# CHALLENGING FEDERAL ENVIRONMENTAL REGULATIONS

## THE BASICS - WHAT IS RULE MAKING

### I. Rule making defined

A. The Administrative Procedures Act ("APA") defines rule making as an agency process for formulating, amending or repealing a rule. 5 U.S.C. § 551(5)

1. A "rule" is defined as the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the organization, procedure or practice requirements of an agency. 5 U.S.C. § 551(4).

B. Rule making is a quasi-legislative authority delegated by Congress to administrative agencies which are empowered to fill in gaps or details which cannot be specified in statutes. Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Morton v. Ruiz, 415 U.S. 199 (1974).

1. An agency's exercise of rule making power is rooted in the grant of such power from Congress, and cannot be greater than that delegated to it by Congress. Lyng v. Payne, 476 U.S. 926 (1986).

2. Since a rule is an offspring of the enabling act, a rule that cannot be harmonized with the statute is unlawful. Dixon v. United States, 381 U.S. 68 (1965).

C. The Non-Delegation Doctrine

1. It had been noted in older Supreme Court cases that a delegation of legislative power to an administrative agency was valid only where Congress provided standards to guide the administrators, while nonetheless recognizing that it would be unreasonable and impracticable to require Congress to prescribe detailed limits on the scope of the agency's power. Under this "non-delegation doctrine", Congress had to "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

a. The Supreme Court had used the "non-delegation doctrine" to strike down only two statutes in its history, one which provided no guidance for the exercise of discretion, and the other which conferred authority to regulate the entire economy on the basis of a standard that the measures stimulate the economy by assuring "fair competition". Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

b. In American Trucking Ass'ns., Inc. v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999), the Court of Appeals resurrected the non-delegation doctrine, finding that in §109(b)(1) of the Clean Air Act, 42 U.S.C. § 7409(b)(1), Congress had improperly delegated legislative power because EPA had interpreted the statute to provide no "intelligible principle" to guide the agency's exercise of authority. Since the Court felt EPA could cure the unconstitutional delegation by adopting a more restrictive construction of §109(b)(1), it did not declare the section unconstitutional, but rather remanded the rule to EPA.

c. The Supreme Court reversed the Court of Appeals. Whitman v. American Trucking Ass'n, 69 U.S.L.W. 4136, 2001 U.S. LEXIS 1952 (February 27, 2001).

(1) First, the Court chastised the Court of Appeals for the notion that an agency could cure an "unconstitutionally standardless delegation of power by declining to exercise some of that power". *Id*. at 12.

(2) Second, the Court noted that it had never demanded, as the Court of Appeals had, that statutes provide a "determinate criterion" for saying "how much [of the regulated harm] is too much." *Id*., at 15.

(3) Upon examining §109(b)(1), the Court held that its requirement that "EPA set air quality standards at the level that is "requisite" - that is, not lower or higher than is necessary - to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent." *Id*., at 15.

D. Rule making distinguished from adjudication

1. An adjudication is an agency process for the formulation of an order. 5 U.S.C. § 551(7). An order is a final disposition in a matter other than a rule making. 5 U.S.C. § 551(6).

2. Some have distinguished rule making and adjudication on the theory that rule making is a quasi-legislative function and adjudication is a quasi-judicial one, a theory which is accepted by the APA which indicates that rule making is an agency statement of future effect. 5 U.S.C. § 551(4). However, this distinction does not reflect that agencies can and do make pronouncements of future applicability in adjudications. SEC v. Chenery Corp., 332 U.S. 194 (1947). And agencies have discretion to determine whether to proceed by rule making or adjudication. *Id*.

## II. **Types of Rules**

A. The APA recognizes four types of rules: legislative (or substantive) rules, interpretive rules, procedural rules and statements of policy. 5 U.S.C. § 553. Since the APA does not define these terms, resort to judicial interpretation is required.

1. The type of rule involved is dependent on both the language of the statement and the purpose it serves.

B. Legislative Rules

1. A legislative rule has the force and effect of law if promulgated in accordance with a delegation by Congress. A legislative rule is promulgated by statutory authority or direction. A valid legislative rule is binding on all persons and the courts.

2. Legislative rules are those that effect a change in existing law or policy or affect previously existing individual rights or obligations.

3. An agency statement that narrowly circumscribes administrative discretion in future cases and finally and conclusively determines the issues to which it relates is also likely to be considered a legislative rule. Whitman v. American Trucking Ass'n, 69 U.S.L.W. 3196 (February 27, 2001).

4. A rule based on the agency's power to exercise its judgment as to how best to implement the general statutory mandate is legislative. United Technologies Corp. v. USEPA, 821 F.2d 714 (D.C. Cir. 1987).

C. Interpretive rules

1. Interpretive rules are statements that indicate what the agency believes the statute means, that clarify or explain existing laws or newly adopted regulations. Federal Labor Relations Auth. v. U.S. Dept. of Navy, 966 F.2d 747 (3d Cir. 1992).

a. Agencies have the inherent authority to issue interpretive rules that

(1) inform the public of the procedures and standards it intends to apply when exercising its discretion with respect to statutes and regulations it administers; and

(2) its construction of those statutes and regulations.

