

NOTE

REMEDIES FOR NONCOMPLIANCE WITH SECTION 553 OF THE ADMINISTRATIVE PROCEDURE ACT: A CRITICAL EVALUATION OF *UNITED STATES STEEL AND WESTERN OIL & GAS*

Under section 553 of the Administrative Procedure Act (APA),¹ federal administrative agencies must in most instances² follow definite procedures when promulgating rules.³ Many rules are challenged on the ground that the promulgating agency did not comply with the requirements of section 553. The overwhelming majority of the courts that sustain such challenges immediately invalidate the challenged rule.

1. 5 U.S.C. § 553 (1976).

2. Under certain circumstances, agencies need not follow any set procedures when promulgating rules that have the force and effect of law. See note 3 and text accompanying notes 15-19 *infra*.

3. The APA prescribes two general sets of procedural requirements. The first set contains the procedures required for what is commonly called "informal" rulemaking. These procedures, set forth at 5 U.S.C. § 553 (1976), are the topic of this note. The second set contains the procedures involved in "formal" rulemaking. Formal rulemaking is essentially informal rulemaking plus hearings and elaborate record-keeping. See *id.* §§ 556-557. For a discussion of formal and informal rulemaking procedure, see I K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6:1-6:3 (2d ed. 1978); Auerbach, *Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review*, 72 Nw. U.L. REV. 15 (1977); Fuchs, *Development and Diversification in Administrative Rule Making*, 72 Nw. U.L. REV. 83 (1977).

Generally, formal procedures are required only when a statute calls for hearings "on the record," either in those words or in similar language. *United States v. Florida E.C. Ry.*, 410 U.S. 224, 234-38 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756-57 (1972); *Hercules, Inc. v. EPA*, 598 F.2d 91, 119 n.53 (D.C. Cir. 1978). See generally Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970). Most other rulemaking is informal.

Certain agency actions, such as statements of policy, and some rulemaking, require no procedures. For discussion of situations in which no procedures are required see *National Retired Teachers Ass'n v. United States Postal Serv.*, 593 F.2d 1360, 1364-65 (D.C. Cir. 1979); *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, 669-70 (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978); *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1111-14 (D.C. Cir. 1974); *Dow Chem., USA v. Consumer Prod. Safety Comm'n*, 464 F. Supp. 904, 908-10 (W.D. La. 1979); Asimow, *Public Participation in the Adoption of Interpretative Rules and Policy Statements*, 75 MICH. L. REV. 521 (1977); Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276 (1972). See also text accompanying notes 15-19 *infra*.

In the recent cases of *United States Steel Corp. v. EPA*⁴ and *Western Oil & Gas Association v. EPA*,⁵ however, the Courts of Appeals for the Eighth and Ninth Circuits sustained procedural challenges but left the improperly promulgated rules temporarily in effect.⁶

In response to this recent departure from precedent, this note examines the question of what remedy is appropriate following a successful procedural challenge to a rule promulgated pursuant to section 553. Part one outlines the procedures prescribed by section 553 and surveys the cases in which courts have fashioned remedies following a finding of agency noncompliance with this statute. Part two examines the competing considerations in cases involving successful procedural challenges to informal rulemaking, and suggests that the formulation of a remedy requires an equitable, balancing approach. This approach allows a court to be responsive to exigent circumstances in a given case, avoiding an often unjust and unreasonable result. Part three is a critical evaluation of *United States Steel* and *Western Oil & Gas* in light of the balancing approach discussed in part two.

I. CONFLICTING JUDICIAL REMEDIES FOR SECTION 553 VIOLATIONS

Congress passed the APA in an effort "to improve the administration of justice by prescribing fair administrative procedure."⁷ Section 553 of the Act prescribes the minimum⁸ procedures that agencies are in most instances obliged to follow when promulgating rules.⁹ The rulemaking process under section 553 commences when the agency

4. 649 F.2d 572 (8th Cir. 1981).

5. 633 F.2d 803 (9th Cir. 1980).

6. See text accompanying notes 104-08 *infra*.

7. SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT: REPORT OF THE COMMITTEE ON THE JUDICIARY, S. REP. NO. 752, 79th Cong., 1st Sess. 7 (1945), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 248, 79th Cong., 2d Sess. 1, 187 (1946) [hereinafter cited as LEGISLATIVE HISTORY].

8. Compare 5 U.S.C. § 553 (1976) with *id.* §§ 556-557. See note 3 *supra*.

9. Section 553 reads, in pertinent part:

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply—

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the

publishes notice of proposed rulemaking in the *Federal Register*.¹⁰ The agency then receives and considers comment from interested parties.¹¹ Following the comment period, the agency publishes a final rule¹² along with a statement of its basis and purpose.¹³ The final rule can be effective no sooner than thirty days from the date of its publication in final form.¹⁴

Section 553 allows agencies to forego the above procedures in certain situations. If "a military or foreign affairs function of the United States . . . [or] a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts" is the subject of rulemaking, the promulgating agency may disregard the procedures of

relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

10. See 5 U.S.C. § 553(b) (1976). The type of notice that an agency must give has been at issue in a number of cases. In general, the notice must afford "interested parties a reasonable opportunity to participate in the rulemaking process." *Forester v. Consumer Prod. Safety Comm'n*, 559 F.2d 774, 787 (D.C. Cir. 1977). The notice must specifically announce that the agency intends to promulgate a rule. *National Tour Brokers Ass'n v. United States*, 591 F.2d 896 (D.C. Cir. 1978). Also, the notice must reach all similarly situated parties, not just selected individuals. *Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013, 1019-20 (3d Cir. 1972). See also *American Iron & Steel Inst. v. EPA* 568 F.2d 284, 291-92 (3d Cir. 1977); *United States v. Daniels*, 418 F.Supp. 1074 (D.S.D. 1976).

11. 5 U.S.C. § 553(c) (1976).

12. Final rules may differ substantially from proposed rules. See *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980); *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974). One commentator has proposed that, in such a case, an additional notice and comment period be instituted prior to the effective date of the rule. Comment, *The Need for an Additional Notice and Comment Period When Final Rules Differ Substantially From Interim Rules*, 1981 DUKE L.J. 377.

13. 5 U.S.C. § 553(c) (1976). The courts have generally held that the statement of basis and purpose need not contain specific details and findings of fact to support the agency's decisions. See, e.g., *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 701 (2d Cir. 1975); *American Medical Ass'n v. Mathews*, 429 F. Supp. 1179, 1204-05 (N.D. Ill. 1977). The statement must, however, "respond in a reasoned manner to the comments received, . . . explain how the agency resolved any significant problems raised by the comments, and . . . show how that resolution led the agency to the ultimate rule." *Rodway v. USDA*, 514 F.2d 809, 817 (D.C. Cir. 1975). Similarly, the statement "must be sufficiently detailed and informative to allow a searching judicial scrutiny of how and why the regulations were actually adopted." *Amoco Oil Co. v. EPA*, 501 F.2d 722, 739 (D.C. Cir. 1974). *But cf.* Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 *Colum. L. Rev.* 721, 754-55 (1975). ("There is not the slightest indication that the purpose of the notice-and-comment proceeding was to develop a record by which a reviewing court could test the validity of the rule which the Administrator finally adopted.")

14. 5 U.S.C. § 553(d) (1976).

the section.¹⁵ The agency may also disregard the procedures when "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" are involved.¹⁶

Section 553 also contains two "good cause" exceptions to its procedural requirements.¹⁷ First, if "the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest,"¹⁸ it may forego notice and comment. The second "good cause" exception allows agencies to make rules effective in less than thirty days upon "good cause found and published with the rule."¹⁹

Since the enactment of the APA, numerous rules have been challenged on the ground that the promulgating agency did not comply with the procedural requirements of section 553.²⁰ Most courts²¹ sus-

15. *Id.* § 553(a). See *National Wildlife Fed'n v. Snow*, 561 F.2d 227 (D.C. Cir. 1976); *Housing Auth. of Omaha v. United States Hous. Auth.*, 468 F.2d 1 (8th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973). See generally, Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540 (1970).

