

# PRELIMINARY INJUNCTIVE REGULATION

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*Rapid technological changes pose serious challenges for the Environmental Protection Agency (“EPA”) and other regulators charged with protecting human health and the environment. These changes can result not only in significant harms, but also in the entrenchment of new technologies that can be difficult to undo should the need arise. In urgent circumstances, agencies often must act quickly, but they face an increasingly ossified rulemaking process. The Administrative Procedure Act’s (“APA”) “good cause” exception to notice-and-comment rulemaking offers the most promising option for a swift and effective response. Empirical analysis of EPA’s use of that exception demonstrates that, contrary to concerns regarding potential agency abuse, EPA has exercised restraint in invoking the exception. Going forward, EPA should consider more aggressive use of the exception to respond to urgencies resulting from rapid technological developments and environmental changes. In justifying an expedited approach, EPA can make explicit reference to congressional inaction on an issue, the generally protracted nature of contemporary rulemaking, and the particular delays that the agency has encountered in ordinary rulemaking.*

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## INTRODUCTION

Powerful trends are undermining the ability of federal regulators to address threats to health, the environment, and the public interest. The world around us is changing rapidly, as emerging technologies, information technology, and internet-based services fuel social and economic transformations. Such technologies—nanotechnology, synthetic biology, and the Internet of Things, for example—promise significant benefits as well as new hazards. The benefits include heightened productivity, new products and services, and possible solutions to longstanding problems. The hazards often relate to health or the environment, but also extend to other concerns, including security, privacy, and inequity. I refer to such hazards, which may not qualify as emergencies yet still warrant prompt government responses, as “urgencies.” Urgencies are not novel, but the pace and magnitude of forthcoming developments will strain regulators’ ability to respond to them adequately and in a timely manner.

State or local authorities may address urgencies in some instances, but the scope of technological developments and their effects—as well as the interests of efficiency and uniformity—will often call for a federal response. However, the federal government’s capacity to act swiftly in the face of urgencies is increasingly in question. Legislative gridlock often stymies congressional action on pressing

issues, particularly if that action involves regulation. In recent years, partisan gerrymandering and routine filibusters have especially hindered legislative efforts.<sup>1</sup>

Agencies have an important role in responding to new challenges “because they are more nimble than Congress, more accountable than courts, and more expert than both in responding to changing conditions.”<sup>2</sup> However, regulatory ossification frequently characterizes agency efforts to respond to problems through rulemaking.<sup>3</sup> Notice-and-comment requirements are intended to produce sound rules and promote political legitimacy.<sup>4</sup> Yet notice-and-comment rulemaking often takes many years and consumes substantial agency resources. As a result, a rule may not issue until long after an agency recognizes the need for it, or a rule made obsolete by new circumstances may remain unchanged.

Together, congressional gridlock and regulatory ossification lead to arbitrary inaction and ineffective governance.<sup>5</sup> They also undermine accountability by tempting regulators to seek ways around ordinary rulemaking processes. My aim is not to rehash the scholarly literature, which is replete with proposals for tackling gridlock and ossification.<sup>6</sup> Nor do I advocate that agencies exceed the authority delegated to them. Rather, this Article focuses on an overlooked but critical issue: what existing authority can agencies exercise to respond rapidly to

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1. See *infra* Part I.B.
  2. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 4 (2014).
  3. See *infra* Part I.C.
  4. See Richard J. Pierce Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 82–86 (1995) [hereinafter Pierce, *Seven Ways*].
  5. See Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2217 (2013).
  6. See, e.g., Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1731–38 (2008) (proposing reforms to give agencies greater incentives to incorporate emerging science into rulemaking revisions); Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2077 (2013) (suggesting that it is legislation, “not gridlock[,] that requires explanation”); Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1025–27 (2000) (discussing role of judicial review in contributing to agency ossification); Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1327–33 (1999) (advocating elimination of almost all judicial review of agency rulemaking); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 22 (1997) (proposing collaborative governance approach to rulemaking characterized by problem solving, broad participation, provisional solutions, accountability, and flexibility); Michael J. Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107 (2013); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1462 (1992) (recommending that President, Congress, and courts allow agencies to “function with greater freedom and flexibility”); Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENVTL. L.J. 311, 314, 327 (2007) (arguing for “preference-directed” regulation, such as provision of information or creation of norms, as tools for combating ossification); Pierce, *Seven Ways*, *supra* note 4.

urgencies, short of full-bore rulemaking? Ideally, an agency response of this sort would be interim in nature, designed to protect the public and preserve the status quo pending final agency disposition. Once an interim response is in place, the agency may proceed through conventional rulemaking. The agency's interim response, akin to the preliminary injunctive relief a court might issue before making a final determination on the merits, I refer to as "preliminary injunctive regulation."

