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ROADBLOCKS TO JUDICIAL REVIEW OF DEPARTMENT OF ENERGY AND FEDERAL ENERGY REGULATORY COMMISSION ADMINISTRATIVE ACTIONS

I. INTRODUCTION

When the energy law practitioner has pursued, but failed to achieve, an appropriate remedy through the Department of Energy (DOE) or the Federal Energy Regulatory Commission (FERC), the practitioner must decide whether to seek judicial review. Although the nature of the administrative action, the relief sought, and the client's propensity to litigate are important factors in making such an assessment, the primordial factor is whether judicial review is available at all. If the practitioner determines that the availability of judicial review does not exist with respect to his client, his assessment ends *ab initio*.

Obtaining judicial review of any administrative action is a complex undertaking, and review within the energy law context has proven no different. Legal obstacles abound. However, these obstacles, which are essentially legal questions peculiar to the regime of administrative law, are surmountable. For the purpose of analysis, these legal questions may be categorized as follows, each of which is a requisite to relief beyond the administrative process:

- I. Determining that judicial review is not precluded by statute;
- II. Determining the court with proper jurisdiction to hear the dispute;
- III. Ensuring that the doctrines of finality, ripeness, and exhaustion of remedies have been satisfied;
- IV. Ascertaining the availability of relief pending review;
- V. Standing of the client to seek review;
- VI. Determining the scope of review.

In order to aid the energy law practitioner, this comment makes an analysis of these legal questions within the context of energy law decisions, with occasional reference to non-energy law decisions of major importance.

II. PRECLUSION OF JUDICIAL REVIEW

The Administrative Procedure Act (APA) provides for judicial review of administrative actions.¹ On its face the APA appears to allow a court to review any agency action which results in a person being "adversely affected" or "aggrieved." However, the APA is limited in very substantial ways.

The last sentence of section 702 states:

Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.²

In effect, this latter qualification means that section 702 of the APA, while expressing strong public interest in avoiding even the appearance of possible abuses of administrative power,³ and creating a presumption of the right to judicial review,⁴ is no more than a "restatement of the existing law" regarding judicial review of agency action⁵ and does not confer jurisdiction on a court not already possessing it.⁶ Further, the most noted self-imposed restriction of judicial review under the APA comes from section 701, which states in pertinent part: "(a) This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."⁷ Therefore, if a statute precludes judicial review of a particular action taken by the Department of Energy or the Federal Energy Regulatory Commission or if that action is "committed by law"⁸ to agency discretion, then judicial review is unavailable.

1. "A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial relief thereof." Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1982)) [hereinafter "APA"].

2. *Id.* § 702.

3. *North Am. Van Lines, Inc. v. ICC*, 386 F. Supp. 665, 678 (N.D. Ind. 1974).

4. *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Rochester v. Bond*, 603 F.2d 927, 931 n. 15 (D.C. Cir. 1979); *Department of Income Maintenance v. Schweiker*, 557 F. Supp. 1077, 1079 (D. Conn. 1983), *aff'd*, 471 U.S. 524 (1985); *National Corn Growers Ass'n v. Berglund*, 471 F. Supp. 1199, 1205 (S.D. Iowa 1979), *vacated in part*, 484 F. Supp. 1342 (S.D. Iowa 1980).

5. *Hamel v. Nelson*, 226 F. Supp. 96, 97 (N.D. Cal. 1963).

6. *American Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1552 (Fed. Cir. 1983), *cert. denied*, 446 U.S. 937 (1984); *Hadley Memorial Hosp., Inc. v. Schweiker*, 689 F.2d 905, 911 (10th Cir. 1982); *Boyce v. United States*, 523 F. Supp. 1012, 1018 (E.D.N.Y. 1981).

7. 5 U.S.C. § 701(a)(1)(2) (1982).

8. *Id.* § 702.

A. *Statutory Preclusion*

Statutory preclusion need not be express. Preclusion may be implied by the language contained in the agency's organic statute or in the legislative history of the statute.⁹

The DOE's organic statute was the DOE Organization Act of 1977.¹⁰ This Act consolidated various federal energy responsibilities into a new cabinet-level Department of Energy and an independent Federal Energy Regulatory Commission.¹¹ Responsibilities of the new department came from a general transfer of the functions of the Federal Energy Administration, the Federal Energy Research and Development Administration, and the Federal Power Commission.¹² Transfers from non-energy agencies included various functions of the Department of the Interior,¹³ the Department of Housing and Urban Development,¹⁴ the Interstate Commerce Commission,¹⁵ the Department of the Navy,¹⁶ and the Commerce Department.¹⁷

Preclusion under the "statutory preclusion" exception to the availability of judicial review does not seem to be an obstacle to judicial review of DOE and FERC actions. The legislative history of the DOE Organization Act provides expressly for judicial review through "Title V—Administrative Procedures and Judicial Review."¹⁸ The Senate Report

9. *Chicago & S. Airlines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948); *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943); *Consumer Fed'n of Am. v. FTC*, 515 F.2d 367, 370 (D.C. Cir. 1975).

10. 42 U.S.C. § 7131 (1982) (originally enacted as Pub. L. 95-91, Aug. 4, 1977, 91 Stat. 565, amended as Department of Energy Act).

11. Originally, an independent Federal Energy Regulatory Commission was not contemplated by the drafters of this act, but politically strange bedfellows were responsible for an amendment which set up FERC as an independent regulatory agency. Professor Byse describes the process leading to the enactment of the amendment relating to FERC as follows:

But a not so funny thing happened to this part of the bill on its way through the House. Representative John E. Moss, a liberal Democrat and an advocate of strict price control of wellhead prices, and Representative Clarence J. Brown, a conservative Republican and an advocate of deregulation, proposed an amendment to establish an independent five-member Federal Energy Regulatory Commission within the Department of Energy and to transfer to the Commission all FPC regulatory powers, except a limited category which were specifically listed and transferred to the Secretary. Messrs. Moss and Brown stressed their unwillingness to give any cabinet officer power to fix the wellhead price of natural gas
Byse, *The Dept. of Energy Organization Act: Structure and Procedure*, 30 ADMIN. LAW REV. 193, 199 (1978) (footnote omitted).

12. 42 U.S.C. § 7151 (1982).

13. *Id.* § 7152.

14. *Id.* § 7154.

15. *Id.* § 7155.

16. *Id.* § 7156.

17. *Id.* § 7157.

18. S. REP. NO. 164, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 854, 897-900.

within the legislative history states: "Sec. 501(F) provides for judicial review of an agency action."¹⁹ The Senate Report neither mentions the underlying policies of section 501(F) (now 42 U.S.C. § 7192) nor contains language that any particular DOE agency action is statutorily prohibited.²⁰ "Neither the Conference Report nor the statements and colloquies made on the floor contain more than oblique references to the availability of judicial review [of DOE agency actions]"²¹

To make a final determination of the availability of judicial review one must ultimately look to the language of section 7192 of the DOE Organization Act itself and disregard the superficial inferences in the legislative history. Section 7192(a) states:

Judicial review of agency action taken under any law the functions of which are vested by law in, or transferred or delegated to the Secretary [of the Energy Department], the [Federal Energy Regulatory] Commission or any officer, employee, or component of the Department shall, notwithstanding such vesting, transfer, or delegation, be made in the manner specified in or for such law.²²

Thus, because DOE and FERC were created by the consolidation of functions of various agencies, statutory preclusion must be determined by a derivative analysis of DOE and FERC actions under the prior authority of a particular transferor agency. This means that in determining whether review is statutorily precluded, either by express language or by implication, one must look at the particular DOE or FERC action in question and then determine from which source the authority for the action originally came.²³ Then one must look to that source's legislative language and history to determine whether review is precluded.²⁴

An illustrative case is *Atlantic Richfield Co. v. DOE*.²⁵ In this case

19. *Id.* at 899.