2. Interpretive rules remind affected parties of existing duties, National Family Planning and Reproductive Health Ass'n v. Sullivan, 979 F.2d 227 (D.C. Cir. 1992).

3. Interpretive rules are not subject to the notice and comment requirements of the APA. 5 U.S.C. § 553(b)(3)(A). The purpose of this exemption is to allow

agencies to explain ambiguous terms in statutes without having to undertake the cumbersome notice and comment proceedings.

4. Because interpretive rules merely indicate the agency's interpretation of existing law or policy, they do not have the force and effect of law and are not binding on the courts.

D. Procedural rules

1. Procedural rules involve an agency's methods of operation and are not intended to change basic regulatory standards.

E. General Statements of Policy

1. General statements of policy are announcements to the public of the policy which the agency hopes to implement in future rule makings or adjudications, or what the agency's prospective position on an issue is likely to be. It is neither a rule nor a precedent, and does not establish a binding norm. Telecommunications Research & Action Center v. FCC, 800 F.2d 1181 (D.C. Cir. 1986).

## CHALLENGING REGULATIONS DURING AGENCY PROMULGATION

### I. Notice and Comment Rule Making

A. 5 U.S.C. § 553 provides that legislative rules are to be promulgated in accordance with a legislative factfinding technique referred to as notice and comment rule making.

B. Notice serves several purposes.

1. First, notice improves the quality of the rule making by insuring agency regulations will be tested by exposure to diverse public opinion. Small Refiner Lead Phase-Down Task Force v. USEPA, 705 F.2d 506 (D.C. Cir. 1983). The public and persons being regulated are afforded the opportunity to participate and provide information and suggest alternatives so the agency is educated about the impact of the proposed rule and can make an informed decision. NLRB v. Wyman-Gordon, 394 U.S. 759 (1969).

2. Second, notice and the opportunity to be heard are essential components of fairness to affected parties. Small Refiner Lead Phase-Down Task Force v. USEPA, 705 F.2d 506 (D.C. Cir. 1983).

3. Third, by giving affected parties an opportunity to comment and develop evidence in the record to support their view and objections to a rule, notice

improves the quality of judicial review. Small Refiner Lead Phase-Down Task Force v. USEPA, 705 F.2d 506 (D.C. Cir. 1983).

C. Publication of Notice

1. The APA requires that notice of proposed rule making be published in the Federal Register, unless persons subject to the rule are named and personally served or have actual notice of the proceeding. 5 U.S.C. § 553(b).

2. Publication in the Federal Register imparts sufficient notice, even though it is constructive notice. Rodway v. United States, 514 F.2d 809 (D.C. Cir. 1975).

3. A failure to publish a notice of proposed rule making will render the rule invalid, unless the proceeding falls within one of the exceptions to notice and comment rule making or the persons subject to the rule are named and were served or otherwise have actual notice. 5 U.S.C. § 553(b).

D. Contents of Notice

1. The APA requires that a notice of proposed rule making include a statement of time, place and nature of the rule making proceedings, reference to legal authority under which the rule is proposed, and either the terms or substance of the proposed rule or a description of the subject involved. 5 U.S.C. § 553(b).

2. If the rule is based on scientific or other technical data, that data and the methodology used to obtain it should be included in the notice to allow meaningful comment. Lloyd Noland Hosp. & Clinic v. Heckler, 762 F.2d 1561 (11th Cir. 1985).

3. Certain statutes provide additional requirements for the notice.

   a. The Toxic Substances Control Act specifies the contents of the required notice for certain rules at 15 U.S.C. §2604(d). The notice is required to include very specific information about the chemicals to be regulated, test data related to manufacture and distribution in commerce and data concerning the health effects of the substance.

   b. The Clean Air Act also requires the notice of rule making to include specific methodology used in obtaining the data in which the proposed rule is based, as well as data compiled by other government agencies. 42 U.S.C. §7607(d)(3).

E. Adequacy of Notice

1. Generally, notice is adequate if it apprises interested persons of the issues to be addressed with sufficient clarity and specificity to allow them to participate in the rule making in a meaningful and informed manner. Mobil Oil Co. v. Department of Energy, 728 F.2d 1477 (Temp. Emer. Ct. App. 1983), *cert. denied*, 467 U.S. 1255 (1983).

2. The notice must provide sufficient factual detail and rationale for the rule to permit interested persons to comment meaningfully. Chemical Waste Mgmt., Inc. v. USEPA, 976 F.2d 2 (D.C. Cir. 1992).

3. Final Rules Differing From Proposed Rules

   a. A final rule is not necessarily invalid for lack of notice simply because it differs from the rule as proposed. American Iron & Steel Institute v. USEPA, 568 F.2d 284 (3d Cir. 1977). An agency is not required to publish in advance every precise change in a final rule, and a final rule which contains changes is not required to go through a separate notice and comment period. A final rule can even contain substantial changes from the rule that was proposed. NRDC v. USEPA, 824 F.2d 1258 (1st Cir. 1987).

   b. A final rule may be defective for lack of notice where it differs substantially from the proposed rule. Two inquiries are made:

      (1) whether the final rule was a "logical outgrowth" of the proposed rule and the comments made during the rule making process. NRDC v. USEPA, 824 F.2d 1258 (1st Cir. 1987). Since the agency is supposed to learn from comments on its proposals, it is essential only that the final rule be a logical outgrowth of the proposed regulations. Chemical Waste Mgmt., Inc. v. USEPA, 976 F.2d 2 (D.C. Cir. 1992).

