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COMMENTS

Agency Discretion to Accept Comment in Informal Rulemaking: What Constitutes “Good Cause” Under the Administrative Procedure Act?

Through their ability to promulgate rules that have the force of law, federal agencies have substantial power to affect the personal and property rights of United States citizens. In recognition of the influence wielded by such agencies, Congress in 1946 enacted the Administrative Procedure Act (APA)\(^1\) "to afford parties affected by administrative powers a means of knowing what their rights are and how they may be protected.”\(^2\) Under the Act an agency engaging in informal rulemaking\(^3\) is required to follow the procedure established in 5 U.S.C. § 553,\(^4\) which calls for notice to the parties affected and an opportunity for those interested to comment upon the proposed rules. Section 553 provides that notice and opportunity to comment need not be provided “when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”\(^5\)

This Comment addresses the nature and scope of the “good cause exception” to the general requirement of prior notice and comment in informal rulemaking.\(^6\) A discussion of federal court

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3. “[R]ule making’ means agency process for the formulating, amending, or repealing a rule.” 5 U.S.C. § 551(5) (1976). “[R]ule’ means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.” Id. § 551(4).
5. Id. § 553(b)(B).
6. The informal — or notice and comment — rulemaking procedure requires publication of notice in the Federal Register and opportunity for those interested to submit oral or written comments. 5 U.S.C. § 553 (1976). The APA also establishes a formal
interpretation and application of the exception develops its contours and serves as a foundation for a proposed rule to govern its application.

I. THE NOTICE AND COMMENT REQUIREMENT OF INFORMAL RULEMAKING

The minimum procedure an agency must follow in promulgating a rule is governed by 5 U.S.C. § 553. This section requires that the agency publish a proposed rule in the Federal Register and invite comment from interested parties, either with or without an opportunity for oral presentation. The agency is then required to consider the data thus gathered in its formulation of the final rule. The final rule is to be published at least thirty days before it is to take effect, providing an opportunity for protests to be directed at the final version before its impact is felt.

This procedure serves two functions: allowing public participation in rulemaking and promoting agency education. Providing interested members of the public an opportunity to participate is crucial to the maintenance of a representative form of government, since rulemaking is a delegation of legislative power to a nonrepresentative body. And while hearing the public, the agency draws upon the public's knowledge — particularly upon the expertise of individuals with special training and skills in the area to be regulated, and upon the experience of those to be affected by the rule. When scrupulously followed, the rulemaking procedure effectuates the intended purposes of the APA, which are (1) to adequately protect the private interests involved, (2) to make only reasonable and authorized regulations, (3) to impartially confer authorized benefits or privileges, and (4) to fully

rulemaking procedure “[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing.” Id. § 553(c). The formal rulemaking procedure requires “trial type” hearings, including the right to submit evidence and to cross-examine. See id. §§ 556-557; B. SCHWARTZ, ADMINISTRATIVE LAW 172-73 (1976).

7. H.R. REP. No. 1980, supra note 2, at 16. Section 553 applies only when no adjudication has been required by statute. If a statute requires adjudication—“to be determined on the record after opportunity for an agency hearing”—§ 554 governs the proceedings. 5 U.S.C. § 554 (1976).


effectuate the declared policies of Congress.\footnote{10}

II. \textbf{THE GOOD CAUSE EXCEPTION TO THE NOTICE AND COMMENT REQUIREMENT}

From the overall requirements of prior notice and opportunity for comment in the rulemaking procedure, Congress carved out specific exceptions where observance of the procedure would not be feasible, practical, or necessary. Among these is the good cause exception, upon which this Comment will focus.\footnote{11} The good cause exception found in section 553(b)(B) excludes a rule from the notice and comment requirement "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."\footnote{12} This exception is designed to give agencies flexibility in the promulgation of substantive rules by allowing them discretion to dispense with notice and comment for rules dealing with matters not otherwise exempted from the rulemaking procedure. However, the use of any of the exceptions to the notice and comment requirement is to be strictly limited.\footnote{13} As stated in the House Judiciary Committee Report on the APA: "The principal purpose of [section 553] is . . . to provide that the legislative functions of administrative agencies shall so far as possible be exercised only upon public participation . . . ."\footnote{14}

The terms "impracticable, unnecessary, or contrary to the public interest," limiting the circumstances in which the good cause exception is to be employed,\footnote{15} are defined in the Senate Judiciary Committee Report on the APA as follows:

"Impracticable" means a situation in which the due and required execution of the agency functions would be unavoidably

\begin{footnotes}
\item[11] Other exceptions to the notice and comment requirement are for rulemaking involving "a military or foreign affairs function of the United States," 5 U.S.C. § 553(a)(1) (1976), for rulemaking involving "a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts," \textit{id.} § 553(a)(2), and for rulemaking involving "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice," \textit{id.} § 553(b)(A).
\item[12] \textit{Id.} § 553(b)(B).
\item[13] See, e.g., Housing Auth. of Omaha v. United States Housing Auth., 468 F.2d 1, 9 (8th Cir. 1974); Hotch v. United States, 212 F.2d 280, 282 (9th Cir. 1954).
\end{footnotes}
prevented by its undertaking public rule-making proceedings. "Unnecessary" means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. "Public interest" supplements the terms "impracticable" or "unnecessary"; it requires that public rule-making procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rule-making warrants an agency to dispense with public procedure.\(^\text{16}\)

