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Pre-Rulemaking Regulatory Development Activities and Sources As Variables in the Rulemaking Fairness Calculus: Taking a Soft Look at the Ex-APA Side of Environmental Policy Rulemakings

BLAIR P. BREMBERG

I. REGULATORY DEVELOPMENT

Administrative agencies engaged in Administrative Procedure Act (APA) informal rulemaking and related policy development are faced with the paradox of trying to protect public notice values while maintaining control over policy development (which

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1 The Administrative Procedure Act (APA) was first enacted as the Act of June 11, 1946, 79th Congress, 2d Sess., ch 324, 60 Stat. 237. It is now codified, as amended, in scattered sections of 5 U.S.C., beginning at 5 U.S.C. § 551 (1988). Informal rulemaking is conducted pursuant to APA section 4, 5 U.S.C. § 553 (1988). The classical informal rulemaking scenario is a pre-rulemaking phase of rule drafting and intra-agency review followed by a notice of proposed rulemaking, public comment period, closure of public comment, the agency's evaluation of the record and final drafting, and rule promulgation. Final rules are subject to judicial review.

2 Public notice values derive from several sources (see infra, notes 25-31 and accompanying text). The sources overlap sufficiently that even in judicial decisions the origin or limits of notice values are not always clear. See Davis, Administrative Common Law and the Vermont Yankee Opinion, 1980 UTAH L. REV. 3, 4 (discussing the holding of Portland Cement Association v. Ruckelshaus, 486 F. 2d 375, 393 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974), to the effect that agencies should not rely upon information known only to themselves for rulemaking support, as possibly being based upon administrative common law, the APA, or due process, or upon some combination of the three).

The values can be impacted by voluntary actions of the agencies or through the intervention of stakeholders, with or without the blessings of the agency. It is the nature of such individuals or groups to become engaged in the process as early as possible. F. HEFFRON WITH N. McFEELEY, THE ADMINISTRATIVE REGULATORY PROCESS (1983), 252-253. This tendency may lead to unbalanced representation before the agencies. In the
necessarily implies some measure of non-public conduct). The agencies employ several approaches to regulatory development, many of which developed as responses to recommendations from the Administrative Conference of the United States. In the environmental field these include dialogues of various kinds with interested groups in advance of an informal rulemaking step and, perhaps, multiple rule proposals. Hence, informal rulemaking is but one component of a complex and rather fluid federal regulatory development system.

In this system, agencies select rule outcomes on the basis of several factors, not all of which fall squarely within the APA rulemaking process or records. These sources can be effectively grouped temporally as pre-rulemaking, contemporaneous with
rulemaking, and post-rulemaking. The pre-rulemaking activities may include data collection, regulatory analyses (including environmental studies, Presidential reviews, and others), policy research, public lobbying, negotiations between "stakehold-

* See, e.g., Rybachek v. United States EPA ("Alaska Miners"), 904 F.2d 1276 (9th Cir. 1990), discussed infra at text accompanying notes 70-91.

7 Rulemakings may develop opportunities for public involvement related to compliance with the National Environmental Policy Act (NEPA), Pub. L. No. 91-190, 83 Stat. 852 (1970), codified as amended in scattered sections of 42 U.S.C. This involvement may include the opportunity for comment on rulemaking-related environmental impact statements. See, e.g., discussion of In re: Permanent Surface Mining Litig. II, Round III, 22 Envt'l Rep. Cases (BNA) 1557, 1563-64 (1985) infra at text accompanying notes 110-119 (parties urged a reopening of rulemaking comment period after rule-related EIS set out the agency's preferred course of action in a rulemaking then underway). The NEPA activity related to a rulemaking is ordinarily described as part of the rule notices. See, e.g., 53 Fed. Reg. 52,374, 52,382 (1988) (the Office of Surface Mining Reclamation and Enforcement (OSM) identifies draft environmental impact statements and preliminary regulatory impact analyses as part of pre-rulemaking in connection with a proposed rule).


* See, e.g., Symposium On Valid Existing Rights, 5 J. Min. L. & Pol'y No. 3 (1989-90). This issue collects law and policy research papers germane to interpretation of the term "valid existing rights" as applied in the Surface Mining Control and Reclamation Act. OSM and the University of Kentucky Mineral Law Center conducted the Symposium in cooperation with the American Bar Association. OSM Director Harry Snyder indicated a purpose was to "cast as wide a net as possible" in searching for a policy solution in this difficult aspect of the surface mining program. See id. at 381-82.

10 Much of the discussion in this article concerns activities that can be broadly grouped as lobbying, although they are perhaps more procedurally restricted than lobbying related to other kinds of political activities. Compare the discussion of outreach in Part III, infra.

Some have argued that a lobbying presence analogous to that common in the legislative process is fully warranted. See Bonfield, "The Federal APA and State Administrative Law," 72 Va. L. Rev. 297, 319 n.91 (1986) ("[A]gencies must be allowed to consider the positions of lobbyists . . . [I]f agency rulemaking is to reflect what would have happened in the legislature had it considered the same subject, the procedures governing public participation during rule making must allow agencies to be 'politically sensitive.' ").
ers" and the agencies, rulemaking agenda setting, and agency-directed outreach. Contemporaneous rulemaking or rulemaking-related activities and sources include submitted rulemaking comments, recorded contacts with stakeholders, materials generated by pre-rulemaking negotiations procedures vary in the government, depending upon the complexity of the rules under consideration and agency culture. See, generally, Administrative Conference of the United States, Office of the Chairman, Negotiated Rulemaking Sourcebook (1990). For example, the Environmental Protection Agency keeps close control of its negotiated rulemakings and selectively chooses topical areas with process management in mind. See Rodgers, The Lesson of the Red Squirrel: Consensus and Betrayal in the Environmental Statutes, 5 J. Contemp. Health L. & Pol’y 161, 164 (1989). The Occupational Safety and Health Administration has in the past practiced a hands-off policy, perhaps to avoid inferences of unfairness in later rulemaking. OSHA sanctioned a negotiation of benzene standards but did not directly participate in the negotiations, which were unsuccessful. This experience led to an ACUS recommendation. See Perritt, Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States, 74 Geo. L.J. 1625, 1647-1667 (1986).

There are apparently no broad-based statutory requirements for rule negotiations other than eventual filtering of the negotiated product through APA rulemaking. But see notes 149-162 and accompanying text infra (the Federal Advisory Committee Act may apply to negotiated rulemakings and has been employed for this purpose in some instances).

The agencies employ several means of setting rulemaking agendas with constituency cooperation. The Administrative Conference’s OSHA Guidelines include the following suggestions: (1) workshops at which participants could comment on regulatory priorities before the agency compiles its initial priorities list; (2) providing access to the results of meetings of a regulatory priorities committee following review by the Assistant Secretary; and (3) allowing review and comment on initial rankings or proposed modifications to the lists. The list is then subject to alteration for expedited decisions on issues referred by EPA (pursuant to the Toxic Substances Control Act), or requested by the President, the Congress, or other agencies. Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration, (ACUS Recommendation 87-1), 1 CFR § 305.87-1 (1990) (preamble appearing at 52 Fed. Reg. 26, 629-30 (1987)).

See infra discussion, Part III. Note that the current level of outreach is probably not as advanced as it was at one time. Pre-rulemaking practices fluctuate depending upon the agencies’ rulemaking agendas and many other elements. See note 23, infra. Compare Sunstein, Factions, Self-Interest, and the APA: Four Lessons Since 1946,” 72 Va. L. Rev. 271, 281-82 (1986) (argues that the methodology prominent in the 1970s of trying to ensure participation on the part of all affected interests in rulemakings has foundered, in part because of the self-selecting character of participant groups and in part because of the lack of theoretical support for rulemaking by preference aggregation).

5 U.S.C. § 553(c) (1988) (after notice, “the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments. . .”).

The Administrative Conference has recommended conferences as a possible phase of informal rulemaking, although it suggests that adequate public notice be given of each meeting of this type. See, Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking (ACUS Recommendation 76-3), 1 C.F.R. § 305.76-3 (1990).
erated through pre-rulemaking activities that are incorporated into the rulemaking record and made subject to comment, and ex parte contracts. Post rulemaking sources include litigation settlements, rule-related policy interpretations, interventions

16 For example, in the informal rulemaking at issue in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), discussed infra at test accompanying notes 59-69, the rulemaking record included a pre-rulemaking scientific report that had been generated by the U.S. Nuclear Regulatory Commission's Staff.

17 Ex parte contacts over the course of noticed rulemaking have engendered rather inconsistent responses from the courts. The split within the D.C. Circuit, as illustrated by Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir. 1977) and Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977) is noteworthy. The FCC's initial policy response noted the discrepancies between these decisions. See 68 FCC 2d 804 (1978). The policy response was followed by rulemaking. 45 Fed. Reg. 45,582 (1980). See generally, E. Gellhorn and G.O. Robinson, Rulemaking "Due Process": An Inconclusive Dialogue, 48 U. Cm. L. Rev. 201 (1981) (discussing these D.C. Circuit cases in a dialectic format).

18 Settlements are a growing and significant facet of informal rulemaking. The agreements may reach beyond consensus on the terms of future rulemaking proposals to include proscriptions of the parties' future conduct, such as a waiver of future litigation over the rulemaking or a pledge to cooperate in the rulemaking by submitting comments supportive of the compromise rule result. See Gaba, Informal Rulemaking by Settlement Agreement, 73 Geo. L.J. 1241, 1274 n.204 and 1279 n.235 (1985) (discussing, respectively, the waiver of future litigation in the settlement of National Coal Ass'n. v. United States EPA, No. 82-1939 and consol. cases (4th Cir. Aug. 1, 1983) and the comment submittal terms of the settlement in Natural Resources Defense Council, Inc. v. Train, 8 Env't Rep. Cas. (BNA) 2120, 2121 (DDC 1976)). (This decision is part of the litigation that includes Environmental Defense Fund, Inc. v. Costle, 636 F.2d 1229 (D.C. Cir. 1980), discussed infra at text accompanying notes 102-109.).

Some technical standard statutes include provisions tending to encourage the employment of post-rulemaking consent decrees. See Perritt, supra note 2, at 1635, n.48 ("Federal environmental statutes have been written in many cases to facilitate the use of federal court litigation to promote negotiated settlement of controversies between administrative and private interests." (citations omitted)).

The settlement of enforcement-based litigation may result in agreements to pursue new rulemakings. For example, in Settlement Agreement Between Save Our Cumberland Mountains, Inc., and Manuel Lujan, Jr., Secretary, United States Dept.of the Interior, January 24, 1990, OSM agreed to undertake several rulemaking actions related to its permit blocking program. At Attachment A of the Agreement, OSM agreed to propose: (1) within 180 days a rule to implement a permit application processing plan, (2) within 180 days a rule regarding procedures for rebuttal of Applicant Violator System linkages, (3) within 270 days a rule providing that an ICP will be proposed and assessed per 30 C.F.R. pt. 846, and (4) within 180 days any rules deemed necessary to protect the due process rights of applicants, permittees, and persons or entities deemed to be in an ownership or control relationship with an applicant, permittee, or violator.

19 Informal rulemaking procedures do not apply to interpretive rules or general statements of policy. 5 U.S.C. § 553(b)(3)(A)(1988). The boundary between exempt policy statements and rules is imprecise. Also, dialogue involving policy choices may impact upon later rulemakings. Assuming that there are controlling rules covering a program function to begin with, adjustments to the manner of implementation of those
from the Congress,\textsuperscript{20} and judicial interpretations.\textsuperscript{21} The informal rulemaking step serves as the funnel to judicial review and, consequently, the rulemaking record and the events that transpire during the rulemaking period receive the greatest attention of reviewing courts.\textsuperscript{22}

The nature of pre-rulemaking activity is in large part a function of the event triggering a rulemaking. The scope of agency-initiated pre-rulemaking activities in turn impacts the approaches taken by stakeholders. Events or actions that may rules through policy pronouncements may be substantively significant, notwithstanding the shield from public rulemaking scrutiny. This aspect of regulatory development explains the omnipresent lobbying activity present at many government programs. The level of this kind of activity is perhaps a function of agency culture. Rulemakings are expensive undertakings, and, unless there is an ongoing rulemaking calendar that can easily accommodate a second-generation rulemaking, the agencies will most likely try to do as much as possible under the policy exemption.

Consider, for example, the NRC's selection of a parent company guarantee policy to implement its financial surety rules under the Uranium Mill Tailings Radiation Control Act. (Policy Guidance Regarding Parent Company and Licensee Guarantees for Uranium Recovery Licenses, December 30, 1985, NRC FOIA-86-705, B/17.) The applicable rules prohibited self-insurance, but after EPA selected through rulemaking a parent company option for one of its financial surety programs NRC followed suit with its policy statement approach. The NRC policy skirted around the existing rule (and the conclusions of a rule-supporting EIS) by proclaiming that parent company guarantees were not a form of self-insurance. See Bremberg, Financial Responsibility Requirements and the Implementation of Environmental Policy: The Case of the Uranium Mill Tailings Radiation Control Act, 8 UCLA J. ENVTL. L. & POL’Y 171, 196-198 (1989). The NRC later produced a policy issue memorandum (SECY-87-253, October 9, 1987) indicating an intent to review the parent company guarantee policy.