The tools available to agencies to undertake preliminary injunctive regulation include emergency authorities, interpretive rules, policy statements, and adjudications. Emergency authorities are granted in specific statutes or based on inherent executive powers, and are generally meant to address a relatively narrow set of circumstances which demand an immediate response, as opposed to a broader range of urgencies.<sup>7</sup> Interpretive rules offer a second option for swift agency action because they do not require prior notice and comment.<sup>8</sup> Interpretive rules may not create new obligations, however, and thus their utility in responding to new challenges depends on the substance of preexisting rules. Policy statements, a third option, lack the binding authority a particular situation may require.<sup>9</sup> Adjudications, yet another option, can have a binding effect but are generally an inefficient and resource-intensive means of addressing a class of problems.<sup>10</sup>

The most promising approach for undertaking preliminary injunctive regulation involves the APA's "good cause" exception to notice-and-comment rulemaking. Under this exception, an agency may promulgate a rule without notice and comment "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."<sup>11</sup> Though reliance on the exception can be challenged in the courts, some scholars worry that agencies may overuse it.<sup>12</sup> Agencies frequently invoke the good cause exception, and its use has apparently increased over time.<sup>13</sup>

In order to understand whether agency reliance on the good cause exception is appropriate, this Article examines the Environmental Protection Agency's ("EPA's") use of that exception over the last twenty years. During that time, EPA has invoked the good cause exception in nearly 900 instances. Analysis of this data suggests that the agency's overall use of the exception has been quite restrained, with the vast majority of instances involving correction of typographical or nonsubstantive errors in previously issued rules, as well as other minor changes. Only in a handful of cases has EPA relied on the exception to deal with emergencies or urgencies, and these cases largely have involved actions of limited scope.

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7. See *infra* Part II.A.

8. See *infra* Part II.B.

9. See *infra* Part II.C.

10. See *infra* Part II.D.

11. 5 U.S.C. § 553(b)(3)(B) (2012).

12. See, e.g., Babette E.L. Boliek, *Agencies in Crisis? An Examination of State and Federal Agency Emergency Powers*, 81 *FORDHAM L. REV.* 3339, 3343 (2013).

13. See *infra* text accompanying notes 180–183.

Indeed, the results suggest that EPA is underusing the good cause exception. Going forward, EPA should consider more aggressive use of the exception to respond to urgencies resulting from rapid technological developments and environmental changes. In justifying a more expedited approach, EPA should make explicit reference to congressional inaction on an issue, the generally protracted nature of contemporary rulemaking, and the particular delays that the agency has suffered in ordinary rulemaking.

Part I of this Article describes the trends warranting attention to preliminary injunctive regulation: rapid changes in technology and society are giving rise to new regulatory challenges, while legislative gridlock and regulatory ossification undermine the government's ability to respond to these challenges. Part II considers agency options for addressing urgencies in light of these trends. Part III focuses in detail on the most promising of these options, the good cause exception to notice-and-comment rulemaking, and examines EPA's use of the exception. Finally, Part IV reflects on the implications of greater reliance on the good cause exception for democratic governance.

## I. TRENDS WARRANTING ATTENTION TO PRELIMINARY INJUNCTIVE REGULATION

This Part sets the stage for the analysis to follow by describing three key trends: social acceleration, legislative gridlock, and regulatory ossification. Together, these trends challenge agencies to respond nimbly to constant change amidst significant regulatory constraints.

### A. *Social Acceleration*

The rapid changes now occurring in technology, society, and everyday life are sometimes described as “social acceleration.”<sup>14</sup> Sociologist Hartmut Rosa suggests that social acceleration consists of three elements: acceleration of technological change, acceleration of social change, and acceleration of everyday life.<sup>15</sup> While it is difficult to provide rigorous proof of social acceleration, commentators point to various bodies of supporting evidence.

Anecdotally, rapid developments in information technology, communications, biotechnology, and other fields suggest that revolutionary transformations are underway.<sup>16</sup> Patent applications and scientific papers are rising

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14. See WILLIAM E. SCHEUERMAN, *LIBERAL DEMOCRACY AND THE SOCIAL ACCELERATION OF TIME*, at xv (2004); Hartmut Rosa, *Social Acceleration: Ethical and Political Consequences of a Desynchronized High-Speed Society*, 10 *CONSTELLATIONS* 3, 5–6 (2003).