As is apparent from these definitions, the parameter of the good cause exception is rather narrowly confined. The Senate Judiciary Committee Report makes clear that it is not an "escape clause"; reliance on the provision must be conditioned upon a "true and supported or supportable finding of necessity or emergency . . . made and published."\(^\text{17}\) Representative Walter, commenting on the proposed Administrative Procedure Act before the House of Representatives, stated that the good cause exception "may be made operative only where facts and interests are such that notice and proceedings are impossible or manifestly unnecessary."\(^\text{18}\)

Congress realized that strict adherence to the requirement of notice and comment would not always be possible, that under certain conditions notice and opportunity for comment would clog the functioning of an agency to the point of destroying its effectiveness to deal with the problems delegated to it by Congress. However, Congress also realized that such circumstances should arise infrequently, and it expected that the agencies would use sound discretion in determining when circumstances warranted the use of the good cause exception.\(^\text{19}\)

A good cause exception also exists to the section 553(d) requirement that a final rule be published thirty days before its


\(^{17}\) S. Rep. No. 752, supra note 2, at 14. The original Senate version of § 553 phrased the good cause exception as "any situation in which the agency for good cause finds notice and public procedure thereon impracticable because of unavoidable lack of time or other emergency." S. 7, 79th Cong., 1st Sess. § 4(a)(3) (1945), reprinted in NLRB, LEGISLATIVE HISTORY MANUAL FOR THE ADMINISTRATIVE PROCEDURE ACT 38 (1947). The Senate Report was drafted after the change to the current language.

\(^{18}\) 92 Cong. Rec. 5650 (1946).

effective date. The congressional reports make clear that this provision in no way relates to the notice and comment requirement, but the federal courts have not always been careful to maintain the distinction. A circuit court, interpreting the section 553(d) good cause exception to require a lesser degree of good cause than the section 553(b)(B) exception, recently used the section 553(d) exception to support its approval of comment after promulgation of a rule as a substitute for prepromulgation notice and comment.

III. COURT APPLICATION OF THE GOOD CAUSE EXCEPTION

A. Development of the Contours of the “Good Cause” Exception by the Federal Courts

Cases where the courts have approved agency use of the good cause exception fall into three general categories: (1) where public notification in advance of the rule promulgation would exacerbate the problem sought to be alleviated by the rule; (2) where the delay in promulgation of the rule would or could have a direct detrimental effect on public health, safety, or welfare; and, (3) where the court deems the need for notice and comment under the rulemaking procedure unnecessary. The first two categories are based generally on the “impracticable” aspect of the exception; the third category is, of course, based on the “unnecessary” aspect.

1. Exacerbation of Problem

The first category of cases in which the courts have upheld the agency use of the good cause exception to notice and comment—where the objective sought by the regulation would be frustrated by prior public notification—presents the strongest case for the approval of the exceptions. A typical case in this category results from an agency fixing or removing a price ceiling. The good cause argued for dispensing with notice and

23. See United States Steel Corp. v. EPA, 605 F.2d 283 (7th Cir. 1979), cert. denied, 100 S. Ct. 710 (1980).
comment is that those to be affected by the regulation, on becoming aware of the impending imposition or lifting of the ceiling, would withhold the commodity in anticipation of the removal of the ceiling, or would raise prices to have a higher base when the ceiling was imposed. In these cases prior public notice is clearly "impracticable" in the sense of the Senate Judiciary Committee definition; it would prevent the agency from fulfilling its function.

In Nader v. Sawhill, the Cost of Living Council (CLC), without public notice or provision of opportunity to present views, amended its Phase IV price regulation covering domestic crude petroleum to allow an immediate one dollar per barrel increase in the maximum ceiling price charged for "old oil." The CLC justified dispensing with the procedural requirements of section 553 on the basis that the need "to provide immediate guidance and information with respect to the decisions of the Council" constituted good cause. The court found this statement of good cause insufficient, but held that good cause was present because advance announcement of the proposed price increase would have resulted in producers withholding "old oil" from the market until the price increase took effect, defeating the purpose of the regulation—alleviation of shortages caused by the Arab oil embargo. While this case seemed to present legitimate good cause, the court felt impressed to "stress categorically that our resolution of the procedural issues herein is founded upon the unique circumstances in which this price increase was

27. "Old oil" is oil produced at the May 15, 1973 level of production. See 38 Fed. Reg. 34,985 (1973). "New oil," oil that was in excess of the May 15, 1973 level of production, was unregulated and allowed to rise to the world price level in an effort to encourage domestic production. Id. at 34,986.
28. Id.
29. Though the CLC had not fully satisfied the requirements of § 553(b)(3)(B)—because it had failed to publish an adequate finding of good cause and supporting reasons therefor with the rules issued—the facts to support a finding of good cause was evident and compelling. The court therefore upheld the regulations. However, it warned that "repeated technical noncompliance [would] not be tolerated." 514 F.2d at 1069.
Good Cause Exception

formulated. Assuming less calamitous circumstances, we fully expect that any future decisions will take the utmost advantage of full and open public comment.\textsuperscript{30}

The court apparently felt that under certain circumstances the removal of a price ceiling would not be sufficient good cause to dispense with public proceedings. This would be true of cases where the policy upon which the rule was based was not to ensure the supply of a commodity, but to increase the profit outlook of a regulated service. For example, a railroad would not be expected to refuse to haul freight simply because it anticipated being able to charge more for the haulage in the future. Since the result sought would not be frustrated by public notice prior to promulgation of the rule, good cause would not exist to dispense with notice and comment. The purpose of the regulation is therefore important in a determination of whether or not there is good cause.

