10-1-1989

The 1988 Washington Administrative Procedure Act—An Introduction

William R. Andersen
University of Washington School of Law

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr
Part of the Administrative Law Commons

Recommended Citation
Available at: https://digitalcommons.law.uw.edu/wlr/vol64/iss4/3

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
THE 1988 WASHINGTON ADMINISTRATIVE PROCEDURE ACT—AN INTRODUCTION

William R. Andersen*

Abstract: The Washington Legislature passed a new Administrative Procedure Act ("APA") in the spring of 1988, effective July 1, 1989. The Article guides the reader through the new APA, discusses its connection to general principles of administrative law and the policies underlying the Act, describes its organization, suggests solutions to interpretative problems, and recommends methods for evaluating future proposed amendments to the Act.

I. INTRODUCTION

Thirty years have passed since Washington first adopted an administrative procedure act.¹ In that period of time, a number of basic changes have occurred in the nature and magnitude of state government. In the 1960's, state governments had a limited role in such matters as environmental protection, energy conservation, and safety in the workplace. Today, most states have separate state agencies for such functions. A substantial growth in public welfare programs also has occurred since the early 1960's, requiring large state agencies with staggering caseloads and putting obvious stress on a procedural system designed for another age.

In addition, our knowledge of the process has grown. There has been an outpouring of scholarly literature. There have been new political perspectives on the role of government generally and on administrative regulation specifically. There have been important changes in judicial perceptions about the administrative process and substantial experimentation in various state legislatures.²

* Professor of Law, University of Washington. Professor Andersen was a member of the Washington Bar Association Task Force which proposed the new Administrative Procedure Act to the state legislature. The views expressed in the Article are the views of the author and are not intended to represent the views of the bar association, the Task Force or the University of Washington.

1. 1959 Washington Laws chap. 234 (codified at WASH. REV. CODE §§ 34.04.010-.950 (1987)).

In the late 1970's, in response to forces such as these, two interrelated developments began. First, the National Conference of Commissioners on Uniform State Laws began a study of a new Model Administrative Procedure Act to replace the 1961 model widely adopted in the United States. Second, a task force of the Washington State Bar Association began a similar study of the Washington Administrative Procedure Act ("APA"). When the new Model Act was published in 1981, the Washington Task Force adopted it as a check list of relevant issues and began a systematic comparison of the Model Act with the existing Washington act. The task was to see, in the case of each subject treated, whether the Model Act, the existing act, or some new provision best met the needs for a modern APA for Washington.

The Task Force itself was small, was composed of essentially the same members throughout its ten-year life, and was intentionally diverse. The underlying policies the Task Force sought to incorporate in the new Act included such goals as increasing agency accountability, improving agency responsiveness, building flexibility, separating inconsistent functions, protecting agency discretion, improving the process of judicial review, and broadening the Act's coverage.

More broadly, it is recognized that administrative procedure acts function as a form of "constitution" for the states' agencies, mandating techniques through which the executive, legislative and judicial branches of government exercise their necessary control over agency discretion. The kind of general and durable constraints imposed on the agencies by these "constitutions" include such things as requirements that agencies hear appropriately from persons affected by agency action, that agencies consider adequately what they hear, and that agencies explain carefully the rationale for their actions. Such requirements not only help confine agency discretion directly, but they also furnish the processes of executive, legislative and judicial review of agency action.

3. MODEL STATE ADMIN. PROCEDURE ACT (Uniform Law Commissioners 1981) [hereinafter MODEL ACT].
5. The Task Force was composed of a practitioner representing business clients (who served as Chair), a practitioner representing low income clients, a lawyer representing a large state agency, an academic, and a lay person broadly experienced in government matters.
7. See generally Arnold, Political Control of Administrative Officials, 3 J. LAW., ECON., & ORG. 279 (1987).
As the beginnings of a new act started to take shape, drafts were circulated among the state's agencies. Extensive reports were received and lively discussions ensued. In the fourth year of this dialogue, a bill was ready for introduction into the state legislature. The legislative process—including hearings, staff meetings, conferences, work sessions, bargaining discussions, and seemingly endless redrafting—occupied three more years. The bill enacted in the spring of 1988 was the result.\footnote{1988 Wash. Laws chap. 288. A technical "clean up" bill was enacted in 1989. \textit{See} Engrossed H.B. 1358, 51st Sess. (1989).} It created a new administrative procedure act, wholly replacing the old act. The new Act will appear in Title 34 of the Code as Chapter 34.05.\footnote{\textit{WASH. REV. CODE} §§ 34.05.001--902 (Supp. 1988).} Its effective date was July 1, 1989.

This Article is not intended as a comprehensive and detailed description of the new Act. Nor is it intended as an authoritative legislative history. Neither of those functions could be performed in the pages available here. Instead, the Article is a guide and a supplement, intended to be helpful to the user of the new Act who seeks to understand its basic organization and pattern, its connection to some of the general principles of administrative law, and some of the underlying policies which the Act seeks to further.

II. DEFINITIONS

The definitional sections of a complex act of this sort are important because these sections determine much of the effect of later provisions.

The Act begins with several important rules of construction.\footnote{\textit{Id.} § 34.05.001.} First, the Act should be interpreted to achieve consistency with other states, with interpretations of the federal administrative procedure act, and with interpretations of model acts. This potentially far-reaching construction rule makes pertinent in Washington all federal decisions interpreting similar provisions of the federal APA and all decisions of other state courts interpreting their acts, including those that adopt provisions patterned on the Model Act.

Second, the Act should be interpreted to provide greater public and legislative access to administrative decision making. As discussed below, enlarging access to administrative materials was one of the principal objectives of the new Act, and the interpretation of a number of the Act's provisions will be influenced by this rule of construction.

Third, where possible the Act should be interpreted to achieve consistency with existing Washington administrative practices and
existing judicial interpretations. Existing Washington case law thus retains its relevance unless the new Act "clearly requires otherwise."

Fourth, the Act is not affected by subsequent legislation governing administrative procedure unless the later legislation expressly states that the Act is affected. ¹¹

The following remarks do not touch all the definitions in the Act, but only those where significant change was made, or those which are central to understanding the basic statutory plan. Treated here are the definitions of agency, agency action, interpretive and policy statements, rules, and adjudicative proceedings.

A. What Is an Agency?

1. Generally

One of the operating assumptions of a general administrative procedure act is that it should apply as broadly as possible. The values sought in such an act—simplicity, clarity, and consistency—are fostered when more rather than fewer of the state's administrative units are brought within one act.

On the other hand, there is a natural desire of many agencies to be separated out from the general lot, and to be treated specially. ¹² Agencies point to their special mission, the special values they are charged with furthering, the special constituencies they must respond to, the special technical expertise they are expected to have, the special nature of their regulatory context—all as grounds for separate treatment.

But the plain truth is that so far as rulemaking and adjudication procedures go, agency functions have much in common. To the extent those common characteristics can be sensibly captured in widely applicable statutory provisions, the system as a whole takes on a clarity, a consistency and a simplicity it could not otherwise have.

---

¹¹. Id. § 34.05.020.

¹². This phenomenon is not peculiar to Washington. As David Frohnmayer, a former Oregon state legislator and state attorney general once put it:

[a] principal objective of advocates of state administrative procedure acts is to bring uniformity to agency procedures. A principal reaction of state agencies usually is to resist that drive for uniformity. Consequently, the number of exemptions to any such act is an index of the persuasiveness of agencies' asserted needs for unique procedures, of the personal experience of legislators with particular agencies, of the political clout of agencies and their client groups, or of all three.

Differences cannot, of course, be ignored. But differences should be treated surgically—with special provisions varying the effect of the relevant provisions of the Act—not with wholesale exemption of the entire agency. And the experience nationally seems to have been that the complete exemption of an agency leads only to a rush of claims for exemption by other agencies.\textsuperscript{13} In general, the legislature followed this surgical approach, giving the term “agency” a very wide definition, but providing variations for particular functions of particular agencies when the need for different treatment was demonstrated.

This also would appear the better strategy for the future as new agencies are created, new powers are conferred, or existing agencies seek exemption. Where the need for different treatment is demonstrated objectively, the legislative response should be precisely drafted, neutrally described exemptions which apply to any agency facing similar circumstances.

2. The Definition of an Agency

Section 34.05.010’s definition of agency is taken largely from the old act and extends the provisions of the statute to all state boards, commissions, departments, or officers authorized by law to make rules or adjudicate cases. There are several matters worthy of note.

First, the limitation to agencies that make rules or decide adjudications is of uncertain reach. The Task Force proposed broader language, based on the Model Act, which sought to cover agencies which affected citizens through other types of action, such as investigation, informal action, and negotiation. Moreover, the Task Force proposal would have permitted judicial review of ultra vires rulemaking or adjudication by agencies not authorized to engage in such action. But representatives of the Attorney General urged the narrower language which appears in the Act. The importance of this limitation remains to be seen. If there are agencies not covered by the language which in fact do take action affecting the rights of citizens in ways that could sensibly be regulated by the Act, the legislature should broaden the definition of agency to cover them.

\textsuperscript{13} A. Bonfield, State Administrative Rulemaking § 2.2.2 (1986) [hereinafter A. Bonfield, SAR].
The new Act continues the exclusion for state legislative and judicial bodies, with the exclusion extending to units or officers in the "legislative or judicial branches." The Model Act contained a much more limited exclusion, excluding only "the legislature" and "the courts." 14

Second, the section contains a new exclusion for "the governor, or the attorney general except to the extent otherwise required by law." Note this does not exclude the office of the governor or the office of the attorney general as some state statutes do. 15 Exclusion of the governor may be justified on constitutional grounds or because the governor is directly elected and there may be less need for judicially-enforced accountability to the legislature. 16 The exclusion of the attorney general is not as easy to justify. Although that official also is directly elected in this state, it is doubtful that his or her work is sufficiently known to voters to produce an electoral accountability similar to the governor's.

The clause which says the governor and the attorney general are excluded "except to the extent otherwise required by law" is thus a signal to the legislature. When the legislature confers powers on those officials to take action affecting individuals, the legislature should consider the utility of making those actions subject to the new Act. To repeat, the underlying principles of the new Act, clarity, consistency, and simplicity, argue for the widest applicability of the Act and the smallest number of special exceptions.

A third major change in the new definition of agency is the re-inclusion of institutions of higher education. Those institutions were included in the original act, 17 but in 1972 were excluded from the operation of the act and put instead under a new higher education administrative procedure act. 18 There is scant legislative history for the 1972 change, so it was not clear what—beyond agency preference—justified the 1972 exclusion. After extended inquiry into the matter, the legislature put those institutions back into the general Act, making special provisions in several places to reflect demonstrated differences in the situation of these institutions. 19

14. MODEL ACT, supra note 3, § 1-102(1). The Model Act also contained a general presumption in favor of broad coverage. Id. § 1-301(a). See A. BONFIELD, SAR, supra note 13, § 2.2.2.
16. See the discussion in A. BONFIELD, SAR, supra note 13, § 2.2.2(c).
19. E.g., the definition of rule excepts certain academic rulemaking, WASH. REV. CODE § 34.05.010(15)(iv) (Supp. 1988), and adjudications in academic cases do not have all the formal protections of other adjudications. Id. § 34.05.425(2).
Fourth, section 34.05.030 exempts the state militia from the Act, as well as the Board of Clemency and Pardons. The Department of Corrections and the Intermediate Sentencing Review Board are exempted with respect to persons over whom they have custody or jurisdiction. Finally, there are some agency functions that are excluded from some parts of the Act such as certain proceedings of the Board of Industrial Appeals, Driver Licensing Proceedings, certain Department of Labor and Industries matters, and informal proceedings conducted by the Board of Tax Appeals.\textsuperscript{20}

Where there is doubt about whether a given organization is covered by the Act, structural solutions may sometimes be apt. For example, if the organization in question is structurally a county organization, the Act—which states that it applies only to state organizations—should apply.\textsuperscript{21} But modern government is too complex to guarantee simple structural categories. When one begins to examine community college districts, transit authorities, boundary review boards, etc., it becomes clear that state authority, state money, and state appointment of officials may be involved in governmental institutions that at first glance seem local.\textsuperscript{22} In such cases, functional rather than structural solutions should be preferred. Washington courts—after informing themselves through the construction rules cited above—should ask whether the function being performed by the organization is of statewide import, not whether the acting officials happen to be employed by the state.\textsuperscript{23} Or—assuming again there is no other guidance on the matter—the court should ask whether inclusion of an organization within the terms of the Act would provide sensible procedures for that organization, not whether the organization is in some metaphysical sense a “state agency.”\textsuperscript{24}

\textsuperscript{20} Id. § 34.05.030.
\textsuperscript{21} Thus, a county board of zoning appeals was held not subject to the old act in Andrew v. King County, 21 Wash. App. 566, 573, 586 P.2d 509, 514 (1978) and a city housing authority was held not subject to the act in Riggins v. Hous. Auth., 87 Wash. App. 97, 102, 549 P.2d 480, 483 (1976).
\textsuperscript{22} See Frohnmeyer, supra note 12, at 423.
\textsuperscript{23} State v. Board of Valuation, 72 Wash. 2d 66, 70, 431 P.2d 715, 718 (1967).
\textsuperscript{24} An example of the formal as distinguished from the functional approach is the court’s opinion in Plumbers and Steamfitters Union Local 598 v. Washington Pub. Power Supply Sys., 44 Wash. App. 906, 910, 724 P.2d 1030, 1033 (1986), cert. denied, 482 U.S. 905 (1987) which held that the Washington Public Power Supply System was merely a “local agency” and hence not subject to the APA.
B. What Is Agency Action?

Agency action is itself separately defined in the new Act. The definition includes agency conduct implementing or enforcing statutes, adopting or applying rules or orders, licensing, imposing sanctions or the granting or withholding of benefits.

The Task Force proposal followed the federal act and the Model Act in including "inaction" within the definition of agency action. It is obvious that in some circumstances inaction can be a powerful form of agency behavior and as such should be as subject to judicial review as conventionally described action. Agencies expressed concerns that including inaction in the definition of agency action could open the door to too-frequent judicial review. The legislature's response was essentially to relocate the concept. Thus, inaction does not appear as part of the definition of agency action, but inaction remains subject to judicial review under section 579(4)(b), and inaction in rulemaking is specifically subjected to legislative scrutiny by sections 630 and 640.

There are a number of specific exclusions from the definition of agency action, each removing specific functions of particular agencies from the operation of some parts of the Act. Thus, agency action does not include certain procurement functions, certain labor dispute determinations, and certain activities in connection with the management of public lands. Given the values of comprehensive coverage of a general act such as this, the justification for all exclusions should be demonstrated objectively. If any of the excluded functions begin to impact citizens in ways that would be subject to the Act but for the exemption, the Act should be amended and the exclusion eliminated.

C. Interpretive and Policy Statements

Included in the definition section are two new devices—interpretive and policy statements. Interpretive statements are agency statements about the meaning of an agency statute, regulation, judicial decision, or other provision of law. Policy statements are agency descriptions of its current approach to implementing provisions of law. As discussed below, these tools are part of the Act’s general effort to

25. WASH. REV. CODE § 34.05.010(3) (Supp. 1988).
26. 5 U.S.C. § 551(13) (1976). MODEL ACT, supra note 3, § 1-102(2)(ii) defines agency action to include "an agency’s . . . failure to perform, any other duty, function, or activity, discretionary or otherwise."
27. WASH. REV. CODE § 34.05.570(4)(b) (Supp. 1988).
28. Id. § 34.05.010(8).
29. Id. § 34.05.010(14).
30. See infra notes 65–94 and accompanying text (discussion of "required rulemaking").
encourage and empower agencies to give the public reliable advice about the likely course of agency action.

D. The Definition of Adjudicative Proceeding

American administrative procedure acts commonly provide separate procedures for rulemaking and adjudication. Efforts to define and distinguish these two kinds of action have not led to full agreement, but the notion that the terms describe basically different processes is widely accepted.

The new Act continues the practice of the old act in using this distinction. The definitions of rulemaking and adjudication are thus crucial in determining which procedures are applicable.

To oversimplify the distinction, rulemaking is the making of policy. It affects people only as members of a class and is typically based on broad policy objectives, not individual grounds. It resembles what a legislature does. An agency determination that licensees must be 21 years of age is rulemaking. Adjudication is the applying of policy. It affects individuals on individual grounds and usually is based on specific facts concerning the affected individual. It resembles what a court does. An agency determination that John Smith is not 21 years old and therefore is not entitled to a license is an adjudication.

The new definition of “adjudicative proceeding” is similar to the old act’s definition of “contested case.” It includes agency proceedings which determine legal rights, duties, or privileges of specific persons and in which another statute or the constitution requires a hearing. Also included are certain ratemaking and licensing proceedings. Thus, the new Act continues the practice of the old in not itself requiring hearings except in the listed ratemaking and licensing proceedings. Beyond those proceedings, whether a hearing is required will be determined either by the legislature in authorizing the action in the first instance, or by a court in ruling that a hearing is required by the constitution.

33. Part IV of the Act prescribes the necessary procedures for adjudication, Wash. Rev. Code §§ 34.05.410–494 (Supp. 1988), while Part III details the procedures required for rulemaking, id. §§ 34.05.310–395.
34. K. Davis, supra note 32, § 7.1.
35. Id. § 7.2; B. Schwartz, supra note 31, § 4.2.
E. Definition of Rule

The new definition of rule comes largely from the old act. The intent seemed to be to retain as much of the old language as possible. There was little legislative or staff discussion of the somewhat different definition of rule included in the Model Act or of the ambiguities that language was intended to clarify.