16. 5 U.S.C. § 553(b)(3)(A) (1976). Agency attempts, both successful and unsuccessful, to rely on the section 553(b)(3)(A) exception are numerous. See *American Bus Ass'n v. United States*, 627 F.2d 525 (D.C. Cir. 1980) and cases cited in note 3 *supra*.

17. 5 U.S.C. §§ 553(b)(B), 553(d)(3) (1976). The legislative history of the APA cautions agencies not to use the good cause exceptions as escape clauses. See LEGISLATIVE HISTORY, *supra* note 7, at 19, 200, 258. Accordingly, courts normally have construed these exceptions narrowly. See *Mobil Oil Corp. v. DOE*, 610 F.2d 796 (Temp. Emer. Ct. App. 1979), *cert. denied*, 100 S.Ct. 2156 (1980); *United States v. Gavrilovic*, 551 F.2d 1099 (8th Cir. 1977); *Detroit Edison Co. v. EPA*, 496 F.2d 244 (5th Cir. 1974). *But see* *Texaco, Inc. v. Federal Energy Admin.*, 531 F.2d 1071 (Temp. Emer. Ct. App.), *cert. denied*, 426 U.S. 941 (1976); *Pent-R-Books, Inc. v. United States Postal Serv.*, 328 F. Supp. 297, 312 (E.D.N.Y. 1971). Agencies successfully invoked the good cause exceptions in the following cases: *Washington State Farm Bureau v. Marshall*, 625 F.2d 296 (9th Cir. 1980); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974). For general discussion of the good cause exceptions, see Comment, *Agency Discretion to Accept Comment in Informal Rulemaking: What Constitutes "Good Cause" Under the Administrative Procedure Act?* 1980 B.Y.U. L. REV. 93; Note, *The "Good Cause" Exceptions: Danger to Notice and Comment Requirements Under the Administrative Procedure Act*, 68 GEO. L.J. 765 (1980); Comment, *The Good Cause Exceptions from Administrative Rulemaking Requirements: Divergent Views in the Clean Air Cases*, 49 U. CIN. L. REV. 624 (1980).

18. 5 U.S.C. § 553(b)(B) (1976).

19. *Id.* § 553(d)(3).

20. See, e.g., *Rowell v. Andrus*, 631 F.2d 699 (10th Cir. 1980) (regulation raising annual payment for oil and gas leases from \$.50 to \$1.00); *Kollett v. Harris*, 619 F.2d 134 (1st Cir. 1980) (regulation attributing to a disabled child certain income of parents or step-parents); *United States v. Gavrilovic*, 551 F.2d 1099 (8th Cir. 1977) (regulation placing mecloqualone on list of controlled substances); *American Frozen Food Inst. v. Train*, 539 F.2d 107 (D.C. Cir. 1976) (regulations creating effluent limitations for potato-processing industry); *Pickus v. United States Bd. of Parole*, 507 F.2d 1107 (D.C. Cir. 1974) (regulations concerning parole eligibility); *California Citizens Band Ass'n v. United States*, 375 F.2d 43 (9th Cir. 1967) (FCC regulations pertaining to Citizens Radio Service).

21. The power of courts to review agency action

may be found in (1) a statute which specifically states that orders or other actions of the named agency may be reviewed . . . or contains a general provision for judicial review

taining such procedural challenges²² immediately invalidate the rule and remand the case to the agency with instructions to follow proper section 553 procedures.²³ The Court of Appeals for the District of

of administrative action . . . ; or (2) a grant of general jurisdiction—either by statute, such as a code of procedure, or under the common law or by constitution.

W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 917 (7th ed. 1979). This power of judicial review has been the focus of a plethora of case law and commentary. With respect to judicial review of agency procedure, the leading case is *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978). *Vermont Yankee* held generally that a court must not impose on an agency more restrictive procedures than those required under the APA. *Id.* at 524. For comment on and criticism of *Vermont Yankee*, see 1 K. DAVIS, *supra* note 2, § 6:37 (2d ed. Supp. 1980); Davis, *Administrative Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3; Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978).

22. An extensive analysis of when a procedural challenge should be sustained is beyond the scope of this note. Briefly, if an agency unjustifiably fails to meet the procedural requirements discussed in notes 8-14 *supra* and accompanying text, it violates section 553. Several courts have held, however, that a minor deviation from strict section 553 procedures does not amount to a violation. See *National Helium Corp. v. Federal Energy Admin.*, 569 F.2d 1137, 1144 (Temp. Emer. Ct. App. 1977); *Alabama Ass'n of Ins. Agents v. Board of Governors of the Fed. Reserve Sys.*, 553 F.2d 224, 236-37 (5th Cir. 1976), *vacated in part*, 558 F.2d 729 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

23. In most instances, the court declares the rule null and void, apparently following 5 U.S.C. § 706 (1976): "The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusion found to be . . . (D) without observance of procedure required by law." In some cases, the petitioning party requests equitable relief, and the court enjoins the promulgating agency from enforcing the challenged rule. See, e.g., *Dow Chemical, USA v. Consumer Prod. Safety Comm'n*, 464 F. Supp. 904 (W.D. La. 1979); *Community Nutrition Inst. v. Butz*, 420 F. Supp. 751 (D.D.C. 1976). Most courts use this remedy as a matter of course, seemingly without considering whether alternatives are available. See, e.g., *PPG Indus., Inc. v. Costle*, 659 F.2d 1239 (D.C. Cir. 1981); *Mobil Oil Corp. v. DOE*, 610 F.2d 796, 806 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980); *City of New York v. Diamond*, 379 F. Supp. 503 (S.D.N.Y. 1974).

In a few isolated instances prior to *United States Steel* and *Western Oil & Gas*, courts left challenged rules temporarily in effect. For example, in *Rodway v. USDA*, 514 F.2d 809 (D.C. Cir. 1975), members of low-income households challenged a food-stamp allocation program that had been instituted without any of the procedures required by section 553. The court held that the program was invalidly promulgated and remanded the case, but left the program in effect until a properly promulgated substitute was in place. *Id.* at 817, 824. The *Rodway* court was not, however, asked to invalidate the program. Although the plaintiffs originally asked the court to enjoin enforcement of the allocation program because it increased the cost of food stamps, they withdrew their request after the Department of Agriculture rolled back the price increase. *Id.* at 812. See also *Natural Resources Defense Council, Inc. v. SEC*, 389 F. Supp. 689, 699 (D.D.C. 1974).

One of the rare cases that clearly contradicts the majority rule prior to *United States Steel* and *Western Oil & Gas* is *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975). *National Nutritional Foods* involved a challenge to FDA regulations that classified certain preparations of vitamins A and D as "prescription drugs" rather than as food. The court held that the agency had not provided an adequate statement of basis and purpose as required by section 553(c). Instead of invalidating the challenged regulations as the plaintiff requested, the court left the regulations in effect and remanded the case for further proceedings. The Court of Appeals for the District of Columbia Circuit criticized the *National Nutritional Foods* case at length in *Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705 (D.C. Cir. 1977). The *Tabor* court convincingly demonstrated that the *National Nutritional Foods* court misread and misapplied the cases on which it based its decision. *Id.* at 711-12. It is interest-

Columbia Circuit followed this practice in *Tabor v. Joint Board for Enrollment of Actuaries*.²⁴

In *Tabor*, experienced actuaries challenged regulations establishing standards and qualifications for persons performing actuarial services for pension plans to which the Employee Retirement Income Security Act of 1974²⁵ (ERISA) applies.²⁶ The actuaries argued, *inter alia*, that the Joint Board had violated section 553 by failing to publish a statement of basis and purpose with the rules.²⁷ The district court granted the Board's motion for summary judgment.²⁸ The Court of Appeals for the First Circuit reversed, vacating the rules and remanding the case to the Board "to enable it to adopt new rules accompanied by a contemporaneous statement of basis and purpose."²⁹

In *United States Steel Corp. v. EPA*³⁰ and *Western Oil & Gas Association v. EPA*,³¹ the Courts of Appeals for the Eighth and Ninth Circuits proposed a new remedy for agency noncompliance with section 553. Both cases arose out of the 1977 amendments to the Clean Air Act (CAA).³² Under the amended CAA, each state submitted to the Environmental Protection Agency (EPA) a list categorizing the areas of the

ing to note that, the Court of Appeals for the Second Circuit, which left the regulations in effect in *National Nutritional Foods*, chose in other cases to invalidate challenged rules immediately. See *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240 (2d Cir. 1977); *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478 (2d Cir. 1972).

