THE APA AND THE BACK-END OF REGULATION: PROCEDURES FOR INFORMAL ADJUDICATION

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TABLE OF CONTENTS

Introduction ................................................................. 1160
I. The Back-End Procedures ............................................. 1161
   A. Adjudication .................................................... 1162
      1. The Clean Water Act ......................................... 1162
      3. The Clean Air Act ........................................... 1163
      4. The Endangered Species Act ............................... 1164
   B. Rulemaking ..................................................... 1164
   C. Summary ....................................................... 1165
II. Amending the APA ................................................... 1166
   A. The Current APA ............................................... 1166
   B. The Need for Amendment ...................................... 1167
      1. No Procedures ............................................. 1167
      2. Common Baseline .......................................... 1168
III. What Procedures? .................................................. 1169
   A. Hearings ..................................................... 1169
      1. Formal Hearings .......................................... 1169
      2. Legislative Type Hearings .............................. 1171
   B. Greater Transparency ........................................ 1172
      1. Electronic Docket ......................................... 1173
      2. Annual Reports .......................................... 1175
      3. Summary ................................................ 1176
Conclusion ..................................................................... 1176

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INTRODUCTION

Much time and effort has been spent in the last two decades attempting to rationalize significant draft regulations before they are proposed. Regulators must comply with a large number of analysis requirements imposed by the White House and Congress before draft regulations can be proposed and final regulations can be promulgated. In a recent book, *Risk Regulation At Risk*, we argued that these efforts were certain to fail because of moral, methodological, and informational problems. This book proposed that the country would be better served by regulators making incremental adjustments in regulation at the "back-end" of the administrative process, by relying on exceptions, time extensions, variances, and waivers, rather than continuing the effort to rationalize regulation at the "front-end" of the process. By focusing on the back-end, administrators have the opportunity to adjust regulations in light of their actual impact, as compared to the unavoidable and significant guess work used in front-end analysis. This makes the back-end adjustments process more consistent with the pragmatic approach to public policy that we advocated in our book, than a process that emphasizes front-end analysis.

In a recent paper, we sought to analyze the extent to which back-end adjustments, as presently structured, contribute to the rationality of regulation. As part of this research, we surveyed five statutes and found that Congress has authorized a significant number of back-end adjustments for a variety of purposes in the statutes that we surveyed. We then organized the adjustments into five categories to reflect the different policy reasons for the adjustments and concluded that these types of adjustments should lead, for the most part, to more rational public policy. We expressed concern, however, about the potential for misuse, either because

3. See id. at 46-72, 92-120 (critically analyzing the methodologies used in analysis requirements).
4. Id. at 177; see also Sidney A. Shapiro & Robert L. Glicksman, *The Missing Perspective*, ENVTL. F., MAR./APR. 2003, at 42.
5. SHAPIRO & GLICKSMAN, supra note 2, at 177.
7. See id. (manuscript at 7, on file with the Administrative Law Review). For a list of the statutes, see also infra notes 15-19 and accompanying text.
9. Glicksman & Shapiro, supra note 6 (manuscript at 12-33).
10. Id. (manuscript at 32-33).
an agency relied too heavily on the adjustment process, failed to consider the cumulative impact of adjustments, or simply used the adjustment process to water down regulations while maintaining an illusion that strict regulation remained in place.\textsuperscript{11} The paper therefore considered the process by which adjustments were issued to determine the agency’s accountability for its actions.\textsuperscript{12} The research found procedural disarray. Many times, Congress required no procedures for such adjustments. When it did specify procedures, it typically required notice and opportunity for comment, but in a few instances it required formal adjudication or rulemaking.\textsuperscript{13} We made several proposals to agencies concerning what procedures they should adopt in cases where Congress had failed to specify procedures, or required what we regarded as inadequate procedures.\textsuperscript{14}

This Article builds on the previous research to consider whether the Administrative Procedure Act (APA) should be amended to provide a baseline set of procedures for the back-end adjustment process, and what those procedures should be. We recommend that Congress amend the APA to require agencies to use the same notice and comment procedures that the APA mandates for rulemaking when they adjudicate whether to grant a back-end adjustment. Congress should also require agencies to establish an electronic docket to make all documents relevant to the adjustment process available on their web sites, and to issue an annual report that provides sufficient detail about the process that it enables interested parties to monitor how the adjustment process is being used.