Programs subject to very active congressional oversight are particularly vulnerable to intervention from Members of the Congress or Committees. The Congress is a frequent cause of reopened rulemaking comment periods; usually this indicates some change in policy direction at the urging of Congress. See, e.g., 53 Fed. Reg. 5430 (1988) (OSM reopened a rulemaking comment period in response to the House Committee on Interior and Insular Affairs). This rulemaking is discussed infra at notes 186-196 and accompanying text.

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\textsuperscript{21} The advent of full scale, long-running regulatory program litigation has given the judiciary an extraordinary role in shaping the outcome of rulemakings and other regulatory development. Examples of these kinds of cases are the Clean Water Act line including Environmental Defense Fund, Inc. v. Costle, 636 F.2d 1229 (D.C. Cir. 1980) and the Surface Mining Control and Reclamation Act line including in re Permanent Surface Mining Litigation II, 22 Env’t. Rep. Cas. (BNA) 1557 (1985). See infra, Part II.

\textsuperscript{22} Technically, judicial review of an informal rulemaking (or other action subject to review under the APA) is premised upon the whole record or parts of it cited by a party. 5 U.S.C. 706 (1988). This article establishes that, at least in the context of fairness reviews, courts are willing to consider ex-APA sources (meaning sources not part of the rulemaking record). These kinds of occurrences, however, have not appeared to be outcome determinative. See generally, discussion, Part II.
lead to rulemakings include: (1) congressional or judicial directives; (2) agency initiatives or investigations; (3) public petitions; (4) another agency's action or initiative; or (5) advisory committee proposals. Congressional and executive oversight and appropriations policy can also be significant factors. Rulemakings that are contentious to begin with, e.g., those that are spin-offs of remand orders, congressional interventions, or public petitions, probably have the strongest political following and may, thus, be the subject of the greatest lobbying pressure in the pre-rulemaking phase.

Public notice values are a central element of procedures under several procedural statutes and orders. Executive Order 12291 and the Regulatory Flexibility Act require twice yearly (October and April) Federal Register publication of agency rulemaking agendas. Various program-specific hybrid rulemaking procedures mandate open contact schemes incidental to rulemaking. The Freedom of Information Act and the Federal

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24 The effect of active congressional oversight is apparent in the administration of the Surface Mining Control and Reclamation Act. The House Interior and Insular Affairs Committee has maintained an active oversight, to the point of directing proposed rule redrafting and reopening of rulemaking comment periods. See 54 Fed. Reg. 52,092, 52,093 (1989).

Appropriations are a viable and, at times, unpredictable mechanism of congressional control over regulatory action. See, e.g., Conference Report on H.R. 1827, Cong. Rec. H5651, H5666 (daily ed., June 27, 1987). In this report, the managers announced plans to prohibit implementation of a certain proposed mineral product valuation rule, and stated, regarding the agency's rulemaking:

The managers understand that [the Minerals Management Service or MMS] will publish draft regulations in final form on or before August 17, 1987 for coal, oil and gas, announce in that Federal Register notice a short comment period, and then publish final regulations on or before September 30, 1987. The managers continue to be concerned with obtaining workable regulations from the Minerals Management Service and hope that new regulations can go forward in fiscal year 1988. (Emphasis added).

See infra note 163, discussing the course pursued by the MMS.

Therefore, although Congress no longer has the authority to exert Legislative Vetos over agency actions, per Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), it is not without the capacity to influence rulemaking outcomes.

25 See supra note 8.

26 The hybrid rulemaking scheme applicable to the Federal Trade Commission's rulemaking program entails a constituency outreach step and fiscal support of citizens' group intervention in the process. The Administrative Conference has issued several
Advisory Committee Act provide for access to some materials and meetings. The agencies' ethical standards based upon the Government in the Sunshine Act also may provide avenues for informed access. And, notwithstanding any of those sources, of course, the First Amendment establishes the paramount right of the people to petition the government, including the administrative agencies. Hence, the question of accessibility in a general sense is rarely in issue; the question of informed, fully noticed access often is. Judicial review of rulemaking fairness is the principal context of these kinds of disputes, although clearly a number of policies supportive of public notice values have emerged in response to other stimuli.

The entire issue of public notice in regulatory development has a long history and a strong imprimatur of pre-APA common law or administrative practice norms. A glance at APA history guidelines in connection with the FTC program; these guidelines serve also to influence the conduct of other agencies. See 1 C.F.R. § 305.79-1 (1990).


The OSM made outreach materials available for this research pursuant to a FOIA request from the author. Correspondence of March 14, 1989, Joan F. Shaw, FOIA Officer, to B. Bremberg and documents.


U.S. Const. amend. I ("Congress shall make no law respecting . . . the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.") This right to petition extends to the petitioning of all branches of Government, including the administrative agencies. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (the Noerr-Pennington doctrine of antitrust immunity for certain protected petitioning activities was extended to the petitioning of administrative agencies, subject to a narrow sham exception in cases of interference with the rights of others to participate). This principle has been recognized in application of citizens' participation rights under environmental protection statutes. Webb v. Fury, 282 S.E.2d 28 (W.Va. 1981) (Surface Mining Control and Reclamation Act). Also see Annotation, The Supreme Court and the First Amendment Right to Petition the Government for a Redress of Grievances, 30 L.Ed 2d 914 and Annotation, "Sham" Exception to Application of Noerr-Pennington Doctrine, Exempting From Federal Antitrust Laws Joint Efforts to Influence Governmental Action, 71 A.L.R. Fed. 723.

See generally discussion of rulemaking cases, infra, Part II.

The greatest activity in this realm is the Congress' enactment of agency-specific hybrid rulemaking requirements.
explains the origin of this kind of problem and sets its current aspects in perspective. In the years leading up to APA enactment, contacts between agencies and their constituencies were a routine part of rulemaking.\textsuperscript{33} For example, the Department of Labor circulated draft rules to trade and labor groups.\textsuperscript{34} It is noteworthy, however, that the emphasis on notice concerns has shifted somewhat since that time. Apparently in the 1940s, concerns regarding public notice centered on the goal of achieving full disclosure of applicable rules and policies as adopted,\textsuperscript{35} rather than on improving notice of the early stages of regulatory development.\textsuperscript{36} The current interest in pre-rulemaking is a func-

\textsuperscript{33} The concept of wide open public commentary on rulemaking is a creature of the APA; the pre-APA practices may have approximated that result, at times, but more commonly resembled today's pre-rulemaking practices. Four types of rulemaking procedures were recognized. These were: investigatory procedure; consultative procedure; auditive procedure; and adversary procedure. Investigatory procedure was analogous to legislative factfinding. Consultative procedure involved receiving opinions, advice, and suggestions from groups that were affected by the work of the agencies. This practice was especially prevalent in areas of economic regulation. The Interstate Commerce Commission, the Federal Power Commission, the Securities and Exchange Commission, the Bureau of Marine Inspection and Navigation, the Board of Governors of the Federal Reserve System, the Food and Drug Administration, and many others followed this practice. Auditive procedure involved informal hearings at which interested parties could comment on proposals. The adversary procedure was based on the railroad regulation model and involved formal evidentiary hearings and legislative findings (rules) based largely upon the record. Whether agencies could go outside the record to make rules was debated in the literature at the time. Fuchs, \textit{Procedure in Administrative Rule-Making}, 52 \textit{Harv. L.R.} 259, 273-280 (1938-39).

\textsuperscript{34} The Division of Public Contracts, Department of Labor (administering the Walsh-Healey Act) had no established procedure for promulgation of regulations, although regular staff conferences addressed rulemaking needs. The Division had never held hearings in connection with rulemaking. However, after preparing drafts the Division did consult the purchasing departments of the Government that would be affected by the proposed regulation and also circulated drafts to trade associations and labor organizations. On some occasions the Administrator asked interested parties to confer prior to the preparation of a draft. Part 1, Division of Public Contracts, Department of Labor, The Walsh-Healey Act, Administrative Procedure in Government Agencies, Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 186, 76th Cong., 3d Sess. 33-34 (1940).

\textsuperscript{35} In the case of the Veterans' Administration, only the "substantive" regulations were published in the Federal Register. However, the service organizations and Administration staff received copies of all regulations. \textit{Id.} at 40-41.

\textsuperscript{36} See, e.g., Cass, \textit{Models of Administrative Action}, 72 \textit{Va. L. Rev.} 363, 381, 391 (1986) ("The report of the Attorney General's Committee [Final Committee Report (Staff of the Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) at 114-15), keeping with the views of its director [Walter Gellhorn], portrayed rulemaking less as a tool of legislative decisionmaking than as a vehicle for announcing agency policy to the outside world. The essential point was not how rules were made but that
tion of the changing system of regulatory development, which, arguably, is steadily growing more akin to the "free for all" pre-APA system. Organized participants can and typically do enjoy a disproportionate level of influence.\textsuperscript{37}

Not surprisingly, the Administrative Conference has seen fit to ponder the topic of notice as it relates to ex-APA processes. Its guidance is fully reflective of the political character of regulatory development—witness its 1976 directive encouraging pre-rulemaking notices to the public, and its 1983 directive essentially discouraging this practice.\textsuperscript{38} Of course, recognizing that political compromise is a factor in rulemaking\textsuperscript{39} merely serves to remind that the impact of any particular event or source of data on rule outcomes is difficult to measure or predict.

The agencies' rationales for engaging in ex-APA regulatory development are varied. Among them are a desire to concentrate lobbying at the agency level (tied to maintaining control over the rulemaking),\textsuperscript{40} a perceived need to rely upon private groups or organizations for technical expertise,\textsuperscript{41} an interest in accomplishing they were announced." And, "Walter Gellhorn particularly emphasized the notice aspect of rulemaking in his contemporaneous text and casebook. See W. Gellhorn, [FEDERAL ADMINISTRATIVE PROCEEDINGS 116-44 (1941)] and W. Gellhorn, [ADMINISTRATIVE LAW: CASES AND COMMENTS 331-554 (1940)]."

\textsuperscript{37} The pattern was well in place in the mid 1970s. See Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1775 (1975) ("Indeed, the content of rulemaking decisions is often largely determined in advance through a process of informal consultation in which organized interests may enjoy a preponderant influence.").

\textsuperscript{38} The Administrative Conference recommended in 1976 that agencies consider voluntary publication of advance notices of proposed rulemaking (ANPRMs). However, by 1983 the Conference conceded that "for rulemaking governed only by section 553 of the APA, an agency publishes an ANPRM, instead of a notice of proposed rulemaking, for mostly psychological—not legal—reasons. Section 553 does not require the agency to publish the terms or text of a proposed rule, and, in any event, the agency is free to change its mind about the contents of the rule." Administrative Conference of the United States, Office of the Chairman, A Guide to Federal Agency Rulemaking (1983) p. 103.

\textsuperscript{39} See Gaba, supra, note 18, at 1250-51 (changes in regulations are generally the result of compromise between the agency and stakeholders, but "[t]he compromise might neither represent the preferred positions of those parties, nor be supported by any information in the record. This is especially true of [EPA] regulations containing specific numerical limitations.")

\textsuperscript{40} See Bruff, supra note 3.

