

## Section 507(d) Legal Issues Memo ( e-mail exchange)

Greg and Michael:

Sorry for the delay in responding. I don't know anything about this issue with regard to the states. With respect to the feds, I had this to say a few years ago in an article published in the *Pace Environmental Law Review*:

### E. Is There an Exhaustion Requirement as a Precondition to Judicial Review of Rulemaking?

Traditionally, courts have not imposed an exhaustion requirement on actions for judicial review of notice-and-comment rulemaking. This may have been because such rulemakings do not have "parties," and the notion of requiring exhaustion was usually to assure that parties to a proceeding utilized the procedures available to them. Nevertheless, some statutes administered by independent regulatory agencies have required a form of exhaustion with respect to rules adopted under those statutes. For example, Section 405(a) of the Communications Act of 1934 [\[FN106\]](#) provides: "The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any [FCC decision] except where the party seeking such review . . . relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass." This "issue presentation" requirement, rather than a traditional exhaustion requirement, does not require a party who was subject to an agency proceeding to appeal that proceeding so the agency can reconsider a decision it had already made. Rather, it assures that whoever brings a judicial challenge on a question of fact or law, new to the Commission, must first present it to the Commission. As a specific statutory requirement, it is fairly easy to apply, although it has been interpreted to be subject to equitable exceptions. [\[FN107\]](#) Unfortunately, some courts have ignored the specific statutory origin for this requirement and have applied a similar exhaustion requirement in cases totally unrelated to that statute, while citing cases involving application of that statute. For example, in *National Ass'n of Manufacturers v. Department of the Interior*, [\[FN108\]](#) the D.C. Circuit foreclosed challengers from arguing that the U.S. Department of the Interior's Natural Resources Damage Assessment regulations were arbitrary and capricious because challengers had not raised that argument in the rulemaking proceeding. [\[FN109\]](#) The court cited two Communications Act of 1934 cases under Section 405(a) and a Supreme Court case involving an adjudication for the proposition that

"[o]ur cases . . . require complainants, before coming to court, to give the [agency] a fair opportunity to pass on a legal or factual argument." \*18 [FN110] Other courts have seen the fallacy in this argument. For example, in American Forest and Paper Ass'n v. United States Environmental Protection Agency, [FN111] the court rejected a similar claim by EPA that persons were required to raise issues during the notice and comment proceeding, saying:

[W]e have never held that failure to raise an objection during the public notice and comment period estops a petitioner from raising it on appeal. EPA presented the same argument to us long ago, but we rejected it, observing that "EPA has cited no authority for the proposition that an argument not raised during the comment period may not be raised on review. [FN112]

Again, the courts are hopelessly confused on the subject. None of these cases discuss Darby or Section 704 of the APA. Section 704's requirements by their terms apply equally to judicial review of rulemaking and adjudication. The term used in Section 704 is "agency action," which is defined to include both. [FN113] If one applies Section 704 faithfully with the Supreme Court's guidance in Darby, there could be no exhaustion required as a precondition of judicial review of rulemaking unless either a statute requires it (as in Section 405(a) of the Communications Act of 1934) or an agency has required it by rule and provided that the rule would be inoperative pending its reconsideration - a situation not present in National Ass'n of Manufacturers v. Department of the Interior. [FN114]

Bill Funk

**From:** Asimow, Michael [mailto:asimow@law.ucla.edu]

**Sent:** Tuesday, April 03, 2007 11:33 AM

**To:** Ogden, Gregory

**Cc:** funk@lclark.edu

**Subject:** RE: Section 507(d) issue exhaustion in rulemaking

[the comment would probably be sufficient](#)

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**From:** Ogden, Gregory [mailto:Gregory.Ogden@pepperdine.edu]

**Sent:** Tuesday, April 03, 2007 11:17 AM

**To:** Asimow, Michael

**Cc:** funk@lclark.edu

**Subject:** RE: Section 507(d) issue exhaustion in rulemaking

Mike, thanks very much for your comment. Bill, thanks for any help that you can provide. Mike, I agree with you about the respondents ability to challenge the validity of the rule in an enforcement action even though he or she did not participate in N & C Procedure. Section 507(c) speaks to that issue.