20. *Id.* 899-900.

21. *Gulf Oil Corp. v. DOE*, 663 F.2d 296, 311 (D.C. Cir. 1981) (footnote omitted) (ruling that finality of agency action is not necessary for judicial intervention based on legislative intent).

22. 42 U.S.C. § 7192(a) (1982).

23. *E.g.*, *HUD* under 42 U.S.C. § 7154 (1982).

24. Professor Byse indicates that "[t]here is a measure of untidiness in this provision, for it means that judicial review of the actions of the Secretary and the Commissioner will be governed by a number of different statutory provisions distributed throughout the United States Code." Byse *supra* note 10, at 223.

25. 500 F. Supp. 1301 (E.D. Pa. 1980), *aff'd*, 665 F.2d 1118 (Temp. Emer. Ct. App. 1981). *See also*, *Montana Power Co. v. Edwards*, 531 F. Supp. 8 (D. Or. 1981). The Montana Power Co. brought a declaratory action against the Secretary of Energy seeking a ruling that the Secretary had no authority to approve the Bonneville Power Admin. rate schedules on an interim basis. The Secretary acted under 42 U.S.C. § 7151(b) (1982) which provides: "Except as provided in title IV of this chapter, there are transferred to, and vested in, the Secretary [of Energy] the functions of the Federal Power Commission, or of the members, officers, or components thereof. . . ."

The court obtained jurisdiction to review this action under 5 U.S.C. § 702 (1982) (a section of

the plaintiffs, all large integrated oil companies,²⁶ brought an action against DOE alleging that regulatory amendments made by DOE to its crude oil "Entitlements Program"²⁷ were beyond the scope of DOE's regulatory authority. The Secretary of the Department of Energy had acted under the Emergency Petroleum Allocation Act (EPAA)²⁸ to alleviate the distortion in prices between "old" oil, which was subject to mandatory price controls, and "new" oil, which could be sold at market levels.²⁹ The Entitlements Program attempted to correct price distortion by allocating a portion of the economic advantage enjoyed by those who had access to "old" oil to those who did not have access to "old" oil.³⁰ In concluding that DOE had not exceeded its authority under EPAA, the court had to look at cases construing the EPAA under the authority of the Federal Energy Administration (FEA), a predecessor agency to DOE.³¹ The court also looked to the legislative history of the EPAA.³² This case shows the derivative analysis that a court must make in determining the scope and availability of judicial review of DOE actions.

B. *Committed to Agency Discretion*

The APA specifically excludes from judicial review agency action that is committed by law to agency discretion.³³ However, the courts, realizing the strong presumption favoring judicial review,³⁴ place the burden of proof as to non-reviewability on the agency.³⁵ Courts have

the APA) governing the availability of judicial review of this type of Federal Power Comm. (FPC) action prior to the Dep't of Energy (DOE) Organization Act. The court held that the legislative histories of the Federal Power Act and the Natural Gas Act (which gave the FPC authority to set Bonneville Power Admin. rate schedules) do not suggest that Congress intended to curb the FPC's authority to grant the interim approval of rates. The Secretary of Energy "inherited" this power with the passage of the DOE Organization Act. *Montana Power Co.*, 531 F. Supp. at 10.

26. *Atlantic Richfield Co.*, 500 F. Supp. at 1303. The plaintiffs were Atlantic Richfield Co., Marathon Oil Co., Mobil Oil Co., and Texaco, Inc.

27. 10 C.F.R. § 211.69 (1986).

28. 15 U.S.C. §§ 751-760 (1982).

29. *Atlantic Richfield Co.*, 500 F. Supp. at 1303.

30. *Id.* at 1304. The "entitlements" amounted to a paper transfer of the right to refine the cheaper "old" oil. The refiner was entitled to one "entitlement" for each barrel of cheap oil it refined. If a refiner used more than the minimum amount of "entitlements" it had to make up the difference by buying "entitlements" from other refiners, primarily those using "new" oil. The price of the entitlement was established by the DOE to reflect the disparity of prices between "old" and "new" oil.

31. *Id.* at 1305.

32. *Id.* at 1306.

33. 5 U.S.C. § 701(a)(2) (1982).

34. *See supra* note 4.

35. *National Resources Defense Council, Inc. v. SEC.*, 606 F.2d 1031 (D.C. Cir. 1979).

stated that this exception to judicial review is a narrow one³⁶ which may be invoked only upon a clear and convincing showing that precluding review would further the intent of Congress.³⁷ This exception applies in those rare instances where statutes are drawn in such broad terms that there is no law to apply.³⁸ Even in those cases where an administrative agency has a special expertise, the court has not entirely precluded judicial review based on agency discretion.³⁹ When the courts so narrowly interpret this preclusionary exception to judicial review and when a provision within the APA itself denies the preclusion where there is an abuse of discretion,⁴⁰ it seems to be a futile effort for an agency to attempt to invoke this exception.

Even though the test is a narrow one, an analysis of energy-related decisions indicates that courts have not been reluctant to defer to agency discretion declaring that the narrow test has been met. One example is *Cerro Wire and Cable Co. v. FERC*.⁴¹ In *Cerro* the Court of Appeals for the District of Columbia held that the FERC's decision to hold an informal conference instead of an evidentiary hearing was not an abuse of agency discretion.⁴² The complaint was lodged by various commercial and industrial users of natural gas regarding alleged violations of the abandonment of service provision of the Natural Gas Act⁴³ by an interstate pipeline company.⁴⁴ The court stated that FERC need not hold an evidentiary hearing where there was no material issue of fact.⁴⁵

Another example is the case of *Illinois Cities of Bethany v. FERC*.⁴⁶ In that case the Court of Appeals for the District of Columbia held that the FERC's refusal to normalize⁴⁷ an increase in the generating plant capacity of a public utility was neither an arbitrary nor capricious abuse

36. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

37. *Morris v. Gressette*, 432 U.S. 491, 501 (1977).

38. *Ashton v. Pierce*, 541 F. Supp. 635, 643 (D.C. 1982), (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)).

39. *Secretary of Labor v. Farino*, 490 F.2d 885 (7th Cir. 1973). "Proper application of [the determination of whether an alien will be a productive citizen] undoubtedly depends on the expertise of the Secretary of Labor. But that does not insulate his decision from judicial review." *Id.* at 889.

40. 5 U.S.C. § 706(2)(A) (1982).

41. 677 F.2d 124 (D.C. Cir. 1982).

42. *Id.* at 129. See also *Public Service Co. v. FERC*, 600 F.2d 944 (D.C. Cir.), cert. denied, 444 U.S. 990 (1979); *Union Mechling Corp. v. United States*, 566 F.2d 722 (D.C. Cir. 1977); *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125 (D.C. Cir. 1969).