15. See Rosa, *supra* note 14, at 6–10; see also SCHEUERMAN, *supra* note 14, at 9–13.

16. See Gary E. Marchant, *The Growing Gap Between Emerging Technologies and the Law*, in *THE GROWING GAP BETWEEN EMERGING TECHNOLOGIES AND LEGAL-ETHICAL OVERSIGHT* 19, 19–20 (Gary E. Marchant et al. eds., 2011) [hereinafter *THE GROWING GAP*]; Hartmut Rosa & William E. Scheuerman, *Introduction to HIGH-SPEED*

rapidly in number,<sup>17</sup> the time needed to generate new technologies is shrinking,<sup>18</sup> and processes of transport, communication, and production are accelerating.<sup>19</sup> Perhaps most prominently, exponential increases in computational power have generated vast quantities of information and enabled not only the proliferation of “smart” devices, but also the rapid development of other life-changing technologies.<sup>20</sup> For example, DNA-sequencing technology is a leading beneficiary of increased computational power, as exponential improvements have enabled new breakthroughs and driven down the cost of procuring genetic information.<sup>21</sup> The various technological developments are occurring against a backdrop of increasing institutional instability and rapid transitions between different forms of social organization.<sup>22</sup>

In the wake of social acceleration, crises may occur more rapidly just as less time is available to respond to them.<sup>23</sup> Technological acceleration “creates new phenomena,” many of which “require government decisions about their prohibition, regulation, or subsidization to forestall harms and capture their full benefits.”<sup>24</sup> Decisions may need to be made rapidly, without opportunities for thoughtful reflection, let alone public deliberation.<sup>25</sup> To make matters worse, the challenges that arise are often more difficult to address because of their scale and complex origins.<sup>26</sup> Governmental failure to act early enough may allow technologies and interest groups to become entrenched, making subsequent regulation more difficult. Meanwhile, the time needed for democratic decision-making increases because social acceleration tends to undermine consensus, reduce certainty about future conditions, and extend the temporal effects of

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SOCIETY: SOCIAL ACCELERATION, POWER, AND MODERNITY 1, 1–2 (Hartmut Rosa et al. eds., 2009).

17. See Marchant, *supra* note 16, at 20, 22.

18. See David Rejeski, *Public Policy on the Technological Frontier*, in *THE GROWING GAP*, *supra* note 16, at 47, 48.

19. See SCHEUERMAN, *supra* note 14, at 9–10; Rosa, *supra* note 14, at 6.

20. See Marchant, *supra* note 16, at 20–21; John O. McGinnis, *Laws for Learning in an Age of Acceleration*, 53 WM. & MARY L. REV. 305, 312–15 (2011).

21. See Marchant, *supra* note 16, at 21.

22. See McGinnis, *supra* note 20, at 310–11 (contrasting slow transition from hunter-gatherer societies to agricultural societies, with more rapid transition to industrial societies and then information-based societies); Rosa, *supra* note 14, at 8 (discussing rapidly changing family and occupational structures).

23. See Rosa, *supra* note 14, at 23 (suggesting that “policy makers are always in danger of making completely anachronistic decisions”); William E. Scheuerman, *Emergencies, Executive Power, and the Uncertain Future of US Presidential Democracy*, 37 LAW & SOC. INQUIRY 743, 743 (2012) (“[T]he pace at which major crises happen is probably undergoing intensification.”).

24. McGinnis, *supra* note 20, at 315. Acceleration may be especially likely to exacerbate ecological problems as natural resources are consumed and wastes are generated more rapidly. See Rosa & Scheuerman, *supra* note 16, at 12.

25. See SCHEUERMAN, *supra* note 14, at 21–22.

26. See Braden R. Allenby, *Governance and Technology Systems: The Challenge of Emerging Technologies*, in *THE GROWING GAP*, *supra* note 16, at 3, 11–13.

political decisions.<sup>27</sup> Society is confronted with a “pacing problem” as technological development outstrips regulatory efforts to keep up.<sup>28</sup> No wonder one commentator concludes, “we are increasingly incapable of managing the complexity that we have ourselves created.”<sup>29</sup>

### *B. Legislative Gridlock*

At the same time that new urgencies confront society, legislative gridlock hampers Congress’s ability to make substantive policy decisions.<sup>30</sup> Gridlock appears not to be a temporary phenomenon, either. Thanks to the historical processes that contribute to congressional gridlock and the limitations of possible institutional reforms, gridlock will likely persist into the future.<sup>31</sup>

