

Rulemaking Requirements

Administrative Law

Penn State Dickinson Law

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The APA's procedural categories

	formal	informal
adjudication	formal adjudication	informal adjudication
rulemaking	formal rulemaking	informal rulemaking

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APA: defining key terms

5 U.S.C. §551(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 U.S.C. §551(5)

“rule making” means agency process for formulating, amending, or repealing a rule;

APA: defining key terms

5 U.S.C. §551(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;

5 U.S.C. §551(7)

“adjudication” means agency process for the formulation of an order;

Which provisions apply to what agency actions

Rulemaking

informal	§ 553
formal	§§ 553, 556, 557

Adjudication

informal	§ 555
formal	§§ 554, 556, 557

a closer look at informal, a.k.a. notice-and-comment, rulemaking

§ 553 sets out:

- 1 when rulemaking requirements don't apply
- 2 what notice must be given
- 3 what public participation must be allowed
- 4 justification requirement

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1. Exceptions to rulemaking procedures: § 553(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.

2. Notice requirements: § 553(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.

[But . . . exceptions for “interpretative rules,” general policy statements, organizational or procedural rules, and when good cause exists to forgo notice.]

3. Participation opportunities: § 553(c), (e)

(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.

. . . .

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

4. Justification requirement: § 553(c)

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Formal Rulemaking

Abandon All Hope Ye Who Enter Here



“Another proceeding involving the standard of identity for peanut butter developed a transcript of over 7,700 pages, largely directed to the question whether the product peanut butter should consist of 90 percent peanuts or 87 1/2 percent peanuts.” - Robert Hamilton, 60 Cal. L. Rev. 1276 (1972)

Rulemaking Resources

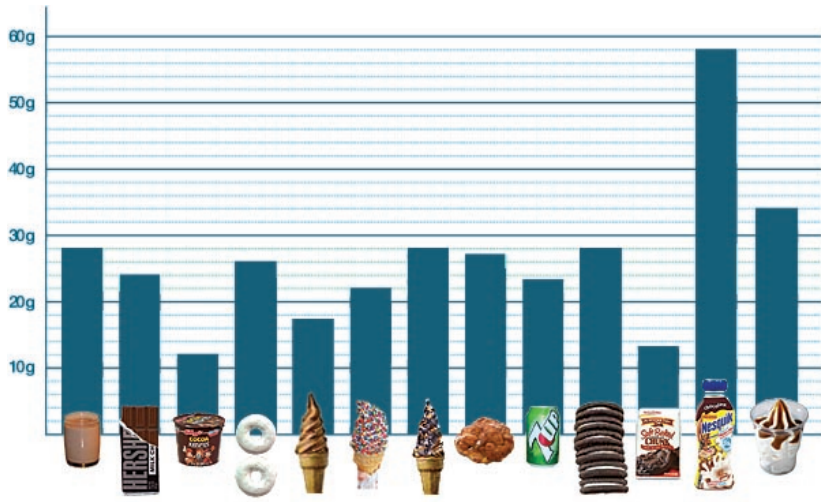
Regulations.gov

RegInfo.gov: the OIRA dashboard

The Federal Register

Chocolate Manufacturers

sugar content of flavored milk



Chocolate Manufacturers Association v. Block

The bottom line

Adequacy of notice

[N]otice is adequate if the changes in the original plan are in character with the original scheme, and the final rule is a logical outgrowth of the notice and comments already given.

United States v. Nova Scotia Food Products

A hot smoked whitefish



Concise general statement of basis and purpose

What must it address?

United States v. Nova Scotia Food Products

It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered. . . . [The concise general statement of basis and purpose must] enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.

Put in different words by a different court:

Reytblatt v. U.S. Nuc. Reg. Comm'n (D.C. Cir. 1997).

[The agency] need not address every comment, but it must respond in reasoned manner to comments that raise significant problems.