      (2) whether the notice of the proposed rule making fairly apprised interested persons so they had an opportunity to comment. American Iron & Steel Institute v. USEPA, 568 F.2d 284 (3d Cir. 1977). The relevant inquiry is whether or not potential commentators would have known that an issue in which they were interested was "on the table" and was to be addressed by the final rule. American Medical Assoc. v. United States, 887 F.2d 760, 768 (7th Cir. 1989).

4. The obligation to comment

a. The obligation to comment is not limited to those adversely affected by the proposed rule. Since the relevant inquiry is whether persons with an interest were apprised of the proposal, it is irrelevant whether a proposed rule is favorable to them. American Medical Assoc. v. United States, 887 F.2d 760, 768 (7th Cir. 1989). Thus, a favorable proposal notifies an interested party that a particular issue is open for discussion. *Id*.

F. Submission of Comments -

1. The APA provides that after notice of the proposed rule is given, interested persons must have the opportunity to submit written comments. 5 U.S.C. § 553(c).

2. Response to comments submitted - the agency is only required to respond to comments which, if valid, would require a change in an agency's proposed rule. American Mining Congress v. USEPA, 907 F.2d 1179 (D.C. Cir. 1990).

G. Statement of Basis and Purpose

1. When promulgating the final rule, the agency must include a "concise general statement" of the basis and purpose of the rule. 5 U.S.C. § 553(c).

2. The "concise general statement" standard is satisfied where it indicates the legal and factual framework underlying the agency's action, the major issues of policy that were raised and explains why the agency responded in the manner it did, responds in a reasoned manner to comments received, and is sufficiently detailed and informative to satisfy a reviewing court that the accompanying rule was properly promulgated, i.e. is based on relevant factors and is not arbitrary or capricious. *See e.g.* Reytblatt v. U.S. Nuclear Regulatory Com'n, 105 F.3d 715 (D.C. Cir. 1997); Amoco Oil Co. v. USEPA, 501 F.2d 722 (D.C. Cir. 1974).

3. A court may require a higher degree of factual support for a rule in the statement of basis and purpose where the agency must justify a particular numerical standard. Kennecott Copper Corp. v. USEPA, 462 F.2d 846 (D.C. Cir. 1972).

H. Publication of the Rule

1. The APA requires publication of the rule, 5 U.S.C. § 553(d), and rules are published in the Federal Register. 44 U.S.C. § 1505(a)(3).

2. Generally, a legislative rule must be published not less than 30 days before its effective date. 5 U.S.C. § 553(d).

a. This requirement does not apply

(1) to a legislative rule that grants or recognizes an exemption or relieves a restriction, 5 U.S.C. § 553(d)(1);

(2) to interpretive rules and statements of policy, 5 U.S.C. § 553(d)(2);

(3) as provided by the agency for "good cause" found, 5 U.S.C. § 553(d)(3).

(a) the "good cause" exception is narrowly interpreted as an emergency provision where delay would do real harm. Buschmann v. Schweiker, 676 F.2d 352 (9th Cir. 1982).

(b) in determining whether to invoke the "good cause" exception, the agency must balance the necessity for immediate implementation against principles of fundamental fairness which requires that all affected persons be afforded a reasonable time to prepare for the effectiveness of the rule. Nance v. USEPA, 645 F.2d 701 (9th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981).

I. Modification of APA procedures - the Clean Air Act ("CAA")

1. Congress may modify the procedural provisions of the APA in enabling legislation, and the CAA is a good example.

2. In §7607(d), Congress provided specific procedures applicable to most rule making under the CAA.

a. That section states that the provisions of §§553 through 557 and 706 of the APA do not, except as expressly provided, apply to most CAA rule makings.

b. Notice of Rule Making - § 7607(d)(3) provides that the notice shall include a statement of basis and purpose which, in addition to the requirements of the APA, also includes: a summary of factual data on which the rule is based; the methodology used in obtaining and analyzing the data; findings and recommendations by the Science Advisory Review Committee and the National Academy of Sciences; and the major legal interpretations and policy considerations underlying the proposed rule.

c. Availability of rule making docket - § 7607(d)(3) contains procedures for review by the public of the rule making docket;

d. Submission of comments - § 7607(d)(5) governs the submission of comments, requiring the Administrator to give interested persons the opportunity for oral presentation of data, views, or arguments, requires EPA to make and keep a transcript of any oral presentations, and to keep the record open for rebuttal evidence after completion of the oral proceeding.

e. Publication of the Rule - § 7607(d)(6) contains specific requirements for the statement accompanying the promulgated rule. The rule must

(1) include an explanation of the reason for any major changes in the promulgated rule from the proposed rule;

(2) be accompanied by a response to each significant comment, criticism and new data submitted during the comment period;

(3) not be based, in part or in whole, on any information or data which was not placed in the docket as of the date of such promulgation.

f. The specific standards concerning the record on review and the standard for review are addressed under those sections below.

