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STUDENT NOTE

TOWARD A MORE COMPLETE NOTICE OF PROPOSED RULEMAKING: A JUDICIAL OVERVIEW AND SUGGESTIONS FOR CHANGE

The cornerstone of informal rulemaking is the notice and comment procedure. Through this simple, and often efficient system, administrative agencies perform many of their delegated duties. This broad delegation, however, carries with it a substantial burden. Administrative agencies must decide con-

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2 Congress may lawfully delegate power to administrative agencies. K. Davis, Administrative Law Text §§ 2.01, 6.01 (3d ed. 1972). The Supreme Court has on only two occasions ruled that delegation of legislative power to a federal administrative agency was unlawful. Panama Refining Co. v. Ryan, 203 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Congress cannot delegate rulemaking authority to private parties or organizations. Carter v. Carter Coal Co., 298 U.S. 238 (1936). (A delegation by Congress to coal producers and workers was held invalid.)

The following is a statement which typifies the United States Supreme Court's philosophy on delegation of rulemaking authority to administrative agencies: "Delegation by Congress has long been recognized as necessary in order that exertion of legislative power does not become a futility." Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940). See generally McGowan, Congress, Court and Control of Delegated Power, 77 Colum. L. Rev. 1119 (1971).

troversial and complex issues that affect all facets of American life. The failure of the rulemaking procedure may unduly delay the implementation of laws which are designed to protect the health of workers, preserve the environment, and insure that the nation's business proceeds in an orderly fashion. It is therefore necessary to properly adhere to rulemaking procedures in order that substantive issues will be settled in an expedient and efficient fashion.

A cursory analysis of the basic provisions of Section 4 of the Administrative Procedures Act (APA) does not reveal the problems inherent in informal rulemaking proceedings. One of the procedural problems which has prompted only limited academic discussion is that of how to effectively notify interested parties of the substance of the proposed rule. Although the APA requirements are simple, the resolution of complex issues by informal rulemaking complicates the task of providing adequate notice of the proposed rule to the public. An agency will often issue a series of notices on the same subject, with each new notice incorporating the substance of the prior one but adding new and variant facts which must be comprehended and commented upon. The result is often a convoluted notice and comment period extending over a number of years. This creates an immense amount of confusion, often resulting in a law suit in which the court may order yet another round of notice and com-

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4 See Wright, The Court of Appeals Review, supra note 3.
8 See Wright, The Court of Appeals Review, supra note 3.
11 See notes 59-122 infra and accompanying text.
12 See notes 70-79 infra and accompanying text.
13 E.g., Wagner Electric Corp. v. Volpe, 466 F.2d 1013 (3d Cir. 1972).
14 Id. Cf. Forester v. Consumer Product Safety Commission, 559 F.2d 744 (D.C. Cir. 1977); see text accompanying notes 70-79 infra.
ment. While there are no easy solutions to this problem, this note will analyze the efficiency of the present system of notifying the public of proposed rules and will examine current thought on how the system can be improved.

This paper is divided into six parts. Parts I and II discuss the basis for and purpose of giving advanced notice of agency rulemaking to the public. The emphasis in Part I is on the general requirements with respect to notice of a proposed rule in light of the enactment of the APA. Part II analyzes the reviewing courts' resolution of controversies in which litigants claim that notice of the proposed rule was insufficient to apprise them of the "subjects and issues" ultimately addressed in the promulgation of the final rule. Although the facts differ substantially in each case where the sufficiency of the notice is contested, there is one common theme that runs throughout the courts' decisions. The content of the notice of the proposed rule is inadequate if it deprives interested persons of their right to submit informed comments on the issues before the agencies. Otherwise, the issuance of the notice would be a mere perfunctory task having no significant bearing on the substance of the final rule.

Part III of this paper discusses the probable effect of the United States Supreme Court's decision in Vermont Yankee Power Co. v. Natural Resources Defense Council upon the notice requirement in informal rulemaking. This decision, which precludes a reviewing court from ordering regulatory agencies to implement additional procedures which exceed those required

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11 See, e.g., note 13 supra.
12 See notes 49-58 infra.
13 See notes 60-122 infra and accompanying text.
16 See text accompanying note 56 infra.
17 E.g., BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 642 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980). See text accompanying notes 86 & 96 infra.
19 See notes 163-75 infra and accompanying text.
by the APA,\textsuperscript{25} may result in increased remands for additional notice and comment.\textsuperscript{26} This prediction is partly based upon the continued use of the "hard look"\textsuperscript{27} doctrine by the federal courts. Courts which apply the "hard look" doctrine carefully scrutinize the informal rulemaking record compiled by the agency, to determine whether it is sufficient to support the agency's ultimate decision.\textsuperscript{28} Additional notice and comment is one way in which a court can require an agency to re-examine its decision without violating Vermont Yankee Nuclear Power Co.\textsuperscript{29}

Any discussion of administrative procedure should be analyzed in light of fairness to the participants in the rulemaking process.\textsuperscript{30} This is the subject of Part IV.\textsuperscript{31} Full notice of the proposed rule is essential to insure that the public will have a fair opportunity to comment on the issues decided in the final rule. The question of how many notices are necessary and how much comment is to be allowed must be answered by the normative concepts of administrative procedure.\textsuperscript{32} A careful balance must be struck between the efficiency of the procedure and the regulatory goals of the agency.\textsuperscript{33} Additionally, the public must be satisfied that the procedures employed by the agency will be sufficient to bring about a fair and rational resolution of the substantive issues.\textsuperscript{34}

\textsuperscript{25} Id. at 548, 549. For a discussion of possible exceptions to the Court's ruling in Vermont Yankee Power Co. v. Natural Resource Defense Council, see note 199 infra. For a list of articles written about the case see note 164 infra.

\textsuperscript{26} See notes 163-70 infra and accompanying text.

\textsuperscript{27} See notes 180-97 infra and accompanying text.

\textsuperscript{28} Id.

\textsuperscript{29} 435 U.S. 519.

\textsuperscript{30} See notes 198-239 infra and accompanying text. One writer commenting on procedural fairness has stated:

A sense of futility accompanies any attempt to speak of fairness, the perception of fairness, or the consent of the governed, because to do so is to indulge in fiction. Nonetheless, the fiction is a necessary one. Contemporary political theory suggests that the governmental sovereign cannot demand, but must entreat, the allegiance of the governed.


\textsuperscript{31} Id. n.185.

\textsuperscript{32} See text accompanying note 209 infra.

\textsuperscript{33} Id.

\textsuperscript{34} Id. For a detailed explanation of the nexus between procedure and rational decisions, see Hahn, Administrative Decision-making, supra note 30, at 505-08.
Part IV also examines the procedural hybrids which the agencies have adopted of their own volition.\textsuperscript{35} The EPA and the FDA have been particularly innovative in assuring that the rule-making process proceeds fairly.\textsuperscript{36} Congress has also been active in adding additional procedures.\textsuperscript{37} A close look will be taken at the Consumer Product Safety Act\textsuperscript{38} which embraces a complicated scheme for providing notice of proposed rulemaking.\textsuperscript{39}

Part V\textsuperscript{40} is an extension of the examination of improved methods for giving notice of proposed rulemaking. Former President Carter, by executive order,\textsuperscript{41} required executive agencies to implement additional administrative procedures beyond those outlined in the APA. Many of these procedures were left in place by President Reagan who also issued an executive order modifying the regulatory process. The important similarities\textsuperscript{42} and differences between the Carter and Reagan reforms are analyzed.\textsuperscript{43}

The United States Congress is also likely to act upon a number of pending bills which may give the President the power to modify rules promulgated by both independent and executive agencies\textsuperscript{44} and which provide for legislative veto of agency rules. The Federal Judiciary Reform Act, commonly referred to as the Bumpers Amendment,\textsuperscript{45} will dissolve all presumptions in favor of regulatory rules and each rule promulgated will have to be supported by a preponderance of the evidence.\textsuperscript{46} This note will examine the possible effect of these proposals upon the notice requirement in informal rulemaking.

\textsuperscript{35} See notes 215-32, infra and accompanying text.
\textsuperscript{36} See notes 215-24 infra and accompanying text.
\textsuperscript{37} See notes 225-28 infra and accompanying text.
\textsuperscript{39} See notes 229-36 infra.
\textsuperscript{40} See notes 237-51 supra and accompanying text.
\textsuperscript{42} For an historical discussion of the roots of alleged administrative procedural tyranny, see Verkuil, \textit{The Emerging Concept of Administrative Procedure}, 78 COLUM. L. REV. 258, 261 (1978). See also text accompanying note 207 infra.
\textsuperscript{43} President Reagan's Exec. Order No. 12291, 46 Fed. Reg. 131393 (1981), suspended all major rules promulgated by the agencies but had not become effective at the time the order was issued.
\textsuperscript{44} See notes 253-65 infra and accompanying text.
\textsuperscript{45} See note 256 infra, and accompanying text.
\textsuperscript{46} Id.
The Conclusion of this note calls for increased procedural flexibility in administrative law and for greater procedural experimentation by regulatory agencies. Agencies have the power to adopt procedures beyond the APA which may result in broader and more meaningful public participation in the rulemaking process. Agencies should exert this power to the fullest extent. Advanced notice of proposed rules, personal notice to parties likely to be affected by the promulgation of rules, and the use of a second round of notice and comment are all viable means of improving the regulatory system.