24. 566 F.2d 705 (D.C. Cir. 1977).

25. Pub. L. No. 96-364, 94 Stat. 1210 (codified in scattered sections of 29 U.S.C.).

26. 566 F.2d at 707. Section 3041 of ERISA, 29 U.S.C. § 1241 (1976) directs the Secretary of the Treasury and the Secretary of Labor to establish the Joint Board for the Enrollment of Actuaries. The Joint Board is to "establish reasonable standards and qualifications for persons performing actuarial services with respect to plans in which this Act applies." *Id.* § 1242. Pursuant to this directive, the Joint Board proposed a set of regulations that was adopted as final on January 14, 1976. 566 F.2d at 707. These regulations were the subject of the *Tabor* case.

27. *Id.* at 709-10.

28. *Id.* at 706.

29. *Id.* at 712.

30. 649 F.2d 572 (8th Cir. 1981).

31. 633 F.2d 803 (9th Cir. 1980).

32. 42 U.S.C. §§ 7401-7642 (Supp. III 1979). For discussion of the 1977 Amendments see Currie, *Relaxation of Implementation Plans Under the 1977 Clean Air Act Amendments*, 78 MICH. L. REV. 155 (1979).

Under the Clean Air Act Amendments of 1970, 42 U.S.C. §§ 1857-1858 (1976) (amended 1977), the Administrator of the EPA established air-quality standards for designated air pollutants. The standards have been in force since November 25, 1971 and are codified at 40 C.F.R. §§ 50.1-50.11 (1981). The states were required to develop plans to meet the standards by 1975. In 1977, because the deadline imposed by the 1970 legislation was not met, Congress amended the CAA to restructure the scheme for attaining the standards set up in 1970. Under the 1977 amendments, the states must meet the air-quality standards for most pollutants by December 31, 1982, 42 U.S.C. 7502(a) (Supp. III 1979), and they must meet the standards for certain other pollutants (photochemical oxidants or carbon monoxide, or both) by 1987 if earlier attainment proves impossible. *Id.* § 7502(b).

state according to the Act's air-quality standards.³³ An area that met the standards was listed as an "attainment" area; an area that failed to meet the standards was designated a "nonattainment" area.³⁴ The EPA Administrator promulgated a final version of the states' lists of designations³⁵ after making "such modifications as he deem[ed] necessary."³⁶ The states were then to base new plans to attain proper air quality on the Administrator's final lists.³⁷

The Amendments called for promulgation of the final lists by February 3, 1978.³⁸ The EPA did not, however, publish the final lists in the *Federal Register* until March 3, 1978.³⁹ This publication, the first public notice of the lists, included instructions that they were to be effective immediately.⁴⁰

Following the March 3, 1978 publication, a number of parties petitioned for review of the Administrator's actions in promulgating the final lists.⁴¹ The parties argued that the EPA had not complied with section 553 because it had published the final lists effective immediately, without prior notice or a comment period.⁴² They sought the

33. 42 U.S.C. § 7407(d) (Supp. III 1979).

34. *United States Steel Corp. v. EPA*, 649 F.2d at 574. An area that had a nonattainment designation on the final list became subject to the EPA's "offset" policy. The offset policy, first mentioned in an interpretive ruling, 41 Fed. Reg. 55,524 (1976), was adopted in the CAA Amendments of 1977, 42 U.S.C. § 7503 (Supp. III 1979). As the *United States Steel* court noted:

This policy places strict limitations on the construction of new facilities, or the modification of existing facilities, that will increase the overall level of pollution emissions in a nonattainment area. Construction or modification in a nonattainment area will be permitted only if the increase in emissions attributable to the new source would be offset by a greater decrease in emissions attributable to existing sources. Construction of a new source of emissions may be disapproved if it will contribute to a violation of air quality standards in a nearby area.

649 F.2d at 576 n.8.

35. See 43 Fed. Reg. 8962 (1978).

36. The Administrator's derived authority to modify the designations from 42 U.S.C. § 7407(d)(2) (Supp. III 1979).

37. *Id.* § 7407.

38. *Id.* § 7407(d).

39. 43 Fed. Reg. 8962 (1978).

40. *Id.* The publication also stated that the agency would accept post-promulgation comment on the designations and would publish revised designations as appropriate.

41. See, e.g., *United States Steel Corp. v. EPA*, 649 F.2d 572 (8th Cir. 1981); *Western Oil & Gas Ass'n v. EPA*, 633 F.2d 803 (9th Cir. 1980); *New Jersey v. EPA*, 626 F.2d 1038 (D.C. Cir. 1980); *Republic Steel Corp. v. Costle*, 621 F.2d 797 (6th Cir. 1980); *United States Steel Corp. v. EPA*, 605 F.2d 283 (7th Cir. 1979), cert. denied, 444 U.S. 1035 (1980); *Sharon Steel Corp. v. EPA*, 597 F.2d 377 (3rd Cir. 1979); *United States Steel Corp. v. EPA*, 595 F.2d 207 (5th Cir.), modified on rehearing, 598 F.2d 915 (1979).

42. See, e.g., *United States Steel Corp. v. EPA*, 649 F.2d at 573-76; *Western Oil & Gas Ass'n v. EPA*, 633 F.2d at 806, 810-12; *New Jersey v. EPA*, 626 F.2d at 1041-42; *Republic Steel Corp. v. Costle*, 621 F.2d at 799, 802-03; *United States Steel Corp. v. EPA*, 605 F.2d at 285-86; *Sharon Steel Corp. v. EPA*, 597 F.2d at 379; *United States Steel Corp. v. EPA*, 595 F.2d at 210, 212-13.

invalidation of the nonattainment designations that affected them.⁴³ The EPA admitted that it did not follow the procedures in section 553,⁴⁴ but argued that the February 3, 1978 deadline provided sufficient "good cause" under section 553(b)(B) to allow it to forego normal rulemaking procedures.⁴⁵

Seven federal courts of appeals considered the petitions. The EPA's "good cause" argument succeeded in the Courts of Appeals for the Sixth⁴⁶ and Seventh⁴⁷ Circuits, but failed elsewhere.⁴⁸ The Courts of Appeals for the Third,⁴⁹ Fifth⁵⁰ and District of Columbia⁵¹ Circuits rejected the EPA's good cause argument, invalidated the challenged designations, and remanded the cases to the agency for proceedings in compliance with section 553.⁵² The Court of Appeals for the Eighth Circuit in *United States Steel* and the Court of Appeals for the Ninth Circuit in *Western Oil & Gas* also rejected the EPA's argument,⁵³ and

43. *See, e.g.*, *United States Steel Corp. v. EPA*, 649 F.2d at 577; *Western Oil & Gas Ass'n v. EPA*, 633 F.2d at 812; *New Jersey v. EPA*, 626 F.2d at 1042; *Republic Steel Corp. v. Costle*, 621 F.2d at 802; *United States Steel Corp. v. EPA*, 605 F.2d at 284-85; *Sharon Steel Corp. v. EPA*, 597 F.2d at 378; *United States Steel Corp. v. EPA*, 595 F.2d at 210, 213, 218.

