup> One district court noted some uncertainty over whether agencies that collect comments on petitions must also address those comments upon denying the underlying petition; regardless, that court found the agency’s two-page response (which did address some comments) to be “sufficient.”<sup>92</sup>

Courts consistently articulate the standard of review on petition denials to be “extremely limited” and “highly deferential”<sup>93</sup> and will only overturn the agency’s judgment in the “rarest and most compelling of circumstances.”<sup>94</sup> On the other hand, the courts simultaneously insist that the APA requires more than “rubber stamp[ing].”<sup>95</sup> The courts must examine whether the agency “adequately explained the facts and policy concerns it relied on and [whether] . . . those facts have some basis in the record.”<sup>96</sup> Indeed, courts occasionally make a fairly searching review of the record in the petition’s docket.<sup>97</sup> The standard may even motivate agencies to deny petitions as early as possible, to prevent the development of a substantial record of public comments, research, and interim determinations on the petition; when the court has nothing more than the agency’s own explanation of its denial, it is more likely to defer to the agency’s expertise.<sup>98</sup>

Courts tend to defer to agencies on denials of petitions for rulemaking when:

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<sup>89</sup> *Midwest Indep. Transmission Sys. Operator v. FERC*, 388 F.3d 903, 913 (D.C. Cir. 2004).

<sup>90</sup> *Nader v. FAA*, 440 F.2d 292, 294 (D.C. Cir. 1971) (“[W]e think it unnecessary for the Administrator to exactly meet each issue raised by a petitioner or to supply all of the details that the petitioner might want. . . . [W]e think it sufficient if it appears from the whole case and the reasons stated that the Administrator’s action is supported by reason.”); *WildEarth Guardians v. Salazar*, 741 F.Supp.2d 89, 104 n.21 (D.C. Cir. 2012) (finding “the fact that FWS did not respond to every question raised in the twenty-three-page APA petition does not render the Response arbitrary and capricious, so long as the administrative record demonstrates that the Response was the product of reasoned decisionmaking,” and emphasizing that 5 U.S.C. § 555(e) only requires a “brief statement of the grounds for denial”).

<sup>91</sup> *Horne v. USDA*, 494 Fed Appx. 774 (9th Cir. 2012).

<sup>92</sup> *Connecticut v. Daley*, 53 F.Supp.2d 147, 170 (D. Conn. 1999); *see also* 63 Fed. Reg. 2652-54 (Jan. 16, 1998) (denying petition).

<sup>93</sup> *National Customs Brokers & Forwarders Assn. of America, Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989).

<sup>94</sup> *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 818 (D.C. Cir. 1981).

<sup>95</sup> *Natural Res. Def. Council v. Daley*, 209 F.3d 747, 755 (D.C. Cir. 2000).

<sup>96</sup> *WWHT*, 656 F.2d at 817.

<sup>97</sup> *See infra* Section II.F.3, on *Massachusetts v. EPA*; *Pierce*, *supra* note 54, at 517 (explaining that the Supreme Court in *Massachusetts v. EPA*, after confirming that the standard of review would be extremely limited and highly deferential, “then proceeded to apply a version of the arbitrary and capricious standard that is neither limited nor deferential”); *accord* Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*, 102 Nw. U. L. Rev. 1029, 1040 (2008) (interpreting *Massachusetts v. EPA* as raising the level of scrutiny).

<sup>98</sup> *See* *Lunenburg*, *supra* note 2, at 560; *WWHT*, 656 F.2d at 816-18 (D.C. Cir. 1981) (“In other words, the greater the agency’s investment of resources in considering the issues raised by the petition, and the more complete the record compiled during the course of the agency’s consideration, ‘the more likely it is that the ultimate decision not to take action will be a proper subject of judicial review.’ . . . We also recognize that where the agency decides not to proceed with rulemaking, the “record” for purposes of review need only include the petition for rulemaking, comments pro and con where deemed appropriate, and the agency’s explanation of its decision to reject the petition.”).

- The agency decides to proceed by adjudication instead of rulemaking;<sup>99</sup>
- The denial is based on scientifically or technically complex judgments, such as determining that new information presented by petitioners is insufficient or less reliable than the information on which the agency based its previous regulatory decision;<sup>100</sup>
- The agency has “considered a great deal of material and reached a reasoned conclusion”;<sup>101</sup>
- When the petitioner’s interests are “primarily economic” (as opposed to “grave health and safety problems” where the facts demonstrate urgency), the courts are “particularly reluctant” to overturn denials;<sup>102</sup> and
- The denial is based on a “balancing of competing priorities”<sup>103</sup>—though the legitimacy of grounds like limited resources or competing priorities is the subject of an active judicial debate, as explored in the next section on *Massachusetts v. EPA*.

In contrast, some factors increase the likelihood that a court will find an agency’s denial of a petition to be arbitrary and capricious:

- Plain errors by the agency in interpreting its legal authority or statutory mission, or failure to ground the denial in the statutory criteria;<sup>104</sup>
- Sparse, conclusory explanations that are insufficient to demonstrate reasoned decisionmaking;<sup>105</sup>
- When petitioners present facts demonstrating urgency to resolve a “grave health and safety problem,” the court’s review may be more searching;<sup>106</sup> and

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<sup>99</sup> *Arkansas Power & Light Co. v. ICC*, 725 F.2d 716, 723 (D.C. Cir. 1984); *see also generally* *City of Arlington, Texas v. FCC*, 668 F.3d 229, 241 (5th Cir. 2012) (deferring to the agency’s choice to handle a petition for declaratory ruling under the APA’s processes for informal adjudications instead of by rulemaking), *cert. granted in part*, 133 S.Ct. 421 (2012) & 133 S.Ct. 524 (2012) *and aff’d*, 133 S.Ct. 1863 (2013).

<sup>100</sup> *New York v. NRC*, 589 F.3d 551, 554-55 (2d Cir. 2009); *In re Int’l Chem. Workers Union*, 830 F.2d 369, 370 (D.C. Cir. 1987) (per curiam).

<sup>101</sup> *O’Keeffe’s v. CPSC*, 92 F.3d 940 (9th Cir. 1996).

<sup>102</sup> *Midwest Indep. Transmission Sys. Operator v. FERC*, 388 F.3d 903, 911 (D.C. Cir. 2004).

<sup>103</sup> *In re Int’l Chem. Workers Union*, 830 F.2d 369, 370 (D.C. Cir. 1987) (per curiam). In fact, the D.C. Circuit (pre-*Massachusetts v. EPA*) implied that an even more deferential standard than normal may be indicated when “the agency has chosen not to regulate for reasons ill-suited to judicial resolution, e.g., because of internal management considerations as to budget and personnel or for reasons made after a weighing of competing policies.” *Prof’l Pilots Fed’n v. F.A.A.*, 118 F.3d 758, 764 (D.C. Cir. 1997); *but see id.* at 776 (Wald, J., concurring in part and dissenting in part) (finding that both the agency’s denial of the petition, based on medical facts the agency assumed to be true but presented without evidence, as well as the agency’s failure to try to obtain the necessary evidence, were arbitrary and capricious).

<sup>104</sup> *Am. Horse Prot. Ass’n, Inc. v. Lyng*, 812 F.2d 1, 6 (D.C. Cir. 1987); *Legal Envtl. Assistance Found. V. EPA*, 118 F.3d 1467 (11th Cir. 1997); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (faulting EPA for basing its denial on an incorrect statutory interpretation and on factors not found in the statute).

<sup>105</sup> *Am. Horse Prot. Ass’n, Inc. v. Lyng*, 812 F.2d 1, 6 (D.C. Cir. 1987). *But see* *Estate of French v. FERC*, 603 F.2d 1158, 1161-62 (5th Cir. 1979) (ruling that a letter was sufficient under § 555(e), despite lack of statement of findings or facts and only a brief statement that “Based upon a review of your request and the supplemental data submitted upon Staff request, it appears that the Estate has the financial ability to make the required refunds. Accordingly, your request [for relief from a ratemaking] is denied.”).

<sup>106</sup> *Midwest Indep. Transmission Sys. Operator v. FERC*, 388 F.3d 903, 911 (D.C. Cir. 2004).

- If the agency ignores significant new information presented by the petition that suggests “a radical change” in factual or legal circumstances.<sup>107</sup>

When a denial is found arbitrary and capricious, the remedy is almost always a remand.<sup>108</sup> In “extremely rare cases,” where “remand . . . would serve no purpose and would only add to the delay,” a court may order an agency that denied a petition for rulemaking to promulgate the requested rule.<sup>109</sup>

The most active judicial controversy on petitions for rulemaking concerns whether an agency may justify a denial based on limited resources and competing priorities alone. Before the Supreme Court’s 2007 ruling in *Massachusetts v. EPA*, in several cases courts had deferred to an agency’s “real world” need to allocate scarce resources, and upheld denials based on such grounds.<sup>110</sup> However, other courts had found petitioners are entitled to a response “on the merits,”<sup>111</sup> and distinguished a decision on the merits from one based on internal management considerations.<sup>112</sup> *Massachusetts v. EPA* calls into question whether limited resources can ever be legitimate grounds for a denial, though recent rulings from the D.C. Circuit continue to insist they are. Many stakeholders are “concerned” and “disturbed” by the trend of courts upholding what petitioners call “unresponsive responses”: final agency decisions based solely on resources, without addressing the petition’s substantive merits. Some stakeholders fear if this trend continues, it will “take all the wind out of the sails of petitions.”

### II.F.3. *Massachusetts v. EPA* and Subsequent Cases on Merits vs. Resources

In 1999, a diverse group of 19 public interest organizations and trade associations petitioned EPA to use its Clean Air Act authority to regulate the greenhouse gas pollution emitted by motor vehicles. Fifteen months later, EPA requested comments on the petition; it received 50,000 in five months. In 2003, EPA denied the petition, explaining that, first, it did not have authority under the statute to control greenhouse gases and, second, even if it did, the agency would prefer not to regulate because of: scientific uncertainty; its preference to address climate change through technology investments and voluntary standards rather than “piecemeal” regulation; and potential conflicts that the regulation could create for the President’s efforts to secure international cooperation.<sup>113</sup> Four years later, in 2007, the Supreme Court held that the Clean Air Act did give

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<sup>107</sup> *Maier v. EPA*, 114 F.3d 1032, 1040 (10th Cir. 1997) provides a good summary of the relevant case law: “We will not blindly uphold agency refusals to initiate rulemaking in the face of new information. ‘[C]hanges in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so.’ *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir.1992). For example, ‘a refusal to initiate a rulemaking naturally sets off a special alert when a petition has sought a radical modification of a rule on the basis of a radical change in its factual premises.’ *AHPA*, 812 F.2d at 5. Thus, the D.C. Circuit has held ‘that an agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject (either to promulgate or not to promulgate specific rules) has been removed.’ *WWHT*, 656 F.2d at 819 (describing *Geller v. FCC*, 610 F.2d 973 (D.C.Cir.1979)).”

<sup>108</sup> See e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>109</sup> *Public Citizen v. Heckler*, 653 F.Supp. 1229 (D.C. Cir. 1986) (where agency had conceded that raw milk was unsafe and had spent thirteen years studying regulatory options).

<sup>110</sup> *Int’l Union v. Chao*, 361 F.3d 249, 256 (3d Cir. 2004); *In re Int’l Chem. Workers Union*, 830 F.2d 369, 370 (D.C. Cir. 1987) (per curiam); *Prof’l Pilots Fed’n v. F.A.A.*, 118 F.3d 758, 764 (D.C. Cir. 1997).

<sup>111</sup> E.g., *Fund for Animals v. Babbitt*, 903 F.Supp. 96, 115-16 (D.D.C. 1995); *Nat’l Org. for Reform of Marijuana Laws v. Ingersoll*, 497 F.2d 654, 659-60 (D.C. Cir. 1974) (remanding for “consideration on the merits”). See also *Pierce*, *supra* note 54, at 517 (“At a minimum, the right to petition for rulemaking entitles a petitioning party to a response to the merits of the petition.”); but see *id.* at 518 (implying that priorities and resources could be legitimate grounds for denial).

<sup>112</sup> *Prof’l Pilots Fed’n v. F.A.A.*, 118 F.3d 758, 764 (D.C. Cir. 1997).

<sup>113</sup> *Massachusetts v. EPA*, 549 U.S. 497, 510-13 (2007).

EPA authority to regulate greenhouse gases, and that EPA's reasons for denying the petition were invalid. That case, *Massachusetts v. EPA*, launched all of EPA's subsequent greenhouse gas regulations in recent years. Consequently, many stakeholders consider that petition to be one of the most successful petitions ever submitted—"the little engine that could," as one stakeholder put it.

The Supreme Court's majority opinion dives into the "debate . . . as to the rigor with which we review an agency's denial of a petition."<sup>114</sup> The Court first acknowledges that "an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities," further declaring "EPA no doubt has significant latitude as to the manner, *timing*, content, and coordination of its regulations with those of other agencies."<sup>115</sup> However, the Court proceeds by saying:

*But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute.* Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.<sup>116</sup>

In other words, the Court says that agencies have considerable discretion to determine the timing of their regulatory dockets according to limited resources and competing priorities, *but once the agency responds to a petition*, it must address the merits of the request and base its decision on statutory factors; resource considerations and other priorities can no longer play a role.<sup>117</sup> Indeed, EPA had cited competing priorities in its explanation of denial, yet the Court rejected that denial.

That reading of the Court's opinion is somewhat called into question by a confusing phrase in that same passage. The Court says EPA may validly deny a petition by offering "some reasonable explanation as to why it cannot *or will not* exercise its discretion." The intended meaning of "will not" is not clear. In fact, the Court specifically declines to explain, saying "We need not and do not reach the question whether on remand . . . policy concerns can inform EPA's actions in the event that it makes such a finding."<sup>118</sup> Though again, the Court seems to assume that EPA will have to "make a finding" on the merits.

A dissent from Justice Scalia (joined by the three other dissenting justices as well) confirms this reading of the majority's ruling. Scalia criticizes the majority because it:

rejects all of EPA's stated "policy judgments" as not "amount[ing] to a reasoned justification," effectively narrowing the universe of potential reasonable bases to a single one: Judgment can be delayed *only* if the Administrator concludes that "the scientific

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<sup>114</sup> *Id.* at 527-28.

<sup>115</sup> *Id.* at 533 (emphasis added).

<sup>116</sup> *Id.* (emphasis added).

<sup>117</sup> At oral arguments, Justice Ginsburg had asked petitioners "How far will you get if all that's going to happen is it goes back and then EPA says our resources are constrained?" It is not clear whether she was expressing a concern that judicial review of petition denials may lack teeth since agencies could always cite limited resources as a legitimate excuse, or whether she was previewing that the Court's ruling would clarify that limited resources are not a legitimate justification for denial. See [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/05-1120.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-1120.pdf) at 20.

<sup>118</sup> *Massachusetts*, 549 U.S. at 534-35.

uncertainty is [too] profound.” The Administrator is precluded from concluding *for other reasons* “that it would . . . be better not to regulate at this time.”<sup>119</sup>

The clear implication of Scalia’s dissent is that the majority held in *Massachusetts v. EPA* that any “policy” considerations, including resource limitations and competing priorities, are not available as rational reasons to deny a petition. Again, perhaps resources and priorities are legitimate grounds for delay, but not denials.<sup>120</sup> Not all courts have followed this interpretation.

***Defenders of Wildlife v. Gutierrez:*** Petitioners sought emergency marine vehicle speed restrictions to protect the right whale. National Marine Fisheries Service rejected the petition, explaining that it preferred to continue pursuing speed restrictions through regular notice-and-comment rulemaking: “an emergency rule would detract agency resources from the promulgation of a final, comprehensive rule. . . . The agency made a policy decision to focus its resources on a comprehensive strategy.”<sup>121</sup> In 2008, one year after *Massachusetts v. EPA*, the D.C. Circuit found that explanation to be sufficiently reasonable.

The court never explains how the facts of its case were different than those in *Massachusetts v. EPA*, where EPA had similarly argued against a petition for rulemaking because it preferred a comprehensive approach instead of what it viewed as an “inefficient, piecemeal” regulatory proposal.<sup>122</sup> Perhaps some distinction is found in that EPA’s preferred “comprehensive” approach was to initially rely on voluntary actions and international negotiations outside of EPA’s specific statutory authority under the Clean Air Act, whereas the NMFS was pursuing “comprehensive” regulations contemplated by the statute. Yet the significance of any such a distinction to the petitioner’s right to a substantive response on the merits of a petition under the APA is not entirely clear.

***NRDC v. FDA:*** Over the last few years, Second Circuit courts have grappled with this issue in reviewing citizen’s petitions to FDA. In 1999 and 2005, various public interest groups petitioned FDA to begin withdrawal proceedings for all non-therapeutic uses of antibiotics in food-producing animals. The agency eventually denied the petitions, citing “the time and expense required to evaluate individual drug safety and to hold formal withdrawal proceedings,” and further touting its “non-binding voluntary measures” on the matter. In 2012, the Southern District of New York found that “[n]either of these grounds provides a reasoned justification for the Agency’s refusal to initiate withdrawal proceedings.”<sup>123</sup> Citing *Massachusetts v. EPA*, the court concluded that the agency’s “reasons for action or inaction must conform to the authorizing statute,” in this case meaning a scientific evaluation of drug safety. “The statute contains no language indicating that the costs of a withdrawal proceeding—either to the Agency itself or to industry—are to be taken into account when making the decision whether to initiate withdrawal proceedings.”<sup>124</sup> By not grounding its

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<sup>119</sup> *Id.* at 549-51 (Scalia, J., dissenting) (emphases original).

<sup>120</sup> *See also* Gulf Restoration Network v. Jackson, civ. 12-677, 2013 WL 5328547 (E.D. La., Sept. 20, 2013) (using Scalia’s dissent to help interpret the majority opinion’s conclusion that petition denials must be grounded in the statute).

<sup>121</sup> *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 921 (D.C. Cir. 2008).

<sup>122</sup> 68 Fed. Reg. 52,922, 52,929-52,931 (Sept. 8, 2003) (“[E]stablishing [greenhouse gas] emission standards for U.S. motor vehicles at this time would . . . result in an inefficient, piecemeal approach to addressing the climate change issue. The U.S. motor vehicle fleet is one of many sources of [greenhouse gas] emissions both here and abroad, and different [greenhouse gas] emission sources face different technological and financial challenges in reducing emissions. A sensible regulatory scheme would require that all significant sources and sinks of [greenhouse gas] emissions be considered in deciding how best to achieve any needed emission reductions.”).

<sup>123</sup> *Natural Res. Def. Council, v. U.S. Food & Drug Admin.*, 872 F. Supp. 2d 318, 337 (S.D.N.Y. 2012) *rev’d*, 12-2106-CV L, 2014 WL 3636283 (2d Cir. July 24, 2014).

<sup>124</sup> *Id.*

decision in scientific evidence, “the Agency failed to address the Petitions on their merits. . . . Denying the Petitions on the grounds that it would be too time consuming and resource-intensive to evaluate . . . is arbitrary and capricious.”<sup>125</sup>

Two years later, the Second Circuit reversed that district court’s ruling, albeit on somewhat different grounds. It distinguished *Massachusetts v. EPA*, concluding that unlike the limitations on EPA’s judgment placed by the Clean Air Act, FDA’s authorizing statute did not require the agency to undertake any particular investigation. The court found FDA’s preference for a voluntary compliance program to be reasonable, and did not clearly comment on whether resource constraints or competing priorities would have also been legitimate grounds.<sup>126</sup> A preference for a voluntary program could arguably be considered a determination on the merits of the petitioners’ request, whereas time and resource constraints clearly are not so.

Yet Chief Judge Katzmman sharply disagreed with his two colleagues from the majority in that case. In a dissenting opinion that echoed the district court’s approach, Katzmman writes,

[J]ust as in *Massachusetts v. EPA*, the agency’s discretion is limited to making the determination required by the statute; it cannot refuse to make that determination just because it would prefer a different regulatory strategy than the statute specifies. The FDA offers reasons for inaction that are eerily similar to those rejected by the Court in *Massachusetts v. EPA*; it complains that withdrawal proceedings “would take many years and would impose significant resource demands,” and claims that its voluntary compliance approach will work just as well. . . . Even if the agency’s reasons were indisputably sound, they are not contemplated by the statute.<sup>127</sup>

**WildEarth Guardians v. EPA:** Contrary to those opinions from the Second Circuit, the D.C. Circuit has continued to grant agencies even greater leeway to deny petitions on resource grounds, arguably without addressing the merits. WildEarth Guardians had petitioned EPA to regulate coal mine emissions, including methane, under a particular section of the Clean Air Act. EPA denied, clarifying that it was not making a determination whether coal mines should be regulated, but rather rejecting the petition due to “limited resources and ongoing budget uncertainties . . . and the necessity of completing court-ordered rulemaking actions . . . [and] other higher-priority activities.”<sup>128</sup>

In oral arguments on March 25, 2014, the judges on the reviewing panel defined their standard for review under *Massachusetts v. EPA* as “the tiniest opening” and “highly, highly, highly deferential.”<sup>129</sup> The attorney for WildEarth Guardians argued that, while resource constraints might be legitimate grounds for delaying action on a petition, denials must be substantive;

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<sup>125</sup> *Id.* at 337-338.

<sup>126</sup> Natural Res. Def. Council, v. U.S. Food & Drug Admin., 12-2106-CV L, 2014 WL 3636283 (2d Cir. July 24, 2014). During the oral arguments on *Massachusetts v. EPA*, Justices Ginsburg and Breyer wondered whether a single invalid reason could “infect” an agency’s other explanations and make the whole response to the petition invalid. See [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/05-1120.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-1120.pdf) at 25-28. It does not seem that other courts have taken this worry seriously, since, for example, the Second Circuit stopped its review after finding a single legitimate basis for the denial.

<sup>127</sup> Natural Res. Def. Council, v. U.S. Food & Drug Admin., 12-2106-CV L, 2014 WL 3636283, at \*35 (2d Cir. July 24, 2014) (Katzmann, J., dissenting).

<sup>128</sup> Letter from Bob Perciasepe, Acting EPA Admin., to Edward B. Zukoski, Earthjustice (Apr. 30, 2013) (EPA-HQ-OAR-2013-0358-0005).

<sup>129</sup> Oral argument recording available at [http://www.cadc.uscourts.gov/recordings/recordings2014.nsf/4D68336D511355D085257CA6005D8A69/\\$file/13-1212.mp3](http://www.cadc.uscourts.gov/recordings/recordings2014.nsf/4D68336D511355D085257CA6005D8A69/$file/13-1212.mp3).

otherwise, all agencies would simply dispense with all petitions by citing resources. One judge responded, perhaps jokingly at first, “We wish!,” but then elaborated that affording the agencies more discretion to reject petitions “would be a welcome change” that would help prevent agencies from being “hamstrung” by petitions.<sup>130</sup>

In the arguments as well as in their ruling, the D.C. Circuit judges highlighted from *Massachusetts v. EPA* the language “cannot or will not exercise its discretion.”<sup>131</sup> The court also reviewed the language of the particular provision of the Clean Air Act under which WildEarth Guardians had selected to petition, finding that the phrases “from time to time” and “in his judgment” gave EPA reasonable discretion on timing and prioritizing its response to the most significant threats.<sup>132</sup> (It is unclear how essential that particular language was to the court’s ruling, and whether petitions under different statutory provisions might fair differently.) The court concluded that, whereas in *Massachusetts*, EPA had preferred voluntary action and international negotiations, here EPA was pursuing a comprehensive strategy under the statute and had simply decided not to prioritize coal mines above other sources. (Recall, though, in *Massachusetts*, EPA had also briefly alluded to a comprehensive, “sensible regulatory scheme” addressing all sources.<sup>133</sup>) The court also was sympathetic to EPA’s claims of a shrinking budget. The court noted that if the petition forced EPA to pursue coal mines, the diversion of resources from higher priorities might increase aggregate air pollution, undermining the very task the statute assigns to EPA.<sup>134</sup>

**Summary:** Though the Second Circuit did not fully reach the issue in its most recent majority ruling (since it found sufficient the agency’s preference for voluntary programs), a dissenting judge as well as the district court found that resources and priorities are not legitimate grounds to deny a petition. The majority ruling of five Supreme Court justices is somewhat more cryptic, though it strongly suggests that resources and competing priorities are off limits for denials of petitions; the four dissenting Supreme Court justices seem to confirm that reading of the majority. The D.C. Circuit, though, adamantly disagrees, insisting that resources and competing priorities are grounds for denial (though not clarifying if those competing priorities must always be other actions under the same statutory provision, or whether their rulings were specific to the agencies’ authorities under those specific statutory provisions).

For now, the debate and lack of clarity will continue, frustrating petitioners and perhaps discouraging petitions. The D.C. Circuit seems fairly hostile to petitions right now. This could prove especially problematic for would-be petitioners given the court’s jurisdiction under the Clean Air Act. Under the Act, the D.C. Circuit district court reviews cases of unreasonable delay, while the Court of Appeals reviews petition denials.<sup>135</sup> Given the court’s recent holdings, EPA may be increasingly inclined simply to deny petitions due to lack of resources, rather than continuing to delay final action on them. That trend could effectively foreclose unreasonable delay suits in the district court, leaving only review by the Court of Appeals. Because the Supreme Court is not likely to take appeals from many D.C. Circuit rulings on petitions, one stakeholder commented the trend could mean petitioners essentially only get “one bite at the apple.”

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*; *WildEarth Guardians v. EPA*, 751 F.3d 649, 650 (D.C. Cir. 2014).

<sup>132</sup> *Id.* at 655.

<sup>133</sup> 68 Fed. Reg. at 52929–52931.

<sup>134</sup> 751 F.3d at 655.

<sup>135</sup> See 42 U.S.C. §§ 7604, 7606.



## II.G. “...to petition...”—No Specific Form Required, but Some Agency Discretion over Content

For a petitioner to take advantage of the above-described rights to have an agency consider and respond to a petition, must the “petition” be submitted in a particular form? In writing? Clearly labeled as a “petition”? Containing certain information, presented in a particular format?

The APA does not define “petition” or provide any details in § 553(e) on required content. While § 555(e), which governs agency denials, contains the word “written,” it is unclear if the adjective actually applies to petitions or only modifies the word “application”:

Prompt notice shall be given of the denial in whole or in part of *a written application, petition, or other request* of an interested person made in connection with any agency proceeding.

Perhaps importantly, the word “request” also appears in § 555(b), which clearly contemplates oral requests. In one case where a stakeholder “met” with an agency to “discuss” and “request” a rule change, despite the lack of a formal petition in the administrative record, the D.C. Circuit had “no difficulty in characterizing the [stakeholder’s] requests for action as such [a petition for rulemaking].”<sup>136</sup> Some jurisprudence suggests that courts may require some flexibility from agencies on what types of requests get classified as “petitions for rulemaking” that are entitled to consideration and response, and courts may only allow agencies to refuse acceptance of a petition in “the clear case of a filing that patently is either deficient in form or a substantive nullity.”<sup>137</sup> Luneburg even wondered whether agencies would have to treat public comments (submitted either on other petitions or during general notice-and-comment rulemakings) as petitions or other “presentations” requiring disposition under §§ 555(b) and (e).<sup>138</sup>

Nevertheless, agencies certainly retain a degree of discretion to interpret the undefined and somewhat ambiguous word “petition.”<sup>139</sup> The full extent of that discretion, however, remains somewhat unclear.

As discussed in Part IV, many agencies have in fact adopted various submission and content requirements through their regulations on handling petitions, at times specifying that petitions must be in written English, mailed, labeled as a “petition,” certified and signed, or submitted with certain information in a particular format. In practice, a number of these agencies do treat as “petitions” even those submissions that may fall short of some of these requirements, but several other agencies expressly state that any insufficient requests for rulemakings will be treated as general correspondence and not as a “petition” entitled to full consideration and response.

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<sup>136</sup> Am. Horse Prot. Ass’n, Inc. v. Lyng, 812 F.2d 1, 5 (D.C. Cir. 1987). A recent ACUS Recommendation reaffirmed that oral communications are generally permissible and beneficial under § 553, especially during the early stages of rule development. [http://www.acus.gov/sites/default/files/documents/Recommendation%202014-4%20%28Ex%20Parte%29\\_0.pdf](http://www.acus.gov/sites/default/files/documents/Recommendation%202014-4%20%28Ex%20Parte%29_0.pdf).

<sup>137</sup> Nat’l Org. for Reform of Marijuana Laws v. Ingersoll, 497 F.2d 654, 659 (D.C. Cir. 1974); *see also* Boyd v. Glickman, 12 F.Supp.2d 1261, 1271 (M.D. Ala 1998) (noting in dicta that “Courts are sometimes willing to construe letters as petitions for rulemaking where it is clear that the request . . . is a request for rulemaking.”).