I. SUBSTANCE AND PURPOSE OF THE NOTICE REQUIREMENT

The requirements for initiating informal rulemaking under Section 4 of the Administrative Procedure Act (APA) are simple and straightforward. The notice of the proposed rule is published in the Federal Register with a statement of the time, place, and nature of the rulemaking proceeding. Reference is made to the legal authority under which the rule is proposed, and either the terms or the substance of the proposed rule, or a description of the subjects and issues involved is given. Following the publi-

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47 See notes 267-71 infra and accompanying text.
50 Id. § 553(b)(1). Some agencies are required by statute to hold public hearings prior to promulgation of a final rule. For example, rules promulgated with regard to EPA's regional air quality control plan must be preceded by a public hearing, Clean Air Act Amendments of 1977 § 103, 42 U.S.C.A. § 7410(c)(2)(E) (repealing 42 USC 1857 c-5(e) (1976), cited in South Terminal Corp. v. E.P.A., 504 F.2d 647 (D.C. Cir. 1974). For other examples of public hearing requirements in informal rulemaking, see Hamilton, Administrative Rulemaking, supra note 10, at 1350 & n.191.
51 Id. § 553(b)(2). Only agencies with rulemaking authority may proceed in that manner. For discussion of rulemaking authority, see Davis, supra note 48, § 6.04. For a discussion of the present tendency of the United States Supreme Court to refuse to allow agencies to exercise powers not specifically delegated to them, see note 185 infra and accompanying text.
52 Id. § 553(b)(3). The substantive requirements of 5 U.S.C. § 553(b)(3) (1976) are the focal point of this paper. The requirement of publishing the notice of the proposed rule in the Fed. Reg., supra note 49, and the agency's need to specify its rulemaking authority, are only discussed when necessary for proper analysis.
ication of the notice in the Federal Register, interested persons may participate in the rulemaking process by submitting comments and criticisms to the agency in question. The agency, in its informal discretion, may choose whether or not to permit interested persons to make oral presentations of their comments and concerns. This permits the agencies to control the course of the informal rulemaking proceeding.

The underlying reason for publication of the proposed rule is "to assure fairness and mature consideration of rules of general application." Prior to publication of the notice of the proposed rule, however, it is expected that the agencies will investigate and study the subject matter involved in order that the notice will be sufficient to permit "intelligent participation in the rulemaking process." Research of the issues also constitutes the initial decision-making process in informal rulemaking. This investigatory process and synthesis of the knowledge thus acquired, manifested in the forms of the notice, provides the public with insight into the agencies' contemplated decision, defines the issues in controversy and determines who may participate.

II. JUDICIAL REVIEW OF THE NOTICE OF PROPOSED RULEMAKING

Two general arguments are often advanced for compelling courts to stop the enactment of the final rule because the original notice was defective. First, it is asserted that the content

53 Id. § 553(c).
58 Hahn, Administrative Decision-making, supra note 30, at 471.
of the proposed agency rule was inadequate to notify interested persons of the subjects and issues to be determined by the rule-making proceeding; second, it is argued that the difference between the proposed rule and the final rule was so substantial that the agency acted unfairly by failing to give advance notice of the intended deviation. In response to these allegations courts have developed general principles and "verbal formulas" which serve to put "teeth" in the basic notice requirements of the Administrative Procedure Act.

One settled principle is that the original notice need not con-

59 E.g., Tour Brokers v. United States, 591 F.2d 896 (D.C. Cir. 1978) (notice insufficient); American Standards Inc. v. United States, 602 F.2d 256 (Ct. Cl. 1979) (notice inadequate); Arlington Oil Mills, Inc. v. Knebel, 543 F.2d 1092 (6th Cir. 1976) (notice inadequate); Rodway v. USDA, 514 F.2d 809 (D.C. Cir. 1975) (notice inadequate); Kollett v. Harris, 619 F.2d 134 (1st Cir. 1980) (notice inadequate); Chrysler Corp. v. Department of Transportation, 515 F.2d 1053 (6th Cir. 1975) (notice adequate); United States Steel Workers v. Marshall, 8 OSHC 1810 (1980) (notice adequate) and; Forester v. C.P.S.C., 559 F.2d 774 (D.C. Cir. 1977) (notice adequate).

60 E.g., South Terminal Corp. v. E.P.A., 504 F.2d 646 (1st Cir. 1974) (notice adequate); BASF Wyandotte Corp. v. Costle, 598 F.2d 637 (1st Cir. 1979), cert. denied 444 U.S. 1096 (1980). In a large number of cases, the arguments that the notice was inadequate, or that the difference between the proposed rule and the final rule was too substantial, overlap. For instance, if agency X suggested in a notice of proposed rulemaking that it was contemplating A and B, but in the final rule A remained the same and B was modified or replaced by C, contestants of the rule would argue that the notice was inadequate to alert them to modifications in B or the substitution of C. Contestants would also argue that the modification of B or the substitution of C was such a substantial change from the proposed rule that a new round of notice and comment should be initiated. See, e.g., Southland Mower v. C.P.S.C., 619 F.2d 499, 525 (5th Cir. 1980) (notice sufficient); American Federation v. Marshall, 617 F.2d 636, 676 (D.C. Cir. 1979) (notice sufficient); American Iron and Steel Institute v. OSHA, 577 F.2d 825, 840 (3d Cir. 1978) (notice sufficient except in one instance), cert. granted, 101 S.Ct. 38 (1980) dismissed pursuant to Rule 53 of the Supreme Court Rules 49 U.S.L.W. 3145 (Sept. 10, 1980) (78-919); Association of Am. Railroads v. Adams, 485 F. Supp. 1077, 1085 (D.D.C. 1978) (notice sufficient); Willpoint Oysters v. Ewing, 174 F.2d 676, 684, 685 (9th Cir. 1949) (notice sufficient), aff'd, 336 U.S. 860 (1949); Appalachian Power Co. v. EPA, 579 F.2d 846, 852, 853 (4th Cir. 1978) (notice sufficient); Mt. Mansfield Television Inc. v. FCC, 442 F.2d 470, 488 (2d Cir. 1971) (notice sufficient); and Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954) (notice sufficient).

61 United States Steel Workers v. Marshall, supra note 19, at 1828.

tain every precise proposal ultimately adopted in the final rule.\textsuperscript{63} This allows the agency to modify the rule as a result of new or critical material received through the rulemaking process.\textsuperscript{64} Otherwise, an agency would be compelled to initiate a new round of notice and comment each time it adjusted the substance of the proposed rule to reflect informed comment.\textsuperscript{65} The reviewing court is satisfied if the content of the notice "fairly apprise(s) interested persons of the subject and issues before the agency."\textsuperscript{66} Or stated differently, "the notice should contain a sufficient exposition of the purposes and basis of the regulation as a whole to satisfy the legislative minimum."\textsuperscript{67}

When the difference between the proposed and final rule is the subject of litigation, substantive changes are permissible as long as the "changes are in character with the original scheme,"\textsuperscript{68} or, "the difference is a logical outgrowth of the notice and comment already given."\textsuperscript{69} The allowance of substantive difference between the proposed and the final rule is consistent with the courts' insistence that informal rulemaking remain flexible

\textsuperscript{63} Mt. Mansfield Television Inc. v. FCC, 442 F.2d 470, 488 (2d Cir. 1971).
\textsuperscript{64} Southland Mower v. CPSC, 619 F.2d 449, 525 (6th Cir. 1980). (Agency adjusting its economic data because of suggestions contained in comments received "increases our confidence in the agency."); American Federation of Labor v. Marshall, 617 F.2d 636 (D.C. Cir. 1979) (Failure to permit agency to adjust original tables which established pulmonary function values would essentially deny to the agency any benefit from comments received.)
\textsuperscript{66} American Iron and Steel Institute v. EPA, 568 F.2d 224, 293 (3d Cir. 1977), cert. granted, 48 U.S.L.W. 3851 (June 24, 1980), dismissed pursuant to rule 53 of the United States Supreme Court 49 U.S.L.W. 3145 (Sept. 10, 1980) (78-919).
\textsuperscript{67} Kenneecott Copper v. EPA, 462 F.2d 846, 850 (D.C. Cir. 1972).
\textsuperscript{68} South Terminal Corp. v. EPA, 504 F.2d 646, 658 (1st Cir. 1974).
\textsuperscript{69} Id. at 659, accord, BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 642 (1st Cir. 1979) cert. denied 444 U.S. 1096 (1980); United States Steel Workers v. Marshall, 8 OSHA 1810, 1828 (1980), cert. denied, 49 U.S.L.W. 3969 (June 30, 1981). Cf. Jones v. Bergland, 456 F. Supp. 635 (E.D. Pa. 1978). The Jones court stated, "[C]ompliance with the notice requirement is had where the rule finally adopted does not substantially differ from the proposed rule." 456 F. Supp. at 645 (citing Chrysler Corp. v. DOT, 515 F.2d 1053 (6th Cir. 1975)) and South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974). Although not reaching the question of whether a substantial change would be a cause for remand to the respective agency, the court in Chrysler did mention that cases had been remanded because the final rule substantially differed from the proposed rule. See notes 123-29 and accompanying text.
enough to allow agencies to adopt plans and ideas different from their own.\textsuperscript{70}

Although often repeated by the courts, the principles and statements referred to above serve only as judicial guidelines because of the factual complexity of each case.\textsuperscript{71} The court must carefully scrutinize the original notice to first decide whether it is sufficient on its face. For example, in \textit{Forester v. Consumer Product Safety Commission},\textsuperscript{72} the agency, following a series of notice and comment rounds, promulgated safety requirements for all types of bicycles.\textsuperscript{73} Petitioners argued that the agency's original notice of the rule was only intended to cover children's bicycles.\textsuperscript{74}