In some cases the form of the regulation may be significant. For example, if a price ceiling fixed to control inflation is based on the transactions occurring during a 30-day period prior to the promulgation of the rule, good cause exists to dispense with notice and comment. Any notice of the impending regulation would fuel inflation by fostering price increases during the 30-day period by businesses desiring to push the price ceiling affecting them as high as possible.\textsuperscript{31} However, if the regulation were to establish a fixed price ceiling without regard to transactions occurring in the industry, the prior notice would not have any effect on the market contrary to that sought by regulation and therefore no good cause would exist.\textsuperscript{32}

\textsuperscript{30} Id. (emphasis in original).

\textsuperscript{31} See DeRieux v. Five Smiths, Inc., 499 F.2d 1321 (Temp. Emer. Ct. App.), cert. denied, 419 U.S. 896 (1974). While there was sufficient good cause in this case to allow the regulations to be published without providing for public notice and comment, the regulations had an interesting twist as applied to Five Smiths, Inc. As operator of the Atlanta Falcons, Five Smiths raised its season ticket prices and sold tickets for games to be played during 1971. Thereafter, Executive Order 11,615 fixed a 90-day price ceiling based on transactions occurring during the 30-day period prior to the promulgation of the regulation. Although the tickets were delivered before the freeze went into effect, the court looked at the playing of games rather than the sale of the tickets as the completion of the transaction. Rejecting challenges based on statutory interpretation and constitutional rights, the court held that the Falcons were bound during the 90-day freeze by the ticket prices charged for games played in 1970.

\textsuperscript{32} In fact, the competition to sell goods at the best price possible before the ceiling is imposed, and the tendency to withhold purchase until then, could result in a market reduction to the proposed ceiling price prior to implementation of the regulation. See, e.g., Consumers Union, Inc. v. Sawhill, 393 F. Supp. 639 (D.D.C.), aff’d per curiam, 523
2. Public Health, Safety, or Welfare

In the second category, courts have approved agency good cause based on the possibility that delay in promulgation could have detrimental consequences on public health, safety, or welfare. In Allegheny Airlines v. Village of Cedarhurst, a municipal ordinance prohibiting flights below 1,000 feet was challenged on the ground that the Civil Aeronautics Act of 1938 had preempted the field. The village responded with the claim that the air traffic pattern directing planes landing at Idlewild Airport over the village was adopted without notice to all interested parties as required by 5 U.S.C. § 1003 (the predecessor of section 553) and was consequently invalid. A prior regulation prescribing a different traffic pattern, in effect from February 3, 1949 until August 1950, had been adopted with compliance to the notice and comment procedures. Based on evidence that the earlier pattern was unsafe and on a statement in the rule that the traffic pattern was "adopted without delay in order to promote safety of the flying public" and that "compliance with the notice procedures and effective date provision of [section 1003], would be impracticable and contrary to the public interest, and therefore is not required," the court with little discussion held that the procedural requirements had been met.

It is apparent that under appropriate circumstances public safety would constitute good cause to dispense with notice and comment, particularly where the safety interest sought to be protected by the regulation significantly outweighed the impact of the regulation on a small segment of the public. However, the Allegheny Airlines summary treatment of the issue is unsatisfying; none of the evidence of the unsafe nature of the prior flight pattern is presented in the opinion. The fact that the prior

33. 132 F. Supp. 871 (E.D.N.Y. 1955), aff'd, 238 F.2d 812 (2d Cir. 1956).
34. The rulemaking procedure enacted in the Administrative Procedure Act, ch. 324, § 4, 60 Stat. 238 (1946), was originally codified at 5 U.S.C. § 1003. In 1966, as part of a general revision and recodification of laws relating to government organizations and employees, the rulemaking procedure was revised and recodified at 5 U.S.C. § 553. Act of Sept. 6, 1966 Pub. L. No. 89-554, 90 Stat. 378 (1966). The relevant provisions of former § 1003 were substantially the same as current § 553.
35. 132 F. Supp. at 883-84.
36. Id. at 884.
37. On appeal the Second Circuit also gave cavalier treatment to the issue stating: "Additional contentions made by the appellants [including the notice and comment argument] have not been overlooked but they do not in our opinion merit discussion."
flight pattern was allowed to be followed for eighteen months before the Civil Aeronautics Board felt compelled to promulgate a new pattern\textsuperscript{38} tends to diminish the likelihood that accommodation of the opportunity for public comment would have significantly compromised the safety of the flying public. Based on the support offered in the Allegheny Airlines decision, it could not be fairly inferred that it was impracticable to allow for notice and comment in the sense that such an allowance would have impaired the functioning of the agency in providing for the public safety. It is this standard that Congress intended.\textsuperscript{39}