## II. **Formal Rule Making**

A. Rule making proceedings based on notice and comment that do not include formal evidentiary hearings are referred to as informal rule making. However, when a statute requires that rules be made on the record after an opportunity for an agency hearing, the notice and comment procedures of §553 do not apply, and instead the provisions of 5 U.S.C. §§ 556 and 557, relating to formal, adjudicatory-type hearings apply. 5 U.S.C. §§ 553(c).

B. The Toxic Substances Control Act is an example of a statute which requires more than notice and comment rule making under §553, although it preserves the notice and comment standard of review.

1. Under 15 U.S.C. § 2605(c), which addresses the promulgation of rules to prohibit the manufacture, processing or distribution in commerce of a toxic substance, the Act requires the agency to provide an opportunity for an informal hearing and to base its rule on the "rule making record".

2. Section 2605(c) allows interested persons to present its position orally, and allows for cross examination of persons the Administrator determines to be appropriate.

C. Similarly, as noted above, the Clean Air Act incorporates some of the procedures of formal rule making.

III. **Petition for Rule Making**

A. The APA provides that each agency must give interested persons the right to petition for the issuance, amendment or repeal of a rule. 5 U.S.C. § 553(e).

B. Section 7004(a) of the Resource Conservation and Recovery Act, 42 U.S.C. §6974(a), allows any person to petition EPA for the promulgation, amendment, or repeal of any regulation.

1. Section 7004(b) encourages public participation in the development, revision, and implementation of any regulation. EPA developed and published guidelines for public participation in such process at 40 C.F.R. Part 25.

IV. **Exemptions to Notice and Comment Rule Making**

A. The APA provides that except where notice of hearing is required by statute, the notice and comment provisions in 5 U.S.C. § 553 do not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice. 5 U.S.C. § 553(b)(3)(A).

B. Congress intended the exemption to be narrow. American Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987). An agency may not, under these exceptions, constructively rewrite regulations or effect a totally different result, thereby avoiding notice and comment. Sentara-Hampton General Hosp. v. Sullivan, 980 F.2d 749 (D.C. Cir. 1992).

C. An agency's characterization of a rule is not binding on a court. Mt. Diablo Hosp. Dist. v. Bowen, 860 F.2d 951 (9th Cir. 1988).

D. Note: although exempt from APA notice and comment, such rules must be published for the guidance of the public under the Freedom of Information Act.

## CHALLENGING FEDERAL REGULATIONS AFTER FINAL RULE MAKING

I. **Jurisdiction**

A. Environmental statutes provide specific grants of federal subject matter jurisdiction.

B. Where Congress has provided a statutory review procedure, that procedure is exclusive. Whitney Nat. Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965).

C. The Administrative Procedures Act (APA), 5 U.S.C. § 701 - 706.

1. Embodies the basic presumption that one who suffers a legal wrong because of agency action or who is adversely affected or aggrieved by such action within the meaning of the relevant statute is entitled to judicial review provided (a) no statute precludes such relief, and (b) the action in question is not one committed by law to agency discretion.

2. However, the APA does not afford an implied grant of subject matter jurisdiction permitting federal judicial review of agency action. Your Home Visiting Nurse Services, Inc. v. Shalala, 525 U.S. 449 (1999); Califano v. Sanders, 430 U.S. 99 (1977). While the APA creates a presumption that judicial review of agency action will be available in a court "specified by statute" or "of competent jurisdiction", those clauses also make clear that the jurisdictional authority for such review must be found outside the APA. Califano, 430 U.S. at 105-107.

D. Ripeness/Pre-Enforcement Review - Whether Promulgation of a Final Rule is Ripe for Judicial Review

1. Many environmental statutes permit broad regulations to serve as the "agency action" and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt.

a. See e.g. - CAA, 42 U.S.C. § 7607(b) - which specifically provides for review of regulations directly. Whitman v. American Trucking Ass'n, 69 U.S.L.W. 3196 (February 27, 2001).

2. Absent such a provision, however, a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to claimant's situation in a fashion that harms or threatens to harm him. Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990).

3. A major exception is a substantive rule which as a practical matter requires the plaintiffs to adjust his conduct immediately; such agency action is ripe for review at once, whether or not explicit statutory review apart from the APA is provided. *Id*. at 891; Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1967).

## II. **Venue for challenge to regulations**

A. General

1. Venue is determined by each organic statute.

2. Where the organic statute specifies a particular procedure or forum for review, such procedure or forum is exclusive. Whitney Nat. Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965).

B. Clean Air Act - 42 U.S.C. § 7607(b)(1) - the judicial review provisions of the CAA are complex based on the large number of rule making actions involved.

1. Review in the United States Court of Appeals for the District of Columbia. A petition for review of an action by the Administrator must be filed in the Court of Appeals for the District of Columbia if the petition challenges

a. Any national primary or secondary ambient air quality standard;

b. Any emission standard or requirement for hazardous air pollutants under 42 U.S.C. § 7412;

c. Any standard of performance or requirement for stationary sources under 42 U.S.C. § 7411;

d. Any current motor vehicle emission standard or determinations of waiver applications for new model cars,42 U.S.C. § 7521;

e. Any control or prohibition of motor vehicle fuels and fuel additives, 42 U.S.C. § 7545;

f. Any aircraft emission standard, 42 U.S.C. § 7571;

g. Any other nationally applicable regulations promulgated, or final action taken, by EPA. 42 U.S.C. § 7607(b)(1).