The court agreed that the first notice only referred to safety requirements for children's bicycles, but held that a final rule which was ultimately suspended,\textsuperscript{75} and a series of published amended proposals\textsuperscript{76} were sufficient to alert the public that the final rule would apply to adult bicycles as well.\textsuperscript{77} The court, having decided that the agency had given adequate notice,\textsuperscript{89} refused to consider petitioners' argument that the difference between the proposed and final rule was so extreme as to warrant additional notice and comment.\textsuperscript{79}

Parties who have contested the sufficiency of an agency's notice on the ground that the content of the proposed rule and

\begin{footnotesize}
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\item \textsuperscript{70} \textit{E.g.}, BASF Wyandotte Corp. v. Costle, 598 F.2d 637 (1st Cir. 1979), \textit{cert. denied}, 444 U.S. 1096 (1980).
\item \textsuperscript{71} 8 OSHC at 1828.
\item \textsuperscript{72} 559 F.2d 774 (D.C. Cir. 1977).
\item \textsuperscript{73} \textit{Id.} at 781; 41 Fed. Reg. 57449 (1925).
\item \textsuperscript{74} 559 F.2d at 787.
\item \textsuperscript{75} Id. at 781-87.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id. at 787-88.
\item \textsuperscript{78} Id.
\item \textsuperscript{79} Id. The court also mentioned that between July of 1974, and Nov. of 1975, over 50 comments were received on the subject of incorporating all bicycles within the regulations. \textit{Cf.} Wagner Electric Co. v. Volpe, 466 F.2d 1013 (3d Cir. 1972) (Although some persons were well informed of the proposed regulations, and submitted comments on the issue in controversy, the court still held that the notice was invalid.)
\end{itemize}
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the final rule differed substantially have not been very successful. The two leading cases on point are South Terminal Corporation v. Environmental Protection Agency, and BASF Wyandotte Corp. v. Costle.

In South Terminal, the EPA, proceeding under its rulemaking authority, promulgated regulations designed to reduce pollution caused by excessive vehicular traffic. One provision of the final rule consisted of a regulation which precluded the construction of new parking facilities unless permission was granted by a regional administrator. Despite petitioner's claim that the substantial change in the final rule was unfair, the court stated that "a hearing is intended to educate an agency to approaches different from its own; in shaping the final rule it may and should draw on comments tendered."

Similarly, in BASF Wyandotte Corp. v. Costle, manufacturers of pesticides sued to enjoin the EPA from adopting final rules governing discharge of pollutants into navigable waters by the pesticide industry. The EPA, after issuing interim regulations on pesticide pollution, sought comments on them. One of the interim regulations placed organic pesticide manufacturers in separate categories. The response to the agency's interim regulations was negative. The pesticide manufacturers wanted the EPA to increase the number of industrial categories. In the final rule, however, the agency combined three of the categories into one classification.

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See notes 60 and 69 supra.
504 F.2d 646 (1st Cir. 1974).
598 F.2d 637 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980).
504 F.2d at 654.
Id. at 658, 659.
Id. at 659. The statute under which the rule was promulgated, 42 U.S.C. § 1857 h-(5)(b)(1) (1976), has been repealed. It is now codified in 42 U.S.C. § 7410(c)(2)(E) (Supp. I. 1977). The statute now states that when any rule is promulgated under the regional quality control plan, which is part of the Clean Air Act Amendments of 1970, §§ 108(b)(1, 2), 307(b)(1), it is required that the EPA hold at least one additional hearing if the agency is contemplating substantial changes in the promulgation of the final rule. 42 U.S.C. § 7410(c)(2)(E) (Supp. I. 1977) (emphasis added).
598 F.2d 637.
Id. at 640.
Id. at 641.
Id. at 642.
Id. at 643.
Id. at 642.
The manufacturers were surprised by the agency's decision to substantially depart from the interim regulations by reducing rather than increasing the number of industrial categories. On appeal, the manufacturers argued that the agency should have initiated a new round of notice and comment before deciding to dramatically alter the categorization plan. The court disagreed, however, holding that the merger of the categories was a reasonable alternative and that the petitioners should have anticipated that the final rule would differ from the interim one. The court's decision was based, in part, on the fact that the comments submitted by petitioners to the agency were critical of the effluent guidelines assigned to the different industrial subcategories. The court stated, "[i]t should be clear to commentators when they criticize a regulatory scheme that if the agency accepts those criticisms a new scheme would be substituted."

The principles set forth in BASF Wyandotte Corp. were important in the disposition of United Steel Workers of America v. Marshall, a case which illustrates the wide latitude given to administrative agencies in developing a final rule. The Occupational Health and Safety Administration (OSHA) issued a series of proposed rules designed to reduce workers' exposure to airborne lead particles in industrial work places. Although the agency was accused to every procedural error imaginable, the most serious defects alleged by the industry were the insufficiency of the notice and the radical difference between the initial and final rules. As recorded in the Federal Register, OSHA

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92 Id. at 643.
93 Id. at 641.
94 Id. The court, in response to petitioners' claim that the change from the interim regulations to the final regulations deprived them of proper notice of informal rulemaking under 5 U.S.C. § 553(b)(3), stated: "This requirement is a critical one because it supports the assumption we make with regard to EPA's substantive decisions that those decisions are in fact the product of informed, expert reasoning tested by exposure to diverse public comment" (emphasis added).
95 593 F.2d at 643.
96 Id.
97 Id. at 637.
98 8 OSHC at 1831.
99 See note 102 infra and accompanying text.
100 Petitioners asserted that the decision-maker was biased, that the staff played an improper role in the decision, that the agency's use of consultants was improper and that the notice of the proposed rule was inadequate. 8 OSHC at 1810-28.
first listed the major issues raised during the rulemaking proceeding as follows:101

1) Whether the proposed permissible exposure limit to lead should be 100 mg/m³ and whether this level incorporates an appropriate margin of safety.

2) Whether the subclinical effects of exposure should be considered in establishing a standard for occupational exposure to lead.

3) To what extent are there groups with increased susceptibility to lead in the working population, such as women of child-bearing age; and should increased susceptibility, if it exists, be considered in establishing a standard for occupational exposure to lead.102

The final rule promulgated by the agency limited the permissible air borne lead content to 50 mg/m³, a substantial drop from the 100 mg/m³ level.103 The lowered level substantially increased the number of workers included within the protected class, and increased the technological burdens on the industry.104 Moreover, several industries which could have complied with the 100 mg/m³ standard were brought within the scope of the lower standard where compliance was not feasible.105 Judge Wright, however, was not persuaded that the proposed rule had been insufficient to alert the industries that a lower permissible standard for exposure to lead (PEL) might be finally adopted.106 He pointed specifically to three clauses in the notice which raised the possibility that OHSA might find the higher PEL not safe enough: 1) the appropriate margin of safety, 2) whether subclinical effects should be considered and 3) whether there might exist in the population groups with increased susceptibility to lead.107 Judge Wright recognized that OHSA could have served the parties better had it listed two or more alternative PELs and invited comments on each of them,108 but he ruled that the notice was “legally adequate”109 to apprise the parties that a

102 Id. (emphasis added).
103 8 OSHC at 1828.
104 Id.
105 Id.
106 Id. at 1829.
107 Id.
108 Id.
109 Id.
lower PEL was being contemplated by the agency. In a strongly worded dissent, Judge MacKinnon stated that the notice was inadequate because OHSA received almost no evidence of the technological feasibility of the final rule.\textsuperscript{10} For instance, the American Iron and Steel Institute (AISI) failed to contest the 100 mg/m\textsuperscript{3} standard because its member industries could have complied with it.\textsuperscript{11} AISI claimed the notice "lulled them into avoiding the feasibility issue, creating a feasibility issue which did not exist before."\textsuperscript{12} The majority concluded that AISI's argument was made in good faith, but that the failure to comment was a "strategical error." According to the court, a closer analysis of the record would have revealed to the petitioners that a lower PEL was being contemplated.\textsuperscript{13}

Judge Wright then focused his attention on those parties who had submitted comments on the 100 mg/m\textsuperscript{3} standard but were shocked to find that the agency had accepted an even lower standard.\textsuperscript{14} Judge Wright dismissed their arguments by relying on precedent first established in Weyerhauser Corp. \textit{v. Costle}\textsuperscript{15} and later expanded in \textit{BASF Wyandotte Corp.}\textsuperscript{16} "We must be satisified....that given a new opportunity to comment, commenters would not have their first occasion to offer \textit{new and different criticisms which the agency might find convincing}."\textsuperscript{17} Judge Wright perceived that the petitioners in \textit{United States Steel Workers} and \textit{BASF Wyandotte Corp.} were similarly

\begin{footnotes}
\item[10] \textit{Id.} at 1905. Judge MacKinnon in reference to the content of the proposed rule stated, "OSHA rested on vague statements in the notice of the proposed rule and perhaps the clairvoyance of the particular witness." \textit{Id.}
\item[11] \textit{Id.} at 1832 & n.49.
\item[12] \textit{Id.} The Bell System had a more “subtle” argument. The change from the proposed rule not only lowered the PEL, but changed the formula for the PEL from an eight-hour time weighted average (TWA) based on a 40-hour work week, to an eight-hour TWA without reference to a work week. Bell argued that the change was critical because under the original TWA it would have complied with the proposed rule. The gravamen of their argument, according to the court, was the notice stating that the standard "would apply to all work places in all industries where lead is exceptionally present or released" 40 Fed. Reg. 45-93713 (1975).
\item[13] 8 OSHC at 1832 & n.49.
\item[14] \textit{Id.} at 1831.
\item[16] 598 F.2d 637 (1st Cir. 1979), \textit{cert. denied}, 444 U.S. 1096 (1980).
\item[17] 8 OSHC at 1831 (emphasis original) (citation omitted).
\end{footnotes}
situated. The court in both cases believed that, no matter what the regulatory agency might have proposed, the petitioners would have criticized it, and would have ultimately petitioned the reviewing court to remand the agency's final rule for additional notice and comment. To emphasize this point, Judge Wright quoted from the decision in BASF Wyandotte Corp.