\textsuperscript{41} This practice runs the risk of inference that the agency has become captured by its regulated community. See Note, Surrogate Rule Making: Problems and Possibilities Under the APA, 61 S. Cal. L. Rev. 1017, 1038 (1988) (arguing that agencies that accept compromise rules from their regulated community are primarily influenced by the industry under regulation).
modating diverse interests as early as possible in the process,\textsuperscript{42} and an interest in avoiding reviewable procedures.\textsuperscript{43} Notice levels vary from essentially a total blackout to policies that are closer to full disclosure;\textsuperscript{44} most agencies in the environmental protection field are probably operating closer to open disclosure than to blackout.\textsuperscript{45}

In 1978, the Supreme Court's landmark decision in \textit{Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.}\textsuperscript{46} constrained to a large degree the role of courts in expanding notice value protections beyond the terms of the APA because of constitutional or applicable statutory proscriptions.\textsuperscript{47} However, similar kinds of results—that is, more detailed

\begin{itemize}
\item Reviews prior to noticed rulemaking can be used to: (1) evaluate factual analysis compiled by staff; (2) compare the legal and policy conclusions of the staff with existing agency policy and the applicable legal regime; (3) obtain internal review from all interested groups, identifying the disagreements; (4) check the documents for quality and formatting; and (5) produce agreement on the specific procedures and other agency actions that will be employed in the rulemaking. Administrative Conference of the United States, A Guide to Federal Agency Rulemaking (1983), at 92.
\item The Administrative Conference notes:
Exposure of the staff's investigative results and preferred regulatory approach to public criticism before publication of the [notice of proposed rulemaking] \textit{has the advantage of permitting changes in the proposal without adherence to any procedural requirements}. Early consultation with potentially interested persons also demonstrates an open mind by the agency, particularly when changes are made in response to criticisms. \textit{Id.} at 102 (Emphasis added).
\item The dichotomy is brought into focus by the opinions in Wolfe v. Department of Health and Human Services, 839 F.2d 768 (D.C. Cir. \textit{en banc} 1988), discussed \textit{infra} at note 139. The Wolfe court upheld a non-disclosure of pre-rulemaking information by the Secretary of Health and Human Services, although acknowledging that other agencies, such as the Internal Revenue Service, engaged in much more open practices with the same type of information.
\item This is the inference I have drawn from the cases and policies reviewed for this article.
\item 435 U.S. 519 (1978).
\item The principal issue before the Court in \textit{Vermont Yankee} was whether cross examination and other hearing procedures were required in a particular informal rulemaking. It held that these additional procedures were not necessary. The decision is most noted for an additional statement, actually at the beginning of the opinion, that sets out the notion that courts lack authority to expand upon the APA minimal level of procedures. Justice Rehnquist stated in summary:

\begin{quote}
Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are
\end{quote}

\end{itemize}
agency activity over the course of rulemaking—have resulted from reviews citing substantive rule content problems rather than procedural compliance issues. Agencies are not prevented from engaging in ex-APA activities, nor are courts prevented from considering the impact of those activities (that, if initiated by the agencies, technically are procedures over and above the APA minima).

This climate raises some interesting quandaries: if ex-APA sources influence rule outcomes, how should these sources factor into considerations of rulemaking fairness? Should reviewing courts bootstrap ex-APA histories or sources into rulemaking fairness analyses, such as in cases raising questions or rulemaking "due process" or the closely related APA-based concept of rulemaking notice adequacy? If not, can normative agency


In Vermont Yankee, the reviewing courts had before them a record of substantial pre-rulemaking activity. This included record development in the context of earlier adjudicatory proceedings, preparation and circulation of staff reports and documentation, and, it can be inferred, a rather well-developed ongoing dialogue involving all parties.

The nature of NRC's ex-APA activities was raised before the Supreme Court, but none were found to be dispositive of any points. Plaintiffs argued that some other of NRC's past ex-APA practices were indicia that the informal rulemaking at issue was inadequate. The gist of this argument was that in combination with NEPA's application in the rulemaking, past agency practices, and the statutory mandate under which the NRC operates justified the D.C. Circuit's imposition of procedures over and above the APA minima. See Vermont Yankee, 435 U.S. at 548. Regarding the past agency practices issue, which conceptually correlates with the idea of agency norms discussed at the conclusion of this article, the plaintiffs were unable to overcome suspicions that the past practices to which they alluded were in fact an aberration in themselves.

Significantly, the Court does not find one way or the other on the question of whether reviews of these kinds of added-procedure policies should or should not be a part of rulemaking judicial reviews. See id. at 542, n.17.

Compare, generally, E. Gellhorn and G.O. Robinson, supra, note 17 (examining ex parte contacts during rulemaking). This article, of course, explores the ex-APA side of regulatory development but notes jurisprudential tendencies similar to the ex parte cases; in short, courts are reaching beyond the limits of APA records and time frames in rulemaking fairness cases. The results are mixed.

conduct or legal support from sources other than the APA negate inferences of unfairness? Should the judicial inquiry be more rigorous in the setting of negotiated rulemaking reviews? Do *Vermont Yankee* and other authorities limit the powers of courts to consider agency adopted ex-APA procedures as part of APA fairness reviews?

In an effort to address these questions, I first consider several recent environmental policy rulemaking cases, starting with *Vermont Yankee*, but concentrating on several subsequent lower federal courts decisions that squarely addressed rulemaking fairness, a question that was not before the Supreme Court in *Vermont Yankee*. The opinions in these later lower federal court cases have incorporated or have appeared to incorporate ex-APA histories into analyses of rulemaking fairness (generally in the form of claims based upon the due process clause or notice provisions of the APA). These opinions are an appropriate study vehicle because of their depth of record discussion. Second, and perhaps of more significance in terms of rulemaking fairness objectives, I examine policies of the agencies. The focus of this discussion is the Office of Surface Mining Reclamation and Enforcement’s (OSM’s) pre-rulemaking outreach program. Lastly I consider the possible role of these kinds of policies in judicial reviews of rulemaking fairness.

II. JUDICIAL REVIEW OF ENVIRONMENTAL POLICY RULEMAKINGS: LOOKING BEYOND THE FOUR CORNERS OF THE APA PROCESSES

Since the Supreme Court issued its *Vermont Yankee* decision, several lower federal court cases have reviewed fairness aspects

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52 I choose to think of rulemaking fairness in a normative sense because, as I point out in later analysis, policies favoring informed representation of all interests in rulemakings are, compared to the strict doctrinal support, the healthier side of the equation. Normative questions, after all, are about values. As the norms evolve they come to be recognized as a contrast to more cut and dried concepts, legal or otherwise. See, *Ethical Issues in Professional Life*, 6-7 (J. Callahan, ed., 1988) (defining idea of normative questions).


54 Although formally the Office of Surface Mining Reclamation and Enforcement, the agency was, early in its history, generally known by the acronym "OSM" as it is currently. During much of the 1980s it was called (in official notices) "OSMRE." This Article uses "OSM" with the exception of some quoted material. The states with approved programs are known as "primacy states."
of complex, extended environmental policy informal rulemakings. At a general level, these cases are not unlike *Vermont Yankee*, which, as noted above, concerned environmental policy informal rulemaking with a substantial pre-rulemaking component, although fairness of the actual rulemaking was not determined in the Supreme Court's decision.\(^{55}\)

On occasion these reviews have included direct or indirect consideration of ex-APA activities and sources that the agencies had brought into the process of regulatory development. Put another way, the courts have been considering the impact that "procedures" over and above the APA procedures (and set in a pre-rulemaking stage) have on the fairness of informal rulemaking. That is not to say, as pointed out in the following sections, that the lower courts are squarely requiring supplemental procedures. Nonetheless, the boundaries between APA processes and ex-APA processes, apart from the formal division established by issuance of a proposed rulemaking notice in the Federal Register, are somewhat indistinct.

This is similar to a court's determination as to whether a legal instrument, such as a deed, is sufficiently ambiguous to warrant the use of extrinsic evidence as an interpretative aid. The role of that extrinsic evidence as adding to the result is sometimes readily apparent, although the court insists that its interpretation is being based solely on the material "within the four corners" of the instrument. By analogy, if a rulemaking complies with the bare minima of APA processes, its fairness is without serious doubt (is not ambiguous) and hence, resort to extrinsic fairness indicators, such as ex-APA activities and sources, is not indicated. Of course, that is not really the way it works in either deed interpretation cases or in APA reviews. How else can the ex parte contact cases be explained? The courts in those cases have been more than willing to consider extrinsic evidence of unfairness or agency bias, even though all the APA processes appear to be in order.\(^{56}\)

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\(^{55}\) The Supreme Court remanded to the Court of Appeals on the question of the rulemaking compliance with the APA. *Vermont Yankee*, 435 U.S. at 549.

\(^{56}\) Ironically, these ex parte contact cases have served to lend "legitimacy" to interventions in the pre-rulemaking and post-rulemaking phases of regulatory development. See J. O'Reilly, Administrative Rulemaking, § 4.02 at 69 (1983), and Perritt, *supra*, note 2, at 1699 (1986) (relying on the implied findings of Home Box Office v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977) and Iowa State Commerce Comm'n v. Office of Fed. Inspector, 730 F.2d 1566, 1576 (D.C. Cir. 1984) that contacts are only restricted...
The cases that have taken the next step of considering ex-APA aspects of regulatory development are noteworthy on several levels. These cases may signal how courts will evaluate one of the issues left unanswered in Vermont Yankee: how ex-APA activities might factor into analyses of rulemaking fairness. The cases may also serve eventually as a policy framework under which agencies will develop future ex-APA activities for use along with subsequent rulemakings.

Although it may foreshadow controversy, courts are looking very favorably on the ex-APA practices. For illustration, agency shielding of the pre-rulemaking Presidential review process has been rigorous. Nevertheless it is indeed very difficult to forecast future public intervention/agency bias scenarios. Thus, the prospect of courts reaching farther into pre-rulemaking political history for a spin on rulemaking fairness remains plausible.

**Vermont Yankee**

In Vermont Yankee the Supreme Court considered the U.S. Nuclear Regulatory Commission’s (NRC’s) use of informal rulemaking for establishing numerical values, if any, to be assigned the environmental effects of the uranium fuel cycle in cost benefit analyses for nuclear power plant licensing decisions. This following the start of rulemaking, *i.e.*, after public notice of proposed rulemaking is given.)

7 In ACUS Recommendation 88-9, Presidential review of agency rulemaking (to be codified at 1 C.F.R. § 305.88-9, 54 Fed. Reg. 5,207 (1989)), the Administrative Conference recommends that Presidential review should apply generally to federal rulemaking but that the Presidential review process should not create any substantive or procedural rights enforceable by judicial review. *Id.*, ¶ 1, ¶ 7. The Conference recommends:

An agency engaged in informal rulemaking should be free to receive guidance concerning that rulemaking at any time from the President, members of the Executive Office of the President, and other members of the Executive Branch, without having a duty to place these communications in the public file of the rulemaking unless otherwise required by law. However, official written policy guidance from the officer responsible for presidential review of rulemaking should be included in the public file of the rulemaking once a notice proposed rulemaking or final rule to which it pertains is issued or when the rulemaking is terminated without issuance of a final rule.


Note that this interpretation modifies the Conference’s position previously set out in Recommendation 80-6, Intragovernmental Communications in Informal Rulemaking Proceedings, 1 C.F.R. § 305.80-6, ¶ 1.

informal rulemaking action was a spin-off of various pending adjudicatory reactor licensing proceedings.\textsuperscript{59}

The NRC’s selected procedures involved pre-hearing distribution of several staff documents,\textsuperscript{60} including a pre-rulemaking NRC technical report titled “Environmental Survey of the Nuclear Fuel Cycle,”\textsuperscript{61} and an informal hearing. Testifiers were subject to questioning from the Commission but were not subject to cross examination from the parties. The record, including a transcript of the hearing, remained open for thirty days following the hearing for additional comment. Following this step, the staff filed a supplemental document to clarify the pre-rulemaking report. The Commission then adopted a rule specifying numerical standards that would be applied in the environmental reviews for all licenses and approving of the informal rulemaking procedures.\textsuperscript{62}

The Court of Appeals panel found these proceedings inadequate and overturned the rule. It ruled with respect to the Vermont Yankee license that the Commission must deal with fuel cycle environmental impacts in individual licensing proceedings,\textsuperscript{63} notwithstanding the fact that the impacts would be substantially identical for any plant.\textsuperscript{64}

In determining that the Court of Appeals should not have imposed adjudicatory requirements as part of this informal rulemaking,\textsuperscript{65} the United States Supreme Court sought to right a fundamental misconception of the “nature of the standard for judicial review of an agency rule.”\textsuperscript{66} The Court’s complex hold-

\textsuperscript{59} See id. at 528-530.

\textsuperscript{60} Id. at 530, n.7. (Eleven documents were made available to all parties several weeks before the hearing.)

\textsuperscript{61} Id. at 528.

\textsuperscript{62} Id. at 529-30.

\textsuperscript{63} This is how the Supreme Court characterized the holding of the Court of Appeals. Id. at 535.

\textsuperscript{64} The uranium fuel cycle consists of a front end (mining and processing of uranium ore, enrichment, and fabrication of fuel for use in a reactor) and, following use of the fuel in a reactor, a back end (management of the spent reactor fuel). Usable uranium and plutonium fuel can be recovered from spent reactor fuel, hence the term “fuel cycle.” All aspects of the cycle may have environmental consequences, but, because the increment of fuel cycle activity attributable to each plant is basically the same, the NRC decided that, for EIS purposes, factors of universal application should be adopted. See generally Bremberg, supra, note 19, at 174, n.11.

\textsuperscript{65} There was no serious dispute as to NRC’s authority to handle this matter as part of an informal rulemaking. The issue was whether the informal rulemaking procedures employed were adequate. See Vermont Yankee, 435 U.S. at 535, n. 13.

\textsuperscript{66} Id. at 547.
ing addressed this point arising out of the Vermont Yankee licensing. It states that procedures over and above the APA minima were not necessary in this rulemaking because the Congress left the matter up to the agencies’ discretion and not to the courts, absent violation of constitutional proscriptions, non-APA statutory standards, or some other compelling reason.67

Of particular interest on the score of ex-APA activities, the United States Supreme Court also noted that the Court of Appeals had made a finding of procedural inadequacy solely on the basis of “the record actually produced at the hearing, and not on the basis of the information available to the agency when it made the decision to structure the proceedings in a certain way. This sort of Monday morning quarterbacking not only encourages but almost compels ... adjudicatory hearings.”68 Thus, the Court implicitly recognizes that review beyond the narrow APA record (the hearing record) may be warranted in a fairness determination. Of course, this particular point was not before the Court, but was mentioned as an indication of the dangers of reviewing courts ignoring relevant information. In this circumstance, the reviewing Court of Appeals clearly had ignored some rulemaking record materials, as well as ex-APA sources.