Both the old and the new Act include within the definition of a rule "any agency order, directive, or regulation of general applicability," while the Model Act includes any agency statement of general applicability. The Model Act language was chosen to ensure that all agency actions with rulemaking effect were characterized as rules. The language was chosen with the recognition that agencies obtain rulemaking effects through a variety of documents which may be called bulletins, announcements, guides, and manuals.

Since the Washington Act goes beyond orders and regulations of general applicability and includes "directives," presumably referring to anything which is directive in nature, whether labeled a bulletin, an announcement, or a manual, the new Act can be read as broadly in its rulemaking definition as the Model Act.

The key to the definition is the requirement in all these acts that rules are matters of general applicability. As indicated above, it is in the nature of a rule that it apply to individuals only as members of a class. Thus, to take an example from higher education, a university's general criteria for the award of scholarships would be included within the definition of a rule, but individualized determinations—for example, the award of particular academic scholarships—would not be rules.

The inclusion of a matter within the definition of rule, of course, does not significantly reduce the agency's power to set policy (to decide, for example, on appropriate scholarship criteria). As will appear below, including an agency process within the definition of rule

38. WASH. REV. CODE § 34.05.010(15) (Supp. 1988).
39. MODEL ACT, supra note 3, § 1-102(10).
40. Id., comments to § 1-102.
41. A. Bonfield, SAR, supra note 13, § 3.3.1; 1 F. Cooper, STATE ADMINISTRATIVE LAW 108 (1965); Auerbach, Administrative Rulemaking in Minnesota, 63 MINN. L. REV. 151, 156 (1979).
42. The same language appears in the old act. See WASH. REV. CODE § 34.04.010(2) (1987).
43. The size of the class usually is not relevant. See Anaconda v. Ruckelshaus, 482 F.2d 1301, 1306 (10th Cir. 1973) (rule applying to class with single member is still a rule; adjudicatory procedures not required).
requires only that the public be allowed to express its opinion on proposed rules before the agency makes its determination.

The definition enumerates the variety of matters of general applicability in which an agency is required to follow rulemaking procedures. Those include agency actions which alter hearing procedures, qualifications for the receipt of benefits, criteria for professional and occupational licensing, or standards for products or materials. Also included are agency actions when a violation of an action subjects a person to penalties or administrative sanctions.

Certain actions which would ordinarily come within these definitions are expressly excluded from the definition of a rule and thus from the requirement that rulemaking procedures be followed. These actions include matters of internal agency management which do not affect the public, interpretive and policy statements as provided for in section 34.05.230, certain traffic regulations, and a cluster of rules made by institutions of higher education concerning academic matters.44

Inevitably, there will be ambiguities concerning the application of this definition. When there is uncertainty about whether an agency action is a rule, the uncertainty again should be resolved on functional grounds, with basic reference to the legislative purpose. The purpose of rulemaking procedures is to ensure that members of the public can participate meaningfully in the development of agency policy that affects them. When the questioned agency action will affect the public in a general way and where notice to and comment by the affected public seems useful, the action should be regarded as a rule.45

44. In this list are some rules concerning truly internal academic matters such as academic credit, and requirements for degrees as well as some rules which have significant impact both inside and outside the institutions, such as admissions standards. In a better act, the latter would have been included in the definition of rule and not excepted, but the legislature was persuaded by the institutions of higher education that such things as admissions standards have primarily internal impact. The external impacts of admissions standards are significant, however, especially in a state institution where the cost of education is substantially subsidized. In that setting, admissions decisions are decisions about which citizens are going to get these subsidies and which are not. Rules governing such decisions should probably not be insulated from public comment.

As the main text points out, including admissions standards within the definition of rule does not cede admissions authority to the outside public. That authority would be retained by the university. The effect of the definition is merely to permit those affected by admissions standards to be heard before the university makes its determination. This is a goal of all rulemaking and is hardly an onerous burden for the institution involved.

45. A. BONFIELD, SAR, supra note 13, § 3.3.2(d).
F. Miscellaneous Definitions

While uniformity sometimes is an important goal, there are settings in which differing agency situations make non-uniformity a more sensible approach. In such cases, variations should be encouraged, and the new Act often permits agencies to tailor the requirements of the Act to fit their own situations. When this happens, the goal of clarity is protected by a requirement that agency variations be made by rule. This kind of flexibility is expressed in many ways. For example, most of the time limits set out in the Act may be modified by agency action. Thus, an agency can frame time limits to fit its situation so long as the variation is done by rule, and where no prejudice to parties is involved.46

The Act also provides for conversion of a proceeding from one form to another when, during a rulemaking or adjudication, an alternative form of proceeding seems more appropriate.47

Finally, informal procedures are “strongly encouraged.”48 It was the hope of the Task Force and the drafters of the Model Act49 that informality be used wherever possible. Agencies should not be forced into more elaborate, time consuming, and expensive procedures than make sense in the situation. Hence, agencies are encouraged to shorten or modify procedures where possible. Moreover, parties are given explicit power to waive procedural entitlements, meaning that increased informality can be obtained with the consent of those affected.50

III. ACCESS TO AGENCY RECORDS

The new Act retains the requirement that agency rules be published and indexed51 and that orders in adjudications, as well as interpretive and policy statements, be available for public inspection and copying.52 Retained as well was the provision that agency orders that had

---

47. Id. § 34.05.070.
48. Id. § 34.05.060.
50. Wash. Rev. Code § 34.05.050 (Supp. 1988).
Washington Administrative Procedure Act

not properly been made available to the public could not be valid against an individual or invoked by the agency for any purpose.\textsuperscript{53}

Public access to agency materials beyond rules and orders is a broader question outside the scope of this Article. Other statutes in Washington cover such matters as so-called freedom of information, open meetings, and the like.\textsuperscript{54} But in passing the new Act, the legislature took the opportunity to clarify some of the relationships between the Act and existing law dealing with public records. A gubernatorial veto of one section of the new Act as first passed in 1988 illustrates the depth of the controversy.

Indexing requirements are important parts of a public records policy. Despite a statutory command that a wide range of agency material be made available for public inspection,\textsuperscript{55} realistic access may be denied because of the volume of material involved. Few members of the public will have the stamina to search through filing cabinets full of materials looking for an agency's treatment of a particular matter. The Washington public records law included an indexing requirement,\textsuperscript{56} but provided that agencies need not index records where to do so would be "unduly burdensome."\textsuperscript{57} Section 702 of the 1988 bill\textsuperscript{58} amended the Public Records Act to make the undue burden option unavailable to agencies in the case of final opinions in adjudicated cases and in the case of policy and interpretive statements. Such documents had to be indexed irrespective of the burden of doing so.

The Governor vetoed section 702, noting that it would "require agencies . . . to maintain indexes that provide identifying information on these kinds of records, regardless of the cost or significance of the indexed records."\textsuperscript{59} Conceding that such indexes would be useful to

\textsuperscript{53} WASH. REV. CODE § 34.05.220(3) (Supp. 1988). The provision does not apply to persons on whom orders have been properly served or who otherwise have actual knowledge of the order. The old act treated the matter in WASH. REV. CODE § 34.04.020(3) (1987).


\textsuperscript{55} WASH. REV. CODE § 42.17.260(2) (1987).

\textsuperscript{56} WASH. REV. CODE § 42.17.260(2) (1987).

\textsuperscript{57} WASH. REV. CODE § 42.17.260(3) (1987).


the public,\textsuperscript{60} the Governor noted that agencies had expressed concern about the cost and that the legislature was unlikely to provide additional funds for compliance. The Governor expressed willingness to “work with the [l]egislature to devise an indexing requirement that would be both prudent . . . and useful.”\textsuperscript{61}

A compromise version of the indexing requirement was enacted in the 1989 technical amendments bill.\textsuperscript{62} Rather than putting the “unduly burdensome” exception back in the Act, the amendment narrowed the reach of the indexing requirement itself. The Act now requires agencies only to index final adjudicated and declaratory orders “of substantial importance,” and interpretive and policy statements.\textsuperscript{63} While these records must be indexed irrespective of burden, gone are the requirements that agencies must index such things as administrative staff manuals and instructions to staff that affect the public, records containing planning policies and goals, reports of factual investigations, tests and consultant reports—all of which had to be indexed under the original public records law—subject, as noted, to the undue burden exception.\textsuperscript{64} The principle behind this drafting strategy is apparently to extend the indexing requirement only to those types of records where indexing likely would generate more public benefits than agency costs. This approach does eliminate uncertainty about what is an “undue burden,” but whether the approach goes too far in protecting agencies at the expense of realistic public disclosure is a question that warrants careful legislative monitoring.

IV. RULEMAKING

A. Generally

Development of new policy is one of the primary reasons for the existence of the administrative process, and rulemaking is the principal means by which agencies make policy. Procedures to govern this important process should ensure that rules are technically sound, are within the agencies’ authority, and are politically acceptable.\textsuperscript{65} These objectives could be approached by including detailed legislative standards in granting rulemaking power. Or, they could be furthered by more intensive judicial scrutiny into the soundness, legality, and

\begin{itemize}
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} Id.
  \item \textsuperscript{62} H.B. 1358, 51st Sess., 1989 Wash. Laws § 36(4).
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} WASH. REV. CODE § 42.17.260(2) (1987).
  \item \textsuperscript{65} A. BONFIELD, SAR, supra note 13, at 143–50.
\end{itemize}
acceptability of rules. But modern rulemaking procedures are built on a recognition that detailed legislative specification is not feasible, and intensive judicial scrutiny is unwise. A major role in achieving the goals of sound rulemaking must be played by the rulemaking procedures themselves. Technically sound, lawful, and politically responsive rules are more likely if there is ample advance notice of the terms of proposed rules, full opportunity for comment, if comments must be fairly considered by the agency proposing the rules, if an adequate rulemaking record is required to facilitate judicial review, and if sufficient opportunities are built into the system by which legislative and other community political interests can be expressed. In short, rulemaking procedures are not merely orderly ways of promulgating rules; they are essential parts of the quality control process.

B. When Must Agencies Use Rulemaking Procedures?

Two separate questions are embraced in this heading. First, when may an agency which is engaged in rulemaking dispense with the Act’s rulemaking procedures? Second, when (if ever) is an agency required to engage in rulemaking for the development of agency policy?

1. Emergency or Temporary Rules

Where an agency is adopting so-called emergency rules, it may dispense with the statutory notice and comment procedures. The federal Administrative Procedures Act provides that agencies may dispense with rulemaking procedures in rulemaking where those procedures are “impracticable, unnecessary or contrary to the public interest.” The Model Act followed this lead, with some variation in terms and in the burden of proof for establishing the existence of the necessary conditions.

The new Washington Act follows the framework of the old act, permitting adoption of a temporary rule without notice and comment where the agency finds for good cause that immediate adoption of the rule is necessary for the public health, safety, or welfare. In addition,
the new Act permits temporary rulemaking where necessitated by federal funding conditions. Such rules become effective on filing but can remain in effect only for 120 days. A statement of the agency’s reasons for adoption of the rule on an emergency basis must be included in the order of adoption.

Because of the importance of the notice and comment process, the provision should be construed strictly against the agency. Washington courts have carefully scrutinized agency findings of emergency in the past and, given the rule of construction stated in section 34.05.001 of the Washington Act, it is expected that this attitude will continue.

2. "Required" Rulemaking

When must agencies use rules rather than some other form of proceeding for policy development? The answer requires a consideration of how agency policies are made. Rulemaking is the obvious method. But new policy can also be made in the adjudication of individual cases. When a new policy is announced in explanation of an individual decision (in the judicial arena think of the Cardozo opinion in Palsgraf), and where the decision is followed by later adjudicators, policy has effectively been made by adjudication. Elaborate networks of policy may develop and come to exist in a body of opinions in individual cases, much like common law.

While there is a place for policy development in the adjudication of individual cases, rulemaking is a far superior policymaking method. In an advanced society where matters to be regulated are complex, subtle and consequential, and in a democratic society where openness, inclusiveness and accountability are prized, rulemaking has distinct

70. Wash. Rev. Code § 34.05.350 (Supp. 1988).
71. Id. §§ 34.05.350(2), .380(2).
72. The old act provided that temporary rules could only be in effect for 90 days, but renewal of the rule was possible. The new Act forbids adoption of "identical or substantially similar" rules in sequence unless conditions have changed or unless the agency has begun a notice and comment proceeding to make the temporary rules permanent. Wash. Rev. Code § 34.05.350(2) (Supp. 1988).
73. Id. § 34.05.350(b).
75. See supra text accompanying note 9.
77. Policymaking by adjudication is useful, for example, when policies are not fully worked out or where fact-specific variation is important in the sensible application of a policy, or where the necessary ex post facto effect of new adjudicative policies is warranted. See SEC v. Chenery Corp., 332 U.S. 194, 202 (1947).
advantages over adjudication as a policymaking technique.\textsuperscript{78} A review of the cited material will show that the advantages of rulemaking over adjudication include:

— the wider, simpler, and cheaper participation of the public in policy formulation;

— greater accountability to democratically elected legislators and governors due to the openness of the process;

— greater public access to and understanding of policies promulgated in rule form;

— wide development of policy quickly rather than in a piece-meal fashion;

— development of policies with more precision, more consistency, and more uniformity than is likely in the development of policies by episodic adjudication and;

— application of new policies prospectively, thus avoiding the \textit{ex post facto} effect of new policies developed through adjudication.

Given the clear advantages of rules as policymaking instruments, the question has arisen whether agencies should ever be \textit{required} to use rules to develop new policy—whether courts should ever prohibit agencies from making important policy through adjudication.

Federal courts historically conceded the advantages of rulemaking, but took the position that an agency’s choice of which way to proceed should be respected by courts and thus that courts ordinarily should not impose a rulemaking requirement.\textsuperscript{79} In more recent times, an

\begin{footnotesize}
\begin{itemize}

The classic judicial statement of the preference for rulemaking is in Cheney, 332 U.S. at 202. In National Petroleum Refiners Ass’n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 915 (1974), the court interpreted the FTC act to empower the agency to act by rule. The court was in part persuaded that Congress intended to grant rulemaking power to the agency because of the advantages of rulemaking as an instrument for policymaking.

\item \textsuperscript{79} The basic principle was laid down by the Supreme Court in Cheney, which states that the choice of whether to proceed by rulemaking or by adjudication should lie “primarily in the informed discretion of the agency.” 332 U.S. at 203. While NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), may have suggested a tougher judicial attitude, NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) seems to have returned to the Cheney liberality. See R. Pierce, S. Shapiro & P. Verkuil, \textit{Administrative Law and Process} 288–95 (1985) [hereinafter Admin. Law].
\end{itemize}
\end{footnotesize}
occasional requirement for rulemaking\textsuperscript{80} or for standards\textsuperscript{81} has been laid down by a federal court.

Commentators, too, have urged that in some circumstances agencies should be compelled to use rulemaking in policy development,\textsuperscript{82} and some state courts have explored such a requirement.\textsuperscript{83} The requirement sometimes is regarded as a matter of statutory interpretation,\textsuperscript{84} as an incident of the power of judicial review,\textsuperscript{85} as a condition of due process,\textsuperscript{86} or as an application of the theory that an agency's choice of procedure should be tested by the arbitrary or capricious standard.\textsuperscript{87}

Sometimes, a state court refuses to permit individual adjudications by an agency in advance of some particularization of standards in rule form. Thus, in a Washington case, \textit{Worthington v. DSHS}, Judge Doran enjoined the agency from terminating or reducing certain welfare benefits, stating that the standards used by the Department for these reductions "must be set forth in regulations promulgated in accordance with the Washington Administrative Procedure Act."\textsuperscript{88}

In this uncertain judicial area, states have explored statutory clarification. Sometimes the approach is merely to require specificity in


\textsuperscript{82} \textit{See} Bonfield, \textit{Mandating State Agency Lawmaking by Rule}, 2 B.Y.U. J. Pub. L. 161, 168 (1988). One commentator, stating that a judicial requirement should not be the general rule, concedes that there may be settings when a judicial requirement of rulemaking would be appropriate, especially when the agency action abruptly changes prior law, where there is unfairness in the retroactive effect of an adjudication, where there has been justifiable reliance on the old policy, and where policymaking through adjudication is unfair to non-parties who cannot participate in its formulation. K. DAVIS, \textit{supra} note 32, § 7.25. Other commentators believe that courts will continue to be tempted to require rulemaking but will rarely yield to the temptation out of respect for agency discretion. ADMIN. LAW, \textit{supra} note 79, at 295.

\textsuperscript{83} It has been persuasively argued that required rulemaking is more necessary at the state level than at the federal. Frohmayer, \textit{supra} note 12, at 446–48.


\textsuperscript{85} Concurring opinion in Medgal, 605 P.2d at 287–88.


\textsuperscript{87} Potts v. Bennett, 487 So. 2d 919, 922 (Ala. Civ. App. 1985); Brookline v. Commissioner of the Dep’t of Envtl Quality Eng’g, 387 Mass. 372, 439 N.E.2d 792 (1982); Bunge Corp. v. Commissioner of Revenue, 305 N.W.2d 779 (Minn. 1981). In each of these cases, the agency’s choice of adjudication was upheld as not arbitrary or an abuse of discretion.