<sup>138</sup> Luneburg, *Petitioning Federal Agencies for Rulemaking*, *supra* note 1, at 28 n.153.

<sup>139</sup> *Chevron v. NRDC*, 467 U.S. 837 (1984).

## II.H. “...for the issuance, amendment, or repeal...” —Initial, Final, and Retrospective Actions

This phrase from § 553(e) implicates two issues: the scope of rulemaking actions that a petitioner may seek; and what constitutes final agency action on a petition.

First, is there a difference between a petition for issuance of a rule versus a petition for amendment or repeal? Though the APA clearly permits the public to request modification or rescission of an existing rule as well as to suggest a new rule, there may be reason to distinguish petitions for amendment or repeal—and especially petitions for reconsideration of a recently finalized rule—from other petitions for new rulemakings. In practice, some agencies do draw such distinctions, handling some formal public requests for amendment or repeal under separate processes for retrospective review or for reconsideration of a final rule.<sup>140</sup> Both Congress and the courts have expressed some concerns with an overly permissive right to petition for amendments and repeals, which may interfere with specific statutory schemes to manage legal challenges to recently enacted rules, and which may force agencies to continually revisit and re-litigate long-established rules.<sup>141</sup> Along those same lines, the APA gives agencies more leeway in denying petitions where the decision effectively “affirm[s] a prior denial” or is otherwise “self-explanatory,”<sup>142</sup> which should enable agencies to more easily dismiss repetitious petitions to reconsider or rescind existing rules.

Second, can an agency discharge its obligation to respond to a petition just by initiating a rulemaking, or can only the “issuance” of a final rule fully grant a petition?<sup>143</sup> In 1986, one of Lunenburg’s major concerns was the trend of agencies treating the initiation, and not the completion, of rulemaking to “grant” a petition under the APA. The plain language of the APA indicates the right to petition is for the “issuance, amendment, or repeal of a rule,” and the statute distinguishes between, on the one hand, the process of formulating a rule (i.e., the “rule making”), and on the other hand, the conclusion of rulemaking (i.e., the final “rule adopted”).<sup>144</sup> Lunenburg expressed concern that if agencies were allowed instead to deem the initiation of rulemaking to satisfy its obligations under the APA, the agency would be free to later withdraw or to never conclude the rulemaking, and there would be no clear judicial review mechanism to ensure a final disposition on

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<sup>140</sup> ACUS has previously recognized the connection between petitions for amendment or repeal and public requests for retrospective review. ACUS Recommendation 95-3, Review of Existing Agency Regulations, 60 Fed. Reg. 43,109 (1995).

<sup>141</sup> See *Nader v. EPA*, 859 F.2d 747, 753 (9th Cir. 1988) (cautioning against an overly permissive right to judicial review of petitions for modification or repeal under particular statutory schemes, because “If parties were free simply to file petitions, await their denial, and then be assured of jurisdiction in the court of appeals, there would be little incentive to comply with the procedural provisions of the FDCA that required direct appeals from a regulation to be made within the statutory time period. EPA could conceivably be forced to appear continually in appellate courts defending regulations long established that parties failed to contest at the time of their promulgation.”); see also H. Rep. No. 94-1679, 1976 USCCAN 4491, 4539, 4583-84 (1976) (legislative history on TSCA, explaining that petitions for *new* rules under TSCA get *de novo* trials, while petitions for amending or repealing rules get only more deferential APA review, because in the latter cases, EPA will have already examined the matter fully in a previous rulemaking, and Congress did not want the agency to be inundated with “constant petitions” challenging rules that petitioners could have challenged directly after the original rulemaking; according to this committee report, TSCA petitions should only be about newly discovered information).

<sup>142</sup> 5 U.S.C. § 555(e).

<sup>143</sup> This is not to imply that an agency could respond to a petition by skipping the rulemaking proceeding and going straight to issuing a final rule, at least not without classifying the matter as exempt from standard notice-and-comment requirements.

<sup>144</sup> Compare 5 U.S.C. §§ 551(4) & (5), 553(c); but see *Oil, Chemical & Atomic Workers Int’l Union v. Zegeer*, 768 F.2d 1480, 1485 (D.C. Cir. 1985).

the merits of the request.<sup>145</sup> However, since 1986, more recent case law has clarified that courts can review both the termination of an ongoing rulemaking<sup>146</sup> and delay in finalizing a rulemaking that was intended to respond to a petition.<sup>147</sup> In fact, courts may treat the cessation of a rulemaking with more scrutiny than a straight denial of a petition.<sup>148</sup>

Delineating what constitutes a final, reviewable agency action is still important.<sup>149</sup> For example, if an agency “grants” a petition by initiating a rulemaking that proposes some, but not all, of what the petitioner requested, has the agency effectively denied part of the petition? In fact, agencies may worry that any intermediate determination or preliminary communication with petitioners could inadvertently constitute final agency action and trigger judicial review, and so they may err on the side of silence until a final decision has already been settled. For example, when EPA was petitioned to regulate acid rain pollution drifting into Canada, it sent letters to keep petitioners “apprised of the status of their petition,” but insisted the letters were just “one subordinate agency official’s views” and did not “deny nor grant the petitions.”<sup>150</sup> The D.C. Circuit, however, determined the agency’s letters did more than they claimed to. The letters came from the principal advisor to the Administrator on the relevant matters, used the collective noun “we,” and were “unambiguous and devoid of any suggestion that [the legal determination] might be subject to subsequent revision.”<sup>151</sup> In short, it was agency action, it was final action, and it was reviewable. With that as the test, however, most intermediate agency communications on a petition should easily avoid judicial review, so long as they are clearly marked with terms indicating they are preliminary and subject to subsequent revisions. An overly rigorous standard for finality here would work against the interests of petitioners, the agency, and the general public, all of whom can benefit from more regular and transparent communications about petitions (see Part V).

## II.I. “...of a rule.”—Includes Non-Legislative Rules and All Subject Matters

Because the APA’s definition of “rule” includes “agency statement[s] of general or particular applicability and future effect designed to implement, *interpret*, or prescribe law or policy . . . and includes the approval or prescription for the future *of rates . . . prices . . .*,”<sup>152</sup> the right to petition extends beyond traditional legislative rules with general policy effects.<sup>153</sup> The APA right clearly also covers petitions both for the issuance or amendment of non-legislative and interpretive rules,<sup>154</sup>

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<sup>145</sup> *Lunenburg*, *supra* note 2, at 535-36, 616 n.590 (focusing on the phrase from § 555(b) “conclude a matter presented to it”).

<sup>146</sup> *Williams Natural Gas v. FERC*, 872 F.2d 438, 443 (DC Cir. 1989); *Montana v. Clark*, 749 F.2d 740, 744 (D.C.Cir.1984).

<sup>147</sup> *See, e.g.*, *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1158 (D.C. Cir. 1983); *Oil, Chem. & Atomic Workers Union v. OSHA*, 145 F.3d 120, 124 (3d Cir. 1998).

<sup>148</sup> *See Radio-Television News Directors Ass’n v. FCC*, 184 F.3d 872, 881 (D.C. Cir. 1999) (finding that since the agency started a rulemaking, the “burden of explanation” shifts on to the agency).

<sup>149</sup> *See* 5 U.S.C. § 704 (“final agency action”).

<sup>150</sup> *Her Majesty the Queen in Right of Ontario v. U.S. E.P.A.*, 912 F.2d 1525, 1531-32 (D.C. Cir. 1990)

<sup>151</sup> *Id.*

<sup>152</sup> 5 U.S.C. § 551(4) (emphasis added).

<sup>153</sup> *See AG’s Manual*, *supra* note 28 (explaining the right “applies not only to substantive rules, but also to interpretations and statements of general policy, and to organizational and procedural rules. It is applicable both to existing rules and to proposed or tentative rules.”).

<sup>154</sup> *See generally* Sean Croston, *Petition is Mightier than the Sword: Rediscovering an Old Weapon in the Battles over Regulation through Guidance*, 63 ADMIN. L. REV. 381, 389 (2011). *See also* *Preminger v. Sec’y of Veterans Affairs*, 632 F.3d 1345, 1351 (Fed. Cir. 2011) (“On its face the provision applies to ‘a rule’ without qualification, a term that . . . encompasses, as the APA itself states, more than legislative rules.”); *Coll. Sports Council v. Dep’t of Educ.*, 465 F.3d 20, 23 (D.C. Cir. 2006) (ordering the district court to review the merits of a challenge to a denial of a “Petition to Repeal and

and for rules of particular applicability like waivers and exemptions, as well as ratemakings. Moreover, because individual requests for exemptions may end up having broader applicability to all regulated parties, such requests may be indistinguishable in format and effect from petitions for legislative rules.<sup>155</sup> Courts apply the same statutory standards to petitions for ratemakings and waivers as for legislative rules.<sup>156</sup>

The plain text of 5 U.S.C. § 553 would ostensibly exempt certain rules from the right to petition, based on their subject matter. Subsection 553(a) seems to broadly exempt any military, foreign affairs, agency management, or proprietary matters from all the provisions in Section 553, potentially including § 553(e). However, the House Committee Report on the original APA legislation explains that the exemption was intended only to encourage the issuance of such rules “by dispensing with all mandatory procedural requirements. Changes can then be sought through the petition procedures . . . by which such rule making may also be initially invoked.”<sup>157</sup> As Congress recognized, the value of public petitions is just as compelling for military and proprietary matters as for other subjects, and given the general flexibility agencies have in responding to petitions, there is no cause for a wholesale exemption.<sup>158</sup> Moreover, the First Amendment provides a backstop, giving the public at least some right to petition agencies on any matter.

Though an act of Congress could fully clear up this confusion,<sup>159</sup> agencies will meanwhile retain discretion to voluntarily include all subject matters within their procedures for accepting and responding to petitions for rulemaking.<sup>160</sup> As seen in Part IV, some agencies have done so.<sup>161</sup>

## II.J. Right to Judicial Review

As discussed repeatedly in the previous sections, courts have nearly unanimously found that agency responses (or lack thereof) to petitions for rulemakings are reviewable under the APA, 5 U.S.C. §§ 701-706.<sup>162</sup>

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Amend Guidance”); *but see* Atchison, Topkea & Santa Fe Ry. Co. v. Pena, 44 F.3d 437, 442 (7<sup>th</sup> Cir. 1994) (en banc) (“[I]nterested parties do not have the right to petition the agency for review of its interpretive rulings.”).

<sup>155</sup> Cf. ACUS, Recommendation 76-5, Interpretive Rules of General Applicability and Statements of General Policy (1976) (“At times policy statements and interpretive rules are barely distinguishable from substantive rules.”).

<sup>156</sup> *E.g.*, Estate of French v. FERC, 603 F.2d 1158 (5<sup>th</sup> Cir. 1979) (applying § 555(e) to a petition asking for relief from a ratemaking/refund requirement).

<sup>157</sup> H.Rep. No. 1980, in Legislative History, *supra* note 24, at 257; *but see* AG’s Manual, *supra* note 28, implying such exemptions would still apply to the right to petition.

<sup>158</sup> Arthur Earl Bonfield, *Military and Foreign Affairs Function Rule-Making Under the APA*, 71 MICH. L. REV. 221, 356 (1972) (“An exemption from the right to petition . . . seems no more necessary or justifiable.”); Arthur E. Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, 600 (1970) (“[N]o situation involving . . . petitions . . . would seem to require even a qualified exemption from section 553(e).”); Bonfield notes that petitions may be especially useful on these exempted subject matters, so the public can ask for reviews of rules enacted without notice-and-comment. *Id.* at 601. Cf. Pierce, *supra* note 54, at 516 (suggesting the literal language does exempt these subject matters from the right to petition, but noting “there is no apparent reason” to exclude them).

<sup>159</sup> Luneburg *supra* note 2, at 508.

<sup>160</sup> ACUS has also previously called for agencies to voluntarily remove these statutory exemptions. Recommendation 69-8, Elimination of Certain Exemptions from the APA Rulemaking Requirements (1969); Recommendation 73-5, Elimination of the “Military or Foreign Affairs Function” Exemption from APA Rulemaking Requirements (1973).

<sup>161</sup> *E.g.*, NRC impliedly includes foreign affairs matters, with some caveats; many agency regulations give the public to right to petition for essentially “any rule,” without subject matter restriction.

<sup>162</sup> In addition to the previous sections, see also Auer v. Robbins, 519 U.S. 452, 459 (1997) (“The proper procedure for pursuit of respondents’ grievance is set forth explicitly in the APA: a petition to the agency for rulemaking, § 553(e), denial of which must be justified by a statement of reasons, § 555(e), and can be appealed to the courts, §§ 702, 706.”).

The availability of judicial review was not always a foregone conclusion, however. In 1947, the Attorney General interpreted language in 5 U.S.C. § 701(a)(2) (which exempts from judicial review any action that “is committed to agency discretion by law”) as foreclosing review of agency denials or inaction on petitions.<sup>163</sup> The Supreme Court’s 1985 ruling in *Heckler v. Chaney* further cast doubt on the reviewability of agency inaction generally.<sup>164</sup>

Nevertheless, courts have disagreed with the Attorney General’s 1947 reading and have repeatedly found jurisdiction to review petition delays and denials under 5 U.S.C. § 706 (albeit under a highly deferential standard), citing both legislative history<sup>165</sup> and the fundamental difference between petition denials and other agency decisions not to act:

[R]efusals to institute rulemaking proceedings are distinguishable from other sorts of nonenforcement decisions insofar as they are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.<sup>166</sup>

These conditions still seem to hold. Though some courts worry that judicial review could overburden agencies if there were an influx of petitions (especially of petitions for reconsideration),<sup>167</sup> petitions are most likely still submitted and denied in relatively low numbers compared with other types of non-enforcement decisions (see Part IV noting the low numbers of petitions most agencies receive). Petition denials are subject to special formalities, including the explanation required by 5 U.S.C. § 555(e) and other procedures adopted in agency regulations. And though some courts seem a bit more willing to delve into the facts of a petition denial (see, arguably, *Massachusetts v. EPA*, discussed above), on the rare occasions when courts do overturn petition denials, it is usually for legal errors. Regardless, in 2007, five Supreme Court justices essentially assumed without much discussion that petition denials were reviewable, and the four dissenting justices offered no objections to that conclusion.<sup>168</sup>

The right to review is somewhat more complicated for petitions for rulemaking submitted under specific statutes (see Part III on other statutory rights to petition). For example, the Eleventh Circuit recently found that, because an Endangered Species Act critical habitat petition addressed a species listed as endangered before 1978 (when the applicable critical habitat provisions were not

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<sup>163</sup> AG Manual, *supra* note 28.

<sup>164</sup> 470 U.S. 821 (1985).

<sup>165</sup> *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 814-16 (D.C. Cir. 1981) (“While we agree that judicial intrusion into an agency’s exercise of discretion in the discharge of its essentially legislative rulemaking functions should be severely circumscribed, we reject the suggestion that agency denials of requests for rulemaking are exempt from judicial review. . . . Th[is] court [has previously] referred to language in Senate Committee Report No. 752, reprinted in Legislative History, at 185, 201, noting that ‘(t)he refusal of an agency to grant the petition or to hold rule making proceedings . . . would not per se be subject to judicial reversal,’ and concluded that the language implied that judicial review would sometimes be available when agencies refuse to institute rulemaking proceedings.”); *Natural Res. Def. Council, Inc. v. Sec. & Exch. Comm’n*, 606 F.2d 1031, 1043 (D.C. Cir. 1979) (finding that the AG’s interpretation is inconsistent with legislative history); *WEPCO v. Costle*, 715 F.2d 323, 328 (7th Cir. 1983) (following *WWHT* in finding that petition denials are reviewable).

<sup>166</sup> *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987).

<sup>167</sup> See, e.g., *Nader v. EPA*, 859 F.2d 747, 753 (9th Cir. 1988) (cautioning against an overly permissive right to judicial review of petitions for modification or repeal under particular statutory schemes, because “If parties were free simply to file petitions, await their denial, and then be assured of jurisdiction in the court of appeals, there would be little incentive to comply with the procedural provisions of the FDCA that required direct appeals from a regulation to be made within the statutory time period. EPA could conceivably be forced to appear continually in appellate courts defending regulations long established that parties failed to contest at the time of their promulgation.”).

<sup>168</sup> See generally *Massachusetts v. EPA*, 549 U.S. 497 (2007).

yet enacted), there was no meaningful standard under the statute against which to judge the agency's exercise of discretion, and so the agency's decision on the petition was unreviewable under 5 U.S.C. § 701(a)(2).<sup>169</sup> However, even that court recognized such cases would be "uncommon" and noted that *Massachusetts v. EPA* allowed review of petitions generally.<sup>170</sup> (Commentators have also criticized the Eleventh Circuit decision.<sup>171</sup>) Some other statutory petition provisions come with their own judicial review processes. In such circumstances, courts may find that judicial review under the APA is not always available.<sup>172</sup>

A final limit to the right to judicial review concerns standing. Though petitioners may be able to demonstrate standing for unreasonable delay suits on the basis of the procedural injury alone, satisfying standing requirements in litigation over arbitrary denials requires a more concrete, substantive injury that § 553(e) alone may not automatically provide, and that not all petitioners will be able to muster.<sup>173</sup>

### III. Other Petition Procedures: Specific Statutes and Executive Actions

Beyond the APA's general right to petition, Congress has repeatedly experimented with granting new rights to petition for rulemaking under specific statutes. Some of these variations contain useful ideas for best practices—or cautionary tales—with respect to deadlines and decisionmaking. The White House has also experimented with ways to add the public's voice to rulemaking and agenda-setting decisions. In addition to retrospective review, a recent Obama Administration initiative, the online platform *We the People*, guarantees a government response to certain kinds of public petitions. The popularity of both the *We the People* site and some statutory petitions processes (especially under the Endangered Species Act) may indicate some perceived deficiencies with the general petition process under the APA. At the same time, not all of the lessons to draw from these other processes are necessarily applicable to a more general context.

#### III.A. Comparative Statutory Rights

Congress has enacted many additional statutory rights to petition, sometimes seemingly just to reiterate the basic APA right,<sup>174</sup> but often to impose additional deadlines, decision criteria, or other procedures. **Appendix B** contains a non-comprehensive chart comparing a selection of the public's statutory rights to petition for rulemakings. Notable features include:

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<sup>169</sup> *Conservancy of S.W. Florida v. FWS*, 677 F.3d 1073 (11th Cir. 2012)

<sup>170</sup> *Id.* at 1085.

<sup>171</sup> William S. Jordan III, *News from the Circuits*, 37 Admin. & Reg. Law News 28 (2012) (criticizing the case for ignoring the difference between petition denials and non-enforcement decisions, and for creating a split with D.C. Circuit precedent).

<sup>172</sup> *See* *EDF v. Thomas*, 657 F.Supp. 302 (D.D.C. 1987) (denial of TSCA petition not reviewable under APA); *EDF v. Reilly*, 909 F.2d 1469, 1505 (D.C. Cir. 1990) (concluding that Congress did not intend to allow simultaneous review of petition denials under both TSCA and APA); *but see* *Walker v. EPA*, 802 F.Supp. 1568 (S.D. Tex. 1992) (denials of TSCA petitions to amend or repeal a rule are reviewable under APA, in contrast with petitions for new rules).

<sup>173</sup> *See* *Am. Sports Council v. U.S. Dep't of Educ.*, 850 F. Supp. 2d 288, 293 (D.D.C. 2012); *Brown v. FBI*, 793 F.Supp.2d 368,375 (D.C. Cir. 2011); *Gettman v. DEA*, 290, F.3d 430, 433 (D.C. Cir. 2002); *Crane v. NRC*, 334 F. App's 316, 317 (9th Cir. 2009) (holding that the court would not review a "hypothetical controversy" where the petitioner was not likely to be able to show concrete injury from denial of petition for rulemaking).

<sup>174</sup> *E.g.*, 21 U.S.C. § 811(a) (referencing APA procedures).



- *“Any” versus an “Interested” Person*—Several statutes declare that the petitioner can be “any person.”<sup>175</sup> Some repeat the APA’s language of “an interested person.”<sup>176</sup> At least one clarifies that a relevant independent Advisory Commission is allowed to petition the agency.<sup>177</sup>
- *Initiation versus Completion as the Grant*—The APA allowed the public to petition for the final issuance, amendment, or repeal of a rule.<sup>178</sup> By contrast, some individual statutes define the right as the ability to request the initiation (but not necessarily the completion) of rulemaking proceeding.<sup>179</sup> One statute (RCRA) just tells the agency to “take action.”<sup>180</sup> This phrasing could put the petitioner’s rights into question if the agency initiates but does not conclude a rulemaking (though the APA’s right to have agencies finally dispose of public petitions should provide some backstop; see above, Section II.H.).
- *Deadlines*—A few statutes give a deadline for publishing notice of receipt of the petition.<sup>181</sup> Several allot typically anywhere from 90-180 days for an agency to decide to grant or deny; a grant usually triggers the requirement to promptly begin rulemaking, sometimes with additional deadlines set for rule proposal and finalization.<sup>182</sup> Missed deadlines are sometimes deemed de facto denials;<sup>183</sup> other times, de facto approvals.<sup>184</sup>
- *Tiers*—A few statutes, most notably the Endangered Species Act, create a tiered decisionmaking structure, whereby the agency first makes a quicker decision on whether the petition at least has some merit, and then is given additional time to study the petition in more depth before making a final decision.<sup>185</sup>
- *Decision Criteria*—The Clean Air Act requires EPA to conduct additional research if it does not have enough information to decide on a petition to phase out ozone-depleting substances.<sup>186</sup> The Energy Policy and Conservation Act requires the Department of Energy to initiate (though not necessarily adopt) a rule whenever a petition contains evidence that a new conservation standard would save energy, is technologically feasible, and is cost-effective.<sup>187</sup> The Consumer Product Safety Act describes the limited grounds on which the Commission can cite the existence of voluntary standards as a reason for denying a petition for rulemaking.<sup>188</sup> The Food, Drug, and Cosmetic Act requires the FDA to follow, or justify rejecting, any finding from an authoritative science body that is relevant to a misbranded food petition.<sup>189</sup>

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<sup>175</sup> *E.g.*, 7 U.S.C. § 7711; 15 U.S.C. § 2620.

<sup>176</sup> *E.g.*, 16 U.S.C. § 1533(b)(3).

<sup>177</sup> 42 U.S.C. § 300aa-14(c)(2).

<sup>178</sup> *See supra* Section II.H.

<sup>179</sup> *E.g.*, 30 U.S.C. § 1211(g).

<sup>180</sup> 42 U.S.C. §§ 6974, 6976.

<sup>181</sup> *E.g.*, 21 U.S.C. § 348(b).

<sup>182</sup> *E.g.*, 16 U.S.C. § 1533(b)(3); 42 U.S.C. § 6295(n).

<sup>183</sup> *E.g.*, 21 U.S.C. § 343(r)(4).

<sup>184</sup> *E.g.*, 42 U.S.C. § 7545(k)(4)(A).

<sup>185</sup> 16 U.S.C. § 1533(b)(3); 16 U.S.C. § 1533(b)(3)(D); *see also* 42 U.S.C. § 6295(n); 49 U.S.C. § 106.

<sup>186</sup> 42 U.S.C. §§ 7671a(c), 7671e(b), 7671j(e).

<sup>187</sup> 42 U.S.C. § 6295(n).

<sup>188</sup> 15 U.S.C. §§ 1193(k), 1262(j), 2058(i).

<sup>189</sup> 21 U.S.C. § 343(r)(4).

- *Resource Limitations and Reports*—The Clean Air Act specifies that resource and time limitations alone cannot be grounds for denying a petition to list hazardous air pollutants for regulation.<sup>190</sup> However, a few statutes make some concessions for resource limitations and competing priorities. The Endangered Species Act allows the agency to decide the petition has merit, but that other priorities preclude immediate resolution; the statute instructs the agency to develop a system to monitor the status of such meritorious but deferred petitions.<sup>191</sup> The Toxic Substances Control Act allows a reviewing court to prescribe a deferred timeline for action if it finds the agency lacks resources to grant a petition (note that resource limitations are not necessarily legitimate grounds for denying the petition, just for delaying action).<sup>192</sup> The Food, Drug, and Cosmetic Act requires FDA to explain to Congress if it takes longer than a year and a half to finalize a rule based on a petition;<sup>193</sup> the FAA must similarly report missed deadlines on petitions to Congress.<sup>194</sup>

Many of these statutory rights were enacted decades ago, and several agency officials as well as some stakeholders express concern that some requirements—particularly tight deadlines—may no longer make sense in light of changing agency budgets, obligations, and priorities. However, other stakeholders continue to believe these rights—and particularly the ones with deadlines—are essential. Current petition practices under the Endangered Species Act and other statutes are discussed further below, in Part IV.

### III.A.1. A Note on Petitions Under the Clean Air Act

The Clean Air Act states that 5 U.S.C. §§ 553-557 and 706 do not apply to a variety of Clean Air Act rules, including some of the Act's most frequently used rulemaking provisions.<sup>195</sup> Though the Act replicates much of the APA and also contains specific petition provisions (like on ozone-depleting substances<sup>196</sup>), the Act does not explicitly contain a general right to petition for any rulemaking under the Act. This exemption puts into question whether and when the public has a right to petition for rulemakings under the Clean Air Act.

Most courts have implied that 5 U.S.C. § 553(e) allows the public to petition for rules under the Clean Air Act, even on subjects the Clean Air Act would seem to exempt from the APA.<sup>197</sup> At least one court disagreed, insisting that if a right to petition for rulemaking exists under the Clean Air Act, it does not derive from the APA.<sup>198</sup> Regardless, in arguably one of the most important cases

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<sup>190</sup> 42 U.S.C. § 7412(b)(3).

<sup>191</sup> 16 U.S.C. § 1533(b)(3).

<sup>192</sup> 15 U.S.C. § 2620; *cf. supra* Section II.F.3 on denials on resources versus merits.

<sup>193</sup> 21 U.S.C. § 343(r)(4).

<sup>194</sup> 49 U.S.C. § 106.

<sup>195</sup> 42 U.S.C. § 7607(d)(1).

<sup>196</sup> 42 U.S.C. §§ 7671a(c), 7671e(b), 7671j(e).

<sup>197</sup> *E.g.*, *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 666 (D.C. Cir. 1975) (implying the APA petition right applies whenever anyone seeks revision to any standard reviewable under Section 307 of the Clean Air Act, the very section containing the list of exemptions); *Com. of Va. v. E.P.A.*, 108 F.3d 1397, 1402 *decision modified on reh'g*, 116 F.3d 499 (D.C. Cir. 1997) (finding § 553(e) applies to petitions for interstate abatement under Section 126 of the Clean Air Act, which is listed by Section 307 as exempt from the APA); *Friends of the Earth v. U.S. E.P.A.*, 934 F. Supp. 2d 40, 54 (D.D.C. 2013) (implying 5 U.S.C. §§ 553(e) and 555(b) apply broadly to EPA and the Clean Air Act); *Sierra Club v. Georgia Power Co.*, 443 F.3d 1346, 1357 (11th Cir. 2006) (saying the APA petition provision allows requests for SIP revisions); *Alabama Env'tl. Council v. Adm'r, U.S. E.P.A.*, 711 F.3d 1277, 1286 (11th Cir. 2013); *State of Vt. v. Thomas*, 850 F.2d 99, 104 (2d Cir. 1988); *Wisconsin Elec. Power Co. v. Costle*, 715 F.2d 323, 325 (7th Cir. 1983).

<sup>198</sup> *State of Maine v. Thomas*, 874 F.2d 883, 890 n.8 (1st Cir. 1989); *see also Massachusetts v. E.P.A.*, 415 F.3d 50, 53-54 (D.C. Cir. 2005) *rev'd*, 549 U.S. 497 (2007) (noting in dicta that 5 U.S.C. § 553 generally does not apply to the Clean Air Act, but still finding jurisdiction to review denials of petitions for rulemaking).



ever regarding a petition for rulemaking, *Massachusetts v. EPA*, the Supreme Court essentially read into the Clean Air Act a general and judicially reviewable right to petition that applies to regulation under the Clean Air Act, concluding that “Congress has moreover recognized [in § 7607(b)(1) of the Act] a concomitant procedural right to challenge the rejection of [a] rulemaking petition as arbitrary and capricious.”<sup>199</sup> The Court also cited 5 U.S.C. § 555(e) to imply that an explanation of petition denials is required even under the Clean Air Act.<sup>200</sup>

*Massachusetts v. EPA* is discussed in greater depth above, in Section II.F.3. Note that Clean Air Act case law is relevant to decisions under the APA, and vice versa, since courts interpret the statutes’ standards of review to be effectively the same.<sup>201</sup> That said, a few quirks apply only to reviews under the Clean Air Act.<sup>202</sup>

### III.A.2. A Statutory Experiment Gone Wrong: Consumer Product Safety Petitions

The history of the Consumer Product Safety Act reveals how granting the public an ambitious right to petition for rulemakings can backfire. Intended by Congress to preemptively prevent the agency from moving slowly on public safety regulation, initially the demanding petition process actually made the agency move more slowly than anticipated. Despite the provision’s later successes, Congress ultimately replaced the right with a more measured petition mechanism. Still, the fate of the ambitious original right was not necessarily inevitable, and strong petition mechanisms may play a valuable role in other contexts.