(1) The phrase "any other ... final action" includes the Administrator's decision

(a) to publish proposed standards of performance
(b) to defer the promulgation of regional standards.

(2) In Whitman v. American Trucking Ass'n, 69 U.S.L.W. 4136, 2001 U.S. Lexis 1952 (February 27, 2001), the Supreme Court held that EPA's policy for implementation of the National Ambient Air Quality Standard for ozone and particulate matter was a "final action" reviewable by the Court of Appeals. The Supreme Court found relevant that EPA proposed the policy in the Federal Register and invited comment, that the White House published a memorandum that prescribed implementation procedures for EPA to follow, and EPA supplemented this memorandum with an explanation of the procedures, along with a statement in the preamble that it had settled on a new

interpretation for implementation and that EPA subsequently refused to reconsider the policy, explaining that its decision was conclusive.

2. Review in other Courts of Appeals - Petitions for review of EPA actions which are locally or regionally applicable must be filed in the U.S. Court of Appeals for the appropriate Circuit for challenges to EPA's action to

   a. Promulgate or approve any state implementation plan for

      (1) national primary or secondary ambient air quality standards under 42 U.S.C. § 7410;

      (2) standards of performance for any existing source for any air pollutant for which air quality criteria had not been issued or which was not included on a list published under § 7408(a) but to which a standard of performance under §7411 would apply if the source were a new source.

   b. Revising regulations for enhanced monitoring and compliance certification programs, 42 U.S.C. § 7414(a)(3).

   c. Note: Notwithstanding this provision allowing review in Circuits other than the D.C. Circuit, §7607(b) provides that if any such action is based on a determination of nationwide scope or effect, and if the Administrator finds and publishes that such action is based on such a determination, then the petition may only be filed in the D.C. Circuit.

   d. In Texas Mun. Power Agency v. USEPA, 89 F.3d 858 (D.C. Cir. 1996), §7607(b) was held to be a venue provision, and not jurisdictional, and thus it could be waived if EPA failed to object.

   e. Petitions to Review EPA action on State Implementation Plans - in the complex process of SIP development and approval, obtaining review in the proper forum is also complex.

      (1) Whenever a state submits a SIP or SIP revision, EPA's approval thereof is reviewable in the appropriate Circuit. NRDC v. USEPA, 507 F.2d 905 (9th Cir. 1974)(Arizona SIP).

      (2) The same is true for

         (a) a final EPA action partially approving and partially disapproving a SIP submittal, Bethlehem Steel Corp. v. USEPA, 782 F.2d 645 (7th Cir. 1986);

         (b) EPA conditional approvals, called "final rules", but which leave open the status of the SIP. Connecticut

Fund for the Env't v. USEPA, 672 F.2d 998 (2d Cir. 1982).

(3) where EPA disapproves a SIP submittal or portion thereof, either by final action or by inaction, EPA may be subject to suit under §304 for failure to promulgate a §110(c) federal SIP. Bethlehem Steel Corp. v. USEPA, 782 F.2d 645 (7th Cir. 1986). This means that a group seeking to argue that EPA approved inadequate SIP revisions and instead should have promulgated a federal implementation plan, has to bring parallel actions in appellate and district courts. *Id*.

C. Clean Water Act - 33 U.S.C. § 1369(b)

1. Judicial review of the promulgation by EPA of regulations under the CWA is available only in the U.S. Court of Appeals in which the person resides or transacts such business. 33 U.S.C. § 1369(b). This includes review of the following actions

a. Promulgating any standard of performance under 33 U.S.C. § 1316;

b. Promulgating any effluent standard, prohibition or pretreatment standard under 33 U.S.C. § 1317;

c. Promulgating any effluent limitation or other limitation under 33 U.S.C. §§ 1311, 1312 or 1316. See e.g. E.I. Du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977).

(1) This includes regulations which are closely related to effluent limitations, such as

(a) general regulations governing variances from established effluent limitations. Crown Simpson Pulp Co. v. Costle, 599 F.2d 897 (9th Cir. 1979), *rev'd on other grounds* 445 U.S. 193 (1980)

(b) regulations limiting discharge of sewage by limiting the availability of variance under 33 U.S.C. § 1311(h); NRDC v. USEPA, 673 F.2d 400 (D.C. Cir. 1982).

(2) Review is not available under 33 U.S.C. § 1369(b)(1)(E) for EPA's action in

(a) approving a state's water quality standards, Bethlehem Steel Corp. v. USEPA, 538 F.2d 513 (2d Cir. 1976). Firms affected by approval of state's

standards must await state amendment of permit and then contest amendment in accordance with state review procedures. Roll Coater, Inc. v. Reilly, 932 F.2d 668 (7th Cir. 1991).

(b) promulgating net-gross regulations, American Iron & Steel Institute v. USEPA, 543 F.2d 521 (3d Cir. 1976).

D. Resource Conservation and Recovery Act

1. Section 7006(a), 42 U.S.C. §6976(a), provides that any petition for review of action of the Administrator in promulgating of any regulation, or denying any petition for promulgation, amendment or repeal of any regulation under the Act must be filed in the Court of Appeals for the District of Columbia.