Therefore, the Vermont Yankee decision leaves one of the more curious features of the APA intact—namely that the agencies are vested with the flexibility to create procedures, and even balance the fairness of procedures, subject to review within the narrower framework of the APA process. Ex-APA activities or sources may be a relevant inquiry for a reviewing court in some circumstances.69

Alaska Miners

A panel of the Ninth Circuit, in Rybachek v. United States Environmental Protection Agency (“Alaska Miners”),70 exam-

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67 See id. at 543 (discussing FCC v. Schreiber, 381 U.S. 279, 290 (1965) (agencies should be free to shape their own procedures)).
68 Id. at 547.
69 The cases collected in this Part describe circumstances in which this may be the case. Consider, for example, the Vermont Yankee opinion’s passing inquiry into whether a well-settled agency procedure (of the kind over and above the APA minima) would be enforceable judicially in the event that an agency later changed its procedures. See Vermont Yankee, 435 U.S. at 542, n.17. Presumably, these kinds of procedures could include ex-APA activities if linked to later rulemakings.
70 904 F.2d 1276 (9th Cir. 1990). Petitioners in No. 88-7393 are Stanley C. Ryba-
ined fairness issues that had entailed several documented pre-rulemaking activities and multiple rule proposals. The Environmental Protection Agency's (EPA's) rules in question established operational standards for placer mining. The miners' group challenging the rules argued that portions of the final rules bore little resemblance to proposals that had been the subject of noticed public rulemaking comment periods and that the EPA's presentation of data was so incomprehensible it rendered the rulemaking unfair.

Regulatory development consisted of original field data collection at operating placer mines, as well as outreach meetings with interested parties to discuss a Development Document. Before EPA completed the rulemaking it conducted two public comment periods on rule proposals. In fact, the lengthiness of the process led to an unusual United States District Court Order instructing EPA to complete the rulemaking by a certain date.

This article discusses the fairness-based aspects of the court's decision. As is common in rulemaking litigation over technical standard environmental regulations, the court also had before it issues concerning the "merits" or substantive validity of the rules. See Alaska Miners, 904 F.2d at 1289-93.


In addition to collecting field data, EPA circulated rule development reports and held workshops with the public prior to proposing a rule, and analyzed comments from 112 sources, comprising approximately 1300 separate comments. See preamble to the final rule, particularly 53 Fed. Reg. 18,764, 18,781 (1988) (public participation and response to major comments). The principal compilation of this information incorporated into the record was EPA, Development Document for Proposed Effluent Limitations Guidelines and New Source Performance Standards for the Ore Mining and Dressing Point Source Category, Gold Placer Mine Subcategory (1985). EPA included this document in its Court of Appeals brief appendix. See Alaska Miners, 904 F.2d at 1287, n.11.

Trustees For Alaska v. Thomas, No. A85-440 (D. Alaska, May 7, 1986), as modified February 1, 1988, cited at 53 Fed. Reg. 18,764 (1988) (the District Court ordered EPA to complete this rulemaking by a date certain; it granted an extension in
The miners and miners' groups framed the fairness issues in terms of due process and the APA. The due process contentions concerned EPA's post-comment period additions to the rulemaking record and the adequacy of proposed rulemaking notices. The key APA claims stated that EPA had presented rulemaking data in an incomprehensible morass.

The Ninth Circuit panel easily dispatched the issues of post-comment period record addition and data presentment. EPA had added over 6000 pages to the rulemaking record following the close of the final public comment period. In rejecting an argument that this obstructed meaningful public comment on the record, the court construed the added record as a permissible "response to comments made during a public-comment period." The data presentment issue gained little sympathy from the court which noted "countless other administrative rulemakings" have equally complex records.

The notice adequacy issues were more difficult to analyze, as they involved two separate proposed rule notices in which EPA had posited several regulatory alternatives tracking statutory Clean Water Act schemes. Among those mentioned in both notices and a draft Development Document was EPA's authority

the modification). These kinds of orders may be on the increase in the health and safety area generally, although they remain unusual. See, e.g., Public Citizen Health Research Group v. Commissioner, Food and Drug Administration, 724 F.Supp. 1013 (D.D.C. 1989) (ordering the FDA to promulgate Toxic Shock Syndrome-related tampon absorbency labeling regulations by a date certain). Compare, United States SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (upon finding that additional evidence should be considered by an agency in order to assure proper judicial review a reviewing court should not generally dictate "to the agency the methods, procedures, and time dimension of the needed inquiry. . .") (Emphasis added).


The claims also stated that EPA had falsified evidence and improperly processed data. Alaska Miners, 904 F.2d at 1295.

The court projected a never ending cycle of public comments followed by agency response, followed by another round of public comments. Alaska Miners, 904 F.2d at 1286, (citing for comparison BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 644-45 (1st Cir. 1979) (agencies should be encouraged to use new information without risking the requirement of a new public comment period), cert. denied, 444 U.S. 1096 (1980), later proceeding, 614 F.2d 21 (1st Cir. 1980)).

Alaska Miners, 904 F.2d at 1295. The court cites, as example, Chemical Mfrs. Ass'n. v. EPA, 870 F.2d 177, clarified, 885 F.2d 253, later proceeding, 885 F.2d 1276 (5th Cir. 1989) (the administrative record exceeded 600,000 pages, covering difficult technical subjects related to production of organic chemicals, synthetic fibers, and plastics).
to impose best management practices (BMPs). One notice also described the permit-issuing authorities' possible imposition of BMPs.80 EPA indicated a possible case-by-case application of BMP criteria.81 But, EPA did not propose specific BMP rule language. The notices gave only a relatively short treatment of the basis for proposed BMPs; in contrast, the final rule preamble included a comparatively lengthy description of the final rule's five BMPs.82

Regarding best available technology (BAT),83 EPA's first notice indicated a probable exemption from a water recycling BAT for small mines on economic feasibility grounds.84 In its second notice, however, EPA revised its economic findings, concluding that recycling was economically possible for small operations but that chemical treatment methods did not appear to be. It solicited comments.85 The notice discussed several non-BAT regulatory alternatives, including limitations based on best practicable technology, best conventional technology, and new source performance standards.86

In approving the adequacy of EPA's BMP notices, the court invoked three criteria. These are the APA's required linkage of the notice's "subjects and issues involved" with the final rule,87

82 See 50 Fed. Reg. 47,982, 48,000 (1985) and 52 Fed. Reg. 9,414, 9,416 (1987) (brief separate sections describe BMPs). The brevity of these sections is startling: the second notice merely identifies analysis present in the Development Document for the first rule notice and concludes: "Suggested BMPs included construction of settling ponds with adequate drainage and storm water diversions around the pond, and recontouring of surface mines and waste piles to decrease erosion and prevent infiltration of water into the mine area." From that threshold, the final rule imposed a complicated five-step BMP requirement for each NPDES permit. These steps cover surface water diversion, berm construction, pollutant materials storage, new water control, and maintenance of water control and solids retention devices. See 52 Fed. Reg. 18,785-786 (1987) (preamble description of the final rule BMPs).
83 Best available technology economically achievable are standards that must be both capable of economical implementation and technologically available. See 33 U.S.C. § 1311(b)(2)(A) & (B) (1982). Alaska Miners, 904 F.2d at 1290.
84 The exemption would have applied to mines handling between 20 and 500 cubic yards of material per day. Recycling was proposed for larger operations. See 50 Fed. Reg. at 47,995 (1985).
87 "[T]he EPA is only required to publish in this context the 'terms or substance of the proposed rule or a description of the subjects and issues involved'. 5 U.S.C. § 553(b)(3) (1988)." Alaska Miners, 904 F.2d at 1287.
and two judicially-recognized criteria: that precise notice of possible final rule language is not required \(^{88}\) and that rules must be a "logical outgrowth" from the notice.\(^{89}\)

The procedural analysis concerning BAT standards for all mines (i.e., selection of the water recycling standard for small mines as well as large ones) was simpler. The court upheld these rules because the notice for the second comment period clearly pointed out the EPA's changed economic analysis regarding small mines and provided an opportunity for comment on that point.\(^{90}\)

The significance of *Alaska Miners* is its implied recognition that fairness protection is afforded in rulemakings involving open, protracted record development. This fairness protection is extant provided the rule choices are discernible from notices or pre-rulemaking records that were incorporated into the rulemaking record. It implies that the activities conducted in the pre-rulemaking period are an added source of notice if conducted in a reasonably open manner. Multiple opportunity for consideration of an ill-defined "laundry list" of regulatory alternatives is sufficient notice, even if the connection to final rule language is fuzzy at best. It is noteworthy that the court's opinion relies upon the rulemaking record's Development Document as partial support of notice to the parties of the BMP alternative. The Development Document is a collection of regulatory and scientific research information assembled prior to rulemaking.\(^{91}\) This source had been based in part on meetings involving the parties.

**Quivira Mining**

In *Quivira Mining Co. v. United States Nuclear Regulatory Commission (Quivira)*,\(^{92}\) a panel of the Tenth Circuit reviewed fairness aspects of a politically charged, extended rulemaking involving standards for remedial actions at uranium and thorium mill tailings sites. In this case, the Kerr-McGee Corporation

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\(^{88}\) *Alaska Miners*, 904 F.2d at 1287 (citing California Citizens Band Ass'n v. United States, 375 F.2d 43, 48 (9th Cir.), cert. denied, 389 U.S. 844 (1967)).

\(^{89}\) The court referenced, for example, American Paper Inst. v. EPA, 660 F.2d 954, 959 n.13 (4th Cir. 1981) (an agency may make substantial changes from notice to final rule if they "are in character with the original proposal and are a logical outgrowth of the notice and comments already given.") *Alaska Miners*, 904 F.2d at 1288.

\(^{90}\) *Alaska Miners*, 904 F.2d at 1288.

\(^{91}\) See supra note 72.

\(^{92}\) 866 F.2d 1246 (10th Cir.1989).
challenged, on due process grounds, a portion of the rules that applied to its thorium mill site. Kerr-McGee owned the only such site subject to the rules.\textsuperscript{93} The rules in question\textsuperscript{94} implemented the Uranium Mill Tailings Radiation Control Act (UMTRCA).\textsuperscript{95}

The core of this dispute was actually foreshadowed by the structure of UMTRCA. First, UMTRCA provides an administrative role for both the EPA and the NRC. The EPA is charged with setting standards of "general application." Implementation of those standards rests with NRC or approved state agencies.\textsuperscript{96} Second, UMTRCA links the regulation of uranium mill tailings sites and thorium mill tailings sites under one program because of substantially similar environmental hazards present at both.\textsuperscript{97} Predictably, in this informal rulemaking NRC drew record from independent actions of NRC and EPA. NRC adopted the EPA finding that uranium and thorium wastes should be treated as comparable hazards and made subject to the same numerical standards.\textsuperscript{98}

Kerr-McGee Corporation, citing its circumstance as owner of the only thorium mill site subject to the remedial regulations, argued that the rulemaking infringed its due process rights. The court found, in essence, that several factors considered in combination indicated no due process violation. Relying upon the broad health protection scope and prospective nature of the rules, the court's opinion rejected arguments that as the singular regulated party Kerr-McGee was entitled to an adjudicatory pro-

\textsuperscript{93} Kerr-McGee Corporation's closed West Chicago Rare Earths plant site. See Quivira Mining, 866 F.2d at 1261.
\textsuperscript{96} The EPA's authority is set out at 42 U.S.C. § 2022 (1982). Regarding the role of states under the AEA's cooperative federalism scheme see Bremberg, supra note 19, at 174-183.
\textsuperscript{97} UMTRCA amended the AEA to bring uranium and thorium mill tailings within NRC licensing jurisdiction as "byproduct materials." Prior to its enactment, jurisdiction over mill tailings after the licensed mill operations ceased was in some doubt. The principal hazards from mill tailings are release of radionuclides, such as radon gas. See Bremberg, supra note 19, at 177-178.
\textsuperscript{98} Quivira Mining, 866 F.2d at 1260 (citing EPA's Final Environmental Impact Statement).
procedure rather than informal rulemaking. The court found that the rulemaking process did not indicate any disadvantage to Kerr-McGee. The corporation had availed itself fully of the opportunity to comment on proposed regulations. And, over the course of two separate comment periods (presumably meaning also the periods before and in between rulemakings), Kerr-McGee had neither approached the NRC with procedural objections nor asked to present oral argument or cross examine witnesses. Additionally, since the program afforded post-rule protections in the form of site-specific licensing procedures, Kerr-McGee would later have an opportunity to present arguments for any desired deviations from the rules as applied at its site.