Not only do we think that petitioners had fair notice..., but we cannot think how their comments would have differed fundamentally if they had known what EPA would do. Though they would have had a different proposition against which to argue, their proposed solutions would, presumably, have been the same for the same reasons. They might have responded in greater volume or more vociferously, but they had not shown us that the content of their criticisms would have been different to the point that they would have stood a better chance of convincing the Agency... Judge Wright concluded that any defect in the notice of proposed rulemaking constituted "harmless error." He stated: "[petitioners] contended that the proposed standard was unfeasible, and would have done the same for the final standard. OHSA would still have believed [petitioners'] cost estimates grossly inflated and its vision of technology too narrow, and would have asserted its legal power to force changes of uncertain costs and technological feasibility."

The impact of this precedent is both fundamental and significant. Once the court determines that interested persons

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118 Id. For a discussion of BASF Wyandotte Corp. v. Costle, see notes 86-96 supra and accompanying text.
119 8 OSHC at 1831.
120 Id. at 1810, 1831 (citing BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 642 (1st Cir. 1979). In his dissent, Judge Mackinnon severely criticized the majority for relying on BASF Wyandotte. He asserted that that type of reasoning, carried to its logical extreme, would have permitted OSHA to lower the PEL standard to 10 mg/m$^3$ regardless of its technological feasibility. "It is absurd to compare the probative effect of the evidence for 100, 50, or 10 mg/m$^3$ and state the only difference is in the word force of the advocacy." 8 OSHC at 1906. Cf. Wright, The Court of Appeals' Review, supra, note 4. In this article Judge Wright expressed his concern with respect to delaying approval of substantive issues which are decided upon during the informal rulemaking process, and which affect the health of workers and the quality of the environment, on nonsubstantive grounds.
121 8 OSHC at 1831.
122 Id. at 1832.
have had an opportunity to submit meaningful comments, a new round of notice and comment will not be granted regardless of the difference between the proposed and final rules, as long as the final rule emerges logically from the rulemaking process. Furthermore, if the court is convinced that a new round of commentary would not persuade the agency to alter the content of the final rule, the rule will be sustained.

The courts, however, are more likely to remand an agency's final rule for additional notice and comment when the underlying data upon which the rule is based is not disclosed to all parties, or is scattered throughout a series of complex notices.\textsuperscript{123} For instance, in Wagner Electric Co. \textit{v. Costle},\textsuperscript{124} the National Highway Traffic Safety Administration proposed a series of regulations intended to modify vehicle safety standards.\textsuperscript{125} The proposed rule incorporated by reference rules originally promulgated by an automobile industry research group.\textsuperscript{126} One of the proposed changes was to amend the standards governing performance of turn signals and hazard warning flashers in automobiles.\textsuperscript{127} The notice, however, failed to forewarn the public of the agency's intent to modify previous standards by eliminating the permissible failure rate of flashers.\textsuperscript{128} The agency argued that the notice was sufficient since some parties had submitted comments concerning the sampling procedure data upon which the permissible failure rate was based.\textsuperscript{129} The court found that those who did submit comments were more knowledgeable about the subject and more aware of the undisclosed data, and that persons not so knowledgeable were interested persons within the meaning of 5 U.S.C. § 553.\textsuperscript{130}


\textsuperscript{124} 466 F.2d 1013 (3d Cir. 1972).

\textsuperscript{125} \textit{Id}.

\textsuperscript{126} \textit{Id.} at 1015. Lighting Committee of the Society of Automobile Engineers (SAE).

\textsuperscript{127} \textit{Id.} at 1016-17.

\textsuperscript{128} \textit{Id}.

\textsuperscript{129} \textit{Id.} at 1016-19.

\textsuperscript{130} \textit{Id}. Although the court did not elaborate, it appeared that large manufacturers of automobile parts had access to all of the data which supported elimination of the flasher rate.
In *Weyerhauser Co. v. Costle*, pulp and paper makers petitioned the court to stop the enforcement of regulations promulgated by the EPA and designed to limit effluent discharges. The court upheld all of the regulations except one which was based on information not properly disclosed through the rulemaking process. The EPA changed its secondary waste load requirements without permitting persons to comment on the data which prompted the change. Furthermore, the agency relied upon data received during the publication of the interim regulations without disclosing it to the public. The court held that the agency's final conclusion was not a "logical outgrowth" of the notice and comment period, but was based on "a complex mix of controversial and uncommented upon data and calculations." Unlike the court in *United States Steel Workers* and *BASF Wyandotte*, this court believed that additional public comment might have altered the agency's ultimate decision.

When there is serious doubt as to whether the original notice was sufficient, some courts have analyzed the seriousness of the impact of the final rule upon the affected parties. For

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121 590 F.2d 1011 (D.C. Cir. 1978).
123 590 F.2d at 1028. The court commended EPA's efforts to accommodate public participation. Four rounds of notice and comment were given by the agency. For an example of how comments can change the agencies' thinking, see id. at 1028 n.17.
124 Id. at 1029. "Raw waste load" is the total amount of waste generated by the mill before treatment. After this waste goes through primary treatment (i.e., after being pumped into a sedimentation tank where some solid waste settles out), the remaining pollutants, called "secondary waste load", are subjected to secondary treatment (breakdown by bacteria) in order to cut down on BOD. Accordingly, the amount of secondary waste load determines the amount and cost of secondary treatment sufficient to meet the BOD limitation.
125 590 F.2d at 1029.
126 Id. at 1030. In his argument, the agency's counsel attempted to explain why the secondary waste load standard had been modified. The court stated, "it is for this reason (i.e., failure to permit public comment on the modified standard) that we take no solace in the fact that counsel, after the fact, may be able to convincingly rationalize the agency's decision."
127 Id. at 1031.
128 8 OSHC at 1810.
129 598 F.2d at 637.
130 590 F.2d at 1031.
131 E.g., American Iron and Steel Institute v. OSHA, 577 F.2d 825 (3d Cir.)
example, in *American Iron and Steel Institute v. OHSA*, dealing with OHSA's standards for reducing employees' exposure to coke oven emissions, petitioners objected to the inclusion of non-coke oven employees, specifically independent contractors, because they were not mentioned in the notice as a class of persons to be protected. Judge Rossen, writing for the Third Circuit Court of Appeals, was convinced that the notice was sufficient to include independent contractors, but held that "in a matter of such vital importance . . . we find it difficult to conclude that the notice given to the coke producers constituted notice of the proposed standards to the non-coke-oven employers." Had the final rule not had such a significant effect, it is safe to assume that the court would have held the notice to be sufficient. The impact of the final regulation was also determinative of the court's decision in the *State of Maryland v. Environmental Protection Agency*. Petitioners successfully argued that EPA's notice was insufficient to inform the parties that employer mass transit incentive provisions were being considered as a means of eliminating automobile pollution. The court stated, "in light of the drastic impact which compliance with regulations such as this will have . . . adherence to the statutory provision is necessary."

The development of this rationale could be significant in the development of environmental and safety and health law where administrative agency rules normally have a dramatic impact. Reviewing courts might begin to require more specific notice of proposed rules, and the listing of specific industries and trade

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143 577 F.2d at 830.

144 *Id.* at 840.

145 *Id.* The judge's reasoning is somewhat confusing, inasmuch as he did believe that the notice was sufficient to logically include independent contractors. Thus, it appears that when the court is in doubt, the substantial impact test can be applied.

146 *Id.*

147 530 F.2d 215 (4th Cir. 1976); Cf. Appalachian Power Co. v. EPA, 477 F.2d 495, 503 (4th Cir. 1973) ("Because of the nature of the regulations and their drastic impact, such opportunity might well include the right to more than merely have the opportunity to comment.").

148 530 F.2d at 222.

149 *Id.*
organizations even though a more generalized notice could reasonably be read to include them. This would change the courts’ general reasoning that the notice is sufficient "if it apprises the public of the subject of the rulemaking," rather than requiring that groups reasonably expected to be affected by the rule be named. For example, the “substantial impact” principle could have been applied in *United States Steel Workers v. Marshall*, where the final rule was a major importance. The court reasoned that from a proper reading of the proposed rule, industries could reasonably have inferred that OHSA might lower the proposed air borne lead standard, even though OHSA did not specifically state that it was considering any alternative permissible lead standards. The court could have relied on *American Iron and Steel Institute* and remanded the rule for a new notice and comment period for those who in good faith failed to comment upon the proposed rule after the original notice was given. Judge Wright, writing for the majority, and Judge MacKinnon, in his dissent, cited *American Iron and Steel Institute* but did not refer to the “substantial impact” language contained therein.

Judge MacKinnon asserted that the notice was insufficient, and was flawed by the agencies’ failure to give notice that it was considering a lower lead standard. The majority recognized the impact of the rule, but were convinced that the lower lead standard was supported by substantial evidence and that addi-

103 8 OSHC at 1831.
104 Id. at 1828.
105 Id. at 1828.
106 See notes 106, 107 supra and accompanying text.
107 See note 108 supra and accompanying text.
108 577 F.2d at 840.
109 See notes 111-113 supra and accompanying text.
110 8 OSHA at 1835.
111 8 OSHA at 1905; see also note 110 supra.
112 8 OSHA at 1905.
tional comments would not have altered OHSA's final rule.\footnote{162 See notes 118, 119 supra and accompanying text.} Therefore, it is uncertain whether the "substantial impact" principle will be adopted by the District of Columbia Court of Appeals.