2. Unlike the Clean Air Act and Clean Water Act, RCRA does not explicitly provide for review of EPA determinations in a Circuit Court of Appeals.

a. In American Portland Cement Alliance v. USEPA, 101 F.3d 772 (D.C. Cir. 1996), the court held that it did not have jurisdiction to hear a petition challenging EPA's "Regulatory Determination on Cement Kiln Dust" that cement kiln dust did not warrant full hazardous waste regulation under Subtitle C of RCRA. The Court concluded that Congress intended to provide review by the Court of only three specific types of actions: the promulgation of final regulations, the promulgation of requirements, and the denial of petitions for the promulgation, amendment or repeal of RCRA regulations.

E. Comprehensive Environmental Response, Compensation and Liability Act

1. Review of any regulation under CERCLA may be had upon application by any interested person only in the United States Court of Appeals for the District of Columbia. 42 U.S.C. § 9613(a).

2. The designation by EPA of a hazardous waste site on the National Priorities list is considered rule making.

F. Surface Mining Conservation and Reclamation Act ("SMCRA")

1. Judicial review of the Secretary's promulgation of national rules or regulations under the following sections are reviewable in the United States District Court for the District of Columbia. 30 U.S.C. § 1276(a):

a. 30 U.S.C. §§1251, 1265 - environmental protection performance standards for surface coal mining and reclamation operations;

b. 30 U.S.C. §§1251, 1253 - requirements for preparation, submission and approval of State programs;

c. 30 U.S.C. §§1251, 1254 - requirements for the development and implementation of federal programs for surface mining;

d. 30 U.S.C. § 1266 - the surface effects of underground coal mining operations,

e. 30 U.S.C. § 1273 - the federal lands program applicable to all surface mining to take place on federal lands.

2. Any other action constituting rule making by the Secretary is subject to judicial review only by the United States District Court for the district in which the surface coal mining operation is located. 30 U.S.C. § 1276.

G. Safe Drinking Water Act

1. A petition for review of actions pertaining to the establishment of national primary drinking water regulations, including maximum contaminant level goals, may be filed only in the United States Court of Appeals for the District of Columbia. 42 U.S.C. § 300j-7(a)(1). *See* Halogenated Solvents Industry Alliance v. Thomas, 783 F.2d 1262 (5th Cir. 1986).

2. A petition for review of any other final action of the Administrator may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action. 42 U.S.C. § 300j-7(a)(2).

a. One such other action was EPA's underground injection control program regulation as applied to Indian mineral reserve lands. Phillips Petroleum Co. v. USEPA, 803 F.2d 545 (10th Cir. 1986).

H. Toxic Substances Control Act

1. Any challenge to EPA's promulgation of the following rules must be filed in the United States Court of Appeals for the District of Columbia Circuit or for the circuit in which such person resides or in which such person's principal business is located. 15 U.S.C. § 2618(a):

a. A rule requiring testing on any substance or mixture, the manufacture, distribution in commerce, processing, use or disposal may present an unreasonable risk of injury to the health or environment, 15 U.S.C. § 2603(a);

b. A determination by EPA that a use of a chemical substance is a significant new use, 15 U.S.C. § 2604(a);

c. A rule regarding the compiling of a list of chemical substances determined by EPA to present an unreasonable risk of injury to health or the environment, 15 U.S.C. § 2604(b)(4);

d. A regulation to prohibit the manufacture, processing, or distribution in commerce of a substance or mixture, either entirely or for a particular use or in a particular concentration, which EPA determines presents or will present an unreasonable risk of injury to health or the environment, 15 U.S.C. § 2605(a);

e. Rules regarding polychlorinated biphenyls, 15 U.S.C. § 2605(e);

f. Rules regarding the reporting and retention of information concerning the manufacture and processing of toxic substances, 15 U.S.C. § 2607.

## III. **When to File Petition for Review**

A. The time period within which a petition for review of agency rule making must be filed is dependent on the particular enabling legislation at issue.

1. Clean Air Act -

a. A petition for review filed in the U.S. Court of Appeals must be filed within 60 days from the appearance in the Federal Register of the notice of promulgation. 42 U.S.C. § 7607(b)(1).

b. This statutory provision regarding when the petition must be filed is jurisdictional. Dressman v. Costle, 759 F.2d 548 (6th Cir. 1985).

c. If the petition is based on new information arising after the deadline, the petitioner must develop a record by submitting a request to EPA for revision of the challenged regulation, so that if the request is denied, the petitioner may seek review of the denial. Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975).

2. Clean Water Act -

a. A petition for review of EPA regulations must be filed within ninety (90) days of promulgation. 33 U.S.C. § 1369(b)(1).

b. Additional evidence - If any party applies to the court for leave to adduce additional evidence, and shows that such additional evidence is material and there were reasonable grounds for the failure to adduce such evidence during the notice and comment period, the court may

order such additional evidence to be taken before the Administrator, who may modify his findings as to the facts, or make new findings. The Administrator must file modified or new findings and his recommendation, if any, for the modification or setting aside of the original determination. 33 U.S.C. § 1369(c).