44. *See* 43 Fed. Reg. 8962 (1978). *See also* *United States Steel Corp. v. EPA*, 649 F.2d 574-75; *Western Oil & Gas Ass'n v. EPA*, 633 F.2d at 805-06, 810; *New Jersey v. EPA*, 626 F.2d at 1041; *Republic Steel Corp. v. Costle*, 621 F.2d at 803; *United States Steel Corp. v. EPA*, 605 F.2d at 286; *Sharon Steel Corp. v. EPA*, 597 F.2d at 379; *United States Steel Corp. v. EPA*, 595 F.2d at 213-15.

45. When it published the final lists on March 3, 1978, the EPA invoked the "good cause" exception as follows:

The States are now preparing revisions to their State implementation plans (SIPs) as required by sections 110(a)(2)(I) and 172 of the Act. This enterprise, which must be completed by January 1, 1979, requires that the States have immediate guidance as to the attainment status of the areas designated under section 107(d). Congress has acknowledged this by imposing a tight schedule on the designation process and requiring the EPA to promulgate the list within 180 days of the enactment of the amendments. Under these circumstances it would be impracticable and contrary to the public interest to ignore the statutory schedule and postpone publishing these regulations until notice and comment can be effectuated. For this good cause, the Administrator has made these designations immediately effective.

43 Fed. Reg. 8962 (1978).

46. *Republic Steel Corp. v. Costle*, 621 F.2d 797, 803-05 (6th Cir. 1980).

47. *United States Steel Corp. v. EPA*, 605 F.2d 283, 286-90 (7th Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).

48. As the split in the circuits indicates, the question of what constitutes good cause under section 553 is a volatile issue. For discussion of this question, see authorities cited in note 17 *supra*.

49. *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 380-81 (3rd Cir. 1979).

50. *United States Steel Corp. v. EPA*, 595 F.2d 207, 213 (5th Cir.), *modified on rehearing*, 598 F.2d 915 (1979).

51. *New Jersey v. EPA*, 626 F.2d 1038, 1043-45 (D.C. Cir. 1980).

52. *Id.* at 1050; *Sharon Steel Corp. v. EPA*, 597 F.2d at 381-82; *United States Steel Corp. v. EPA*, 595 F.2d at 218.

53. *United States Steel Corp. v. EPA*, 649 F.2d 572, 575-76 (8th Cir. 1981); *Western Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 810-12 (9th Cir. 1980).

remanded the challenged designations for further proceedings.⁵⁴ Rather than setting aside the challenged designations immediately, however, these courts left them in effect pending the EPA's compliance on remand.⁵⁵ The courts justified this novel remedy by explaining that the decision was within their discretion "to shape an equitable remedy," and that the equities weighed in favor of leaving the rules temporarily in effect.⁵⁶

United States Steel and *Western Oil & Gas* are unprecedented.⁵⁷ Other courts that sustain procedural challenges to informally promulgated rules invalidate the rules pending the outcome of the proceedings on remand regardless of the equities of the case, but *United States Steel* and *Western Oil & Gas* suggest that courts may use their equitable powers to protect challenged rules from immediate invalidation. Identification of the competing considerations—the reasons both for and against immediate invalidation—is the first step in evaluating the propriety of this type of equitable relief following a successful procedural challenge to an informally promulgated rule.

II. REASONS FOR AND AGAINST IMMEDIATE INVALIDATION OF IMPROPERLY PROMULGATED RULES

A. *Reasons for Leaving Challenged Rules in Effect Pending Procedures on Remand.*

A court fashioning a remedy for agency noncompliance with section 553 has two primary reasons for leaving the challenged rule temporarily in effect. First, and most important, leaving a rule in effect may promote its statutory purpose.⁵⁸ Second, it may be unreasonable

54. *United States Steel Corp. v. EPA*, 649 F.2d at 575-77; *Western Oil & Gas Ass'n v. EPA*, 633 F.2d at 810-13.

55. *United States Steel Corp. v. EPA*, 649 F.2d at 577; *Western Oil & Gas Ass'n v. EPA*, 633 F.2d at 813.

56. *Western Oil & Gas Ass'n v. EPA*, 633 F.2d at 813; *See also United States Steel Corp. v. EPA*, 649 F.2d at 576.

57. It could be argued that these two cases are applications of a section of the CAA Amendments of 1977, 42 U.S.C. § 7607(d)(8) (Supp. III 1979), which provide:

[i]n reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

One could argue that the courts in *United States Steel* and *Western Oil & Gas*, both CAA cases, were merely complying with this statute, and not employing a novel equitable approach. This argument, however, is flawed. Both courts specifically stated that their choice of remedy was an exercise of equitable discretion; neither mentioned 42 U.S.C. § 7607(d)(8) (Supp. III 1979). Nor did either court find that the procedural errors did the substantive damage contemplated by section 7607(d)(8).

58. See notes 60-61 *infra* and accompanying text.

to invalidate the rule on merely procedural grounds.⁵⁹ The force of these reasons may vary with both the type of rule challenged and the type of defect in agency procedure.

Federal agencies promulgate rules to further statutory purposes,⁶⁰ and the result of an immediate invalidation of a challenged rule may be to frustrate the statutory purpose until a substitute rule is in place. Avoiding this result is a major reason for leaving successfully challenged rules in effect pending agency action on remand. The strength of this argument, however, depends on the statutory purpose that the challenged rule was designed to implement. When the rule promotes an urgent statutory purpose, the argument is compelling.⁶¹

Another argument for leaving the rule temporarily in effect is that it is unjust and unreasonable to allow a mere procedural "technicality"⁶² to upset an otherwise sound regulatory scheme. Although intuitively appealing, this argument is not always persuasive. One of the functions of section 553 is to improve the substantive accuracy of rules by ensuring that the promulgating agency considers as much data and criticism as possible.⁶³ When a rulemaking agency does not accept comment from interested parties, its rules are of questionable validity. Thus, a procedural challenge may imply a challenge to the substance of the rule as well. If the procedural defect does not relate to the notice and comment provisions of section 553, however, no substantive challenge should be implied.⁶⁴ Thus, the propriety of leaving the rule in effect should vary according to the type of procedural defect.

59. See notes 62-64 *infra* and accompanying text.

60. "Congress often enacts regulatory legislation with broad substantive provisions; enactments, for example, making illegal 'unfair labor practices.' Congress then delegates to an agency the task of defining precisely the range of proscribed conduct." Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103, 104 (footnote omitted). See generally, K. DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 3.01-13 (1958); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

61. A strict statutory deadline may be an indication that Congress considered the statutory purpose compelling. See, e.g., *United States Steel Corp. v. EPA*, 605 F.2d 283, 287-89 (5th Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980) (statutory deadline sufficient indication of urgency of purpose such that "good cause" exception will apply).

62. See *United States Steel Corp. v. EPA*, 649 F.2d 572, 577 (8th Cir. 1981). See also, notes 118-21 *infra* and accompanying text. If the petitioner can offer no substantive criticism, the rule may be substantively sound. If the rule is sound, it presumably will not be changed after notice and comment on remand. Perhaps it is wasteful to remand the rule in such a case, only to have it reinstated later in substantially the same form.

63. See notes 67-69 *infra* and accompanying text.

64. The notice and comment provisions are the requirements of section 553 that have the most impact on the content of rules. See notes 67-69 *infra* and accompanying text. Presumably, if the agency violates section 553 merely by not publishing a statement of basis and purpose or by making a rule effective immediately, the substance of the rule is not as likely to be questionable.

B. *Reasons for Immediate Invalidation of Challenged Rules.*

There are several reasons for immediately invalidating a challenged rule following a finding of noncompliance with section 553. First, because section 553 procedures serve to educate agencies and apprise them of the public interest the rule may be inaccurate and contrary to the public interest, and thus unworthy of being extended. Second, enforcement of a rule that results from improper procedure runs afoul of fundamental notions of democratic government.⁶⁵ Third, leaving the rule temporarily in effect may have undesirable effects on the procedures on remand.⁶⁶ Again, the strength of these arguments varies with the rule being challenged and the type of procedural violation.