43. 15 U.S.C. § 717(f)(b) (1982).

44. *Transcontinental Gas Pipe Line Corp. (Transco)*.

45. *Cerro Wire*, 677 F.2d at 128.

46. 670 F.2d 187 (D.C. Cir. 1981).

47. The court defined "normalize" in this case, determining that it meant to exclude from the rate base of a public utility all costs associated with reserve capacity in excess of 15%. *Id.* at 200-01.

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of discretion⁴⁸ under the Federal Power Act.⁴⁹ Various municipalities sought direct review of a FERC order approving a wholesale electric power tariff filed by an electric utility.⁵⁰ The court stated that the FERC is permitted to adjust retail rates within a range of reasonableness to respond either to utility efforts to depress retail rates to meet competition or to situations where imperfections of regulation result in an unintended price squeeze.⁵¹ Even though the municipalities alleged a price squeeze,⁵² the court allowed the agency discretion to raise the tariff that the municipalities would have to pay to the public utility wholesaler when there was no concurrent increase in the rate that the municipalities could charge the individual consumer.

The leading case respecting FERC's action as committed to agency discretion is *General Motors Corp. v. FERC*.⁵³ In that case the petitioner, General Motors, sought to set aside a FERC order which dismissed General Motor's complaint against a curtailment plan filed with FERC by the Natural Gas Pipeline Company of America (Pipeline).⁵⁴ Because of natural gas shortages, Pipeline filed a proposal with FERC to curtail gas deliveries. Pipeline also filed an accompanying scheme to allocate deliveries between customers.⁵⁵ The allocation scheme allowed Pipeline's small users to increase their entitlements to output up to previous contractual limits, while Pipeline's large customers would not be allowed to increase entitlements and would be forced into pro rata curtailments should shortages occur.⁵⁶

A subsequent FERC order⁵⁷ set out priorities of allocation during periods of curtailment and specified that the natural gas' "end use" would be the basis of allocation. This order provided the springboard for General Motors' complaint.⁵⁸ General Motors alleged that FERC's approval of Pipeline's allocation scheme violated section 5(a) of the Natural

48. *Id.* at 201.

49. 16 U.S.C. § 824(d) (1982).

50. *Illinois Cities of Bethany*, 670 F.2d at 187.

51. *Id.*

52. *Id.* at 194.

53. 613 F.2d 939 (D.C. Cir. 1979). This opinion refers to all actions as "FERC" actions. The author, in his discussion of this case, follows a like practice, but wishes to remind the reader that FERC was not created until 1977 and all actions prior to 1977 are technically FPC actions.

54. *Id.* at 941.

55. *Id.*

56. *Id.* at 942.

57. Order 467, 49 F.P.C. 85 (1973), amended 49 F.P.C. 583 (1973), amended 51 F.P.C. 1199 (1974).

58. *General Motors*, 613 F.2d at 943.

Gas Act⁵⁹ because, inter alia, it was not based on the "end use" standard required in the subsequent FERC order.⁶⁰

FERC dismissed the complaint stating that a particular curtailment plan was not a per se violation of section 5(a) even though it was not based on "end use." FERC further stated that General Motors had failed to show proximate cause between Pipeline's curtailment plan and General Motors' alleged injury.⁶¹ FERC granted General Motors rehearing on the basis that a formal hearing was necessary to investigate Pipeline's alleged shortages, and to determine whether the curtailment plan was subject to an "end use" test. After rehearing, FERC again dismissed General Motors complaint stating that General Motors had again failed to show proximate cause and that FERC's order referring to "end use" was never intended to apply to every pipeline system because market deterrents could effectively preclude imposition of the order.⁶²

General Motors then appealed to the Court of Appeals for the District of Columbia alleging that FERC's two dismissals were an abuse of discretion and were arbitrary and capricious.⁶³ The Court of Appeals disagreed stating that an administrative agency's decision to conduct or not to conduct an investigation⁶⁴ is a matter committed to agency discretion.⁶⁵ After stating that General Motors had not contended that FERC had ignored any relevant factor in its decision to dismiss and the reasons therefore, the court said: "If an agency considers all the relevant factors so that a court can satisfy itself that the agency has actually exercised its

59. 15 U.S.C. § 717(a) (1982). This statute states:

(a) Necessity of regulation in public interest. As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for *ultimate distribution* to the public is *affected with a public interest*, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. *Id.* (emphasis added).

The basis of General Motor's reasoning was that it was in fact an *ultimate* consumer within the language of the statute, and FERC, by virtue of what General Motors viewed as a violation of its own order (Order 467, *supra* note 56) did not act in the "public interest."

60. Order 467, *supra* note 57.

61. *General Motors*, 613 F.2d at 944.

62. *Id.*

63. *Id.*

64. Apparently, General Motors believed that a formal hearing, which it requested on meeting with FERC, is tantamount to an "investigation." It is possible, however, for an agency to conduct *informal* hearings which include investigations into such things as Pipeline's alleged shortages of natural gas. General Motor's request, on rehearing, that FERC explain why a formal hearing was not necessary to investigate Pipeline's alleged shortages is evidence of General Motor's apparent inability to detach the necessity of an investigation from the necessity of a formal hearing. *Id.*

65. *Id.*

discretion, an agency's decision to refrain from investigation is unreviewable."⁶⁶ But a concurring opinion reiterated the idea that, absent a clear intent to the contrary, agency action is presumptively reviewable⁶⁷ and that, notwithstanding the court's decision, the unreviewability of agency action committed to agency discretion is constrained by various other factors.⁶⁸

III. PRIMARY AND EXCLUSIVE JURISDICTION AND METHODS OF OBTAINING AN APPROPRIATE REMEDY

If judicial review of agency action is not precluded, the next step is to determine which court has the proper jurisdiction to decide the controversy. In seeking review of DOE or FERC action⁶⁹ the first place to look is the DOE Organization Act.⁷⁰ If a statute that provides for judicial review of agency action is deemed to be exclusive, the APA cannot contravene it⁷¹ even though the statute does not expressly indicate exclusivity.⁷²

The DOE Organization Act provides a starting point for determining jurisdiction. The derivative nature of DOE and FERC creation makes the question of jurisdiction easier for those familiar with the derivative acts. Section 7192(a), provides:

Agency Action. Judicial review of agency action taken under any law the functions of which are vested by law in, or transferred or delegated to the Secretary, the Commission or any officer, employee, or component of the Department shall, notwithstanding such vesting, transfer,

66. *Id.*

67. *Id.* at 946 (Bazelon, J., concurring).

68. Factors mentioned in Judge Bazelon's concurrence allow review of discretionary agency action, including situations where:

1. the agency relies on legal rather than mere factual grounds;
2. the aggrieved party claims arbitrariness;
3. there is no other adequate remedy in court for a challenge to final agency action.

Id. (citations omitted).

But see *City of Bedford v. FERC*, 718 F.2d 1164 (D.C. Cir. 1983) (where the court held that even though investigations bearing upon statutory entitlements are exceptions to the general proposition that investigation priorities are matters committed to agency discretion, the court must nevertheless accord the agency's judgment great weight).