III. THE POSSIBLE IMPACT OF VERMONT YANKEE NUCLEAR POWER CORP. v. NATURAL RESOURCES DEFENSE COUNCIL, INC., AND THE "HARD LOOK" DOCTRINE ON THE NOTICE REQUIREMENT


\[\text{https://researchrepository.wvu.edu/wvlr/vol84/iss1/9}\]
of the bases and purposes of their decisions,\textsuperscript{166} or to reply to critical comments received.\textsuperscript{167}

Although the Supreme Court clearly foreclosed the right to cross examination,\textsuperscript{168} it is unclear whether the latter two options exercised by the lower courts have been eliminated. The court in Vermont Yankee Nuclear Power Corp. held that the administrative agency's decision must be supported by the record.\textsuperscript{169} Two methods by which the reviewing court can compel the agency to compile a more complete record are to remand the rule for a more complete statement of the agency's rationale for its decision, and to require the agency to respond to critical comments received during the rulemaking process.\textsuperscript{170} It is highly unlikely


\textsuperscript{168} See United States Steel Workers v. Marshall, 8 OSHC at 1832-34, (citing Vermont Yankee Nuclear Power Corp.) dismissed petitioner's claim that he had a right to cross examination.

\textsuperscript{169} 435 U.S. at 549. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). (In an informal adjudication procedure the court held that, by APA standard, the Secretary of Transportation had acted arbitrarily and capriciously. The reviewing court must conduct "a thorough, probing, indepth review" and must make a "searching and careful" inquiry into the facts.) Id. at 415-16. The courts have applied the Citizens to Preserve Overton Park standard to informal rulemaking, requiring a more extensive record of the proceedings. See Wright, Commentary: Rulemaking and Judicial Review, 30 Ad. L. Rev. 461, 465 (1978).

Informal adjudication procedures are "hybrids" in the sense that they cannot formally be classified as informal rulemaking procedures, 5 U.S.C. § 553(e), or formal rulemaking procedures 5 U.S.C. § 553(d)(e). For an analysis of informal adjudication procedures see Verkuil, A Study of Informal Adjudication Procedures, 43 U. CHI. L. REV. 739 (1975-76). One of the criticisms of Vermont Yankee is that it has created strict bipolar administrative procedures. The rulemaking process is either formal or informal, with no intertwining of the two. Verkuil, The Emerging Concept of Administrative Procedure, 78 COLUM. L. REV. 258, 322 (1978) (commentary calls for liberal use of oral presentation, for cross-examination on specific issues and greater blending of formal and informal rulemaking procedures); Gifford, Rulemaking and Rulemaking Review: Struggling Toward a New Paradigm, 32 AD. L. REV. 577, 612 (1980) (suggests that all rulemaking review be on the record and that a more unified approach is needed to blur the distinction between formal and informal rulemaking).

\textsuperscript{170} See Stewart, Vermont Yankee and the Evolution of Administrative Pro-
after Vermont Yankee, however, that the reviewing court can "command" the agency to follow a particular procedure. There it was stated that, "the court should engage in this kind of review [of the record] and not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' . . ."111

Professor Stewart argues that the decision in Vermont Yankee Nuclear Power Corp. is self-contradictory because of the Court's recognition that the reviewing court should base its decision upon the record.112 As a result, courts will on occasion have to remand the rule to the agency for development of a more complete record even though the agency fully complied with the APA requirements.113

Regardless of the friction which the Vermont Yankee Nuclear Power Corp. ruling has created between the scholars and the courts, the decision in no way impedes the federal judiciary's power to remand cases where the original notice of proposed rulemaking is insufficient.114 Although the decision precludes informal rulemaking hybrids, it is still the court's function to determine whether the basic requirements of the APA have been met.115 Remand for additional notice and comment also has the dual effect of creating a more complete rulemaking record and providing for a more critical examination of the agency's decision.116 The remand for additional notice and comment, however, may be subject to abuse. Having this authority to remand, without violating the ruling of Vermont Yankee

111 See 435 U.S. at 549.
112 Stewart, Vermont Yankee, supra note 170, at 1816. It has traditionally not been required that the agency's final decision be based on a carefully "delimited record". Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185, 186; Gifford, Rulemaking and Rulemaking Review: Struggling Toward A New Paradigm, 32 Am. L. Rev. 557, 548 (1980) [hereinafter referred to as Gifford, A New Paradigm] (drafters of the APA assumed that judicial review of regulations promulgated informally would be "undetailed").
113 Stewart, Vermont Yankee, supra note 170 at 1816.
115 Id.
Nuclear Power Corp., one can envision an instance where the court, unable to impose additional procedures which it deems necessary, will remand the entire agency proceeding for a new round of additional notice and comment.\textsuperscript{177} Moreover, in the past, when permitting cross examination or some other procedure was perceived to be a more expedient method of testing the rationality of the final rule and assuring fairness to all parties, courts may not have felt compelled to remand for additional notice and comment. It is unlikely, however, that courts will unnecessarily compel new notice and comment periods; judges are certainly aware of and sensitive to the consequences of prolonged administrative proceedings.\textsuperscript{178} When remand for a new additional notice and comment period is unjustified, the courts will more than likely follow the suggestions of Professors Williams and Bryse: "The reviewing court should point out the problem with the agency's decision and allow the agency to utilize whatever procedures it deems appropriate to ventilate the issues."\textsuperscript{179}

The court's decision as to whether to remand for a new notice of proposed rulemaking has been aligned with the "hard look" doctrine.\textsuperscript{180} The "hard look" doctrine is used by the courts when the consequences of the agency's rule, if approved, will be significant. It is normally employed when the courts have to grapple with difficult environmental, health and safety regulations.\textsuperscript{181} As one commentator has explained, "the 'hard look' doctrine has been used to examine the record for agency reactions to presentations made by participants in rulemaking and to eliminate the possibility that the agency has relied upon a crystal ball to resolve tough questions."\textsuperscript{182} There is, of course, a certain tension between the "hard look" doctrine and the Ver-
Yankee Nuclear Power Corp. decision, since federal courts have used the "hard look" doctrine to add administrative procedures which exceed the APA requirements. Although the Supreme Court has foreclosed the "procedural hybrid" option, it has adopted the theory that both the courts and agencies must take a "hard look" at the consequences of rulemaking.

The relationship between the "hard look" doctrine and the notice requirement must be analyzed in light of the three "essential ingredients" of the "hard look" doctrine. Applying this doctrine, the court first reviews the substance of the agency's operative statute as written by Congress, to determine whether the agency acted within the scope of its assigned discretion. In the notice of proposed rulemaking, the agency is required to specify the statute under which it is acting. As was stated previously, the notice requirement stimulates the decision making process in informal rulemaking. Therefore, the agency, knowing that the court will carefully scrutinize its statutory authority, will be compelled to carefully draft the notice so as to convince the reviewing court that it has proceeded within the bounds of that authority. The second ingredient of the "hard look" doctrine is procedural in nature. Inasmuch as the "hard look" doctrine evolved within the area of administrative law, it does not theoretically apply to the court's review of the sufficiency of notice. The court has always had the responsibility of carefully examining the proposed notice and determining whether it complies with the APA standards. The application of this doctrine to the notice issue is more subtle; it is equivalent to the "substantial impact" principle discussed previously. When the effect of the final rule will be substantial, and there is a reasonable doubt at to the sufficiency of the notice, either the "hard look" doctrine or the "substantial impact" principle may be applied by the court to justify ordering a new round of notice.

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183 Rogers, Hard Look Doctrine, supra note 167 at 708.
185 Id. at 705. E.g., FCC v. Midwest Video Corp., 99 S. Ct. 824 (1979) (FCC lacked authority to require cable television operators to allow free access to certain channels by the public).
186 Id.
187 See notes 59-61 supra and case cited therein.
188 See notes 141-57 supra and accompanying text.
and comment. Viewed analytically, however, a judicial remand for an additional notice which fully discloses the data upon which the agency's decision was based, is similar in its effect to application of the "hard look" doctrine, in which the agency is ordered to compile a more complete record for the reviewing court. The "substantial impact" principle is applied when the final agency rule incorporates an unexpected group or industry, or when there is a substantial deviation from the proposed rule.

The third and most important component of the "hard look" doctrine is the court's requirement that an agency's promulgated rule be a product of reasoned decision making. Depending on the agency's operational statute, the decision must be rationally based upon or supported by substantial evidence. A full and adequate notice of the proposed rule is obviously one way in which the agency may begin the process of reasoned decision making. The notice of a rule dealing with an important

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193 The trend toward requiring additional notices of proposed rules has already begun to prompt judicial commentary. The late Judge Harold Leventhal, in his remarks to a symposium on procedural trends in administrative law, stated:

The first [trend that has evolved] is that when the agency finally comes up with a rule that is quite different from that which was set forth in the notice and also quite different from that which any person suggested, basic fairness requires some opportunity for comment on the newly proposed revision. And this had given rise to what is now not unknown and almost widespread in agency practice, the second round of notice and comment.

However, the courts in their infinite mercy have only required two rounds . . . Those cases do not say that the rule is defective when it does not provide for a second round of notice and comment . . . [W]hat they say—most notably the ones I've written—is that the court cannot intelligently exercise its functioning review unless it knows what the agency's position is on the point that is being raised by petitioner.