In 1972, the Consumer Product Safety Act was signed into law, with a bold, “unprecedented” right to petition for rulemakings.<sup>203</sup> Congress felt the departure from the APA was justified by the subject matter and wanted to give petitioners more power to prevent possible agency inertia.<sup>204</sup> The agency had to respond to any public petition within 120 days; denials would be reviewed *de novo* in district court on a preponderance of evidence standard; and petition grants could be combined with a complex “offeror” process, whereby industry or consumer groups could develop the initial regulatory proposal.<sup>205</sup> At the time, any right to judicial review on petitions was relatively “novel,” since it was not yet clear whether review was generally available for APA petitions.<sup>206</sup>

From the moment the Act went into effect, the Consumer Product Safety Commission took these obligations quite seriously: the agency actively solicited petitions, treated nearly any request for action as a “petition,” and thoroughly evaluated all petitions, conducting additional research when the petitioner supplied insufficient data. Seven of the first nine standards it began work on were initiated by petitions, including some products that did not rank high on the hazard index, like tents and, most notoriously, swimming pool slides: the pool slide standard took five years to develop,

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<sup>199</sup> *Massachusetts v. E.P.A.*, 127 S. Ct. 1438, 1455 (2007).

<sup>200</sup> *Id.* at 1459.

<sup>201</sup> *E.g.*, *Allied Local and Regional Mfrs. Caucus v. EPA*, 215 F.3d 61, 68 (D.C. Cir. 2000) (“To determine whether EPA’s rules are ‘arbitrary and capricious,’ we apply the same standard of review under the Clean Air Act as we do under the Administrative Procedure Act.”).

<sup>202</sup> For example, certain Clean Air Act-specific limitations to filing for judicial review may apply, in particular to petitions seeking the amendment of an existing rule, see *Am. Rd. & Transp. Builders Ass’n v. E.P.A.*, 588 F.3d 1109 (D.C. Cir. 2009). Also, suits for unreasonably delay under the Clean Air Act go to the D.C. Circuit court, while suits for arbitrary and capricious denials go straight to the D.C. Circuit. See 42 U.S.C. §§ 7604, 7606.

<sup>203</sup> Teresa M. Schwartz, *Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 34 (1982-1983).

<sup>204</sup> *Id.* at 45 (quoting Senator Kennedy).

<sup>205</sup> See Consumer Product Safety Act, Pub. L. No. 92-573, §§ 7, 10, 86 Stat. 1217 (1972) (repealed 1981).

<sup>206</sup> Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899, 928 (1973).

had few safety benefits, interfered with competition, and financially benefited the petitioner (a manufacturer of slides).<sup>207</sup> “The result, according to one informed observer, was ‘disaster’; the agency was ‘swamped in . . . unproductive investigations of useless subjects,’ plagued by delay, and deprived of the ability to set its own agenda.”<sup>208</sup>

The Commission soon realized it was asserting too little discretion over petitions and had underestimated the resource demands of developing standards. Thus, it changed its interpretation of the statute, stopped encouraging petitions, no longer assumed responsibility for researching the merits of petitions, and started relying to a greater degree on voluntary compliance programs. The new streamlined procedure was more successful; petitioners alerted the Commission, for example, to risks from electric space heaters and power wood splitters that otherwise might have gone unnoticed. The total number of petitions received dropped.<sup>209</sup>

Despite those eventual modest successes under a seemingly workable procedure, the harsh criticism generated by the initial paralyzing effect of the petition process was too much to overcome, and Congress repealed the provision in 1981. As a practical matter, the repeal may have had little effect, as the Commission had not been meeting the 120-day deadline anyway, and judicial review was never a major factor in the petition process.<sup>210</sup> On the other hand, in discussing other similar statutory deadlines for handling petitions, many agency officials and stakeholders report that deadlines are influential even when routinely missed, since they can create a cultural norm around prioritizing and efficiently processing petitions.

According to Professor Teresa Schwartz, the lesson to draw from the Consumer Product Safety Act’s history is that overly ambitious petition provisions are ill-suited to fight or preempt agency inaction. A bold petition provision can give outsiders a voice in setting agency priorities, which may or may not be desirable. The individual and private entities that petition agencies may have narrow interests and incomplete information and, consequently, can be quite bad at setting relative policy priorities in a way that maximizes net benefits for the whole of society; on the other hand, allowing public input in setting agency agendas promotes important and necessary democratic values.<sup>211</sup>

Professors Eric Biber and Berry Brosi, however, recommend caution in extrapolating any lesson from the story of the Consumer Product Safety Act to other contexts. In particular, they find evidence that Endangered Species Act petitions do not interfere with setting a rational agenda consistent with agency missions, since the petition process simply lets the public share its diffuse expertise with the agencies. Biber and Brosi find that ESA petitioners are at least as good as the agencies at identifying “at risk” species that are not too costly to help recover. They also note, however, several features of the ESA petition process that may not apply to all petitions generally.<sup>212</sup> Current practices on ESA petitions are discussed in greater depth in Section IV.

As a coda to the Consumer Product Safety Act story, in 1990 Congress further amended the statute to clarify that responses should be made in a “reasonable time” and to restrict instances when the agency can deny petitions on the basis of a pre-existing voluntary standard.<sup>213</sup> Currently, the CPSC

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<sup>207</sup> Schwartz, *Consumer Product Safety Commission*, *supra* note 203, at 47-52.

<sup>208</sup> Jonathan Weinberg, *The Right to Be Taken Seriously*, 67 U. MIAMI L. REV. 149, 162 (2012-2013).

<sup>209</sup> Schwartz, *Consumer Product Safety Commission*, *supra* note 203, at 53-54.

<sup>210</sup> *Id.* at 55 (noting only two suits were ever filed, and both were dismissed).

<sup>211</sup> *Id.* at 76.

<sup>212</sup> Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321, 363-64 (2010) (contrasting CPSC petitions with ESA petitions).

<sup>213</sup> 15 U.S.C. §§ 1193(k), 1262(j), 2058(i).

receives about 2 to 3 petitions per year; industry submits most, but about a quarter come from public interest groups or individuals; the agency grants about half of petitions it reviews.<sup>214</sup>

### III.A.3. Recent Congressional Proposals and Debates

Though the 1970s were the heyday for enactment of statute-specific petition provisions, the topic of petitions for rulemaking still comes up in congressional debates and legislative proposals from time to time.<sup>215</sup> In recent years, Congress has also actively debated larger revisions to the APA. However, congressional staffers report that petitions have not been at the focus of the recent flurry of legislative proposals to amend the APA, explaining that neither pro- nor anti-regulatory groups had complained very loudly to Congress about petitions for rulemaking. But on the rare occasions when Congress has debated the public's right to petition for rulemaking, the conversation has taken on a highly partisan flavor.

In the 113<sup>th</sup> Congress, Republicans in the House introduced a variety of bills to revise the APA, including H.R. 2122, the Regulatory Accountability Act of 2013. Even though that bill in fact did not seek to change the right to petition and would have preserved exactly the language from the APA, Democratic members of the House Judiciary Committee were instinctively skeptical of all provisions in the Republican bill, objecting that affording the petition right to all interested parties “appears to be extremely broad.”<sup>216</sup> This is not to say that Democrats oppose the APA's broad right to petition for rulemakings; rather, they just seem skeptical of anything the Republicans appear to support.

A similar partisan debate played out in the 104<sup>th</sup> Congress in 1995, over the Comprehensive Regulatory Reform Act introduced in the Senate. That bill, S. 343, would have created a number of new petition rights for regulated entities subject to major rules, including specific rights to petitions for interpretative rules, guidance, variances, and exceptions, as well as to petition for cost-benefit analyses of existing rules.<sup>217</sup> The bill would have further required agencies to grant or deny all petitions within 180 days. John Kerry took to the Senate floor to object strongly to such proposals:

Our fear is that this bill . . . is going to result in the agency being so swamped with petitions and having to respond to so much judicial review that they simply cannot do what they were intended to do, which is protect the health, the safety, and the environmental concerns of Americans. . . . All of us think any American . . . that feels aggrieved by a decision ought to have some means of redress . . . . What we do not want . . . is an unlimited Pandora's box for gaming the system, where one company can come in and bring a petition, then their cohort . . . then another . . . . It is going to create far more gridlock than we have had before because you are going to take a fixed number of employees with a shrinking budget, given them greater responsibility to answer petitions, greater responsibility to go to court . . . .<sup>218</sup>

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<sup>214</sup> See statistics in Appendix C.

<sup>215</sup> For example, H.R. 3675, 113<sup>th</sup> Cong., FCC Process Reform Act of 2014, which passed the House, calls for setting deadlines for the FCC to issue public notice of petitions received.

<sup>216</sup> H. Rep. No. 113-237 at 74 (2014) (dissenting view of Reps. Conyers, Nadler, Scott, Watt, Lofgren, Jackson Lee, Cohen, and Johnson Jr.).

<sup>217</sup> ACUS has studied the issue of petitions for cost-benefit analyses on existing rules before. ACUS consultant Sidney Shapiro concluded such petitions would be duplicative and disruptive. Forcing an agency to conduct or re-conduct a cost-benefit analysis within tight deadlines on any number of existing rules would disrupt a more orderly retrospective review process conducted on the agency's own timelines. Shapiro, *supra* note 4, at 423. This should be contrasted with the more favorable idea of letting the public request cost-benefit analyses on certain proposed, still pending rules, which some U.S. states allow. See Jason A. Schwartz, *supra* note 4, at 87, 111-113.

<sup>218</sup> 141 Cong. Rec. S10,371-72 (July 20, 1995) (statement of Sen. Kerry).

### III.B. Executive Action: Non-Binding but Still Powerful

The White House, and in particular the current administration, has made numerous commitments to engage the public in rule development and to allow generally for petitions. Though these promises are not judicially enforceable, they still provide useful tools for the public to petition agencies for rulemakings.

#### III.B.1. Executive Orders and Retrospective Review

Executive Orders on the rulemaking process, though not judicially enforceable, strongly indicate a preference for agencies to involve the public in rule development, perhaps including through the use of petitions. Executive Order 12,866 tells agencies “to involve the public . . . in regulatory planning”<sup>219</sup> and, where appropriate, to use “consensual mechanisms for developing rulemaking.”<sup>220</sup> Executive Order 13,563 elaborates that agencies “must allow for . . . an open exchange of ideas.”<sup>221</sup> Also relevant to the petition process, agencies must “develop [their] regulatory actions in a timely fashion,”<sup>222</sup> a goal that reinforces the APA instructions that agencies must resolve petitions presented to them in a reasonable time.

Of course, these orders generally apply only to executive branch agencies. But one provision applies to independent agencies, too, instructing all agencies to “prepare an agenda of all regulations under *development or review*, at a time and in a manner specified by the Administrator of OIRA.”<sup>223</sup> Arguably, any pending petition for rulemaking not yet denied by an agency could be “under review.”<sup>224</sup> OIRA could make use of this authority to collect statistics on action and inaction on petitions by both executive branch and independent agencies (see Section V on recommendations).

Independent agencies have also been strongly encouraged by executive order to follow the practice of retrospective review,<sup>225</sup> which is required for executive branch agencies.<sup>226</sup> The retrospective review process seeks to identify regulations that need to be “modified, streamlined, expanded, or repealed.”<sup>227</sup> An OIRA memorandum clarifies that, “Consistent with the general commitment to public participation, agencies should solicit the views of the public on how best to promote retrospective analysis of rules.”<sup>228</sup> Many agencies have developed retrospective review plans that include regular solicitations from the public of suggestions on modifying or repealing existing rules, or expanding regulatory schemes with new rulemakings. In practice, neither industry nor public

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<sup>219</sup> Exec. Order No. 12,866 § 4, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

<sup>220</sup> *Id.* § 6(a)(1).

<sup>221</sup> Exec. Order No. 13,563 § 1(a), 76 Fed. Reg. 3,821 (Jan. 18, 2011).

<sup>222</sup> Exec. Order No. 12,866, *supra* note 219, § 6(a)(3).

<sup>223</sup> *Id.* § 4(b).

<sup>224</sup> See American Bar Association, House of Delegates, Resolution on Petitions for Rulemaking (1988) (“recommends that administrative agencies implement the right to petition for rulemaking . . . by . . . including in the Annual Regulatory Program of the President a list of pending petitions for rulemaking”; but note a different Executive Order existed at the time on the annual regulatory agenda) (cited in Luneburg, *Petitioning Federal Agencies for Rulemaking*, 1988 WIS. L. REV. at 63 n.367); see also Attorney General’s Committee on Administrative Procedure, Final Report: Administrative Procedure in Government Agencies, S. Doc. No. 8, 77<sup>th</sup> Cong., 1st Sess. at 120-21 (1941) (recommending that agencies report on petitions to Congress).

<sup>225</sup> Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 11, 2011).

<sup>226</sup> Exec. Order No. 13,563, *supra* note 221, § 6.

<sup>227</sup> *Id.*

<sup>228</sup> Memorandum from Cass Sunstein, OIRA Administrator, to the Heads of Executive Departments and Agencies and of Independent Regulatory Agencies, at 5, Feb. 2, 2011 (OIRA M-11-10), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf>.

interest groups frequently participate in these retrospective solicitations: public interest groups may perceive the process as tainted by anti-regulatory bias, and industry players who have already sunk costs into complying with existing rules are not eager to let new competitors off the regulatory hook.

There are obvious overlaps between public suggestions on retrospective review and public petitions for rulemaking: a few agencies even report that petitions have generated useful ideas for their retrospective review efforts. Though some agencies currently try to draw a sharp line between retrospective review and petitions, any suggestions submitted through an official retrospective review process that meet an agency's content requirements for petitions should be treated as petitions for rulemaking, regardless of whether they are labeled as such.

### III.B.2. We the People: Pent-up Public Demand?

In 2011, President Obama's White House launched the *We the People* online platform, where the public can submit petitions "on a range of issues—and get an official response."<sup>229</sup> Essentially anyone with an e-mail account can register to submit or sign a petition.<sup>230</sup> If a petition receives 150 signatures within 30 days, it becomes searchable in the *We the People* database; if the petition collects 100,000 signatures in 30 days, the petition is entitled to a response from the White House<sup>231</sup> (the original threshold was 5,000 signatures; it has been raised twice so far).<sup>232</sup> As of June 2014, the website reported having over 14.4 million users, who had signed nearly 350,000 petitions with over 21.2 million signatures.<sup>233</sup> The overwhelming majority of petitions seem to originate with individual petitioners, though some efforts are backed by organizations, non-profits groups, or businesses. Most stakeholders responding to this study (i.e., trade associations, public interest groups, and law firms) were generally familiar with the website but had not been actively involved in petitions.

At least 225 government responses have been generated as of June 2014,<sup>234</sup> about 150 of which are posted on the site as "featured responses."<sup>235</sup> There is no deadline for petitioners to receive their response: the site says the White House will "do our best to respond to petitions that cross the signature threshold in a timely fashion, however, depending on the topic and the overall volume of petitions from We the People, responses may be delayed."<sup>236</sup> Many participants have complained that the responses are not substantive or sincere, and the canned language in some responses does suggest that this process may not be an effective vehicle for changing minds in the White House on established policy positions. "In the fall of 2011, the most popular petition was: 'Actually take these

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<sup>229</sup> Macon Phillips, *We the People: Announcing White House Petitions & How They Work*, White House Blog, Sept. 1, 2011.

<sup>230</sup> The registration form (available at <https://petitions.whitehouse.gov/register>) does not request verification of U.S. citizenship or residence; the zip code field is optional. The Frequently Asked Questions page (<https://petitions.whitehouse.gov/how-why/frequently-asked-questions>) indicates users should be over 13 years old.

<sup>231</sup> White House, *We the People* Terms of Participation (last updated June 24, 2014) (stating the signature thresholds as of January 15, 2013), available at <https://petitions.whitehouse.gov/how-why/terms-participation>.

<sup>232</sup> Michael Herz, *Using Social Media in Rulemaking: Possibilities and Barriers* 27 (Report to ACUS 2013). A signature threshold that triggers a response requirement also appears in some U.S. state administration procedure acts: for example, if 150 registered voters in Maine petition an agency to adopt or amend a rule, the agency cannot immediately deny the petition and must instead at least initiate a rulemaking proceeding. Me. Rev. Stat. tit. 5 § 8055.

<sup>233</sup> Ezra Mechaber, *Making We the People More User-Friendly Than Ever*, White House Blog June 25, 2014.

<sup>234</sup> *Id.*

<sup>235</sup> We the People, Responses, <https://petitions.whitehouse.gov/responses>.

<sup>236</sup> We the People, Frequently Asked Questions, <https://petitions.whitehouse.gov/how-why/frequently-asked-questions>.

petitions seriously instead of just using them as an excuse to pretend you are listening.”<sup>237</sup> Yet according to conversations with government officials familiar with the site, petitioners report a highly positive overall experience with the process, even when the response they receive is negative.

Nevertheless, a few petitions have contributed to real outcomes: the biggest success story to date has been the recent passage of legislation, prompted by petition, to allow customers to unlock their cell phones.<sup>238</sup> Such success stories indicate that where a petition demonstrates the electorate is passionate about an issue that is not on the administration’s radar and is not inconsistent with their other goals, it is possible to influence a policy outcome.

Though many petitions are aimed at other executive powers or even legislation, some do address regulations, either explicitly or implicitly, and some such petitions have been moderately successful. For example, after a petition to regulate “puppy mills” crossed the signature threshold, the Department of Agriculture proposed a rule to update the definition of “retail pet stores.”<sup>239</sup> The final rule’s Frequently Asked Questions page says that the agency first made a commitment to change the regulatory definition following a 2010 Inspector General audit, but also explains the rule responds to the *We the People* petition.<sup>240</sup> Similarly, in May 2014, the Department of Homeland Security proposed a rule that, for the first time, would allow work authorizations for spouses of H-1B workers, a change specifically requested in a 2011 *We the People* petition.<sup>241</sup>

A slightly less clear-cut, but still successful, case involves FDA’s rule on gluten-free labels. The Food Allergen Labeling and Consumer Protection Act of 2004 required FDA to develop a gluten-free label rule by 2008. FDA proposed a rule in January 2007; in August 2011, it reopened the comment period,<sup>242</sup> indicating the rule was still far from final. On October 2, 2012, a *We the People* petition to finalize the rule was launched. It attracted enough signatures to cross the threshold. On August 5, 2013, FDA at last published the final rule.<sup>243</sup> Neither the rule nor FDA’s supporting documentation mention the *We the People* petition directly,<sup>244</sup> but it is possible the petition was a factor in bringing the rule to the finish line.

Even some petitions that fall short of the signature threshold and do not win an official online response end up influencing regulations. For example, a *We the People* petition to revise new Defense Department regulations governing military hairstyles, which some felt discriminated against black women in the military, technically fell short of the signature threshold. Nevertheless,

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<sup>237</sup> Herz, *supra* note 232, at 27.

<sup>238</sup> Ezra Mechaber, *Here’s How Cell Phone Unlocking Became Legal*, White House Blog, August 15, 2014.

<sup>239</sup> Rebecca Blue, USDA Deputy Under Secretary for Marketing and Regulatory Programs, *Official U.S. Department of Agriculture Response to “crack down on puppy mills” Petition: Improving Regulation and Oversight of Commercial Breeders*, available at <https://petitions.whitehouse.gov/response> (last updated September 18, 2013).

<sup>240</sup> APHIS, *Questions and Answers: Retail Pet Store Final Rule*, Dec. 2013, [http://www.aphis.usda.gov/publications/animal\\_welfare/2013/faq\\_retail\\_pets\\_final\\_rule.pdf](http://www.aphis.usda.gov/publications/animal_welfare/2013/faq_retail_pets_final_rule.pdf).

<sup>241</sup> See Penny Pritzker, Sec’y of Commerce, *Taking Action to Attract the World’s Top Talented Professionals*, The U.S. Dep’t of Commerce Blog, May 6, 2014. The administration initially responded to the petition by referencing a package of potential immigration reforms announced in early 2012. Felicia Escobar, *Official White House Response to “Allow H-4 Visa Member to Work Legally” Petition: Allowing Employment Authorization for H-4 Dependent Spouses*, available at <https://petitions.whitehouse.gov/response>.

<sup>242</sup> FDA, *Questions and Answers: Gluten-Free Food Labeling Final Rule* (Aug. 5, 2014).

<sup>243</sup> *We the People* Petition to “Finalize Standards for Gluten-Free Labeling,” available at <https://petitions.whitehouse.gov/petition/>.

<sup>244</sup> FDA, *Guidance and Regulation: Gluten-Free Labeling of Foods*, available at <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Allergens/ucm362510.htm>.

it attracted enough media and congressional attention that the Defense Department agreed to review and revise the regulations governing hairstyles.<sup>245</sup>

Other petitions target still pending or recently concluded regulatory proposals, like FCC's net neutrality regulation (the official White House response contained standard talking points on net neutrality and explained the FCC is an independent agency),<sup>246</sup> or FDA's proposed electronic cigarettes regulation (the official response encouraged petitioners to comment on the proposed rule).<sup>247</sup> Though most *We the People* petitions are short on details, analysis, or other content, and often are just a few sentences long,<sup>248</sup> many try to tackle highly technical and complex subject matters, such as a petition to repeal FERC's shoreline management rules for hydroelectric projects.<sup>249</sup> Many other petitions do not directly call for regulation but could be interpreted as such: for example, a petition to generally "Protect Children from Dangerous Air Pollution" generated a White House response touting recently finalized Clean Air Act regulations.<sup>250</sup>

Many of these general calls to action or terse requests likely could not meet the content requirements that most agencies place on APA-based petitions. Not every user of *We the People* would necessarily be eager to submit a formal petition for rulemaking (see Section IV.A.1 on the many factors that discourage submitting APA-based petitions).<sup>251</sup> Moreover, a large number of *We the People* petitions do not address agency authorities or seek regulatory solutions. Nevertheless, the popularity of *We the People*—especially in contrast to the relatively low number of statute-based petitions for rulemaking submitted every year—could reflect some amount of pent-up demand for public input into the government's agenda. Quite possibly, some *We the People* users are not fully aware of their statute-based rights to petition. Unfortunately, the *We the People* website contains no information on the APA or other statutory processes for petitions for rulemaking—not even on its FAQ page under the question "Is *We the People* the only way I can submit a petition to or contact the White House?"<sup>252</sup> The *We the People* site could play a role in providing the public with basic background information on the other, more formal petition processes that are available to them.

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<sup>245</sup> Benjamin Goad, *Pentagon Relent on 'Offensive' Hairstyle Reg*, The Hill, Aug. 15, 2014; see also Richard Sisk, *Hagel Reviews Hair Regs Seen as Racially Biased*, Military.com, Apr. 30, 2014.

<sup>246</sup> Gene Sperling & Todd Park, *Office White House Response to "Restore Net Neutrality by Directing the FCC to Classify Internet Providers as 'Common Carrier'" Petition: Reaffirming the White House's Commitment to Net Neutrality*, available at <https://petitions.whitehouse.gov/response>.

<sup>247</sup> Mitch Zeller, *Official Food and Drug Administration Response to "Prevent the FDA from Regulation or Banning the Sale and Use of Electronic Cigarettes, Accessories, and Associated Liquids" Petition: Regulation of Electronic Cigarettes by the FDA*, available at <https://petitions.whitehouse.gov/response>.

<sup>248</sup> In a conversation with the authors, one stakeholder called these online petitions "dinky" and nothing like the substantial, legal documents usually submitted under the APA process.

<sup>249</sup> *We the People* Petition to "Curb FERC Regulations, which Overreach and Overregulate the Shorelines of its Hydroelectric Projects," available at <https://petitions.whitehouse.gov/petition/curb-ferc-regulations-which-overreach-and-overregulate-shorelines-its-hydroelectric-projects/pf8SPy6t>.

<sup>250</sup> <https://petitions.whitehouse.gov/petition/protect-children-dangerous-air-pollution>

<sup>251</sup> Some petitioners may prefer collecting signatures, as a way of demonstrating the extent of public support for the proposal. However, APA-based petitions can also be submitted with numerous signatures, and sometimes are. Nothing would stop a petitioner from collecting a large number of signatures using online tools, but then submitting the petition as an APA-based petition for rulemaking, rather than through *We the People*.

<sup>252</sup> *We the People*, Frequently Asked Questions, <https://petitions.whitehouse.gov/how-why/frequently-asked-questions>.



## IV. Current Practices: Evidence and Anecdotes

Current practices for handling petitions are highly variable—from agency to agency, from division to division within an agency, and from petition to petition. This Part summarizes both actual evidence of agencies’ guidelines on and handling of petitions, and perspectives reported by study participants from agencies and stakeholder organizations. **Appendix C** contains three comparative charts: the first on regulations, the second on online information and tools, and the third with statistics on petitions. This Part moves step-by-step through the petition process, from filing to consideration to decision to judicial review, highlighting stakeholder complaints and agency best practices.

### IV.A. Why and How Often Stakeholders Do (Or Do Not) Petition

The chart in Appendix C3 contains some comparative statistics on the average number of petitions different agencies receive annually. Data come from Luneburg’s 1986 study commissioned by ACUS,<sup>253</sup> Biber and Brosi’s study of Endangered Species Act petitions,<sup>254</sup> Professors Livermore and Revesz’s study of EPA petitions and inaction,<sup>255</sup> the Fish and Wildlife Service’s workplan for petitions,<sup>256</sup> surveys conducted for this study with various agencies, and certain agency websites that provide background information on petitions or easily searchable online dockets.<sup>257</sup>

Though a handful of agencies receive several dozen or even hundreds of petitions each year, many others receive relatively few or none at all. Even among those agencies with moderate or high numbers of petitions, many such submissions would be classified as specific requests by regulated entities for waivers or exemptions; while such requests certainly fall under the APA’s definition of a petition for a rulemaking, they are quite different from policy-oriented petitions for legislative rules of general applicability. Policy-oriented petitions are relatively rare. Even some very sophisticated stakeholders, who are otherwise quite active in the regulatory process, report having “limited experience with petitions.”

Putting aside the question of whether more or fewer petitions for rulemaking would be optimal, this section explores the various factors that influence who petitions, and when.

#### IV.A.1. Factors that Discourage Stakeholders from Filing to Petitions

There are many reasons why stakeholders in the regulatory process may choose not to submit a petition, including:<sup>258</sup>

- *Better Alternatives*—The availability of more effective or more efficient means of influencing an agency’s agenda may discourage petitions. Such alternatives include:
  - Asking Congress for oversight, appropriation riders, or legislative changes.

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<sup>253</sup> Luneburg, *supra* note 2, at 519-20, 537.

<sup>254</sup> Biber & Brosi, *supra* note 212.

<sup>255</sup> Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L. J. 1337, 1386 (2013).

<sup>256</sup> U.S. Fish & Wildlife Service, *Listing Program Work Plan: Questions and Answers*, [http://www.fws.gov/endangered/improving\\_esa/FWS%20Listing%20Program%20Work%20Plan%20FAQs%20FINAL.PDF](http://www.fws.gov/endangered/improving_esa/FWS%20Listing%20Program%20Work%20Plan%20FAQs%20FINAL.PDF)

<sup>257</sup> Relevant websites are listed in the chart in Appendix C2.

<sup>258</sup> Besides anonymous conversations conducted by the authors, this section draws from Luneburg, *supra* note 2, at 518; Shapiro, *supra* note 4, at 413; Neil R. Eisner & Judith S. Kaleta, *Federal Agency Reviews of Existing Regulations*, 48 ADMIN. L. REV. 139, 166 (1996) (derived from a Report to the ABA Section of Administrative Law and Regulatory Practice) [hereinafter “ABA Report”].