\textit{Detroit Edison Co. v. EPA}\textsuperscript{40} supports the view that there must be an element of exigency for notice and comment to be dispensed with on public health or safety grounds. There, a regulation requiring sulfur dioxide emission sources to comply with limitations on sulfur in fuel and emission rates of sulfur dioxide was promulgated without prior notice and opportunity for comment. The health, safety, and welfare impact of continued failure to meet the limitations on emission was significant, yet the court ruled that because of the substantial impact of the regulations and because of the EPA's failure to show that the regulations were based on emergency, the Administrator could not justify lack of notice and comment as "impracticable, unnecessary, or contrary to the public interest."\textsuperscript{41} \textit{Detroit Edison} points out that in cases where the good cause asserted is potential damage to the health, safety, and welfare of the public, this potential damage must be balanced with the impact on the parties affected by the regulation in determining whether the good cause asserted is adequate to dispense with notice and comment.\textsuperscript{42}

3. \textit{Lack of Necessity}

Court approval of agency assertions of good cause based on lack of necessity for notice and comment constitutes the third category. Cases in this area indicate that a court may deem notice and comment unnecessary because some other mechanism

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38. 132 F. Supp. at 883.


40. 496 F.2d 244 (5th Cir. 1974).

41. Id. at 249.

provides interested parties with an opportunity to present their views on the matter. In Appalachian Power Co. v. EPA, it was argued that EPA approval and promulgation of state plans for implementation of federal ambient air quality standards were invalid because hearings were not held by the EPA prior to publication of the plans. The court repelled this attack on the regulations saying that the parties had been afforded opportunity to voice their objections to the plans in hearings held by the state. This, the court reasoned, coupled with a tight statutory deadline imposed by Congress—indicating its concern that the plans be promulgated as expeditiously as possible—rendered hearings at the EPA level both “unnecessary” and “impracticable.” Therefore, the requirements of section 553(b)(B) to dispense with public proceedings for good cause had been met.

Two facts diminish the precedential value of this case as support for the proposition that other types of proceedings may be good-cause substitutes for notice and comment. First, it is notable that the court did not base its holding solely on the prior opportunity to be heard in state hearings or on the statutory deadline. The court deemed the combination of the two to rise to the level of good cause, but expressed no view that either aspect alone was adequate. Second, the petitioners were seeking a hearing rather than just notice and opportunity to comment. The court drew a distinction between hearings and other procedures, and its holding was limited to the decision that no hearing before the EPA was required. Consequently, a lesser showing of good cause was probably found adequate than would have been the case had the petitioners been seeking only notice and

43. 477 F.2d 495 (4th Cir. 1973).
44. The court in dicta suggested that additional procedural requirements beyond those found in § 553 could be imposed if the question involved so demanded. Id. at 501. In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), this dicta was overruled. There it was held that while an agency could in its discretion grant additional procedural rights, such rights could not be imposed by the courts; § 553 establishes the maximum mandatory procedural requirements.
45. The record of the state hearings was not before the court, and accordingly it could not “determine whether those hearings provided the petitioners with the type of hearing the importance of their rights required.” 477 F.2d at 503. The case was thus remanded. On consideration after remand the court held that the state hearings had adequately satisfied the requirements of due process. Appalachian Power Co. v. EPA, 579 F.2d 846 (4th Cir. 1978).
46. 477 F.2d at 503.
47. See id. at 500-03.
opportunity for comment.

In few cases would state hearings or other mechanisms for public input directed at parties other than the agency promulgating the rule truly afford parties an opportunity to comment in the way contemplated by section 553. An agency engaged in rulemaking does so under the auspices of federal authority delegated by Congress, and its rules have the force of law.48 This fact is likely to provide an incentive to interested parties wishing to present views not present in other contexts. Also, a strong possibility exists that notice of such other public proceedings as may have been provided was not as extensive as the publication in the Federal Register required by section 553, which constitutes constructive notice to all citizens of the United States.49

A second type of case in this category is that in which comment subsequent to the promulgation of the rule is deemed by the court to satisfy the requirement of notice and opportunity for comment. In Pent-R-Books, Inc. v. United States Postal Service,60 notice of a proposed rulemaking concerning use of the mails for sexually oriented advertising was published in the Federal Register on January 12, 1971, calling for comment to be received by January 20, 1971. On January 30, 1971, revised regulations were published and were made effective on publication with the stipulation that comment would be considered after the effective date. After receipt and consideration of additional comment, amended regulations were published on May 5, 1971. The court stated that whatever objection there was to the original regulations as published on January 30 was disposed of by the repromulgation.51 While this case raises the issue of whether interested parties had "the reality of an opportunity to submit an effective presentation,"52 it is not clearly a good cause exception case; prior notice and opportunity to comment were provided, though on a reduced scale. The case does, however, point to the idea that allowance of comment after publication may be adequate to correct deficiencies in compliance with the notice and comment requirement.