Vermont Yankee and court-imposed hybrid procedures



Vermont Yankee: background

Two proceedings at issue in the case:

- Vermont Yankee's application for an operating license from the Atomic Safety and Licensing Board for a nuclear power plant in Vernon, Vermont
- Rulemaking by Nuclear Regulatory Commission (at the time, Atomic Energy Commission) on whether environmental effects of reactor waste should be considered in individual licensing cases, under NEPA

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Vermont Yankee: background 2

About NEPA (National Environmental Policy Act):

- Requires Environmental Impact Statements from big governmental projects
- Adverse environmental effects must be investigated “to the fullest extent possible.” 42 U.S.C. § 4332.

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NRC's NEPA rulemaking on the uranium fuel cycle

- NOPR raises two alternative proposals: (1) ignore waste disposal in licensing EISs; (2) use Table S-3: a formula for estimating environmental impact of spent fuel for any particular plant.
- NRC held two days of public hearings on proposals, and also accepted written comments.
- NRC's Director of Waste Management and Transportation, Dr. Frank Pittman, testified at hearings that spent fuel has limited environmental impact.
- Pittman's conclusion based largely on the proposed spent fuel storage facility.
- In its rule, NRC adopts the Table S-3 approach.

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Table S-3

Nuclear Regulatory Commission

§51.51

TABLE S-3—TABLE OF URANIUM FUEL CYCLE ENVIRONMENTAL DATA ¹
 [Normalized to model LWR annual fuel requirement [WASH-1248] or reference reactor year [NUREG-0116]]
 [See footnotes at end of this table]

Environmental considerations	Total	Maximum effect per annual fuel requirement or reference reactor year of model 1,000 MWe LWR
NATURAL RESOURCE USE		
Land (acres):		
Temporarily committed ²	100	Equivalent to a 110 MWe coal-fired power plant.
Undisturbed area	79	
Disturbed area	22	
Permanently committed	13	
Overburden moved (millions of MT)	2.8	Equivalent to 95 MWe coal-fired power plant.
Water (millions of gallons):		
Discharged to air	160	=2 percent of model 1,000 MWe LWR with cooling tower.
Discharged to water bodies	11,090	
Discharged to ground	127	
Total	11,377	<4 percent of model 1,000 MWe LWR with once-through cooling.
Fossil fuel:		
Electrical energy (thousands of MW-hour)	323	<5 percent of model 1,000 MWe LWR output.
Equivalent coal (thousands of MT)	118	Equivalent to the consumption of a 45 MWe coal-fired power plant.
Natural gas (millions of scf)	135	<0.4 percent of model 1,000 MWe energy output.
EFFLUENTS—CHEMICAL (MT)		
Gases (including entrainment): ³	

Vermont Yankee: D.C. Circuit Opinion

The problem:

In substantial part, the materials uncritically relied on by the Commission in promulgating this rule consist of extremely vague assurances by agency personnel that problems as yet unsolved will be solved. That is an insufficient record to sustain a rule limiting consideration of the environmental effects of nuclear waste disposal to the numerical values in Table S-3. . . .

Vermont Yankee: D.C. Circuit Opinion

Possible solutions:

Many procedural devices for creating a genuine dialogue on these issues were available to the agency including informal conferences between intervenors and staff, document discovery, interrogatories, technical advisory committees comprised of outside experts with differing perspectives, limited cross-examination, funding independent research by intervenors, detailed annotation of technical reports, surveys of existing literature, memoranda explaining methodology. . . . Whatever techniques the Commission adopts, before it promulgates a rule limiting further consideration of waste disposal and reprocessing issues, it must in one way or another generate a record in which the factual issues are fully developed.

Judicial Glosses on N&C Rulemaking Requirements

- Notice** A final rule must be a logical outgrowth of the proposed rule. *Chocolate Mfrs. Ass'n v. Block*
- Participation** Agencies must make available to the public the data they rely on in promulgating rules. *Portland Cement Ass'n, Nova Scotia Food Prods.*
- Justification** The statements of basis and purpose accompanying final rules must address comments raising significant problems with the agency's proposal. *Nova Scotia Food Prods.*