I. THE BACK-END PROCEDURES

We surveyed five statutes that provide for back-end adjustments to determine what procedures are used for such adjustments. The statutes were the Clean Water Act (CWA),\textsuperscript{15} the Resource Conservation and Recovery Act (RCRA),\textsuperscript{16} the Clean Air Act (CAA),\textsuperscript{17} the Occupational Safety and Health Act (OSH Act),\textsuperscript{18} and the Endangered Species Act (ESA).\textsuperscript{19}

Most of the back-end adjustments under these statutes involved adjudication, although agencies use rulemaking to a lesser extent to make such adjustments. An agency is involved in adjudication when the

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{10}
\item \textit{Id.} (manuscript at 34).
\item \textit{Id.} (manuscript at 44-49).
\item \textit{Id.} (manuscript at 40).
\item \textit{Id.} (manuscript at 49-52).
\item \textit{Id.} §§ 7401-7671 (2000).
\end{enumerate}
\end{footnotesize}
outcome of an adjustment request depends on the application of a statutory provision or regulation that allows for an adjustment if certain criteria are met. When there is no pre-existing statutory or regulatory provision that authorizes a back-end adjustment, an agency uses rulemaking to make an adjustment. The agency uses rulemaking because it must amend an existing regulation in order to permit the applicant to engage in some form of adjusted compliance. When agencies use adjudication, they usually are not subject to any statutory procedural requirements, although Congress sometimes specifies procedures, including formal adjudication. When agencies use rulemaking, they normally engage in informal rulemaking, although Congress has required formal rulemaking in some instances.

A. Adjudication

Most of the statutes that we surveyed do not require the agency concerned to use any procedures to adjudicate whether a regulated entity is entitled to a back-end adjustment. Agencies have generally plugged this gap by voluntarily engaging in a notice and comment process. When Congress has required procedures, it usually has required a notice and comment process. In a few instances, however, it has prescribed a legislative-type hearing, and in three instances Congress prescribed formal adjudication.

1. The Clean Water Act

The CWA does not mandate procedures to be used for most of the significant number of back-end adjustments that it authorizes using adjudication. Congress, however, provided that the Environmental Protection Agency (EPA) (or a state) can only issue a more lenient effluent limitation for a point source engaging in a thermal discharge "after opportunity for public hearing." An early circuit court decision interpreted this provision as requiring formal adjudication, but other circuits have since disagreed with this interpretation concerning adjustments granted under other statutes that use the identical language.

The EPA subjects back-end adjustments to the same notice and comment procedures that apply to the disposition of applications for permits or

21. Glicksman & Shapiro, supra note 6 (manuscript at 32).
23. See Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1978) (holding that formal adjudication was required in permit proceedings conducted under § 1326(a), even though the statute did not require that the determination be made “on the record”); see also U.S. Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977).
permit renewals by point sources. In addition, the EPA will notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. The final decision must include a response to significant comments on the draft permit raised during the comment period or during a formal hearing. Final decisions are to be based on the administrative record, which includes the record for the draft permit, all comments received during the comment period, the response to comments, and the final permit. Any person who filed comments on the draft permit may petition the Environmental Appeals Board to review any condition of the permit decision within thirty days after the final permit decision.

2. The Resource Conservation and Recovery Act

Congress also failed to require any procedures for most of the adjustments made using adjudication under the RCRA, although there are some procedural requirements for a few types of adjustments. The RCRA authorizes the EPA to extend the deadline for compliance with land disposal prohibitions “after notice and opportunity for comment and after consultation with appropriate State agencies in all affected States.”

Similarly, Congress authorized the EPA (or a state) to modify a prohibition on the receipt, storage, or treatment of hazardous waste at surface impoundments “after notice and opportunity for comment.”

As in the case of the CWA, the EPA has obligated itself to use notice and comment procedures for many of the RCRA back-end adjustments. For back-end adjustments issued during the course of a RCRA permit proceeding for treatment, storage, or disposal facilities, the procedures are similar to those that apply to CWA permits. In other situations, the EPA is obligated to use notice and comment procedures and to publish final decisions in the Federal Register.