Other ex-APA factors may be implied as fitting within the court’s analytical framework. These include congressional interventions to preclude and later weaken the eventual rules, and extensive regulatory analysis studies. These factors undoubtedly affected NRC’s final rule choices. Congress had interceded on several occasions following the passage of UMTRCA, blocking enforcement and later amending UMTRCA so as to require economic balancing in the rulemaking. Also, the rulemaking record incorporated a substantial pre-rulemaking record. This pre-rulemaking record included separate environmental impact statements (EISs) prepared by NRC and EPA, and a Regulatory Impact Analysis (RIA) prepared by EPA. The EISs provided opportunities for public involvement prior to the rulemaking. Additionally, the RIA fulfilled the UMTRCA economic balancing requirement.

The Quivira court’s inclination to view the totality of circumstances around this rulemaking demonstrates the court’s sense that ex-APA factors may be relevant in a rulemaking fairness case, although perhaps not alone dispositive. The close nature of the industry/agency relationship in this case is an additional

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99 Id. at 1261-62.
100 Id.
101 See Bremberg, supra note 19, at 206-07. A congressional embargo prohibiting implementation of UMTRCA in Agreement States (states which have cooperative federalism programs under the AEA) lasted three years. In 1980, after EPA had missed compliance with the UMTRCA regulatory development timetable, NRC issued interim regulations. In 1981 Congress refused to appropriate funds for NRC implementation of those regulations. In 1983 Congress amended UMTRCA to require economic balancing in the rulemaking and to establish a type of variance procedure for states to alter the NRC-issued regulations if warranted by local conditions. The program has been enforced since 1983.
factor. The court emphasized this relationship by references to post-rule licensing, as well as pre-rulemaking, access opportunities that existed over the course of two rulemaking efforts.

**Environmental Defense Fund v. Costle**

A panel of the D.C. Circuit considered a post-rulemaking settlement agreement that dictated certain pre-rulemaking activities in *Environmental Defense Fund v. Costle*. This agreement pertained to EPA’s implementation of the Clean Water Act. The terms in issue required EPA to “initiate preliminary investigations as a first step toward determining whether or not to promulgate regulations.” As thus characterized, the obligations of EPA under the modified agreement were not subject to notice-and-comment procedures under the APA. Accordingly, the court found that EPA was under no legal obligation to inform the public of its investigatory activities leading up to possible rulemaking, although it could request participation from affected industry members and others if it chose to do so.

This is not quite as harsh as it might seem on first blush. Actually, as the court pointed out, the agreement provided for EPA to give quarterly briefings on the status of activities. Obviously this forum would provide opportunity for dialogue regarding the program. Additionally, EPA followed certain policy practices highly supportive of public notice values. The court noted that “EPA’s practice in developing effluent limitation guidelines has been to solicit comments on the preliminary findings of its investigatory programs before publishing proposed regulations.”

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103 636 F.2d 1229, 1255.
104 Id.
105 636 F.2d at 1255-56.
106 Id. at 1256.
107 Id.
The court considered an additional source of public notice values. It found that the Clean Water Act's public participation requirements (a hybrid rulemaking feature), as interpreted by EPA, did not require application in this context. EPA's interpretive regulations limited these activities to "plans" or "programs" given financial assistance by EPA. Since this pre-rulemaking activity did not fit that standard, EPA did not implement the public participation rule. The court found that EPA's interpretation of this provision of the Clean Water Act was entitled to deference.108

The companies also argued, unsuccessfully, an infringement of their due process protections. The court questioned whether the companies were entitled to "effective notice" of the modifications because the companies' "interest" in the investigatory program, although genuine, did not concern "immediate and direct" effects on their business activities. The notice-and-comment phase of informal rulemaking based upon the investigatory program would, the court reasoned, provide a safeguard of any due process rights that the companies might have. The court further observed that assuming arguendo the companies were entitled to notice, EPA's actions provided adequate notice. EPA gave the companies ten days to comment on proposed modifications, which they did. Then, after submittal to the District Court, the proposed joint modification was subject to comment for a three week period.109

The Environmental Defense Fund v. Costle opinion, consistent with the others in this Part, finds that ex-APA pre-rulemaking activities fall outside of APA protections. At the same time, of course, it wrestles with the fairness of these activities, noting favorably the quarterly notices and brief comment opportunities.

In re: Permanent Surface Mining Litigation II, Round III

Judge Flannery of the U.S. District Court for the District of Columbia was not disposed to accord weight to ex-APA factors in his In re: Permanent Surface Mining Litig. II, Round III110 decision. This case was part of an extended litigation involving

109 Costle, 636 F.2d at 1257.
the OSM's permanent program regulations under the Surface Mining Control & Reclamation Act (SMCRA). This decision concerned challenges brought by environmental groups and state regulatory authorities regarding OSM's 1983 "Valid Existing Rights" (VER) rulemaking, alleging inadequate notice under the APA's informal rulemaking procedures.\footnote{Id. at 1558-59.}

SMCRA prohibits surface mining on certain categories of properties, unless the mining is to be conducted pursuant to valid existing rights on the date of enactment. Interpreting the meaning of this term has been daunting. This particular rule adopted a constitutional takings standard as the definition of VER, \textit{i.e.}, if prohibiting mining would amount to a takings of the coal property under the fifth amendment then the coal owner qualified as having VER in the property. The original rule proposal, however, had not set out that option among the three different VER schemes proposed for comment—mere ownership of coal, ownership of coal plus the contractual or property right to mine by surface methods, or ownership of coal plus a good faith attempt to obtain all permits for surface mining.\footnote{Id.}

After quickly dispatching the Government's argument that the rulemaking was not legislative (and hence not subject to judicial review),\footnote{Id.} the court analyzed the rulemaking renoticing issue. The court looked at the actual comment record tied to the promulgated rule and found that renoticing was required.\footnote{Id. at 1559-60.} Of significance to the court was the fact that commenters had focused on the proposed mechanical tests "and did not anticipate the possibility that the approach of using a mechanical test would be jettisoned in favor of the approach finally taken."\footnote{Id. at 1562.} The court observed that the concept of VER was related to takings but that mere mention of the takings idea in selected comments was not adequate notice to all commenters of this alternative possibly being chosen as the final rule.\footnote{Id.}

Following the statement of its holding, the court examined other arguments raised by the defendants. Of specific interest, after the close of the comment period on the proposed rule, the

\footnote{Id. at 1562.}

\footnote{'In re: Permanent Surface Mining Litig. Round II, Round III, 22 Env't Rep. Cas. at 1562.'}
Secretary (OSM) had issued a final environmental impact statement (EIS) on the rules. The EIS had indicated the Secretary’s preference for a VER rule based on constitutional takings. At that stage, several parties sought reopening of the rulemaking comment period. Others submitted comments during the post-comment period on the new takings rule idea mentioned in the EIS. On this basis, the Government argued that the parties had actual notice of the final rule and, in fact, had commented upon it even though not through a noticed rulemaking comment period.

Apparently, the court did not give weight to these developments precisely because it “was left with the impression that the [post-rulemaking comment period] comments made were never seriously considered by the Secretary. This impression comes from the fact that the preamble to the rule as finally promulgated did not address, in even the most indirect way, the objections raised to the preferred, broad approach.” The result in this case is not really at odds with the prior decisions that have implicitly recognized notice connections in the ex-APA activities and sources. Notice is a two-edged sword—it must inform the public and the public’s response must be considered in the agency decision making.

One other aspect of this litigation may distinguish its result. The rule in question in this case had very significant policy implications as far as the substantive impact of SMCRA. This is because VER relates to the one aspect of the regulatory scheme that the environmental community holds nearest and dearest—namely the outright prohibition of mining from specified categories of lands, including some types of environmentally sensitive areas. Given that dimension of the case it is conceivable that the court reasoned that, if it became known that the takings test was an option, there would naturally be a larger segment of the population with genuine interest in the rulemaking than merely the participants that had been tracking the EIS and earlier rule proposals. In any event, it is apparent that had OSM given a thorough treatment to the negative post-rulemaking comments it might have swayed the court in the other direction.

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117 Id. at 1563-64.
118 Id. at 1564.
Neighborhood Toxic Cleanup Emergency

Another fairness challenge was made in Neighborhood Toxic Cleanup Emergency v. Reilly. There Judge Brotman, of the United States District Court for the District of New Jersey, upheld an EPA Superfund site rulemaking. At issue was the application of a statutory judicial review limitation precluding review of a remedial action remedy for a New Jersey Superfund site. The court found the EPA's Record of Decision (addressing site remediation plans) to be a rulemaking. Because it was a rulemaking, the plaintiffs' expectations of due process were "relatively minimal: [EPA] must provide notice and allow public comment."

In finding that the Record of Decision process and subsequent activity complied with due process, the court noted that EPA had informed the public of its plans and had solicited comments. In addition, the state agency supervising the site cleanup delayed implementation after rule promulgation to solicit additional public comments. Plaintiffs were also unable to demonstrate to the court that newer studies (not in the rulemaking record) had turned up information not already considered by EPA. Moreover, the plaintiffs had other avenues to pursue this matter, since common law or other alternate state remedies were not precluded by the federal statutory scheme.

As in the other lower court cases discussed above, the APA process alone was sufficient for upholding the agency actions on fairness grounds. But again, the court was inclined to take the

122 The CERCLA/SARA citizens suits provisions (42 U.S.C. § 9659(a), as limited by § 9613(h), the court found, precluded judicial review in certain circumstances, among them the stage of EPA adopting a Record of Decision. Neighborhood Toxic, 716 F.Supp. at 833-34.
123 The court characterized the process of EPA developing a remedial action plan and Record of Decision for a Superfund site as a hybrid of adjudication and rulemaking, but found the action before it most akin to a rulemaking because of its prospective application and broad affect on the thousands of people living near the site. Neighborhood Toxic, 716 F.Supp. at 836.
124 Id.
125 Id. The State agency is the New Jersey Department of Environmental Protection ("DEP").
126 Neighborhood Toxic, 716 F. Supp. at 836-37.
further step of weighing the ex-APA factors in the balance. Although the factors included post-rulemaking in this instance, the usage and significance of the elements in the court’s analysis remains consistent with that of the other lower courts. The significance of this case is its apparent factoring of post-rulemaking access, alternative common law remedies, and supplemental factual data as considerations in the fairness analysis. The New Jersey U.S. District Court’s decision again shows the growing tendency to consider sources outside of the APA process.

The Case Lessons

These cases all suggest that ex-APA activities have a role in rulemaking fairness analysis. Courts do consider these factors—if not under a “hard look,” at least something less rigorous. If nothing else, the courts are pleased to see agencies involving the public in procedures beyond the minimal APA level. The exact role of that involvement remains open to question. To date the courts’ ex-APA source considerations have not been clearly the dispositive aspect of any case. However, it is very reasonable to infer that some weight is being given to these elements. It must be carefully noted that these cases do not involve examples of rulemakings approaching anything close to sham dimensions. Although each of these cases could have been decided without a second thought given to ex-APA factors, such cases that have examined ex-APA actions in the course of rulemaking review may someday be afforded weight in support of using ex-APA analysis.

The sham rulemaking issue will probably be the next step in factoring of ex-APA sources into fairness analysis. Consider the future likelihood, for example, of a relatively short public comment period on a proposed technical standard rule which is the product of several years of pre-rulemaking negotiations.\footnote{The nuclear waste repository rulemaking will be just such a scenario, assuming the negotiation is followed by an informal rulemaking as seems most likely at this point.} It would certainly be fair to say that the participants in those negotiations will have had a “preponderant influence.”\footnote{To borrow the phrase of Professor Stewart. See supra note 37.} And, likewise it might be reasonably inferred that public comments will not have much substantive play in the final rule determi-
nation. Would that be a sham rulemaking? Most surely it would be found to be so, unless the reviewing court was inclined to consider the fairness, such as it might have been, of the pre-rulemaking negotiation period. That consideration, in turn, would likely depend upon how the rulemaking record is assembled and how artful the negotiators are in supplementing the record with appropriate comments (to indicate some bases for the negotiated results). 129

III. Outreach and Other Pre-Rulemaking Contacts

Pre-rulemaking practices are of both the mandatory and free form variety. Required practices include the rulemaking analyses undertaken to support rules, 130 the publication of rulemaking agendas, and any applicable hybrid rulemaking features. The informal group is dominated by agency-directed outreach activities.

Rulemaking Agendas

The rulemaking agendas 131 serve as an invitation for lobbying activity that the agencies may or may not choose to openly accept. 132 The agendas, however, are non-binding 133 and are

129 An Administrative Conference study suggested that parties participating in non-public rulemaking sessions should "protect" their agreed rules from APA-based judicial review by agreeing in advance of public noticed comment periods (1) what each of the parties would put into the "rulemaking record" and (2) what the agency would later state as the rationale for its "final rule." Administrative Conference of the United States, Office of the Chairman, A Guide to Federal Agency Rulemaking, 100-101 (1983).