69. In passing the DOE Organization Act Congress created a separate DOE and FERC but no separate provisions for review. Review of either DOE or FERC actions arises under 42 U.S.C. § 7192 (1982).

70. 42 U.S.C. § 7131 (1982).

71. *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). The court in *Getty* stated: "If Congress specifically designates a forum for judicial review or administrative action, such a forum is exclusive, and this result does not depend on the use of the word 'exclusive' in the statute providing for a forum for judicial review." *Id.* at 356.

72. *Id.*

or delegation, be made in the manner specified in or for such law.⁷³

As in the question of preclusion, the source of agency power will determine which court has jurisdiction. For example, jurisdiction of a DOE action which was previously the responsibility of the Federal Energy Administration is in the United States Court of Appeals for the District of Columbia when DOE rules in areas of general and national applicability. But when DOE rules in areas of general but less than national applicability, jurisdiction is in the Court of Appeals of the circuit where the rule has its greatest impact.⁷⁴

The second paragraph of section 7192(b) of the DOE Organization Act which allows judicial review is residual.⁷⁵ It gives United States District Courts exclusive jurisdiction of all agency actions not covered by section 7192(a). The only exception is that state courts have jurisdiction over state actions enforcing rules or orders made by state officials under the Act that involve non-constitutional questions.⁷⁶

A particular factual situation may lead to review in different courts, depending on the interpretation given to those facts. In *Texaco, Inc. v. DOE*⁷⁷ the issue was whether the Temporary Emergency Court of Appeals (TECA) had jurisdiction over FERC inaction or omission in refusing to review a DOE interim order.⁷⁸ A federal district court concluded that FERC had such reviewing authority and remanded to FERC for review. Not wanting to be forced into reviewing its own decision, FERC appealed to TECA.⁷⁹ TECA dismissed the appeal for want of jurisdiction, stating that an omission is an "agency action" that did not have a derivative source and is thus exclusively governed by the DOE Organization Act.⁸⁰ The district court, under 42 U.S.C. § 7192(b), retained jurisdiction because its decision was not yet appealable, the merits not yet having been decided.⁸¹ In other words, the district court, not TECA, had original jurisdiction.⁸² If TECA had determined that FERC's omis-

73. 42 U.S.C. § 7192(a) (1982).

74. 15 U.S.C. § 766(c) (1982). This occurs because the Federal Energy Administrative Act, which predated the DOE Organization Act from which the latter derives its jurisdiction in actions previously committed to the FEA, so provides.

75. 42 U.S.C. § 7192(b) (1982).

76. *Id.*

77. 616 F.2d 1193 (Temp. Emer. Ct. App. 1979).

78. *Id.* at 1195.

79. *Id.* at 1194.

80. *Id.* at 1196.

81. *Id.*

82. TECA stated:

Whether FERC must entertain an appeal from a grant as well as a denial of adjustment relief thus involves an interpretation of the DOE Act itself and not an application of any

sion did not arise under the DOE Organization Act, but instead under the Emergency Petroleum Act as FERC argued, section 7192(a) would have applied. If that had been the case, the Emergency Petroleum Allocation Act would have granted TECA jurisdiction.

Whether the APA could be an independent source of jurisdiction where a statute did not otherwise provide has been the subject of divergent conclusions among the legal profession. Professors Byse and Fiocca have determined that the APA confers jurisdiction,⁸³ while Professor Cramton determined that the APA cannot confer jurisdiction.⁸⁴ In *Califano v. Sanders*⁸⁵ the Supreme Court acknowledged the confusion and held that since Congress amended⁸⁶ 28 U.S.C. § 1331(a), federal question jurisdiction, to eliminate the need for any dollar amount to be in controversy, the APA could not be read to confer jurisdiction. That opinion rendered moot the question of whether the APA confers jurisdiction.⁸⁷ The Court stated:

The obvious effect of this modification, subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate. We conclude that this amendment [to 28 U.S.C. 1331(a)] now largely undercuts the rationale for interpreting the APA as an independent jurisdictional provision.⁸⁸

This statement is logical in light of the APA structure itself. While not seeming to require an independent source of jurisdiction, the APA does not state that it confers independent jurisdiction. In fact, the APA seems to go out of its way to prevent the conclusion that it confers jurisdiction, stating:

Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to

other law. . . . [42 U.S.C. § 7192(b)] thus controls judicial review. It provides that the district courts shall have exclusive original jurisdiction of all cases arising exclusively under the Act without special provision for appeal to TECA. That "omission" is decisive on the question of this Court's jurisdiction. This Court may act only where it has express authority to do so.

Texaco, 616 F.2d at 1196.

83. Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 330 (1967).

84. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 389, 432 (1970).

85. 430 U.S. 99 (1977).

86. Pub. L. 94-574, 90 Stat. 2721 (1976).

87. *Califano v. Sanders*, 430 U.S. at 105.

88. *Id.*

grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.⁸⁹

Califano indicated that the jurisdictional language of the APA was not intended to confer jurisdiction, but to evidence Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials.⁹⁰

Califano further found that while the APA does not independently confer jurisdiction over agency actions, a general review statute may confer jurisdiction. For example, the Administrative Orders Act⁹¹ confers jurisdiction to the Circuit Courts of Appeals over actions of the Atomic Energy Commission.⁹² Where such a general statutory grant of jurisdiction exists, the court so endowed has jurisdiction exclusive of all other courts.⁹³ General review statutes may also confer jurisdiction on district courts.⁹⁴ It is particularly important to be aware of these jurisdictional limitations as they may make relief unavailable despite a seeming compliance with all prerequisites.

IV. THE TIMING OF JUDICIAL REVIEW: FINALITY, EXHAUSTION OF REMEDIES, AND RIPENESS FOR REVIEW

The doctrines of finality, exhaustion of remedies, and ripeness are examples of some of the limitations referred to previously. These doctrines are specifically designed to address whether the petitioner seeking judicial review of an administrative action has prematurely resorted to the courts.⁹⁵ These doctrines are a method to ensure that the time and resources of the court are not wasted on review of hypothetical questions and to allow an agency the sovereignty legislated to it.

A. *Finality*

The first of these doctrines, finality, refers to the quality of the

89. 5 U.S.C. § 702 (1982).

90. *Califano*, 430 U.S. at 103-04.

91. Hobbs Act, 28 U.S.C. §§ 2341-51 (1982 & Supp. 1985).

92. 28 U.S.C. § 2342(4) (1982).

93. *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984) (holding that a district court lacks jurisdiction over a suit challenging FCC conduct as ultra vires when the Hobbs Act confers jurisdiction on the Court of Appeals).

See also *Sunflower Coalition v. NRC*, 534 F. Supp. 446 (D. Colo. 1982) (holding that a Court of Appeals has exclusive jurisdiction over NRC final licensing orders); *Desrosiers v. NRC*, 487 F. Supp. 71 (E.D. Tenn. 1980) (holding that a district court is without jurisdiction to grant plaintiff public hearing regarding issuance of limited license as Court of Appeals has exclusive jurisdiction).

94. *E.g.*, 28 U.S.C. § 1331(a) (1982).