3. The Clean Air Act

The CAA fails to mandate procedures for the issuance of some back-end adjustments, but for other adjustments, the statute requires that the EPA

25. 40 C.F.R. § 122.21(m)-(n) (2003).
26. Id. § 124.15(a).
27. Id. § 124.17(a)(2).
28. Id. § 124.18(a)-(b).
29. Id. § 124.19(a).
30. Glicksman & Shapiro, supra note 6 (manuscript at 32).
32. Id. § 6925(i)(4).
34. Glicksman & Shapiro, supra note 6 (manuscript at 38).
35. Id. (manuscript at 37-38).
or the state make its determinations "after notice and opportunity for public hearing." 36 Still other adjustments are subject to the statutory procedures that govern the issuance of permits. 37 The CAA forbids the EPA from approving a state permit program unless, among other things, the state program contains "[a]dequate, streamlined, and reasonable procedures" for public notice, including an opportunity for public comment and a hearing. 38 Under this authority, the EPA has imposed on permitting authorities notice and comment requirements similar to those that the EPA uses for its CWA and RCRA permits. 39 In addition, the permitting authority may hold a public hearing whenever it finds a significant degree of public interest in a draft permit or whenever a hearing might clarify one or more issues involved in the permit decision. 40

4. The Endangered Species Act

The ESA requires notice and comment procedures for most of the back-end adjustments it authorizes, 41 but one back-end adjustment requires considerably more. When permit applicants, states, or federal agencies seek exemptions from the ESA's no jeopardy provision from the Endangered Species Committee, the Committee must grant an exemption if it determines "on the record" that the statutory criteria are met, 42 which the Department of the Interior interprets as requiring formal adjudication. 43

B. Rulemaking

Many back-end adjustments involve adjudication, and most adjudication involves a notice and comment process required by a statute or voluntarily adopted by an agency. Agencies also use a notice and comment process when they use rulemaking to grant an adjustment request, although

36 See 42 U.S.C. § 7411(j)(1)(A) (2000) (concerning waivers for new sources using innovative emission reduction technology); see also id. § 7410(f)(1) (discussing petitions by a state governor for temporary emergency suspensions of state implementation plan provisions); id. § 7521(b)(3) (explaining waivers from standards for emissions of oxides of nitrogen from light-duty motor vehicles); id. §§ 7671(d)(1)-(2); 7671e(a)(1)-(2); 7671g(a)(1) (granting various exemptions from prohibitions on the production and use of ozone-depleting substances).
37 Glicksman & Shapiro, supra note 6 (manuscript at 38-39).
39 EPA regulations require the permitting authority to give public notice of actions such as initial denial of a permit application, preparation of a draft permit, and scheduling of a hearing. 40 C.F.R. § 71.11(d)(1)(i) (2003). The permitting authority must allow at least thirty days for public comment. Id. § 71.11(d)(2)(i) (2003). The permitting authority must notify each person who has submitted written comments or requested notification of the final permit decision, including reference to the procedures for appeal of a final permit decision. Id. § 71.11(i) (2003).
40 Id. § 71.11(f)(1)-(2) (2003).
41 Glicksman & Shapiro, supra note 6 (manuscript at 39-40).
43 50 C.F.R. § 425.05 (2003).
Congress has, on occasion, also required legislative-type hearings and even formal rulemaking.

RCRA requires the EPA to provide notice and opportunity for comment before granting or denying a petition to delist a hazardous substance if the EPA considers factors that could cause a waste to be a hazardous waste other than those for which the waste was listed. The EPA treats this provision of the RCRA as requiring informal rulemaking. Furthermore, Congress mandated that the EPA make adjustments for small quantity generators of hazardous waste by promulgating "standards," which the EPA has also interpreted as requiring informal rulemaking.

Petitions to list or delist species under the ESA also are subject to notice and comment procedures. In addition, the agency has affirmative obligations to seek comments from certain entities and to hold a public hearing if any person requests one within forty-five days after public notification.

The OSH Act requires the Secretary of Labor to issue a variance from an occupational safety or health standard, "if he determines on the record" that workers will still receive the same degree of protection as they enjoyed under the regulation after the variance is granted. The Occupational Safety and Health Administration (OSHA) has issued regulations establishing formal rulemaking procedures for granting such variances.

C. Summary

Congress has generally not required any procedures for back-end adjustments involving adjudication under the environmental statutes surveyed above, but the EPA has voluntarily adopted a notice and comment process for these proceedings. When Congress has required procedures, it usually requires notice and comment, although it has sometimes also required a legislative-type hearing. In our survey, we found two procedural requirements that have been interpreted as requiring formal adjudication.