Leventhal, Improving the Administrative Process-Time For a New APA?, 32 AD. L. Rev. 287, 291-92. But see 8 OSHC 1810 (1980) (rule upheld although not one comment was received on the change in the rule). For an example of a remand for new rounds of notice and comment ordered by Judge Leventhal, see Portland Cement Ass'n v. Ruckelhaus, 486 F.2d 375, 392 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974) (case remanded for new round of notice and comment because the data upon which the rule was based was not revealed adequately to interested parties).

190 See Portland Cement Ass'n v. Ruckelhaus, 486 F.2d at 393.
191 See notes 141-57 supra and accompanying text.
192 Rogers, Hard Look Doctrine, supra note 167, at 705.
193 Gifford, A New Paradigm, supra note 172, at 580-84.
194 See notes 57-59 supra and accompanying text.
issue should prompt useful and critical comments upon which the agency may rely in reaching a rational decision.¹⁹³ Courts encourage agencies to incorporate reasonable suggestions in the final rule.¹⁹⁴ When a notice is designed so as to stimulate substantial public comment, and when the final rule reflects those comments, the rule is more likely to be the product of reasoned decision making, and thus better able to withstand the close scrutiny of the courts.¹⁹⁵

IV. THE NEED FOR PROCEDURAL FAIRNESS

In Vermont Yankee Nuclear Power Corp., the Supreme Court ruled that in the absence of any constitutional constraints, the basic procedures provided for in the APA¹⁹⁸ were sufficient to satisfy due process requirements in informal rulemaking.¹⁹⁹ The decision came as a shock to many academicians²⁰⁰ and judges²⁰¹ who perceived that additional procedures were sometimes necessary to "ventilate"²⁰² critical issues in a fair manner. Underlying their perception was the belief that additional procedures were likely to result in the formulation of a


¹⁹⁴ See, e.g., cases cited note 64 supra.

¹⁹⁵ "It should be noted that the procedure does not assure that the resulting decision will be rational. Rather, the procedure increases the probability that the decision will be rational and responsive to the relevant information presented." Hahn, Administrative Decision-making, supra note 30, at 508 n.204.

¹⁹⁶ 435 U.S. 519.

¹⁹⁷ The court, in acknowledging exceptions to its holding, cited Bi-metalic Inv. Co. v. State Bd. of Equalizations, 239 U.S. 441, 446 (1915). The court in Bi-metalic Inv. Co. recognized that when a smaller number of people is exceptionally affected, they have a right to a public hearing (citing Londoner v. Denver, 210 U.S. 373, 385 (1908)). The Bi-metalic Inv. Co. case is important since Justice Holmes rules that the constitution did not require a public hearing for the adoption of rules that apply to a large number of people. Thus, one exception to Vermont Yankee arises when a rule promulgated by an agency applied only to a small class of people. The second exception is when the statute requires that the rulemaking proceedings be "on the record" after opportunity for an "agency hearing". United States v. Florida East Coast R.R. Co., 410 U.S. 224, 237 (1973).

²⁰⁰ E.g., Rogers, Hard Look Doctrine, supra note 167, at 699.


²⁰² Stewart, Vermont Yankee, supra note 170, at 1806.
more reasoned decision and that the country had historically relied upon the courts to insure that administrative laws would not be enacted without due process safeguards.203 Others, however, applauded the court's decision. They believe that the enactment of procedures in addition to those contained in the APA is within the exclusive province of Congress204 or the agency.205 As Justice Rehnquist recently stated in a case following Vermont Yankee Nuclear Power Corp.: 

It is within the agency’s discretion to afford the parties more procedures but it is not within the province of the courts to do so. In Vermont Yankee we recognized that the APA is 'a formula upon which opposing social and political forces have come to rest.' Courts upset that balance when they override informed choice of procedures and impose obligations not required by the APA.206

The debate over the fairness of administrative procedures is not a recent development. Professor Verkuil, in his historical assessment of administrative procedure, stated:

Administrative procedure has been struggling to find recognition and respectability since the beginning of the twentieth century. The obstacle was, and to some extent still is, a perception among judges, lawyers, and legislators that the adversary system is the only legitimate way to make decisions in our society. This point of view is held most strongly by those who oppose the substance of the government regulations to which administrative procedures attach ... . Some who accept the basis for regulation, however, instinctively fear that displacing adversary procedures will lead to procedures that are inherently arbitrary and oppressive ... . This fear should have been allayed by the enactment of the APA. The APA was premised on the notions that (1) what agencies did was not inherently arbitrary and (2) general procedure guidelines in rulemaking and adjudication would be adequate to assure fairness.207

As Professor Verkuil suggests, however, the debate over administrative procedural fairness has not come to an end. In fact,

203 Weyerhauser Co. v. Castle, 590 F.2d 1011, 1027 (D.C. Cir. 1979).
204 Bryse, A Somewhat Different View, supra note 179, at 1829.
205 Id. at 1824, 1831.
he is one of the strongest proponents of modifying the APA to improve informal rulemaking procedures. Verkuil has analyzed the need for change with reference to the three normative concepts of administrative procedure: 1) overall fairness to the parties and accuracy of decisions, 2) efficient and low cost resolution of the issues, and 3) participant satisfaction with the process. Because agencies which have adopted the practice of issuing more than two rounds of notice have not suggested that it has impeded their administrative mandate, this is one simple way to increase fairness, efficiency, and participant satisfaction in the administrative process. Otherwise, participants who perceive that their due process rights have been violated by "legally adequate notices," eventually become dissatisfied with the system and lose confidence in administrative procedures. Given the broad procedural discretion provided by Vermont Yankee Nuclear Power Corp. and its predecessor, United States v. Florida East Coast Railroad Co., it would not be unduly burdensome to require agencies to give additional notices when they are contemplating substantial changes between the original and the final rule.

Agencies, through internal mechanisms, could gauge the sufficiency of the notice by the content of the comments they receive. If the comments do not generally reflect a perception of the agency's contemplated action, it could publish a more detailed notice of the proposed rule. Agencies have recognized that in

202 For one of Professor Verkuil's suggestions see note 169 supra.
199 For a complete list see supra note 169, at 320-29.
200 Id. at 279.
210 Williams, Hybrid Rulemaking, supra note 10, at 450-51.
214 When analyzing the sufficiency of the notice, judges often refer to the number of comments received on a specific proposal. See Forester v. CPSC, 559 F.2d 774 (D.C. Cir. 1977); United States Steel Workers v. Marshall, 8 OSHC 1810 (1981). The Commissioner of the FDA, however, in giving notice of a proposed rule designed to expand public participation in rulemaking, said that recommendations will be judged by their quality, not by the quantity received. The Commissioner referred to the common practice of persons who, in an effort to oppose the rule, encourage other people to mail in form letters. 40 Fed. Reg. 22,950 (1975).
some instances it is necessary to go beyond the requirements of the APA to insure fair public participation in the rulemaking process. The EPA, in its promulgation of rules under the Federal Water Pollution Control Act, allows for two rounds of notice and comment. Prior to the publication of the proposed rule, the EPA provides interested persons with the technical analysis of the issues. Public comments are invited, and afterwards the notice of the proposed rule is published along with EPA's own draft report in which it tries to substantiate its position. The FAA and CAB also give advanced notices of the proposed rulemaking. These advanced notices suggest issues which need to be resolved, and invite public comment thereon.

The FDA has been particularly innovative in permitting greater public participation in the rulemaking process. The FDA invites the public to petition its commissioner to promulgate certain regulations. If the commissioner believes that the petitioner's suggestion is worthy of a proposed rule, he may in his discretion issue for publication two or more alternative proposals on the same subject and ask for comments on both of them. When the commissioner is uncertain whether the suggested rule justifies a proposal, he may issue notice of the petition and request comments with respect to the merits of the petition.

Congress has enacted statutes requiring regulatory agencies to use additional procedures not required by the APA. Legislation has been passed to compel the EPA, in some instances, to issue a new round of notice and comment when it contemplates

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215 Williams, Hybrid Rulemaking, supra note 10, at 450. See Weyerhauser v. Costle, 590 F.2d at 1011, 1028 (D.C. Cir. 1978) (4 rounds of notice and comment); Ethyl Corp. v. EPA, 541 F.2d 1, 42 (D.C. Cir. 1976) (three rounds of notice and comment).