Enacting federal legislation is difficult by design: the Constitution prescribes that a bill be passed by both the House and Senate and be signed by the President.<sup>32</sup> Each of these actors faces different electoral cycles and responds to different constituencies, however, thereby increasing the likelihood that each will take different positions on a legislative subject.<sup>33</sup> A number of modern features make this process even more cumbersome today. Internal rules of governance generally require committee approval of bills before they can be voted on by the entire House or Senate.<sup>34</sup> Such committees often serve as an obstacle to legislation because of their unrepresentative membership and the autonomy with which they operate.<sup>35</sup> Even when a bill is voted out of committee, frequent use of the filibuster means that a supermajority of sixty votes may be necessary to bring up a bill for a floor vote in the Senate.<sup>36</sup> Aggressive use of legislative holds to delay

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27. See Rosa, *supra* note 14, at 23; Rosa & Scheuerman, *supra* note 16, at 13 (observing that legitimate democratic decision-making “tend[s] to be even more slow-going in dynamic, constantly changing societies since political commitments there tend also to become short-lived”).

28. See Marchant, *supra* note 16, at 19 (“The consequence of this growing gap between the pace of technology and law is increasingly outdated and ineffective legal structures, institutions and processes to regulate emerging technologies.”); see generally ALBERT C. LIN, PROMETHEUS REIMAGINED: TECHNOLOGY, ENVIRONMENT, AND LAW IN THE TWENTY-FIRST CENTURY 5–6 (2013) (discussing predominant reactive approach to technology oversight).

29. Allenby, *supra* note 26, at 11.

30. See Teter, *supra* note 5, at 2218.

31. See Freeman & Spence, *supra* note 3, at 4 (concluding that “congressional paralysis is likely to be enduring”); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 275–76 (2011).

32. U.S. CONST. art. I, § 7, cl. 2.

33. See Chafetz, *supra* note 6, at 2075.

34. See Gerhardt, *supra* note 6, at 2110–11.

35. See John C. Roberts, *Gridlock and Senate Rules*, 88 NOTRE DAME L. REV. 2189, 2192 (2013).

36. See Chafetz, *supra* note 6, at 2082–84; Michael J. Teter, *Congressional Gridlock’s Threat to Separation of Powers*, 2013 WISC. L. REV. 1097, 1107 (2013) (discussing increased combination of filibuster and cloture rules to kill legislation).

consideration of a bill also has exacerbated gridlock.<sup>37</sup> Increased deployment of such tactics reflects a growing disregard for norms of institutional cooperation that once encouraged compromise.<sup>38</sup> As a result, Congress is now “structurally incapable” of responding to many critical policy problems.<sup>39</sup>

Partisan gerrymandering to increase the number of safe districts makes it even more likely that districts will elect legislators with polarized views, further adding further to gridlock.<sup>40</sup> Indeed, numerous studies have found Congress to be “more ideologically polarized now than at any time in the modern regulatory era.”<sup>41</sup> Polarization reduces the likelihood of bipartisan action to address problems, especially when few legislators are in the ideological middle.<sup>42</sup> Bipartisan action may be even more difficult with respect to environment and energy policy, “where the partisan divide seems especially wide and strong and where debates over fundamental issues, such as the scientific basis for regulatory action, are particularly intense.”<sup>43</sup> Under such circumstances, legislation is not impossible but may require a salient crisis that generates strong public pressure for action.<sup>44</sup>

More generally, public choice dynamics serve as a further obstacle to enacting regulatory regimes that provide public goods. Public choice theory predicts that concentrated interests have relatively greater influence on the legislative and regulatory process than diffuse interests.<sup>45</sup> Members of concentrated groups have a proportionately greater stake in solving collective-action problems than members of larger, more diffuse groups, who face more powerful temptations to free ride.<sup>46</sup> Thus, an impacted industry has a stronger incentive to block the establishment of a regulatory regime than an average voter has in supporting it.<sup>47</sup> Public choice dynamics can also make it harder to revise a

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37. See Roberts, *supra* note 35, at 2196.

38. See PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 9–13 (2009); Scheuerman, *supra* note 23, at 751.

39. Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 683–84 (2015).

40. See Gerhardt, *supra* note 6, at 2119; see also Pildes, *supra* note 31, at 308 (describing theory as to how gerrymandering can increase polarization). Rick Pildes concludes, however, that “gerrymandering does not seem to be a major cause” of polarization. *Id.* at 315.