49. The Interior Department must provide actual notice of proposed listing or delisting regulations to the state agency in each state in which the species is believed to occur, and invite each such agency to submit comments. 16 U.S.C. § 1533(b)(5)(A)(ii) (2000). It may give notice to professional scientific organizations and must publish a summary of the proposal in a newspaper of general circulation in each area of the United States in which the species is believed to occur. Id. § 1533(b)(5)(C)-(D) (2000).
50. Id. § 1533(b)(5)(E) (2000); 50 C.F.R. § 424.16(c)(3) (2003).
Congress has required informal rulemaking for several other adjustments with an additional requirement of a legislative-type hearing in some instances. As with adjudication, formal procedures are rarely used, but Congress sometimes takes this step and requires formal rulemaking.

II. AMENDING THE APA

The two most notable aspects of this analysis are: (1) Congress has failed to specify procedures for many back-end adjudications; and (2) the process used for back-end adjustments varies from statute to statute, and even within a statute itself. This pattern raises two issues:

(1) Should Congress amend the APA to establish a baseline set of procedures to be used when agencies grant back-end adjustments in the form of exceptions, time extensions, variances, and waivers? (2) If so, what procedures should Congress require?

This section considers the reasons to amend the APA to mandate baseline procedures for back-end adjustments, and analyzes what those procedures should be. Although a notice and comment process is the least an agency should do, notice and comment alone is not likely to make the back-end process sufficiently transparent to interested persons. Therefore, Congress should require agencies to establish an electronic docket for back-end proceedings and publish an annual report on their back-end adjustment activity.

A. The Current APA

As those familiar with the APA know, agencies must conform to the trial-like procedures specified in §§ 556 and 557 of the APA “in every case of adjudication required by statute to be determined on the record after opportunity for agency hearing.”\(^{53}\) Similarly, the APA requires formal rulemaking governed by the same two sections of the APA when rules “are required by statute to be made on the record after opportunity for an agency hearing.”\(^{54}\) The Supreme Court has never definitively interpreted when formal adjudication is required. It has held, however, that in the context of rulemaking, an agency is not obligated to follow §§ 556 and 557, unless the statute under which the rule is being promulgated contains the same language as the APA, or there is a clear legislative intent to use formal rulemaking.\(^{55}\)

The circuit courts disagree about when § 554(a) triggers formal adjudication. Following the Supreme Court’s lead concerning rulemaking,

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54. Id. § 553(c) (2000).
some circuits held that formal adjudication is not required unless the statute under review contains the same language as § 554(a) or Congress has otherwise clearly required formal adjudication.56 Other circuits have applied Chevron, deferring to an agency’s interpretation of whether formal adjudication is required when a statute is ambiguous.57 Still other circuits have held that the presence of the words “after opportunity for a public hearing” in an agency’s organic statute is sufficient to trigger the formal adjudication requirements of the APA.58 This disagreement, however, is irrelevant when a statute is silent on the adjudicatory procedures that an agency must use for back-end adjustments.

B. The Need for Amendment

Congress should amend the APA to mandate procedures for adjudications that determine whether a regulated entity is entitled to a back-end adjustment in the form of a deadline extension, exception, waiver, or variance.59 The lack of an APA mandate frees agencies to avoid these procedures or otherwise to provide inadequate procedural protection.

1. No Procedures

The government conducts thousands of adjudications every year for which there is no procedural process, but back-end adjustments are too significant to be conducted without the use of at least notice and comment procedures. As mentioned earlier, without effective public monitoring, an agency may grant so many exceptions that a rule becomes incoherent. A rule may also be threatened if regulators fail to consider the cumulative impact of the adjustments that they are making.60 In addition, an agency may simply hand out back-end adjustments that are undeserved.61 In all of these circumstances, such adjustments could weaken a pre-existing regulation intended to protect people or the environment. If the protections that the regulation is designed to provide are insignificant, the regulation should be repealed. If those protections continue to be important, however, the agency’s ability to create exceptions or other kinds of back-end adjustments should be conditioned on the use of appropriate procedures.

An agency is accountable for its actions even if it is not required to hold a hearing prior to granting a back-end adjustment. If someone sues to

56. See, e.g., City of West Chicago v. NRC, 701 F.2d 632, 641 (7th Cir. 1983).
58. Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876 (1st Cir. 1978).
59. There are other forms of back-end adjustments, such as the exercise of enforcement discretion, but our recommendations are limited to the types of back-end adjustments described above.
60. See supra note 11 and accompanying text.
61. Id.
contest an agency’s action, a court will review the adequacy of the agency’s action based on its contemporaneous justification for its action and whatever paperwork constitutes the record for its action. Without at least a notice and comment process, however, the agency’s record for its decision is likely to be very thin, consisting of whatever written documents the agency might have gathered in the course of making the decision. In light of the deference that a court will give to the agency’s substantive decision, persons opposing the decision will have to build their case against the agency in appellate briefs without being able to point to documents in the record that bolster their arguments. Moreover, although the agency is obligated to respond to significant comments in the record, litigants cannot hold the agency accountable for its failure to take the comments into account if there is no notice and comment process. This means that judicial review may not catch significant errors made by the agency.