\textsuperscript{88} Worthington v. Sugarman, No. 87-2-00832-8 (Thurston County 1987).
rules that are adopted, as in the Illinois provision which requires an agency rule concerning the exercise of a power to contain "standards by which the agency shall exercise the power." 89 Sometimes, the statute merely only authorizes rulemaking to encapsulate the policy product of individual adjudications. 90 The recently enacted Utah Act requires agencies to "enact rules incorporating the principles of law established by final adjudicative decisions within 90 days after the decision is announced." 91 An optional provision of the Model Act encourages rulemaking by "requiring" agencies to adopt "as soon as feasible and to the extent practicable . . . rules to supersede principles of law or policy . . . declared by the agency as the basis for its decisions in particular cases." 92

The new Washington Act follows the last pattern, encouraging but not requiring rulemaking. The legislative preference for rulemaking is clear. Agencies are "encouraged to formalize the general principles that may evolve from [individual] decisions by adopting the principles as rules . . . ." 93 Agencies are further encouraged by section 230(1) "to convert long-standing interpretive and policy statements into rules." Section 630(2) specifically authorizes the legislative rules committee to "review an agency's use of policy statements . . . to determine whether an agency has failed to adopt a rule." Section 640 details the sanctions which can be imposed for failure to adopt a rule.

Given the clear advantages of rulemaking, it is hoped that agencies will comply with these clearly expressed legislative preferences. If an individual agency does not afford the legislative preference adequate respect, a reviewing court could properly consider that fact in its overall judgment about whether the agency action was arbitrary. 94 And if agencies generally do not show adequate respect for the legislative preference, a legislative requirement such as appears in the Utah Act would seem indicated.

89. ILL. REV. STAT. ch. 127, § 1004.02 (1981).
90. "Each agency authorized to exercise discretion in deciding individual cases may formalize the general policies evolving from its decisions by promulgating the policies as rules . . . ." Wis. Stat. § 227.11(2)(c) (Supp. 1988.).
92. MODEL ACT, supra note 3, § 2-104(4).
93. WASH. REV. CODE § 34.05.220(4) (Supp. 1988).
94. See infra notes 346-354 and accompanying text.
C. How Is the Rulemaking Process Initiated?

Agencies are authorized to solicit comments prior to the initiation of formal rulemaking procedures and to appoint consultant committees to consider possible rulemaking initiatives. Rulemaking can be initiated by petition of "[a]ny person" or by agency action. Agency action will usually take the form of a notice of proposed rulemaking published in the state register at least 20 days before any hearing.

The new Act is more specific than the old act about the contents of the notice in an effort to facilitate public participation in rulemaking. Where the old act required the notice to include only the authority for the proposal, its terms, and time and manner of public participation, the new Act also requires such details as the name of the person proposing the rule, a statement of the reasons for the proposed rule, a statement of the proposal's anticipated effects, agency comments (if any) on enforcement or fiscal aspects of the proposed rule, and a description of how the proposal would change existing law.

To provide further information to the public about rules and the status of any ongoing rulemaking proceeding, the Act requires that agencies designate a "rules coordinator"—a person with knowledge of rulemaking matters currently being proposed or prepared within the agency. The rules coordinator is to respond to public inquiries about possible or proposed rules and to identify people in the agency who are working on any pending proposals.

D. The Public Comment Process

As with the notice requirements, the requirements for public participation are more detailed in the new Act. The old act required that "interested persons" be given "reasonable opportunity" to comment, with the opportunity for oral argument limited to cases where the opportunity was requested by 25 persons.

The new Act seeks to make participation easier for members of the public and to ensure that the results of citizen participation are adequately preserved for agency consideration and for any judicial review.

95. WASH. REV. CODE § 34.05.310(1) (Supp. 1988).
96. Id. § 34.05.310(2).
97. Id. § 34.05.330. For a detailed examination of how federal agencies evaluate petitions for rulemaking, see Luneborg, Petitioning Federal Agencies for Rulemaking, 1988 Wisc. L. REV. 1.
98. WASH. REV. CODE § 34.05.320(1) (Supp. 1988).
100. WASH. REV. CODE § 34.05.320(1) (Supp. 1988).
101. Id. § 34.05.310(3).
which may occur. The Act makes oral argument available in all cases,\textsuperscript{103} provides for a presiding official at the hearing, provides for stenographic or other recording of the comments received and, where the head of the agency does not preside, requires that a memorandum summarizing the comments be prepared for the agency head—a memorandum which becomes a public record.\textsuperscript{104} All of the material received from outside the agency and prepared within the agency in the course of the rulemaking proceeding must be included in a “rulemaking file,” with the exception of certain internal preliminary drafts, opinions, and recommendations.\textsuperscript{105} The file will be made available to the court on judicial review.\textsuperscript{106}

E. Agency Deliberation

After the public comment phase, agency consideration of the final rule begins. As in the old act, the new Act requires only that “the agency shall consider the written and oral submissions, or any memorandum summarizing oral submissions.”\textsuperscript{107}

Several specific matters concerning agency deliberation on a rule may be noted. It is made explicitly clear that the agency may consider matters other than material submitted, that “the official rulemaking file need not be the exclusive basis for agency action on the rule.”\textsuperscript{108} This is in keeping with the legislative nature of rulemaking. While a court usually is limited to the record developed in the proceeding before it, and agency adjudications are likewise limited,\textsuperscript{109} a legislature is free to consider anything that it feels is pertinent, whether or not any witnesses happened to develop such matters in the legislative hearings. Agencies making rules are treated in this regard as legislative bodies.

This does not mean, of course, that an agency may disregard the public comment received. It must “consider” that comment. As discussed below, this requirement is enforced by requiring the agency to explain its reasons for the adoption of a rule (in some circumstances, explaining why it rejected views submitted) and by the requirement that the rule must be rational.\textsuperscript{110}

\begin{footnotes}
\item[103] WASH. REV. CODE § 34.05.325(2) (Supp. 1988).
\item[104] Id. § 34.05.325(3).
\item[105] Id. § 34.05.370.
\item[106] See infra notes 240–419 and accompanying text.
\item[107] WASH. REV. CODE § 34.05.335(2) (Supp. 1988).
\item[108] Id. § 34.05.370(4).
\item[109] See infra notes 125–226 and accompanying text.
\item[110] WASH. REV. CODE § 34.05.461(4) (Supp. 1988).
\end{footnotes}
An agency is specifically authorized to incorporate by reference in its rules any codes, standards, rules, or regulations adopted by other federal or government bodies where inclusion of the full text in the rules would be cumbersome. Agencies may not use this provision to incorporate by reference future changes in the codes or regulations involved.

Finally, there is a time limit within which agency consideration must take place. If no rule has been adopted after 180 days since publication of the last notice, new rulemaking proceedings must be commenced. This provision, which is drawn from the Model Act, is intended to ensure that an agency will "not use undue delay between publication of a notice of a proposed rule adoption and actual adoption of a rule... as a means of defusing or circumventing widespread public opposition to its action."

F. Promulgation of the Rule

On promulgation, rules are filed with the code reviser and are published and indexed as indicated earlier.

When the final version of a rule is "substantially different" from the rule as originally proposed, the new Act imposes additional requirements, which are an elaborated version of the old act's provisions. The new Act seeks to define what is "substantially different" and then provides an opportunity for reopening the comment process for any rules so characterized.

The final rule must be accompanied with a "concise explanatory statement" which identifies "the agency's reasons for adopting the rule" and the reasons for any changes between the rule as proposed and as adopted. Where there has been opposition to a proposed rule, the agency, on the timely request of an interested person, also

111. Id. § 34.05.365.
112. Id. § 34.05.335(3).
113. MODEL ACT, supra note 3, § 3-106(b).
114. Id. § 3-106 comment. For additional discussion, see A. BONFIELD, SAR, supra note 13, at 230–32.
115. WASH. REV. CODE § 34.05.380(1) (Supp. 1988). The section exempts from the filing requirement certain rules contained in tariffs filed with the Utilities and Transportation Commission.
116. See supra notes 51–64 and accompanying text.
118. WASH. REV. CODE § 34.05.340 (Supp. 1988).
119. Id. § 34.05.355(1).
must explain its "principal reasons for overruling the considerations urged against its adoption."\footnote{120}

How complete must the explanatory statement be? Must it be the equivalent of a set of findings that accompany an adjudicated order? Must it touch all the reasons for and against the rule's adoption? Must it explain how and why the significant issues were resolved the way they were? Professor Bonfield seems to suggest an affirmative answer to these questions,\footnote{121} but there are other views.\footnote{122} To the extent judicial review of a rule will consider the rule's rationality,\footnote{123} the explanatory statement certainly must articulate the law and policies from which that rationality can be deduced and must do so in a manner comprehensible to the nonexpert judge. While courts have not been anxious to inquire too directly into the quality of the agency's reasoning process,\footnote{124} the ultimate standard has to do with reasonableness and a large component of that is related to the care with which the agency treated public comment.

The Model Act wisely included a provision that limited justification of rules on judicial review to reasons contained in the agency's concise general statement.\footnote{125} The purpose of such a restriction is to ensure that reasons and justifications were part of the agency deliberative process and not the \textit{post hoc} rationalizations of agency lawyers or judges. It has been settled law since the Supreme Court decided \textit{Chenery} in 1947\footnote{126} that an agency action not supported by its contemporaneous

\footnotetext{120}{\textit{Id.} § 34.05.355(2). This provision, carried over from section 34.04.025(3) of the old act, was part of the initial Model Act, but not contained in the 1981 Model Act. For discussion, see Auerbach, \textit{Informal Rulemaking: A Proposed Relationship Between Administrative Procedure and Judicial Review}, 72 NW. U. L. REV. 15, 56 (1977) [hereinafter Auerbach, \textit{Informal Rulemaking}].}

\footnotetext{121}{A. \textsc{Bonfield}, SAR, \textit{supra} note 13, at 307–15.}


\footnotetext{123}{See infra notes 240–409 and accompanying text.}


\footnotetext{125}{"Only the reasons contained in the concise explanatory statement may be used by any party as justifications for the adoption of the rule in any proceeding in which its validity is at issue." \textsc{Model Act, supra} note 3, § 3-110(b).}

\footnotetext{126}{SEC v. \textit{Chenery Corp.}, 332 U.S. 194, 196 (1947). The case makes it:}
statement of reasons should be remanded for agency reconsideration, rather than become the subject of speculation by those outside the agency decisional process. Simple respect for the agency process would seem to require this result, as does an appreciation of the comparative levels of expertise of courts and agencies. As the Supreme Court stated in 1983, "the courts may not accept [agency] counsel's post hoc rationalizations for agency action . . . . It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." The Uniform Law Commissioners adopted the provision without dissent and it has the support of most commentators. Unfortunately, such a provision was not proposed for inclusion in the new Act. It is to be hoped that the legislature will correct this oversight at an early date and that in the meantime, the omission will not be read by courts as an invitation to judicial invention. The traditional "Che-nery remand" should remain the proper remedy when a rule is not adequately supported by its contemporaneous justification.

G. Effective Date of Rules

The Act provides that rules ordinarily will be effective thirty days after filing with the code reviser. Later effective dates can be provided in the rule itself, or by statute. As has been indicated, emergency rules are effective on filing.

---


128. Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29, 50 (1983). It is of course generally accepted that a court may provide an acceptable theory for a lower judicial decision, Bode v. State, 91 Wash. 2d 94, 586 P.2d 1173 (1979). It is only where the lower tribunal is thought to bring something special to the deliberative process—as is the case with juries and administrative agencies—that the referenced limitation comes into play.


130. WASH. REV. CODE § 34.05.380(2) (Supp. 1988).

131. Id.
V. ADJUDICATION

As indicated earlier, rulemaking involves the creation of general policies while adjudication involves the application of those policies in an individual case. If an agency engaged in rulemaking functions like a legislature, an agency engaged in adjudication functions like a court. Thus, adjudicatory procedures often resemble judicial procedures. Care must be taken to employ judicial procedures only where they really contribute to efficient and fair process; over-judicialization of the administrative process is both costly and counterproductive.\(^{132}\)

Sections 410 through 494 of the new Act describe when adjudicatory procedures are required and what those procedures are. The basic changes in the new legislation relate mostly to the second of these questions. In its description of what procedures are required, the new Act provides more detail than did the old and introduces much needed flexibility.

A. When Adjudication Procedures Are Required

The title covers two different questions: First, what are the circumstances which trigger obligatory adjudication, and second, at what time are those procedures required?

1. Circumstances Requiring Adjudication

Four preliminary matters may be noted. First, the Act does not detail adjudicatory procedures for activities that do not fit within the definition of adjudication. As discussed earlier,\(^{133}\) adjudications are individualized actions determining the legal interests of specific persons.\(^{134}\) Second, the Act does not treat adjudicative procedures for the adjudications exempted by sections 030,\(^{135}\) and 410.\(^{136}\) Third, the definition of adjudicative proceeding is limited to cases where a hearing is required either before or after the interests are determined. Depending on how the word “hearing” is interpreted,\(^{137}\) this may suggest a further narrowing: The Act should not apply to adjudications in which a hearing would be pointless (such as where there are no facts in dispute) or inappropriate (such as where some form of test or inspection


\(^{133}\) See supra notes 31–37 and accompanying text.

\(^{134}\) See definition of order in WASH. REV. CODE § 34.05.010(10) (Supp. 1988).

\(^{135}\) WASH. REV. CODE § 34.05.030 (Supp. 1988).

\(^{136}\) Id. § 34.05.410.

\(^{137}\) Some acts specifically define the word. See, e.g., Iowa Code 17A (1985).
would more sensibly resolve disputed facts). Where ambiguity is present, the underlying inquiry should be functional: Are the adjudicatory procedures made available by the Act sensible means for resolving the issues involved? If so, the Act should apply. Finally, there are places in the Act where a particular part of the set of adjudicatory procedures is altered for a particular agency or function.  

Turning to the question of when adjudicatory procedures are required, there are two basic drafting strategies for an act of this sort. The question can be answered in the administrative procedure act itself, as in the new Model Act and administrative procedure acts in states such as Florida, Delaware, Virginia and Wisconsin. On the other hand, the drafter can leave to other statutes (and the constitution) the question of whether a hearing is required, as in the original Model Act and the federal APA. In such a case, the administrative procedure act merely specifies the procedures which must be followed when a hearing is required by such external authorities.

The former method usually states the hearing requirement in a general phrase, the meaning of which must be construed by courts in particular cases. Thus, this approach has all the benefits of a case by case approach (flexibility and sensitivity to elements in each particular case) and all the costs (unpredictability and decision by nonexperts).

138. For example, independent presiding officers are not required in adjudications involving institutions of higher education. Wash. Rev. Code § 34.05.425(2) (Supp. 1988); see the discussion infra at note 172.

139. Model Act, supra note 3, § 4-102.


143. Wis. Stat. § 227.42 (Supp. 1988). The Wisconsin Supreme Court has read the provision to provide hearings even in the absence of constitutional or other legislative command. Milwaukee Metro. Sewer Dist. v. DNR, 126 Wis. 2d 63, 375 N.W.2d 648, 652 (1985). For discussion, see Note, Milwaukee Metropolitan Sewerage District v. DNR: Expanding the Scope of State Agency Actions Covered by Contested Case Hearings, 1986 Wis. L. Rev. 963.

144. The 1961 Revised Model Act provides procedures for hearings otherwise "required by law." Model State Admin. Procedure Act (1961). There were, in addition, a small set of proceedings (mostly involving licensing) where the act did lay down a hearing requirement. Id. § 14(c).

The federal APA, section 554(a) provides procedures for "every case of adjudication required by statute to be determined on the record after opportunity for agency hearing." (emphasis added). Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50 (1950), modified, 339 U.S. 908 (1950), added the gloss that the act also could be used where a hearing was required by the constitution.

145. For example, the Florida act requires a hearing whenever a person's "substantial interests" are involved. Fla. Stat. Ann. § 120.57 (West Supp. 1982).
The latter method permits legislatures to determine, as they confer particular powers on agencies, whether hearings should be part of the procedure involved—subject, of course, to any relevant constitutional requirements. This is more predictable, uses an arguably better decision maker, and may facilitate better use of informal procedures, but has the usual disadvantages of general treatment, such as possible inflexibility.

The new Washington Act follows this latter approach. As in the old act, with one exception, the new Act does not itself mandate the use of adjudicatory procedures. Instead, it provides that the agency shall commence an adjudicative proceeding when required by some external authority. What kinds of external authority can trigger an adjudication requirement? Modification of the definitional language has left some confusion about the nature of this authority. In the old act, adjudications (called “contested cases”) were defined to include proceedings in which a hearing was required by “law” or constitutional right. Presumably, the word “law” included agency regulations, with the result that hearings not required by the constitution or by statute but required only by agency regulations were subject to the Act. The new definition of adjudication applies to proceedings in which hearings are required by “statute” or constitutional right. Facially, this suggests that hearings required only by agency rule are not covered by the Act.

It is not at all clear that this is what the legislature intended. In the first place, the broader phrase “law or constitutional right” was retained in section 413 which specifically states the adjudication requirement. Moreover, an adjudication required only by agency rule would have to be conducted in any event, since an agency must

---


147. The new Act continues the approach of the old act in requiring the use of adjudicatory process before contested license applications can be granted, before application for licenses and rate applications can be denied and before licenses can be revoked, suspended or modified. WASH. REV. CODE § 34.05.422 (Supp. 1988).

148. Id. § 34.05.413(2).

149. WASH. REV. CODE § 34.04.010(3) (1987).

150. The U.S. Supreme Court has called this the “traditional understanding” and explained that since “properly promulgated substantive agency regulations have the ‘force of law’ . . . it would . . . take a clear showing of contrary legislative intent before the phrase ‘authorized by law’ . . . could be held” not to include such rules. Chrysler v. Brown, 441 U.S. 281 (1979).