41. Freeman & Spence, *supra* note 3, at 2, 14–15 (citing studies); see also Pildes, *supra* note 31, at 277 (noting shrinking proportion of moderates in House and Senate).

42. See Freeman & Spence, *supra* note 3, at 14–15.

43. *Id.* at 16.

44. See *id.* at 13, 16–17.

45. See Daniel A. Farber & Philip P. Frickey, *Public Choice Revisited*, 96 MICH. L. REV. 1715, 1718 (1998).

46. See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 44 (1965); Matthew Wansley, *Virtuous Capture*, 67 ADMIN. L. REV. 419, 421, 427 (2015).

47. See Farber & Frickey, *supra* note 45, at 1718; Livermore, *supra* note 6, at 345.



law than to enact a law in the first instance because political entrepreneurs are less able to claim credit for legislative accomplishments.<sup>48</sup>

Given the difficulty of legislating, it is perhaps unsurprising that Congress has enacted little environmental legislation since the 1990 Clean Air Act Amendments.<sup>49</sup> In contrast to the preceding two decades—when Congress passed numerous major environmental statutes as well as amendments to correct flaws or fill gaps in original legislation—the last twenty-six years have witnessed the enactment of no significant new environmental statutes and only one substantial amendment.<sup>50</sup> This lull is especially striking because new legislative needs have been clear. Climate change and other new threats have emerged, scientific understanding of environmental problems has changed significantly, and new regulatory tools have developed.<sup>51</sup>

Gridlock in Congress may have some virtues in terms of reducing federal regulatory burdens and leaving room for state regulation.<sup>52</sup> But the price of gridlock can be steep. Our constitutional structure presumes that Congress—elected by and accountable to the people—will make fundamental policy decisions.<sup>53</sup> A gridlocked Congress leaves essential policy decisions unmade, leading to arbitrary governmental action in some cases and arbitrary inaction in others.<sup>54</sup> Ultimately, gridlock hinders accountability and transparency and prevents the solution of social problems.<sup>55</sup>

### C. Regulatory Ossification

Legislative gridlock can leave a policy vacuum for agencies to fill. With their expertise and focused attention, agencies are sometimes may be better equipped than Congress to address new challenges, but they face their own hurdles to effective action. Procedural requirements and the threat of searching judicial review have ossified rulemaking, particularly for “major rules predicated on assumptions concerning complicated factual and scientific relationships.”<sup>56</sup>

When an agency adopts a rule, the APA generally requires that the agency give notice of the proposed rule in the Federal Register, take public

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48. See Livermore, *supra* note 6, at 346.

49. See *id.* at 338.

50. See Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 501 (2008); Freeman & Spence, *supra* note 3, at 8–9. The one significant piece of environmental legislation, the Frank R. Lautenberg Chemical Safety for the 21st Century Act, amended the Toxic Substances Control Act. See Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114–182, 130 Stat. 448 (2016).

51. See Biber, *supra* note 50, at 501.

52. See Gerhardt, *supra* note 6, at 2109, 2112–12; Teter, *supra* note 36, at 1142–44.

53. See Teter, *supra* note 5, at 2223–24.

54. See *id.* at 2217.

55. See Gerhardt, *supra* note 6, at 2109, 2111–12; Teter, *supra* note 36, at 1142–44.

56. Pierce, *Seven Ways*, *supra* note 4, at 62.

comment, and publish the final rule along with a general statement of its basis and purpose.<sup>57</sup> These requirements advance important democratic values of fairness, accountability, and participation.<sup>58</sup> Interested parties can present their views to the agency, raise concerns, or suggest possible applications that an agency overlooked.<sup>59</sup> Rulemaking requirements also may further substantive goals by making rules more effective, less costly to administer, and more politically acceptable.<sup>60</sup>

These benefits come at a cost, however. Notice-and-comment rulemaking often takes many years and consumes substantial resources.<sup>61</sup> Parties seeking to block regulation may delay the process by flooding the agency with comments.<sup>62</sup> As a result of the expected difficulties of rulemaking, an agency may not issue a rule even long after it recognizes a regulatory need, or an agency may fail to update an obsolete rule despite changed circumstances.<sup>63</sup> The effect of cumbersome procedures is to stymie rulemaking activity and hinder the achievement of congressional policy goals.<sup>64</sup> Furthermore, an agency may be reluctant to experiment with new rules if it expects future adjustments to be necessary yet difficult to achieve.<sup>65</sup> In policy areas where scientific knowledge is constantly shifting, technology is rapidly developing, and new regulatory challenges are continually arising, such reluctance is especially worrisome.<sup>66</sup> These circumstances call for novel and nimble responses that agencies may be too afraid to undertake.