- Pursuing litigation.
- Communicating informally with agencies or the White House.
  - Many agencies operate in insular worlds and are “plugged in” to the regulated and advocacy communities. Stakeholders already talk to agencies regularly and do not need petitions to ask for rule changes or interpretations. For example, regulated entities may communicate requests to enforcement staff in the field.
  - Stakeholders may indirectly appeal to an agency by working informally through friendly contacts in another agency or an office in the White House. Some regulatory suggestions are raised during advisory committee meetings.
  - Some agencies prefer to receive requests for rule reviews through their retrospective review procedures.
  - Informal requests may leave fewer fingerprints than written petitions, allowing the agency to claim (or the stakeholder to avoid) credit for the rule.
  - When agencies have established more detailed procedures for handling petitions, stakeholders may purposively avoid using the word “petition” in making a request, for fear of delays. For example, in an independent agency, the commissioners may need to schedule a vote on a “petition,” whereas the general counsel might be able to offer informal guidance on a mere “request.”
- *Limited Benefits*—Fear that a petition will not succeed in securing the desired regulatory changes may discourage petitions. For example, stakeholders may:
  - Expect that the agency will ignore or not respond favorably to the request.
    - One agency acknowledged that if it granted more petitions, it would likely see increased use of the device.
    - Because litigation may be required to get an agency response on a petition, some stakeholders view petitioning not only as a long, uphill process, but as a blunt tool to be used sparingly.
  - Expect extreme delays in agency responses to petitions, or general ossification in the rulemaking process.
    - A slow timeline for handling petitions is especially problematic for time-sensitive requests, such as a public safety emergency or when seeking a stay of enforcement on a regulation about to take effect.
  - Expect that agencies are already working on or have fixed positions on most issues that might otherwise be the subject of a petition.
  - Expect that courts will simply “rubber stamp” agency denials of petitions.
- *Inaccessibility* may further discourage petitions:
  - Stakeholders and the general public may not be aware of the process; some may send requests by letter (or online through *We the People*), not knowing they could have styled the request as a “petition” under the APA. Even one active stakeholder reported having no knowledge of a particular, issue-specific petition process with statutory deadlines until they “stumbled upon it” in the U.S. Code.
  - Lack of clear procedures may leave stakeholders confused about how to petition.

- Stakeholders and the general public may lack the necessary resources, data, or expertise to prepare a petition. Some agencies claim that their regulations are “too sophisticated” for most stakeholders to meet the content requirements for petitions; sophisticated stakeholders already have informal relationship with the agencies and do not require petitions to get the agency’s attention.
- Some stakeholders know or fear that they would not have standing to litigate a denial of their petition, and so are discouraged from ever filing the petition to begin with.
- *Costs* may further discourage petitions:
  - As one stakeholder summarized, petitions are “grunt work, aren’t glamorous, take a long time, and require expertise.”
    - Petitions that are lighter on substance have a relatively poorer track history (or at least perceived track history) in securing regulatory changes, since agencies are usually not inclined divert their own research efforts to investigate whether a petition has merit. Consequently, many petitioners feel that, to position themselves for success, their petitions must be data-heavy, highly technical, and backed by peer-reviewed science and legal expertise. Even sophisticated, well-financed stakeholders report sometimes needing to hire outside consultants to prepare a petition. The resource demands can be intense.<sup>259</sup>
    - Furthermore, the effort to build a coalition and organize follow-up campaigns to promote a petition can be considerable.
  - Stakeholders may anticipate that costly and unpredictable litigation over unreasonable delay would end up being necessary to prompt an agency to respond to a petition.
  - Stakeholders may not want to risk alienating their agency contacts by petitioning them with an unpopular request.

#### IV.A.2. Factors that Motivate Stakeholders to File Petitions

Stakeholders and agencies also report a variety of reasons why petitions might sometimes still be the best advocacy tool for the job:<sup>260</sup>

- *Last Resort*—Petitions are sometimes appealing when stakeholders run out of other options.
  - As congressional oversight of agency activity has become more partisan and less substantive, going to Congress is viewed as less effective.
  - Informal communications with agencies may prove unsuccessful, perhaps especially when the political climate shifts in a pro- or anti-regulatory direction.
  - At times, the courts have held that the only available option for a legal challenge to a longstanding regulation is to first petition for modification or repeal.<sup>261</sup>

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<sup>259</sup> *But see* Biber & Brosi, *supra* note 212, at 344 (“[I]t is relatively easy to prepare and submit a petition, as evidenced by the participation of a wide range of individuals.”).

Note that this reference to the resource demands of preparing a lengthy, data-heavy petition previews the resource demands on agencies of reviewing such petitions. Such demands on the agency are explored in Section IV.F.3.

<sup>260</sup> See also the same sources as cited at *supra* note 258.

<sup>261</sup> *E.g.*, *Auer v. Robbins*, 519 U.S. 452, 459 (1997) (“[W]here, as here, the claim is not that the regulation is substantively unlawful, or even that it violates a clear procedural prerequisite, but rather that it was ‘arbitrary’ and ‘capricious’ not to conduct amendatory rulemaking (which might well have resulted in no change), there is no basis for

- In an advocacy campaign, stakeholders may use any and all available means.
- *A Culture of Petitioning* may explain why certain agencies get many more petitions than others.
  - For certain matters, like listings under the Endangered Species Act, petitions emerged as the main vehicle for public participation; stakeholders see no effective alternatives.<sup>262</sup>
  - In certain legal circles, especially smaller communities like the food and drug bar, petitions are common knowledge and have become part of standard lawyering practice.
  - On very rare occasions, both regulated entities and public interest stakeholders report receiving encouragement from agency staff to submit a petition.
    - At least one agency said it would strongly encourage the public to submit more petitions. Such a sentiment is firmly a minority view; other agencies may express surprise at the lack of policy-oriented petitions they receive, but specifically are *not* seeking more, noting the intense resource demands.
    - In recent years, some in the business community have accused agencies of complicity in being petitioned for rulemakings and then sued for failure to respond, with the alleged goal of committing to regulatory action in a settlement agreement without broader public input. Agencies and public interest groups emphatically deny any such arrangement. (See Section IV.G. for more on the “sue and settle” controversy.)
    - Sometimes an agency will tell a stakeholder that an informal request for a rule change or guidance can be processed only if re-submitted formally as a petition.
- *Written Record*—Petitions may help stakeholders organize and clarify their requests.
  - By building a coalition and collecting signatures from many groups, stakeholders can use petitions as written evidence of the breadth of public support for their request.
  - Petitions help stakeholders crystalize their request into a clear, formal statement.
  - Some stakeholders find value in conducting the necessary research to develop the petition. It is a way of gathering the latest data to present to the agency.
  - Putting a request in writing, as opposed to making it informally or orally, may help ensure the request does not get lost. (Though at least one petitioner reported that an agency did literally lose one of its petitions after several years.)
- *Radars and Nudges*—Some petitions set up or gently push along the conversation.

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the court to set aside the agency’s action prior to any application for relief addressed to the agency itself. The proper procedure for pursuit of respondents’ grievance is set forth explicitly in the APA: a petition to the agency for rulemaking, § 553(e), denial of which must be justified by a statement of reasons, § 555(e), and can be appealed to the courts, §§ 702, 706.”); *see also* RSR Corp. v. EPA, 102 F.3d 1266, 1270 (D.C. Cir. 1997) (“The proper place for RSR to raise its ‘new studies’ argument is in a petition for a rulemaking.”); *but see* Skubel v. Fuoroli, 113 F.3d 330, 334 (2d Cir. 1997) (“Where a plaintiff is challenging the validity of a regulation, the rule of exhaustion normally requires that the plaintiff petition the agency for rulemaking. However, a plaintiff’s failure to exhaust administrative remedies can be excused if . . . exhaustion would be futile or . . . would result in irreparable harm. . . . In this case . . . letters written by [the agency foreclosing new regulation absent court order] provide strong evidence that it would have been futile to petition HHS for rulemaking.”); Fox Television Stations v. FCC, 280 F.3d 1027, 1040 (D.C. Cir. 2002); Pierce, *supra* note 54, at 522-23 (criticizing rulings that excuse failure to petition for rulemaking before seeking judicial review).

<sup>262</sup> The ESA’s provision on petitions itself may be seen by stakeholders as a credible commitment by Congress that the agencies will take petitions seriously, providing incentives for outside groups to collect the scientific information necessary to support petitions. Biber & Brosi, *supra* note 212, at 367.

- The goal may be to start a public-private conversation, using the petition as a rallying point to create public awareness and put an issue on an agency's radar. Such petitions may be most successful when the issue simply has been ignored and does not actively conflict with other administrative priorities or preferences. Petitions may also be political statements, designed to attract congressional attention.
- Some petitions are designed to preserve an idea that is not yet ripe; stakeholders may be happy to wait until the window of opportunity does open, even if it takes years.
- Petitions can be useful when an agency has been mulling for years and the rule is in limbo, to remind the agency that stakeholders still care.
- As formal submissions, petitions may attract more press attention than informal requests, and sometimes press attention is the goal of petitioning in the first place.
- *Legal Rights*—Petitioners value the action-forcing nature of the right to petition.
  - Petitioners know that, though it may take years and they may not like the answer they get, eventually the agency will have to address their issue.
  - Some petitioners claim petitions are most useful when there is not any other clear statutory obligation for the agency to act; other petitioners say the opposite, that petitions are most useful to enforce a specific legal obligation the agency is ignoring.
  - Petitions can set up litigation, which may be especially helpful if a political change is anticipated or feared.
- *Earnest Hope*—Some petitioners insist that only their earnest hope to change policy motivates the petition, not press or litigation. As one stakeholder said, "It may work, you never know!" Another said, "Petitions are the ugly ducklings of administrative law: they do not get much credit, but they are a valuable tool."
- *"Sham" Petitions*—In 1995, the Federal Trade Commission launched an investigation into whether pharmaceutical and medical device companies were filing frivolous, anticompetitive petitions with the FDA to impose barriers to market entry; allegations of sham petitioning had also been raised about petitions before FCC, FERC, NRC, and USDA, among other agencies.<sup>263</sup> Though FDA proposed rules in 1999 to try to limit such allegedly frivolous petitions, it withdrew the rules in 2003.<sup>264</sup> Petitions could in theory be used to deliberately impose additional resource burdens on agencies, to delay various agency actions.

#### IV.A.3. Who Petitions?

Some of the factors listed above might predict that only the most well-financed, organized stakeholders with long-term advocacy strategies would be able and motivated to submit petitions for rulemaking. Other factors would hint that only less-connected stakeholders would ever bother with petitions. Some agencies report receiving petitions from a wide range of stakeholders, with petition quality varying accordingly from highly technical to less sophisticated.

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<sup>263</sup> See Lars Noah, *Sham Petitioning as a Threat to the Integrity of the Regulatory Process*, 74 N.C. L. REV. 1, 2, 12-13, 18 n.70 (1995) (noting FTC investigation and other allegations, though also reporting several agencies indicate sham petitioning occurs "rarely" or "never").

<sup>264</sup> See FDA, 64 Fed. Reg. 66,822 (Nov. 30, 1999) (proposing amendments to petition procedures); Comments from FTC Bureau of Competition and Policy Planning Staff, to FDA, on Docket No. 99N-2497 (March 2, 2000) (praising FDA's proposal as an effort to reduce the potential for petitions to be used for "improper purposes, such as delaying competition").

Historically, evidence and best guesses had pointed to the regulated industries as the dominant petitioners.<sup>265</sup> In 1973, then-ACUS chair Antonin Scalia and Frank Goodman noted that while Congress may have intended special statutory rights to petition to increase general public participation in rulemaking and agenda-setting, “experience . . . suggests that regulated companies may be the most frequent users of the petition procedure and its principal beneficiaries.”<sup>266</sup>

Today, according to available evidence, the regulated community still submits the majority of petitions government-wide, and the majority at most agencies. But the makeup of petitioners varies from agency to agency. The comparative statistics in Appendix C3 on who petitions are based on samples of petitions submitted over the last several years and either available on agencies’ online dockets or provided by agencies in response to this study’s questionnaire; some data sources may be incomplete, and the years selected for review are not necessarily representative. The authors roughly grouped petitions into broad categories of petitioner types; the percentages in the chart should be taken as general approximations of the frequency of submissions by petitioner type, and not as precise calculations.

At many agencies, regulated businesses and trade associations submit a clear majority or even essentially all petitions. At the Department of Energy, for example, of 112 recent petitions, 2 were from public interest or legal advocacy groups, 2 were from state governments, and rest (108) were from trade associations and industry. FERC reports that, though they receive few petitions, almost all come from trade associations. At the Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (PHMSA), which receives over 20 petitions per year on average, all but one currently pending petition (as of August 2014) came from industry. At both the Consumer Product Safety Commission and the Securities and Exchange Commission, nearly three-quarters of petitions are from business interests.

However, public interest groups submit the clear majority of petitions at a few agencies, like EPA and the two agencies that manage Endangered Species Act petitions.<sup>267</sup> Yet even at these agencies, businesses still submit a fair number of petitions, and individuals also are frequent petitioners. A similar mix is found at the Federal Election Commission.

Only a few agencies receive petitions in nearly even proportions from the various categories. At the Food Safety and Inspection Service, for example, public interest groups submit roughly the same number of petitions as businesses and trade associations. The Nuclear Regulatory Commission has perhaps the most even mix, with businesses, public interest groups, and individuals all submitting in roughly equal measure. Labor organizations are, predictably, most active before only a few agencies, like the National Labor Relations Board.

“Individuals” is perhaps too broad a category to convey useful information.<sup>268</sup> The chart in Appendix C3 shows that individuals submit about a tenth to a quarter of the petitions at some agencies. Yet most agency officials and stakeholders interviewed for this study assumed that average U.S. citizens were generally unaware of the right to petition for rulemaking and were

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<sup>265</sup> *E.g.*, Luneburg, *supra* note 2, at 542, 551 (estimating that about half of petitions to NHTSA came from manufacturers, with the rest from trade associations, interest groups, or private citizens; and noting that at the NRC, 9 of 41 petitions came from public interest groups, 7 from private citizens, 2 from governments, and the rest from licensees or trade associations).

<sup>266</sup> *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899, 928 (1973).

<sup>267</sup> In matters before EPA, at least, “industry groups do not appear to have successfully used petitions as a means of increasing their influence over regulating agencies.” Livermore & Revesz, *supra* note 255, at 1389.

<sup>268</sup> In the chart, loosely organized groups are included in the “individuals” category, since some of these groups may effectively be a single individual with a website. Such groups are contrasted with more organized public interest groups, which are likely registered as a 501(c)(3) or the equivalent.

unlikely to submit petitions. In practice, many of the individual petitioners are former agency staffers, lawyers, or academics, especially scientists and law professors. It is not surprising that such individuals are more likely to be aware of the right to petition for rulemakings.

#### **IV.A.4. One Brief Example: On the Lighter Side of Petitions...Make that the Darker Side**

On May 7, 2014, the USDA's Agricultural Marketing Service proposed a rule based on a 2011 petition from the International Maple Syrup Institute (a trade group) to relax restrictions on the darkest blends of syrup and allow them to be classified for retail sale.<sup>269</sup> Perhaps agency officials and regulatory stakeholders can all come together to cook up some Johnnycakes in honor of the constitutional right to petition the government!

### **IV.B. Official and Informal Procedures**

Many agencies have not adopted written procedures on petitions, preferring a more ad hoc approach.

#### **IV.B.1. Comparative Regulations for Handling Petitions**

In 1986, Luneburg made this observation on official agency procedures for petitions: "Some have none; others largely mirror, without elaborating much on, statutory procedures; and still others have adopted rather detailed requirements . . . going considerably beyond the procedures expressly mandated by statute."<sup>270</sup> Nearly 30 years later, the observation holds. Appendix C1 is a comparative chart of agency regulations on handling petitions. Some noteworthy features are highlighted in blue in the chart (each such feature may be highlighted only once, even though multiple agencies may share the same practice); these features are discussed more in the following sections.

Of the cabinet-level executive agencies:

- 5 have no regulations on handling petitions (Defense, Education, Small Business Administration, State, and Veterans Affairs);
- 8 have no general regulations, though a few subagencies or individual regulatory programs may have their own specific rules for handling petitions (Commerce, with the exception of National Marine Fisheries Service; neither Energy nor EPA, with the exception of a few specific programs; Health and Human Services, with the exception of FDA; Homeland Security, with the exception of Coast Guard and FEMA; Justice, with the exception of a single DEA program; Labor, with the exception of OSHA; and Treasury, with the exception of TTB and IRS);
- 2 have general regulations that largely mirror statutory procedures, though subagencies may offer more detailed guidance (Agriculture; Interior); and
- 2 have somewhat more detailed procedures (Housing and Urban Development; Transportation).

Of independent agencies, several have notably detailed procedures (such as the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Election Commission, and the Nuclear Regulatory Commission), while others have either no procedures or offer few

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<sup>269</sup> 79 Fed. Reg. 26,200 (May 7, 2014).

<sup>270</sup> Luneburg, *supra* note 2, at 510; *see also* ACUS Recommendation 86-6, at 1 (1986) ("[F]ew agencies have established sound practices in dealing with petitions or responded promptly to such petitions.").

details beyond basic statutory requirements (such as the Consumer Financial Protection Bureau, Federal Electricity Regulatory Commission, and the Securities and Exchange Commission).

ACUS's 1986 Recommendations on petitions for rulemaking did influence at least some agencies to adopt or update their procedures. For example, in 1993, the Food Safety and Inspection Service was motivated by the ACUS Recommendations to adopt public "guidelines" as well as internal directives on petitions, to replace its purely "ad hoc" system.<sup>271</sup> Those guidelines were initially published as just a *Federal Register* notice and not codified as official agency regulations. By 2006, the agency felt that actual regulations would be more desirable, because "petitions are submitted to FSIS in various forms, often without adequate data and supporting documentation for FSIS to properly evaluate the merits."<sup>272</sup> Those proposed rules were not finalized until over three years later, though, suggesting that while the agency believed official procedures on petitions would be beneficial, they were not the highest priority. Similarly, the Department of Homeland Security has published notice of its intent to develop procedures on petitions in every unified regulatory agenda since 2009, but every six months the target deadline is pushed to the following six-month period.<sup>273</sup> Evidently, some agencies recognize that ideally they should have petition procedures, but it is not their highest priority.

Agencies have different perspectives on whether a lack of official procedures affects their handling of petitions in practice. One agency explained that, despite a lack of procedures, its staff had given serious thought to how to handle petitions. In contrast, another agency admitted that, given the low number of petitions it received and lack of official procedures, when the occasional petition does come in, most staff members are initially clueless about what steps they are required to take.

Most stakeholders would prefer that agencies adopt clear guidelines on how to submit petitions and how the agency will process petitions. A few indicated that the adoption of new regulations would not likely increase the number of petitions they submit. Rather, stakeholders want agencies to adopt regulations as part of a broader effort to improve transparency in the handling of petitions.

#### IV.B.2. Other Guidance and Websites

In addition to official procedures adopted by regulation, some agencies have written guidance or internal memoranda on how they process petitions. PHMSA provides a good example of a staff manual on petitions.<sup>274</sup> Its Standard Operating Procedure designates a Petitions Coordinator to perform an initial assessment of whether submissions meet basic requirements for filing, diagrams a decision-making flowchart, and includes sample letters of denial and acceptance. Other agencies, such as the Alcohol and Tobacco Tax and Trade Bureau, have manuals designed for potential petitioners, intended to help improve the quality of submissions.<sup>275</sup> Appendix C1 lists which agencies have public or internal guidance.

A growing number of agency websites also offer some additional, informal instructions about petitions, though the clear majority of executive and independent agencies and subagencies have little or no specific web content on the general right to petition or instructions on how to petition. Web content may include a general description of the right to petition, links to regulations on

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<sup>271</sup> 58 Fed. Reg. 63,570 (Dec. 2, 1993) (also noting the revision of FSIS Directive 1232.2 in 1989).

<sup>272</sup> 74 Fed. Reg. 16,104 (Apr. 9, 2009) (finalizing the regulations).

<sup>273</sup> Most recently, the target to propose regulations on petitions is set for December 2014, <http://www.reginfo.gov/public/Forward?SearchTarget=Agenda&textfield=1601-aa56>.

<sup>274</sup> It is not clear if the manual is available to the public.

<sup>275</sup> E.g., TTB, American Viticulture Area Manual for Petitioners (2012), available at [http://www.ttb.gov/wine/p51204\\_ava\\_manual.pdf](http://www.ttb.gov/wine/p51204_ava_manual.pdf).



petitions, or detailed manuals. The best examples include plain language descriptions of the process petitioners may use submit and track the status of their requests (see, for example, the next section on the Nuclear Regulatory Commission's web content). Appendix C2 lists agency websites on petitions for rulemaking.

A few agencies have published blog posts or newsletter articles on petitions for rulemaking, including FSIS,<sup>276</sup> the Coast Guard,<sup>277</sup> FAA,<sup>278</sup> and NRC (see next section).

Putting aside the question of whether more agencies should offer the public more official or online guidance on the petition process, those agencies that do should be careful to ensure that their regulations and guidance do not conflict, fall out of date, or inadvertently send mixed signals to petitioners. For example, the National Organic Program's regulations say petitions must be mailed, while its public guidance says e-mail submissions are preferred.<sup>279</sup> Similarly, as of July 2014, FDA's website misleadingly informs visitors that petitions cannot be accepted electronically, even though the agency now allows submissions through an innovative use of regulations.gov.<sup>280</sup>

There are also two government-wide online resources that house information about the regulatory process, allow the public to participate in the regulatory process, and even are sometimes used by agencies for publishing and collecting public comments on petitions: regulations.gov and federalregister.gov. Neither of those sites (nor the *We the People* petition site as noted above) contains much background information on the right to petition or how the public can petition agencies for rulemaking. One of the *Federal Register's* online tutorials on the rulemaking process, posted under their "Learn" tab, does very briefly mention petitions for rulemaking.<sup>281</sup> Overall, though, the lack of background information on these sites represents a missed opportunity to educate the public about the right to petition for rulemakings.<sup>282</sup>

#### **IV.B.3. Case Study: Best Practices in Education, Transparency, and Communication at the NRC**

Of all agencies, the Nuclear Regulatory Commission has perhaps given the most thought to how it handles petitions. In the last few decades, the agency has twice conducted in-depth studies of its own and other agencies' practices, the most recent effort leading to changes proposed in 2013 (which have not yet been finalized).<sup>283</sup> As a result, the agency has developed some best practices for educating the public about the right to petition, transparently reporting the status of petitions, and regularly communicating with petitioners. See Appendices C1 and C2 for more details on NRC's regulations and online tools on petitions for rulemaking.

*Education:* In addition to posting online a copy of its regulations for handling petitions, as well as links to the dockets on all petitions received, the NRC's website features a plain language description of the process for filing a petition.<sup>284</sup> In May 2014, the agency further published a blog

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<sup>276</sup> Beth A. McKew, *How to Submit a Petition to FSIS*, Small Plant News vol. 6, no. 7 (2014).

<sup>277</sup> Capt. Sandra Selman, *Petition for Rulemaking: The Public's Role*, USCG Proceedings (Winter 2012).

<sup>278</sup> Tom Hoffman, *Flying by the Rules*, FAA Safety Briefing (Jan. 2012).

<sup>279</sup> Compare 7 C.F.R. § 205.607 with 72 Fed. Reg. 21267 (guidance, 2007).

<sup>280</sup> Compare <http://www.fda.gov/aboutfda/contactfda/commentonregulations/default.htm> with Instructions for Submitting Citizen Petitions Electronically, <http://www.fda.gov/RegulatoryInformation/Dockets/ucm379450.htm>.

<sup>281</sup> <https://www.federalregister.gov/learn/tutorials>.

<sup>282</sup> OIRA's [reginfo.gov](http://www.reginfo.gov) could also contain basic background information on petitions, in its FAQ or Related Resources sections.

<sup>283</sup> See Luneburg, *supra* note 2, at 547 (noting NRC's recent "self-examination"); 78 Fed. Reg. 25,886 (May 3, 2013) (proposing changes, following a review of practices).

<sup>284</sup> <http://www.nrc.gov/about-nrc/regulatory/rulemaking/petition-rule.html>

post entitled “You Can Ask the NRC to Change Its Rules,”<sup>285</sup> which again explains the process in plain language and links to the relevant regulations. The blog post also gives an example of a successful petition, as guidance and perhaps encouragement to would-be petitioners, though the agency is upfront in noting that “[m]ost rule changes are initiated by the NRC, not by petitions from the public.”<sup>286</sup>

*Transparency:* Petitions to NRC are announced in the *Federal Register*, and dockets containing all related communications are publicly available on regulations.gov. Publication and docketing typically happens within a few months of submission (though for at least one petition submitted to the NRC’s Atomic Safety Licensing Board, it took 18 months between receipt and publication of notice).<sup>287</sup>

The NRC’s regulations require semiannual summaries of the status of petitions;<sup>288</sup> in practice, the NRC has replaced this with an up-to-date database of all open and resolved dockets on petition,<sup>289</sup> as well as describing all petitions in its annual summary of rulemaking activities. (NRC’s proposed revisions to its petition process would codify this practice.<sup>290</sup>) The annual summary lists the number of petition receipts published and describes all regulatory activity in response to petitions, including partial considerations and denials.<sup>291</sup>

In publishing grants or denials, the NRC explains its reasoning and responds to public comments received on the petition. If a petition is accepted for further consideration, the *Federal Register* notice explains what steps the NRC intends to take and how the public can keep track of those ongoing efforts.<sup>292</sup> NRC’s proposed revisions to its petition process would clarify its decisionmaking process to the public, explaining how the agency factors in the merits of the petition, the immediacy of the concern, available resources, ongoing related processes, relative priority, public comments received, and previous relevant decisions.<sup>293</sup>

*Communication:* NRC’s regulations provide contact information and permit potential petitioners to consult with agency staff before submitting,<sup>294</sup> and its website encourages such consultations. NRC offers to “provide information about the process, our regulations, and what we understand about the issues you intend to raise. If a petition falls short of the legal requirements, we’ll explain how to meet our criteria. The petitioner then has the chance to send us more information.”<sup>295</sup>

Consultations are intended to clarify the request and not to debate the merits of the petition. The agency’s proposed revisions to its petition process would expand on this commitment to make consultations available both before and after filing, and would codify a process for petitioners to amend (or withdraw) their requests.<sup>296</sup>

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<sup>285</sup> <http://public-blog.nrc-gateway.gov/2014/05/06/you-can-ask-the-nrc-to-change-its-rules/>

<sup>286</sup> <http://public-blog.nrc-gateway.gov/2014/05/06/you-can-ask-the-nrc-to-change-its-rules/>; see also *id.* (posting a May 9, 2014 reply by Jennifer Borges, Regulations Specialist).

<sup>287</sup> See <http://pbadupws.nrc.gov/docs/ML1333/ML13331B046.pdf>.

<sup>288</sup> 10 C.F.R. § 2.802(g).

<sup>289</sup> <http://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/petitions-by-year.html>

<sup>290</sup> 78 Fed. Reg. 25,886 (May 3, 2013).

<sup>291</sup> <http://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/published-rules-by-year.html>

<sup>292</sup> <http://public-blog.nrc-gateway.gov/2014/05/06/you-can-ask-the-nrc-to-change-its-rules/>

<sup>293</sup> 78 Fed. Reg. 25,886.

<sup>294</sup> 10 C.F.R. § 2.802(b) (“may consult”).

<sup>295</sup> <http://public-blog.nrc-gateway.gov/2014/05/06/you-can-ask-the-nrc-to-change-its-rules/>

<sup>296</sup> 78 Fed. Reg. 25,886.

To further facilitate communications with petitioners, the agency's proposed revisions to its petition procedures would require petitioners to clearly identify the contact information (including organizational affiliations) for the lead petitioner.<sup>297</sup> Upon finding that the petition meets basic criteria for docketing, the agency sends the petitioner a letter providing its own contact information for the relevant agency staff.<sup>298</sup> NRC does its best to provide "periodic updates on the status of the staff's work on the petition,"<sup>299</sup> and recent petition dockets on regulations.gov typically contain regular e-mails sent about every six months or every year to petitioners.<sup>300</sup> The agency sometimes asks petitioners for clarifications,<sup>301</sup> and it sometimes publishes draft interim reviews of issues raised by petitions,<sup>302</sup> to which the petitioner and others can respond with comments.<sup>303</sup> Though some stakeholders complain that NRC routinely breaks its promises to communicate,<sup>304</sup> evidence in its online dockets suggests NRC is among the most responsive agencies, with some of the clearest practices for communication.