If there is a notice and comment process, however, a court will demand that the agency adequately justify its decision in light of the comments that it has received. This type of process gives interested parties the opportunity to contest an outcome that they oppose, and requires the agency to explain its disagreement with any relevant substantial objections that are brought to its attention. This additional scrutiny increases the agency’s accountability for back-end decisions and gives the agency an opportunity to adjust its decision in light of the information it has received. Regulators therefore have an opportunity to consider information that they may otherwise have disregarded or not understood.

2. Common Baseline

Amending the APA to include at least a notice and comment process would establish a greater degree of accountability for the back-end adjustment process. Amending the APA to establish a common baseline of procedures would also have advantages. As discussed above, the procedures currently used for back-end adjustments are haphazard. If Congress amends the APA, it can determine the minimum level of appropriate procedures. The next section considers whether notice and comment procedures are sufficient for back-end adjustments, or whether Congress should impose additional process requirements.

63. See infra notes 65-66 and accompanying text.
64. See, e.g., Rodway v. USDA, 514 F.2d 809, 817 (D.C. Cir. 1975) (holding that an agency’s justification must “explain how the agency resolved any significant problems raised by the comments”).
III. WHAT PROCEDURES?

If Congress required a notice and comment process when an agency engages in adjudication to implement back-end adjustments, this process would become the minimum procedural obligation for agencies engaged in back-end adjustments. The APA already requires agencies using rulemaking to make such adjustments using a notice and comment process. But should Congress mandate additional procedures? This section considers what type of additional procedures, if any, are appropriate for an incremental adjustment process. While no additional hearing procedures should be required, Congress should make the adjustment process more transparent.

A. Hearings

Congress could require agencies to use either a legislative-type hearing or a formal hearing, but neither seems to be necessary in this instance. As Roger Cramton noted, the potential benefits of administrative procedure—fairness and accuracy—need to be balanced against the “efficient disposition of agency business.” The cost of requiring some sort of hearing appears to be greater than the potential benefit to an agency.

1. Formal Hearings

Notice and comment rulemaking is considered to be an adequate process for the promulgation of rules because the agency’s design of the rule is normally based on scientific and policy information. Because these decisions do not involve facts that are within the knowledge of specific individuals, the extra time and expense of using trial-type procedures that are designed to facilitate the development of that type of factual information, such as testimony and cross-examination, are unnecessary. In other words, the opportunity to file written comments offers an adequate opportunity to contest scientific or policy information on which an agency may rely. At the same time, notice and comment rulemaking promotes the efficient disposition of agency business because the agency can avoid the time and expense associated with holding a formal hearing.

68. See Rossi, supra note 8, at 354 (discussing how the Florida legislature reached the same conclusion that a notice and comment procedure is sufficient for gaining public input concerning waivers).
71. Id.
As discussed in our earlier article, an agency’s decision to make a back-end incremental adjustment using adjudication likewise involves mostly scientific and policy information.\textsuperscript{72} A regulated entity, for example, may be entitled to regulatory relief if it does not create the same risk to people and the environment that a rule was designed to address,\textsuperscript{73} or if it is likely to produce an innovative abatement technology.\textsuperscript{74}

Some adjustment proceedings, however, involve adjudicative facts. For example, the agency may have to determine the degree of economic hardship to which a firm is subject if it does not obtain an adjustment.\textsuperscript{75} Nevertheless, there are three reasons why a notice and comment process is adequate to resolve adjudicatory facts in this context.\textsuperscript{76} First, the regulated entity is likely to depend on documentary evidence to establish its economic situation, and it seems unlikely that testimony and cross-examination will be necessary to assess the accuracy of this information.\textsuperscript{77} Second, the significance of the firm’s claims can be assessed by looking at information such as industry profitability data, which is publicly available.\textsuperscript{78} Finally, a firm is usually not entitled to regulatory relief under the statutes we surveyed unless it can also demonstrate that the incremental adjustment will not unduly endanger the public or the environment.\textsuperscript{79} An agency assessing whether a firm has made this showing will be analyzing scientific and policy information.