One function of the procedures of section 553 is to help agencies promulgate more rational, accurate rules by exposing the rulemaking process to criticism from interested commentators.⁶⁷ According to the Senate Judiciary Committee report on the APA, “[agency] knowledge is rarely complete, and [the agency] must always learn the . . . viewpoints of those whom its regulations will affect. . . . [P]ublic participation . . . in the rulemaking process is essential in order to permit administrative agencies to inform themselves.”⁶⁸ If a rule is complex or far-reaching, the risk of inaccuracy increases. With a complex rule, it is imperative that the agency consider all available comment to ensure accuracy.⁶⁹ Similarly, a rule of broad scope affects many individuals and therefore requires consideration of a wide variety of viewpoints to define the public interest.⁷⁰ In our form of government, the public interest is defined by compromise between competing interests in soci-

65. See notes 75-81 *infra* and accompanying text.

66. See notes 82-86 *infra* and accompanying text.

67. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 777-78 (1969) (Douglas, J., dissenting); *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978); LEGISLATIVE HISTORY, *supra* note 7, at 19-20, 200-01, 358-59. See also ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REPORT ON ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 101-02 (1941).

68. LEGISLATIVE HISTORY, *supra* note 7, at 20.

69. See the cases cited at note 41 *supra*. In those cases, interested parties challenged the EPA's final designations. The designations were the result of an extensive and elaborate process of data accumulation. The public was not given an adequate opportunity to comment during this process, and many of the designations were altered after publication. See text accompanying note 124 *infra*. The complexity of the designation scheme made public comment a necessity. Presumably, some of the later alterations of the designations would have been avoided had public comment been allowed. See generally, Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 376 (notice and comment procedures needed when complex issues are involved).

70. A narrow, technical rule affects only a small segment of the population with limited interests. The agency's failure to listen to criticism is less important when the narrow "public" interest

ety.⁷¹ By exposing proposed rules to criticism from interested parties, section 553 in principle helps agencies fashion rules more nearly in accordance with the public interest.⁷² When a court finds that a rule was promulgated in violation of section 553, failure to immediately invalidate it may subject parties to more than thirty days⁷³ of regulation under a rule that is both inaccurate and contrary to the public interest.

The type of procedural defect has great bearing on the likelihood that a rule is inaccurate or contrary to the public interest. The notice and comment provisions of section 553, more than the other provisions, influence the degree to which rules are accurate and consonant with the

is readily ascertainable. See, e.g., *American Frozen Food Inst. v. Train*, 539 F.2d 107 (D.C. Cir. 1976).

71. Although commentators may disagree about the wisdom of this principle, they generally agree that it is one of the tenets of liberal democracy.

[A]lthough the "public interest" cannot be objectively defined, one can safely conclude that administrators who ignore relevant facts and who take the counsel of blind prejudice will serve the "public interest" only by the operation of chance. Therefore, although a rulemaker's decisions cannot be "accurate" in the conventional sense, and although regulated parties have no fundamental "right" to participate in rulemaking, the administrator owes a duty to the public to give serious consideration to all reasonable contentions and evidence pertinent to the rules he is considering.

Wright, *supra* note 69, at 380. See generally Barry, *The Public Interest in THE BIAS OF PLURALISM* 159, 160 (W. Connolly ed. 1969); Connolly, *The Challenge to Pluralist Theory in THE BIAS OF PLURALISM*, *supra*, at 3; THE FEDERALIST NO. 10 (A. Hamilton); Harmon, *Administrative Policy Formulation and the Public Interest*, 29 PUB. AD. REV. 483, 485 (1969) ("the public interest is the continually changing outcome of political activity among individuals and groups within a democratic political system"); Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1230-35 (1966); Note, *Democratizing the Administrative Process: Toward Increased Responsiveness*, 13 ARIZ. L. REV. 835, 838-40 (1971).

72. Although the procedures of section 553 expose proposed rules to criticism, the efficacy of such criticism has been questioned:

Public participation in rulemaking procedures was a part, of course, of the original notice and comment procedures in the Administrative Procedure Act of 1946. It is fair to say, however, that while there is much public participation in such an informal written comment procedure, it is of a sort which gives only dubious satisfaction. A particular public comment simply becomes one of a great mass of comments, and there is no overt reaction by the agency to each comment. Unless the individual commenting is filing views as part of an organization known to have significant strength before the agency, the filing of a comment is much akin to dropping a feather into the Grand Canyon and trying to hear the impact.

Williams, *Securing Fairness and Regularity in Administrative Proceedings*, 29 AD. L. REV. 1, 16 (1977).

Concern that administrative agencies are not sufficiently democratic has resulted in a variety of suggestions for increasing input. See, e.g., Asimow, *Public Participation in the Adoption of Interpretative Rules and Policy Statements*, 75 MICH. L. REV. 520 (1977); Koch, *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, GEO. L.J. 1047 (1976). See also Comment, *Inducement of Public Participation in Administrative Proceedings Through the Award of Attorneys' Fees*, 30 BAYLOR L. REV. 785 (1978); Comment, *The Need for an Additional Notice and Comment Period When Final Rules Differ Substantially from Interim Rules*, 1981 DUKE L.J. 377.

73. In almost every case, compliance with section 553 on remand requires more than thirty days, the statutory minimum for promulgation of a new rule. See 5 U.S.C. § 553(d) (1976).

public interest.⁷⁴ Hence, if a rule's only procedural flaw is the failure to print a statement of basis and purpose, concern for its substance should not compel invalidation.

The procedures of section 553 also serve to keep administrative agencies accountable and to legitimize agency action. Administrative agencies occupy a precarious position in a system of government that values limited power and the rule of law.⁷⁵ It is a basic principle of democratic government that the consent of the governed is necessary to the legitimate exercise of power. Nonetheless, agencies often act as independent legislatures.⁷⁶ To a certain extent, the procedures of section 553 legitimize this agency legislation.⁷⁷ They ensure that interested parties are allowed to participate in rulemaking, in effect guaranteeing a modicum of consent to agency action.⁷⁸ Another fundamental of democratic government is that governmental power must be checked. Agencies have broad discretion when they make rules under the mandate of vague statutes.⁷⁹ To counter this discretion, section 553 renders agencies accountable by requiring them to expose the rulemaking process to public scrutiny and to articulate the basis and purpose of their rules.⁸⁰

74. See note 64 *supra* and accompanying text.

75. See generally M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1967); Freedman, *Crisis and Legitimacy in Administrative Process*, 27 *STAN. L. REV.* 1041 (1975); Stewart, *The Reformation of Administrative Law*, 88 *HARV. L. REV.* 1669 (1975).

76. According to the traditional model of the administrative function, agencies were to be mere "transmission belts," carrying out the instructions of Congress. See Tarlock, *Administrative Law: Procedural Due Process and Other Issues*, 56 *CHI.-KENT L. REV.* 13 (1980); Stewart, *supra* note 75, at 1669-76. The administrative agencies have burgeoned however, into a "veritable fourth branch" with enormous impact on individuals, *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting), impact that is often not stamped with a congressional mandate. See Stewart, *supra* note 75, at 1676-88; *LEGISLATIVE HISTORY, supra* note 7, at 383.

77. See generally Mayton, *supra* note 60, at 107.

78. See notes 67 & 72 *supra* and accompanying text.

79. See Stewart, *supra* note 75, at 1682-85. The problem of keeping agencies accountable has become acute in recent years. Agencies, according to some commentators, have come to abuse their discretion by, *inter alia*, serving the interests of narrow groups rather than those of the general public. See generally, G. MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* 336-68 (1967); Freedman, *supra* note 75 at 1042.