#### IV.C. Content Requirements and Petition Quality

Appendix C1 describes the different content requirements set out by various agency regulations or guidelines. Many regulations take a general approach to content, calling only for petitioners to identify their interest, describe the substance of their proposal, and provide any information available to them that supports their proposal. In contrast, some regulations are much more specific, requiring that petitions be clearly marked as "petitions"<sup>305</sup> or include:

- Specific document headings and sections;<sup>306</sup>
- Precise text of the regulatory proposal;<sup>307</sup>
- Sufficient evidence so that no independent research by the agency is required to evaluate the petition's merits;<sup>308</sup>
- Any information available to petitioner that may be unfavorable to the proposal, in addition to the favorable data;<sup>309</sup>
- Full copies of all literature and data relied upon;<sup>310</sup>
- Upon agency request, additional analyses on costs, benefits, or various impacts (though the agency may consider whether such data is not reasonably available to the petitioner);<sup>311</sup>

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<sup>297</sup> *Id.*

<sup>298</sup> <http://www.regulations.gov/#!documentDetail;D=NRC-2011-0189-0008>.

<sup>299</sup> <http://public-blog.nrc-gateway.gov/2014/05/06/you-can-ask-the-nrc-to-change-its-rules/>

<sup>300</sup> <http://www.regulations.gov/#!documentDetail;D=NRC-2011-0189-0034>

<sup>301</sup> <http://www.regulations.gov/#!documentDetail;D=NRC-2012-0177-0003>

<sup>302</sup> <http://www.regulations.gov/#!documentDetail;D=NRC-2009-0554-0046>

<sup>303</sup> <http://www.regulations.gov/#!documentDetail;D=NRC-2009-0554-0048>

<sup>304</sup> <http://www.regulations.gov/#!documentDetail;D=NRC-2009-0044-0003> (comment by petitioner).

<sup>305</sup> E.g., 50 CFR 424.14.

<sup>306</sup> E.g., 21 CFR §§ 10.20, 10.30, 10.33, 10.35.

<sup>307</sup> E.g., 17 CFR 13.2.

<sup>308</sup> E.g., 27 CFR § 9.11-9.14.

<sup>309</sup> E.g., 7 CFR 340.5.

<sup>310</sup> E.g., 9 CFR pt 392.

<sup>311</sup> E.g., 49 CFR §§ 106.95-106.130. The Federal Railroad Administration goes further and required a cost-benefit analysis, quantified to the extent possible, on all petitions. 49 C.F.R. § 211.9.

- Details on how the proposal would advance the agency's mission, and what resources the agency would need to develop the proposal;<sup>312</sup> and
- A signed certification of the truth of any claims made.<sup>313</sup>

At times, it can be difficult to discern whether regulations are mandating certain content, or whether they are just making recommendations to the petitioner.<sup>314</sup> Some agencies will take into account the resource limitations of small entities or individual petitioners and will relax their expectations for content and quality.<sup>315</sup> Most agencies report being fairly flexible in treating most written requests for regulatory changes as "petitions," even when they are not labeled as such or do not perfectly comply with all content requirements.<sup>316</sup> However, other agencies are upfront about rejecting submissions that fail to meet their criteria. Typically, such petitions found to be incomplete will be returned to the petitioner with an explanation of the deficiency or instructions to submit additional data.<sup>317</sup> A few agencies will still evaluate the merits of deficient submissions, but only on a more ad hoc basis and not according to any of the rigorous procedures that govern the handling of official "petitions."<sup>318</sup>

Stakeholders and agencies sometimes disagree on what counts as a "petition." One stakeholder reported that, after submitting a clearly labeled petition to an agency that likely had little previous experience with petitions, the agency sent back its thanks for the "letter"; the petitioners then had to explain to the agency the rights entitled to petitions under the APA. In another case, an agency notified a stakeholder that its letter requesting a regulatory change would be treated as a "petition"; the group objected to the label, insisted its letter was not a petition, and filed a document formally withdrawing the "petition."<sup>319</sup> Some agencies will not treat requests for guidance or suggestions for retrospective review as petitions under the APA.

Agencies generally do not believe that their detailed content requirements have deterred any would-be petitioners. In fact, lack of clear requirements can be more of a deterrent, as some petitioners have had to gauge by trial-and-error the amount of data agencies will need to evaluate their petitions.

Whether or not they have adopted formal content requirements, most agencies prefer petitions to include a very specific request, ideally in the form of suggested rule language, and sufficient supporting data. Agencies report that petitions are frequently submitted without sufficient data to facilitate the agency's review. One agency noted that cost-benefit data, which it finds particularly useful in its evaluations of petitions, is "sorely lacking." Other supporting evidence that agencies find useful includes new peer-reviewed studies, of which the agency might not yet be aware. One agency said it wished petitioners were more mindful of just how essential data is to evaluate petitions. Another indicated it gave some consideration to the fact that individual petitioners and small businesses or organizations may not always have access to necessary data. A few agencies reported conducting targeted outreach efforts to likely petitioners or, when rejecting a petition,

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<sup>312</sup> E.g., NMFS Operational Guidelines: Proc. for Dev. of Regs. (1998).

<sup>313</sup> E.g., 7 CFR 340.5.

<sup>314</sup> E.g., 7 CFR 340.5; *see also* Luneburg, *supra* note 2.

<sup>315</sup> E.g., 9 CFR pt 392.

<sup>316</sup> Some agencies noted that oral requests would not count as "petitions," but they would encourage the requesting party to put their suggestion in writing.

<sup>317</sup> E.g., 10 CFR 2.802-2.803.

<sup>318</sup> E.g., 16 CFR §§ 1051.1-1051.11; 11 CFR 200.1-200.6.

<sup>319</sup> Letter from Claire Leslie, Midwest Coalition for Human Rights, to FSIS, re: Petition Number 11-13, Apr. 27, 2012.

providing a very detailed denial letter to help encourage the future submission of high-quality, data-driven petitions.

Despite agency concerns about poor-quality or incomplete petitions, many agencies process petitions relatively quickly, and at least some agencies grant a fair number of the petitions they receive (see Sections IV.F.3-4 and Appendix C3 for some rough statistics on the disposition of petitions). These two facts strongly suggest that many petitions are not frivolous, but rather are high-quality and meritorious. In one study of Endangered Species Act petitions, Professors Biber and Brosi find “little difference between petitions and agency-initiation in overall listing success rate” and conclude petitioners are at least as good as the agency at identifying “at risk” species that are relatively inexpensive to recover.<sup>320</sup> Of course, the lessons learned from the ESA context may not necessarily apply more generally (see Section IV.F.2 for more details on ESA petitions).

#### IV.D. Submission, Initial Review, and Publication

Submission, receipt, docketing, and publication are all related processes that can potentially be facilitated through greater use of online tools.

**Pre-Submission:** As noted above, the Nuclear Regulatory Commission has an official process for pre-submission consultations. Even in the absence of established procedures, stakeholders with close relationships with key agency staff sometimes will inform the agency of their plans to submit a petition.

**Submission:** For most agencies, petitions can be mailed or, presumably, delivered in person. Some specify that certified mail must be used.<sup>321</sup> One agency imposes a filing fee.<sup>322</sup> Many agencies require multiple copies to be submitted, as many as seven copies plus the original.<sup>323</sup>

Only a handful of agencies clearly indicate that they will accept petitions electronically, either by e-mail (Agricultural Marketing Service’s National Organic Program,<sup>324</sup> Coast Guard,<sup>325</sup> and Nuclear Regulatory Commission), by regulations.gov docket (FDA and Federal Aviation Administration), or by the agency’s own e-filing system (FCC, International Trade Commission, and Postal Regulatory Commission). In practice, other agencies may accept electronic submissions, but the availability of that option is not always made clear in regulations or guidance.<sup>326</sup> See Appendix C2 for details.

In practice, and especially when an agency has no specified procedure for submissions, stakeholders will often submit their petitions in duplicate, both by certified mail and e-mail.

FDA provides a good example of the innovative use of online tools to receive petitions. FDA has established an open docket on regulations.gov,<sup>327</sup> to which any interested person can submit a petition and supporting documentation, using essentially the same online forms and fields available

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<sup>320</sup> Biber & Brosi, *supra* note 212, at 353, 361.

<sup>321</sup> E.g., 40 CFR § 260.20-260.43.

<sup>322</sup> 46 CFR § 502.51.

<sup>323</sup> 29 CFR §§ 102.124-102.125. One agency prefers at least 15 copies. 49 CFR § 1110.2.

<sup>324</sup> The agency’s regulations indicate petitions must be mailed, but guidelines indicate e-mail is preferred. See 72 Fed. Reg. 2167.

<sup>325</sup> Coast Guard regulations require submission by mail, but informal guidance indicates e-mailed petitions are accepted.

<sup>326</sup> Not every independent agency with its own e-filing system necessarily will accept petitions submitted electronically. Many independent agencies have regulations that require petitions to be submitted by mail.

<sup>327</sup> FDA-2013-S-0610; see also <http://www.fda.gov/RegulatoryInformation/Dockets/ucm379450.htm>

on the site to collect public comments on proposed rules.<sup>328</sup> Those petitions then get processed by FDA staff and, if they meet basic criteria, are filed in their own docket.

According to one person familiar with the FDA petition process and the reams of data frequently attached to such petitions, moving submissions online greatly simplified the process for both the agency and petitioners. A different agency indicated it would like to develop a robust online system for the submission and tracking of petitions, which would benefit the agency by enabling faster processing, but it would need more funding to do so. Other agencies disagree that online submissions would in any way speed up or simplify their initial processing and evaluation of petitions.

**Initial Review and Receipt:** Many agencies have official or informal procedures for an initial screening of petitions, to evaluate whether the submission meets the basic content criteria and requests something within the agency's regulatory authority. The screening may be conducted by the General Counsel, the docket manager, a designated petition coordinator, or a relevant program or policy office. Some agencies commented that they had very little discretion during this review to reject any submission, so long as it was properly filed. Other agencies assert greater discretion to dismiss petitions that are "moot, premature, repetitive, frivolous, or which plainly do not warrant consideration."<sup>329</sup> After the initial screening, agencies typically either send petitioners an acknowledgment of receipt or will open a public docket for the petition, or both. Only a few agencies' regulations (FSIS and NRC) guarantee that this letter of receipt will also designate a point of contact within the agency for the petitioner; in practice, other agencies may also provide contact information at this time.

However, some stakeholders report never receiving any acknowledgment of receipt from certain agencies on some of their petitions, noting it was not even clear to them what happened to their petitions after submission. Some stakeholders expressed greater satisfaction with agencies' handling of petitions and the transparency of the process under specific statutes, like the Endangered Species Act, as compared with APA-based petitions. A few speculated that agencies are more likely to acknowledge receipt of a petition and open a docket if they fear the petitioner might litigate. One stakeholder told a story of contacting a major regulatory agency two years after submitting a petition, only to learn the agency had no record or memory of receiving the petition, stating it was lost and the petitioner would need to resubmit.

The timely and orderly initial processing and docketing of petitions can be especially challenging in very decentralized agencies: for example, submissions made to a field office could take quite some time to find their way to the central office for review. One agency official estimated it could take two weeks to channel a petition through the agency to the appropriate people for review. Similarly, large agencies present a special challenge to petitioners when the agency does not designate a clear point of contact: if a petition addresses multiple agency programs or regions, stakeholders report difficulty finding any agency official who is willing to comment on the petition's status, since most officials will be disinclined to speak about a matter not entirely within their particular jurisdiction.

**Docketing and Publication:** Though a few agency regulations specify that agencies must publish notice of petitions in the *Federal Register*,<sup>330</sup> many others leave the matter up to agency

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<sup>328</sup> Regulations.gov was designed to be scalable in order to support new agency uses, including petitions. See "How to Use Regulations.gov," <http://www.regulations.gov/#!help> (mentioning petition applications). However, it is up to individual agencies to take advantage of these features and to tag documents with labels like "petition for rulemaking."

<sup>329</sup> 47 CFR §§ 1.401-1.407.

<sup>330</sup> E.g., 7 CFR § 340.5.

discretion.<sup>331</sup> Before the rise of the Internet, essentially the only way to publish notice of receipt of a petition was in the printed version of the *Federal Register*. Such publications can be costly, and in 1986, Luneburg concluded that the costs of always requiring publication of petitions would outweigh the benefits, preferring to leave the decision to the agency's discretion.<sup>332</sup> Even today, due to cost considerations, some agencies that publish notice of receipt of petitions will do so in bulk, on a quarterly or other regular basis, which saves money compared to individual notifications. Other agencies publish notice of only some, not all, of the petitions they receive.

However, the Internet now offers potentially cheaper methods of publishing notice of receipt of petitions. Regulations.gov, which some agencies already use to docket petitions simultaneously with publication in the *Federal Register*, could also be used to docket petitions only online, possibly at less cost than printing in the *Federal Register*. When an agency is not required by statute or regulation to publish notice of receipt in the *Federal Register*, and when the choice is between either publishing online only or else not publishing any notice of receipt at all, online tools may be an attractive alternative to the *Federal Register*. (Note that this section refers only to notice of receipt of a petition and not to notice of any rule an agency may propose in response to a petition.)

Regulations.gov already provides a number of different labels that agencies can use to tag documents and dockets, including: Petition, Petition(s), Petition for Reconsideration, Petition for Rulemaking, Petitions for Exemption, and Petitions for Modification.<sup>333</sup> For agencies that use such tags, the public can access all petitions through an advanced search function. However, not all agencies use these labels, and some labels are used inconsistently. Consequently, most searches for petitions on regulations.gov currently yield somewhat unwieldy results. It is often difficult to distinguish petitions for specific waivers from petitions for legislative rules of general applicability. Some searches turn up results that seem quite unrelated to petitions for rulemaking.<sup>334</sup> And even for petitions with accessible dockets on regulations.gov, the current status of the petition is not always evident, as some dockets include nothing more than the original petition and do not make public any other communications or comments received.

A number of agencies maintain their own online dockets of petitions for rulemaking.<sup>335</sup> These may be in addition to or independent from any use of regulations.gov. Notable examples of executive branch agencies that maintain petition dockets include: USDA's Food Safety and Inspection Service; Commerce's National Marine Fisheries Service (on Endangered Species Act petitions); Energy (a partial list); EPA; Interior's Fish and Wildlife Service (on Endangered Species Act petitions); Transportation's Office of Hazardous Materials Safety and Surface Transportation Board; and Treasury's Alcohol and Tobacco Tax and Trade Bureau (on viticulture area petitions). This list is in

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<sup>331</sup> E.g., 33 CFR § 1.05–20.

<sup>332</sup> Luneburg, *supra* note 2, at 509.

<sup>333</sup> <http://www.regulations.gov/#!advancedSearch>

<sup>334</sup> See e.g. <http://www.regulations.gov/#!searchResults;rpp=50;po=0;a=EPA;docst=Petition>

<sup>335</sup> At least one agency (FSIS) assumed that posting public petitions and supporting documents on its website would require an OMB information collection approval. See 75 Fed. Reg. 3847 (Jan. 25, 2010). But memoranda on the Paperwork Reduction Act clarify that unstructured solicitations and posting of public comments or feedback, including ideas and suggestions about program improvement, are not subject to the PRA. See Cass Sunstein, Memorandum to Agency Heads, *Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act* (Apr. 7, 2010) (distinguishing surveys that solicit personal or demographic information beyond name and contact, or that ask a series of specific questions); see also Sunstein, Memorandum, *Information Collection under the PRA* (Apr. 7, 2010) (explaining the general exemption for solicitation of comments). If necessary, OMB could use its authority to specify an exemption for collecting and posting petitions for rulemaking and related documents.



addition to those agencies that may routinely docket petitions only on regulations.gov (such as FDA and Coast Guard).

Independent agencies with dockets designed specifically to house petitions include: the Consumer Product Safety Commission, Federal Trade Commission, Nuclear Regulatory Commission, and Securities and Exchange Commission. Other independent agencies may have their own general e-filing systems that are searchable for petitions, such as: FCC, FEC, Federal Maritime Commission, and Postal Regulatory Commission. See Appendix C2 for more details.

Not all petition dockets are comprehensive or up to date. For example, EPA created a docket in 2013, in response to the sue-and-settle controversy (see Section IV.G). The site explains that “petitions provided as comments in a publicly available rulemaking docket are not reproduced here”<sup>336</sup>—meaning when EPA receives a request for a regulatory change during notice-and-comment rulemaking, it may be treated as a petition, but it is not logged on the petitions docket as such. Several dockets contain only the original petition submitted and not any supporting materials, public comments, or agency communications. Others do contain such information, as well as the status or final agency response.

#### **IV.D.1. Case Study: Best Practices in Online Docketing at SEC**

Though several executive and independent agencies maintain dockets of petitions for rulemakings, the SEC has earned special praise from stakeholders for its online docket.<sup>337</sup> SEC has made a push in recent years to publish everything it receives from the public online, to improve transparency. After receiving and initially screening petitions, SEC sends the petitioner an acknowledgment and transmits the petition to the appropriate division of the agency, as well as to its web staff for posting. Stakeholders report this docketing typically happens fairly promptly. The agency then continues to update the docket with all comments it receives from the public on the petition. SEC reports that even with a relatively high volume of petitions, public comments, and other documents to process, its small web team has managed the volume well. The agency has tools to conserve resources by aggregating comments from letter-writing campaigns that may generate thousands of comments; stakeholders also appreciate the aggregation of repetitive comments, which makes it easier for them to sort through the dockets. Stakeholders find the docket to be quite helpful, by letting them know what other issues are before the agency, even though many stakeholders will wait to see whether the SEC will propose a rule based on the petition before commenting on the petition’s merits.

Despite the high praise among petitioners for SEC’s transparent, streamlined process of online docketing, one stakeholder expressed disappointment that, as soon as the initial docketing was complete, it never heard from the agency again and was left feeling like its petition had entered a “black hole.” That is a sentiment shared by many other stakeholders concerning their experience with petitioning before a number of agencies.

#### **IV.E. Communication and Comments**

Of all the aspects in the petition process, petitioners report the most frustration over the lack of ongoing communication and status updates from the agencies. For many stakeholders, it feels like their petitions enter a “black hole.” Many agencies, on the other hand, report providing updates as

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<sup>336</sup> <http://www2.epa.gov/aboutepa/petitions-rulemaking>

<sup>337</sup> <https://www.sec.gov/rules/petitions.shtml>; this section draws from Conversations with SEC and recent petitioners.

often as they are able and may feel constrained by scarce resources and potential legal risks that limit their ability to communicate with petitioners.

**Communication:** Only two agencies (NRC and FSIS) specify in their official guidelines that they will provide petitioners with a specific agency contact for communications. Some other agencies do so in practice, by including contact information with their initial letters acknowledging receipt of the petition. However, stakeholders report that contact information is not always provided (and that a letter acknowledging receipt is not always sent).

Several agencies report that, while they are always happy to meet with petitioners or provide status updates, the petitioner is responsible for following up,<sup>338</sup> and some petitioners never bother to contact the agency. In such cases, agencies may assume that the petitioners never expected a regulatory change in the first place and were just using the petition to generate media or political attention. Some agencies claim that petitioners are most likely to follow up regularly when there is money directly on the line: that is, when the petitioner requests a specific variance to reduce its compliance costs.

When agencies meet with petitioners, most agencies prefer to focus on clarifying the request, rather than debating the merits of the petition. A few agencies report reaching out to petitioners when they need clarification. Several agencies allow petitioners to submit additional information to supplement or amend the original petition. Agencies may occasionally request such additional information or updates from petitioners as well. At one time, FSIS had a policy that, if a request for additional information was ignored by the petitioner, the petition was considered abandoned.<sup>339</sup>

Petitioners widely report frustration over communications with agency about their petitions. Several said that besides the occasional curt acknowledgement of receipt, most agencies certainly do not initiate discussions, and even directly contacting agencies will not necessarily yield a satisfactory status update. Some stakeholders were told that their petitions were related to a pending rulemaking and the agency could not discuss ongoing proceedings. A frequent lack of a designated agency contact for petition review complicates efforts by stakeholders to initiate a dialogue. Some petitioners felt like they were talking to a brick wall, at least until they filed litigation, which tends to focus agency attention on a petition.

One petitioner speculated that agencies avoid communicating out of fear they might inadvertently create final, judicially reviewable agency action. Indeed, one agency confirmed that it typically prefers to maintain silence until the final rule or denial is ready, precisely for that reason. Such fears may be misplaced, as some stakeholders report they would be less likely to pounce on a missed deadline and take the agency to court if they have heard from the agency and knew there was still some forward progress in reviewing the petition. (Moreover, a few cases notwithstanding, courts are unlikely to treat status updates as final action, see Section II.H.)

Only a few agencies have standardized processes for communicating with the petitioners. For example, the FDA generally sends a letter 180 days after receiving a petition, to at least confirm that they are still working on their review. The NRC has instituted some of the best practices on communication. Their regulations encourage petitioners to confer with their staff prior to filing a petition, and a pending update to the NRC procedures would clarify that consultations are also available after filing. NRC staffers typically send petitioners status reports every few months, which are also posted to the online docket. Maintaining up-to-date online dockets is another way to keep petitioners and the public apprised of the status of a petition.

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<sup>338</sup> CSPC regulations explicitly say it is the petitioner's duty to keep apprised of the petition's status.

<sup>339</sup> 56 Fed. Reg. 63,570 (Dec. 2, 1993).

**Comments:** A few agencies publish notice of most petitions and solicit public comments as a matter of course, explaining that public input is always welcome and frequently helpful.<sup>340</sup> Other agencies, instead of actively seeking public comments by posting notices in the *Federal Register*, simply keep up-to-date online dockets of petitions and stay open to any public comments they might receive.<sup>341</sup> At least one agency notifies interested parties through a listserve. Yet many agencies prefer to retain discretion over whether they seek public comments on a petition.<sup>342</sup> For example, the NRC explains that “[i]f public comment can play a role in resolving the petition,”<sup>343</sup> then the agency will open a 75-day comment period and make comments available on regulations.gov.<sup>344</sup>

Agencies identified several reasons why they may prefer to avoid receiving additional comments on petitions.<sup>345</sup> Most agencies worry about the costs of routinely soliciting comments on all petitions. A comment period can theoretically delay timely action on a clearly deserving (or clearly undeserving) petition. Comments may yield few benefits in terms of facilitating the agency’s evaluation. Agencies assume they will not receive many comments, and those they do will be largely predictable and most likely to express only political views rather than contain additional, useful data. Agencies are confident in their own in-house expertise to evaluate petitions without outside input. If they need outside input, they can always seek it. In fact, agencies sometimes voluntarily refer issues raised by petitions to advisory committees for further study.

Agencies may also be concerned that accepting comments could create legal risks, and that courts may scrutinize whether the agency, in responding to the petition, also adequately addressed the substance of every comment received. Similarly, if comments themselves propose alternative regulatory actions, agencies may worry that they would have to treat such comments as petitions for rulemaking as well. A few agency regulations may be designed to try to head off such concerns. For example, FDA regulations clarify that comments requesting some alternate agency action will not themselves be treated as petitions unless resubmitted specifically as such. A few agencies, like CPSC, specify that comments are accepted in support or opposition to granting the petition but not on other topics, perhaps to contain the number of subjects the agency must address in its response. But such concerns may be limited anyway by the overall deference courts give agencies in considering and responding to petitions (see Section II.F).

Though some stakeholders say they are aware of opportunities to comment on petitions—through a *Federal Register* notice, an online docket, a petitioner’s own media campaign, or simply because they operate in small, niche worlds—others say a lack of transparency makes it difficult to track and participate in proceedings on petitions. Some stakeholders say their limited personnel and other priorities would prevent them from commenting on petitions from other groups anyway.

Nevertheless, when available for public comment, petitions can attract a good number of comments. Evidently, stakeholders do track online dockets of petitions and want to express their

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<sup>340</sup> For example, according to their regulations, FEC will not consider the merits of a petition before a public comment period has ended. In handling petitions on non-hazardous fuels, EPA regulations imply that even denials are first published as tentative decisions, on which public comments are solicited.

<sup>341</sup> For example, FSIS notes that it posts all petitions online and will accept any comments submitted within 60 days of posting, regardless of whether the agency has solicited comments.

<sup>342</sup> Some agencies, like OSMRE, will allow petitioners to request a public hearing, and the agency will publish for comments any petition deemed to have “reasonable basis,” though that determination is up to the agency’s judgment.

<sup>343</sup> <http://public-blog.nrc-gateway.gov/2014/05/06/you-can-ask-the-nrc-to-change-its-rules/>

<sup>344</sup> <http://www.nrc.gov/about-nrc/regulatory/rulemaking/petition-rule.html>.

<sup>345</sup> See also Luneburg, *supra* note 2, at 524-39.

viewpoints.<sup>346</sup> For example, in 2012, the Office of the Federal Register received its first ever petition from a group of law professors, on incorporation by reference. Despite the highly niche topic, the agency received over 100 comments, some of which were detailed and substantive, and on October 2, 2013, the agency published a notice of proposed rule partially granting (and, accordingly, partially denying) the petition.<sup>347</sup>

Stakeholders express somewhat mixed views on whether agencies take seriously the comments they submit on petitions. Some felt their opinions had been heard; others complain that they were all but excluded from the conversation over how to resolve the petition. Regardless, petitioners themselves may appreciate comments, as their original proposals may not be perfect and constructive criticism may be helpful.

## IV.F. Decisions

Besides insufficient communication, stakeholders' biggest complaint is probably delay in agency review of petitions and the perceived need to file unreasonable delay litigation just to prompt an agency response. A close runner up is the growing trend of the "unresponsive response"—that is, denials that cite resource constraints and essentially boil down to "thanks but no thanks." For their part, agencies report that the petition review process can impose intense demands on their resources, especially when petitions do not contain adequate data to facilitate the review. Agencies wish for more flexibility to deny meritless petitions and focus on their own priorities.

### IV.F.1. Decisionmaking Structures: Delegation, Criteria, Tracks, and Tiers

Even among agencies with regulations or guidance on how the public can submit petitions, not all have detailed an official process for how the agency will then review such petitions. At many agencies, the review process remains essentially ad hoc.

**Delegation:** Some agencies specify that an initial screening for compliance with basic submission requirements is conducted by an attorney, docket manager, the relevant policy or program office, or a "petition coordinator." At some agencies, lawyers are quite involved throughout the entire petition review process. One agency official speculated that agencies' fears of litigation over petitions, and the influence of that fear on their decisions, could stem not from real litigation risks but from the mere involvement of lawyers in coordinating the review process.

At many decentralized agencies, however, the central administrator's office and general counsel play a small role in reviewing the petition. Instead, the petition is channeled to the appropriate division or regional office. Though often the agency's administrator or commissioners must make the final decision on petitions for rulemaking, some agencies empower assistant administrators, general counsels, or policy offices to reject certain meritless petitions or to approve certain non-controversial responses.<sup>348</sup> Some agency procedures specify that internal working groups of technical, regulatory, and legal experts on staff should evaluate the merits of petitions; other agencies may appoint an advisory committee to study an issue.<sup>349</sup> Often, however, such working groups can make only recommendations that are passed on to senior managers, and typically, only the top officials can make final decisions to grant a petition. For example, in independent agencies, staff might prepare a recommendation, but typically the commissioners must vote on any final action.

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<sup>346</sup> For example, some of the online petition dockets maintained by various agencies (like SEC) as well as regulations.gov contain a number of comments on petitions for rulemakings.

<sup>347</sup> 78 Fed. Reg. 60,784 (Oct. 2, 2013).

<sup>348</sup> See, for example, the regulations of FCC and NHTSA.

<sup>349</sup> See, for example, OSHA regulations.

**Criteria:** Agencies rarely provide much detail in their regulations on the criteria they apply to make decisions on granting or denying petitions. Agencies surveyed for this report listed a range of factors as most important, from the petition’s merit to political and public acceptance of the proposal. Some agencies distinguished between their review criteria for a petition for variance, which is simply a scientific or engineering determination, versus a policy-oriented petition, which must be reviewed on a more ad hoc basis. A few agency regulations are explicit in making practical considerations part of the petition review, including available agency resources, other priorities, or even the perceived likelihood of success in litigation if the petition’s request were issued as a final rule and subsequently challenged in court.<sup>350</sup> Some agencies expressed a desire to have more discretion to quickly determine that certain petitions are not worth further investigation.

**Tracks:** A few agencies have a procedure for, upon intake, classifying petitions into different categories. For example, some petitions will be classified as making simple requests that would only require very minor regulatory amendments, while others will be classified as complex and requiring substantial agency analysis. NRC had a “fast track” process, to take clearly meritorious petitions that will not adversely affect anyone and propose a rulemaking based on the petition as quickly as possible, skipping over any preliminary publication of notice or collection of public comments. Historically, this “fast track” approach has been infrequently used.<sup>351</sup>

A few statutes (see Appendix B) set up a tiered decisionmaking structure, in which the agency first makes an initial determination whether the petition has at least some merit. If the petition has merit, the agency then either undertakes a longer review leading to a final decision, or is instructed to initiate a rulemaking. Such an initiation could be accomplished by advanced notice of proposed rulemaking,<sup>352</sup> and the agency is always free to deny the petition at any point. One of the most-used tiered processes was created by the Endangered Species Act, examined more thoroughly in the next section.