It seems unlikely that postpromulgation opportunity to

51. Id. at 312.
comment would ever be found to substitute for prepromulgation notice and comment in the absence of some other showing of good cause. But a court may be willing to accept a lesser standard of good cause than that prescribed by section 553 where postpromulgation comment has been accepted. However, this approach has been rejected in several decisions. One court succinctly stated: "The reception of comments after all the crucial decisions have been made is not the same as permitting active and well prepared criticism to become a part of the decision-making process." Postpromulgation comment is nowhere provided for in section 553 as a substitute for prepromulgation notice and comment, and it should not relieve the agency from providing prepromulgation notice and comment, or from meeting the strict requirements of good cause contained in section 553(b)(B).

The courts generally have restricted the use of the "unnecessary" aspect of the good cause exception to cases where the rule could truly be classified as "minor or merely technical, . . . in which the public is not particularly interested." The congressional reports point out that the "unnecessary" aspect of the good cause exception can also be employed "where authority beneficial to the public does not become operative until a rule is issued." In these cases "the agency may promulgate the neces-

53. See e.g., United States Steel Corp. v. EPA, 605 F.2d 283 (7th Cir. 1979) (discussed in text accompanying notes 89-105 infra).
57. Agencies have attempted to avoid this consequence by calling the final regulation "interim final" and later promulgating the "final" rule. However, as the regulation would be effective when published in interim final form, proceeding in this manner is substantively no different than promulgation of a final rule with a later re-promulgation, and so must be rejected on the same grounds. See American Iron and Steel Inst. v. EPA, 568 F.2d 284 (3d Cir. 1977); Consumers Union, Inc. v. Sawhill, 393 F. Supp. 639 (D.D.C.), aff'd per curiam, 523 F.2d 1404 (Temp. Emer. Ct. App. 1975).
sary rule immediately and rely upon supplemental procedures in the nature of a public reconsideration of the issued rule to satisfy the requirement of [section 553]. Thus, in the rare instances where a regulation has only beneficial effect on the public—such as a regulation implementing a tax relief measure—the agency is authorized to refine the regulation through post-promulgation comment proceedings.

B. Recent Interpretations of the “Good Cause” Exception in Air Quality Non-Attainment Designation Cases

A recent series of cases in the circuit courts depicts the continuing confusion and uncertainty with which the federal courts approach the issue of what constitutes good cause to dispense with notice and opportunity for comment prior to promulgation of an agency rule. Under nearly identical factual and procedural settings, and in regard to the issuance of the same regulations, the Third and Fifth Circuits ruled that “good cause” did not exist for dispensing with pre-promulgation notice and comment, while the Seventh Circuit ruled that there was indeed “good cause” and allowed the regulations to stand.

As originally enacted, the Clean Air Act (CAA) required the Environmental Protection Agency (EPA) to promulgate national primary and secondary ambient air quality standards (NAAQS) and the states to develop implementation plans to achieve these standards. In 1977, the CAA was amended to extend the primary compliance deadline to 1982 and to prescribe a new implementation process. Under the new process, the states were to submit to the Administrator of the EPA within 120 days

60. Id.
61. Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979); United States Steel Corp. v. EPA, 595 F.2d 207 (5th Cir. 1979).
62. United States Steel Corp. v. EPA, 605 F.2d 283 (7th Cir. 1979), cert. denied, 100 S. Ct. 710 (1980).
64. 42 U.S.C. § 7409(a) (Supp. I 1977). The national primary ambient air quality standards are those which, in the judgment of the Administrator of the EPA, are requisite to protect the public health. Id. § 7409(b)(1). The national secondary ambient air quality standards are those which, in the judgment of the Administrator of the EPA, are requisite to protect the public welfare. Id. § 7409(b)(2). These standards, promulgated by the Administrator of the EPA pursuant to the statutory mandate, are codified at 40 C.F.R. §§ 50.1-50.11 (1979).
after August 1, 1977, a list of air quality regions or portions of regions that did not meet the NAAQS. The Administrator of the EPA was to promulgate these lists with any modifications he deemed necessary within sixty days after the states' submissions. On March 3, 1978, without prior notice of a proposed rulemaking or opportunity for comment by interested parties, the EPA promulgated a list of attainment designations based on the states' submissions.

One effect of the promulgation was to require the states to incorporate more stringent provisions into the state implementation plan for areas that had been designated "non-attainment." Such revised implementation plans were to be submitted to the EPA no later than January 1, 1979. The more immediate impact of a nonattainment designation, however, resulted from a pre-existing EPA interpretive ruling—the "Offset Ruling." This ruling was explicitly adopted by Congress, had the force of law, and was enforceable by the EPA. The ruling severely limited construction or modification of facilities that would contribute to an existing violation of a NAAQS.

Steel companies operating plants in areas that had been designated "non-attainment" attacked the EPA promulgation of the attainment designation lists, contending, among other things, that the EPA violated the procedural requirements of the APA. The EPA had published a statement with the March 3, 1978 promulgation asserting good cause based upon the tight statutory deadlines imposed by Congress, and upon the need to provide expeditious guidance to the states to enable them to formulate their implementation plans. It was contended that these grounds made it "impracticable and contrary to the public interest" to provide for prepromulgation notice and comment.