80. Clearly, Congress intended section 553 to be a restraint on agency power. See *LEGISLATIVE HISTORY, supra* note 7, at 337-38, 349-51, 383-84, 392. In *Shell Oil Co. v. FEA*, the court stated: "[t]he agency's discretion, and thus its latitude for promulgating unwise rules, was to be restrained through this deliberately prescribed process for meaningful comment—a competition of ideas, which replaced the restraint once performed by the marketplace's competition for profits." 574 F.2d 512, 516 (Temp. Emer. Ct. App. 1978). Some courts have gone so far as to equate the procedures of section 553 with due process of law. See, e.g., *Fund for Animals v. Frizzell*, 530 F.2d 982, 988 (D.C. Cir. 1975); *Bell Lines, Inc. v. United States*, 263 F.Supp. 40, 46 (S.D.W.Va. 1967). See generally Sinaiko, *Due Process Rights of Participation in Administrative Rulemaking*, 63 *CAL. L. REV.* 886 (1975).

Rules promulgated under improper procedures are therefore an affront to fundamental notions of democratic government. When a court allows such a rule to remain in force, it extends the life of an illegitimate exercise of power and possibly promotes abuses of agency power. This argument is especially compelling when the challenged rule is promulgated under a vague statute. When a vague statute is involved, the need is great to ensure that the agency remains accountable, and has not acted beyond its statutory mandate.⁸¹

This reason for immediately invalidating challenged rules will also vary in force as a function of the type of the procedural defect at issue in the case. Of the requirements in section 553, the notice and comment provisions play the most important role in legitimizing agency actions and in keeping agencies accountable. Thus, when an agency fails to give notice and accept comment, this reason carries greater weight.

A third reason for immediately invalidating challenged rules focuses on the effect that leaving them in place is likely to have on the procedures on remand. In a long line of cases, courts have held that allowing comment on rules after they have already become effective is not a satisfactory substitute for pre-promulgation comment.⁸² These courts reasoned that once a rule is effective, the agency responsible for the rule is unlikely to consider comments seriously. The agency becomes close-minded after making a final determination.⁸³ Moreover, the agency's credibility is at stake; when the rule is in final form the

Proper section 553 procedures theoretically create a record that can be reviewed judicially, thereby increasing agency accountability. *See, e.g., National Welfare Rights Org. v. Mathews*, 533 F.2d 637, 648-49 (D.C. Cir. 1976). *See also*, Recent Developments, 44 *FORDHAM L. REV.* 402 (1975). *But see* Nathanson, *Probing the Mind of the Administrator: Hearings, Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 *COLUM. L. REV.* 721, 754, 754-56 (1975).

81. *See* Stewart, *supra* note 75. Professor Stewart argues as follows:

Vague, general, or ambiguous statutes create discretion and threaten the legitimacy of agency action under the "transmission belt" theory of administrative law. Insofar as statutes do not effectively dictate agency actions, individual autonomy is vulnerable to the imposition of sanctions at the unruled will of executive officials, major questions of social and economic policy are determined by officials who are not formally accountable to the electorate, and both the checking and validating functions of the traditional model are impaired. However, rather than being the exception, federal legislation establishing agency charters has, over the past several decades, often been strikingly broad and non-specific, and has accordingly generated the very conditions which the traditional model was designed to eliminate.

Id. at 1676-77 (footnotes omitted).

82. *See, e.g., Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979); *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 899 (D.C. Cir. 1978); *Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013, 1019 (3d Cir. 1972); *City of New York v. Diamond*, 379 F. Supp. 503, 517 (S.D.N.Y. 1974).

83. *See* cases cited at note 82 *supra*.

agency may take a defensive posture.⁸⁴ This argument also seems to apply when the rule is not fully effective but only in place temporarily. Substantial rule revision taxes the agency; a change in the rule requires altering the machinery of implementation, enforcement, and documentation.⁸⁵ The agency has good reason to be close-minded once the rule is remanded. As a result, it is likely that if the rule is not invalidated immediately the procedures on remand may be a mockery of section 553, with the agency giving little serious consideration to the criticisms and comments of the interested parties.⁸⁶ Consequently, the permanent rules that result from the remand procedures are likely to be the temporary rules in a slightly revised form. This is unacceptable because the temporary rules must be subjected to criticism. As discussed previously, improperly promulgated rules are possibly inaccurate,⁸⁷ possibly contrary to the public interest,⁸⁸ and definitely an affront to notions of proper government.⁸⁹

Both the type of rule and the type of procedural defect in question affect the force of this argument for invalidation. If, for example, the rule has caused the agency to erect elaborate enforcement mechanisms, the agency has increased motive for disregarding criticism.⁹⁰ Depend-

84. See *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978). The *National Tour Brokers* court presented another reason for rejecting post-promulgation comment:

[A]n individual . . . should have an opportunity to address a proposal before, not after, a decision on whether it should be implemented has been made. The fact that the matter has been prejudged might very well discourage disclosure of pertinent points of view. For example, someone might be inclined to respond to an initial proposal because this could be done without the aid of professional advice. But he or she might not be similarly inclined to file a petition responding to the proposal's adoption because of a belief that to do so would require such advice.

Id. at 902 n.24 (quoting *Entry Control of Brokers*, 126 M.C.C. 476, 531 (1977)). In *Sharon Steel Corp. v. EPA*, the court offered yet another reason: "If a period for comments after the issuance of a rule could cure a violation of the APA's requirements, an agency could negate at will the Congressional decision that notice and an opportunity for comment must precede promulgation." 597 F.2d 377, 381 (3d Cir. 1979).

85. Presumably, a change in the temporary rule would require the agency to publish notice of the change, and to educate agency personnel and regulated members of the public regarding the change.

86. Of course, if an agency were intent on leaving a challenged rule in effect in the future, it would not matter whether the rule was invalidated immediately or left in place during compliance with section 553. In either situation the agency would disregard comments.

87. See notes 67-69 *supra* and accompanying text.

88. See notes 70-72 *supra* and accompanying text.

89. See notes 75-80 *supra* and accompanying text.

90. See, e.g., *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated and remanded*, 431 U.S. 99 (1977). *Maryland* involved a challenge to several regulations that were part of a complex plan devised by the State of Maryland and the EPA for achieving air-quality standards in metropolitan Baltimore. See *id.* at 217-19. One of the regulations at issue was the Employer's Provision for Mass Transit Priority Incentives (EMTI). The EMTI plan was devised by the EPA and required each employer of more than 700 employees within the region to submit to the EPA a plan for

ing on the procedural defect, however, this argument may be less persuasive. If there has been proper notice and comment, the agency's determination to adhere to its rule may be justifiable. In some situations, therefore, the two relevant concerns—the type of rule and the type of procedural defect—may offset each other.

C. *The Propriety of Balancing the Competing Considerations.*

As the foregoing illustrates, competing considerations confront a court faced with the decision whether to leave informally promulgated rules temporarily in effect following a successful procedural challenge. The question remains, however, whether it is appropriate for courts making this decision to use their equitable power⁹¹ to balance these considerations.⁹² On the one hand, section 706 of the APA⁹³ appears to preclude courts from using an equitable approach because it appears to compel immediate invalidation of all rules found to have been improperly promulgated. It reads in pertinent part: "The reviewing court

encouraging employees to use mass transportation rather than automobiles. The plan went into effect on December 12, 1973, without having been mentioned in any previous Maryland or EPA proposal. Thus, neither the State of Maryland nor the general public was afforded an opportunity to comment on the plan before it went into effect. The EPA did, however, offer to accept post-promulgation comments. *Id.* at 221.

The Court of Appeals for the Fourth Circuit held the EMTI plan invalid "as a result of the lack of notice . . . and failure to comply with the notice and publication requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b)(3)." *Id.* at 222. The court explained that "[t]he reception of comments after all the crucial decisions have been made is not the same as permitting active and well prepared criticism to become a part of the decision-making process." *Id.*

In *Maryland*, the controlling consideration in the remedy decision was the effect of that decision on the procedures on remand. Considering the complexity of the statutory scheme involved, *see id.* at 218-19, the agency would have been tempted to ignore postpromulgation comment in order not to disrupt the overall plan and lose face. *See* note 85 *supra* and text accompanying notes 83-85 *supra*. Notably, the regulations challenged in this case are still in effect. *See* 40 C.F.R. § 52.1105 (1981).