216 Williams, supra note 10 at 450.

217 Id. at 451 & n.237; 39 Fed. Reg. 45044 (Dec 30, 1974).


219 Williams, supra note 10 at 451 & n.237.


221 Id.

222 Id.

223 See Hamilton, The Need for Procedural Innovation in Administrative Rulemaking, 60 CALIF. L. REV. 1279, 1315 (1972) (discusses various hybrid procedures which Congress has attached to the operative statutes of regulatory agencies).
that the final rule will deviate substantially from the proposed one.\textsuperscript{224} Many agencies are required to hold public hearings\textsuperscript{225} and to consult with advisory committees before issuing the final rule.\textsuperscript{226} For example, OSHA promulgated a rule designed to improve ground fault circuit protection in the construction industry. On an appeal to the Court,\textsuperscript{227} the rule was remanded to OSHA for further consideration because of failure to comply with a statute requiring it is consult with an advisory committee before promulgating the rule.\textsuperscript{228}

The Consumer Product Safety Act\textsuperscript{229} is striking in that it contains numerous variant procedures which go beyond the minimal requirements of the APA. The notice of the proposed rule must identify the product and the risk of injury associated with its use. To avoid overlapping of regulations the agency must specify existing rules which might be relevant in establishing the proposed one and also invite persons, states, or other federal regulatory agencies to submit an existing standard which would suffice as the proposed rule. Moreover, the statute contains an unique provision whereby persons may offer to develop the proposed standard.\textsuperscript{230}

If an interested person offers to develop the standard,\textsuperscript{231} and the Commission finds him technically competent to do so, it must publish the name and address of the person, and a summary of the terms of the offer accepted. Of course, notice is provided and an opportunity to participate in the development of the standards is given to interested persons.\textsuperscript{232}

\textsuperscript{224} See code sections cited note 85 supra.
\textsuperscript{225} 29 U.S.C. § 655(b)(3) (1976) (OSHA required to give an oral hearing upon request).
\textsuperscript{226} 29 U.S.C. § 655(b)(1, 2) (1976) (OSHA required to consult with the National Advisory Committee on Occupational Safety and Health before promulgating a final rule).
\textsuperscript{227} 581 F.2d 960 (D.C. Cir. 1978).
\textsuperscript{228} Id. at 967, 968. The Secretary of OSHA did not have to follow the recommendations of the advisory committee; he must, however, submit the rule for recommendations. Id. at 968.
\textsuperscript{230} Id. § 2056(b)(1).
\textsuperscript{231} Id. § (d)(1).
\textsuperscript{232} Id.
If the agency decides to develop the standard on its own, it must follow all of the informal rulemaking requirements of the APA. Upon request by a member of the public, however, the agency must allow oral presentation of views on the proposed rule. Once the Commissioner of the Consumer Product Safety Commission (CPSC) analyzes all the information gathered, and decides upon the substance of the regulation, he must (1) include in the promulgation of the final rule certain findings with respect to the degree and nature of the risk of injury which the rule is designed to eliminate or reduce, (2) name the number of products or class of products subject to the rule, (3) analyze the consequences of the rule and (4) examine means for achieving compliance with the standard without adversely affecting competition or disrupting manufacturing. Under the basis requirements of the APA, most agencies need only give a statement of the basis and purpose of the final rule. Under this statute, the Commissioner of the CPSC must give a comprehensive analysis of the basis and purpose of the final rule in order to comply with the statute. As a result, the impact of any rule promulgated by the CPSC is measured and re-measured with considerable care.

V. REFORM OF ADMINISTRATIVE PROCEDURES TO PROVIDE FOR A MORE ADEQUATE NOTICE OF PROPOSED RULEMAKING

Each president, since Richard Nixon, has sought to control the regulatory process of the executive agencies. Former Presidents Nixon and Ford required the Office of Management and Budget (OMB) to perform a "quality of life" review of significant

233 Commissioner has the discretion to accept or reject an offer within 30 days after notice of the proposed rule is given. 15 U.S.C. § 2056(e)(1) (1976 & Supp. III 1980).

234 Id. at § 2058(a)(2) (1976).

235 Id. Commissioner must also consider the special needs of the handicapped to the extent that they may be adversely affected by the promulgation of a rule. 15 U.S.C. § 2058(b)(2) (1976).

236 Id. at § 2057(c)(1)(A)-(D).
environmental regulations. Ford also required that an "inflationary impact statement" be made prior to the promulgation of new regulations. President Carter, however, went further than any of his predecessors by introducing, via executive order, a number of regulatory reforms that not only required a form of review and economic analysis of proposed regulations, but imposed new informal rulemaking procedures on executive agencies. Many of these reforms were incorporated in Reagan's Executive Order 1229. For example, the agencies must publish semi-annually an agenda of "major" regulations under develop-

227 "Quality of life" review by OMB during the Nixon Administration was blamed for undermining many environmental regulations. Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 Col. L. Rev. 943, 949 (citing Office of Management and Budget Plans Critical Part in Environmental Policymaking, 7 ENVIR. REP. (BNA) 693 (1976)).


Because of unfavorable public response, Carter decided not to include independent regulatory agencies in the executive order. 43 Fed. Reg. 12,670 (1978). One commentator has asserted that the President has the constitutional power to impose additional rulemaking procedures on independent agencies. See Verkuil, Ex Parte Contacts, supra note 227, at 948 & n. 28 (citing Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 498-99 (1979)). President Reagan, however, specifically excluded independent agencies from his executive order. The Carter Administration's Regulation Reform Act S. 755, included many of the procedural reforms contained in the former President's executive order S. 755 which failed to gain Congressional approval, would have applied to independent regulatory agencies. The Bill was based, in part, on recommendations made by Senate Governmental Affairs Committee which in 1975 conducted a comprehensive review of governmental regulations. Carter's bill was designed to improve the regulatory process within the system. Its major goals were to 1) improve the analytical ability of the agencies, 2) improve agency procedures, 3) enhance public input into the process. See Wegman, Improving the Administrative Process—Time for a New APA?, 32 Ad. L. Rev. 287, 297 (1980) (Symposium Remarks). [hereinafter cited as Wegman, Time For a New APA?]. For a full discussion of Senate Bills designed to improve agency rulemaking procedures see, Regulatory Reform Legislation: Hearings on S. 262, S. 755, S. 446, S. 93 before the Committee on Government Affairs, United States Senate 1st Sess. (1979) [hereinafter referred to as Reform Legislative Hearings]. The speakers invited to testify before the Committee were generally supportive of some type of legislation to amend the APA.


231 A major regulation is defined as having an annual effect on the economy of $100 million or more, causes major increases in costs on prices, or has significant adverse effects on competition, employment, investment, productivity, in-
ment or review and draft more informative notices of proposed rules, supplemented by preliminary and final regulatory analyses. The publication of the regulatory agenda serves as an "early warning" devise to alert the public federal rulemaking activity, while the economic analysis provides the public with an estimate of the social and economic consequences of new regulations. The analyses must also identify the anticipated costs, benefits of, and less costly alternatives to proposed regulations.

Though these similarities are important, there are some very conceptual differences between the Carter and Reagan executive orders. The Reagan order mandates that the "potential benefit to society" outweigh the potential cost of any new governmental regulation. Reagan's "Regulatory Impact Statement" places more emphasis on identifying the benefits and costs of new regulations. Moreover, the agency must explain the legal basis for rejecting less expensive regulations. Although Carter required an explanation for choosing one rule over another, the decision could be based on factors other than legal ones.

The form of review of a proposed regulation required is the major difference between the two administrations. Carter required the head of each agency to approve the promulgation of any significant rule, but Reagan has returned the responsibility to the Director of OMB. Carter's review plan was based on the supposition that top agency officials were more sensitive to comments and criticisms concerning a proposed rule. The former President's aides charged that lower level agency officials, who often drafted the proposed rules, were committed to keeping them in their vestigial form. Therefore, the problem became a


Another purpose of the regulatory agenda under the Carter Administration was to identify overlapping and conflicting upcoming rules and regulations. Neustadt, The Administration's Regulatory Reform Program: An Overview, 32 Ad. L. Rev. 129, 139 (1980) [hereinafter cited as Neustadt, Regulatory Reform].

Recall that the administrator of OSHA suspended the implementation of regulations to limit worker exposure to lead until a cost/benefit analysis was completed.

Exec. Order No. 12077.


Neustadt, Regulatory Reform, supra note 242.
lack of change rather than a substantive change in the final rule. This resulted in inflexible decision making, a state of affairs inimical to the rulemaking process.

The OMB review required by Reagan will provide the executive branch with more direct control over the executive branch with more direct control over the promulgation of new regulations. The OMB review by the Reagan administration will differ from that of the Nixon and Ford administrations because it encompasses all major regulations proposed by executive agencies.

Despite the differences in the type of administrative review of regulations, the continuation of the regulatory agenda, identification of major rules, the publication of a summary of regulatory analyses will provide the public with important information. This information should stimulate more knowledgeable public input in the regulatory process and better coordinate regulatory policies.\(^\text{247}\)

Other major recommendations for procedural reform have come from the Administrative Conference of the United States.\(^\text{248}\) In 1976, the Conference made specific recommendations with respect to how the agencies could better inform the public of the substantive issues raised in informal rulemaking. The Conference suggested that “each agency should decide in light of the circumstances of a particular proceeding whether or not to provide procedural protections going beyond those of 5 U.S.C. § 553.\(^\text{249}\) Circumstances which might prompt the agency to “tack on” procedures exceeding the requirements of the APA were described as follows:

\(^{247}\) The Reagan Executive Order did delete some of the Carter Administration's suggestions for procedural reform such as publication of advance notices of proposed rulemaking, providing notices of proposed rules to publications likely to be read by persons who might be affected by the rules and notifying directly persons who certainly would be affected. Carter had also expanded the notice and comment period to 60 days, Exec. Order No. 12044, 3 C.F.R. § 152 (1979).

\(^{248}\) The Administrative Law Conference of the United States is an independent Federal Agency established by the Administrative Conference Act of 1964, 5 U.S.C. §§ 57-576. (1976). The purpose of the Conference is “to identify the causes of inefficiency, delay, unfairness, in administrative proceedings affecting private rights, and to recommend improvements to the President, the agencies, the Congress and the courts.” Administrative Conference of the United States, Recommendations and Reports 3 (1976-77).