68. Id. § 7407(d)(2).
74. See 43 Fed. Reg. 8,962 (1978). The full text of the statement is as follows: The States are now preparing revisions to their State implementation plans (SIPs) as required by sections 110(a)(2)(I) and 172 of the Act [42 U.S.C. §§ 7410(a)(2)(I), 7502]. This enterprise, which must be completed by January 1, 1979, requires that the States have immediate guidance as to the attainment
The Third Circuit was the first to hand down an opinion. In *Sharon Steel Corporation v. EPA,* the court reasoned that it should have been apparent to Congress at the time the amendments to the CAA were passed that tight statutory deadlines were being imposed, yet it did not express an intention that the amendments should relieve the EPA from the notice and comment requirement. The court went on to suggest that the statutory schedule did not preclude prior notice and comment. The state designations could have been published as a proposed rule, satisfying the APA requirement that the notice of rulemaking include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." The EPA then could have accepted comments and promulgated the final rule "on about April 15, 1978, instead of the March 3 date . . . achieved without notice and comments," which would still have allowed adequate time for the states to draft their plans. The court thus concluded that the statutory deadlines did not constitute good cause to dispense with notice and comment. This conclusion is reinforced by the fact that the states could have commenced development of the plans at the time they submitted the designations to the EPA and then made modifications as necessary if their designations were altered by the EPA. The court further held that the violation of the APA's notice and comment requirement was not cured by acceptance of comments after promulgation of the rule, since the decision of

status of the areas designated under section 107(d). Congress has acknowledged this by imposing a tight schedule on the designation process and requiring EPA to promulgate the list within 180 days of the enactment of the amendments. Under these circumstances it would be impracticable and contrary to the public interest to ignore the statutory schedule and postpone publishing these regulations until notice and comment can be effectuated. For this good cause, the Administrator has made these designations immediately effective.

*Id.*

75. 597 F.2d 377 (3d Cir. 1979).

76. *Id.* at 380.

77. 5 U.S.C. § 553(b)(3) (1976). The Third Circuit had formerly noted that the final rule need not be identical to the proposed rule for notice to be effective: "[T]he adequacy of the notice must be tested by determining whether it would fairly apprise interested persons of the 'subjects and issues' before the agency." American Iron and Steel Inst. v. EPA, 568 F.2d 284, 293 (3d Cir. 1977).

78. Sharon Steel Corp. v. EPA, 597 F.2d 377, 380 (3d Cir. 1979). Even without providing notice and comment the EPA had missed the February 3, 1978 deadline. *Id.* at 380 n.7.

79. *Id.* at 380.
Congress was to provide for prior notice and comment to allow “effective participation in the rulemaking process while the decisionmaker is still receptive to the information and argument.”

The Fifth Circuit addressed the issue next, and in *United States Steel Corporation v. EPA* concluded, as had the Third Circuit earlier, that the tight statutory schedule proposed by the EPA as good cause was insufficient to meet the requirements of section 553(b)(B), and that postpromulgation opportunity for comment was not an adequate substitute for prepromulgation notice and comment. The court thought that a tight statutory deadline was a factor to be considered in determining whether there is good cause, but that it could not be “good cause” by itself. The court also recognized that there were “substantial public health interests involved,” yet it did not find them adequate to satisfy the narrow exception to the notice and comment requirement contained in section 553(b)(B). The court implicitly analyzed the good cause exception in terms of the second category of the exception discussed above, where a delay in promulgation could have detrimental consequences to the public health, safety, or welfare. While the impact on the public health was deemed significant, and while it was perceived that the congressional time framework indicated a concern with the public health, in the absence of express congressional indication that the rulemaking procedure of the APA was not to apply, the court was unable to find that the public health interest outweighed the interest of the steel companies in having a voice in the rulemaking process. This was particularly true where the nonattainment designations, when coupled with the prior Offset Ruling, would strictly limit new construction or modification of plants in areas designated nonattainment. Characterizing the good cause exception as “an important safety valve to be used where delay would do real harm,” the court found the harm to the steel companies caused by depriving them of prior notice and an opportunity to comment too substantial to be overcome by the potential harm to the public health and safety that would

80. *Id.* at 381.
81. 595 F.2d 207 (5th Cir. 1979).
82. *Id.* at 213.
83. *Id.* at 214.
84. 595 F.2d at 211.
85. *Id.*
have attended the delay in promulgation of the designations.\[86\]

The court went on to hold that acceptance of comments after the promulgation of the rules did not cure the infirmity of the rules. It stated that to approve such a procedure "would make the provisions of § 553 virtually unenforceable,"\[87\] since an agency wishing "to dispense with pre-promulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act."\[88\]

In spite of the decisions of the Third and Fifth Circuits holding that "good cause" to dispense with notice and comment did not exist, the Seventh Circuit decided in United States Steel Corporation v. EPA\[89\] that the EPA did have good cause to dispense with notice and comment under section 553(b)(B). The court further reasoned that even if good cause did not exist to dispense with notice and comment under section 553(b)(B), comment could be postponed under a lesser standard of good cause found in section 553(d)(3) until after the promulgation of the final rule.\[90\]

The Seventh Circuit reasoned that the statutory deadlines imposed on the EPA to promulgate the attainment designations

\[86\] Id. at 214-15.
\[87\] Id. at 215.
\[88\] Id.
\[89\] 605 F.2d 283 (7th Cir. 1979), cert. denied, 100 S. Ct. 710 (1980).
\[90\] Ultimately the Seventh Circuit held that even if the procedural requirements of § 553 had not been met, it could not reverse the EPA's action, since 42 U.S.C. § 7607(d)(9)(D) limited reversal for failure to observe procedure to cases where (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) [requiring that the procedural objection be raised during the period of public comments] has been met, and (iii) the condition of the last sentence of paragraph (8) [requiring that procedural error be "so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made"] is met.