Congress has required a formal hearing in three instances in the statutes surveyed in this Article.\textsuperscript{80} It is unclear why Congress thought such additional procedures were necessary, since none of the three exceptions appear to involve adjudicatory issues to a greater extent than the other types of incremental adjustments surveyed. Congress, for example, requires formal adjudication concerning requests to the Endangered Species Committee for exemptions from the ESA’s no jeopardy provision.\textsuperscript{81} A regulated entity is entitled to an exemption if the adjudicator determines that: (1) there are no reasonable and prudent alternatives to the

\begin{itemize}
\item \textsuperscript{72} Glicksman & Shapiro, \textit{supra} note 6 (manuscript at 35-41, 45-46).
\item \textsuperscript{73} \textit{ld.} (manuscript at 8).
\item \textsuperscript{74} \textit{ld.} (manuscript at 19).
\item \textsuperscript{75} \textit{ld.} (manuscript at 12).
\item \textsuperscript{76} \textit{See} PIERCE ET AL., \textit{supra} note 69, at 267 ("Not all controversies concerning adjudicative facts require use of a judicial-type hearing.").
\item \textsuperscript{77} \textit{See} Chem. Waste Mgmt., Inc., 873 F.2d at 1482 (upholding the EPA’s determination that a judicial-type hearing was unnecessary regarding a corrective order, in part because there would be little need to establish witness credibility through demeanor evidence or cross-examination).
\item \textsuperscript{78} \textit{ld.} at 1482 (upholding the EPA’s determination that a judicial-type hearing was unnecessary regarding a corrective order, in part because evidentiary disputes could be resolved on the basis of the written evidence in the record).
\item \textsuperscript{79} Glicksman & Shapiro, \textit{supra} note 6 (manuscript at 17-19).
\item \textsuperscript{80} \textit{See} supra notes 23, 42-43, 51-52 and accompanying text.
\item \textsuperscript{81} \textit{See} supra note 42 and accompanying text.
\end{itemize}
proposed agency action; (2) the benefits of the action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and the action is in the public interest; (3) the action is of regional or national significance; and (4) neither the agency nor the exemption applicant made any irreversible or irretrievable commitments of resources to the proposed action.\textsuperscript{82} The exemption also must establish reasonable mitigation and enhancement measures that are necessary and appropriate to minimize the adverse effects of the agency action upon the listed species and its critical habitat.\textsuperscript{83} Determining whether an exemption is appropriate will turn on inquiries concerning legislative-type facts, rather than information uniquely available only from the knowledge of one or more individual.

2. Legislative-Type Hearings

Some of the back-end adjustments authorized by existing environmental statutes are issued after legislative-type hearings under certain circumstances.\textsuperscript{84} Congress could amend the APA to require a similar legislative-type hearing in order to give interested parties an additional opportunity to influence an agency. Interested groups and individuals, however, are capable of bringing the same information to an agency’s attention through written comments, as they can through testimony. This conclusion assumes that they have the resources to participate effectively in a notice and comment process. In fact, it appears that written advocacy would be more effective than having an opportunity to speak orally for a short time.

A legislative-type hearing process would allow citizens who normally would not file comments to appear before the agency and make their views known. Such a process may indicate something about the extent and intensity of public support or opposition. Moreover, if the legislative hearing is structured to permit agency officials to ask questions, they might be able to obtain useful information through follow-up questions.

These potential advantages, however, are not so impressive that Congress should mandate the use of a legislative-type hearing in every adjustment proceeding. Public testimony is unlikely to present policy information that is influential to an agency or a reviewing court. As it has sometimes done, Congress could authorize an agency to hold such a hearing in its discretion, which would allow agencies to use this process in

\textsuperscript{82} Id.


\textsuperscript{84} See supra notes 40, 50 and accompanying text.
circumstances in which the advantages of gaining additional information outweigh the costs to the agency.

B. Greater Transparency

This Article argues that a notice and comment process should be the baseline process for back-end adjustments, but notice and comment alone is not sufficient to establish agency accountability. The problem is the potential number of such proceedings and the capacity of environmental and other public interest groups to participate in them.