151. WASH. REV. CODE § 34.05.413(2) (Supp. 1988): “When required by law or constitutional right . . . an agency shall commence an adjudicative proceeding.” (emphasis added).
comply with its own rules. It seems unlikely that the legislature intended to provide no guidance for such hearings.

Finally, there is no risk that application of the Act to rule-required hearings would overformalize an agency's own efforts to provide informal hearings. In general, the Act provides ample opportunity for informality even in its most formal processes. In particular, it makes explicit provision for informal adjudications in some kinds of cases. The Author concludes that the change in the definition of adjudicative proceeding was an inadvertance and that the retention of the familiar phrase in section 413 is the surer guide to legislative intent.

The statutory phrase which makes adjudications available when required “by constitutional right” continues to enable judges, through rulings on procedural due process, to determine when the Act’s adjudicatory procedures apply. A discussion of those issues is beyond the scope of this Article, but it should be noted that the courts have been moving in the same direction as the Act’s drafters were in exploring less and less formal ways of providing necessary hearings. Cases such as Goss and Loudermill make it clear that brief and informal hearings may, in proper circumstances, satisfy due process, and the provisions of the new Act (discussed below) on brief adjudicatory proceedings seem designed to capture similar efficiencies.

2. At What Time Must Adjudicative Procedures Be Made Available?

Ordinarily, statutes contemplate and due process requires that adjudicatory hearings must be made available before an agency sanction is imposed. The principle gives way in emergency settings, where agencies need to act summarily, providing fuller hearings later.

An emergency situation exists, under the terms of the Act, when there is “an immediate danger to the public health, safety, or welfare

153. WASH. REV. CODE §§ 34.05.482–91 (Supp. 1988) (brief adjudicative proceedings); see infra notes 231–239 and accompanying text.
154. For recent discussion, see ADMIN. LAW, supra note 79, ch. 6; B. SCHWARTZ, supra note 31, ch. 5; Comment, supra note 146.
157. See infra notes 231–239 and accompanying text.
159. WASH. REV. CODE § 34.05.410(1)(B) (Supp. 1988) exempts “emergency adjudicative proceedings” from the adjudicatory requirements of the Act, provided they are conducted in accordance with section 479, discussed below.
requiring immediate agency action."160 The agency must give such notice “as is practicable,”161 and must enter an order explaining its reasons for taking the action.162 The order is effective when entered. The agency must limit its action to what is necessary to prevent or avoid the danger which justified the emergency proceeding.163 After entering the order, the agency must provide “as quickly as feasible” whatever hearing would have been required but for the emergency.164 Of course, the use of emergency process must comply with relevant constitutional authority.

B. What Procedures Are Required

As with most administrative procedure acts, the statute itself lays down only minimum standards of procedure, leaving detailed procedural regulation to agency rule. Mindful that one purpose of the new Act was to bring consistency across agencies where possible, the legislature provided that Model Rules of Procedure were to be formulated by the Chief Administrative Law Judge.165 The Model Rules deal with all common agency functions and are to be adopted by each agency so far as is “reasonable under the circumstances”; any variations by an agency require a finding stating reasons for the variance.166

I. Prehearing Procedures

Section 434 details the required contents of the notice which begins an adjudication and provides that notice must precede the hearing by at least seven days.167 Pleadings, briefs, and discovery are all provided for.168 Discovery is made subject to agency rule, but where not inconsistent with such rules, the presiding officer is authorized to employ all the techniques mentioned in Rules 26–36 of the Superior Court Civil Rules.169

Prehearing conferences for simplification and settlement are authorized, and the Act specifically provides that these can be conducted

160. Id. § 34.05.479(1).
161. Id. § 34.05.479(4).
162. Id. § 34.05.479(3).
163. Id. § 32.05.479(2).
164. Id. § 34.05.479(5).
165. Id. § 34.05.250. Draft model rules were promulgated by the Chief in January 1989 and later adopted. See MODEL RULES OF PROCEDURE, Wash. St. Reg. 89-10-035.
166. WASH. REV. CODE § 34.05.250 (Supp. 1988).
167. Id. § 34.05.434(1). The old act provided a twenty day minimum. WASH. REV. CODE § 34.04.090(1) (1987).
168. WASH. REV. CODE § 34.05.437 (Supp. 1988).
169. Id. §§ 34.05.446(2)–(3).
through telephone, television, or other electronic means. The electronic conference is specifically conditioned on the absence of prejudice to any party.

2. *The Process of Proof in Formal Adjudications*

The new Act contains more detailed hearing procedures than the old act. Fairness in adjudications is sought by the continuing requirement that presiding officers are either disinterested or fully accountable. Adjudications must be presided over by either an agency official with authority to make a final decision—a visible, accountable person—or an administrative law judge from the Office of Administrative Hearings—a disinterested hearing officer. A few agencies are exempted from this requirement and permitted to select organizational inferiors to serve as presiding officers. The justification apparently is that such agencies are themselves subject to review by other agencies or that their hearings present special problems not amenable to the rules which govern "typical" agencies. Finally, section 458 imposes additional limitations on the selection of presiding officers in an attempt to eliminate inconsistent functions.

Hearings are open to the public unless closure is otherwise authorized. At the hearing, a party is entitled to appear in person and to be advised and represented by counsel. The new Act makes no significant change in the rules of evidence in adjudications, although there is a provision referring the presiding officer to the Washington

---

170. Id. § 34.05.431.
171. Id. § 34.05.425(1).
172. WASH. REV. CODE § 34.05.425(2) (Supp. 1988) exempts those agencies not within the independent hearing officer system, listed in WASH. REV. CODE § 34.12.020 (1987) to include the Pollution Control Hearings Board, the Shorelines Hearings Board, the Forest Practices Appeals Board, the Environmental Hearings Office, the Board of Industrial Insurance Appeals, the State Personnel Board, the Higher Education Personnel Board, the Public Employment Relations Commission, the Personnel Appeals Board, and the Board of Tax Appeals.

To this list of exemptions, section 425(2) of the new act adds institutions of higher education. The effect is to deny a faculty member, student, or staff member against whom an institution is conducting proceedings the opportunity of having an "outside" presiding officer for the initial phase of a hearing. Representatives of the University of Washington proposed the exception, fearing—as is detailed infra, note 220—interference with the internal governance systems of the university. For the reasons suggested, infra note 220, this seems an unwise exclusion and should be an early candidate for legislative correction.

173. WASH. REV. CODE § 34.05.458 (Supp. 1988) prohibits certain investigators, prosecutors, or advocates (or persons subject to their supervision) from serving as presiding officers. An agency head, whose only participation in a case has been to make a "probable cause" type determination, is permitted to serve as a presiding officer unless bias is shown.

174. Id. § 34.05.449(5).
175. Id. § 34.05.428.
Washington Administrative Procedure Act

Rules of Evidence "as guidelines for evidentiary rulings" where the Act itself is silent.\textsuperscript{176} Parties are entitled to respond, to present evidence ("good" hearsay evidence is explicitly made admissible\textsuperscript{177}), and to conduct such cross examination as is "necessary for full disclosure of all relevant facts and issues."\textsuperscript{178}

Official notice may be taken (as in the old act\textsuperscript{179}) of judicially cognizable facts or technical matters within the agency's expertise.\textsuperscript{180} In addition, the Act now provides for official notice of codes or standards adopted by governmental bodies "or by a nationally recognized organization or association." Parties are entitled to be notified of matters being officially noticed and to have an opportunity to contest the matters.

A recording of the hearing is required, and parties are allowed to make their own additional recordings if that can be done without distraction.\textsuperscript{181}

As with the prehearing conference mentioned above, adjudicatory hearings may be conducted by telephone, television, or other electronic means, subject to the discretion of the presiding officer and in the absence of prejudice to any party.\textsuperscript{182}

3. The Process of Decision in Formal Adjudications

a. The Quality of the Decisional Process—Ex Parte Communications and Separation of Functions

Because one element of a fair hearing is a decision based on a public record, private communications by presiding officers with persons inside or outside the agency must be restricted. Nevertheless, an airtight insulation of the decisionmaker from outside influence—such as we use with judges—is not feasible in the administrative agency setting. Some communications from outside the agency are inevitable and, indeed, are part of the accountability process. Some communications from those within the agency are essential if the institutional resources of the agency are to be employed in decisionmaking. Drafters of administrative procedure acts search for the correct balance.

\textsuperscript{176} Id. § 34.05.452(2).
\textsuperscript{177} Fetting v. DSHS, 49 Wash. App. 466, 744 P.2d 349 (1987).
\textsuperscript{178} WASH. REV. CODE § 34.05.449(2) (Supp. 1988).
\textsuperscript{179} WASH. REV. CODE § 34.05.452(5) (Supp. 1988).
\textsuperscript{180} Id. § 34.05.449(4).
\textsuperscript{181} Id. § 34.05.449(3).
The new Washington Act contains an expanded set of prohibitions of *ex parte* communications. The old act prohibited presiding officers from consulting persons or parties on facts or law without notice and opportunity for all parties to be present. Exceptions permitted presiding officers to consult with each other, with personal assistants, and with others in the agency who had not participated in the case, who had performed no investigative functions in the case or who were not prosecutors.

The new Act contains much the same set of prohibitions, but they are more specific. Section 455(1) identifies the persons *inside* the agency with whom *ex parte* communications are forbidden. Presiding officers may not communicate *ex parte* with persons "employed by the agency" regarding any issue in the proceeding except that members of a multimember decisional body may discuss the case among themselves, and presiding officers can consult with legal counsel or staff assistants under their supervision. In addition, *ex parte* communication is permitted with agency personnel or consultants who have not participated in the case and who are not engaged in either prosecutive or investigative functions in the case or a factually related case.

Section 455(2) identifies those *outside* the agency with whom *ex parte* communications are forbidden. Presiding officers are forbidden from communicating *ex parte* with any person not employed by the agency if that person has "a direct or indirect interest in the outcome of the proceeding." The general phrase leaves several questions open, such as the legality of communications between presiding officers on the one hand and members of the legislature or the executive branch on the other hand. Such persons may have no pecuniary

---

183. Id. § 34.05.455.
185. And persons reviewing initial orders. WASH. REV. CODE § 34.05.464(3) (Supp. 1988).
186. Id. § 34.05.455(1). In context, this includes both employees and consultants of the agency.
187. The Model Act provision from which this section was drawn carries the following comment: "This section is not intended to apply to communications made to or by a presiding officer or staff assistant, regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, or manner of service; such topics are not regarded as 'issues' . . ." MODEL ACT, supra note 3, § 4-213 comment.
188. WASH. REV. CODE § 34.05.455(1)(a) (Supp. 1988).
189. Id. § 34.05.455(1)(b).
190. Id. § 34.05.455(1)(c). This is a slightly narrower prohibition than in the old act, since that act prohibited communication with *all* prosecutory employees, while the new Act prohibits communication only with prosecutors in the same or a factually related case.
191. WASH. REV. CODE § 34.05.455(2) (Supp. 1988).
interest in the proceeding, but very real (and perhaps very persuasive) political interests in the outcome. This is an example of a direct collision between the values of political accountability (which would permit the communication) and fairness (which would prohibit the communication).192

Section 455(3) prohibits persons mentioned in the first two subsections from communicating ex parte with presiding officers. This facilitates the enforcement and sanction provisions which follow in the section. Improper communications and responses to them must be disclosed, including the identity of the sender, and all parties must be given the opportunity to rebut. Presiding officers who receive forbidden communications can be disqualified, and the portions of the record containing the communication sealed. Finally, disciplinary action against those making improper communications is authorized.193

b. Manner of Decision

Sections 461 through 467 detail the agency process after the hearing has concluded. Where the head of the agency presides at a hearing, or where the presiding officer has authority to make a final decision, an initial or final order may be issued. In all other cases (as, for example, where an administrative law judge presided at the hearing) an initial order will be issued.194

Initial and final orders should be responsive, articulate, and complete. The new Act requires that such orders contain findings and conclusions and the reasons therefore on all material issues of law, fact, or discretion presented on the record. Findings as to credibility must be identified as such. Findings which simply repeat the relevant statutory formulas must be accompanied by a description of the record evidence in support of the findings.195

Findings must be based exclusively on record evidence196 which is necessary if the hearing is to be fair. The countervailing need to bring agency technical expertise into the decision of cases is met by several provisions.

192. See generally ADMIN. LAW, supra note 79, § 9.3; B. SCHWARTZ, supra note 31, § 7.15.
193. WASH. REV. CODE §§ 34.05.455(4)–(7) (Supp. 1988).
194. Id. § 34.05.461(1).
195. Id. § 34.05.461(3).
196. Id. § 34.05.461(4).
First, the record can be supplemented by matters officially noticed.\textsuperscript{197} As was indicated earlier, official notice extends to technical matters within the agencies' specialized knowledge. Second, agencies are expressly permitted (as they were in the old act\textsuperscript{198}) to use their experience, technical competence, or specialized knowledge in evaluating evidence.\textsuperscript{199} This is a very important agency power and is properly used by experienced agencies to settle fact disputes on slim or ambiguous record evidence.\textsuperscript{200}

Of course, the order ultimately must be supported by substantial evidence.\textsuperscript{201} The new Act makes clear what was only implicit in the old act:\textsuperscript{202} That hearsay evidence alone \textit{can} be substantial so long as the parties' opportunity to confront and rebut is not unduly abridged.\textsuperscript{203}

It is important that judges state clearly the basis for reversals or remands based on inadequate facts. In \textit{McDaniels v. DSHS},\textsuperscript{204} for example, the court of appeals remanded an agency order in part because of an inadequate factual predicate. The court felt the agency had not met its burden of proving that the welfare recipient's divorced husband was in fact living with her. The court said the agency's findings that the former husband was living in the house were based on the "documentation evidence," (credit card and auto registration addresses), "double and triple hearsay" (testimony of postman that some man appeared to be living in the house) and "conjecture." The court remanded. There is nothing remarkable in the case if it is understood to permit both the introduction and the exclusive use of hearsay of the type permitted in the Act, "the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs."\textsuperscript{205} The language of the opinion might be stretched to suggest

\begin{itemize}
\item \textsuperscript{197} \textit{Id.}
\item \textsuperscript{198} \textsc{Wash. Rev. Code} § 34.04.100(4) (1987).
\item \textsuperscript{199} \textsc{Wash. Rev. Code} § 34.05.461(5) (Supp. 1988). The new Act is slightly less generous than the old in this respect, permitting the use of agency expertise in evaluation only "where it bears on the issues presented." \textit{Id.}
\item \textsuperscript{200} For an example of the use of this power under the old act, see Washington Medical Disciplinary Bd. \textit{v. Johnston}, 99 Wash. 2d 466, 663 P.2d 457 (1983).
\item \textsuperscript{201} \textit{See infra} notes 342–361 and accompanying text (discussing judicial review of questions of fact).
\item \textsuperscript{202} \textsc{Wash. Rev. Code} § 34.04.100(1) (1987).
\item \textsuperscript{203} \textsc{Wash. Rev. Code} § 34.05.461(4) (Supp. 1988). Stated otherwise, Washington here rejects the "residuum rule" which permits the admission of hearsay evidence but which requires that there must be a residuum of "legally competent" evidence to support a finding. \textit{See} B. \textsc{Schwartz}, \textit{supra} note 31, § 7.4 (discussing the residuum rule).
\item \textsuperscript{204} 51 Wash. App. 893, 756 P.2d 143 (1988).
\item \textsuperscript{205} \textsc{Wash. Rev. Code} § 34.05.461(4) (Supp. 1988).
\end{itemize}
that an order can never be based exclusively on hearsay. That would be inconsistent with the weight of authority and plainly at odds with the new Act which explicitly allows orders to be based on evidence even though the evidence "would be inadmissible in a civil trial." When reversing or remanding on factual grounds, therefore, judges should carefully explain that the finding is not supported by substantial evidence and, if further discussion is thought helpful, explain why the evidence in support of the order is not the "kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." Further characterizing discredited evidence as hearsay risks confusion.

As indicated, initial as well as final orders must include findings, conclusions, and the reasons and basis for the order.

c. Internal Review

If a decision has been embodied in a final order, disappointed parties may examine the options for stays and reconsideration, and then may proceed to judicial review. In the case of an initial order, the Act provides for a system of internal agency review.

Agencies can by rule provide that initial orders become final without further action by the agency, so parties must be aware of agency deadlines for filing exceptions. If so authorized, agencies also can delegate the power to review initial decisions and render final orders.

In designing a system of internal review, it is critical how much weight is to be afforded the decision of the person who presided over the hearing. Requiring that substantial weight be given to the initial decision is a way of assuring accuracy in fact finding since the initial decisionmaker spent time with the case and saw the witnesses. On the other hand, providing that the agency head have a rather free hand in reviewing initial orders is a way of assuring that legislative policies are appropriately reflected in agency decisions.

206. See B. SCHWARTZ, supra note 31, § 7.4.
207. WASH. REV. CODE § 34.05.461(4) (Supp. 1988).
208. Id. § 34.05.461(3).
209. Id. § 34.05.467.
210. Id. § 34.05.470.
211. Id. § 34.05.464(1).
212. Id. § 34.05.464(2).
The Washington Act follows the federal act\textsuperscript{213} and the Model Act\textsuperscript{214} in lodging very broad power in the reviewing officer. The Act provides that the reviewing officer "shall exercise all the decisionmaking power that the reviewing officer would have had . . . had the reviewing officer presided over the hearing."\textsuperscript{215} Presumably, this means that the reviewing officer can freely substitute his or her judgment for that of the presiding officer on all matters of law and policy.