42 U.S.C. § 7607(d)(9)(D) (Supp. I 1977). Since the court found that none of these requirements had been met by the petitioning steel companies, it held that there could be no reversal for the procedural errors. 605 F.2d at 291. However, it should be noted that the Fifth Circuit had earlier dismissed United States Steel's argument that the more stringent procedural requirements of § 7607(d) should be met by the EPA on remand, saying that the "designations are plainly not among the actions enumerated in § 7607(d)," United States Steel Corp. v. EPA, 595 F.2d 207, 215 n.17 (5th Cir. 1979), and that the provisions of § 7607(d) therefore did not apply. In his vigorous dissent to the denial of certiorari to the Seventh Circuit case, Justice Rehnquist said that the Seventh Circuit's holding on this issue "[had] the effect of establishing two Administrative Procedure Acts, one for the EPA and one for all other agencies." United States Steel Corp. v. EPA, 100 U.S. Ct. 710, 711 (1980) (Rehnquist, J., dissenting).
and on the states to formulate implementation plans were ade-
quate to satisfy the "impracticable" aspect of the section
553(b)(B) good cause exception. Reliance was placed on the sub-
stitution of "impracticable, unnecessary or contrary to the pub-
lic interest" for "impracticable because of unavoidable lack of
time or other emergency," which had been found in earlier ver-
sions of the bill that was later to become the APA.91 The court
deemed that this change in language had broadened the excep-
tion.92 This conclusion is undercut by the congressional reports
on the bill drafted after the modification, which state that the
exclusion was to be operative only upon a "true and supported
or supportable finding of necessity or emergency."93 Addition-
ally, no circuit court had previously held that tight statutory
deadlines alone were adequate to satisfy the good cause require-
ment necessary to dispense with notice and comment. Arguably,
the elimination of the "because of unavoidable lack of time" lan-
guage narrowed, rather than broadened, the scope of the section
553(b)(B) exception, since lack of time was eliminated as an exi-
geniy sufficient to dispense with notice and comment.

The court also relied on two cases to support its assertion
"that the 'good cause' exception may be utilized to comply with
the rigors of a tight statutory schedule."94 In both cases the reli-
ance is ill-founded. In the first, Clay Broadcasting Corp. v.
United States,95 prior notice of the rulemaking had been pub-
lished in the Federal Register and a large number of comments
had been received.96 The challenge was to making the final rules
effective immediately upon publication, rather than to the fail-
ure to provide prior notice and comment. Therefore, this case
was clearly governed by section 553(d)(3), not section 553(b)(B).

The second case relied upon by the Seventh Circuit, Energy
Reserves Group, Inc. v. Federal Energy Administration,97 in-
volved regulations governing the pricing of crude oil. These reg-
ulations were required by statute to be promulgated within 15
days of the enactment of the Emergency Petroleum Allocation

92. 605 F.2d at 287.
94. 605 F.2d at 287.
95. 464 F.2d 1313 (5th Cir. 1972,) rev'd on other grounds sub nom. National Cable
96. Id. at 1316.
Act. The challenged regulations exempted "stripper" well production from price controls. Though the statutory deadline was significantly shorter than that facing the EPA in promulgation of the nonattainment designations, and though by its abridged duration alone the deadline implied a congressional intent to dispense with notice and comment, it played only a minor role in the court's determination that good cause existed to exclude the rulemaking from the notice and comment requirement.

The court recognized that the purpose of the rule was to encourage domestic production of crude oil in order to relieve the effects of the Arab oil boycott. Had prior notice of the impending release of price controls on stripper well oil production been published, such oil would have been held off the market in anticipation of the price increase, aggravating the already severe petroleum shortage. Energy Reserves Group, therefore, fits nicely into the first category of the "good cause" exception, where the goal of the regulation would be thwarted by prior public notice.

The Seventh Circuit, apparently feeling uncomfortable with a decision based solely on the tight statutory deadline, mentioned that continuing adverse impact on health would be caused by further delay, and in a footnote included tables of estimates of adverse health effects if the NAAQS were not met in 1980. While it is apparent that some adverse health impact is possible if the air pollution standards are not attained, it is not clear that provision of a notice and comment period would have significantly set back the attainment of such standards. As was pointed out by the Third Circuit, if a notice and comment period had originally been provided, the designation lists still could have been promulgated with adequate time for the states to develop implementation plans by January 1, 1979, the date required by statute. Moreover, the implementation plans were not the end result, but were to provide for the attainment of the air quality standards by December 31, 1982. And in certain circumstances, and for certain pollutants, such attainment could be delayed until December 31, 1987. When filtered through this
protracted chain of statutory requirements, it is doubtful that provision of a notice and comment period would have significantly delayed the ultimate attainment of the air pollution standards. In such cases, where the potential for impact on public health is small and speculative in comparison to the real interest of parties to have an opportunity to comment, the strict provisions of the good cause exception have not been met.