Section 507 (c) A petitioner for judicial review of a rule need not have participated in the rulemaking proceeding upon which that rule is based.

I do not think that the Section 507(d) requirement should preclude a respondent in an enforcement action from being able to raise a new issue in an enforcement proceeding that was not raised in the N & C proceeding. I do not think the the respondent should have to petition the agency to raise this new issue when it is probably just as easy (and surely less cumbersome) for the issue to be adjudicated in the enforcement action. There may be a way to indicate this either in the text of Section 507(d), or in the comments.

Thanks for pointing this out. Greg

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**From:** Asimow, Michael [mailto:asimow@law.ucla.edu]

**Sent:** Tuesday, April 03, 2007 11:04 AM

**To:** Ogden, Gregory

**Cc:** funk@lclark.edu

**Subject:** RE: Section 507(d) issue exhaustion in rulemaking

Hi Greg,

Off hand, I don't know of any authority. As I recall, this was a creative compromise reached within the committee to allow people who weren't parties to the notice and comment procedure to seek JR of a rule; but if they raise a new issue, they have to give the agency notice of the issue by filing a petition for rulemaking. I am forwarding this to Bill Funk who I know has done a lot of work on the issue of exhaustion of remedies in RM and who can tell us whether there is any authority on how to deal with the problem of a new issue being raised by someone who wasn't a party to the original RM.

Incidentally, here's something else that troubles me: what if the issue about validity of a rule comes up in an agency enforcement action against a private party (as opposed to being raised in a petition for JR of a rule). Can the respondent in the enforcement action challenge the rule if he didn't participate in N&C procedure? I assume the answer is yes. However, if he

wants to raise a new issue that wasn't raised during N&C, does he also have to first petition the agency?

Bill, here is the material that Greg is asking about:  
Section 507(d) issue exhaustion in rulemaking

(d) If the issue that a petitioner for judicial review of a rule under this section was not raised and considered in a rulemaking proceeding, before bringing a petition for judicial review, the petitioner must petition the agency to initiate rulemaking under Section 317 to take action to resolve or cure the issue or issues that the petitioner is challenging; and in the petition for judicial review the petitioner must disclose the petition for rulemaking and the agency action on that petition to the court.

### Comment

This section creates a default requirement of exhaustion, which is generally followed in the states. However, the section creates several exceptions to the default rule. Subsection (b) requires issue exhaustion in appeals from rulemaking for persons who did not participate in the challenged rulemaking. It excuses persons seeking judicial review of a rule who were not parties before the agency from the exhaustion requirement; but, if the issue that they seek to raise was not raised and considered in the

rulemaking proceeding that they challenge, then they must first petition the agency to conduct another rulemaking to consider the issue. If the agency refuses to do so or if the agency conducts a second rulemaking that is adverse to the petitioner on the issue or issues raised in his petition for rulemaking, then the petitioner may seek judicial review.

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**From:** Ogden, Gregory [mailto:Gregory.Ogden@pepperdine.edu]

**Sent:** Tuesday, April 03, 2007 9:58 AM

**To:** Asimow, Michael

**Subject:** Section 507(d) issue exhaustion in rulemaking

Hi Mike, we are going to be discussing the issue exhaustion in rulemaking requirement from Section 507(d) in the draft of the Revised MSAPA at the April 2007 meeting. I did some research on this, but was not able to find a lot of authority for this requirement. Some members of the committee raised questions about this subsection at the November meeting. If it is not too much trouble, can you give me some references supporting this requirement, as I think that it makes sense from an administrative law standpoint. Those could be statutes, cases, law review articles, or other academic studies. If you do not have time for this, could you just point me in the right direction, and I will have my research assistant track things down. thanks, Greg

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