91. It is well established that a court considering a petition for review of an agency action "may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939). *Accord*, *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979); *Indiana and Michigan Electric Co. v. Federal Power Comm'n*, 502 F.2d 336, 346 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975).

Although *Ford Motor Co.* has been read to hold that the power to fashion equitable remedies in these cases is vested in the courts of appeals, *see* K. DAVIS, *ADMINISTRATIVE LAW TEXT* 441 (3d ed. 1972), it is not clear whether a district court could also use the balancing approach suggested here. As a practical matter, however, it is of no great import that the district courts may not have this power. The overwhelming majority of actions for review of agency rules are brought in the appellate courts. *See* W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 21, at 917-19.

92. Manifestly, equity would require the court making this decision to balance the competing considerations. As Justice Frankfurter phrased it: "It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief." *Eccles v. Peoples Bank*, 333 U.S. 426, 431 (1948).

93. 5 U.S.C. § 706 (1976).

shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (D) without observance of procedure required by law.”⁹⁴ On the other hand, the courts in *United States Steel Corp.*⁹⁵ and *Western Oil & Gas*⁹⁶ used their equitable discretion unhesitatingly and left the designations temporarily in effect pending agency action on remand.

The approach taken by the *United States Steel* and *Western Oil & Gas* courts is preferable. First, section 706 probably does not apply to the specific question of whether courts can leave rules in effect during the procedures on remand.⁹⁷ Along with the above-quoted language, section 706 contains a provision that requires reviewing courts to take “due account . . . of the rule of prejudicial error.”⁹⁸ According to the Senate Judiciary Committee’s Report on the APA, this provision “means that a procedural omission which has been cured by affording the party the procedure to which he was originally entitled is not a reversible error.”⁹⁹ Although the Report speaks in terms of omissions that have been cured, it seems equally applicable to omissions that will be cured. Accordingly, because successful challengers to informally promulgated rules are guaranteed proper procedures on remand,¹⁰⁰ the procedural omissions found by the courts in these cases probably do not constitute reversible error. Thus, section 706 very likely does not compel courts to invalidate rules immediately.

A second reason for rejecting the notion that section 706 precludes courts from leaving challenged rules temporarily in effect hinges on the function of the quoted portion of section 706. Section 706(2)(D) is an enforcement provision for the APA; its essential function is to promote the purposes of the procedural requirements of the APA. With regard to section 553, this portion of section 706 is designed to ensure that rulemaking is informed¹⁰¹ and legitimate.¹⁰² Hence, there is little purpose to be served by applying this provision in cases in which the rulemaking process has been substantially informed and legitimate. In such cases the reasons for leaving the rules temporarily in effect out-

94. *Id.*

95. 649 F.2d 572, 577 (8th Cir. 1981).

96. 633 F.2d 803, 813 (9th Cir. 1980).

97. This would explain why courts invalidating successfully challenged rules so seldom refer to section 706. See generally note 23 *supra* and accompanying text.

98. 5 U.S.C. § 706 (1976).

99. LEGISLATIVE HISTORY, *supra* note 7, at 214.

100. The quality of the procedures on remand, however, will not always be satisfactory to the challenging party. See notes 82-90 *supra* and accompanying text, and notes 131-34 *infra* and accompanying text.

101. See notes 67-72 *supra* and accompanying text.

102. See notes 75-80 *supra* and accompanying text.

weigh the reasons for invalidating them immediately.¹⁰³ When the competing considerations weigh heavily in favor of leaving the rules in effect, immediately invalidating challenged rules will not promote the purposes of section 553 to any appreciable extent. Enforcing section 706(2)(D) in such cases is likely to have undesirable effects. Thus, because the purpose of section 706 should not require immediate invalidation in every instance, section 706 should not bar courts from using an equitable approach.

III. EVALUATION OF *UNITED STATES STEEL* AND *WESTERN OIL & GAS*

The *United States Steel* and *Western Oil & Gas* courts departed from precedent by choosing the equitable remedy of leaving the challenged designations in effect.¹⁰⁴ In support of this novel remedy choice, the *Western Oil & Gas* court explained that it did not want to interfere with "the operation of the Clean Air Act in the State of California."¹⁰⁵ The *United States Steel* court followed this reasoning¹⁰⁶ and offered a second reason for not immediately invalidating the challenged designations.¹⁰⁷ Noting that *United States Steel* had not challenged the merits of the designations, the court wrote that it was "appropriate" to leave the designations in effect because "United States Steel had elected to rest its challenge . . . primarily on procedural grounds."¹⁰⁸

The *United States Steel* and *Western Oil & Gas* courts touched on two previously described reasons for leaving rules in effect—promotion of statutory purpose and the inequity of invalidating for procedural reasons alone. They did not, however, adequately discuss several other considerations that should have influenced the remedy decision. Moreover, their reliance on statutory purpose and equitable considerations may have been unjustified.¹⁰⁹

103. In other words, the reasons for leaving the rules in effect, see text accompanying notes 58-64 *supra*, would carry some weight, but the first two reasons for invalidating, see text accompanying notes 67-81 *supra*, would already have been satisfied.

104. See note 56 *supra* and accompanying text.

105. 633 F.2d 803, 813 (9th Cir. 1980).

106. 649 F.2d 572, 576-77 (8th Cir. 1981).

107. *Id.* at 577.

108. *Id.*

109. See notes 112-17 *infra* and accompanying text.

A. *Competing Considerations Facing the United States Steel and Western Oil & Gas Courts: Reasons for Leaving the Designations in Effect.*

The courts' desire to promote statutory purposes weighed heavily in the remedy decision in both *United States Steel* and *Western Oil & Gas*.¹¹⁰ This emphasis on statutory purposes was justified in principle; Congress made clear in the 1977 Amendments to the Clean Air Act (CAA) that it considered clean air to be of crucial importance.¹¹¹ However, invalidating the challenged designations would not necessarily have frustrated the purposes of the Amendments.¹¹² The final goal of the Amendments was the attainment of certain air-quality standards.¹¹³ The states were to use the designations as the basis for formulating state-wide plans by 1979 to implement, maintain, and enforce the standards.¹¹⁴ The designations also triggered an offset policy, in effect limiting pollution from new or modified sources in nonattainment areas.¹¹⁵

Thus, if the challenged designations had been invalidated, the goals of the CAA Amendments might have been hindered because first, the states would temporarily have had incomplete information with which to formulate their implementation plans, and second, the pollu-

110. See text accompanying notes 105-07 *supra*.

111. The strict statutory deadlines set up by the Amendments show that it was Congress's desire to achieve clean air as expeditiously as possible. See 42 U.S.C. § 7407 (Supp. III 1979). See generally *Republic Steel Corp. v. Costle*, 621 F.2d 797, 804 (6th Cir. 1980); *United States Steel Corp. v. EPA*, 605 F.2d 283, 287-88 (7th Cir. 1979).

112. See generally Comment, *Agency Discretion to Accept Comment in Informal Rulemaking: What Constitutes "Good Cause" under the Administrative Procedure Act?*, 1980 B.Y.U. L. REV. 93, 111-12.

Other courts that considered the challenges to the EPA's list of designations, see note 41 *supra*, gave conflicting accounts of the effect immediate invalidation would have had on the functioning of the CAA. For example, compare the following statements:

We note that if we were to remand in this case, the entire deadline scheme would be thrown into complete disarray. State Implementation Plans, which were scheduled to be (and presumably were) formulated by January 1, would have to be further delayed while the EPA proceeded with yet another notice and comment period, and after promulgation of those designations states would have to repeat the hearing-consultation process in order to resubmit implementation plans . . . [R]emand in this case would permit U.S. Steel to continue the very procrastination which Congress sought to end.