130 See supra note 60.

131 Executive Order 12291 and the Regulatory Flexibility Act require twice yearly (October and April) publication of a rulemaking calendar. As stated in the Order, this is "an agenda of proposed regulations that the agency has issued or expects to issue, and currently effective rules that are under agency review..." Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981), Section 5(a), reproduced in 5 U.S.C. § 601 (1988).

132 It is ironic that this aspect of federal administrative practice has not gained a large state following. Most states have administrative procedure laws that provide for rulemaking methodologies, but only California has added the calendar feature to its rulemaking program. CAL. GOV. CODE 11017.6 (West Supp. 1990). This provision requires publication of an annual rulemaking calendar, including the names of the agency organization unit responsible for the rulemaking and contact persons at the agency. In addition, the agency must send this calendar to the author of each statute with a description of the priority assigned to the rulemaking. See, Houston and Renfrow, A Comparative Analysis of Rulemaking Provisions in State Administrative Procedure Acts, 6 POLICY STUDIES REVIEW, No. 4, 657-665 (May 1987) (The authors included this California provision as a ranking factor in a comparison of state rulemaking provisions).

133 "Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda." 5 U.S.C. § 602(d) (1988).
probably exempt from judicial review in most applications. The Administrative Conference, in fact, insists that agendas should be structured so as to avoid any prospect of judicial review. The Conference does, however, support public intervention in agenda prioritization. Regulatory agendas, published in the Federal Register, are not to be confused with other types of records of regulatory development status.

Most other pre-rulemaking records are probably protectible from disclosure through application of Exemption 5 of the Freedom of Information Act. However, it appears that disclosure is not routinely denied unless it would concern pending Presidential or Cabinet-level review decisions. As the D.C. Circuit found in Wolfe v. Department of Health and Human Services, the disclosure policy is properly determined by the agency in this circumstance.

Open Meetings Policies

Open meetings policies are a factor at a few agencies. The Consumer Product Safety Commission (CPSC), for example,

134 In its general recommendation regarding rulemaking in the area of cancer-causing chemicals, the Administrative Conference found that the rulemaking schedule rankings, the result of inter-agency planning, should be tentative and not subject to judicial review. Federal Regulation of Cancer-Causing Chemicals, Part II (ACUS Recommendation 82-5), 1 C.F.R. § 305.82-5 (discussed at 52 Fed. Reg. at 23,630 nn.1, 2 (1987)).


138 Id.

139 Wolfe, 839 F.2d at 775. Judge Bork, writing for the majority, questioned the relevance of Judge Ruth B. Ginsburg's reference to IRS policies in this matter, particularly in light of certain exemptions from OMB rule review that some IRS rulemakings fall under. Id. at n.6. Judge R. Ginsburg, in dissent, observed that it would be extraordinary for administrative units to relate to one another in as rigid a manner as the majority opinion had, in her view, posited. Judge R. Ginsburg cited, for comparison, the commercial report, BNA, Report by Legislation and Regulations Division of Internal Revenue Service's Office of Chief Counsel on Status of Regulations Projects, as not only disclosing such information as the names of responsible administrators and subject matter of various actions, but as indicating a common stated reason for transmittals within the bureaucracy as “returned for revision.” Wolfe, 839 F.2d at 780, note (unnumbered) (R. Ginsburg, dissenting).
has taken a statutory directive to cooperate with the public\textsuperscript{140} as the basis for its meetings policy. This policy commits CPSC to “conduct its business in an open manner free from any actual or apparent impropriety.”\textsuperscript{141} CPSC maintains a calendar of its activities, through which the public may learn of planned meetings with outside parties.\textsuperscript{142} Records are kept of all such meetings and are made freely available to the public.\textsuperscript{143}

These policies are applied to meetings regarding any “substantial interest” matters, \textit{i.e.}, any non-trivial issue “that is likely to be the subject of a regulatory or policy decision by the Commission.”\textsuperscript{144} Generally, notice is given at least seven days in advance of a meeting.\textsuperscript{145} Any person can attend CPSC meetings involving substantial interest matters, or may attend other meetings at the discretion of the meeting chairperson.\textsuperscript{146} However, telephone conferences are discouraged. If callers raise substantial matters during any telephone conferences, the agency employees are urged to discontinue the conference. The employees must in any case keep a telephone call summary which is made public.\textsuperscript{147}

Through these measures CPSC generally keeps lobbying out in the open.

Perhaps most significantly for the protection of notice values, the CPSC dropped a proposed rule which would have exempted from the public notice requirements all meetings involving “early, exploratory” stages of an issue. That possible loophole had been opposed in rulemaking comments submitted by several private and public consumer agencies.\textsuperscript{148}

\textsuperscript{140} The Consumer Product Safety Commission, as the agency charged with implementing the Consumer Product Safety Act, is obligated to provide the Congress and President an annual report including, among other things, a summary of the extent of cooperation between Commission officials and representatives of industry and other interested parties in the implementation of this Act, including a log or summary of meetings held between Commission officials and representatives of industry and other interested parties; . . . Consumer Product Safety Act § 27(j)(8) 15 U.S.C. § 2076(j)(8), (1972).

\textsuperscript{141} 16 C.F.R. § 1011.1(b) (1990).
\textsuperscript{142} 16 C.F.R. § 1011.4(a).
\textsuperscript{143} 16 C.F.R. § 1012.1(a). The two principal kinds of records kept are meeting summaries and transcripts. The transcripts are usually taken at hearings or meetings concerning complex subjects where exhibits may be discussed. 16 C.F.R. § 1012.5.
\textsuperscript{144} 16 C.F.R. § 1012.2(d).
\textsuperscript{145} 16 C.F.R. § 1012.3(a).
\textsuperscript{146} 16 C.F.R. § 1012.4(a).
\textsuperscript{147} 16 C.F.R. § 1012.7.
FACA Committees

Another source of notice values is the Federal Advisory Committee Act (FACA), which, although seemingly avoided at all costs in most pre-rulemaking settings, provides significant procedural safeguards where applicable. Despite the widespread efforts to circumvent its application, in some negotiated

149 The Administrative Conference adopted recommendations in 1980 stating it believed that the Act was not applicable to ad hoc, unstructured, non-continuing groups and that the General Services Administration's guidelines should make this clear. Coverage of such groups, according to the Administrative Conference, would not further the purposes of the Act. Interpretation and Implementation of the Federal Advisory Committee Act, (ACUS Recommendation 80-3) 1 C.F.R. § 3045.80-3, ¶ 2(a) (1983). The GSA did adopt the Conference's views in its preliminary regulations. 48 Fed. Reg. 19,323-31 (1983).

150 The Federal Advisory Committee Act (FACA), 5 U.S.C. app. I (1988), establishes rigorous procedural standards for committees that meet its definition of advisory committee:

“any committee board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as “committee”), which is—
(A) established by statute or reorganization plan, or
(B) established or utilized by the President, or
(C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.


151 In several contexts the agencies and private interest groups have gone to extremes to avoid application of FACA. One of the more peculiar examples involved the Department of Justice’s longstanding relationship with the American Bar Association’s Standing Committee on the Federal Judiciary (a group that reviews the merits of judicial appointment decisions). While a FACA-based challenge to this relationship was pending before the Supreme Court, the ABA published the gist of its scheme for FACA avoidance in the event the Supreme Court was to rule against its position. The ABA Journal reported this scheme as follows:

[The committee could preserve confidentiality by obtaining the names of nominees from public announcements rather than accepting the names of prospective nominees from the attorney general before there has been a nomination or an announcement to the public. That change would sever the thread between the ABA and the Justice Department—the thread upon which the lawsuit hangs.

“A loss wouldn’t mean the committee would go out of business,” says a committee source. “But we don’t think we’re going to lose.”


In Public Citizen v. United States Department of Justice, et al., 109 S.Ct. 2558 (1989) the Court found the practices involving the ABA Committee and the Department were not subject to FACA.
rulemakings (a form of pre-rulemaking) FACA chartered advisory committees are utilized. One example of this application is the pending nuclear waste repository rules for which the Nuclear Regulatory Commission has retained the Conservation Foundation as facilitator.152

The Food and Drug Administration (FDA) has an extensive FACA program,153 although a close reading of the FDA's FACA rules shows wide exceptions for many classes of pre-rulemaking activities. Either in cases of its convening of groups, or its utilization of existing groups, FDA exempts from FACA application the following, among other categories:

- groups convened on an ad hoc basis but which have no continuing function or organization;154
- private experts consulted by FDA on rulemaking issues;155
- groups that provide only information, as opposed to advice or opinions;156 and
- routine meetings between FDA and "any committee representing or advocating the particular interests of consumers, industry, professional organizations, or others."157

In addition, the activities of the recognized advisory committees outside of formal business meetings are exempt from regulation.158

In the event of FACA-covered meetings, the FDA provides Federal Register notice of the meeting schedule, including agenda items and whether hearing testimony or written comments may be submitted to the committee.159 Records are kept of the meetings, either in informal minutes form160 or as transcripts.161 The records are available for public inspection.162
On-Record Contacts As Part of Extended, Multi-Stage Rulemaking

Several agencies have had success conducting stakeholder contact sessions during noticed rule comment periods or in the interlude between rule proposals. Technically, an interlude between rule proposals is a pre-rulemaking period in that activities that occur during this hiatus are not subject to APA processes. If closely spaced, however, agencies may treat the entire episode as being essentially on-record. For example, the Mineral Management Service (MMS) apparently used this approach in its development of revised coal product valuation regulations and related topics. In its process, stretching over two years, MMS held some closed-door meetings with stakeholders, but generally kept records of the meetings. Thus, the closed door meetings were functionally the equivalent of submitted rulemaking comments which became part of the reviewable record.163

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163 These regulations are primarily economic regulations, as the formulae contained in the regulations dictate royalty payment rates applicable to certain Government-leased coal producing lands. The process included an initial 90-day comment period and a following reopened period of two weeks' duration. Public hearings and meetings of the Royalty Management Advisory Committee also occurred during the initial comment period. An outreach-style meeting with industry, state, and Indian representatives also occurred during the initial period. The minutes of the meetings, transcripts of the public hearing and RMAC meeting, and written comments received by MMS were incorporated into the rulemaking record. Later the MMS reopened the comment period for 69 days to solicit comments on a proposal submitted on behalf of the coal and electric utility industries. Contemporaneously, MMS completed two rulemakings to adopt new product valuation regulations for oil and gas. These processes included draft rules, and two further notices of proposed rulemaking with draft final rules appended. After the comment period for the industry proposal closed, MMS held three days of open meetings with representatives of the Western States, Indiana Tribes, and the coal and electric utility industries to review a draft of the proposed rule. In response to the comments at this session, MMS established a new 60-day comment period for the proposed rulemaking during which MMS conducted a public hearing, the minutes of which were incorporated as rulemaking record. The period from initial notice of proposed rulemaking to publication of the final rule consumed two years. The initial notice appeared at 52 Fed. Reg. 1840 (1987) and the final rule appeared at 54 Fed. Reg. 1492 (1989). See Paragraph 1 (Introduction) at 54 Fed. Reg. 1840.

Following an intervention from some members of the Congress (see supra, note 24), the MMS went forward with a further notice of proposed rulemaking (setting out in the appendix a draft final rule) as directed. However, prior to promulgating final rules, it reopened the comment period two more times. As part of the reopened comment period activities MMS held several meetings with stakeholders, for which it kept records. 53 Fed. Reg. 1230 (1988). The coal regulations were issued in final form at 54 Fed. Reg. 1492 (1989). It has also chartered an advisory committee, which considers implementation issues arising under these regulations. See 54 Fed. Reg. 16,415 (1989) (notice of meeting of the Royalty Management Advisory Committee).
Off-Record Outreach in Pre-Rulemaking

Regulatory outreach is one example of institutionalized *ex parte* activity in the pre-rulemaking period. Through regulatory outreach programs administrative agencies maintain contact with their constituencies as part of regulatory development activities. One of the leading proponents of this practice, the Office of Surface Mining Reclamation and Enforcement (OSM), has recognized five kinds of outreach activities (these are neither precluded nor mandated by statute.)\(^{164}\) The five are: (1) advice or comments on regulatory development priority setting, scheduling, and planning;\(^{165}\) (2) background briefings and working groups;\(^{166}\) (3) draft regulatory language reviews;\(^{167}\) (4) regulatory facilitation or facilitated rulemaking (an informal process of requesting participation from affected interests in the development of proposed rules);\(^{168}\) and (5) regulatory negotiation or negotiated rulemaking (a formal process through which affected interests participate in development of proposed, or even final rules).\(^{169}\)

This program is a product of battlefield psychology—OSM put it in place because of its large calendar of remanded rules.\(^{170}\)

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\(^{164}\) SMCRA rulemaking authority is very general: the Secretary, acting through the OSM, shall "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this chapter." 30 U.S.C. § 1211(c)(2). The U.S. District Court for the District of Columbia District is vested with jurisdiction to review the rules of the OSM. 30 U.S.C. § 1276.