95. GELLHORN & BYSE, *ADMINISTRATIVE LAW CASES AND COMMENTS*, 213-14 (5th ed. 1970).

agency action. A court normally will not intervene in non-final agency action because non-final action does not require compliance on the petitioner's part. In *Federal Power Commission v. Metropolitan Edison Co.*⁹⁶ the United States Supreme Court defined finality.⁹⁷ The Court stated: "[Finality] thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case."⁹⁸

For an agency action to be final, the action must be sufficiently definite for the petitioner to be expected to act in compliance with the agency's determination. If the "action" were couched in vague or ambiguous terms, there would be no reason to believe the agency expected compliance because the petitioner would not know with what he was expected to "comply." The *Metropolitan Edison* court's reference to "orders", as opposed to "regulations" or "opinions" may be based on the idea that only an order is retrospective in nature, requiring an immediate change in conduct by particular individuals. A regulation, however, is prospective in nature, allowing the petitioner to adjust his conduct with sufficient notice to avoid any irreparable harm.⁹⁹

In *Cities Service Gas Co. v. Federal Power Commission*¹⁰⁰ the Tenth Circuit Court of Appeals found that final agency action exist: "for the purposes of review, when it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process. . . ."¹⁰¹ However, the Supreme Court has emphasized that the concept of finality is not easily defined and must take into account the practical effects of review. In *Columbia Broadcasting System, Inc. v. United States*¹⁰² the Court stated:

The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the

96. 304 U.S. 375 (1938).

97. *Id.* at 384. *E.g.*, *Papago Tribal Utility Auth. v. FERC*, 628 F.2d 235, 238-39 (D.C. Cir.), *cert. denied*, 449 U.S. 1061 (1980).

98. *Metropolitan Edison*, 304 U.S. at 384.

99. Indeed, irreparable harm is a major factor in a court's determination of whether it should intervene in *non-final* agency action. *General Motors v. FERC*, 607 F.2d 330 (10th Cir. 1979); *see, e.g.*, *Niagara Mohawk Power Corp. v. FPC*, 538 F.2d 966 (2d Cir. 1976).

100. 255 F.2d 860 (10th Cir.), *cert. denied*, 358 U.S. 857 (1958).

101. *Id.* at 863. *See also*, *Conway Corp. v. FPC*, 510 F.2d 1264, 1267 (D.C. Cir. 1975), *aff'd*, 426 U.S. 271 (1976).

102. 316 U.S. 407 (1942).

regulations purport to control.¹⁰³

In *Niagara Mohawk Power Corp. v. Federal Power Commission*¹⁰⁴ the FPC issued an order that allowed an anticompetitive practice between two public utilities pursuant to a transmission agreement between them. The order was issued over the objection of a newly-formed municipal electric system.¹⁰⁵ The court of appeals denied the municipal electric system's petition for review and stated that the FPC order was not "final" agency action. The holding was notwithstanding that the FPC characterized the action as an "order" and that the FPC had demonstrated no intention to allow wielding of power between the public utilities.¹⁰⁶

B. Ripeness

The second doctrine, ripeness, deals with the timing of an action. Before judicial review of an agency's order may be obtained, the issues must be ripe for judicial review.¹⁰⁷ To determine ripeness, a court must evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding consideration of the issues.¹⁰⁸ The Supreme Court decision in *Abbott Laboratories v. Gardner*,¹⁰⁹ the best

103. *Id.* at 425. See also *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970); *Frozen Food Express v. United States*, 351 U.S. 40 (1956); *National Wildlife Fed'n v. Goldschmidt*, 677 F.2d 259 (2d Cir. 1982); *Getty Oil Co. v. Andrus*, 607 F.2d 253 (9th Cir. 1979); *Conway Corp. v. FPC*, 510 F.2d 1264, 1267 (D.C. Cir. 1975), *aff'd*, 426 U.S. 271 (1976).

104. 538 F.2d 966 (2d Cir. 1976).

105. *Id.* at 967.

106. *Id.* at 970-71.

107. *Placid Oil Co. v. FERC*, 666 F.2d 976, 981 (5th Cir.), *reh'g denied*, 673 F.2d 1322 (1982). The doctrine of ripeness is tied to finality because ripeness can not exist without finality. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). However, an action is not ripe simply because it is final. *Gardner v. Toilet Goods Association*, 387 U.S. 167 (1967) (This was a companion case to *Abbott Laboratories*.) Section 704 of the APA requires that actions of an agency be final in order to be subject to judicial review. *National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971). 5 U.S.C. § 704 (1982), provides:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Ripeness may also be a constitutional limitation, (*Laird v. Tatum*, 408 U.S. 1 (1972)), by virtue of the requirement that federal courts may only hear "cases and controversies, (U.S. CONST. art. III, § 2), and an agency action prematurely reviewed may not yet qualify as a controversy.

108. *Placid Oil Co.*, 666 F.2d at 981 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)).

109. 387 U.S. 136 (1967).

known case addressing the ripeness doctrine, stated that in order for an agency action to be "ripe" it must first be "final,"¹¹⁰ and that finality is to be construed in a "pragmatic way".¹¹¹

Even though the agency itself characterizes its action as "final" a court will still look to the practical consequences of the action to determine finality.¹¹² In *Pennzoil v. FERC*¹¹³ the court of appeals enumerated four criteria to aid in making this evaluation:

- (1) Whether the issues presented are purely legal;
- (2) Whether the challenged agency action constitutes "final agency action," within the meaning of the [APA];
- (3) Whether the challenged agency action has or will have a direct and immediate impact upon the petitioners; and
- (4) Whether resolution of the issues will foster, rather than impede, effective enforcement and administration by the agency.¹¹⁴

In *Louisiana v. DOE*,¹¹⁵ a United States District Court held that all four of the above criteria existed in a case involving the definition of "properties"¹¹⁶ to be used in a two-tier crude oil pricing system.¹¹⁷ The petitioner brought an action against DOE seeking a declaration that the reservoir-wide producing units which petitioners had established were separate "properties" for the purpose of federal oil and gas pricing regulations. The court found that petitioner's claim involved two purely legal issues: "(i) Whether DOE's interpretation [of 'property'] is valid; and, (ii) if DOE's interpretation is valid, whether it is the only reasonable interpretation and thereby entitled to retroactive application."¹¹⁸ Regarding the element of finality, the court found that the issuance of rules was determinative because the issuance of rules caused injury to Louisiana and because DOE had shown that it intended no further proceedings.¹¹⁹ As to whether a direct and immediate harm to petitioner was present; the

110. *Id.* at 149.

111. *Id.*, (citing, *Columbia Broadcasting Sys. v. United States*, 316 U.S. 407 (1942)).

112. *Carter/Mondale Presidential Comm., Inc. v. Federal Election Comm'n*, 711 F.2d 279 (D.C. Cir. 1983).

113. 645 F.2d 394 (5th Cir. 1981); see also *Phillips Petroleum Co. v. FEA*, 435 F. Supp. 1239 (D. Del. 1977).

114. 645 F.2d at 398.

115. 507 F. Supp. 1365 (W.D. La. 1981), *aff'd*, 690 F.2d 180 (1982), *cert. denied*, 460 U.S. 1069 (1983). For a case involving the same factual circumstances brought by an aggrieved oil producer see *Texaco, Inc. v. DOE*, 490 F. Supp. 874 (D. Del. 1980).