Further complicating the rulemaking process, Congress and the President have imposed additional requirements beyond those set out by the APA.<sup>67</sup> These requirements, along with careful judicial review of the procedure and substance of

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57. See 5 U.S.C. § 553 (2015).

58. See RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 497, 500–01 (5th ed. 2010); Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113, 116 (1984); see also Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 708 (1999) (“Notice and comment procedure is a surrogate political process.”).

59. See PIERCE, *supra* note 58, at 570–71; Asimow, *supra* note 58, at 708.

60. See Asimow, *supra* note 58, at 708.

61. See Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 551 (2000) [hereinafter Pierce, *Distinguishing Legislative Rules*].

62. See Matthew T. Wansley, *Regulation of Emerging Risks*, 69 VAND. L. REV. 401, 409 (2016).

63. See Pierce, *Distinguishing Legislative Rules*, *supra* note 61, at 551.

64. See McGarity, *supra* note 6, at 1391.

65. See *id.* at 1392.

66. See *id.*

67. By one count, up to eighteen such requirements have been imposed over the last couple decades. Lyn M. Gaudet & Gary E. Marchant, *Administrative Law Tools for More Adaptive and Responsive Regulation*, in *THE GROWING GAP*, *supra* note 16, at 167, 169.

agency rulemakings, have led to the ossification of notice-and-comment rulemaking.<sup>68</sup>

Congressionally imposed rulemaking requirements include procedural or analytical mandates under the Small Business Regulatory Enforcement Fairness Act (“SBREFA”), the Regulatory Flexibility Act (“RFA”), and the Unfunded Mandates Reform Act (“UMRA”). The SBREFA requires agencies to submit each rule to Congress, along with a report containing a cost–benefit analysis.<sup>69</sup> Though “non-major” rules may take effect immediately, the Act subjects “major” rules to a sixty-day waiting period.<sup>70</sup> The RFA requires agencies to describe the impact of each proposed and final rule on small entities and discuss regulatory alternatives to the rule.<sup>71</sup> In addition, the UMRA requires agencies to estimate the compliance costs of a rule as well as anticipated costs and benefits prior to issuing a rule that may result in the expenditure of \$100 million or more by state or local governments or the private sector.<sup>72</sup>

Perhaps the most prominent source of additional rulemaking requirements is Executive Order 12,866 and its successors, which require agencies to submit “significant regulatory actions” for review by the Office of Information and Regulatory Affairs (“OIRA”), a unit within the Office of Management and Budget (“OMB”).<sup>73</sup> OIRA review, which is said to promote accountability, cost-effective rulemaking, and policy coordination within the executive branch,<sup>74</sup> was once characterized as a “black hole” in which significant rulemaking initiatives languished.<sup>75</sup> The review process is now subject to a ninety-day limit<sup>76</sup>—which is often disregarded—and continues to result frequently in the withdrawal or reconsideration of agency rules.<sup>77</sup> The process requires an agency to provide OIRA

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68. See PIERCE, *supra* note 58, at 678–80.

69. 5 U.S.C. § 801(a)(1) (2012).

70. 5 U.S.C. § 801(a)(3) (2012). A “major” rule is defined as a rule having an annual effect on the economy of at least \$100 million, or as likely to result in a major increase in costs or prices or significant adverse effects on competition and other economic factors. 5 U.S.C. § 804(2) (2012).

71. 5 U.S.C. §§ 603, 604 (2015).

72. 2 U.S.C. § 1532 (2015).

73. Exec. Order No. 12,866, § 6(a)(3)(B), 58 Fed. Reg. 51735 (Sept. 30, 1993). A “significant regulatory action” is defined as any regulatory action that, *inter alia*, has an annual effect on the economy of at least \$100 million, interferes with an action taken by another agency, or raises novel legal or policy issues. *Id.* § 3(f). Executive Order 12,866 was reaffirmed with relatively minor modifications by President Obama’s Executive Order 13,563. See Exec. Order No. 13,563 § 1(b), 76 Fed. Reg. 3821 (Jan. 18, 2011).

74. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1261 (2006); McGarity, *supra* note 6, at 1430. For a critical view of the accountability rationale, see SHANE, *supra* note 38, at 158–66.