Even if the EPA's actions were not justified by the impracticability standards of section 553, the Seventh Circuit reasoned that they were justified by the good cause exception found in section 553(d)(3). The court felt that section 553(d)(3) could be used to dispense with prior notice and comment, rather than notice and comment altogether, and that section 553(d)(3) allowed for a broader standard of good cause. While section 553(d)(3) arguably allows for a broader standard of good cause, and while it could have justified the EPA in publishing the rule effective immediately, it cannot be used to postpone notice and comment until after publication of a final rule. Section 553(d)(3) relates only to the conditions under which a final rule can be made effective less than 30 days after its publication. It does not relate to when or under what conditions notice and comment need be provided. As stated in the Senate Judiciary Committee Report, "[section 553(d)] does not provide procedures alternative to notice and other public proceedings required by the prior subsections of this section [sections 553(a)-(c)]." As has been previously noted, an agency wishing to dispense with prepromulgation notice and comment must meet the good cause requirement of section 553(b)(B), even where postpromulgation opportunity for comment is provided.

IV. TOWARD A CONSISTENT APPLICATION OF THE GOOD CAUSE EXCEPTION

This Comment has pointed out a number of differences in the federal courts' interpretation of what constitutes good cause within the meaning of section 553(b)(B). Some courts have implied that other proceedings may substitute for the notice and comment procedure required by the APA, or that postpromulgation comment can correct the absence of prepromulgation notice

104. 605 F.2d at 289-90.
and comment. Other courts have confused the standard to dispense with prior notice and comment with the standard to publish a rule with immediate effect. Where public health and safety are involved, the courts have not articulated the bases of their decisions that provision of notice and comment would have had such an impact as to meet the congressional standard of "impracticability"—that is, impairment of "the due and required execution of the agency functions." As is demonstrated by the recent series of cases involving the EPA air quality nonattainment designations, courts applying different criteria can come to different conclusions on whether good cause is present, even where virtually identical factual and procedural settings are presented.

While certain things seem clear—such as that other proceedings cannot be good-cause substitutes for the notice and comment procedure, and that statutory deadlines alone are inadequate to constitute good cause—a rule of interpretation that will effectuate the congressional intention that "the legislative functions of administrative agencies shall so far as possible be exercised only upon public participation" is necessary. At the same time, agencies must be allowed flexibility to deal with problematical situations. With these goals in mind, it is apparent that the good cause exception is appropriately applicable in three sets of circumstances.

The first and clearest case for application of the exception is where the problem sought to be alleviated would be exacerbated by the actions of those affected if they became aware of the regulation before its implementation. The inquiry in this area should be focused on what problem the regulation addresses and how public notification of the content of the regulation in advance of its promulgation would affect that problem. A determination that such notification would worsen the problem would justify application of the good cause exception.

Cases where the delay caused by the notice and comment period would in and of itself result in significant public harm constitute the second situation for application of the exception. Most cases of rulemaking in areas affecting the public health, safety, or welfare involve ongoing problems, and significant additional harm will not be caused if the problem is allowed to con-

continue for the relatively short period of time required to provide for prepromulgation notice and comment. Thus, in order to preserve the integrity of the notice and comment procedure, the good cause exception should be employed in such cases only where there is a measurable, demonstrable, and significant impact on the public health, safety, or welfare, directly caused by the delay necessary to provide the opportunity for comment.

The third situation for appropriate application of the good cause exception is where the rulemaking relates only to a minor or merely technical ruling over which little or no public concern could be expected. This category corresponds to the "unnecessary" aspect of good cause as interpreted by the Senate Judiciary Committee Report,\(^{108}\) and should be strictly limited to those cases where the detrimental effect on any member of the public is so minimal that no protest could reasonably be expected.

Applying the above criteria, an agency should be able to determine the propriety of dispensing with prepromulgation notice and comment under the good cause exception, and enforcement of these criteria by the courts should ensure the rights of the public to participate in the administrative rulemaking process.

V. CONCLUSION

To effectively implement the policy that effective exercise of delegated legislative power is premised on public participation, it is important that deviations from the public proceedings requirements of informal rulemaking be limited to cases where such deviation is manifestly necessary, or where public proceedings can serve no useful purpose. This Comment has suggested that only when (1) public proceedings prior to promulgation of a rule would exacerbate the problem sought to be corrected, (2) the delay caused by public proceedings would in and of itself result in significant public harm, or (3) no public concern could reasonably be expected, should notice and comment be dispensed with under the good cause exception to the notice and comment requirement of informal rulemaking. Careful definition of the circumstances under which the good cause exception is properly employed will promote the continued integrity of the notice and comment procedure as a means of assisting agencies in developing rules that soundly implement congressional policy.

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108. S. REP. No. 752, supra note 2, at 14; see also H.R. REP. No. 1980, supra note 2, at 24.
and as a means of providing those affected by administrative powers an opportunity to protect their rights.

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