On matters of fact, the same is apparently true, except that the Washington Act follows case law requiring a reviewing officer to give appropriate consideration to the administrative law judge's findings on demeanor evidence.\textsuperscript{216} The Act provides that the initial order must identify any findings "based substantially on credibility . . . or demeanor"\textsuperscript{217} and that in reviewing factual findings of the presiding officer, the reviewing officer "shall give due regard to the presiding officer's opportunity to observe the witnesses."\textsuperscript{218}

This is not a perfect solution. When a party has received a favorable ruling from an independent administrative law judge, only to have that determination reversed on appeal to the head of an agency which is seen as having a strong policy bias—indeed, which may have functioned as prosecutor in the case—a sense of unfairness may be palpable. But this seems to be the balance most statutes and courts have struck. It respects the legislative choice that final decision on policy matters be lodged in the agency, and it respects the hearing rights of parties by insuring that agency reviewers give some weight to those elements of the fact finding process that are affected by witness demeanor and credibility.

The courts, too, can play a "safety net" role here. The ultimate test of the factual adequacy of an agency order is whether the order is supported by substantial evidence. The substantiality of the evidence is to be assessed specifically "in light of the whole record,"\textsuperscript{219} which includes transcripts of the agency hearing and the credibility and demeanor findings of the presiding officer. Agencies which ignore

\begin{footnotes}
\item[213] 5 U.S.C. § 557(b) (1982) provides that "on appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision."
\item[214]  Model Act, supra note 3, § 4-216(d).
\item[216]  In the federal area, the principle was laid down in Universal Camera v. NLRB, 340 U.S. 474 (1951), cited with approval in Farm Supply Distribs. v. Washington Utils. and Transp. Comm'n, 8 Wash. App. 448, 506 P.2d 1306 (1973), rev'd on other grounds, 83 Wash. 2d 446 (1974).
\item[217]  Wash. Rev. Code § 34.05.461(3) (Supp. 1988).
\item[218]  Id. § 34.05.464(4).
\item[219]  Id. § 34.05.570(3)(e).
\end{footnotes}
such findings can be corrected by the courts, and the courts have not shirked their duty to ensure essential fairness.220

There is no right to oral argument on internal review, though agencies are authorized to grant the opportunity.221 In reviewing an initial decision, the Act requires the reviewing officer to “personally consider the whole record” as submitted.222 This is an onerous burden, especially in complex cases. Fairness compels the requirement, though practicality largely frustrates its enforcement.223

It is unclear what internal review procedures exist for those agencies exempted from the obligation of using independent administrative law judges. An eleventh hour amendment224 refers to those agencies and seems to describe a separate internal review procedure for them.225 What is not clear is whether the other parts of the Act’s internal

220. See, e.g., Cinderella Finishing School v. FTC, 425 F.2d 583, 585–589 (D.C. Cir. 1970) (agency which ignores fact findings of hearing officer violates due process). This analysis should make it clear how misguided is the expressed fear of the independent administrative law judges—a concern which was voiced emphatically when the Office of Administrative Hearings was created in 1981, and voiced again by several agencies while the new APA was being drafted.

Institutions of higher education, for example, obtained an exemption from the obligation to use independent administrative law judges. WASH. REV. CODE § 34.05.425(2) (Supp. 1988). The expressed concerns were two. First, members of the university “family” should not be forced to use outside decision makers. This was not a weighty concern because the choice always was left with the individual as to whether the decisionmaker was from inside or outside; the independent administrative law judge would be required only when the faculty member, student, or staff member against whom the university was taking action had concerns about the objectivity of inside fact finders. It is in precisely such a case that other citizens in the state are entitled to an independent hearing officer and it is not clear why members of the university family should be regarded with less respect.

Second, it was asserted that an outside decisionmaker might not apply university academic policy with appropriate sensitivity. But as the main text makes clear, control of policy remains completely in the hands of the head of the agency — here the president of the university. The independence of the outside presiding officer only protects the objectivity of the factfinding process.

It can be hoped that as these matters are better understood, the legislature will correct the error and provide members of the university family with the rights other citizens have.

221. WASH. REV. CODE § 34.05.464(6) (Supp. 1988).

222. Id. § 34.05.464(5).

223. The frustration grows from the practical difficulty of exploring the “mental processes” of an adjudicator as well as from doubts about the appropriateness of the inquiry. In Morgan v. United States, 304 U.S. 1, 18 (1941) and Morgan v. United States, 313 U.S. 409, 422 (1941) the Court said it was inappropriate to so inquire. And while there have been assertions to the contrary, the lower courts have been reluctant to press the matter too far. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971); K. Davis, supra note 32, § 17.4; B. Schwartz, supra note 31, § 7.21.

224. WASH. REV. CODE § 34.05.461(2) (Supp. 1988).

225. WASH. REV. CODE § 34.05.461(2) provides that in the case of exempted agencies the presiding officer shall transmit the record to the head of the agency, including comments on witness demeanor. The head of the agency then shall consider the record and the evidence and enter an order.
review process discussed in this section apply to these agencies. Those provisions contain important guarantees of the quality of the internal review process, and no reason for exemption from those requirements is apparent.

4. **Informal Adjudications**

Perhaps the most innovative part of the new Washington Act is its approach to the informal administrative process. Even though most agency adjudications are informal, most administrative procedure acts do not discuss them: perhaps because procedure acts contain formal procedures while we tend to define the informal process as the absence of procedure.

But we have known for some time that elemental fairness is both necessary and possible in informal process.226 Academicians,227 legislators,228 and courts229 have now and then attempted to prescribe some minimum standards for informal adjudications.

Accordingly, the new Washington Act, based in part on provisions of the Model Act,230 provides a new procedure called a “brief adjudicative proceeding.”231 An agency generally may use such a proceeding when it does not violate another provision of law, when the public interest does not require participation by those other than the parties, and when the issues and interests affected do not warrant formal adjudicatory process.232 Concern about the quality of informal hearings in the welfare area led the legislature to prohibit their use in certain welfare proceedings.233

An agency wishing to use brief adjudicative procedures must provide by rule for classes of cases in which the procedure will be employed.234 Administrative law judges can be used, but are not required; a presiding officer can be selected from within the agency.235

The procedure requires only that the agency inform the party of the agency’s view on the matter, give the party an opportunity to explain

---

226. K. DAVIS, DISCRETIONARY JUSTICE (1971) was one of the early reminders of this.
227. E.g., K. DAVIS, supra note 32, § 13.22.
228. See the examples collected in Comment, supra note 146, at 44 n.31 (1982).
230. In addition to formal adjudications, Article IV of the MODEL ACT provides for three other types of adjudications: conference, emergency, and summary adjudications.
231. WASH. REV. CODE §§ 34.05.482-.494 (Supp. 1988).
232. Id. § 34.05.482(1).
233. Id. § 34.05.482(2).
234. Id. § 34.05.482(1)(c).
235. Id. § 34.05.485(1).
his or her view, and give the party a statement of reasons for the agency decision. The decision may be reviewed internally at the instance of the party or the agency. In review on motion of the agency, action less favorable to the party than the initial action cannot be taken without giving the party an additional opportunity to express his or her views on the question. The order on review must be in writing, must include a brief statement of the reasons for the agency decision and must be filed within 20 days after the initial order.236

Judicial review of brief adjudicative proceedings will be held on a record consisting of documents considered or prepared by the agency. The Act expressly states that this record need not be the exclusive basis for the agency's decision.237

The future of the informal adjudicative process remains to be seen. There is great potential for "dejudicializing" the administrative process in such proceedings, and several other states have begun similar experiments.238 It is hoped Washington agencies will make broad use of the Act's provisions.

VI. JUDICIAL REVIEW

A. Generally239

When the legislature authorizes executive branch officials to act and that action comes before the judicial branch for review, the intersection of all three branches of government creates a complex structural problem. In the overall design, the basic function performed by judicial review is to keep administrative agencies within the bounds set for them by legislative and constitutional command. During judicial review, courts support the legislative process by insisting that legislatively prescribed boundaries of agency action are respected. Courts also may be enforcing any constitutional limits the people have thought wise to impose on agencies or legislatures.

Agencies benefit from judicial review. Courts can support vigorous agency action with statutory clarifications. Courts sometimes can insulate agencies from wrongful pressure from other public or private actors. In a broader sense, judicial review confers legitimacy on the

236. Id. § 34.05.491.
237. Id. § 34.05.494.
238. They are reviewed in Comment, supra note 146.
239. The following text is about judicial review. There also is legislative review of some agency rules provided for in the Act. WASH. REV. CODE §§ 34.05.610–660 (Supp. 1988). These were not part of the Task Force deliberations and are beyond the scope of this Article.
administrative process, in essence certifying that agency action is legis-
latively authorized, and hence is democratically accountable.\(^{240}\)

Although Americans repose great trust in their judicial system,\(^{241}\) there are important limitations on the institution of judicial review. Some of the limitations are the limitations of legitimacy. It is not the province of the judge to substitute a judicial view of wise policy for the view of the agency. While the distinction is difficult to articulate in statutory terms, and even harder to implement in actual cases, it is essential that the courts not overstep their proper boundaries. Just as agencies should be kept within the bounds set by the legislature, so courts should respect legislative delegations of discretion to agencies. When a judge is satisfied that agency action comports with the appropriate standards laid down in the statutes, in the constitutions, and in any applicable common law sources, the judicial task is at an end.\(^{242}\)

Other limitations on judicial review inhere in the process itself. Courts are passive, not active, instrumentalities. They are unable to seek out emerging problems or to investigate possible solutions. Moreover, judicial action is discontinuous—courts deal with matters on an episodic basis, and they cannot function effectively in a general supervisory role. Further, courts are staffed with generalists, not people whom we expect (or even desire) to master the intricate areas of agency expertise.

Because judicial review remains so broadly important, it is not surprising that statutory judicial review formulas have been centers of controversy since the first administrative procedure acts were attempted.\(^{243}\) The polar positions of the debate are clear. At one extreme is the view that agency action should be subjected to close and careful scrutiny, with maximum restrictions on agency discretion and ample opportunities for outside review. At the other extreme is the argument that agencies best serve the public interest when they are not subjected to tight restrictions and frequent review, but instead are left to deal creatively and flexibly with problems, subject to internal management control and periodic accountability through legislative and executive oversight.


\(^{241}\) A. DEFOUQUEVILLE, DEMOCRACY IN AMERICA 263–70 (Mayer ed. 1969).

\(^{242}\) ADMIN. LAW, supra note 79, at 124–28.

\(^{243}\) James DeLong notes the length and indeterminacy of the debate with the ironic phrase, "[t]he relationship between courts and agencies has been settled many times." DeLong, New Wine for a New Bottle: Judicial Review in the Regulatory State, 72 VA. L. REV. 399, 399 (1986).
In drafting judicial review provisions, the challenge to the drafter is to find some sensible, useful ground between these poles. One searches for verbal formulas which liberate agency discretion to the maximum extent consistent with an honest commitment to the rule of law. One tries to draft with practicalities in mind, forgetting neither the special risks of unchecked bureaucratic power nor the institutional limits of the judicial process. And, finally, one seeks language which has bite, and which avoids the cosmic generalities that give no one guidance.

A general administrative procedure act should contain several types of information about judicial review. The statute should identify who can seek judicial review, when review can be obtained, where it is available, how one gets it, and what it consists of once it is secured. The new Act seeks to clarify a number of these questions which were either not treated in earlier acts or which have become problematical. The new provisions on judicial review are not expected to eliminate all questions about judicial review. Rather, the goals are to give all judges the same statutory starting places when reasoning about review. That should produce a more consistent and more predictable system of review. In turn, the reduction in the range of judicial variation may, in turn, even reduce the quantity of review which is sought.

The old APA provided for judicial review of formal adjudications and unapplied rules. All other judicial review of agency action had to be obtained through a special writ or under the courts' inherent review authority.

The rule of construction stated in section 34.05.020 seems to overrule the court's opinion in Muije v. Board. That case resolved conflicts between statutes on the principle that a later specific statute prevails over an earlier, general statute. The new APA, despite its general nature, will now expressly prevail over even specific later statutes unless those statutes expressly so require.

The new Washington Act states that it is the “exclusive means of judicial review of agency action,” except for cases for money damages or cases in which other statutes expressly provide otherwise.

244. Wash. Rev. Code §§ 34.04.070 (rules) and 34.04.130 (orders) (1987).
247. “No subsequent legislation shall be held to supersede or modify the provisions of this chapter . . . except to the extent that such legislation shall do so expressly.” Wash. Rev. Code § 34.05.020 (Supp. 1988).
Because the new Act provides review for a wide range of agency conduct,250 and because it provides a wide range of remedies,251 there would appear to be little need for special writs252 and the "inherent" review power.253

B. How Review Is Obtained

As in the current Act, review generally will occur in Superior Court254 and, at petitioner's discretion, venue is laid in the county where the petitioner resides, where affected property is located, or in Thurston County.255

Review is obtained by filing a petition for review, the contents of which are detailed in the Act.256 If the agency action complained of is a rule, review may be had in the form of a declaratory judgment proceeding in Thurston County.257

Stays can be granted by agencies258 or by courts.259 Where agency action is based on "public health, safety, or welfare grounds," the power of courts to grant stays is sharply limited by the new Act. Such stays cannot be obtained unless the court finds that the applicant is likely to prevail on the merits and will suffer irreparable harm without

250. See the definition of agency action in WASH. REV. CODE § 34.05.010(3) (Supp. 1988) and the inclusive statement in WASH. REV. CODE § 34.05.570(4) (Supp. 1988).

251. WASH. REV. CODE § 34.05.574 (Supp. 1988) provides a full range of remedies, including reversal, remand, money damages, declaratory and injunctive relief both negative and positive.

252. Confirming this, the legislature has excepted action reviewable under the APA from the statutes granting courts authority to issue writs of mandamus and declaratory judgments. 1989 Wash. Laws, 51st Sess., H.B. 1358 §§ 38, 39.


254. An earlier draft of the bill provided for review in the court of appeals, a more logical place for the sort of appellate review that is contemplated in most cases. But the drafters were persuaded that the court of appeals workload was such that retaining superior court review was appropriate.

The new Act continues the provisions of the old act which allow the superior court to certify urgent and important matters for direct review by the court of appeals. WASH. REV. CODE § 34.05.518 (Supp. 1988).

255. Id. § 34.05.514. Note that in review of actions involving institutions of higher education, the action must be filed where that institution is located. Id. § 34.05.514(2).

256. Id. § 34.05.546. The petition must include identification of the agency action, facts to demonstrate that the petitioner is entitled to relief, reasons for believing relief should be granted, and a statement of the relief requested.

257. WASH. REV. CODE § 34.05.538 (Supp. 1988).

258. Id. § 34.05.550(1).

259. Id. § 34.05.550(2).
a stay, that a stay will not harm other parties, and that the agency's judgment that immediate enforcement is necessary is not justified.\textsuperscript{260}

C. \textit{Who Can Obtain Judicial Review}

The old act provided judicial review to "any person aggrieved by a final decision in a contested case."\textsuperscript{261} Taken broadly, that standard would extend judicial review too far: Many persons could be aggrieved in some sense by agency action, yet be unlikely prospects for vigorous, well informed judicial review. Moreover, some quantitative limits on judicial review are necessary if the courts and the agencies are to be able to function.

For these reasons, courts everywhere have developed a body of judge-made law limiting the class of persons who can seek judicial review of agency action. Known as the doctrine of standing, this body of rules seeks to restrict review to those most immediately affected by the action. Sometimes, the rules turn on formal matters such as whether the applicant was a party or whether the applicant's legal interests have been impaired.\textsuperscript{262} Sometimes, standing turns more on functional harm such as where the applicant suffers serious economic loss by reason of the agency action.\textsuperscript{263}

This judge-made law is voluminous, complex, and confusing.\textsuperscript{264} The new Act makes an effort to reduce both the complexity and the confusion by stating some basic principles in the text of the Act itself. As indicated above, the expectation is not that this will settle all questions of standing. Rather, the hope is that with the basic principles stated in an authoritative place, all judges will have the same textual starting place. This seems likely to improve both the consistency and predictability of judicial review.

\textsuperscript{260} Id. § 34.05.550(3). In McKinlay v. DSHS, 51 Wash. App. 491, 497, 754 P.2d 143, 147 (1988), a stay by the trial court was upheld against the objection that it was an abuse of discretion to stay an order revoking a day care license.

\textsuperscript{261} WASH. REV. CODE § 34.04.130(1) (1987).

\textsuperscript{262} B. SCHWARTZ, supra note 31, § 8.15.


\textsuperscript{264} "Standing may be the most arcane and bewildering concept in administrative law." ADMIN. LAW, supra note 79, at 142. For a discussion of the volumes of litigation over standing and the resulting confusion, see K. DAVIS, supra note 32, §§ 24.1, 24.36.
The standing principles stated in the new Act are not novel; rather, they come from the better reasoned judicial opinions. Nor do the principles turn on formal categories; instead, they are cast in functional terms. Section 530 imposes three conditions on the availability of judicial review: First, that prejudice or potential prejudice can be shown; second, that the applicant's interests were among those the agency was required to consider; and third that the judicial relief asked for would substantially eliminate the prejudice shown.\textsuperscript{265}

It might be thought that the first condition is merely a de minimis rule: if substantial harm is not threatened, no important social purpose is served by review. But a judicial appraisal of the extent of harm is not contemplated. The requirement of harm is best thought of as one rational way to delimit the class of persons who can seek review. It is rational because it provides review for those close enough to the agency action to feel its impact in a tangible way and excludes those who are further removed. Thus, a person should be able to meet this condition if he or she can show that the potential injury is real, not that it is substantial. As the United States Supreme Court stated, an "identifiable trifle" should be sufficient.\textsuperscript{266} At a later stage in the review, a court is told to limit relief to those who have proven substantial prejudice from the action.\textsuperscript{267} But a substantiality filter at that later stage in the proceedings presents much different considerations.