75. See McGarity, *supra* note 6, at 1431–32.

76. Exec. Order No. 12,866, 58 Fed. Reg. 51735, § 6(b)(2) (Oct. 4, 1993).

77. See Bagley & Revesz, *supra* note 74, at 1281; see, e.g., Letter from Richard A. Denison et al. to Sen. Richard Blumenthal (Sept. 10, 2013), [http://blogs.edf.org/health/files/2013/09/EDF-Earthjustice-UCS-LCV-letter-to-Blumenthal-Hatch-on-Regulatory-Review\\_final.pdf](http://blogs.edf.org/health/files/2013/09/EDF-Earthjustice-UCS-LCV-letter-to-Blumenthal-Hatch-on-Regulatory-Review_final.pdf) (alleging that OIRA review of various Toxic

with a proposed rule, a description of the need for the regulatory action, and an assessment of costs and benefits.<sup>78</sup> Upon review, OIRA may issue a return letter articulating concerns regarding the rule's substance.<sup>79</sup> An OIRA return letter has been analogized to a judicial reversal and remand, as it may require the agency to reconsider some or all of a proposed rule.<sup>80</sup> OIRA may also encourage the agency to withdraw a rule, negotiate revisions, transmit comments or edits, or respond in other ways.<sup>81</sup> Additionally, OIRA oversight occurs not only through the more formalized process just described, but also through informal pre-proposal communications as an agency initially crafts a rule.<sup>82</sup>

Finally, aggressive judicial review can delay agency rulemaking even further.<sup>83</sup> Judicial review to ensure that a rule has a reasonable basis and that an agency responds to outside comments is “not especially burdensome in theory.”<sup>84</sup> Such review serves as an important check on the administrative process and promotes its legitimacy.<sup>85</sup> Under the “hard look” doctrine, however, close judicial review of the administrative record and an agency's explanations can obstruct agency efforts to respond to regulatory challenges.<sup>86</sup> Regulated parties reflexively litigate each rule and comb the rulemaking record for any issue that the agency arguably should have discussed more thoroughly.<sup>87</sup> Aware that close judicial scrutiny might derail a regulatory effort, agencies expend substantial time and resources to assimilate as detailed and complete a record as possible to support each rule.<sup>88</sup> Agency efforts to safeguard a rule from judicial invalidation often

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Substances Control Act rules greatly exceeded 90-day deadline). More fundamentally, OIRA review has created an institutional bias against regulation. *See* Bagley & Revesz, *supra* note 74, at 1267–68.

78. Exec. Order No. 12,866, § 6(a)(3)(B), 58 Fed. Reg. 51735 (Oct. 4, 1993).

79. Exec. Order No. 12,866, § 6(b)(3), 58 Fed. Reg. 51735 (Oct. 4, 1993). For a compact description of the history and nature of OIRA review, see Nestor M. Davidson & Ethan J. Leib, *Regleprudence—at OIRA and Beyond*, 103 GEO. L.J. 259, 275–79 (2015).

80. *See* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1778–79 (2013).

81. *See id.* at 1779–81.

82. *See* Davidson & Leib, *supra* note 79, at 278; Livermore, *supra* note 6, at 337.

83. *See* Blais & Wagner, *supra* note 6, at 1705–06 (“[M]ost scholars agree that the predominant culprit [behind regulatory ossification] is the probing judicial scrutiny that characterizes judicial review under the [APA’s] arbitrary and capricious standard.”).

84. McGarity, *supra* note 6, at 1400 (suggesting that such practices are not burdensome in theory but could lead to practical burdens).

85. Blais & Wagner, *supra* note 6, at 1709–10.

86. *See* McGarity, *supra* note 6, at 1410–12.

87. *See* Gaudet & Marchant, *supra* note 67, at 169 (noting characterization of rulemaking as an adversarial process of “regulate, litigate, regulate, litigate”); Pierce, *Seven Ways*, *supra* note 4, at 69.

88. *See* McGarity, *supra* note 6, at 1400–01; Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 498–99 (1997) (“To the extent the hard look doctrine has imparted any message to agencies, it is that agencies must collect data and provide analyses to support their rejection of every reasonable alternative to the approach they took and to respond to every plausible argument against their approach.”).

begin at a rule's embryonic stage, long before the agency publishes a proposal in the Federal Register.<sup>89</sup>

Ossification of the rulemaking process is the net result of the just-discussed rulemaking obligations and oversight. As one commentator observes, “[t]he rulemaking process drags on in endless litigation and political fighting,” leaving the regulatory state “stagnant.”<sup>90</sup> Notwithstanding the various requirements that must be met, agencies do manage to engage in considerable rulemaking.<sup>91</sup> But economically significant rules that raise controversial issues and involve high stakes face substantial, if not insurmountable, barriers to their development.<sup>92</sup>