116. This issue was whether a property interest arose from a leasehold or fee estate.

117. "The two-tier system was designed to achieve two goals simultaneously. It was to control inflation by limiting the price of oil then being produced to an established 'ceiling price.' At the same time, it would stimulate increased production by allowing newly discovered crude oil to be sold at a higher free-market price." *Louisiana*, 507 F. Supp. at 1367.

118. *Id.* at 1372.

119. *Id.*

petitioner alleged that it was presently receiving reduced oil royalties because of DOE's interpretation of the word "property."¹²⁰ Finally, the court stated that litigation of the controversy would expedite final resolution of the matter.¹²¹

Conversely, in *Diversified Chemicals and Propellants Co. v. Federal Energy Administration*¹²² the court held that the test originated in *Abbott* and followed by *Pennzoil* was not satisfied. In *Diversified Chemicals*, a distributor and marketer of chemical hydrocarbon propellants used in aerosol cans asked the Federal Energy Administration, (FEA), for an interpretation of an FEA notice that had informed the petitioner that petitioner's product might be covered by FEA price regulations under the Emergency Petroleum Allocation Act.¹²³ The FEA subsequently issued an interpretation stating petitioner's product was covered by provisions of the Act.¹²⁴ After petitioner appealed to the agency, the FEA dismissed the petition because of petitioner's failure to notify its customers of the appeal as was required by FEA regulations.¹²⁵ After FEA issued a notice of probable violation, petitioner sought judicial review.¹²⁶

By relying on *Abbott* and by determining that the matter was not ripe for review, the court conceded that the issue was purely legal—whether petitioner's product is covered by pricing regulations—but stated that that issue was not conclusive.¹²⁷ The court went on to state that a pragmatic reading of the finality requirement does not negate entirely the need for final agency action.¹²⁸ The FEA had not yet issued any type of order. Thus, compliance was not yet expected. As to the issue of whether the withholding of review would cause petitioner to suffer an unreasonable hardship, the court stated that "[u]ntil the FEA seeks to enforce an order, the plaintiff is not subject to the possibility of actual pecuniary liability."¹²⁹ Furthermore, "prior to enforcement of an order, an order would first have to be issued, . . . and the issuance would be subject to appeal."¹³⁰

120. *Id.* at 1373.

121. *Id.* at 1374.

122. 432 F. Supp. 859 (N.D. Ill. 1977), *aff'd* 710 F.2d 814 (Temp. Emer. Ct. App. 1983).

123. 15 U.S.C. § 751 (1982).

124. 432 F. Supp. at 860.

125. 10 C.F.R. § 205.104(a) (1986).

126. 432 F. Supp. at 861.

127. *Id.* at 863.

128. *Id.*

129. *Id.* at 863-64.

130. *Id.* at 864 n.1. See also *Diamond Shamrock Corp. v. Costle*, 580 F.2d 670, 674 (D.C. Cir. 1978) for the prospect that in the absence of hardship, only a minimum showing of countervailing

Louisiana may also be distinguished from *Diversified Chemicals* on the basis of formality or lack thereof. As the *Abbott* decision implies, the degree of formality of the administrative action may be important in determining whether the issue is ripe for review.¹³¹ In *Louisiana* the FEA issued a ruling published in the Federal Register¹³² after first issuing notice. The FEA then issued another published ruling.¹³³ DOE later initiated administrative enforcement proceedings against the oil producers.¹³⁴ By contrast, in *Diversified Chemicals* the FEA had merely issued an interpretation upon petitioner's request and a subsequent notice of probable violation.¹³⁵

C. Exhaustion of Remedies

The last doctrine to be considered also deals with the basic question of timing. Generally, one is not entitled to judicial relief until a prescribed administrative remedy has been exhausted.¹³⁶ Exhaustion of remedies means that a party must seek all available remedies within the agency before the courts will review the dispute.¹³⁷ Exhaustion of remedies is required for the same reason finality and ripeness are required—to keep courts from disrupting agency proceedings.¹³⁸ The doctrines' purpose is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies.¹³⁹

Exhaustion differs from finality in that exhaustion refers to the steps which the litigant must take, whereas finality refers to the conclusion of activity by the agency.¹⁴⁰ As the case of *FTC v. Standard Oil Co. of Calif.* points out, a party may take all the measures available to it in the administrative process to obtain relief, and yet not obtain a final review-

judicial review of an administrative decision; *Helco Products Co. v. McNutt*, 137 F.2d 681 (D.C. Cir. 1943) (ruling that informal interpretations are not final action).

131. *Abbott Laboratories*, 387 U.S. at 136.

132. 42 Fed. Reg. 3628 (Jan. 19, 1977).

133. 42 Fed. Reg. 4409 (Jan. 25, 1977).

134. *Louisiana v. DOE*, 507 F. Supp. 1365, 1369 (W.D. La. 1981), *cert. denied*, 460 U.S. 1069.

135. *Diversified Chemicals v. FEA*, 432 F. Supp. 859, 860 (N.D. Ill. 1977). See also *International Longshoremen's Union v. Boyd*, 347 U.S. 222 (1954) (holding that notwithstanding demonstrated hardship, an issue was not ripe for review due to the informality of the agency's action).

136. *Coalition for Safe Nuclear Power v. United States Atomic Energy Comm'n*, 463 F.2d 954 (D.C. Cir. 1972).

137. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49 (1938).

138. *McKart v. United States*, 395 U.S. 185 (1969).

139. *SEC v. G.C. George Sec., Inc.*, 637 F.2d 685 (9th Cir. 1981).

140. *Bethlehem Steel Corp. v. EPA*, 669 F.2d 903, 908 (3d Cir. 1982).

able order.¹⁴¹ Conversely, an agency order may be final for purposes of judicial review, even though the party has not fully pursued administrative remedies.

Although the doctrines of exhaustion and ripeness are similar,¹⁴² exhaustion may not be required to obtain ripeness where the agency is "plainly" acting beyond its jurisdiction,¹⁴³ where the agency remedy is inadequate,¹⁴⁴ where the pursuit of intra-agency remedies would be futile,¹⁴⁵ or where other exceptions to the doctrine of exhaustion exist within the courts discretion.¹⁴⁶ For example, in *Gulf Oil Corp. v. DOE*,¹⁴⁷ the court of appeals sustained a district court injunction prohibiting further destruction of discovery material and compelling DOE to preserve in one location all documents arguably related to the crude cluster proceedings.¹⁴⁸ DOE audited petitioner and petitioner was then informed that it had violated the DOE regulations which controlled the price of crude oil.¹⁴⁹ Subsequently, certain of DOE's records pertinent to its audit of petitioner were destroyed.¹⁵⁰ The court held that the district court properly intervened even though DOE proceedings were on-going and were not expected to end for five years. The court stated that a delay in full discovery rights for such a time period would "irreparably impair" petitioners' attempt to develop their major defense.¹⁵¹

V. RELIEF PENDING REVIEW

The APA provides for stays of execution of agency action pending judicial review. Section 705 states:

When an agency finds that justice so requires, it may postpone the

141. 449 U.S. 232 (1980).

142. *Phillips Petroleum Co. v. FEA*, 435 F. Supp. 1239, 1248 (D. Del. 1977).