The second condition—that the applicant's interests be among those the agency was required to consider—is the drafter's way of referring to a set of largely prudential concerns in the law of standing.\textsuperscript{268} These concerns arise from the feeling that not every person who can show an injury in fact should be permitted to have judicial review. There are many people potentially affected by agency action in a complex interdependent society. To permit them all to seek review would overburden both the courts and the agencies. Hence, the courts have felt that a further filter was needed. Called the "zone of interest" test in United States Supreme Court parlance,\textsuperscript{269} the test seeks another rational

\textsuperscript{265.} WASH. REV. CODE § 34.05.530 (Supp. 1988).
\textsuperscript{266.} United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 689 n.14 (1973) (quoting Davis, Standing: Taxpayers and Others, 35 U. CHI. L. REV. 601, 613 (1968)) ("regulation imposing increased freight costs would make shipping recycled materials more expensive and thus would adversely affect the environment in areas student-plaintiffs used; causation was attenuated but sufficient as long as particular harm to these plaintiffs was proven").
\textsuperscript{267.} WASH. REV. CODE § 34.05.570(1)(d) (Supp. 1988).
means for limiting review to those for whom it is most appropriate.\textsuperscript{270} Here, the focus is on legislative intent. While the Supreme Court has backed away from a stringent zone of interest analysis,\textsuperscript{271} the underlying question is whether the legislature intended the agency to consider the applicant\'s interests when taking the action it took.\textsuperscript{272}

To take a simple example, where an agency is revoking a carrier\'s license to engage in a transportation service, it might be thought that the agency was required to consider the effect of the revocation on shippers. If so, a shipper would be able to meet this part of the standing test. On the other hand, the legislature might not have intended the agency to consider the effect of its revocation on the carrier\'s creditors. If that was the legislative judgment, those creditors—who clearly might be affected by the action—could not meet the standing test.\textsuperscript{273}

The third condition—that judicial relief will actually help solve the applicant\'s problem—is the result of judicial reluctance to issuing meaningless or ineffective decrees. If the agency action is only one of several elements which contribute to the applicant\'s problem, striking down the agency action may not advance the applicant\'s interests at all. In such a case, the court may stay its hand.

For example, suppose an agency issues a tax ruling that denies a tax exemption for gifts for hospital construction. Should prospective patients be allowed to challenge the rule? The first two conditions may be met here because some prejudice is foreseeable and because one could argue that the agency was supposed to think of the interests of patients when it issued rules affecting hospitals.

But if a patient were successful and had the rule overturned, would more hospitals be built? Perhaps, but there are many other actors and many other decisions that affect the construction of hospitals. A judicial decree in such a case might have no effect.\textsuperscript{274}

\textsuperscript{270} The U. S. Supreme Court, which originated the zone of interest test, formulated it in terms of statutes, and the new administration does the same. But it is not yet fully settled whether the test has some constitutional basis. See, e.g., the majority opinion of Justice O'Connor in Allen v. Wright, 468 U.S. 737, 753–761, 766 (1984).


\textsuperscript{272} See WASH. REV. CODE § 34.05.530 (Supp. 1988).

\textsuperscript{273} See L. JAFFE, supra note 241, at 520–28.

Obviously, sorting out those who should and those who should not have standing is difficult. The practical reality is that courts are most likely to examine narrowly drawn challenges to the legality of agency action at the instance of parties who have suffered injury in a setting which bespeaks injustice. Similarly, courts are less likely to reach unfocused, peripheral or fact-dependent questions at the instance of those whose injuries are slight or whose claim to justice is marginal.

D. When Can Review Be Obtained: Timeliness, Finality and Exhaustion of Administrative Remedies

The provisions on timing answer three closely related questions. First, are there time deadlines for seeking review of a final order—the question of repose. Second, when is agency action ripe for review—the question of finality. Third, what internal agency procedures must an applicant complete as a condition of judicial review—the question of exhaustion, and the related question of what new issues can be raised for the first time on judicial review.

1. Repose

While the Act provides no general statute of limitations, there are several specific time limitations within which petitions for review must be filed. With respect to rules, the new Act carries forward a provision of the old act and requires that challenges to the procedural validity of a rule be commenced within two years of the rule’s effective date. Unless otherwise provided by statute, challenges to the substance of a rule “may be filed at any time.”

Petitions to review orders must be filed within thirty days after service of the final order. Petitions to review other matters must be filed within thirty days of the action complained of unless the petitioner could not reasonably have known of the action or its effect.

Petitioners should note that under the new Act, service should be made on the agency as well as on the Attorney General and the parties.

275. WASH. REV. CODE § 34.05.542(1) (Supp. 1988).
276. Id. § 34.05.542(1).
277. Id. § 34.05.542(2).
278. Id. § 34.05.542(3).
279. Id. § 34.05.542(2).
2. **Finality**

Usually, only final agency action should be reviewable. The policy is to prevent premature judicial review, which interferes with agency discretion and which can present matters to the court which are insufficiently developed for effective judicial review. Generally, in Washington an action is final, whatever its form or however it is labelled, if it imposes an obligation, denies a right, or fixes a legal relationship. The act does not change this settled principle.

3. **Exhaustion**

Where error has occurred in the course of an administrative proceeding, it is more efficient for agencies to have the opportunity to correct it themselves without the need for judicial intervention. Moreover, agency corrections may be quicker, cheaper and more consistent with legislative policy. Hence, there has grown up a rule of “judicial administration” that applicants for judicial review must first exhaust any remedies available to them within the agency. The requirement inevitably involves a substantial amount of judicial discretion. As with the judicially created rules of standing discussed above, exhaustion rules have grown into a mass of complex doctrine. The new Act attempts to restate existing exhaustion doctrine in clear, statutory terms which should provide the basis for a more consistent and more predictable judicial treatment of the exhaustion question.

The basic principle is that administrative remedies must be exhausted. Three exceptions or qualifications are stated in the statute.

280. See Admin. Law, supra note 79, § 5.7.1.
281. Id.
285. Washington's basic exhaustion requirement is stated in Spokane County Fire Protection Dist. v. Spokane County Boundary Review Bd., 97 Wash. 2d 922, 928, 652 P.2d 1356, 1359 (1982). There are a number of exceptions dealing with the type of issue raised or the effectiveness of the administrative remedy. Orion Corp. v. State, 103 Wash. 2d 441, 457, 693 P.2d 1369, 1378 (1985) (futile remedies need not be exhausted); South Hollywood Citizens Ass'n v. King Co., 101 Wash. 2d 68, 74, 677 P.2d 114, 118 (1984) (exhaustion waived if issue raised is constitutional); State v. Tacoma-Pierce County Multiple Listing Serv., 95 Wash. 2d 280, 284, 622 P.2d 1190, 1192 (1980) (exhaustion not required when issue relates to agency's authority).
a. Exhaustion Sometimes Excused in Rulemaking

Two kinds of agency procedures specifically are not made conditions of judicial review of rules. First, following the old act, the new Act permits judicial review of rules even though the applicant has not asked the agency to pass upon the validity of the rule. Second, a new provision makes it clear that judicial review is available to a person even though the person did not participate in the rulemaking process which led to the issuance of the rule.

But if internal agency remedies are available, they must be exhausted before a rule can be reviewed. For example, if an agency creates a special protest proceeding in which affected persons may challenge the validity of a rule, that administrative remedy must be exhausted before those persons may seek judicial review of a rule.

Moreover, if the review of the rule occurs in the course of a review of an adjudicated agency order, the further exhaustion rules concerning orders, discussed below, may become relevant.

b. Exhaustion Excused by Other Statute

The legislature is left free to provide for immediate judicial review of agency action where it deems that wise.

c. General Exceptions to the Exhaustion Requirement

The new Act identifies three general exceptions to the exhaustion requirement.

The first exception excuses exhaustion when the administrative remedy is "patently inadequate." For example, such inadequacy would exist if the remedy were not commensurate with the claim. If an applicant for judicial review seeks immunity from agency action on constitutional grounds, a requirement of first seeking a discretionary exemption from the agency would not vindicate the petitioner's claim.

The second exception excuses exhaustion when the remedy is futile. A futile remedy exists when the agency lacks power to cure

---

289. Id.
290. A. Bonfield, SAR, supra note 13, at 561.
293. Wash. Rev. Code § 34.05.534(3)(a) (Supp. 1988). The Model Act, supra note 3, excused exhaustion when remedies were "inadequate." Agencies pressed for the additional
the problem or when the possibility of the petitioner succeeding in the agency action is minimal. Of course, many applicants for judicial review will feel that all internal remedies are futile since the agency has made up its mind. But speculations about agency predispositions should not excuse exhaustion; exhaustion should be required unless it is very clear that the agency would not honestly entertain the claim.294

Finally, an applicant for review may not be required to exhaust remedies if "grave" and irreparable harm will result which is "clearly" disproportionate to the benefits of exhaustion.295 This provision allows a court to recognize the special (and probably rare) situation where exhaustion produces few social benefits compared to the individual harms it inflicts.

The substantial amount of judicial discretion that is employed in resolving these issues seems affected in a practical way by several identifiable factors. For example, exhaustion should not be required in cases where the agency clearly lacks jurisdiction, where its position clearly is illegal, where the issue on the merits is a legal issue within the competence of the court, and where the administrative remedy is awkward, expensive, or inefficient compared to the judicial remedy sought. On the other hand, exhaustion is most sensible where factual issues remain undeveloped, where the agency's policy choice seems of special importance, when the agency will resolve the controversy satisfactorily, and where interruption of the agency process seems unwise.296

Some of the values which underlie the exhaustion doctrine also support the rule that parties should be encouraged or required to raise issues at the earliest possible time in the agency proceedings. The sooner an agency learns of an issue, the sooner it can take it into account in its deliberations. This ensures that agency discretion can


295. WASH. REV. CODE § 34.05.534(3)(c) (Supp. 1988). The MODEL ACT, supra note 3, required only irreparable harm disproportionate to benefits. As with the prior section, agencies insisted on the additional adjectives here, that harm be "grave" and the disproportionality be "clear." Again, the qualifiers seem to add nothing to the meaning of the statute.

be brought to bear on the resolution of the issues, which is presumably what the legislature intended. It also permits agency disposition of the matter which may make later judicial review unnecessary.\textsuperscript{297} Despite these undoubted values, parties should not have to predict, at their peril, every issue that might become relevant in an agency proceeding and during the judicial review of the proceeding.\textsuperscript{298}

The Act seeks a sensible balance between these concerns. The general principle is stated clearly: "issues not raised before the agency may not be raised on appeal."\textsuperscript{299} Several exceptions are then stated, all seeking to define circumstances where a person could not reasonably have raised the issues at an earlier time. For example, a new issue is not foreclosed when the person who wishes to raise it could not have known the facts giving rise to the issue, or when the person was not a party in the earlier agency proceedings.\textsuperscript{300} More generally, a new issue can be raised on judicial review if it arose from agency action (or is based on changes in controlling law) which occurred after all opportunities for relief have expired, and if "the interests of justice would be served."\textsuperscript{301}

The Act then states that when exceptional circumstances do permit the raising of new issues, the court must remand to the agency for consideration of the issues.\textsuperscript{302} This provision underscores the benefits of agency consideration of important issues before judicial review: Some of the issues will be resolved satisfactorily on remand, obviating the need for judicial consideration; others will return to the judicial forum with the illumination provided by further agency consideration. The reviewing court then can perform its proper function, which is to review, not to exercise, discretion.

In addition to this clear notice to advocates about the risks of withholding argument during agency proceedings in the hope of a more favorable judicial decision, the Act also suggests the risks in holding back any proof. The Act precludes judicial consideration of facts not

\textsuperscript{297.} The basic rule precluding consideration of issues raised for the first time on judicial review is often stated in Washington cases. \textit{E.g.}, Griffin v. DSHS, 91 Wash. 2d 616, 631, 590 P.2d 816, 825 (1979); Leschi Improvement Council v. Washington State Highway Comm'n, 84 Wash. 2d 271, 274, 525 P.2d 774, 778 (1974).


\textsuperscript{299.} \textsc{Wash. Rev. Code} § 34.05.554(1) (Supp. 1988).

\textsuperscript{300.} \textit{Id.} §§ 34.05.554(1)(a), (b) and (c).

\textsuperscript{301.} \textit{Id.} § 34.05.554(1)(d).

\textsuperscript{302.} \textit{Id.} § 34.05.554(2).
contained in the agency record unless supplemented by new evidence, and it sharply limits the new evidence that can be taken by the court on review.

**E. Scope of Review**

1. **Generally**

When a case is presented for review in the proper court, at the instance of a proper party, following the proper procedure, and presenting proper issues, the court then has to confront the question of how closely it will scrutinize the agency action. Formulas which describe the appropriate judicial role at this stage are called "scope of review formulas."

At the outset, it is helpful to clarify some terminology. Discussions about scope of review can refer to two different matters.

First is the *extent* of review: To what issues does the judicial inquiry extend? An example of a specific legislative restriction on the extent of review is when a court, in issuing a declaratory judgment on the validity of a rule, is told to look at some but not all of the potential legal challenges to a rule.

The second reference is the *intensity* of review: On an issue properly within the court's assigned role, to what degree is a court free to substitute its own views for that of the agency? When a court feels free to substitute its view for that of the agency, we will speak of a *more intensive* judicial review. When the court feels it necessary to defer significantly to the agency's judgment on the issue being considered, we will speak of a *less intensive* judicial review. This way of labelling is less likely to confuse than the customary labels for review intensity.

The process of judicial judgment is too subtle to be imprisoned in any one phrase or formula, but two fundamental maxims may be mentioned at the outset. *The court should make judgments about the extent and intensity of review which (1) are consistent with whatever*

---

303. Id. § 34.05.558.
304. Id. § 34.05.562.
305. See infra notes 379–386 and accompanying text.
306. The labels traditionally used in review formulas are sometimes more confusing than helpful. For example, terms such as "narrow" or "broad" review leave the reader uncertain whether the author is referring to the *extent* or the *intensity* of review. Terms such as "deep" or "shallow" seem to be referring to intensity, but one cannot quite be certain. And even where one is certain the author is referring to intensity, secondary connotations of the labels may conflict, as where an author uses "broad" and "deep" as apparent synonyms when they can, in some usages, suggest opposites.
legislative direction appears and (2) make sensible use of the relative abilities of agencies and courts.

The first principle instructs the court to determine how much discretion the legislature intended to confer on the agency. Legislative signals can be general or specific, explicit or implicit. For example, a certain degree of judicial deference to agencies may be inferred from the legislative choice to use the administrative process in the first place. That is, a legislative choice to employ an administrative agency—with its distinctive legal powers and unique political placement—reflects a certain degree of legislative confidence in agency policymaking and cautions against a too-intrusive judicial review. At a more specific level, legislative direction may appear in express statutory language detailing the appropriate level of review. It is here that one confronts the limited number of formulas that have been discussed over the years: de novo, preponderance, substantial evidence, clearly erroneous, and arbitrary and capricious. While it sometimes is difficult to distinguish among these formulas, passionate battles have been fought over the choice among them and courts seem endlessly fascinated with them. The drafter must be sensitive to these underlying moods and attitudes.

The second principle focuses on the comparative qualifications of courts and agencies to decide the issue presented. For example, substantial judicial deference to agency views would seem appropriate when an agency determination is based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency's expertise. On the other hand, when the issue being reviewed is a relatively pure legal or constitutional issue, the qualifications of the court would seem greater, and judicial deference is less warranted.

As discussed above, the judicial review provisions of the earlier act treated only review of adjudicated orders and pre-application

---

308. In some cases, there is constitutional direction about scope of review. For example, in the federal law, the doctrines of so-called constitutional or jurisdictional fact may in some areas produce heightened judicial scrutiny. B. SCHWARTZ, supra note 31, at 624–47.

In the states, heightened scrutiny also may be required by constitutional command. See e.g., Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 44, 520 P.2d 29, 40, 112 Cal. Rptr. 805, 816 (1974) (constitutional right to de novo review of some agency determinations), noted in Comment, The Supreme Court of California 1973-74, 63 CALIF. L. REV. 11, 27 (1975).

309. Davis estimates 500 pages of federal judicial opinions annually are devoted to scope of review discussions. K. DAVIS, supra note 32, § 29.2.

review of rules.\textsuperscript{311} In contrast, the judicial review provisions of the new Act cover review of all agency action, calling for a more sophisticated treatment of the scope of review.

The new Washington Act provides separate scope language for each type of proceeding.\textsuperscript{312} Thus, the new Act provides separate scope of review formulas for review of rules,\textsuperscript{313} review of orders,\textsuperscript{314} and review of other agency action.\textsuperscript{315}

Finally, by way of introduction, a preliminary subsection provides that the burden of proof is on the party asserting the invalidity of agency action,\textsuperscript{316} that the validity of agency action is to be determined as of the time the agency action is taken,\textsuperscript{317} and that reviewing courts must make a separate ruling on each issue presented to them.\textsuperscript{318} This subsection also contains the rule of the old act\textsuperscript{319} that relief cannot be granted unless the complainant has shown substantial prejudice from the agency action complained of.