3. Resource Conservation and Recovery Act

a. The petition for review must be filed with the Court of Appeals for the District of Columbia within ninety (90) days from the date of such promulgation or denial. 42 U.S.C. § 6976(a)(1).

b. The petition may be filed after the ninetieth day only if the petition is based solely on grounds arising after such ninetieth day. 42 U.S.C. § 6976(a)(1).

c. A provision similar to that contained in the Clean Water Act provides that if any party applies to the court for leave to adduce additional evidence, and shows that such additional evidence is material and there were reasonable grounds for the failure to adduce such evidence during the notice and comment period, the court may order such additional evidence to be taken before the Administrator, who may modify his findings as to the facts, or make new findings. The Administrator must file modified or new findings and his recommendation, if any, for the modification or setting aside of the original determination. 42 U.S.C. § 6976(a)(2).

4. Comprehensive Environmental Response, Compensation and Liability Act

a. The application for review of any regulation promulgated under CERCLA must be filed in the United States Court of Appeals for the District of Columbia within ninety (90) days from the date of promulgation. 42 U.S.C. § 9613(a).

5. Surface Mining Conservation and Reclamation Act

a. A petition for review of any action subject to judicial review under 30 U.S.C. §§1276 must be filed in the appropriate court within sixty (60) days from the date of the action. 30 U.S.C. §§1276(a)(1).

b. This limitation is jurisdictional in nature, National Mining Ass'n v. United States Dep't of Interior, 70 F.3d 1345 (D.C. Cir. 1995), and noncomplying actions will be dismissed as untimely. Coal Corp. Operating Co. v. Hodel, 669 F.Supp. 362 (W.D. Okla. 1987), *aff'd* 876 F.2d 860 (10th Cir. 1989).

c. The only exception is for petitions based solely on grounds arising after the 60th day.

6. Safe Drinking Water Act

a. The petition for review of regulations promulgated under the Act must be filed within forty five (45) days beginning on the date of the promulgation of the regulation. 42 U.S.C. § 300j-7(a).

(1) the same exception exists for petitions based solely on grounds arising after the 45th day.

7. Toxic Substances Control Act - the petition for review must be filed within sixty (60) days after the date of promulgation.

## IV. **Standing**

A. Standing for purposes of the APA exists if a person has (1) suffered a legal wrong as a result of agency action; or (2) suffered injury in fact to an interest arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee that the agency is claimed to have violated. National Credit Union Admin. v. First Nat. Bank & Trust Co., 522 U.S. 479 (1998); Sierra Club v. Morton, 405 U.S. 727 (1972).

B. A party invoking federal jurisdiction bears the burden of establishing the elements of standing. Since standing is and essential part of the Constitution's case-or-controversy requirement, Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992), and an indispensable part of plaintiff's case, each element of standing must be supported by evidence. *Id.*

## V. **Intervention in Challenges to Federal Regulations**

A. Intervention as of right - Fed.R.Civ.P. 24(a)

1. Under Fed.R.Civ.P. 24(a), a person may intervene as a matter of right in any action (1) when a statute confers an unconditional right to intervene, or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that applicant's interest is adequately protected.

B. Permissive Intervention - Fed.R.Civ.P. 24(b)

1. Under Fed.R.Civ.P. 24(b), a person may intervene (1) when a statute confers a conditional right to intervene, or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

2. When the person seeking intervention relies for ground of the claim or defense upon any statute or regulation administered by a governmental officer, that officer may be permitted to intervene.

3. In general, Fed.R.Civ.P 24(a)(2) and (b) will apply to determine whether a person meets the criterion for intervention, whether as of right or permissive.

a. Examples of cases in which intervention in challenges to regulations was granted

(1) NRDC v. USEPA, 99 F.R.D. 607 (D.Colo. 1983) - pesticide manufacturers permitted to intervene in action challenging EPA procedures allowing representatives of pesticide industry to actively participate in agency's health and safely decision making through "decision conferences".

(2) Sierra Club v. Ruckelshaus, 602 F.Supp. 892 (N.D. Cal. 1984) - association representing 50% of elemental phosphorus producers allowed to intervene in action to compel EPA to comply with CAA procedural requirements related to rule making.

b. Examples of cases in which intervention in challenges to regulations was denied.

(1) Commonwealth Edison v. Train, 71 F.R.D. 391 (N.D. Ill. 1976) - organization did not meet criteria of Rule 24(a)(2) regarding challenge by power utility companies to EPA regulations; however, organization did satisfy requirement for permissive intervention.

(2) Cronin v. Browner, 898 F.Supp. 1052 (S.D.N.Y. 1995) - electric utility companies not allowed to intervene in action by environmental organizations to compel EPA to issue regulations under CWA.

## VI. **Record for Review**

A. Review on the record.

1. The record on which EPA's rule making will be reviewed generally consists of the material compiled in the notice of proposed rule making, during the comment period, and in the statement of reasons for the promulgated rule. 5 U.S.C. §§ 701 - 706.

2. The Resource Conservation and Recovery Act specifies that judicial review of regulations promulgated under the Act is in accordance with provisions of the APA. 42 U.S.C. § 6976(a).