143. *Mobil Oil Corp. v. FTC*, 430 F. Supp. 855 (S.D.N.Y.), *rev'd*, 562 F.2d 170 (1977). However, the claim that an agency is acting beyond the scope of its statutory jurisdiction is not enough to overcome the exhaustion doctrine if demonstrating this depends on how the jurisdictional aspects of the statute are *applied* to the facts. *Myers*, 303 U.S. at 51.

144. *Texaco v. DOE*, 490 F. Supp. 874 (D. Del. 1980).

145. *Mobil Oil Corp. v. DOE*, 520 F. Supp. 420 (N.D.N.Y.), *rev'd on other grounds*, 659 F.2d 150 (2d Cir.), *cert. denied*, 454 U.S. 1110 (1981); *Phillips Petroleum Co. v. FEA*, 435 F. Supp. 1239 (D. Del. 1977).

146. *Layton & Fine, The Draft and Exhaustion of Administrative Remedies*, 56 *GEO. L.J.* 315, 320 (1967).

147. 663 F.2d 296 (D.C. Cir. 1981). *Accord Pennzoil Co. v. DOE*, 466 F. Supp. 238 (D. Del. 1979).

148. *Gulf Oil*, 663 F.2d at 304.

149. *Id.* at 298.

150. *Id.* at 299-302.

151. *Id.* at 307. However, the court of appeals held that subsequent unrelated events mooted the lower court's intervention.

effective date of action taken by it, pending judicial review. In such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.¹⁵²

Thus, under the APA either the agency itself or a reviewing court may delay the effective date of an agency's action pending the outcome of judicial review. The exhaustion doctrine does not allow such delay¹⁵³ absent a prudential or constitutional exception.¹⁵⁴

Courts have developed a four-part test to determine whether to grant a stay and interim relief from agency action. The petitioner must show (1) that he will suffer irreparable injury,¹⁵⁵ (2) that he will probably prevail on the merits if agency proceedings are not stayed,¹⁵⁶ (3) that it is in the public's interest that a stay and interim relief be granted,¹⁵⁷ and (4) that a stay will not substantially harm the opposing party if the opposing party ultimately prevails.¹⁵⁸ Under this four part test, the petitioner bears the burden of proof.¹⁵⁹

VI. STANDING TO SEEK REVIEW

The doctrine of standing has its roots in both the United States Constitution¹⁶⁰ and common law. The Constitution limits the power of federal courts to "cases" and "controversies."¹⁶¹ At common law, a person seeking review of agency action had to demonstrate the invasion or threat of invasion of a private, substantive legally protected interest arising from case law or statute.¹⁶² A personal or economic interest was

152. 5 U.S.C. § 705 (1982).

153. See *Sampson v. Murray*, 415 U.S. 61, 78 (1974).

154. See *infra* notes 159-166 and accompanying text.

155. See *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), *Hamlin Testing Laboratories, Inc. v. United States Atomic Energy Comm'n*, 337 F.2d 221, 222 (6th Cir. 1964). The District of Columbia circuit court has aptly stated that "what constitutes irreparable injury in one instance may not constitute such under different circumstances." *Virginia Petroleum Jobbers Ass'n v. FPC*, 295 F.2d 921, 925 (D.C. Cir. 1958).

156. *Permian*, 390 U.S. at 747. See also *Tennessee Gas Transmission Co. v. FPC*, 283 F.2d 729, 729-30 (5th Cir. 1979).

157. *Permian*, 390 U.S. at 748.

158. *Unglesby v. Zimny*, 250 F. Supp. 714, 716 (W.D. Cal. 1965).

159. See *Corning Savings and Loan Assoc. v. Federal Home Loan Bank Bd.*, 562 F. Supp. 279, 282 (E.D. Ark. 1983) (cited for the proposition that the test applied for an application of a stay is same as that for a preliminary injunction, placing burden of proof on movant).

160. U. S. CONST., art. III § 2.

161. *Id.*

162. *Associated Indus. of New York State v. Ickes*, 134 F.2d 694, 700 (2d Cir. 1943), *rev'd* 64 S.Ct. 74 (1943).

insufficient.¹⁶³ In essence, the agency must have caused some wrong that would have given the plaintiff a legal cause of action, had the agency been an individual.

Eventually, the growth of the federal bureaucracy¹⁶⁴ led to a liberalizing trend in the doctrine of standing. The trend received legitimacy with the decision of *FCC v. Sanders Bros. Radio Station*,¹⁶⁵ which held that the term "aggrieved person" was not limited to one suffering an individual wrong.¹⁶⁶ The trend received further legitimacy with the adoption of the APA a short time later,¹⁶⁷ especially by the adoption of section 702.¹⁶⁸

Standing is determined by a much different test today than at common law. The prerequisites for standing to sue are: (1) "There must be injury in fact to the Plaintiff, economic or otherwise; and (2) The interest sought to be protected by the Plaintiff must arguably be within the zone of interests to be protected or regulated by the statute involved."¹⁶⁹ If the plaintiff meets these two requirements, then the plaintiff is an "aggrieved person" within the meaning of section 702 of the APA.¹⁷⁰

An example of the modern liberalizing trend in the standing doctrine is the case of *American Horse Protection Association Inc. v. Frizzell*.¹⁷¹ In that case, the United States District Court for the District of Nevada described the "injury in fact" element of the standing requirement thusly:

[The injury in fact] requirement can be met by alleging that the members of some group suffer an actual injury by the agency action; the injury can be aesthetic or environmental values. The crucial factor is whether plaintiff alleges an actual injury in fact; the Court should find that standing exists where such an injury is alleged, despite an attenuated line of causation from the agency action to the injury and whether

163. *Alabama Power v. Ickes*, 302 U.S. 464, 478-79 (1938).

164. See Hasl, *Standing Revisited—The Aftermath of Data Processing*, 18 ST. LOUIS U.L.J. 12 (1973), for a discussion of bureaucratic growth.

165. 309 U.S. 470 (1940). See also *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942).

166. *Sanders Bros. Radio*, 309 U.S. at 476-77.

167. The APA was adopted in 1942, two years after *Sanders*.

168. 5 U.S.C. § 702 (1982).

169. *Nuclear Data, Inc. v. Atomic Energy Comm'n*, 344 F. Supp. 719, 724 (N.D. Ill. 1972) (quoting *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150 (1970)). See also *Safir v. Kreps*, 551 F.2d 447 (D.C. Cir.), cert. denied, 434 U.S. 820 (1977); *Caulfield v. Board of Educ. of New York*, 449 F. Supp. 1203 (E.D.N.Y. 1978); *City and County of San Francisco v. United States*, 443 F. Supp. 1116 (N.D. Cal. 1977).

170. 5 U.S.C. § 702 (1982).