A notice and comment process is sufficient for both adjudication and rulemaking because an agency is looking primarily at legislative facts in deciding whether to issue a back-end adjustment, regardless of which process is used. Nevertheless, there is a significant concern about whether these processes are sufficient to promote adequate agency accountability. Whereas agencies typically have only a few notice and comment proceedings in a year to adopt new rules at the front-end of the process, they are likely to have considerably more adjustment proceedings during a similar time frame. In light of their limited resources, environmental and other citizens groups may find it more difficult to participate fully in adjustment proceedings than to participate in the development of new rules at the front-end of the process. By comparison, regulated entities will be participants in every such process because they will have requested the change.

Whereas rulemaking proceedings occur in Washington, D.C., where most national environmental and other citizen organizations are located, adjustment proceedings also occur in regional offices far from Washington. In light of the limited resources of environmental and other public interest groups, those groups may not be able to participate in dozens of back-end proceedings involving requests for regulatory adjustments. Moreover, although regional or local groups may be in a better position to participate in adjudications in a regional office, some of these groups lack the scientific and technical resources to participate effectively in adjustment proceedings to the extent that such decisions turn on this information. Indeed, even the national organizations may not be able to afford to

85. Shapiro & Glicksman, supra note 2, at 173 (noting that back-end adjustments may dilute the resources of public interest groups, thereby reducing their ability to affect public policy).

marshal the scientific and technical resources to participate in dozens of adjustment proceedings.

There are two potential solutions to address this problem: (1) Congress should require agencies to establish electronic dockets for back-end adjustments, and (2) Congress should require agencies to report annually on the adjustment process.

1. Electronic Docket

If Congress amended the APA to require a notice and comment process for back-end adjustments, agencies would be required to notify the public in the Federal Register that they have received a request for a back-end adjustment. An agency, however, is not legally obligated to make the comments that are filed and other relevant documents available to the public on its web site. As a result, someone who seeks these documents would have to show up at an agency’s document room, either in Washington or a regional office, as appropriate, or the person would have to locate and communicate with the appropriate agency employee to request that the documents be sent to him or her. This makes it quite difficult for interested persons to monitor the agency’s decisionmaking process, and thereby limits the agency’s accountability.

The Freedom of Information Act (FOIA) requires agencies to make public any information that an individual requests that is maintained in the agency’s records, except to the extent that the records fall within one of the exceptions from disclosure that Congress established. The information relevant to an adjustment proceeding is therefore available to the public upon request, except for documents that might qualify for protection as trade secrets and confidential commercial information.

Moreover, the FOIA requires agencies to make available some agency records in a public reading room, and to make the same information available on a website. Under the FOIA, an agency has an affirmative obligation to make available to the public in a reading room “final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases” and any other information that “the agency determines [has] become or [is] likely to become the subject of subsequent requests.” The Electronic Freedom of Information Act Amendments of 1996 mandate that each agency establish a web site for

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88. Id. § 552(a)(3)(A).
89. Id. § 552(b); see also PIERCE ET AL., supra note 69, at § 8.3.3 (describing the exemptions from disclosure).
91. Id. § 552(a)(2)(A) (2000).
92. Id. § 552(a)(2)(D).
information that the FOIA requires the agency to make available in a reading room.\textsuperscript{93}

This requirement, however, does not go far enough. As just noted, an agency does not have any legal obligation to establish a web site for comments filed in adjustment proceedings unless they “have become or are likely to become the subject of subsequent requests.”\textsuperscript{94} Since it seems highly unlikely that public interest groups will file enough FOIA requests for comments and other documents pertinent to adjustments that the information will fall within this requirement, an agency would have no legal obligation to make the comments and documents available on its web site.

The American Bar Association (ABA) has noted the benefits of electronic dockets.\textsuperscript{95} Regarding rulemaking, the ABA recommends that agencies provide “a means for interested persons to enroll for electronic notification of further developments in a matter,” post “notices of proposed rulemaking on the agency’s own site, and provid[e] opportunities for electronic comment there,” and post “required analyses, public comments, and other constituent elements of a rulemaking docket on the agency’s web site as far as practicable in readily searchable form.”\textsuperscript{96} Obviously, the same disclosures would be useful to the public in terms of monitoring the notice and comments procedures used in informal adjudications by agencies that determine adjustment requests.

However, Congress should go further and require such an electronic docket. An electronic reading room for adjustment applications is necessary to lower the cost of participation for interested persons and groups, and thereby promote the accountability of the process. Under the ABA proposal, a party can sign up for electronic notice that an application has been made and monitor whether anyone has filed comments in favor of or in opposition to an application. If groups have an easier way to monitor the process, they should be in a better position to determine which applications pose a threat to people and the environment and file comments in those proceedings.