[When] (1) the scientific, technical, or other data relevant to the proposed rule are complex; (2) the problem posed is so open-ended that an agency may profit from receiving diverse public views before publishing a proposed rule for final comment; and (3) the costs that errors in the rule may impose, including health, welfare, and environmental losses imposed on the public and pecuniary expenses imposed on the affected industries and consumers of their products, are significant.\textsuperscript{250}

The specific additional procedures suggested in the recommendations include:

1. Providing from the outset for the possibility of two cycles of notice and comment when the agency anticipates that the issues will be unusually complex, as when the notice of proposed rulemaking is expressed in general terms.
2. Providing for a second cycle of comment when comments filed or the agency's response to such comments present important new issues or serious conflicts of data.
3. Incorporating in the notice a summary of the agency's attitudes toward the critical issues in the proceeding and a description of the data on which the agency relies.
4. Providing an explanation of the tests and other procedures utilized by the agency and a statement of the significance the agency has attached to them.
5. Holding conferences with interested groups to resolve, narrow, or clarify disputed issues.
6. Hearing argument or other oral presentation at which agency officials may ask questions, including questions submitted by interested persons.
7. Allowing cross-examination to resolve specific issues of fact when the agency considers that to be appropriate.

The recommendation concluded with the following admonition:

An agency should employ any of [these] devices . . . or permit cross-examination only to the extent that it believes that the anticipated costs (including those related to increasing the time involved and the deployment of additional agency resources) are offset by anticipated gains in the quality of the rule and in the extent to which the rulemaking procedure will be perceived as having been fair.\textsuperscript{251}


\textsuperscript{251} Bryse, A Somewhat Different View, supra note 179, at 1852, (citing Administrative Conference of the United States, 1976 Report 43-47 (1976-77)).
Judging from the content of the Conference's suggestions for improving rulemaking procedures, the notice component was deemed extremely important. The first six recommendations were exclusively designed to better inform rulemaking participants about the proposed rule and the agencies' contemplated action. The recommendations made by the Conference explicitly recognize the necessity of having a full and viable notice and comment period before a final rule is promulgated by the agency. Moreover, it appears from the analysis of the cases in Part II that employment of the "early warning" notice of proposed rulemaking and the second round of notice and commentary may have prevented litigation over the notice issue. An advanced notice of a proposed rule should better inform the public of the substance of the proposed rule while additional notices should reduce the "shock" resulting when the final rule significantly differs from the proposed one. If these procedural devices do work, delays in promulgating rules will actually be reduced; there will be fewer court-ordered remands for additional notice and comment, and fewer remands for development of more complete informal rulemaking records.

VI. RECOMMENDATIONS FOR EXTERNAL CONTROLS EXCEEDING THOSE OF ADMINISTRATIVE PROCEDURE

Congress is presently debating various bills that would place constraints beyond those contained in the Administrative Procedure Act on agency actions. The legislative veto would suspend rules promulgated by agencies for 30 to 60 days until one of the houses of Congress vetoes it or lets it stand. Former President Carter vigorously opposed the legislative veto, claiming that it would undermine the constitutional division of powers by having Congress execute laws as well as make them. Supporters of the bill argue that Congress has delegated too much law-making authority to the agencies, and that the legislative veto is one way to regain control over the administrative process.

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252 Wegman, Time for a New APA? supra note 239, at 300.
253 Id. See Adkins v. United States, 556 F.2d 1028, 1063 (Ct. Cl. 1977) (en banc) (per curiam) (plurality opinion) (majority upheld one-house veto in Federal Salary Act of 1967 against constitutional attack).
254 Neustadt, The Administration's Regulatory Reform Program, supra note 246, at 146.
255 See Roger, Hard Look Doctrine, supra note 167, at 703.
Another bill, sponsored by Senator Dale Bumpers and known as the Federal Court Improvement Act, would subject final rules to more stringent judicial review. Under this bill all of the presumptions in favor of a rule promulgated by the agency would be eliminated. The rule would also have to be supported by a preponderance of the evidence. This would require a more comprehensive record of the rulemaking proceedings.

Opponents of the bill argue that "preponderance of the evidence" language will lead to de novo review of the agency action by the reviewing court.

The Commission on Law and Economy, sponsored by the American Bar Association, has recommended that Congress enact a statute permitting the President to direct both executive and independent agencies to consider or reconsider the issuance of new regulations, and allowing the President to modify regulations inimical to the well being of the nation. This limited control of federal agencies by the President has gained the support of the Honorable Henry J. Friendly, who is certainly no stranger to administrative law. He has stated that:

Each agency has a devotion to its primary purpose; it will continue to have this no matter how many statutes are amended to say that it shall 'consider' other interests as well. Someone in government, and in the short run that someone can only be the President, must have power to make agencies work together rather than push their own special concerns to the point that the country becomes ungovernable."

The President's authority to control administrative actions, however, is limited. He is only authorized to rely on factors

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237 The late Judge Leventhal interpreted the proposed Bumpers Amendment as a mandate by Congress to compel judges to scrutinize more carefully the substantive rulemaking issues. Leventhal, Time For a New APA?, supra note 237, at 294.
238 Id.
239 Wegman, Time for a New APA?, supra note 239, at 301. Wegman states that he is confused as to what is meant by a preponderance of the evidence in informal rulemaking. He wonders whether the proceedings will be conducted on an adversarial basis, with trial-type hearings, and full opportunity for parties to cross-examine witnesses.
240 See ABA Commission on Law and Economy, FEDERAL REGULATION: ROAD TO REFORM (1979) [hereinafter cited as ROAD TO REFORM].
241 Id. at 79.
242 Separate statement of J. Friendly, id. at 163.
which the agency is authorized to consider, and may only control national policies when the agency's statutory charter is broad. Furthermore, the President's action must be published in the Federal Register, in the form of an Executive Order explaining why the Order is necessary.263

Of the three "oversight" proposals, the Presidential one is most directly related to the notice issue. The President could order the agency to reopen the record. The President could publish a notice in the Federal Register informing the public of his intention to issue an executive order concerning a proposed or promulgated rule.264 The public would be allowed thirty days to submit comments, and all comments would be subject to public inspection.265

The effect of the legislative veto would be more subtle. Congress might be more responsive to protests that the content of the proposed rule was insufficient to alert the public about the contemplated regulation. This is not to suggest that the courts are less sensitive to procedural complaints, but rather that Congress might take into account political considerations not normally addressed by the court. The intense, subjective pleas of business or environmental groups are permitted to be heard in the halls of Congress, but the court's review of the agencies' actions is limited to the record. Nonetheless, this proposed reform is indicative of the discontent with present administrative procedures.

VII. CONCLUSION

In light of the conviction of academicians, politicians and the general populace to revise the present regulatory system, administrative rulemaking procedures are likely to be changed in this decade.266 Proposals for altering administrative procedures range from the complete overhauling of the APA to amendments which would simply add some of the procedures utilized in formal rulemaking to informal rulemaking.267 This would create a

263 See ROAD TO REFORM, supra note 260, at 80.
264 Id. at 81.
265 Id.
266 See notes 239-59 supra and accompanying text.
267 See discussion in note 169 supra.
more "unified" concept of administrative procedure rather than the bi-polar structure presently in existence. Others prefer to leave the APA intact, but insist that the agencies, through internal means, must provide for procedures not required by the APA. The power of the agencies to "tack on" additional procedures is perceived to be one of the most efficient and flexible ways to improve administrative procedures. However, much time probably will pass before the President and Congress reach a consensus as to exactly what is necessary to improve the present regulatory system.

Turning to the narrower issue of the notice of proposed rulemaking, the courts and agencies will be faced with the question of how much is enough. As emphasized in this paper, the EPA and other agencies regularly allow for multiple rounds of notice and comment when the subject matter of the rule is complex. Courts too, have begun to emphasize the need for a more sufficient notice in order to insure more competent public participation in the rulemaking process. Courts are willing to remand a rule for additional notice and comment when a more complete record for review is necessary, but are reluctant to extend the rulemaking process, given their perception that petitioners will never be satisfied with any rule adopted, and that the agency's position is unlikely to change.

The court's determination as to whether to prolong the notice and comment period is also tempered by the need to resolve matters of great importance expeditiously. At best, additional notice and comment results in more meaningful public participation. At worst, it results in interminable delays in the resolution of the issues. The problem of striking a balance between fairness and efficiency is exacerbated by a paradox which surrounds the notice issue. Agencies are criticized for not adjusting the rule to reflect informed public comment, but are also accused of being unfair when the change from the proposed to the final rule is substantial. The court must apply the ubiquitous balancing test to gauge the reasonableness of the agency's action in light of all the circumstances. Though this method of after-the-fact review of complicated decisions made by both the

agency and the petitioners throughout the rulemaking process is imperfect, it must suffice until a more effective means of controlling agencies' decisions is devised.\footnote{269 See notes 237-70, supra and accompanying text.}

The agencies, however, are not limited to the use of hindsight when determining the fairness or the appropriateness of their actions. They are involved in the decision-making process from beginning to end. The means by which agencies reach decisions on issues of manifest importance should not be narrowly circumscribed by any set of procedures. They should draw from their accumulated experience and experiment with a broad range of procedural innovations. Many of the reforms implemented by the Carter and Reagan administrations, and those recommended by the Administrative Conference of the United States\footnote{270 See Administrative Conference of the United States, 1976 Report 43-47 (1976-77).} and the American Bar Association\footnote{271 ROAD TO REFORM, supra note 260.} should be adopted by independent regulatory agencies to determine which ones work best. Advance notice of proposed rulemaking, second rounds of notice and comment, full and timely disclosure of the data underpinning the agencies' contemplated decisions and response to worthwhile criticisms of proposed rules may all be used to better inform the public and to develop a record which will withstand judicial review. Moreover, full adoption of these mild procedural reforms might assuage the agencies' critics and restore public confidence in the administrative system.

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