2. Rulemaking

The new Washington Act states a separate standard of review for judicial review of agency rules.\textsuperscript{320} Under the old act, rules could be reviewed in two ways: before enforcement in a declaratory judgment proceeding, or as part of the review of an agency order in which the rule had been applied.\textsuperscript{321} In the declaratory judgment proceeding, the extent of review was limited to constitutional issues, statutory authority, and procedural regularity. In the review of an order applying a

\textsuperscript{311} \textit{Id.} § 34.04.070.

\textsuperscript{312} The most discerning approach is a system which details the scope of review for each type of issue being reviewed. For example, a 1986 American Bar Association study presented a model scope of review statute which provided separately for the scope of review on issues of fact, law, and discretion. Section of Admin. Law, American Bar Ass’n, \textit{Scope of Review Doctrine: Restatement and Commentary}, 38 ADMIN. L. REV. 233 (1986). The Model Act provisions are similar. MODEL ACT, supra note 3, § 5-116.

\textsuperscript{313} WASH. REV. CODE § 34.05.570(2)(c) (Supp. 1988).

\textsuperscript{314} \textit{Id.} § 34.05.570(3).

\textsuperscript{315} \textit{Id.} § 34.05.570(4).

\textsuperscript{316} \textit{Id.} § 34.05.570(1)(a).

\textsuperscript{317} \textit{Id.} § 34.05.570(1)(b). For discussion of this matter, see A. BONFIELD, SAR, supra note 13, at 571–72.

\textsuperscript{318} WASH. REV. CODE § 34.05.570(1)(c) (Supp. 1988). This requirement is in response to agency concerns about the “shotgun” judicial opinion in which agency action is set aside or remanded, but in which the precise nature of the difficulty cannot be identified.

\textsuperscript{319} WASH. REV. CODE § 34.04.130(6) (1987).

\textsuperscript{320} WASH. REV. CODE § 34.04.570(2) (Supp. 1988).

\textsuperscript{321} The declaratory judgment procedure was described in WASH. REV. CODE § 34.04.070 (1987). Authority to review the validity of a rule being applied by an order was implicit in authority to review the order.
rule, there was no separate statutory standard for measuring the validity of a rule. The new Act, as will be seen, provides a single standard for review of rules, irrespective of the timing of the review.\footnote{322 See \textit{infra} notes 329–336 and accompanying text.}

As the legislature came to draft the review standard for rules, the law on the subject was in the process of rapid change.\footnote{323 K. \textsc{Davis}, \textit{supra} note 32, § 29.1; \textsc{Admin. Law}, \textit{supra} note 79, 393–400.} Historically, rules had been reviewed with great deference; rules have been accorded something of the deference courts pay to enactments of legislatures. The classic statement of Justice Brandeis has often been quoted and its parallel to judicial review of statutes is evident: "[W]here the regulation is within the scope of the authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes . . . and to [rules] of administrative bodies."\footnote{324 Pacific States Box and Basket Co. v. White, 296 U.S. 176, 186 (1935).} There is merit in a substantial degree of judicial deference to agency rules. When a legislature has granted broad rulemaking authority to an agency, it has necessarily conferred substantial discretion on that agency. The legislative choice to confer discretion must be respected by the courts.

Deference has its limits, however. When modern rulemaking began to impact large segments of the population—in fields such as consumer protection, workplace safety, and the environment—and when the fiscal, ecological and other consequences of inappropriate rules began to be appreciated, judges began to rethink their traditional reluctance to inquire into agency rules. Because intensive inquiry was not thought appropriate for judges, judicial probes in this direction were halting, uneven, and sometimes cloaked as procedural inquiries, asserting that the agency product was not adequately explained or that the record was in some sense incomplete.\footnote{325 For a general discussion, see K. \textsc{Davis}, \textit{supra} note 32, § 6.36. The best illustration of this phenomenon, played out as a conflict between the D.C. Circuit—seeking deeper judicial review of agency procedures—and the U.S. Supreme Court—seeking to keep judges within more traditional bounds—is seen in the \textit{Vermont Yankee} litigation. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 547 F.2d 633 (D.C. Cir. 1976), rev'd, 435 U.S. 519 (1978).} The Supreme Court has attempted to keep this movement within some bounds,\footnote{326 \textit{Vermont Yankee}, 435 U.S. 519 (1978).} but with only limited success.\footnote{327 For discussion of the difficulty of arresting the development of this new judicial assertiveness, see K. \textsc{Davis}, \textit{supra} note 32, § 6.37; Symposium, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.: \textit{Three Perspectives}, 91 \textsc{Harv. L. Rev.} 1804 (1978).}
The drafters of the Model Act were well aware of the rapid movement in this doctrine and provide a much more intensive scope of review than the orthodox *Pacific States Box and Basket* deference. The Model Act provides that beyond the usual constitutional, statutory and procedural issues (which always had been reviewable), courts could also inquire into the adequacy of the factual basis of a rule, using the substantial evidence test.\textsuperscript{328} Further, courts could inquire into the reasonableness of a rule under either an "outside the range of discretion" formula\textsuperscript{329} or an optional "arbitrary and capricious" test.\textsuperscript{330}

In drafting the new Washington Act, some increased intensity in the review of agency rules seemed appropriate given the current movements in judicial doctrine, but some felt the arbitrary and capricious test stated too intensive a standard. After considerable discussion, the legislature provided that courts can examine a rule to see if it could "conceivably have been the product of a rational decision maker."\textsuperscript{331}

It remains to be seen if this subtle drafting effort really states a formula that a judge can distinguish from the arbitrary and capricious standard. However it is phrased, it is clear is that limited judicial review was intended. The cautions noted below in connection with the use of the arbitrary and capricious standard in reviewing orders\textsuperscript{332} are cautions which should apply with special force in reviewing rules.

This standard now applies to review of rules in advance of application as well as review of rules which have been applied in an agency adjudication. When review of a rule is undertaken in the course of reviewing an adjudicated order, there may be two separate inquiries: Whether the underlying rule is valid, and whether the application of the rule in this case is valid. Where rationality is a part of both inquiries, the statute seems to state different standards: The "product of a rational decisionmaker" test for rules and the "arbitrary and capricious" test for applications. Again, only judges can tell us whether these tests have different operational meaning.

\textsuperscript{328} *Model Act* § 5-117(c)(7).
\textsuperscript{329} *Id.* § 5-116(c)(8)(i).
\textsuperscript{330} *Id.* § 5-116(c)(8)(iv).
\textsuperscript{331} *Wash. Rev. Code* § 34.05.570(2)(c) (Supp. 1988).
\textsuperscript{332} See infra notes 366–375 and accompanying text.
3. **Orders**

Section 34.05.570(3) details the scope of review of agency orders.\(^{333}\) The section states a number of separate grounds for invalidity. Conceding the risks of paraphrase, it may be helpful to see the list in a general way. Under the section an order is invalid if it is:

(a) in violation of the constitution,
(b) outside the agency’s authority,
(c) the product of invalid procedure,
(d) based on erroneous interpretation or application of law,
(e) unsupported by substantial evidence,
(f) incomplete (i.e., required issues are unresolved),
(g) the product of a biased tribunal,
(h) inconsistent with an agency rule, or
(i) arbitrary or capricious.

a. **Reviewing Law and Policy**

The *extent* of review under the first four sections is clear. The court may look to any relevant legal standards to determine the legality of the agency action, including constitutional provisions, authorizing statutes, other statutes, and agency rules. The inquiry can extend to the legality of the order itself, to the constitutionality of the statute on which the order rests, or to the legality of the agency rule to which it applies.

The question about the *intensity* of judicial review of these items is more complex. One begins with the supposition that in reviewing questions such as these—questions which might be characterized as questions of law—review will be relatively intense. On the comparative qualifications principle discussed above, the courts, not the agencies, are the experts on legal questions. This suggests that courts should be fairly free to substitute their judgments for those made by the agency.

But the other principle mentioned above requires us to consider the probable intent of the legislature about the degree of intensity which courts should use in reviewing agency determinations of law. Now and then it is possible to find, express or implied, a judgment of the legislature that the agency’s discretion in working with the statute should be given some special weight. For example, item (d) in the list authorizes a court to reverse for an error in the *application* of law. If

---

\(^{333}\) **WASH. REV. CODE** § 34.05.570(3) (Supp. 1988).
the agency were authorized to apply a broad statutory term to a specific set of facts, one might infer that the legislature expected some benefit of insight or judgment from the agency's initial determination. If so, some judicial deference would seem appropriate. The federal cases have not produced a single rule, but there is old and solid authority, as well as current decisions, that permit or even require courts to defer to agencies on such questions.

In Washington, the court has stated the proposition that an agency's interpretation of its own statute is entitled to "substantial weight," "great deference," or "great weight." And an agency's interpretation of its own regulations has been similarly respected by the Washington courts. At the same time, other cases hold that in reviewing an agency's application of a statutory term to a specific set of facts, the court has an "inherent and statutory authority to make a de novo review independent of the [agency's] decision."

Of course, these formulas are highly elastic; courts can move up or down the intensity scale to a considerable degree without violating such general guides. Judicial deference on questions seen as questions of law is most appropriate when the determination is inextricably bound up with factual issues and most especially when those factual issues are technical, complex, or specialized and are within the presumed expertise of the agency. General judicial deference beyond this area would not seem warranted, but legislative intent is again the key.

334. The classic authority is NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944) where the Court stated:

[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. [The agency's] determination ... is to be accepted if it has 'warrant in the record' and a reasonable basis in law.

322 U.S. at 131.

The comments to MODEL ACT, supra note 3, § 5-116, reflect the same view.


b. The Substantial Evidence Test: Testing the Factual Adequacy of Agency Action

In review of record proceedings, the factual adequacy of the agency order is tested under the substantial evidence test. That test has the advantage of familiarity,\textsuperscript{341} and it was the test originally used in the first Washington Administrative Procedure Act.\textsuperscript{342} In 1972, it was replaced with the “clearly erroneous” test.\textsuperscript{343} The Washington courts seem to have been unclear about the purpose of the change, and whether it was intended to make review of agency fact findings more or less intensive.\textsuperscript{344} Considering the normal usages of the terms in other contexts, it is arguable that clear error is a more intensive test than the substantial evidence test.\textsuperscript{345} This suggests that the legislature intended by the present change to reduce the intensity of judicial review of agency factfinding. The possibility seems remote, however, that a reviewing judge will be able to identify a significant operational difference between the two standards.\textsuperscript{346} Both are middle-level tests, more intensive than “scintilla” or “no basis in fact” tests and less intensive than de novo or other fully substitutional tests. In any event, in the new Act, the legislature has returned to the more widely used and better understood substantial evidence test.

The substantial evidence test sometimes is described as an inquiry into the reasonableness of the evidentiary support for the order.\textsuperscript{347} Perhaps more accurately, it is a test of the quality of the reasoning process which connects the evidence with the agency finding: Evidence is substantial when the court concludes that the agency, by reasoning, could have moved from the evidence in the record to the findings.\textsuperscript{348} Whether the findings are reasonable in any other sense would not seem

\textsuperscript{341} The substantial evidence test is the usual test for reviewing jury verdicts, B. SCHWARTZ, supra note 31, § 10.11, and is the standard for reviewing the factual adequacy of adjudicated orders under the federal administrative procedure act. 5 U.S.C. 706(2)(E).

\textsuperscript{342} 1959 Wash. Laws ch. 234, § 13(6)(e).

\textsuperscript{343} WASH. REV. CODE § 34.04.130(6)(e) (1987).


\textsuperscript{345} Id.

\textsuperscript{346} Professor Cooper, a draftsman of the 1961 Model APA, did a comparative study of the two tests and concluded that “many judges find it most difficult to distinguish between the ‘substantial evidence’ and ‘clear error’ tests.” Cooper, Administrative Law: The ‘Substantial Evidence’ Rule, 44 A.B.A.J. 945, 947 (1958).

\textsuperscript{347} The basic judicial statement is Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1951). See ADMIN. LAW, supra note 79, § 7.3.1; B. SCHWARTZ, supra note 31, § 10.7.

\textsuperscript{348} L. JAFFE, supra note 241, at 598.
relevant. And of course, whether the court would have made the same findings from the evidence is equally irrelevant.

These considerations make it clear that the substantial evidence test in its pure form should apply only to review of agency factual determinations\(^4\) and then, only to factual determinations that are made on some kind of record.\(^5\)

Moreover, under the new Act the substantial evidence test applies only to adjudications—where some record is produced—and is not used to review the factual adequacy of rules. If the validity of a rule is questioned in the review of an adjudicative proceeding, the factual foundation for the rule is tested by the more general "product of a rational decision maker" test.\(^6\) Whether the tests are distinguishable is, of course, debatable, but the legislature presumably intended some difference in the different formulations. Based on the preceding discussion of the legislative nature of rulemaking,\(^7\) one would suppose that judicial review of the factual adequacy of a rule would be less intensive than judicial review of the factual adequacy of an order.

The record to which a court looks for substantial evidence is the record defined in the Act, plus any supplementary material which is permitted. The type of proceeding involved determines the degree to which a record can be supplemented on review. In the case of formal adjudications, the record presented by the agency to the court on review can be supplemented only as to matters bearing on procedure or on the disqualification of the agency.\(^8\) On review of informal proceedings, such as brief adjudications and rulemaking, the record on review can be supplemented by "[m]aterial facts" as needed.\(^9\)

The substantiality of the evidence is to be judged, as it was under the old act,\(^10\) on the basis of the record as a whole. This means that the judicial function is not completed when the court finds in the record some evidence it regards as substantial. The court instead must

\(^{349}\) It is confusing to equate tests of evidentiary adequacy with tests of general reasonableness of the agency order. Thus, courts should avoid the conclusion that inadequacy of evidentiary support renders an order "arbitrary or capricious." Cf. Stempel v. Department of Water Resources, 82 Wash. 2d 109, 114, 508 P.2d 166, 169 (1973).

\(^{350}\) This does not mean that the substantial evidence test is used only when the agency has engaged in a formal adjudication. The record referred to is defined in the Act and includes the record in informal proceedings as well. See infra note 355 and accompanying text.

\(^{351}\) WASH. REV. CODE § 34.05.570(2)(c) (Supp. 1988).

\(^{352}\) See supra notes 321–333 and accompanying text.

\(^{353}\) WASH. REV. CODE § 34.05.562 (Supp. 1988).

\(^{354}\) Id. § 34.05.562(1)(c).

\(^{355}\) WASH. REV. CODE § 34.04.130(6)(e) (1987).
look at the entire record submitted and make its judgment about substantiality after it has considered any evidence that "fairly detracts" from the evidence supporting the order. As was indicated earlier, hearsay evidence can be admitted. The statute makes clear, too, that hearsay alone can be substantial evidence, so long as it is "the kind of evidence on which reasonably prudent persons are accustomed to rely" and if the use of such evidence does not "unduly abridge the parties' opportunities to confront witnesses and rebut evidence." This indicates that the legislature has specifically rejected the so-called "residuum rule."

c. Requiring Consistency in Agency Action

As discussed earlier, the new Act seeks reliability and predictability in agency decisions. This purpose is furthered by the provision that agency orders ordinarily must be consistent with agency rules. The Act provides that an order inconsistent with an agency rule can be set aside unless the agency demonstrates a rational basis for the inconsistency.

For purposes of clarity, it would have been preferable if the Act also codified the principle asserted in some Washington cases requiring that orders also be consistent with agency practice unless the inconsistency is explained. A provision to this effect was proposed in the Model Act, and a version was included in the Task Force proposal. The legislature apparently was persuaded, however, that the proposed standard was unnecessary—either because the doctrine was already established in case law, or because unexplained variations from agency practice could be reached under the arbitrary and capricious standard.

---

357. See supra notes 177, 202-208 and accompanying text.
359. Id. § 34.05.461(4).
361. See supra notes 29-30 and accompanying text (discussion of interpretive and policy statements).
364. Model Act, supra note 3, § 5-116(c)(8)(ii).
Washington Administrative Procedure Act

d. Arbitrary and Capricious Agency Action

The final item in the new Act’s list of grounds for invalidity of agency action is the arbitrary and capricious test.\textsuperscript{365} The test is as old as judicial review of government action and is intended to authorize courts to set aside administrative action wholly lacking in rationality. It is difficult to elaborate the concept beyond the natural meaning of the words used in its formulation, and the endless judicial glosses and applications do not add much.

A couple of general observations about its use may be helpful, however. First, the test is the proper test to use when reviewing exercises of agency discretion.\textsuperscript{366} That means it bears close resemblance to the "abuse of discretion" test.\textsuperscript{367} It would serve analytical clarity to reserve the test for reviewing exercises of discretion and not use it in reviewing agency determination of law or fact. Second, on the intensity of review spectrum, the test occupies a band closer to the least intensive end. That is, it usually does not authorize judges to freely substitute their preferences or policy conclusions for that of the agency. We do deal, however with a band on the intensity scale, not a point. And within that band, there is room for a court to describe the arbitrary and capricious test as requiring a "thorough, probing, in depth review"\textsuperscript{368} and to engage in what has become known as "hard look" review—clearly a few steps up the intensity scale.\textsuperscript{369} In most situations, however, a less intensive version of the test seems most consistent with judicial practice and with legislative preference that discretion be exercised by agencies rather than by courts.\textsuperscript{370}

Whatever smooth formulations may appear in learned journals or judicial opinions, the real world application of the arbitrary and capricious test cannot be easy. It requires a judge with sensitivity to the

\textsuperscript{365} WASH. REV. CODE § 34.05.570(3) (Supp. 1988).
\textsuperscript{367} The two are often coupled, as in the Federal Administrative Procedure Act, 5 U.S.C. § 706 (2)(A) (1982), and in section 15(g)(6) of the original (1961) Model Act.
\textsuperscript{368} Overton Park, 401 U.S. at 415.
\textsuperscript{369} ADMIN. LAW, supra note 79, § 7.5.2.
\textsuperscript{370} As Professor Bonfield has put it:

[It is clear that the words . . . 'arbitrary or capacious' are not intended to vest authority in the courts to substitute their judgments for those of the agencies with respect to the wisdom or desirability of [agency action]. Instead, this language intends only to authorize the courts to set aside [agency action if it is] so clearly outside the range of action expected from responsible decision makers that [it] cannot be successfully defended as an exercise of reasoned judgment. That is, this language . . . is intended to authorize judicial invalidation of agency action only if the agency took such action wholly on the basis of whim or illogical thinking. In short, the agency must have acted irrationally.