#### IV.F.2. Case Study: Tiered Decisionmaking and Timing under the Endangered Species Act

The Fish and Wildlife Service (within the Department of the Interior) and the National Marine Fisheries Service (within NOAA, within the Department of Commerce) are tasked with listing endangered species and critical habitat under the Endangered Species Act. The statute allows any “interested person” to petition to add or remove a species or to revise a critical habitat designation. Congress likely enacted the ESA’s petition provision in an attempt to encourage greater public participation and so head off any potential agency capture or indifference to important environmental problems.<sup>353</sup> The statute sets up a tiered process for the agencies’ review of these petitions.

First, the agencies decide whether the petitions “may be warranted.” This standard sets a very low bar, and the agencies have tried not to make the petition content requirements too onerous, in order to preserve the public’s ability to participate in this process. Only truly meritless or incomplete petitions lacking sufficient data are rejected, and the petitioner can always re-file with new supporting data that responds to the agency’s stated reasons for rejecting the original, incomplete petition. Though the natural inclination of some agency scientists is to conduct additional research at this phase and come to a final determination, the agencies try to limit their

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<sup>350</sup> See, for example, the regulations from FAA and NHTSA.

<sup>351</sup> Luneburg, *supra* note 2, at 545.

<sup>352</sup> This is not to suggest that any agency could only issue an advanced notice of proposed rulemaking and then move right to a final rule. Rather, an advanced notice could satisfy a statutory requirement to “initiate” a rulemaking by a certain deadline. The agency could subsequently decide to either continue moving forward, in which case the agency would likely next have to issue notice of a proposed rule, or else just deny the petition.

<sup>353</sup> Biber & Brosi, *supra* note 212, at 331.

review to a very preliminary decision based only on the material already on file. The agencies do not solicit public feedback at this stage.

The statute intends the agencies to complete this decision within 90 days, “to the maximum extent practicable.” Stakeholders report that the agencies do not always meet the 90-day target, but they agree the agencies work earnestly toward that target, and that the timing and amount of communication is an improvement over the typical agency review of an APA-based petition. Stakeholders note that the agency contacts are fairly accessible when petitioners call to check on a delayed petition. Agency staff will even sometimes let the petitioner know when the initial finding is nearly complete and ready for publication.

If a petition passes that first tier, the agency publishes a notice in a *Federal Register* and opens a docket on regulations.gov, which the agencies use to collect comments. The statute then gives the agencies 9 additional months (12 months from the initial submission) to either deny the petition, propose a regulation, or publish a finding that, while the petition may be warranted, other priorities and limited resources preclude an immediate resolution of the matter. Stakeholders report that, as a general matter, agencies usually request a 6-month extension on this deadline (which is difficult to appeal to courts, since litigation itself would take longer than 6 months).

If the agencies cite competing priorities and defer a final decision, the statute instructs the agencies to implement a system to monitor the status of all pending petitions. The agencies keep websites with information on so-called “candidate” species awaiting final determination, and the agencies regularly publish a notice of candidates still under review, soliciting new information from the public on any still-pending candidates.

At times, the agencies have felt inundated and hamstrung by the volume of petitions and litigation over missed deadlines. As petitioners have grown more sophisticated, the higher quality of petitions demands more resources from the agencies to respond, and with flat or shrinking budgets, the agencies have struggled to meet deadlines. As some scholars and government officials have put it, the agencies have “lost control over the listing process as decisions about whether to list species are largely made in response to citizen petitions for listing and litigation. . . . [T]he listing and critical habitat program is now operated in a “first to the courthouse” mode . . . We are no longer operating under a rational system that allows [agencies] to prioritize resources to address the most significant biological needs.”<sup>354</sup>

However, a recent settlement agreement developed a timeline for working through the backlog of petitions,<sup>355</sup> and both agency officials and stakeholders report generally positive progress. Some stakeholders note that, at least following the recent settlement agreement, petitions under the Endangered Species Act are reviewed efficiently and often achieve productive results. These stakeholders credit an agency staff experienced with running the petition process, but they also feel the statutory deadlines and clear decision criteria are essential.

The agencies worry that the petition process has shifted perhaps too much control over species protection efforts from the agencies to the public. The agencies partly welcome the public involvement as necessary in a representative democracy, and they acknowledge that petitions often highlight important needs. However, the agencies do worry that the statute and petition process could sometimes be wielded for purposes unrelated to species protection (like trying to stop a

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<sup>354</sup> Katrina Miriam Wyman, *Rethinking the ESA to Reflect Human Dominion over Nature*, 17 N.Y.U. Env'tl. L. J. 490, 496 & 497 n.30 (2008) (quoting Craig Manson, Asst. Sec'y for Fish & Wildlife & Parks).

<sup>355</sup> [http://www.fws.gov/endangered/improving\\_esa/listing\\_workplan\\_FY13-18.html](http://www.fws.gov/endangered/improving_esa/listing_workplan_FY13-18.html).

specific construction project),<sup>356</sup> and so are concerned about ceding too much control over their efforts to prioritize species protection on a nationwide basis and in keeping with the best science. On the other hand, an empirical study by Professors Biber and Brosi found that public petitions “result in the identification of species that are at least as deserving of protection under the Act as species identified by the agency on its own.”<sup>357</sup> Biber and Brosi’s results indicate that petitions are not just important to promote democratic values, but may actually improve the rationality of agency agenda-setting.

Not surprisingly, some stakeholders wish that agencies processing petitions under the APA could emulate some of the better practices developed under the ESA. However, agency officials caution against trying to apply lessons from the ESA to the APA, due to important differences in the two petition regimes. ESA petitions always ask for a specific, scientific determination, whereas APA petitions may seek agency consideration of a limitless range of proposals and findings. With over 200,000 native species in the United States and relatively few experts or published literature on any given species, the highly dispersed biological information relevant to ESA petitions makes public participation uniquely valuable.<sup>358</sup> ESA petitions only ask agencies to make a binary decision (to list or not); APA petitions, by contrast, may ask an agency to fine-tune a standard set on a nearly infinite spectrum of stringency.<sup>359</sup> Moreover, Congress has capped the percent of agency budgets that may be spent on ESA listing decisions, meaning that any petition to list species will only take resources away from other listing activities and not from the rest of the agencies’ many other responsibilities.<sup>360</sup> Such a budget cap does not exist to shield other agencies’ budgets or priorities from the resource demands of petitions based under the APA or other statutes.

Nevertheless, Biber and Brosi cautiously recommend that the success of ESA petitions may justify a greater role for petitions at least in other similar contexts. They identify some key traits and conditions that may indicate when petitions could be most useful: if the petition addresses a relatively straightforward decision; if a default regulatory standard is applied when petitions are granted; and if the number of petitions that can be granted per year is capped.<sup>361</sup> They nominate several subject matters that may fit these criteria and so benefit from greater public involvement and use of petitions, including pesticide regulation, vehicle safety regulations, and securities regulation.<sup>362</sup>

#### IV.F.3. Agency Resources and Timelines for Review

In 1986, Luneburg concluded that, though petitions sometimes generate valuable ideas, the overall strain on agency resources made it hard to declare the right to petition to be a cost-effective addition to the regulatory process.<sup>363</sup>

Today, several agencies report that petitions are often valuable and not a great burden on their resources. This belief may be most especially shared by agencies that receive relatively few, if any, petitions in any given year. Yet even one agency that receives a relatively high number of petitions

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<sup>356</sup> *But see* Biber & Brosi, *supra* note 212, at 361 (finding that petitions are not more correlated with conflicts or costs than agency-initiated efforts).

<sup>357</sup> *Id.* at 321, 325 (“If anything, petitions seems to better identify at-risk species that cost relatively little to restore to health.”).

<sup>358</sup> *Id.* at 364, 366.

<sup>359</sup> *Id.* at 379.

<sup>360</sup> *Id.* at 336, 379.

<sup>361</sup> *Id.* at 382.

<sup>362</sup> *Id.* 379-80, 383.

<sup>363</sup> Luneburg, *supra* note 2, at 562.



and reports having some staff spend up to 50% of their time on petitions concludes that the process is generally “not burdensome.”

On the other hand, a number of agencies disagree, concluding like Lunenburg that the petition process, though occasionally valuable, frequently demands substantial resources disproportionate to that value. Various factors can increase the resource demands as certain agencies respond to certain petitions:

- *Technical and Sophisticated Petitions*—Some petitions are highly technical, like petitions for variances from certain testing or compliance requirements. Though the investigation required to resolve such petitions may be relatively straightforward, it can be demanding. Some of the more policy-oriented petitions have also become increasingly technical and data-driven in recent years, with the evolution of sophisticated public interest groups and the information explosion on the Internet. As petition quality increases, the resource demands at agencies to resolve petitions may increase.
- *Poor Quality and Meritless Petitions*—While some agencies simply reject petitions they deem to be incomplete, poor quality, or specious, others feel obligated to fully evaluate even low-quality petitions submitted with insufficient supporting data. This obligation places the burden on the agency to research the matter. Even if the agency can quickly identify such petitions as meritless, there is a certain kind of “churning” work required to prepare an adequate notice of denial that will pass judicial muster. Agencies may resent such petitions as a waste of their time, especially when petitions are perceived as having been submitted only to attract media attention and not as serious attempts to influence agency policy. At least some agencies wish they had more discretion to classify certain poor-quality submissions as not being “petitions,” and to reject meritless submissions more easily.
- *Comments*—Agencies that regularly collect and respond to comments on petitions require additional resources to do so, though some say the increased transparency and enhanced public confidence is well worth the effort.
- *Litigation*—Agencies will often commit even more resources to a review if they perceive the threat of litigation.

Staff time devoted to reviewing petitions varies. Some agencies say petitions generally only require the review of one or two attorneys; at other agencies and for highly technical petitions, the review may require teams of lawyers, scientists, engineers, and policy staff. Agencies that receive a moderate to high number of petitions reported a range of staff time required, anywhere from 5% to 75% of the time of a few or half-dozen relevant staff members. However, petition reviews are not necessarily budgeted into an agency’s work plan or staffing allotment, and a sudden spike in the average number of petitions received can put tremendous pressure on the staff.<sup>364</sup> One agency official described the dilemma: “Because the public can petition on anything, the volume of work is unlimited, while agency resources are flat or declining.”

Resource constraints inevitably lead to delays. Agencies aver that they work as efficiently as they can to review petitions, given available resources. Various factors outside agencies’ control can increase review time. An agency may determine that issues raised by a petition should be presented to an advisory committee for further study, but then the agency must wait for the completed study. If pending litigation or a pending rulemaking relates to a petition, the agency may have to wait years for the litigation or rulemaking to conclude. Strict statutory deadlines on other,

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<sup>364</sup> For example, NRC was used to receiving about 9 petitions per year and so faced a new resource challenge in 2011, when 25 petitions came in, mostly as a reaction to the Fukushima nuclear plant crisis. See 78 Fed. Reg. 25,886 (May 3, 2013).

non-petition obligations, settlement agreement deadlines, and administration-set priorities may already push the agency into extreme overtime, leaving no room for petition reviews.

Consequently, agencies are very resistant to the idea of any additional, enforceable, external deadlines on petition review. According to one agency, any 90-day or shorter deadline is particularly problematic, especially when it takes two weeks just to route the petition through a large, decentralized agency. Besides hard deadlines imposed under certain individual statutory rights to petition, some agencies have adopted non-binding targets, either in their regulations or informally, usually on the order of 6 to 12 months. Though such deadlines are not always—and perhaps not often—met, some agencies find them helpful to remind their staff that petitions are important.<sup>365</sup>

Some agencies have adopted procedures to handle delays and backlogs. For example, agencies may try to update petitioners about the reasons for delay, and may even propose a new target date.<sup>366</sup> Stakeholders, however, report they are unlikely to receive any status updates from most agencies, let alone updates that clearly set a timeframe for response. In 1999, FDA undertook various efforts to reduce its backlog of petitions, including “contacting petitioners whose requests are of long standing to determine whether they still want FDA to take action on their petitions, and revising delegations of authority so that certain FDA centers may issue a greater range of petition responses.”<sup>367</sup> By 2003, such efforts had “led to a marked increase in the number of citizen petition responses, and [the agency’s] current annual response rate is equal to, and sometimes even exceeds, the number of citizen petitions that we receive.”<sup>368</sup>

A few stakeholders report relatively quick responses from some agencies and a satisfying overall experience. Many more recognize that agencies have dwindling resources, heavy obligations, and political pressures, and are willing to wait for a response to their petitions—they measure their progress in years or decades. But the perspective of many stakeholders is that, at some agencies, the only way to get a response is to sue for unreasonable delay. Though a few stakeholders find this sue-for-response arrangement acceptable, others feel frustrated by having to sue every time. Stakeholders generally report more favorable experience petitioning under specific statutes besides the APA, which are more likely to have clear deadlines. As a result, stakeholders often invest more resources into these petitions, on which there is more guarantee of a quicker response.

Even some stakeholders who would oppose on the merits petitions submitted by other groups may still prefer a speedier resolution on the petitions, rather than having them sit in limbo for years. The delay can create uncertainty for both the public and the regulated community. On the other hand, some business interests worry that a non-transparent process for resolving delays, such as a settlement agreement or private negotiations with an advocacy organization that submitted the petition, could end with agencies committing to a quick timeline for rulemaking, without having solicited broader public input. Given the resource constraints agencies face, prioritization and scheduling has real policy consequences, and the business community is concerned that overly

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<sup>365</sup> For example, though FDA’s procedures provide that review must be complete within 180 days, FDA’s website states that review of complex petitions may take “more than a year.” *Compare* 21 C.F.R. § 10.30(e)(2), (4), *with* Food & Drug Administration, <http://www.fda.gov/aboutfda/contactfda/commentonregulations/default.htm>.

<sup>366</sup> For example, FDA regulations allow a tentative response indicating the need for more time, resources, or information, and note that tentative responses may set a new timeline. Under the land sales registration program, HUD regulations also require communicating the reasons for delay to petitioners.

<sup>367</sup> 64 Fed. Reg. 66,823 (Nov. 30, 1999).

<sup>368</sup> 68 Fed. Reg. 16,461 (April 4, 2003).

aggressive petition mechanisms with tight deadlines will force agencies to cede their policymaking authority to unaccountable petitioners.

The few statistics available on response time paint a mixed picture. Some agencies do seem to clear petitions off their docket within a matter of months. Of the agencies that submitted data in response to this study, some show having no outstanding petitions that were submitted more than a few years ago, while others still have petitions pending from over a decade ago.<sup>369</sup> One stakeholder described receiving a call from an agency asking them to withdraw their petition from nearly two decades ago, since the agency was still unable to respond. An internal EPA report from 2009 (published by Public Employees for Environmental Responsibility, an interest group, in 2013) found that the agency's Office of Resource Conservation and Recovery had fully addressed only 2 of 50 petitions submitted since 1981; for 34 of 50 petitions, EPA had "no record of any action formally taken."<sup>370</sup>

#### IV.F.4. Responses

It is difficult to gauge how often agencies "grant" or "deny" petitions without knowing what those two words mean. Many agencies consider a "grant" to occur upon the initiation of a rulemaking proceeding; at least one agency said a "grant" only required giving the petitioner notice of the agency's intent to take action. A few stakeholders complained of agencies "granting" their petitions by promising to convene a scientific working group to study an issue, only to see no study produced and no final action taken. Agencies may also consider a petition to be "granted" upon proposing a rulemaking that follows some but not all the petitioner's suggestions, though from the stakeholder's perspective, at least part of the petition has been effectively denied. A few agencies have official procedures whereby petitioners or the public can ask for reconsideration of a denial or grant of a petition.<sup>371</sup>

Some agencies resolve petitions outside of the rulemaking process. An agency might, for example, prefer to address the petitioner's issues in a guidance document, and so might technically deny the petition but release favorable guidance. Other agencies prefer to handle requests for variance through a more adjudicative process, though they still might follow up on any waivers granted by revisiting the relevant regulation.

The Federal Aviation Administration has a unique method for resolving some petitions. If the agency determines a petition has merit but cannot be addressed due to other priorities and resources, the FAA may dismiss petition but log the meritorious arguments in a database, which the agency then examines during future rulemakings.

Though the APA requires agencies to explain their reasons for denying petitions,<sup>372</sup> at least one agency felt it would have discretion to give essentially a one-line denial. In recent years, stakeholders have begun to fret about what they perceive as an increasingly common denial: the "thanks but no thanks letter," which typically indicates that the petitioner's request may be valid, but the agency cannot make a final determination because of scarce resources or competing priorities. Many stakeholders are worried about this trend (and about the courts upholding such denials) and feel it undermines their right to a substantive response (see Section II.F.). A few

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<sup>369</sup> See also online dockets from NRC, PHMSA, and other agencies, showing still open petitions for rulemaking.

<sup>370</sup> See Chichang Chen, *Info Briefing for Office Director: Outstanding Rulemaking Petitions in ORCR*, available at <http://tinyurl.com/epaanalysis>; Press Release, *EPA is Graveyard for Rulemaking Petitions*, PEER (Aug 20, 2013), available at <http://tinyurl.com/peerepa>.

<sup>371</sup> For example, see FDA and CPSC regulations; see also 7 CFR §§ 2901.5, 2901.7 (allowing an internal appeal to the Secretary).

<sup>372</sup> 5 U.S.C. § 555(e); see Section II.F.

agencies agreed with these stakeholders that, while resources and priorities may be relevant to the timing of a petition review, they should never be grounds for denying the petition. Indeed, one agency wished that was an option, since it would give the agency more flexibility in issuing denials, but felt such a denial would not likely survive an arbitrary and capricious challenge.

Several factors can make an agency more or less likely to respond to a petition, and to respond favorably. For example, several agencies and stakeholders report that grants are more likely when the agency can easily fold the petitioner's request into other ongoing rulemakings. Some agencies give greater attention to petitions seeking to modify rules to keep up with the latest technologies, since agencies value the public's assistance in staying up to date with rapidly changing technology. Similarly, stakeholders may feel they have a better chance of success when they can present new, compelling science to an agency, and particularly to agency officials known to be receptive to science-driven arguments. Litigation, or the threat of litigation, also tends to encourage an agency response (though the response may typically be a denial). And of course, different agencies have more or less room in their dockets for discretionary rulemakings to begin with, with some agency agendas so dominated by statutory mandates as to leave no bandwidth for responding to petitions.

Some of the statistics collected for this study indicate that grants are fairly common, sometimes more common than denials (see Appendix C3). This is the reverse of the situation Luneburg reported on in 1986.<sup>373</sup> Though there are no numbers on how many requests for rules are weeded out by an initial screening and never even logged as "petitions," of the petitions that survive an initial screening, the number of grants strongly implies that many petitions have considerable merit. At some agencies, grants tend to be for petitions seeking waivers; one frequently petitioned agency could think of only a single policy-based petition in the last decade that was granted and prompted a useful regulatory change. Other studies indicate that some agencies grant policy-oriented petitions at a fairly high rate.<sup>374</sup> Even a low rate of granting would not necessarily indicate that petitions lack value: denied petitions can still influence agency thinking and public debates, and as demonstrated by the case of *Massachusetts v. EPA* (see Section II.F.3), even a single petition can lead to tremendously impactful regulatory change.

#### IV.G. Frequency of Litigation and the "Sue-and-Settle" Controversy

In recent years, some in the business community and in Congress have accused federal agencies of complicity in an arrangement known as "sue and settle."<sup>375</sup> The allegation is that agencies encourage or allow stakeholders to sue them—perhaps by first petitioning for rulemakings and then suing for failure to respond—so the agency can commit to regulatory action in a settlement agreement without appearing to have initiated the rulemaking. The U.S. Chamber of Commerce has been the leading voice in decrying this so-called "sue and settle" arrangement as undemocratic, with regulatory decisions made behind closed doors under outsized influence from a handful of stakeholders, and without transparency or broader public input. Petitions to and lawsuits against environmental agencies have been a major focal point of these allegations, with recent settlements to resolve a backlog of Endangered Species Act petitions serving as a poster child. A chief concern expressed by the Chamber and others is that, given agencies' limited resources, the scheduling and prioritization of rulemakings have tremendous policy consequences. Therefore, if a petition is resolved by a private settlement agreement that commits the agency to conduct a rulemaking on a

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<sup>373</sup> Luneburg, *supra* note 2, at 520.

<sup>374</sup> Livermore & Revesz, *supra* note 255, at 1387-88 (reporting that of 38 policy-oriented petitions submitted to EPA between 1999 and 2011, 19 were granted, 12 were denied, and 7 were still pending).

<sup>375</sup> See U.S. Chamber of Commerce, *A Report on Sue and Settle: Regulating Behind Closed Doors* (2013); Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 SEATTLE U. L. REV. 891 (2014).

tight schedule, the business community and other stakeholders may feel they have been shut out of a key step in the agenda-setting process. For them, having the chance to later submit comments on a proposed rulemaking is already too late.

Agencies and public interest groups emphatically deny any such arrangement, saying the accusation is “wholly invented”<sup>376</sup> and noting that, during litigation, the relationship between petitioners and the agencies is anything but cordial, let alone conspiratorial.<sup>377</sup> Moreover, as a U.S. District Judge for the District of Columbia recently confirmed, settlements simply provide some framework “to clear the backlog of [petitions] . . . . They do not dictate that the [agency] reach any particular substantive outcome on any petition.”<sup>378</sup> Any actual action to resolve a petition would still first appear as a proposed rule subject to full and transparent public notice and comment.

Additionally, some stakeholders indicate that their strong preference is to avoid judicial review whenever possible and instead to work with the agency through a public process. One stakeholder insisted it would never consider suing on a petition, noting the agency has the ultimate discretion. Though one D.C. Circuit judge recently implied that reviewing petitions and petition denials had become a burden on agencies and the courts alike,<sup>379</sup> stakeholders and agencies report relatively few, if any, litigations over petition denials. Some stakeholders will threaten litigation to force an agency response after a long delay, but often the agency simply takes that opportunity to deny the petition, and the lawsuit is dropped. Statistics bear out that litigation over petitions is not very common. For example, the NRC reports that of 88 petitions received in the last nine years, it granted 22 and denied 32, but had seen zero lawsuits over failure to respond, and only six suits over a denial. Both the FMCSA (with an average of 6 petitions per year) and the CPSC (with an average of 2 to 3 petitions per year) report experiencing zero litigation since 2005. The Department of Energy, which receives over 10 petitions per year, reports only a single legal challenge to a denial since 2005. Obviously, all the cases cited in Part II indicate there is *some* litigation over petitions. But it remains fairly rare. Even in the years immediately following *Massachusetts v. EPA*, a highly publicized case that arguably increased the courts’ scrutiny over agency denials of petitions, there were very few challenges to petition denials filed in federal courts.<sup>380</sup>

Stakeholders list several reasons for choosing not to bring litigation. On at least some occasions, stakeholders report being satisfied or perhaps even convinced by the agency’s explanation in its denial. Other times, it is the standard of review that discourages petitioners from litigating—a standard perceived by some to be so deferential and so vague that judicial review becomes a meaningless rubber stamp. Additionally, whereas stakeholders can more easily demonstrate standing for unreasonable delay suits on the basis of the procedural injury alone, satisfying

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<sup>376</sup> Avi Garbow, *Setting the Record Straight*, EPA CONNECT: THE OFFICE BLOG OF EPA’S LEADERSHIP (Feb. 12, 2014, 1:35 PM), <http://blog.epa.gov/epaconnect/2014/02/setting-the-record-straight/>

<sup>377</sup> Ann Alexander, *Sue and Settle Legislation: A Cure in Search of a Disease*, NRDC Switchboard Staff Blog, July 16, 2012.

<sup>378</sup> Nat’l Ass’n of Home Builders v. U.S. Fish and Wildlife Serv., No. 12-2013 (D.D.C. Mar. 31, 2014).

<sup>379</sup> *WildEarth Guardian v. EPA*, Mar. 25, 2014, oral argument recording available at [http://www.cadc.uscourts.gov/recordings/recordings2014.nsf/4D68336D511355D085257CA6005D8A69/\\$file/13-1212.mp3](http://www.cadc.uscourts.gov/recordings/recordings2014.nsf/4D68336D511355D085257CA6005D8A69/$file/13-1212.mp3).

<sup>380</sup> Jeffrey Rosen, *Chance for a Second Look: Judicial Review of Rulemaking Petition Denials*, Admin. & Regulatory L. News, Fall 2009, p.9.

standing requirements in litigation over arbitrary denials requires a more concrete, substantive injury that not all petitioners can muster.<sup>381</sup>

Stakeholders express mixed views on the value of suing an agency for unreasonable delay in responding to a petition for rulemaking. Some note that starting litigation is the best way to get an agency to actually respond, since agencies want to avoid the costs of litigation and perhaps fear they will lose on the merits of an unreasonable delay case. Others disagree, insisting neither the threat of litigation nor the available remedies upon success are very valuable, given that, in today's political climate of sue-and-settle allegations, an agency is most likely to respond to litigation by simply denying the petition.<sup>382</sup> At least some agencies are fairly confident that they would prevail in most unreasonable delay litigation so long as they can clear a low bar of articulating some reasons for their decisions on priorities and litigation.

Whether sue-and-settle is real or imagined, the controversy has already had important effects on the petition process. Some stakeholders indicate that before the sue-and-settle controversy, when they sued over failure to act on a petition, the agency would sometimes agree to develop a public process to explore the issues raised; now, after the sue-and-settle allegations, agencies are more likely to simply deny a petition upon being sued for delay. Additionally, though congressional staff indicate that citizen suit litigation (not petitions) was the focus of congressional debates over sue-and-settle, at one hearing "when EPA was asked by Congress to provide information about . . . the petitions for rulemaking served on EPA by private parties, the agency could not—or would not—provide the information."<sup>383</sup> In response to the congressional request, EPA started its online petition docket.<sup>384</sup> Stakeholders, including those most concerned about sue and settle, are encouraged by EPA's preliminary efforts to improve transparency, but most still feel agencies should do more to increase the openness of the handling of petitions for rulemaking.

## V. Recommended Reforms

This Part suggests reforms that can benefit petitioners, agencies, and the general public alike, while safeguarding the constitutional and statutory rights to petition the government.

### V.A. Striking the Right Balance

Reforming the petition process is not inevitably a zero-sum game, pitting agencies against petitioners. Facilitating the submission of higher-quality petitions can benefit both sides. Agencies can use high-quality petitions to harness petitioners' data and apply the diffuse, collective wisdom of the public to help produce more efficient regulations that will advance agencies' missions. Petitions can alert agencies to which issues the public takes most seriously, letting agencies be more responsive to the public they serve. Giving the public a clear voice in the agenda-setting process may increase confidence in agency decisionmaking, improving relationships between the

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<sup>381</sup> See *Am. Sports Council v. U.S. Dep't of Educ.*, 850 F. Supp. 2d 288, 293 (D.D.C. 2012); *Crane v. NRC*, 334 F. App'x 316, 317 (9<sup>th</sup> Cir. 2009) (holding that the court would not review a "hypothetical controversy" where the petitioner was not likely to be able to show concrete injury from denial of petition for rulemaking).

<sup>382</sup> For examples of an agency denying a petition soon after suit for unreasonable delay was filed, see, e.g., *Natural Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 872 F. Supp. 2d 318, 330 (S.D.N.Y. 2012) *rev'd*, 12-2106-CV L, 2014 WL 3636283 (2d Cir. July 24, 2014); *United Transp. Union Local 418, Burlington Sys. Div. of the Bhd. of Maint. of Way Employees v. Boardman*, C07-4100-MWB, 2008 WL 2600176 (N.D. Iowa June 24, 2008) (reviewing practice of other jurisdictions in finding a response to moot litigation over unreasonable delay on a petition for rulemaking).

<sup>383</sup> Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* 5 (2013).

<sup>384</sup> See Sandra Snyder, *EPA Improves Transparency by Posting Petitions and Notices of Intent Online*, Energy Legal Blog, July 16, 2013.

public and the government, potentially increasing regulatory compliance and decreasing adversarial legal battles.

Similarly, discouraging meritless petitions can benefit both sides. Agencies free up scarce resources to devote to their own initiatives that will advance general social welfare. Many agencies conclude that, on the whole, the petition process is valuable and has more advantages than disadvantages. One agency official exclaimed petitions were “fabulous! . . . the process just needs to work better.” Another offered a different spin on the value of petitions: “Not always welcome, but often helpful.”