171. 403 F. Supp. 1206 (D. Nev. 1975). But see *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (holding that standing will not be allowed where nothing more than a "longstanding interest" is alleged). *Id.*

or not plaintiff will be able to prove ultimately that he has in fact suffered the alleged injury.¹⁷²

Energy-related cases have followed the liberalized trend of standing. In *Northern States Power Co. v. Rural Electrification Administration*,¹⁷³ the court allowed standing to two privately-owned power companies which objected to REA's grant of a loan to an electric cooperative. The companies alleged that the electric cooperative would use the proceeds to duplicate some of the services of the power companies, thus causing economic harm to REA.¹⁷⁴ Under the common law analysis, the petitioners would not have had standing because loans between two individuals are not illegal, despite economic harm to a third person. However, under modern analysis the result is contrary. Mere economic injury, if caused by "unlawful" competition¹⁷⁵ which is the result of agency action, is sufficient to satisfy the "injury in fact" element of standing.¹⁷⁶ In *Arkla Exploration Co. v. Watt*,¹⁷⁷ Arkla objected to the government's granting of an application of another exploration company for oil and gas leases on military lands.¹⁷⁸ The United States District Court for the Western District of Arkansas allowed the petitioner standing even though the petitioner had not alleged that it would have been successful, had it been allowed to bid competitively with the other exploration companies.¹⁷⁹

Even if all the aforementioned obstacles to judicial review are satisfied, courts will not entertain a request for relief if the request falls outside the boundaries of judicial province. These boundaries are defined under the scope of the judicial review doctrine.

VII. SCOPE OF JUDICIAL REVIEW

If judicial review is available, the scope of review will be limited depending on whether the controverted issue is one of fact or one of law.¹⁸⁰ With respect to questions of fact, the prevailing view is that a

172. *American Horse Protection Ass'n*, 403 F. Supp. at 1214.

173. 248 F. Supp. 616 (D. Minn. 1965).

174. *Id.* at 624.

175. The *Northern States Power Co.* court did not define "unlawful competition," but it did imply that competition which would not have occurred but for the REA violation of its own order is unlawful competition.

176. *Northern States Power Co.*, 248 F. Supp. at 624.

177. 548 F. Supp. 466 (W.D. Ark. 1982). This court gives a very complete and relatively lengthy discussion of the present doctrine of standing.

178. *Id.* at 468.

179. *Id.* at 471.

180. *General Ry. Signal Co. v. Washington Metro. Area Transit Auth.*, 527 F. Supp. 359, 360 (D.D.C. 1979), *aff'd*, 664 F.2d 296 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 915 (1981).

court will not set aside an agency finding of fact as long as such a finding is supported by "substantial evidence."¹⁸¹ Rule 706 of the APA¹⁸² calls for a "substantial evidence" rule in formal agency actions and when a statute otherwise requires review on the record.¹⁸³ This "substantial evidence" rule is similar to the scope of review available to appellate court review of jury determinations. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion.¹⁸⁴ Further, the evidence must be enough to justify a refusal to grant a directed verdict.¹⁸⁵ Moreover, the substantial evidence rule does not involve weighing the evidence. Further the possibility of drawing inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.¹⁸⁶ In *Distrigas of Massachusetts Corp. v. FERC*,¹⁸⁷ the First Circuit stated that as long as FERC's argument on a natural gas rate issue was logical, consistent with traditional rate-making principles, supported by substantial evidence on the record, and not otherwise arbitrary, the court must uphold the result.¹⁸⁸

By sharp contrast, when the issue is one of law there is no presumption of finality as is given to issues of fact. The court may decide the issue itself.¹⁸⁹ This makes sense in light of the expertise of the court in resolving questions of law and the fact that an agency's own factual determinations may be based on its particular expertise¹⁹⁰ in its area of regulatory responsibility.¹⁹¹ Once again, under section 706 of the APA¹⁹² only formal actions are involved.¹⁹³ An administrative determination of a question of law does not have a presumption of correctness. Although it

181. *Placid Oil Co. v. FPC*, 483 F.2d 880 (5th Cir. 1973), *aff'd*, 417 U.S. 283 (1974).

182. 5 U.S.C. § 706 (1966).

183. 5 U.S.C. § 706(2)(E) (1982).

184. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

185. *United States v. Texas Pipe Line Co.*, 528 F. Supp. 728, 732 (E.D. Okla. 1978), *aff'd*, 611 F.2d 345 (10th Cir. 1979).

186. *Ward v. Harris*, 515 F. Supp. 859, 862 (W.D. Okla. 1981); *June Oil and Gas, Inc. v. Andrus*, 506 F. Supp. 1204, 1206 (D. Colo. 1981), *aff'd*, 717 F.2d 1323 (10th Cir. 1983).

187. 737 F.2d 1208 (1st Cir. 1984).

188. *Id.* at 1215. *See also* *Consolidated Gas Supply Corp. v. FERC*, 606 F.2d 323 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

189. *General Ry. Signal Co. v. Washington Metro. Area Transit Auth.*, 527 F. Supp. 359 (D.D.C. 1979), *aff'd*, 664 F.2d 296 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 915 (1981).

190. *United States ex rel. Chapman v. FPC*, 191 F.2d 796 (4th Cir. 1951).

191. *Lugo v. Simon*, 426 F. Supp. 28 (N.D. Ohio 1976).

192. 5 U.S.C. § 706 (1982).

193. Informal actions are discussed *infra* notes 193-96 and accompanying text.

might be entitled to some weight, it is not conclusive.¹⁹⁴ Therefore, the decision by the Secretary of the Interior in *Brennan v. Udall*¹⁹⁵ was reviewable. The Secretary held that certain homesteaders' reservation of oil rights to the United States included oil shale adversely affected by the successors to the homesteaders' title to land.¹⁹⁶

The above analysis dealt with formal agency action under the auspices of the APA. Informal agency action is subject to an "arbitrary and capricious" test.¹⁹⁷ In *Mobil Oil Corp. v. DOE*¹⁹⁸ the court stated:

The standard of review of agency action alleged to be arbitrary and capricious is not simply whether there exists a rational basis for the action. Rather, . . . the inquiry is whether the decision was based on a consideration of relevant factors, whether there has been clear error of judgment and whether there is a rational basis for the conclusions approved by the administrative body.¹⁹⁹

As the *Mobil Oil* court makes clear, the standard of review to informal agency action is highly deferential and presumes the validity of agency action.²⁰⁰

VIII. CONCLUSION

If all of the above elements are surmounted, the court may review the agency action in controversy. Of course an aggrieved person must seek out every possible intra-agency remedy before attempting judicial review. This makes sense because even if judicial review is obtained, it is a mere starting point, subject to a determination on the merits and to the appeal process just as any ordinary judicial determination would be. In a cost/benefit analysis, judicial review would not be feasible unless the benefits of seeking judicial review far outweigh the costs of complying with the agency action. Thus, a person seeking judicial review will almost always be a person capable both of losing a great deal in complying with

194. *Strachan Shipping Co. v. Shea*, 276 F. Supp. 610, 612 (S.D. Tex. 1967), *aff'd*, 406 F.2d 521 (5th Cir.), *cert. denied*, 395 U.S. 921 (1969).

195. 379 F.2d 803 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967).

196. *Id.* at 805.

197. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

198. 610 F.2d 796 (Temp. Emer. App. 1979), *cert. denied*, 446 U.S. 937 (1980).

199. *Id.* at 801. See also *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 685 F.2d 459 (D.C. Cir. 1982).

For a discussion asserting that the "arbitrary and capricious" standard should not stand in the way of pragmatic considerations see, Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 HARV. L. REV. 914 (1966).

200. *Motor Vehicles Mfgs. Ass'n v. Ruckelshaus*, 719 F.2d 1159 (D.C. Cir. 1983).

agency action and of sustaining the long and costly process that litigation entails.

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