United States Steel Corp. v. EPA, 605 F.2d 287, 288 n.5 (7th Cir. 1979);

[T]he respective states already had most of the information contained in the EPA's designations, since those designations were based on submissions by the states. The statute indicates that the EPA's role is limited to reviewing the state designations and modifying them where necessary . . . The states could have begun the revisions [of their implementation plans] with the information on hand, changing them later as required by EPA alterations of the §§ 7407(d) list.

United States Steel Corp. v. EPA, 595 F.2d 207, 214 (5th Cir.), *modified on rehearing*, 598 F.2d 915 (5th Cir. 1979).

113. 42 U.S.C. §§ 7410, 7502 (Supp. III 1979).

114. *Id.*

115. *Id.* § 7503 See note 34 *supra*.

tion level might have increased in nonattainment areas because the offset restrictions would not have applied. It was not shown, however, in either *United States Steel* or *Western Oil & Gas* that invalidation for the amount of time required for compliance with section 553 would have put statutory deadlines out of reach.¹¹⁶ Nor was there any evidence that the pollution levels would have increased greatly as a result of the lack of offset restrictions in the areas in question.¹¹⁷

The *United States Steel* court reasoned that it is inappropriate to invalidate a rule on primarily procedural grounds.¹¹⁸ Considering the facts of the case, the court was justified in its analysis. United States Steel's challenge was primarily procedural.¹¹⁹ "[O]f the three mining companies . . . who challenged the EPA's initial nonattainment designations, only U.S. Steel did not submit detailed information to support its claim that the designations should be modified."¹²⁰ Because United States Steel waived its opportunity to object to the substance of the designations, its procedural challenge arguably did not call the substance of the designations into question.¹²¹

B. *Competing Considerations Facing the United States Steel and Western Oil & Gas Courts: Reasons for Invalidating the Designations Immediately.*

A successfully challenged rule may be both inaccurate and contrary to the public interest.¹²² This consideration should have influenced the *United States Steel* and *Western Oil & Gas* decisions. There was a substantial risk that the designations challenged in both cases were inaccurate. The designations challenged in *United States Steel*

116. In *United States Steel* the challenged designations related to an area comprising only 25 square miles. 649 F.2d at 573 n.2. Hence, Minnesota would probably not have been substantially hindered in formulating an implementation plan. See also *United States Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir.), modified on rehearing 598 F.2d 915 (5th Cir. 1979).

117. The cases do not indicate what effect removing the offset restrictions would have had on the areas in question. One can speculate that United States Steel or Western Oil and Gas might have constructed or modified their facilities to the detriment of air quality.

118. 649 F.2d at 577. The court did not explicitly state why the "primarily" procedural challenge did not merit invalidation of the designations. It is a fair inference, however, that the court thought it would be inequitable to invalidate on the basis of a procedural challenge alone, since United States Steel could challenge the merit of the nonattainment designations in further administrative hearings.

119. *Id.*

120. *Id.*

121. See note 64 *supra* and accompanying text. The *Western Oil & Gas* court failed to address this reason for leaving the designations in effect. The opinion does not reveal whether Western Oil and Gas had the same opportunity to comment that United States Steel had.

122. See notes 67-73 *supra* and accompanying text.

related to the Mesabi Iron Range area of Minnesota.¹²³ Six months after United States Steel commenced its action against the EPA, a new study of the air quality in the area was commissioned,¹²⁴ which implies that the original designations were inaccurate. According to the Court of Appeals for the Ninth Circuit, the designations challenged in *Western Oil & Gas* were "hastily drafted."¹²⁵ The court was not satisfied with the designations "on substantive grounds."¹²⁶

The *United States Steel* and *Western Oil & Gas* courts were apparently not concerned that by leaving the designations in effect they were extending the life of an illegitimate agency action. The EPA avoided all of the section 553 procedures in the promulgation of the designations,¹²⁷ thereby violating the principles of legitimization and accountability.¹²⁸ This reason for invalidation should have been considered in the two decisions. Because the CAA Amendments of 1977 were quite explicit, however, the EPA had a clear congressional mandate to promulgate the designations.¹²⁹ The need for EPA accountability was therefore not as great as it would have been had the statute been vague. Similarly, the designation presumably did not adversely affect vital interests of either United States Steel or Western Oil and Gas. As a result, the need for legitimization was not as great as it could have been.¹³⁰ It should therefore have been a comparatively minor factor in the *United States Steel* and *Western Oil & Gas* decisions.

The *United States Steel* court, but not the *Western Oil & Gas* court, indirectly dealt with the negative effect that leaving the designations in place would have on the procedures on remand. United States Steel argued that the EPA and the Minnesota Pollution Control Agency would "feel no compulsion to act expeditiously on remand"¹³¹ unless

123. 649 F.2d at 573.

124. *Id.* at 573 n.3.

125. 633 F.2d at 806.

126. *Id.*

127. See text accompanying notes 42-45 *supra*.

128. See generally notes 75-80 *supra* and accompanying text.

129. The Amendments specifically instructed the EPA to promulgate the final lists. 42 U.S.C. § 7407 (Supp. III 1979). Hence, in promulgating the lists the EPA was not legislating on its own but merely carrying out a congressional directive. The decisions would have been more questionable if Congress had delegated to the EPA the power to protect the environment and the EPA had contrived the designation scheme itself.

130. *United States Steel* and *Western Oil & Gas* do not discuss in detail what harm or expense the two companies would have suffered if the offset policy were in effect. Presumably, the harm could not have been great. The offset policy was not an absolute bar to construction or modification. The only restriction was that the building or modification could not increase pollutant levels. See note 34 *supra*. *But see* *United States Steel Corp. v. EPA*, 595 F.2d 207, 211 (5th Cir. 1979) ("the designations have consequences . . . that constitute a substantial injury to the petitioners").

131. 649 F.2d at 577.

the designations were invalidated. In response, the court directed the two agencies "to promptly hear and resolve the existing controversy and to consider United States Steel's comments without regard to the nonattainment designations that we have permitted to remain in effect."¹³² The court was, of course, correct to give such directions. The EPA had motive to disregard United States Steel's comments because changing the temporary designations required a substantial effort.¹³³ Furthermore, because there had been no previous notice and comment, the need was great for full section 553 procedures on remand.¹³⁴ By instructing the agency to consider United States Steel's comments fully¹³⁵ the court at least attempted to minimize the chance that the temporary designations would go untested. Since there was a substantial risk that the designations were inaccurate,¹³⁶ and since there had been no previous criticism,¹³⁷ it was important that the designations be subjected to criticism.

IV. CONCLUSION

After sustaining a procedural challenge to a rule promulgated by a federal administrative agency, courts must fashion a remedy. The conflicting considerations involved in fashioning this remedy require a balancing approach. The courts should follow the lead of the eighth and ninth circuits in *United States Steel* and *Western Oil & Gas* and adopt such an approach.

The courts should recognize, however, that the *United States Steel* and *Western Oil & Gas* courts failed to properly apply this balancing approach. They neither articulated nor considered all of the reasons for or against invalidating. Moreover, they attached inordinate weight to promoting the Clean Air Act Amendments of 1977. Nevertheless, the basic approach of both courts was correct, and there is no indication that such an approach will not work well in the future. As courts become more accustomed to evaluating the competing concerns in these cases, they are likely to become more adept at applying a balancing approach.

David B. Chaffin

132. *Id.*

133. See generally text accompanying notes 83-85 *supra*.

134. See notes 82-86 *supra* and accompanying text.

135. 649 F.2d at 577.

136. See text accompanying notes 124-26 *supra*.

137. See 649 F.2d at 574. Consequently, the need to have the designations tested was greater than it would have been had the procedural problem been minor.