Reforms also need not pit some stakeholder camps against others: for example, there is nearly unanimous agreement among business interests, public interest organizations, and individuals (and even some government officials) that more transparency in the petition process is desirable.<sup>385</sup>

However, at least sometimes making it easier for agencies to dispose of petitions could make it harder for the public to participate in setting the regulatory agenda, and vice versa. Therefore, it is important to understand the different values that may hang in the balance. On the one hand, there is the value of democratic accountability, public-private dialogue, and collaboration. Petitions provide an essential mechanism to let the public participate not just by passively commenting on government actions, but actively helping to set the agenda and combating agency inertia.<sup>386</sup> Though agencies may prefer to have more flexibility in setting their own priorities, the right to petition for rulemaking guarantees that individuals will have a say in the decision as well. As a Coast Guard official recently wrote, “The petition for rulemaking process is an equal opportunity activity, providing identical access to [agency] officials regardless of a requester’s status. A concerned citizen receives the same consideration as a well-funded and organized industry group.”<sup>387</sup>

On the other hand, there is the benefit of an efficient and rational administrative state. Even if individual petitioners have the best intentions, their narrow interests and potential lack of expertise can make them rather bad at setting relative policy priorities in a way that will maximize net benefits for all of society.<sup>388</sup> If petitions come mostly from well-organized, well-financed groups, any agency resources spent responding to petitions could take resources away from attending to the interests of the general public.<sup>389</sup> Additionally, if wielded with less good intentions, petitions could become a tool to interfere with agency action, by bottling up the agency’s agenda and diverting resources from other activities.<sup>390</sup> Agencies have dwindling free resources and heavy obligations, and most agencies feel they are already working as hard and as intelligently as they can and have set priorities accordingly; petitions could disrupt those expert judgments.

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<sup>385</sup> But the business community may not be so quick to embrace all petition types as equally valuable. Some stakeholders see a useful role for petitions for technical determinations or waivers or alternate compliance options, while opposing petitions for broad, legislative rules as inappropriate.

<sup>386</sup> Livermore & Revesz, *supra* note 255.

<sup>387</sup> [http://www.uscg.mil/proceedings/archive/2013/Vol70\\_No1\\_Spr2013.pdf](http://www.uscg.mil/proceedings/archive/2013/Vol70_No1_Spr2013.pdf).

<sup>388</sup> Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 Yale J. on Reg. 1, 15-16 (1989).

<sup>389</sup> ACUS Recommendation 95-3, at 2 (1995) (“Although petitions for rulemaking are a useful method for the public to recommend to agencies changes it believes are important, such petitions should not be allowed to dominate the agency’s agenda. Agencies have a broad responsibility to respond to the needs of the public at large and not all members of the public are equally equipped or motivated to file rulemaking petitions. Thus, the petition process should be a part, but only a part, of the process for determining agency rulemaking priorities.”).

<sup>390</sup> In one recent study conducted at the state government level, total public access in the rulemaking process, including the right to petition (though not clear if that right in particular was instrumental in the observed effects) decreased environmental compliance costs borne by industry, which could suggest agency capture leading to under-regulation, though it also could suggest regulations had otherwise been set at a cost-inefficient level. See Neal D. Woods, *Regulatory Democracy Reconsidered: The Policy Impact of Public Participation Requirements*, JPART Oct. 31, 2013.



## V.B. Pre-Submission: Facilitate and Educate

Educating the public about the right and the process to petition for rulemakings will not only benefit stakeholders, but will also benefit agencies by helping petitioners submit more high-quality, easy-to-review petitions and fewer meritless petitions.

### Recommendation #1: Adopt official procedures for handling petitions.

Official procedures are essential to alert both the public and the agency staff about the attention that petitions for rulemaking should be given. ACUS's conclusion from 1986 remains true: "The absence of published petition procedures, excessive or rigidly-enforced format requirements, and the failure to act promptly on petitions for rulemaking may undermine the public's right to file petitions for rulemaking."<sup>391</sup> (See also Sections II.D. and IV.B-F.)

**How Agencies Benefit:** Adopting regulations or other official guidelines on handling petitions will alert agency staff to the procedures and required level of attention to give petitions for rulemakings. Some agencies report that, upon receiving petitions, new staff members are unsure what to do. Having official procedures on the books can educate new staff and create an internal agency culture around efficiently processing petitions. In the absence of official procedures, some agencies report that "perceived" and unnecessary procedural prerequisites emerge in an ad hoc system, which can inefficiently tie the staff's hands.<sup>392</sup>

Official procedures can also help conserve agency resources. By defining minimum content requirements, agencies can more easily segregate communications entitled to special treatment as "petitions" from other correspondence; without such guidelines, agencies would seemingly have to treat any request that suggests any regulatory change as an action-forcing, priority-setting petition under the APA.<sup>393</sup> By clarifying required content and the desired supporting data, official procedures can help ensure agencies will receive complete petitions with the supporting information needed to review the merits efficiently. And by detailing the timeline and basic steps for review, procedures can reduce the need to respond to public inquiries about the process and the status of individual petitions.<sup>394</sup>

Regulations will also promote consistent handling across different agency program divisions and from petition to petition within an agency, which will prevent unequal treatment and increase public confidence in the process.

**How Stakeholders Benefit:** Though sophisticated stakeholders (including some individual lawyers, scientists, and former government employees) already take advantage of their right to petition for rulemaking, the consensus view is that much of the general public remains unaware of the right or the process for exercising that right. The subset of individuals who both read the *Federal Register* but are currently unaware of their right to petition may not be large, but the adoption of official procedures will nevertheless help educate those individuals about an important constitutional and statutory right.

But even for sophisticated stakeholders already aware of their right, the value proposition is not always clear to would-be petitioners. What does it take to get a response from an agency? How likely is that response to lead to the desired regulatory change? By explaining the agency's review

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<sup>391</sup> ACUS Recommendation 86-6, at 1-2 (1986).

<sup>392</sup> 78 Fed. Reg. 25,886 (May 3, 2013).

<sup>393</sup> See Section II.G.

<sup>394</sup> Luneburg, *supra* note 2, at 511-12, 585 n.93.

process step-by-step, regulations can clarify the value proposition, which will help stakeholders focus their attention on subject matters most suited to the petition process.

***Anticipating Counterarguments:*** Adopting regulations will not likely expose agencies to increased judicial scrutiny for procedural violations. Such cases are rare, and the standard of review is highly deferential to agencies' own interpretations of their regulations.

Agencies that get few or no petitions may be reluctant to spend much time developing procedures. However, agencies can borrow from the best practices of other agencies to greatly reduce the costs of developing regulations. The benefits of adopting procedures, thus, should outweigh these minimal costs.

An ad hoc approach is not the only way to maintain the flexibility to respond to petitions that may vary considerably in subject matter and quality. Those agencies that already have regulations on the books demonstrate that formalizing the process does not need to tie the agency's hands in any serious way. Similarly, so long as procedures are not "excessive or rigidly-enforced," they should not bog down the review process; many stakeholders and even some agencies feel that having clear procedures is, in fact, essential to prompting the agency to act on petitions in a timely manner.

Agencies may worry that, by facilitating petitions, they will suddenly become overburdened. However, sophisticated stakeholders indicate they are already petitioning about as much as they want to, and that having clearer procedures, though desirable, would only increase the incentive to petition "at the margins." Any members of the public likely to read and react to a *Federal Register* notice of new procedures on the handling of petitions are probably sophisticated enough to already petition if they want to.

***Implementing the Recommendation:*** There is no one-size-fits all approach to handling petitions, and overly rigorous procedures can delay review. Without imposing too many finely detailed requirements that could stifle flexibility, agencies can adopt a basic, rational framework for evaluating petitions. Agencies may want to borrow best practices from those with a lot of experience handling petitions, such as the Nuclear Regulatory Commission (see Section IV.B.3).

Key elements should include the following (some of which apply additional recommendations proposed below; see *infra* for more details and justifications):

- *Pre-Submission*—Encourage pre-submission (and post-submission) consultations with staff, to clarify the petitioners' request.
- *Submission*—Enable submission by e-mail or online docket. Regulations should also list mailing and physical addresses, but they should clarify that electronic submissions are preferred, will likely speed processing, and will enable the generation of an electronic receipt, and so there is no need for duplicate mailings by petitioners.
- *Minimum Content*—Detail that petitions must be made in writing, contain contact information and the affiliation of the lead petitioner, detail the interests of the petitioner, and include a clear request for concrete action within the agency's authority.
  - Clarify whether submissions containing such information, even if submitted through retrospective review or during notice-and-comment proceedings, will be automatically treated as a petition or need to be submitted separately as such.
  - Indicate that the agency retains discretion to treat as routine correspondence any submissions that do not comply with these requirements and do not otherwise label themselves as "petitions" or as submitted under relevant statutory rights to petition. If a submission is clearly intended as a "petition" but fails to meet these content

requirements, the agency should reply, briefly explaining why the submission was found insufficient.

- Agencies may explore whether certifications are appropriate, so that criminal penalties could be assigned against petitioners who knowingly supply false information in a petition.<sup>395</sup>
- An agency may consider listing additional content requirements if well justified, but should recognize the potential resource limitations of petitioners. Most additional content specifications should be clearly designated as optional recommendations.
- *Recommended Content*—Indicate whether the agency prefers that petitions propose specific regulatory language, and detail the preferred kinds of supporting data.
  - Agencies may want to encourage the submission of peer-reviewed analyses, including cost-benefit analyses, of the proposal. Such content should be clearly marked as optional, given potential resource limitations of some petitioners.
  - Agencies may allow petitioners to justify any request for more expeditious consideration of their petition. Grounds could include emergency public health, safety, or welfare considerations, or if the petition was developed by a consensus-driven process.<sup>396</sup> Agencies would retain discretion whether to expedite review.
- *Review Procedure and Criteria*—
  - Explain the procedure for initial screening, acknowledgement of receipt, and online docketing. Designate the relevant agency contact as soon as possible. If a petition addresses multiple program areas or regions, an agency should designate a single contact to coordinate the handling of the petition.
  - Utilize an online docket and institute an open comment period. Post all comments, status updates, and other communications to the docket.
  - Commit to regular status updates and annual summaries of the status of all petitions. Clarify that such updates are not intended as final agency action.
  - If an agency wants to deviate from the default timelines proposed by Executive Order (see Recommendation #8 below), the agency should justify a different target deadline, and condition the timeline with phrases like “to the maximum extent practicable given resources.”
  - Specify the agency’s criteria for review.
- *Scope and Uniformity*—Regulations should be as uniform as possible across agency programs.
  - Clarify that the regulations cover all requests for rules, guidance, or waivers, including petitions for reconsideration, and also cover petitions on any matters of agency management, proprietary functions, and (if relevant) foreign affairs (see Section II.I).

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<sup>395</sup> See Comments from FTC to FDA, *supra* note 264, at 3.

<sup>396</sup> Neil R. Eisner & Judith S. Kaleta, *Federal Agency Reviews of Existing Regulations*, 48 ADMIN. L. REV. 139 (1996) (derived from ABA report, and recommending the encouragement of consensus-driven petitioning) [hereinafter “ABA Report”].

- The agency can adopt different regulations governing the process for handling different kinds of petitions, where justified.
- If multiple sets of regulations exist or are adopted, for example to correspond with specific statutory petition provisions, cross-references should be added to indicate that both more general and more specific petition processes exist.<sup>397</sup>

It will also be useful for agencies to adopt more detailed internal guidance on additional procedures, for example diagramming the flowchart for channeling the petition to different reviewers in the agency and delegating decisionmaking authority.

## **Recommendation #2: Use online platforms to educate the public.**

Agency websites and other administration-wide online platforms should educate the public about how to file petitions. (See also Sections II.D. and IV.B.)

**How Agencies Benefit:** Creating educational materials on petitions for rulemaking will have many of the same benefits as adopting official procedures. By teaching the public about content requirements and the elements of successful petitions, agencies will encourage higher-quality, easier-to-review submissions. Detailing in plain language the timeline and basic steps for review will help reduce public inquiries about the process. By providing examples of successful petitions, as well as details about the full procedures, rate of denials, and other agency priorities, agencies can encourage the public to be more realistic about the petition process, to better appreciate the substantive obstacles involved and the likely timeline for accomplishing the desired regulatory change.<sup>398</sup> And though directed at public education, the same materials can also help inform agency staff about the procedures and required level of attention to petitions for rulemakings.

Though educational materials are unlikely to significantly increase the number of petitions submitted to agencies, agencies may in fact find the facilitation of some additional petitions to be desirable. For example, agencies may want to encourage stakeholders to use petitions to come first to the agency with their complaints, rather than seeking congressional or White House oversight, which the agencies might find is more of an imposition than petitions are.<sup>399</sup>

**How Stakeholders Benefit:** Benefits to stakeholders of educational materials are also similar to their benefits from official agency procedures. Namely, some subset of the public previously unaware of the right to petition for rulemaking will learn about this constitutional and statutory guarantee. Even some sophisticated stakeholders are unaware of some of the narrower, statute-specific rights to petition. More importantly, all stakeholders and potential petitioners will better understand the value proposition in petitioning. Especially if the web content include examples of successful petitions, realistic estimates about the timeline for review and likely rate of granting, and descriptions of the agency's other competing priorities, the materials will encourage stakeholders to focus their attention on subject matters best suited to the petition process.

**Anticipating Counterarguments:** Historical evidence does not suggest that an increase in public awareness of the right to petition for rulemaking will dramatically increase the number of petitions that agencies receive. For example, EPA does not seem to have experienced any large influx of petitions following the publication of its new online petitions docket, which includes basic

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<sup>397</sup> Luneburg, *supra* note 2, at 569.

<sup>398</sup> See ABA Report, *supra* note 396.

<sup>399</sup> *Id.*

information on the right to petition—even after some prominent news coverage of the website.<sup>400</sup> Similarly, there was not a huge increase in the number of petitions submitted to agencies immediately following the highly publicized *Massachusetts v. EPA*.

**Implementing the Recommendation:** Agencies should use their websites, blogs, and social media platforms to offer plain language descriptions of the petition process. These materials should include links to the relevant regulations or statutes on petitioning, as well as to online dockets of petitions. Both the APA process and any statute-specific petition provisions should be described. Agencies should provide examples of successful petitions, but also include realistic cautions on the likelihood of a petition being granted, the likely timeline for review, and the agency’s competing priorities. Agencies should keep their web materials up to date and consistent with their regulations, to prevent confusing or misleading petitioners.

Administration-wide online platforms should also provide basic information on the rights to petition contained in the APA and other statutes. Such platforms include the *Federal Register* website (under its “Learn” tab), regulations.gov, reginfo.gov, and the *We the People* website.

Agencies could also reference the basic right to petition in any published solicitations for public input into their retrospective review processes, as well as in publishing their priorities in the annual preambles to the unified regulatory agenda.<sup>401</sup>

### **Recommendation #3: Facilitate consultations with petitioners before (and after) submission**

Pre- and post-submission consultations between the agency and petitioners can help both parties conserve resources.

**How Agencies Benefit:** Agencies can ask the petitioner to clarify its request or submit additional information, which will make the petition easier to review. Agencies can alert petitioners to recent developments that may warrant the modification or withdrawal of the petition. Additional benefits to the agencies of post-submission consultations are discussed below, in Recommendation #6 on communication and updates.

**How Petitioners Benefit:** Petitioners can learn whether an existing program or pending rulemaking could address their request. Petitioners can also better understand what information the agency requires or prefers, to ensure their submission is high-quality and easy-to-review, which can forestall the need to resubmit a petition upon failure to clear an initial screening for content requirements.

**Anticipating Counterarguments:** By limiting such consultations to procedural matters, rather than debating the merits of the request, agencies should not be overburdened by such discussions. In fact, many sophisticated petitioners already discuss their petition with the agency before submission. Specifying the availability of pre-submission consultations simply levels the playing field, so the general public is aware of this opportunity as well.

**Implementing the Recommendation:** The Nuclear Regulatory Commission perhaps has the most experience with pre- and post-submission consultations. Other agencies can learn from their practices.

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<sup>400</sup> See Lenny Bernstein, *Vitter Drops Filibuster Threat on EPA Nominee Gina McCarthy*, WASH. POST, July 9, 2013 (noting that Senator Vitter dropped a filibuster threat after EPA, among other things, agreed to publish petitions for rulemaking on a new website).

<sup>401</sup> For example, the Postal Regulatory Commission has called for public input into its agenda, [http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201404/Preamble\\_3211.html](http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201404/Preamble_3211.html).

## V.C. Tracking: Online Efficiencies, Transparency, Communication

More frequent and transparent interactions between the agency, petitioners, and the general public will benefit all parties, improving the quality of petitions and conserving resources. Reducing existing frictions and frustrations will likely ease the threat of litigation. Online tools can greatly facilitate communication and the tracking of petitions' status. (See Sections IV.D-F.)

### Recommendation #4: Use online dockets to allow the public to monitor status.

**How Agencies Benefit:** Online dockets will generate political and public relations benefits for agencies, by directly responding to transparency concerns raised by many petitioners and by opponents of "sue and settle" (see Section IV.G). Many stakeholders have praised EPA's recently created online docket of petitions, for example, as a valuable first step toward improved transparency. By listing all petitions received and so demonstrating the extent of the demands on agency resources, an online docket may help explain to petitioners (including potential litigants) the reasons why an agency needs more time to review petitions; the docket may similarly convey such information on resources to Congress and potentially even to judges.

Once established, dockets can archive an agency's history of handling petitions for rulemaking. An agency can so take credit for the reviews it completes<sup>402</sup> and can convey information to potential petitioners on the likely rate of success, which may discourage less-meritorious petitions. These and other benefits will accrue as the agency uses its online docket to facilitate compliance with this study's additional recommendations on collecting comments, posting regular status updates, and reporting summary statistics on petitions.

Dockets may also help conserve agency resources in several ways. Digital submissions should be easier for agencies to process. Checks on certain content requirements, such as certifications, could be performed almost automatically. Stakeholders are also less likely to submit duplicative petitions if they see that another group has already petitioned on the same matter. The docket may even expose any intentionally duplicative or meritless petitions filed by petitioners with the intent to bog down an agency (though evidence of such "sham" petitions is limited). Since stakeholders will know their petitions will be published with their names attached, they may think twice before submitting frivolous petitions.<sup>403</sup>

**How Stakeholders Benefit:** Online submission is likely easier for most petitioners and will quickly generate electronic receipts, relieving petitioners of the worry that the agency never in fact received their petitions. Stakeholders will appreciate the ability to monitor the petitions submitted by other organizations and individuals, to watch for opportunities to participate and to understand what other issues are on the agency's plate. Since the existence of a tracking system itself can help spur agencies to avoid unnecessarily long delays in processing petitions, online dockets may also help ensure speedier reviews for petitioners.

**Anticipating Counterarguments:** Online docketing should be a relatively low-cost solution, since it allows the agency to provide notice of receipt of a petition without having to individually publish announcements in the *Federal Register*. Of course, where statutes or regulations require *Federal Register* notice of receipt of a petition, and subsequently for notice of any rule proposed pursuant to any petition, the agency will still need to publish in the *Federal Register*. But when the alternative is not publishing any notice of receipt of petitions, online dockets may be an attractive and low-cost

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<sup>402</sup> Currently, for agencies that do not publish notice of receipt, if the agency spends significant time and resources reviewing a petition and ultimately denies the petition, all that effort is invisible to most stakeholders. By showing reviews on petitions are started and then completed, agencies can take credit for the significant work they do reviewing petitions.

<sup>403</sup> See Comments from FTC to FDA, *supra* note 264, at 2-3.

option. SEC, for example, reports that a small web team is able to handle a relatively high volume of petitions, comments, and other public submissions.

If necessary, exceptions to online docketing could be made for petitions that contain too much confidential information.

**Implementing the Recommendation:** Agencies should accept submissions electronically, either by e-mail or online docket. E-mailed or mailed petitions should then be uploaded to online dockets. Independent agencies should be encouraged to use regulations.gov, to make the process as centralized and uniform as possible, and to take advantage of the economies of scale and expertise of the regulations.gov staff. Of course, independent agencies are also free to opt-out and maintain their own petition dockets instead on their own websites. But for any agency (independent or executive branch) that receives relatively few petitions, using regulations.gov will probably be a lower-cost solution than managing its own docket.

Agencies should standardize their use of labels and tags for documents on regulations.gov or their own dockets, to facilitate public searches for petitions. To the extent possible, agencies should use available features on regulations.gov or their own online dockets to distinguish between petitions for waivers, petitions for guidance documents, petitions for legislative rules, petitions for reconsideration, and other relevant categories. Such distinctions will help the public (and Congress) better understand the nature of petitions submitted to various agencies. Regulations.gov should work with agencies to ensure that searches for petitions generate easily digestible results, free of unrelated documents and organized by filters (such as open versus closed petitions). Improved search functions, to allow filtering for petitions open to public comment, for example, would also be desirable. Any enhancements necessary to facilitate the docketing process should be made to the Federal Document Management System. To the extent possible, agencies should populate the docket with petitions received over the past several years as well, especially any that are still pending.

Online submissions and docketing will allow agencies to seamlessly provide petitioners with electronic receipts of their submissions, which should also include the contact information for relevant agency staff and a standard explanation of the next steps in the process.

#### **Recommendation #5: Allow an open comment period on all petitions.**

Currently, most agencies prefer to maintain some discretion on the solicitation of comments, citing potentially steep costs and limited benefits (see Section IV.E). However, the lack of a default comment period on all petitions can create an anti-regulatory bias. As Luneburg explained in his 1986 report to ACUS, if the agency likes the petition and moves forward, notice-and-comment rulemakings guarantees that opponents will have a chance to try to dissuade the agency; however, if the agency does not favor the petition and chooses not to seek comments, there is no opportunity for the general public to weigh in and try to persuade the agency.<sup>404</sup> Agencies should institute an open comment period on all petitions for rulemaking that are received and docketed online.<sup>405</sup>

**How Agencies Benefit:** As with other transparency and participation measures recommended by this study, allowing for comments on petitions for rulemaking will yield political and public

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<sup>404</sup> Luneburg, *supra* note 2, at 563-64.

<sup>405</sup> ACUS has repeatedly called for agencies to voluntarily allow for comments during the decisionmaking process, even if not required. See <http://www.acus.gov/newsroom/administrative-fix-blog/long-history-encouraging-voluntary-agency-efforts-expand-public>.



relations benefits for agencies. An open comment period directly responds to sue-and-settle-type criticisms and could increase public confidence in the agency's agenda-setting processes.

Comments can also help conserve agency resources. By highlighting strengths and weaknesses of the proposal, comments narrow the scope of debated issues at an early stage in the decisionmaking process, which can help expedite subsequent review.<sup>406</sup> Comments are essentially a way for agencies to outsource some of the responsibility for justifying an eventual grant or denial.

**How Stakeholders Benefit:** By demonstrating the breadth of public support for a petition, comments can help soften agency resistance to outside ideas. Comments can also help refine the initial petition to make the request even more efficient or effective. For stakeholders concerned about a lack of transparency in agency decisions on petitions, an open comment period will give them a chance to add their voice to the discussion.

**Anticipating Counterarguments:** Agencies typically resist a universal requirement to collect comments on petitions out of concerns for the costs, risk of delaying the review, and risk of judicial review for failure to adequately address comments. However, by maintaining an online docket with a clear procedure for the submission of comments, agencies can avoid much of the cost of publishing individual notices of comment periods in the *Federal Register* or otherwise having to solicit comments. By having an open comment period with no fixed deadline, the agency eliminates the risk of delay, since it can still act at any time to grant or deny the petition.<sup>407</sup> The comment process will apply only to petitions that have been docketed online, meaning they have cleared an initial screening to ensure the request meets basic content requirements and does not seek action that is obviously beyond the agency's authority or is otherwise patently frivolous. Agencies will also remain free to skip over this initial comment period by immediately granting the petition and proposing a rulemaking (with its own attendant comment period).<sup>408</sup>

Receiving comments should not significantly increase the risk of a court overturning an agency denial of a petition. The standard is already highly deferential to agencies (see Section II.F). And since taking comments on petitions is almost always optional—unlike the required comment processes for proposed rulemakings under 5 U.S.C. § 553(c)—arguably agencies do not face the same obligation to respond in full to all comments. The agency will simply have to justify its decision on the basis of the record, a standard that, again, is highly deferential. Agencies can also specify that comments will be accepted in support or opposition to granting the petition but not on other topics, and that any comments that propose alternative agency action will not automatically be treated as “petitions” themselves unless resubmitted separately as such; these measures may further help contain the number of subjects the agency must address in its response. Agencies should never feel the need to race to issue a denial just to avoid creating a judicially reviewable record as comments and other communications come in.

There may be some concern that an open comment period could favor well-organized interest groups and allow them to bury otherwise meritorious petitions in an avalanche of negative comments before an agency really has a chance to conduct its review. This reflects a general concern about a potential imbalance of public participation through the entire regulatory process, and is not unique to petitions. In fact, skipping over an initial comment period at the beginning of the petition review process may just delay the inevitable, since any rule proposed pursuant to the petition would surely attract the same or more attention during a subsequent comment period. By

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<sup>406</sup> ABA Report, *supra* note 396.

<sup>407</sup> If granting a petition results in the initiation of a rulemaking, of course the agency would most likely have to hold a fixed-length comment period on any proposed rule. And some statutes or regulations may fix the length for a required comment period on the receipt of a petition for rulemaking.

<sup>408</sup> Luneburg, *supra* note 2, at 565.

allowing comments sooner rather than later, at least the original petitioner may have more of a chance to respond to any public criticisms. And, as noted previously, in cases where the agency is disinclined to move forward on the petition, an early comment period gives the petitioner its best chance to rally additional public support. The benefits of allowing comments should outweigh the risks.

**Implementing the Recommendation:** Agencies should use their online petition dockets to automatically initiate an open comment period with no fixed deadlines. The online system should provide clear instructions for the submission of comments, freeing agencies from publishing individual solicitations. Of course, when specifically required by statute or regulation to call for public comments in a *Federal Register* notice, an agency will need to comply.

Comments should be posted to the online petition docket as soon as possible. With the help of software tools, some independent agencies have already proven that a small web team can readily manage a moderate volume of petitions and comments. Agencies should work with FDMS personnel to develop the appropriate tools to manage petitions and comments on petitions.

Agencies should make it clear to commenters whether their comments on a petition will be incorporated into the record on any subsequent related rulemaking.

#### **Recommendation #6: Provide regular updates and designate contacts.**

One of the biggest complaints among petitioners is that, after the agency sends an initial receipt and dockets the petition, the petition seems to enter a “black hole”: most agencies provide no regular updates and may disclose little about the petition’s status even if the petitioner reaches out to them (see Section IV.E). Agencies should provide regular updates, posted to the petition’s online docket.

**How Agencies Benefit:** As with many of the recommendations discussed above, improving transparency will increase public confidence in the agency’s decisionmaking process. Stakeholders report that frustration over complete silence can make them more likely to sue for an unreasonable delay; providing updates, thus, can reduce the threat of litigation. Updates may help agencies justify any long review timelines to petitioners, as well as to Congress and potentially even to judges.

Updates will allow agencies to take credit for the significant work they do to review petitions. Currently, much of an agency’s work on any ultimately-denied petitions is largely invisible to the public. Posting updates and ultimate determinations on petitions to an online docket will create a detailed and lasting record of the agency’s efforts on petitions. Such a record will also provide guidance to prospective petitioners on their likely chances for success, which should reduce the number of meritless petitions.

Providing more regular updates, and allowing the petitioner and the public to respond to such updates, will enable the kind of back-and-forth interaction that is essential to unlocking the promised benefits of the e-rulemaking movement.<sup>409</sup> Agencies can use regular communication with petitioners to assess whether a petitioner’s needs have changed, which could result in a withdrawal of the petition, saving agency resources.<sup>410</sup> For example, as part of a successful campaign to reduce

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<sup>409</sup> See Herz, *supra* note 232 (“[B]arriers to effective participation remain high because members of the public remain largely unaware and uninformed about the process and particular rulemakings and do not know how to make useful contributions, there is no back-and-forth among commenters or between commenters and the agency, and the process remains largely sealed off from the public at large.”).

<sup>410</sup> Luneburg, *supra* note 2, at 546.

its backlog of petitions, FDA began contacting petitioners on a regular basis to ask whether their needs had changed.<sup>411</sup>

**How Stakeholders Benefit:** This recommendation directly addresses a chief complaint of petitioners. Most report they would be satisfied with very simple updates, so long as they are honest and somewhat regular. Other stakeholders will also benefit from insights into agencies' progress on and prioritization of the various matters before them.

**Anticipating Counterarguments:** Agencies may fear that any interim determination or communication could constitute final agency action subject to judicial review. However, stakeholders report that frustration over complete silence can actually make them more likely to sue for an unreasonable delay. Moreover, a few cases notwithstanding, courts are unlikely to treat status updates as final, reviewable action (see Section II.H.).