\(^{165}\) Correspondence of May 8, 1985, Jed Christensen, OSM Director, to "Recipient" (Stating that OSM's first Regulatory Development Schedule that was completed on May 1, 1986, represented the first time OSM had employed its Outreach Program "to obtain advice from industry, environmental groups, and State Regulatory Authorities.")

\(^{166}\) See FY 87 OSMRE Regulatory Outreach Plan (October 2, 1986).

\(^{167}\) Id.

\(^{168}\) Id. OSM used facilitated rulemaking in one instance, that of a rulemaking for experimental mining practices. That process did not lead directly to a proposed rulemaking. See discussion *infra*, note 194.

\(^{169}\) Id. OSM has not utilized the formal negotiated rulemaking process.

\(^{170}\) OSM developed a summary outline of its Regulatory Development Program which it provided with its FY 1987 Regulatory Outreach Plan. In this outline OSM noted that the agency faced a large number of rulemakings, approximately 60, which were derived from remands, petitions, agency initiatives and commitments, and congressional action. Accordingly, the agency formulated a basic conclusion that:
in order to reduce the delays and litigation at the end of the process of rulemaking, OSMRE would have to spend additional time and resources in the front end of the process. To the extent that consensus could be obtained and rulemaking would be improved at the beginning, we could
The Surface Mining Control and Reclamation Act (SMCRA or the Act), which these rules are designed to implement, is primarily of the "technology standard" genre of environmental protection statutes. The Act establishes a national regulatory program addressing the surface impacts of all forms of coal mining. Responsibility for implementation is divided between OSM and states qualifying under the Act's cooperative federalism standards.

SMCRA states a rigorous body of technology standards, but interpretation of some of its language has been very difficult. This aspect of the statute led Judge Abner Mikva to suggest that because of the urgency of its enactment and concomitant ambiguities of language, the necessity of resort to legislative history was an "absolute given." In many areas however, SMCRA reduce the uncertainty and instability at the end of the process.

Undated Memorandum, OSMRE's Regulatory Development Program (Apparently from the February 21, 1986 initial meeting of OSM's Rulemaking Outreach Program).

On the occasion of the transition to the Bush Administration, a state agency lobbying group, The Interstate Compact Commission, criticized the rulemaking track record of OSM:

State programs have been hampered by constant changes to federal regulations and unending demands by OSM that States change their rules to conform to the everchanging federal regulations. The net result has been a continual rulemaking process in most States which has created uncertainty for operators and the environmental community, and diverted important state agency resources from program management to "paper shuffling" activities. Changes to OSM regulations should be limited to those which make a clear improvement to the program, and thereby avoid the disruptive cycle of litigation and subsequent additional rule modifications.

Interstate Mining Compact Commission, "Report to the Transition Team, Department of the Interior, Policies and Programs to Implement the Surface mining Control and Reclamation Act," at 3 (December, 1988).

As a technology standard statute, SMCRA structurally limits the discretion of the executive, acting through OSM. SMCRA is in a broad sense only slightly less restrictive from the executive's viewpoint than the laws that dictate specific numeric standards (e.g., auto emissions). In the case of the latter, an agency's regulations simply mimic the law, and quantitative analyses for rulemaking purposes—cost benefit, risk, and effectiveness analyses—are wholly irrelevant as the Congress has implicitly determined the standard.

Mikva, A Reply to Judge Starr's Observations, 1987 Duke L.J. 380, 381 ("It
“specifies mining procedures in a level of detail not unlike an operating engineer’s handbook,” and thereby limits the rule-making discretion of the OSM and primacy states. OSM rules have been particularly vulnerable to substantive or “statutory duty” challenges and, hence, OSM has moved toward fuller preamble synopticism. This is achieved, in part, by scoping issues through regulatory outreach. Not all outreaches lead to rulemaking, and not all OSM rulemakings are foreshadowed by an outreach. The availability of outreach is probably favored generally by those invited to participate. The general public typically receives its first inkling of an outreach effort after the
fact—in Federal Register notices of comment periods or in the preambles to final rules.¹⁷⁶

At first, OSM's outreach did not focus upon rulemaking solely,¹⁷⁷ but interest in using the outreach process in development of specific rule proposals soon followed.¹⁷⁸ In organizing its rulemaking calendar for outreach the first time, OSM subdivided and assigned outreach dates to 21 potential proposed rules. The rule topics were grouped into divisions of (1) background briefings and working groups (14 topics); (2) reviews of draft regulatory language (5 topics); and (3) facilitated/negotiated rulemakings (2 topics).¹⁷⁹

As it has been actually practiced by OSM, outreach has involved the agency initiating contact with representatives of its principal constituencies¹⁸⁰ on such matters as setting the rule-

¹⁷⁶ The preamble to OSM's final prime farmland rule states:
"On March 19, 1986, OSMRE involved major external groups in its regulatory process through an outreach program designed to obtain comments on initial drafts of significant rulemakings prior to development of proposed regulations. Nine commenters provided comments to OSMRE on the initial draft of these prime farmland rules." 53 Fed. Reg. 40,828, 40,829 (1988).

¹⁷⁷ Before it evolved into a mainstay of second generation rulemaking, OSM's outreach program sought out views of major groups in the community on such issues as: (1) how to improve rulemaking by identifying different approaches to rulemaking, including facilitated and negotiated rulemaking, as well as outreach procedures; (2) establishment of regulatory priorities; and (3) improvement of communication with outside groups. In the area of regulatory priorities, the outreach program employed a professional facilitator, Keystone Center, under a contract let in December of 1985. OSM "held three outreach meetings with major representatives of external groups plus an internal meeting of the OSMRE top management." The schedule included a February 21 meeting to lay out a proposal for the outreach activity, an April 1 meeting to develop a consensus on rulemaking priorities, an April 23 meeting of the Directorate to develop a final schedule, and a July 30 meeting with the outreach group "to obtain input on regulatory priorities and input about how outreach should be done and on which rules, and which rules should be considered for facilitated rulemaking." "OSMRE's Regulatory Development Program," undated memorandum attached to FY 87 OSMRE Regulatory Outreach Plan (October 2, 1986).

¹⁷⁸ The American Mining Congress' Ed Green had expressed a desire to involve the participants from the first prioritization outreach in specific outreach activities. June 19, 1986 correspondence, Jed Christensen, OSM to Ed Green, American Mining Congress.

¹⁷⁹ See FY 87 OSMRE Regulatory Outreach Plan (October 2, 1986).

¹⁸⁰ The outside outreach participants are likely to include individuals from the major OSM constituent bodies—state regulatory authorities, the coal industry, and the public interest environmental litigation groups. The first OSM outreach meetings concerned prioritization of the agency's rulemaking calendar. Early in 1986 the agency held outreach meetings under the direction of a meeting facilitator. Subsequently the process became less formal, with face-to-face meetings less likely.

Attendees of the initial meeting included persons associated with the Mining and
making agenda, drafting of "potential proposed rules," and other policy activities. Generally, these are handled without public notice, but notice is sometimes given. The term "outreach" is not necessarily always applied to describe the practices. OSM usually did not announce the outreach activity to

Reclamation Council, American Mining Congress, National Coal Association, National Wildlife Federation, Western Interstate Energy Board, Interstate Mining Compact Commission, the OSM's Regulatory Development & Issues Management group, and the Office of the Solicitor, Department of the Interior. March 5, 1986 correspondence, Jed Christensen, OSM to Gary L. Merritt, Pennsylvania Dept. of Environmental Resources, and enclosures.

The agency prefers to circulate potential proposed rules—draft rules that have not yet been made public as proposed rules through publication in the Federal Register—for advance outreach review by the affected parties.

An odd sequence of events led OSM to reject the idea of revising a definition of "support facilities" through second generation rulemaking. The first generation rule had defined support facilities in terms of proximity to mine operations. Following invalidation of that rule, OSM issued a notice of rule suspension and proposed to abolish the definition through future rulemaking. It received comments in response to this notice. OSM later stated in the preamble to a final regulation defining "coal preparation" that it would propose a new definition of "support facilities." OSM also consulted with its field offices regarding the practices of states. The field offices indicated only two instances in which states were served with notices questioning whether or not particular facilities should have been regulated as support facilities. The 1987 outreach participants indicated that support for the definition was not strong, and, in fact, based on these discussions, OSM was unable to develop a definition using categories of facilities. Outreach participants also noted that a firm definition would impair flexibility in finding which facilities met the threshold "resulting from or incident to" standard. Thus, as a result of developing an outreach dialogue, OSM's outreach constituency dropped support for a rule defining the term. On June 22, 1988, OSM issued a proposed rule notice which indicated its plan to remove the "support facilities" definition from the permanent regulatory program (30 C.F.R. § 701.5). 53 Fed. Reg. 23,522 (1988) (Proposed rule). Note that the second generation rule never advanced beyond the pre-rulemaking phase; it was killed in outreach.

In 1990, OSM sought dialogue on a "notice of inquiry" which regards possible changes to some select engineering-based elements of the permanent surface mining program. The inquiry is a response to enforcement problems in the area of highwall fill settling and inefficient (untimely) reclamation of the mountain top removal operations. See 55 Fed. Reg. 14,319, 19,637 and 25,983 (1990) (comment periods on "notice of inquiry"). This may perhaps lead to a notice of proposed rulemaking. It is distinguishable from outreach in that the general public has been notified of the inquiry, rather than a select group.

In an August 3, 1988 proposed rule concerning permits for special categories of mining and special permanent program performance standards (alluvial valley floors), OSM mentioned its outreach activity without expressly using the term "outreach." A discussion of the proposed rule states:

"In developing the proposed rule, OSMRE solicited and received comments on draft rule language from citizen and environmental groups, industry trade associations, and State regulatory authorities. These comments have been considered in drafting the rule." 53 Fed. Reg. 29,310 (1988) (Proposed rule amending 30 C.F.R. pts 701 and 785); Final rule promulgated 54 Fed. Reg. 9724 (1989).
the public until publication of proposed rules (the start of APA processes), only maintained records of some, but not all contacts, and changed the list of participants in the outreach group from time to time. OSM has considered all forms of outreach recommendations as non-binding, although the policy direction is probably well established by the conclusion of outreach.185

Additionally, OSM advises the outreach groups of judicially imposed conditions or its agreed settlement terms.186 For example, in its outreach for a second generation prime farmland rule OSM informed its outreach group187 of its intent to comply with a court decision "in a manner which is practical, environmentally protective and which will conserve prime farmland."188

Outreach groups are formed for each outreach event, although the groups include representatives of the OSM’s three

185 OSM always maintained that the process was informal and nonbinding. The agency clearly notes in outreach correspondence regarding draft rules that the drafts are not yet proposed rules and that the comment period under the APA will follow a later notice. See e.g., December 7, 1987 correspondence, OSM Director to Ed Green, American Mining Congress (re: Abandoned Mine Land program).

186 In an October 29, 1987 proposed rule notice concerning civil penalties OSM solicited public comments to follow up outreach comments. The proposed rules under consideration were to implement the terms of a settlement agreement in Save Our Cumberland Mountains v. Hodel, No. 81-2238 (D.D.C. June 7, 1985). Nevertheless, OSMRE had proceeded with a "Draft Regulatory Language Review" outreach phase (OSM mailed drafts of the rule to its outreach list). Noting conflict between several of its outreach comments and the settlement agreement-based rule language, OSM sought to bolster the rulemaking record with repeats of the outreach comments. It stated:

Comments received during this phase for this rulemaking activity have been reviewed but have not been incorporated into the proposed rule because the rule is being proposed in accordance with the suggested language of the SOCM agreement and some of the suggestions provided in outreach would represent significant changes from the language of the SOCM agreement.

However, OSMRE wishes to solicit comments on the specific suggestions resulting from the outreach program and wants to ensure that any such suggested changes are formally submitted as part of the rulemaking process and are incorporated in the administrative record for the rulemaking.


187 Included were the American Mining Congress, National Coal Association, Interstate Mining Compact Commission, Environmental Policy Institute, Mining and Reclamation Council of America, Galloway and Greenburg, the Illinois South Project Inc., Land Reclamation Division of the State of Illinois, Indiana consultant Russ Bolding, Ohio Environmental Council, Law Professor Mark Squillace (currently at the University of Wyoming), Citizens for Preservation of Knox County, Issac Walton League of Hunterton, Indiana, Indiana Division of Reclamation, and Ohio Division of Reclamation.

188 This language is included in the preamble to OSM’s proposed prime farmland rule. 52 Fed. Reg. 9644, 9645 (1987).
principal stakeholder alignments—primacy state agencies, coal industry companies or organizations, and active public interest litigation groups.\textsuperscript{189} Outreach ordinarily does not involve representatives of other federal agencies, the Congress, or the Executive Office of the President.