A. BONFIELD, SAR, supra note 13, at 575.
values of agency policymaking, with commitment to reasoned government action, and with the wisdom to tell when one of these important values has unacceptably encroached upon the other.

The arbitrary and capricious test was included in the original Washington Act, and the Washington courts have tended to assign it the conventional, low-intensity meaning being herein described. The provision was included in the new Act, presumably on the assumption that the prevailing consensus about its intensity would continue.

Finally, one special aspect of the arbitrary and capricious test warrants mention—the propriety of using the test to inquire into the adjudicator's motive or purpose. The Model Act and the original Task Force proposal included a separate reference to "improper purpose" as a grounds for reversal of agency orders. The Task Force proposal was supported by several Washington cases that made the integrity of the adjudicator an issue in determining arbitrariness. As enacted, the Act does not contain this separate provision. Presumably, the prior Washington case law continues and the motive of the adjudicator can be examined as part of the court's general inquiry into the arbitrariness of the order.

4. Reviewing Agency Action Beyond Rules and Orders

The final part of the scope of review section deals with agency action that is neither a rule nor an order. As has been indicated, the old Washington act provided judicial review only for formal adjudications and unapplied rules, and did not address scope of review issues for other forms of agency action. Because the new Act applies to a broader range of action, scope of review formulas for these forms are included in this section.

372. Pierce County Sheriff v. Civil Serv. Comm'n for Sheriff's Employees, 98 Wash. 2d 690, 695, 658 P.2d 648, 651 (1983) ("heavy burden" on one challenging agency action under this test); Public Employee Relations Comm'n v. City of Kennewick, 99 Wash. 2d 832, 841–42, 664 P.2d 1240, 1245 (1983) (arbitrary and capricious review labelled "limited" review in which court is to give "great deference" to agency fact findings and expertise); Equitable Shipyards, Inc. v. State, 93 Wash. 2d 465, 474–75, 611 P.2d 396, 402 (1980) (court not to substitute its views for those of agency).
373. MODEL ACT, supra note 3, § 5-116(c)(6).
376. Id. § 34.04.070.
377. See supra notes 25–27 and accompanying text (definition of "agency action").
Washington Administrative Procedure Act

a. The Extent of Review

The extent of review is carefully spelled out. The additional forms of agency action covered include all agency conduct within the Act's definition of agency action which is not in the form of a rule or order—i.e., agency conduct which involves such things as the "implementation or enforcement of a statute" or the "imposition of sanctions, or the granting or withholding of benefits."\(^{378}\) As discussed below, this section specifically provides for judicial review of agency inaction in certain circumstances.\(^{379}\)

In reviewing this type of agency action, the court may look at questions of (i) constitutionality, (ii) statutory authority, (iii) whether the action was arbitrary or capricious, or (iv) whether the agency itself was properly constituted.\(^{380}\) It is instructive to compare this list with the provisions describing the extent of review of rules and orders. The review provided in this section is very much like the scope stated for review of rules, where the court also can examine the constitutional and statutory authority supporting the action, as well as make some inquiry into its rationality.\(^{381}\) On the other hand, questions that can be examined in review of orders that are not listed in this section include the legality of procedures followed,\(^{382}\) the adequacy of the factual support for the action,\(^{383}\) the completeness of the action,\(^{384}\) and its consistency with agency rules.\(^{385}\) Since these criteria are employed in the review of orders, and thus are given a kind of legitimacy, it seems likely that serious shortfalls in any of these areas can be reached under the section's arbitrary and capricious standard.

b. The Intensity of Review

The intensity of review will depend on the type of issue that is presented for review. Presumably, review of items (i), (ii) and (iv) in the above enumeration will receive relatively intensive review, reflecting the comparative qualifications of courts and agencies on such questions. In contrast, the intensity of review of questions of arbitrariness should receive less intensive review for the reasons discussed earlier.

\(^{378}\) WASH. REV. CODE § 34.04.010(3) (1987).
\(^{379}\) WASH. REV. CODE § 34.05.570(4)(b) (Supp. 1988).
\(^{380}\) Id. § 34.05.570(4)(c).
\(^{381}\) Id. § 34.05.570(2)(c).
\(^{382}\) Id. § 34.05.570(3)(c).
\(^{383}\) Id. § 34.05.570(3)(e).
\(^{384}\) Id. § 34.05.570(3)(f).
\(^{385}\) Id. § 34.05.570(3)(h).
c. Review of Agency Inaction

Because inaction can be a powerful form of agency action in some circumstances, judicial review of inaction serves the conventional purposes of protecting citizens and keeping agencies within legislatively prescribed bounds. At the same time, inappropriate judicial second guessing of some kinds of agency decisions not to act would be unwise; prosecutorial discretion, for example, does not seem a suitable subject for intensive judicial supervision.

Statutory and judicial treatment of the problem of reviewing inaction work within this conflict in values. The federal act covers inaction generally, but excepts from judicial review matters "committed to agency discretion," an exception of uncertain scope. Some states specifically provide for review of "failure or refusal of an agency to act." The Model Act included inaction within its definition of agency action, making it always subject to review, the drafters believing that frivolous or too-intrusive review were better dealt with by scope of review provisions than with preliminary definitions. The original Task Force proposals were patterned on the Model Act approach.

Agencies expressed concern that explicit inclusion of inaction within the definition of agency action would invite too frequent and too intrusive review. In response to such concerns, the legislature left inaction out of the definition of agency action. Nevertheless, much agency inaction remains subject to judicial review under the new Act. This section provides that a person whose rights are violated "by an agency's failure to perform a duty that is required by law to be performed" is entitled to judicial review. And the section describing the types of relief available specifically authorizes a court to "order an agency to take action required by law."

Other sections of the Act also make it clear that the presence of agency discretion does not deprive the court of power to review agency inaction. Section 580 authorizes judicial inquiry into the arbitrariness of an agency's failure to act. Section 574 specifically authorizes a

388. Admin. law, supra note 79, § 5.3.1.
390. Model Act, supra note 3, § 1-102 comments.
392. Id. § 34.05.574.
393. Id. § 34.05.570(4)(c)(iii).
court to compel an agency to exercise its discretion.\textsuperscript{394} And section 582 provides that a court can inquire into the arbitrariness of an agency's refusal to enforce an order.\textsuperscript{395}

It would seem that in these various sections dealing with review of inaction, the legislature sought to eliminate the formal, narrow and complex proceedings associated with the prerogative writs, and to put in their place a simple, clear way to test the legality of agency conduct, whether the injury caused by that conduct resulted from action or inaction.

Turning to the \textit{intensity} with which courts are to review agency inaction, the intensity level probably will be relatively low in most cases. The Act makes the arbitrary and capricious test the appropriate formula to use and the comments above concerning the appropriate level of intensity under that test are generally applicable here. Certainly, any judicial appraisal of the rationality of an agency's decision not to act must be sensitive to the special problems of priority setting and resource allocation which may lie behind a particular case of agency inaction.\textsuperscript{396} Where inaction is the result of determinations of this sort, a court should proceed with great caution.

Where an agency has refused to exercise its discretion as required by law, we have seen that section 574 authorizes courts to compel agency action. At the same time, the section makes clear that not only must judges respect agency discretion, but that agency lapses are not to be cured by judicial substitution; the usual remedy is remand:

In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion . . . . The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.\textsuperscript{397}

\section*{F. Enforcement}

\subsection*{1. Enforcement by the Agency}

Sections 578 through 594 contain the procedure by which agencies can seek civil enforcement of rules and orders. Agencies proceed by

\textsuperscript{394} \textit{Id.} \textsuperscript{\textsection} 34.05.574(1).
\textsuperscript{395} \textit{Id.} \textsuperscript{\textsection} 34.05.582(3). In addition to these means of judicial review of inaction, the new Act provides some legislative oversight of some forms of agency inaction. \textit{See id.} \textsuperscript{\textsection} 34.05.640.
\textsuperscript{396} Sunstein, \textit{supra} note 386, at 672–75.
\textsuperscript{397} \textit{WASH. REV. CODE} \textsuperscript{\textsection} 34.05.574(1) (Supp. 1988).
petition for civil enforcement in the superior court, venue being determined as in civil cases generally. The record in an enforcement action is the same as the record on judicial review.

2. Enforcement by Private Parties

If the agency which issued the order has chosen not to enforce it, persons with standing can petition for its enforcement. This authority is new and is patterned on a provision of the Model Act. Notice that this authority extends to agency orders but does not apply to agency rules; presumably an agency refusal to enforce a rule can be reached only by a petition for review and by a showing that the inaction is arbitrary or capricious.

With respect to orders, the agency's "prosecutorial discretion" is protected in several ways. First, the outside petitioner must give the agency 60 days notice prior to filing the petition. This permits the agency to consider whether enforcement is desirable. If the agency commences enforcement action within the sixty days, the private petition cannot be filed.

Second, only persons with standing can petition for enforcement of an agency order. As has been indicated earlier, the provisions governing standing are relatively strict. They also leave a court with some discretion and thus provide a further filter to protect agency discretion. Finally, the agency on motion is entitled to a dismissal of the outside petition unless the petitioner can show that the agency acted arbitrarily in refusing to enforce the order. For the reasons suggested earlier, referrals to enforce based credibly on agency decisions about priorities and resources seldom will appear arbitrary to a court.

---

398. Id. § 34.05.578.
399. Id. § 34.05.590(2). The record in judicial review is described in id. § 34.05.566.
400. Id. § 34.05.582.
401. MODEL ACT, supra note 3, § 5-202.
402. See supra notes 387-400 and accompanying text (discussion of review of agency inaction).
403. WASH. REV. CODE § 34.05.582(1)(b) (Supp. 1988).
404. See supra notes 262-275 and accompanying text (discussion of standing).
405. WASH. REV. CODE § 34.05.530 (Supp. 1988).
406. Id. § 34.05.582(3).
407. See supra notes 387-400 and accompanying text (discussion of inaction).
408. Privately enforced actions under this section cannot be the basis for a judicial award of monetary payments or damages apart from taxable costs. WASH. REV. CODE § 34.05.582(4) (Supp. 1988).
In the absence of special statutory provisions, it would seem that the legality of an agency action is a condition of judicial authority to enforce it. It would follow that questions about an order's legality could always be raised as a defense in a judicial proceeding to enforce the order. On the other hand, where there is statutory authority for direct judicial review of agency orders, there is practical good sense in a requirement that a party should ordinarily seek that way of challenging the legality of agency action, allowing later enforcement actions to proceed in a summary fashion. That seems to be the general principle in the federal cases though in the case of rules, a person's failure to use existing procedures to seek pre-enforcement review does not usually preclude the person from raising questions about the rule's legality in a later enforcement proceeding. Of course, if the alternative means of raising the issue is not considered exclusive by the court, the defendant apparently can choose the forum in which to raise the issue.

Even where it is generally agreed that issues not raised earlier are waived, a party still should be able to raise in an enforcement proceeding an issue that reasonably could not have been raised earlier. The Model Act treats the question by simply incorporating in the enforcement-defense section the standards from earlier sections which determined when issues not raised before the agency could be raised for the first time on judicial review. Thus, under the Model Act, a party can raise a defense in an enforcement proceeding if the defense arose from facts a party did not know and was under no duty to discover, or if the defense arose from a change in law or from agency action that took place after entry of the order being reviewed.

409. B. SCHWARTZ, supra note 31, at 553.
410. See, e.g., United States v. Sykes, 310 F.2d 417 (5th Cir 1962). Typical federal statutes seem to contemplate such a result in providing that an order is "final" when the time for direct review has expired. See, e.g., Federal Trade Commission Act, 15 U.S.C. §§ 45(c), 45(g) (1982). B. SCHWARTZ, supra note 31, at 552.
411. Deering-Milliken v. OSHA, 630 F.2d 1094 (5th Cir. 1980); B. SCHWARTZ, supra note 31, at 553.
412. Compare Public Employee Relations Comm'n v. City of Kennewick, 99 Wash. 2d 832, 839, 664 P.2d 1240, 1244 (1983) (subsequent detailed statutory scheme renders APA review not exclusive and defendant who did not seek review under the APA can raise legality as defense in enforcement proceeding; review, however, will be "limited") with Boch v. Pilotage Comm'trs, 91 Wash. 2d 94, 97-98, 586 P.2d 1173, 1175 (1978) (APA is exclusive remedy and court is without jurisdiction to entertain mandamus action). See supra notes 250-254 and accompanying text (discussing when the judicial review provisions of the new Act are exclusive).
413. MODEL ACT, supra note 3, § 5-203, referring to §§ 5-112 through 5-114.
Since the new Washington Act contains a similar issue-limiting provision on direct review, the same strategy was open. But agency concerns that the Model Act approach opened up too many defenses at the enforcement stage led the legislature to attempt a more limited approach. The reader can examine the resulting section 586 and judge whether the additional restrictions and the resulting complexity really constitute an improvement.

Looking generally at the section, it first identifies which defenses cannot be raised in enforcement proceedings: Issues the defendant could have raised before a reviewing court or agency and did not, or issues that were raised before those bodies but were unsuccessful. This means that any defense a party knew about and failed to appeal is foreclosed in a later enforcement action. It also means that if the party did appeal from the agency action, but lost, the defense cannot be raised again in an enforcement proceeding. It will remain to be seen whether this provision is too restrictive. One might conceive of a situation where in the face of certain and imminent enforcement proceedings, a party decides to forgo the additional expense of separate judicial review, intending to present his other defenses in the forthcoming enforcement proceeding. The section seems to state that the defenses are waived in such a case and it is not at all clear that this is either fair or efficient. This section bears careful legislative monitoring.

Having excluded defenses a party could have raised earlier, we are left with defenses a party had no opportunity to raise below. One might suppose that a party who had no opportunity to raise a defense before the agency or in a reviewing court ought to be allowed to raise it during an enforcement proceeding no matter what the nature of the issues it presented. But the Act continues its relentless restriction. Under the provisions of the Act, a party in this situation can raise issues of constitutionality, statutory authority, procedural regularity, and bias. But the party cannot raise issues about the substantiality of the evidence supporting the order or about whether it is arbitrary or capricious.

The wisdom of depriving a party of these defenses is not clear. Nor, for that matter, is the utility. One doubts that a court really would

---

414. WASH. REV. CODE §§ 34.05.554, .562 (Supp. 1988) (discussed supra at notes 300–305 and accompanying text).
415. Id. § 34.05.586.
416. Id. § 34.05.586(1).
417. Assuming, as the Act requires, that the party did not know and could not reasonably have discovered facts giving rise to the issues. Id. § 34.05.586.
enforce an admittedly arbitrary agency order against a party who had no opportunity to defend. Judges tend to take a more functional view. When faced with elaborate arguments about which defenses were permissible in an labor board enforcement action, Justice Stafford once observed: “The parties have argued at length about which rules . . . should prevail; however, we decline merely to choose one . . . . Rather, we find it necessary to determine what kind of judicial review will best serve the labor relations policy of this state.”

The Model Act approach was much simpler and seemed to the legislature to be the correct approach when deciding which issues not raised before the agency could be raised for the first time on judicial review. Their use in determining which issues can be raised in enforcement would seem sensible.

VII. CONCLUSION

To the reader who has struggled through to the end of this Article, it must finally be clear that an act of this comprehensiveness incorporates a number of diverse values, compromises, and tradeoffs. None of the Act’s solutions can be regarded as final. With experience under the Act, necessary modifications will be identified, proposed, debated, and enacted. In this necessary process of adjustment, it can be hoped that any needed amendments can remain consistent with the underlying policies of the new Act. Adaptations to new circumstances will be necessary. Corrections of obvious error or oversights cannot be avoided. But piece-meal exemptions and exclusions at the instance of special pleaders—from inside or outside government—should be watched with great care or else the clear legislative wish for comprehensiveness and clarity will be compromised.

Washington is not well equipped to manage this kind of monitoring over time. The subject of administrative procedure does not enlist the enthusiasms of the people, no matter its importance to them. Our history shows the problems. As recounted above, the old act was amended several times. In each instance, the change seemed to be at the insistence of a particular interest group—inside or outside government—and there did not seem to be any place for objective appraisal of the change. From today’s vantage point, the changes tended to run contrary to the underlying legislative preference for clarity and simplicity.

Perhaps it is time in Washington for some relatively permanent body of advisors on administrative procedure. At the federal level, we have the excellent Administrative Conference of the United States, created twenty-five years ago by Congress and performing useful study and evaluative work. While Washington may not need a full time official agency to do this task, some form of objective and continuing instrumentality would be very useful. The representatives of regulated parties cannot be expected to perform this task with objectivity. And the office of the Attorney General—an otherwise likely place for such a function, given its expertise—too easily falls into the role of defending agencies. What is needed is a knowledgeable body which represents the people of the state, not the agencies or the regulated parties. Continued improvement in the quality of our governmental processes—which cost so greatly and affect so many—would seem to warrant some modest provision toward this end.