An electronic reading room is also necessary to empower interested persons to monitor and assess whether an agency has granted an excessive number of applications or failed to take into account the cumulative impact of the applications that it has granted. If this information is posted on the

\textsuperscript{94} See supra note 92 and accompanying text.
\textsuperscript{96} Id.
web, interested persons or groups can monitor on a real-time or historical basis, how the agency is implementing its back-end adjustments. Nevertheless, because of the potential volume of adjustment proceedings, Congress should also require agencies to publish an annual report, which would make monitoring these potential problems easier.

2. Annual Reports

In addition to requiring an electronic reading room, Congress should require an agency to publish a yearly report on its web site describing its adjustment record and activities. The report should include statistics on the number of adjustment requests that the agency received and the disposition of those requests, both in total and in relationship to the statutory provisions that authorize adjustments. This information should be organized by geographical area, to permit readers to determine the number and type of adjustments made under different statutory provisions in the same location. Finally, the report should state the basis of the adjustment and describe how the adjustment process has served the statutory goals of the statutes under which adjustments have been granted.

Such a report could alert the public that an agency has granted an excessive number of adjustments or failed to consider the cumulative impact of its adjustments. If it appears that an agency has granted so many adjustments that the integrity of a regulation is threatened, readers could investigate further by looking at individual proceedings in the electronic docket. Similarly, the report should make it easier to identify whether an agency has taken into account the cumulative impact of the adjustments it has granted. If the agency has granted significant adjustments in one geographical area, readers could go to the electronic reading room to see if the agency has taken the cumulative impact of its adjustments into account when granting the adjustments.

Armed with this information, environmental and other interest groups could focus their efforts on those agencies and adjustment proceedings in which it appeared that an agency was acting inappropriately. In this manner, the groups would have a better chance of heading off misuse of the adjustment process. The same groups could call the attention of their political allies in Congress to misuse of the adjustment process, which may result in political pressure being brought to bear on the agency. Similarly, they could call the attention of the media to the misuse of the adjustment process by an agency, which may result in adverse publicity for the agency.

97. See Rossi, supra note 8, at 355 (stating that the state of Florida requires such a report for waivers).
3. **Summary**

These additional protections would not prevent all misuse of the adjustment process. Environmental and citizen groups will still be hamstrung in participating in back-end proceedings by a lack of resources despite an opportunity to prioritize the proceedings in which they would like to intervene. Newspaper or television reporters are often uninterested in complicated stories about a complex administrative process. These days, the political allies of environmental and other public interest groups may lack the clout to rein in misguided or captured agencies.

No administrative process will prevent all malfeasance by the government. Nevertheless, the greater degree of transparency that we propose will expose agencies to significant public monitoring of their actions, and the amount of oversight and concern will increase if agencies adopt the back-end adjustment process as an important method of adjusting regulatory policy.

**CONCLUSION**

The significant problems that arise from the efforts to rationalize regulation prior to its adoption can be mitigated by making incremental adjustments in regulations after they are promulgated. Such a back-end process would use exceptions, time extensions, variances, and waivers to adjust regulations in light of their actual impact, as opposed to the considerable guess work that is involved in rationalizing regulations at the front-end of the process.

While greater reliance on back-end adjustments can lead to better regulatory results, the back-end process can also be misused and abused by agencies to grant regulatory relief to undeserving regulated entities. Thus, it is crucial that agencies be accountable for their behavior in the adjustment process. Nevertheless, Congress has made widely varying decisions as to what procedures should be used for back-end incremental adjustments, including requiring no procedures at all.

The best solution to this procedural disarray is for Congress to amend the APA to establish baseline procedures. At a minimum, all agencies should be required to use the same notice and comment procedures that the APA mandates for rulemaking when they adjudicate whether to grant a back-end adjustment. In light of the nature of the issues involved, a notice and comment process gives interested parties an opportunity to influence the result without involving an agency in more cumbersome and time-consuming procedures that are unlikely to improve the agency’s decisionmaking ability. Since, however, a notice and comment process may not be adequate to assure accountability, Congress should take two additional steps. It should require agencies: (1) to establish an electronic
docket to make all relevant documents relevant to the adjustment process available on their web sites, and (2) to issue an annual report providing sufficient details about the process, thus enabling interested parties to monitor how the adjustment process is being used.
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HeinOnline -- 56 Admin. L. Rev. 1178 2004