Outreach procedures are not formalized in any type of policy manuals or directives, although informal ground rules have from time to time surfaced in singular outreach efforts and planning.\textsuperscript{190} One outreach in which OSM did keep records was in connection with its second generation prime farmland reclamation rules.\textsuperscript{191} In other instances, OSM staff persons have actually tossed out accumulated outreach comments at the start of the relevant APA comment period.\textsuperscript{192} Arguably, the records could prove to be of little use in the actual rulemaking, or otherwise. The Federal Trade Commission has found, in the context of its

\textsuperscript{189} There have been 30 core outreach leaders and a group of 400 or so persons who generally receive copies of Federal Register rule publications. There is some overlap between the groups. Telephone conference with OSM's Andy DeVito, February 16, 1989. This overlap leads to some confusion on the part of the public; however, it is quite clear that OSM varies the outreach group for each draft rule proposal and has never allowed the groups to grow large. See correspondence of January 19, 1988, Tom FitzGerald, Kentucky Resources Council, to Richard Miller, OSM (complaining about being left off the mailing group for a draft rule and requesting inclusion in the future mailings of draft regulations).

\textsuperscript{190} For example, documentation of OSM's first outreach meeting identifies a framework for rule prioritization: (1) group rules appropriately to avoid piecemeal rulemaking; (2) avoid changing existing rules or regulations unless necessary; (3) proceed on rules that produce efficiency and effectiveness in program activities, mining operations, and/or environmental protection; (4) assign high priority to resolution or stabilization of rules that directly control operations; (5) finalize rules affecting permit requirements; (6) take account of interest groups' concerns as part of priority setting; (7) base priorities on the degree of programmatic impact a new rule will achieve; (8) consider the real or potential legal aspects of rulemaking. Undated Outline, OSMRE Rulemaking Outreach Program, Suggested Criteria For Rulemaking Priority Setting, attachment to Correspondence of March 5, 1986, Jed Christensen, OSM Director Designate, to Gary L. Merritt, Pennsylvania Department of Environmental Resources.

\textsuperscript{191} The two outreach programs organized under a set procedure were prime farmland and contract blocking. These files contain entry logs, others do not. The process has been very informal. Telephone conference with OSM's Andy DeVito, March 9, 1989.

\textsuperscript{192} OSM tossed out records from a civil penalty rule outreach at the point of Federal Register notification of proposed rulemaking.

Sometimes informal pre-NPRM meetings are not called "outreach" for reasons that are unclear. Thus, in the context of the owner/operator rule some face-to-face meetings of industry and environmental community leaders were held, but with no agreement being reached. Records of these types of meetings are not routinely available either. Telephone conference with OSM's Andy DeVito, February 12, 1989.
statutory outreach programs, that its outreach records were not used in rulemaking, apparently because participants treated outreach as a separate, preliminary step and started over at the rulemaking stage.\textsuperscript{193}

In its experimental mining practices "facilitated rulemaking" (an informal negotiated rulemaking, apparently without a mandate to reach consensus) OSM invited participants\textsuperscript{194} to a meeting to discuss possible rule proposals. In advance of the meeting the OSM provided the participants a summary of the regulatory background, program implementation background, regulatory issues, the regulations in existence at the time of the meeting, a list of practices that had been approved under the subject experimental mining regulations, and the experimental practices provisions in State Regulatory Programs, among others.\textsuperscript{195} As is custom in OSM outreach, in circulating draft rules for comment OSM clearly delineated that the draft was not a proposed rule and that, should a proposed rule eventually be published for notice-and-comment rulemaking, the outreach comments would not be considered in the final rulemaking.\textsuperscript{196}


\textsuperscript{194} Correspondence of March 23, 1987, OSM Director to Anthony Abar, Maryland Bureau of Mines, and enclosures. For the followup meeting of the experimental mining group, the list of invitees was changed to include representatives of the Western Interstate Energy Board, AMAX Coal Company, and Pennsylvania and omit representatives of the National Wildlife Federation and Mining and Reclamation Council. Correspondence of December 9, 1987, OSM Acting Director to Gred Conrad, American Mining Congress, and enclosures.


\textsuperscript{196} The Director emphasized the status of the proposal:

I would like to stress that this draft rule is not yet a proposed regulation, but instead, is being distributed so that OSMRE may have the benefit of public review and input prior to initiating proposed rulemaking. A proposed regulation will be prepared in consideration of the comments received on this draft rule and will apppear in the Federal Register with time allotted for public review and comments prior to the development of the final regulation.

At this stage, the list of persons on the "Outreach Leadership Group" had grown to include representatives of the American Mining Congress, National Coal Association, Interstate Mining Compact Commission, Western Interstate Energy Board, Environmental Policy Institute, the Washington, D.C., law firm of Galloway and Greenburg, and the agencies of 25 states: Alabama, Alaska, Arkansas, Colorado, Illinois, Indiana, Iowa,
The pattern of outreach use at OSM is well illustrated by its incidental coal extractions rulemaking. The regulation of incidental coal extractions led to second generation rulemaking on OSM's own initiative.\textsuperscript{197} SMCRA provides that mining activity in which the extraction of coal does not exceed 16-2/3 percent of the tonnage of minerals removed for purposes of commercial use or sale are exempt from the jurisdictional definition of surface coal mining operations.\textsuperscript{198} This incidental mining exemption first appeared in a 1973 precursor of SMCRA and was carried in the several bill drafts leading up to SMCRA enactment in 1977.\textsuperscript{199} OSM's first regulations simply restated the provision of SMCRA.\textsuperscript{200} Later, the regulations were reorganized and procedural rules were added.\textsuperscript{201}

However, OSM recognized a lack of specific guidance in its regulations for the determination of exempt status. To address this it published guidelines,\textsuperscript{202} an ANPRM seeking comment on SMCRA section 701(28),\textsuperscript{203} and began a regulatory outreach. OSM considered the outreach comments in the drafting of proposed 1987 rules.\textsuperscript{204} After the initial informal rulemaking comment period closed, OSM twice revised the proposed rule and reopened the comment period—the second time in response to comments from the House Committee on Interior and Insular Affairs.\textsuperscript{205} The final rule appeared in late 1989.\textsuperscript{206}

Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Virginia, West Virginia, and Wyoming. OSM received written comments from two public interest groups, the Kentucky Resources Council and the Environmental Policy Institute, agencies of 13 states, and the Association of Abandoned Mine Land Programs which represents 28 jurisdictions (states and Indian Tribes). The commenting state agencies represented Alabama, Indiana, Kentucky, Maryland, Michigan, Missouri, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, West Virginia, and Wyoming. Correspondence of December 7, 1987, OSM Director to Edward M. Green, American Mining Congress, attachments, and responses to the proposals as indicated.

\textsuperscript{197} The current regulations were promulgated as final rules at 54 Fed. Reg. 52092 (1989). The bulk of these regulations are codified at 30 C.F.R. pt. 702.

\textsuperscript{198} SMCRA § 701(28), 30 U.S.C. § 1291.


\textsuperscript{200} 44 Fed. Reg. 15,315 (1979); 30 C.F.R. § 700.11 (1979). Similarly, the reference in the abandoned mine reclamation fund regulations simply incorporated the statutory language. 30 C.F.R. § 870.11(d) (1979).

\textsuperscript{201} 47 Fed. Reg. 33,424 (1982).


\textsuperscript{205} The comment period was first reopened by notice at 53 Fed. Reg. 54,30 (1988).
Lessons From the Pre-Rulemaking Practices

The Consumer Product Safety Commission's (CPSC) open meetings policy stands in stark contrast to the realities of agency/stakeholder dialogue at most agencies. One might indeed wonder why that is. Perhaps it is because the premise behind agency/stakeholder dialogue is not "notice values" but something else. Perhaps the premise encompasses attempts at preference aggregation by agencies gun shy from remands and other missives fired by a judiciary impatient with particular regulatory programs. Preference aggregation alone—arguably no more legitimate a premise for technical standard rulemaking than quotient verdicts—should probably not be the key premise. Nevertheless, keeping abreast of the constituencies' views is certainly a legitimate goal because it points out trouble spots in the statutory and regulatory scheme.

Perhaps the greatest disappointment of the policy structure in the pre-rulemaking realm is the apparent impotence of the Federal Advisory Committee Act (FACA). Agencies engaged in activities closely approximating negotiated rulemaking would be required to keep records of contacts and open meetings to the public if the negotiators were constituted as a FACA Committee. If this were the case there would be very little doubt as to whether a subsequent informal rulemaking incorporating the FACA records could survive fairness reviews (assuming no irregularities).

OSM's version of outreach and the closely related on-record meetings policy of MMS should be able to meet the concerns that a FACA structure would clearly answer. Substantively, there must be little difference between the MMS approach of stop/start rulemaking (in which stakeholders have significant input in the area of proposed rule language) and an outreach that circulates draft rules. The difference, obviously, is that the MMS approach assures that these kinds of comments find their way into a reviewable record, whereas the outreach comments of OSM have actually found their way into the trash can.

Do the members of OSM's constituency have a particular reason for wanting to keep outreach comments off-record? Given


the continuum of litigation that engulfs the OSM permanent program regulations, there certainly is a risk that a party will have to "eat crow" at some point because of comments directed to a draft proposal that, technically speaking, would not itself be the subject of judicial review. It's like being held accountable for legislative history. However, this problem could be solved at the agency level. If OSM changes its draft regulations it should clearly state that previous comments are no longer being considered. As it stands, OSM alleges that it has relied upon outreach comments in developing proposed rule language while at the same time discarding these records. OSM should be able to choose to ignore the records. However, if OSM relies upon them, the burden of discrediting the records should fall on the parties. A party can then clarify a prior comment through submittal of a subsequent comment during rulemaking.

The other puzzle is less easy to solve. Is there a general disadvantage to informing the public of planned outreaches? In effect, MMS does this through flying trial balloon regulations. However, by displaying these regulations MMS becomes susceptible to the wrath of the Congress or energy industry lobbyists. Does the regulatory agenda accomplish enough of this objective?

Certainly, the wise use of the semi-annual regulatory agenda by interested parties should assure a reasonable notice of likely outreach activities. Its use can easily lead to on-going dialogue with the agencies. Agency culture is a problem here. It appears that most of the environmental policy agencies (at least those considered in this article—OSHA, OSM, EPA, and NRC) are inclined to engage in dialogue. Not to say they are exposing the generally secretive OIRA review processes, but it's clear that pre-rulemaking information, and sometimes actual draft rule proposals, are getting around. The paranoia of the FDA stands in contrast.

It appears from informal discussions that OSM believes the published rulemaking agenda (which in their case is a product, in part, of outreach) has a connection with the interested community. That is probably true. And, OSM's habit of announcing outreach after the fact in final rule preambles and otherwise is certainly a signal that interested parties should follow up on. Generally, then, the agenda policy is a plus for notice values. However, the added step of an on-site calendaring of outreach meetings, per the CPSC, would be an even greater plus.
IV. CONCLUSIONS: WHAT SHOULD THE COURTS DO WITH PRE-RULEMAKING INFORMATION?

The notice values business is rather murky. To the extent the courts are inclined to discuss pre-rulemaking, it seems almost inadvertent. Perhaps it is easier to consider all of the available information than to split hairs over what is and is not in the reviewable record. I think that the courts have shown a generally favorable reaction to pre-rulemaking practices that are supportive of notice values. Again, not in an outcome determinative fashion, but just in general. It's a soft look approach. Where will it go?

I suspect that some agencies are creating various expectations of process that may, some day, become enforceable through the judiciary. If OSM uses outreach for every second-generation rulemaking it ever faces, does its failure to do so at some stage mean a party has an enforceable interest in outreach? Probably not. But what might happen is a court finding that OSM has "cut somebody out of the loop," indicating at least an inference of impropriety. Unless the agency can clearly establish that it is free from lobbying activity altogether OSM is far better off to continue with some level of orchestration to assure that all possible points of view are before it. Whether this is called outreach or something else, ultimately it is the absence of the process that raises questions of fairness, not its presence. This is the context in which judicial review might someday evaluate such questions.

Selective record incorporation of pre-rulemaking information also raises avenues for consideration on review. This is the Alaska Miners scenario. The key is for the agencies to assure that comment opportunities are reasonable. The presence of extensive pre-rulemaking contacts greatly enhances the argument on behalf of the agencies.

Continued reference to these activities by the courts will, I think, encourage more policies favorable to fairness values. It is quite apparent that short of something approaching a sham rulemaking, pre-rulemaking activity is not going to lead to a finding of unfairness (either as a due process or APA claim). But the fairness values are supported by the policies in place.

In the future, litigators should remain sensitive to the political history of rulemakings. One never knows what might turn up. Still, I would urge caution in the use of pre-rulemaking information in litigation over rule fairness. The existing practices
are not obtrusive. Further record keeping obligations are not warranted as long as the general objective, as in the case of OSM, is to involve all affected interests.