**Implementing the Recommendation:** Updates could be as simple as checking a box to indicate the current status or next planned steps: for example, "no action yet," "determining priority level," "deemed lower priority, awaiting necessary resources," "crafting substantive response," or "waiting for conclusion of litigation/related rulemaking/advisory committee study." Using online tools, such updates can be accomplished with relatively little cost. Agencies should clearly mark updates as preliminary and subject to subsequent revisions, to prevent triggering judicial review for final agency action. Updates should be provided at least annually.

To facilitate communication, agencies should identify the appropriate contact person for petitioners as early as possible. The designated contact should have authority to coordinate the agency's review process and report on the petition's status.

Agencies may also want to draw lessons from the tiered decisionmaking and petition tracking procedures developed under the Endangered Species Act (though perhaps without mirroring the strict 90-day deadlines). Providing a relatively quick, initial determination on whether the petition *may* have merit, though a low bar, weeds out frivolous petitions and helps both the agency and the petitioner focus on the most promising requests. It also gives petitioners a sense that the agency is taking the petition seriously, which could make petitioners less frustrated and less litigious. A second, more in-depth review period may conclude with the finding that the petition still could be warranted, but the agency lacks the necessary resources to take action. (Note that resources should only be grounds for delay, not denial.) Under the Endangered Species Act, the agencies keep track of such pending petitions, provide annual updates on the status, and seek out new information from the petitioners and the public.

#### **Recommendation #7: OIRA should collect summary statistics on petitions from agencies.**

OIRA has authority to collect information from both executive branch agencies and independent agencies on the matters that will be "under review" during the coming year (see Section III.B.1). OIRA should use this authority to collect summary statistics from agencies about any still pending or recently resolved petitions. These statistics could then be incorporated into existing OIRA publications (there is no need to create new reporting requirements), such as the unified regulatory

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<sup>411</sup> See 64 Fed. Reg. 66,823 (Nov. 30, 1999); 68 Fed. Reg. 16,461 (April 4, 2003). The HHS Inspector General had further recommended publishing notice in the *Federal Register* for petitioners who do not respond to such correspondence, notifying that petition will be removed from FDA's records unless advised otherwise. *Review of the FDA's Citizen Petition Process*, A-15-97-50002 (1998).

agenda or the annual report to Congress on regulatory activity. Calls for summary reports have frequently appeared in previous sets of recommendations on petitions for rulemaking.<sup>412</sup>

**How Agencies Benefit:** As with the provision of regular updates, publishing annual statistics will improve transparency, increase public confidence, allow agencies to take credit for the significant work they do reviewing petitions, and enable agencies to justify their timelines for review. In fact, the credibility of an OIRA report may make it even easier for agencies to justify any delays and the need for more resources to petitioners, potential litigants, Congress, and the courts. As one scholar explained, “An agency’s OIRA submissions are more credible than the papers its lawyers file in litigation. Courts would no longer have to second-guess the agency’s purported priorities, as they currently must do under the *TRAC* analysis.”<sup>413</sup> (See Section II.F.1. on unreasonable delay cases.)

The report will alert Congress to agencies’ needs for additional resources to meet their statutory obligations to respond to petitions, and will more generally enable Congress to weigh in on prioritization decisions.<sup>414</sup>

Reports may also help conserve agency resources, much like previous recommendations. By publishing statistics on the number of denials and length of time for review, petitioners can be more realistic about their chances of success and more discerning on which subject matters they select for petitions.

**How Stakeholders Benefit:** Stakeholders will gain even clearer insight into agencies’ petition processes, including likely timelines for review and chances of success. Also, simply having a system in place to track agencies’ overall progress in reviewing petitions should spur agencies to review petitions as expeditiously as possible (given their limited resources).

**Anticipating Counterarguments:** Using their online dockets, preparing annual statistics should be relatively straightforward and inexpensive for agencies. Because the statistics can be incorporated into existing OIRA publications, either the annual agenda or the annual report to Congress, the additional burdens should be minimal.

**Implementing the Recommendation:** In any summary reports, agencies should distinguish, to the extent feasible, between petitions for general legislative rules, those for specific exemptions, and those for guidance, to help the public and Congress better understand the nature of petitions received by the agencies.

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<sup>412</sup> See e.g., American Bar Association, House of Delegates, Resolution on Petitions for Rulemaking (1988) (“recommends that administrative agencies implement the right to petition for rulemaking . . . by . . . including in the Annual Regulatory Program of the President a list of pending petitions for rulemaking”; but note a different Executive Order existed at the time on the annual regulatory agenda) (cited in Luneburg, *Petitioning Federal Agencies for Rulemaking*, 1988 WIS. L. REV. at 63 n.367); Attorney General’s Committee on Administrative Procedure, Final Report: Administrative Procedure in Government Agencies, S. Doc. No. 8, 77<sup>th</sup> Cong., 1st Sess. at 120-21 (1941) (recommending that agencies report on petitions to Congress; “Congress and the public are, however, entitled to know of the rulemaking activities of administrative agencies. The progress of the law which these agencies are developing should be recorded and submitted for information and criticism in such a way as to give an over-all view of what is being done, rather than mere information of isolated instances. Not only new regulations adopted but unaccepted proposals for change in existing regulations or for additions to them, emanating from outside the agencies, are of importance.”); Sant’Ambrogio, *supra* note 60, at 1434-35 (arguing for agencies to tell OIRA about matters they are not actively pursuing because of resources and other priorities).

<sup>413</sup> Sant’Ambrogio, *supra* note 60, at 1434.

<sup>414</sup> See William Yeatman, *Deadline Citizen Suits: An Idea Whose Time Has Expired*, 8 APPALACHIAN NAT. RESOURCES L.J. 51, 78 (2014); see also Sant’Ambrogio, *supra* note 60, at 1435.

## V.D. Decisions: Reasonably Prompt and On the Merits

### Recommendation #8: Set default target timelines for response, by Executive Order.

As a variation on past ACUS recommendations calling for deadlines to complete reviews on petitions for rulemakings,<sup>415</sup> the President, by executive order, should set a non-enforceable, default timeline for resolving most petitions within 12-18 months of their submission. If an agency determines that the default target is unworkable, it should be encouraged to justify and adopt its own non-enforceable but transparent target schedules.

**How Agencies Benefit:** As the HHS Inspector General concluded, when an agency “does not answer petitions in a timely manner, the public may lose confidence in the regulatory process.”<sup>416</sup> A few agencies report that, even though target timelines may not always be achieved, having the internal target in place helps create a staff culture in which the expeditious review of petitions is a serious goal and unnecessary delays are avoided.

**How Stakeholders Benefit:** Benefits to petitioners are obvious. Even if the target timeline is not met, having a target will encourage agencies to continue making progress and updating the petitioner on the status of the request. Even some stakeholders who would oppose on the merits petitions submitted by other groups may still prefer a speedier resolution on the petitions, rather than having them sit in limbo: delay can create uncertainty for both the public and the regulated community (see Section IV.F.3).

**Anticipating Counterarguments:** Because such targets will represent aspirational goals and will not be judicially enforceable deadlines, concerns about creating an unrealistic burden on agency resources should be limited. Targets should always be conditioned by a phrase like “to the full extent that resources allow,” to avoid creating any new judicially enforceable deadlines. The APA standard of reasonableness should continue to govern during judicial review.

**Implementing the Recommendation:** When an agency misses its target date for response, it should update petitioners as to the reasons, such as the need for more information or resources. Where possible, a new timeline should be set. Targets should be realistic and should be revisited every few years; several agencies felt that the short deadlines set by statute in the 1970s, for example, had grown exceedingly unreasonable in modern times.

### Recommendation #9: Delegate and classify to expedite review of less controversial petitions.

Agencies should classify incoming petitions according to the level of review required. Petitions that are clearly meritless or that seek relatively minor, uncontroversial changes should be delegated so that less senior staff can take final action.<sup>417</sup> Delegation was included in a package of reforms that helped FDA reduce its backlog of petitions.<sup>418</sup>

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<sup>415</sup> ACUS Recommendation 86-6, at 2(d) (“establish . . . deadlines for completing interim actions and reaching conclusions on petitions”); ACUS Recommendation 95-3, at IV(b) (“Agencies should establish deadlines for their responses to petitions; if necessary, the President by executive order or Congress should mandate that petitions be acted upon within a specified time.”).

<sup>416</sup> HHS Inspector General, *Review of the FDA’s Citizen Petition Process*, A-15-97-50002 (1998) p.i.

<sup>417</sup> Luneburg, 548-49 (citing NRC Study Commission Paper SECY-77-526 (Oct. 1977)).

<sup>418</sup> 64 Fed. Reg. 66,823 (Nov. 30, 1999); 68 Fed. Reg. 16,461 (April 4, 2003).

### Recommendation #10: Resources and priorities justify delays only, not denials.

Agencies should resist the temptation to deny petitions on the basis of limited resources and competing priorities alone; such grounds should be used only to justify a delayed resolution of the petition. Under the APA and the standards of sound regulatory decisionmaking, petitioners arguably deserve a final determination on the merits of their requests (see Section II.F).

**How Agencies Benefit:** As the D.C. Circuit once suggested, denying a petition on grounds other than the merits gives “short shrift” to “a serious presentation” and is “not the kind of agency action that promote[s] the kind of interchange and refinement of views that is the life-blood of a sound administrative process.”<sup>419</sup>

**How Petitioners Benefit:** A denial on the merits allows petitioners to refine their requests. Even more importantly, they will know that the agency took their suggestion seriously.

**Anticipating Counterarguments:** Though agencies are entitled to substantial discretion in delaying and denying petitions, allowing denials for resources or other priorities gives agencies so much discretion to reject a petition as to make the determination all but unreviewable. It is hard to imagine any agency that could not articulate some claim of limited resources or cite another, arguably more pressing priority.

Of course, a petitioner could always re-petition the agency some time after being rejected on such grounds,<sup>420</sup> submitting the same request with updated information and the hope that the agency’s resources or priorities had changed. Yet it makes little sense to put the burden on the petitioner to try to predict if and when the agency’s resources and priorities might change. The agency is in a much better position to gauge that.

**Implementing the Recommendation:** If an agency honestly does not have the resources necessary to make a final determination on a petition, it should follow the practices established under the Endangered Species Act. It should publish a finding that the petition may have merit but that resources and competing priorities prevent the agency from immediately taking final action on the petition. The pending petition should remain in an online docket, and the agency should provide status updates at least on an annual basis, indicating whether resources or priorities had changed, and calling for additional relevant information from the petitioner and the public. At some point, the delay may be ripe for an unreasonable delay challenge, and the standard of review should fully account for an agency’s resources and competing priorities. However, when the agency takes final action on the petition, it should be on the merits.

### Recommendation #11: Prioritize petition reviews at least ahead of informal requests.

Responding to petitions is one of many obligations imposed on agencies by statutes, all competing for limited agency resources. Agencies also deserve a chance to set discretionary priorities according to their own expertise. However, petitions have a valuable role to play and represent an essential democratic right—they, too, deserve attention. In their internal guidance on handling petitions, agencies should adopt a policy of prioritizing the review of formal petitions for rulemaking at least ahead of informal requests for regulatory changes. Given that regulated entities and well-organized interest groups are considerably more likely than the general public to have the close contacts necessary to make informal requests to the agency, prioritizing formal petitions over informal requests somewhat levels the playing field.<sup>421</sup>

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<sup>419</sup> Nat’l Org. for Reform of Marijuana Laws v. Ingersoll, 497 F.2d 654, 659 (D.C. Cir. 1974).

<sup>420</sup> Some agencies also have special procedures to petition for reconsideration of a denial of a petition. See, for example, FDA and CPSC regulations.

<sup>421</sup> See Luneburg, *supra* note 2, at 498.

### Another Notable Proposal: OIRA Review of Denials

In a recent article, Professors Michael Livermore and Richard Revesz (co-author of this study) propose that OIRA review the denial of petitions that were submitted by petitioners with credible cost benefit-analyses.<sup>422</sup> Under their proposal, if OIRA examined the petitioner's cost-benefit analysis and found a strong case for regulation, OIRA could either try to mediate between the agency and the petitioner, or else could issue a finding of fact, which could then be taken to court in a suit challenging an arbitrary and capricious denial.<sup>423</sup> Livermore and Revesz see OIRA review of petition denials as a check against inaction, providing essential balance to the existing structure of regulatory review, which focuses almost exclusively on reviewing agency action. By reviewing petition denials and focusing on agency inaction, OIRA could solidify its role as a check against capture in the regulatory process.<sup>424</sup>

Most government officials and stakeholders who participated in this study were not eager for OIRA review of petition denials. Some stakeholders expressed concerns with any expansion of OIRA authority. Many noted that OIRA is already short-staffed and any increase in its workload would further delay the regulatory process. Some felt that, especially for highly technical, variance-type petitions that turn on scientific and engineering determinations, OIRA's economic expertise would not prove particularly useful. A few worried that OIRA review of cost-benefit analysis could incentivize more deregulatory petitions, because costs are often easier to monetize than benefits. One stakeholder expressed more faith in the judicial branch to review denials than in the executive branch.

A handful of stakeholders indicated that some kind of non-judicial review process, by some White House entity or inter-agency working group, could be an appealing and cheaper alternative to going to court, but review by OIRA in particular made them nervous. However, many others feared that any kind of additional review process whatsoever would simply add burdens to everyone involved and increase delays.

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<sup>422</sup> Livermore & Revesz, *supra* note 255, at 1382-83; *see also* REVESZ & LIVERMORE, RETAKING RATIONALITY (2008).

<sup>423</sup> REVESZ & LIVERMORE, RETAKING RATIONALITY, at 174.

<sup>424</sup> Livermore & Revesz, *supra* note 255.



## Appendix A: Participants and Methodology

### Participants

The authors thank individuals from the following organizations and agencies for sharing their perspectives on rulemaking petitions. The views expressed during conversations reflected both personal and institutional opinions.

1. AFL-CIO
2. American Chemistry Council
3. Center for Biological Diversity
4. Center for Effective Government
5. Center for Food Safety
6. Center for Science in the Public Interest
7. Competitive Enterprise Institute
8. Consumers Union
9. Council of Institutional Investors
10. Environmental Defense Fund
11. Institute for Policy Integrity at NYU School of Law<sup>425</sup>
12. International Center for Technology Assessment
13. Labaton Sucharow LLP
14. National Association of Manufacturers
15. Oceana
16. Public Citizen
17. Troutman Sanders LLP
18. U.S. Chamber of Commerce
19. U.S. Congressional Committee Staff (several staff members on several committees)
20. U.S. Consumer Product Safety Commission
21. U.S. Department of Commerce
22. U.S. Department of Energy
23. U.S. Department of Homeland Security
24. U.S. Department of Homeland Security—Coast Guard
25. U.S. Department of Homeland Security—Customs and Border Protection
26. U.S. Department of Homeland Security—Immigration and Customs Enforcement
27. U.S. Department of Interior—Fish and Wildlife Service
28. U.S. Department of State
29. U.S. Department of the Treasury—Alcohol and Tobacco Tax and Trade Bureau
30. U.S. Department of Transportation—Federal Aviation Administration
31. U.S. Department of Transportation—Federal Motor Carrier Safety Administration
32. U.S. Department of Transportation—Federal Railroad Administration
33. U.S. Department of Transportation—Pipeline and Hazardous Materials Safety Administration: Office of Pipeline Safety
34. U.S. Department of Transportation—Pipeline and Hazardous Materials Safety Administration: Office of Hazardous Materials Safety
35. U.S. Department of Transportation—Saint Lawrence Seaway
36. U.S. Department of Transportation—Surface Transportation Board
37. U.S. Environmental Protection Agency
38. U.S. e-Rulemaking Program at EPA ([regulations.gov](https://www.regulations.gov))

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<sup>425</sup> The authors work for Policy Integrity, and where appropriate have drawn on Policy Integrity's experience with submitting petitions.

39. U.S. Equal Employment Opportunity Commission
40. U.S. Executive Office of the President (several staff members in several offices)
41. U.S. Federal Communications Commission
42. U.S. Federal Energy Regulatory Commission
43. U.S. Federal Trade Commission
44. U.S. Food and Drug Administration
45. U.S. General Services Administration
46. U.S. Internal Revenue Service
47. U.S. International Trade Commission
48. U.S. Nuclear Regulatory Commission
49. U.S. Office of the Federal Register
50. U.S. Postal Regulatory Commission
51. U.S. Securities Exchange Commission
52. U.S. Small Business Administration—Office of Advocacy
53. U.S. Veterans Association
54. Various administrative law scholars and former government officials
55. Various individual petitioners
56. WildEarth Guardians

## Written Questionnaire to Agencies

### Contact Information

- Please provide the following information: Name; Agency; Title; Phone Number; E-mail Address.

### Current Petition Practices

- Please quantify to the extent possible (or, if no quantitative data exists, please approximate to the best of your ability and mark the answer as an estimate):
  - How many petitions your agency received in each year from 2005 through 2013.
  - How many petitions your agency granted in each year from 2005 through 2013.
  - How many petitions granted in each year from 2005 through 2013 resulted in a final rule.
  - How many petitions your agency denied in each year from 2005 through 2013.
  - How many petitions were submitted in each year from 2005 through 2013 but have not been acted upon by your agency.
  - How many petitioners have filed suit for failure to respond since 2005.
  - On average, how long after a petition is submitted do petitioners:
    - State informally their intent to sue for failure to respond.
    - Give formal notice of intent to sue for failure to respond.
  - What percentage of your agency's rulemaking docket consists of:
    - Scheduled or otherwise mandatory rulemakings.
    - Discretionary rulemakings.

### Statutory Requirements

- What is your agency's interpretation of its obligations to accept and act on rulemaking petitions under § 553(e) of the Administrative Procedure Act (APA)?
- Other than the APA, are there any statutory requirements that impact your petition process?

### Agency Review Process

- Please explain in detail your procedure for processing and reviewing petitions. If possible, please send copies of any manuals, internal memoranda, guidelines, orders, or directives to staff describing these procedures.
- Please explain any published or official procedures regarding petitions and how these procedures were developed.
- Please describe any aspect of the petition process that your agency considers burdensome.
- Please describe how your agency decides whether to grant a petition.
- Please rank the importance of the following factors in deciding what action to take on a petition (with 1 being the most important and 4 being the least important)
  - Merits of the petition (e.g., efficiency, effectiveness, fairness, and feasibility)
  - Agency resources and priorities
  - Whether the action sought by petition is legally mandated
  - Political factors or stakeholder/public acceptance
  - Please explain your answers and identify any other considerations and their respective ranks.
- What information is useful in evaluating the merits of a petition?
- Are stakeholders or anyone outside the agency consulted during your agency's decision-making on petitions?
  - Whom does your agency consult?
  - How does your agency determine whom to consult?
- If your agency had more resources, would devoting those resources to petition review be a: low priority, medium priority, or high priority? Please explain why.

- Please list the titles or job series of all agency staff members involved in the petition process, describe each staff member's role in the process, and estimate what percentage of each staff member's time is spent on petitions as opposed to other agency business.

### **Online Submissions**

- Does your agency allow online submissions of petitions?
  - If not, do you think online submissions would improve your agency's petition process? Please explain your answer.
  - If yes, where online are petitions submitted? How have online submissions affected the quality of petitions?

### **Tracking Petitions**

- Can petitioners and/or the public track the progress of a petition? If yes, how?
- Are petitions posted online? If yes, where?

### **Public Comments**

- Does your agency seek public comments on petitions?
- How does your agency seek public comments on petitions: *Federal Register* notice; online posting; solicitation of specific stakeholders; informal conversations; other?
- Are comments on pending petitions valuable to your agency's decision whether to grant a petition?

### **Petition Content**

- Please describe the minimum content one must include in a petition to receive an agency response (i.e., for the petition to be considered a "petition" under the APA).
- Please describe the quality of the petitions you currently receive.
- Approximately how often (never, rarely, sometimes, often, or almost always) do petitions:
  - Rely on reports, scientific studies, or other empirical data?
  - Include at least a rudimentary cost-benefit analysis?
  - Include a detailed cost-benefit analysis?

### **Petition Denials**

- What occurs after a petition is denied?
- How are petitioners given notice of denial?
- Are petitioners given reasons for the denial?
- Is there an opportunity for reconsideration?
- Since 2005, how many petition denials have led to litigation?

### **Petition Grants**

- At what point does your agency consider a petition for rulemaking granted? When the agency notifies petitioner of the agency's intent to take action; when a proposed rule has been published; when a final rule has been published; when a final rule takes effect; other?
- What occurs after a petition is granted? Please describe the steps your agency takes to turn a granted petition into a proposed rule.

### **Ideas for Improvement**

- How useful is the current petition process to your agency? What, if anything, limits the value of petitions?
- Please describe how you would improve the petition process.
- Should the petition process be more accessible to the public? Why or why not? If yes, how can the process be made more accessible?
- In a process that is separate from APA or statute-based petitions for rulemaking, President Obama's *We the People* initiative ([www.petitions.whitehouse.gov](http://www.petitions.whitehouse.gov)) seeks to encourage the

petitioning of government. It permits anyone to submit a petition on a range of policy issues. If a petition receives 100,000 signatures in 30 days, the White House releases a formal response. Please describe your views on the potential benefits and drawbacks of this type of petition process. Are there any principles or ideas (e.g., a supporter threshold for prioritizing the review of petitions) from *We the People* that should be incorporated into agency petition processes?

- What are your views on the potential for external review of petition denials? For example, allowing for review by the Office of Information and Regulatory Affairs (OIRA) of petitions that contain a detailed cost-benefit analysis.
- Do you have any other comments, questions, or concerns?

## Appendix B: Other Statutory Rights to Petition

[See separate Excel file.]

## Appendix C: Agency Practice

[See separate Excel file.]

### C1: Regulations and Guidance

Appendix C1 is a comparative chart of agency regulations on handling petitions. Some noteworthy features are highlighted in blue in the chart. Each such feature may be highlighted only once, even though multiple agencies may share the same practice.

### C2: Online Information and Tools

### C3: Statistics

Data comes from Luneburg's 1986 study commissioned by ACUS,<sup>426</sup> Biber and Brosi's study of Endangered Species Act petitions,<sup>427</sup> Professors Livermore and Revesz's study of EPA petitions and inaction,<sup>428</sup> the Fish and Wildlife Service's workplan for petitions,<sup>429</sup> surveys conducted for this study with various agencies, and certain agency websites that provide background information on petitions or easily searchable online dockets.<sup>430</sup>

The approximate frequencies of submissions by petitioner type are based on samples of petitions submitted over the last several years that are either available on agencies' online dockets or were provided by agencies in response to this study's questionnaire. Some data sources may be incomplete, and the years selected for review are not necessarily representative. The authors roughly grouped petitions into broad categories; the percentages in the chart should be taken as general approximations of the frequency of submissions by petitioner type, and not as precise calculations.

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<sup>426</sup> Luneburg, *supra* note 2, at 519-20, 537.

<sup>427</sup> Biber & Brosi, *supra* note 212.

<sup>428</sup> Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 Geo. L. J. 1337, 1386 (2013).

<sup>429</sup> U.S. Fish & Wildlife Service, *Listing Program Work Plan: Questions and Answers*, [http://www.fws.gov/endangered/improving\\_esa/FWS%20Listing%20Program%20Work%20Plan%20FAQs%20FINAL.PDF](http://www.fws.gov/endangered/improving_esa/FWS%20Listing%20Program%20Work%20Plan%20FAQs%20FINAL.PDF)

<sup>430</sup> Relevant websites are listed in the chart in Appendix C2.

## Appendix D: Excerpts of Statutory Text and Previous Recommendation

### Administrative Procedure Act

#### **5 U.S.C. § 551—Definitions**

For the purpose of this subchapter—

(1) “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency...

(2) “person” includes an individual, partnership, corporation, association, or public or private organization other than an agency;

...

(4) “rule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) “rule making” means agency process for formulating, amending, or repealing a rule;

(6) “order” means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) “adjudication” means agency process for the formulation of an order;

...

#### **5 U.S.C. § 553—Rule making**

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—



- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
  - (2) interpretative rules and statements of policy; or
  - (3) as otherwise provided by the agency for good cause found and published with the rule.
- (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

#### **5 U.S.C. § 555—Ancillary Matters**

- (a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.
- (b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

...

- (e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

#### **5 U.S.C. § 701—Judicial Review—Application; definitions**

- (a) This chapter applies, according to the provisions thereof, except to the extent that—
- (1) statutes preclude judicial review; or
  - (2) agency action is committed to agency discretion by law.

...

#### **5 U.S.C. § 704—Actions Reviewable**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action....

#### **5 U.S.C. § 706—Scope of Review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (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;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

### **Previous ACUS Recommendation on Petitions**

See next page.



## **Recommendation 86-6**

### **Petitions for Rulemaking**

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(Adopted December 4, 1986)

The Administrative Procedure Act (APA) requires each federal agency to give interested persons the right to petition for the issuance, amendment, or repeal of a rule, 5 U.S.C. § 553(e). The APA also requires that agencies conclude matters presented to them within a reasonable time, 5 U.S.C. § 555(b), and give prompt notice of the denial of actions requested by interested persons, 5 U.S.C. § 555(e). The APA does not specify the procedures agencies must follow in receiving, considering, or disposing of public petitions for rulemaking.<sup>1</sup> However, agencies are expected to establish and publish such procedures in accordance with the public information section of the APA. *See* Attorney General's Manual on the Administrative Procedure Act 38 (1947). An Administrative Conference study of agency rulemaking petition procedures and practices found that while most agencies with rulemaking power have established some procedures governing petitions for rulemaking, few agencies have established sound practices in dealing with petitions or responded promptly to such petitions.

This Recommendation sets forth the basic procedures that the Conference believes should be incorporated into agency procedural rules governing petitions for rulemaking. In addition, the Conference encourages agencies to adopt certain other procedures and policies where appropriate and feasible. The Conference feels that, beyond this basic level, uniform specification of agency petition procedures would be undesirable because there are significant differences in the number and nature of petitions received by agencies and in the degree of sophistication of each agency's community of interested persons.

Agencies should review their rulemaking petition procedures and practices and, in accordance with this Recommendation, adopt measures that will ensure that the right to petition is a meaningful one. The existence of the right to petition reflects the value Congress has placed on public participation in the agency rulemaking process. The Administrative Conference has recognized, in past recommendations, the benefits flowing from public

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<sup>1</sup> But other statutes expressly create the right to petition for rulemaking, and some of these statutes specify procedures to be followed in the petitioning process.



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participation in agency rulemaking and from publication of the means for such participation.<sup>2</sup> The absence of published petition procedures, excessive or rigidly-enforced format requirements, and the failure to act promptly on petitions for rulemaking may undermine the public's right to file petitions for rulemaking.

Some agencies currently have petition-for-rulemaking procedures that are more elaborate than those recommended in this Recommendation. This Recommendation is not intended to express a judgment that such procedures are inappropriate or that the statutes mandating particular procedures should be amended. Nor is the Recommendation intended to alter the prior position of the Conference recommending elimination of the categorical exemptions of certain types of rulemaking from the APA's rulemaking requirements. See Recommendations 69-8 and 73-5. To the extent Congress or agencies adopt those recommendations, they should also expressly apply the right to petition to those types of rulemaking.

### **Recommendation**

1. Agencies should establish by rule basic procedures for the receipt, consideration, and prompt disposition of petitions for rulemaking. These basic procedures should include: (a) Specification of the address(es) for the filing of petitions and an outline of the recommended contents of the petition, such as the name, address, and telephone number of the petitioner, the statutory authority for the action requested, and a description of the rule to be issued, amended, or repealed; (b) maintenance of a publicly available petition file; and (c) provision for prompt notification to the petitioner of the action taken on the petition, with a summary explanatory statement.

2. In addition, agencies should, where appropriate and feasible:

a. make their petition procedures expressly applicable to all types of rules the agency has authority to adopt;

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<sup>2</sup> See Recommendation 69-8, *Elimination of Certain Exemptions from the APA Rulemaking Requirements*, 1 CFR § 305.69-8; Recommendation 71-6, *Public Participation in Administrative Hearings*, 1 CFR § 305.71-6; Recommendation 73-5, *Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements*, 1 CFR § 305.73-5; Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 1 CFR § 305.76-5; and Recommendation 83-2, *The "Good Cause" Exemption from APA Rulemaking Requirements*, 1 CFR § 305.83-2.



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b. provide guidance on the type of data, argumentation, or other information the agency needs to consider petitions;

c. develop effective methods for providing notice to interested persons that a petition has been filed and identify the agency office or official to whom inquiries and comments should be made; and

d. establish internal management controls to assure the timely processing of petitions for rulemaking, including deadlines for completing interim actions and reaching conclusions on petitions and systems to monitor compliance with those deadlines.

### **Citations:**

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