B. Clean Air Act specifies certain procedures for record review

1. The rule may not be based on any information or data which has not been placed in the docket as of the date of promulgation. 42 U.S.C. § 7607(d)(6)(C);

2. Documents that become available after a proposed rule has been published and which the Administrator determines are of central relevance to the rule making are placed in the docket as soon as possible after their availability. 42 U.S.C. § 7607(d)(4)(B)(i);

3. However, it is improper for EPA to add evidence to the record at the end of or after the close of the comment period if there is no opportunity to reply to the new evidence. Small Refiner Lead Phase-Down Task Force v. USEPA, 705 F.2d 506 (D.C. Cir. 1983). In such a case, the petitioner must identify with reasonable specificity what portions of the documents it objects to and how it could have responded if given the opportunity. *Id.* The court should not consider any evidence to which petitioner objects in determining whether there is enough evidence in the record to support a final rule. *Id.*

4. The petitioner may not go beyond the record to raise a new objection during judicial review which was not raised with reasonable specificity during the public comment period. 42 U.S.C. § 7607(d)(7)(B);

a. To bring a new objection into the record for review, the petitioner must convince the EPA Administrator to convene a proceeding for reconsideration of the rule if the objection is of central relevance to the outcome of the rule, upon a showing by the petitioner that it was impracticable to raise the objection within the comment period, or that the grounds for the objection arose after the comment period but within the time specified for judicial review. 42 U.S.C. § 7607(d)(7)(B).

C. The Toxic Substances Control Act also provides additional provisions for the record on review.

1. Since TSCA provides for hearings and the taking of testimony for certain rule makings, it provides that review is based on the "rulemaking record", defined to include, for such rules, transcripts of oral presentations.

## VII. **Standard of Review**

A. General

1. In reviewing whether the agency has exceeded the scope of its authority, the court gives considerable weight to EPA's interpretation of the statute it is charge to enforce. Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

2. Where a statute is clear and unambiguous on an issue, the statute controls and EPA is without authority to diverge from Congressional mandate. *Id*. at 842-43.

    a. In Whitman v. American Trucking Ass'n, 69 U.S.L.W. 4136, 2001 U.S. LEXIS 1952 (February 27, 2001), the Supreme Court concluded that Congress clearly provided in the text of §109(b) of the CAA, 42 U.S.C. §7409(b), that EPA not consider costs in the setting of national ambient air quality standards. Finding Congressional intent to be unambiguous, that ended "the matter for us as well as the EPA." Slip op. 11.

3. If a statute is "silent or ambiguous" with respect to an issue, then the courts are required to defer to a "reasonable interpretation made by the administrator of an agency." *Id*., at 844. *See also* Whitman v. American Trucking Ass'n, 69 U.S.L.W. 4136, 2001 U.S. Lexis 1952 (February 27, 2001).

4. Where the Courts find that EPA's interpretation goes beyond what is ambiguous and contradicts what is clear in the statute, the agency's interpretation will be found unlawful. Whitman v. American Trucking Ass'n, 69 U.S.L.W. 4136, 2001 U.S. Lexis 1952 (February 27, 2001).

    a. In Whitman, *supra*, the Supreme Court concluded that EPA's interpretation of the interplay between the provisions of subparts 1 and 2 of part D of Title I of the CAA concerning implementation of the new 8-hour ozone standard and the old 1 hour standard were inconsistent with §7411(a), Table 1, which classified categories of non-attainment areas and prescribed attainment deadlines for each as a matter of law, eliminating regulatory discretion.

B. Clean Air Act

1. The court may reverse rules promulgated under the CAA 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 authority;

    d. without observance of procedure required by law, if such failure is arbitrary and capricious. 42 U.S.C. § 7607(d)(9)

2. An error in rule making under the CAA taken by EPA without observance of the procedure required by law can be reversed only if

   a. The failure to observe such procedure is arbitrary and capricious;

   b. A specific objection to the procedure employed was raised during the comment period, or afterward if the grounds for objection arose only after the comment period and the objection is of central relevance to the outcome of the rule; and

   c. The errors were so serious and related to maters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made. 42 U.S.C. § 7607(d)(9)(D).

3. A court therefore cannot reverse a decision of EPA solely because EPA failed to follow procedures required by law. The Court must find that EPA's failure was arbitrary and capricious, and goes to the heart of the decision making process. Air Pollution Control Distr. v. USEPA, 739 F.2d 1071 (6th Cir. 1984).

C. Toxic Substances Control Act

1. TSCA refers to the APA for the standard of review except

   a. In the case of review of a rule under § 2603(a), 2604(b)(4), 2605(a) and 2605(e), the standard of review of §706(2)(E) [unsupported by substantial evidence in a case reviewed on the record of an agency hearing] does not apply, and instead the court is to hold unlawful and set aside such a rule if it finds that it is not supported by substantial evidence in the rule making record taken as a whole. 15 U.S.C. §2618(c).

   b. In the case of review of a regulation under 2605(e) [Rules regarding polychlorinated biphenyls], the rule is to be considered unlawful if EPA's determination that a petitioner was not entitled to conduct cross examination or to present rebuttal precluded disclosure of disputed material facts which was necessary to a fair determination by the EPA of the rule making, taken as a whole. 15 U.S.C. §2618(c).