Regulatory ossification is especially problematic in the health and environmental arenas. Environmental statutes often impose scientifically taxing and unrealistic mandates on EPA that leave the agency especially vulnerable to rulemaking delays.<sup>93</sup> One study of EPA rulemaking found on average that the agency took nearly four years to issue a proposed rule after initiating the rulemaking, and that the agency then took another one and a half years to produce a final rule after publishing the proposed rule.<sup>94</sup> EPA rules have been disproportionately subject to close OIRA scrutiny—and more often changed as a

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89. See Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1495–97 (2012); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 110–11 (2011) (explaining that agencies conduct “a great deal of the policymaking and true regulatory work . . . during the rule development stage,” prior to issuing the notice required by APA § 553).

90. Livermore, *supra* note 6, at 313.

91. See Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 932 (2008) (concluding from empirical analysis that agencies do engage in considerable rulemaking activity but adding caveat that for various reasons, the analysis “does not resolve the ossification debate”); see also Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414, 1421 (2012) (concluding from an analysis of Department of Interior rulemakings that “evidence that ossification is either a serious or widespread problem is mixed and relatively weak”). *But cf.* Pierce, *supra* note 89, at 1495–1503 (explaining why Yackee & Yackee study does not undermine ossification hypothesis).

92. See Pierce, *supra* note 89, at 1497–98; see also Ronald M. Levin, *More on Direct Final Rulemaking: Streamlining, Not Corner-Cutting*, 51 ADMIN. L. REV. 757, 767 (1999) (noting that ossification is typically thought to apply to major rules rather than low-stakes regulation); *cf.* O'Connell, *supra* note 91, at 965 (noting that her analysis of agency rulemaking activity focused on quantity of rules and that rules promulgated may be low-quality rules or rules that slightly modify earlier regulations).

93. See Wendy E. Wagner, *Congress, Science, and Environmental Policy*, 1999 U. ILL. L. REV. 181, 205–13, 262 (1999) (noting agency struggles to implement “scientifically unrealistic” environmental and public health mandates); see also O'Connell, *supra* note 91, at n.182.

94. Wagner et al., *supra* note 89, at 144–45. This estimate of rulemaking length is consistent with an earlier EPA claim that informal rulemaking procedures take approximately five years. See Pierce, *Seven Ways*, *supra* note 4, at 60.

result of that scrutiny—than rules of other agencies.<sup>95</sup> Furthermore, ossification plagues not only the promulgation of new rules, but also the revision of existing rules. Advances in scientific knowledge often warrant changes to existing standards.<sup>96</sup> Yet regulated parties have strong incentives to block revision of these standards, while the public often remains unaware of the need for such revision.<sup>97</sup>

The difficulty of managing health and environmental hazards is especially pronounced when those hazards are generated by emerging technologies. Unlike other risks the state regulates, “the information necessary to answer potentially dispositive questions about how the risk should be regulated will not be available when regulators first become aware of the technology.”<sup>98</sup> As explained above, the rulemaking process demands that regulators have sufficient information to justify the substance of a rule, analyze costs and benefits, and respond to comments. Such information demands may be nearly impossible for an agency to satisfy with respect to emerging technology risks. Indeed, agencies would understandably hesitate to devote their energies to rulemaking on emerging technologies when the standards they might develop face dim prospects of surviving the rulemaking process and judicial review.<sup>99</sup>

## II. OPTIONS FOR ADDRESSING URGENCIES

So how might federal agencies address urgencies through existing law? This Part considers several options: exercising emergency authority, issuing interpretive rules or policy statements, making policy through adjudication, and issuing proposed rules for parties to follow in advance of finalization. However, none of these options are likely to be widely effective in responding to urgencies, as they are limited in their scope or effect. Rather, agencies’ most promising course is to rely on the APA’s good cause exception to notice-and-comment rulemaking, as Part III will examine in greater detail.

### A. *Emergency Authorities*

Perhaps the most obvious option for agencies confronted with urgencies would be to expansively interpret their authority to respond to emergencies.

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95. See Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 872–73 (2003); U.S. GEN. ACCOUNTING OFF., GAO-03-929, OMB’S ROLE IN REVIEWS OF AGENCIES’ DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 5, 75–78 (2003), <http://www.gao.gov/new.items/d03929.pdf> (finding that EPA’s rules were most often significantly changed by OMB review, as compared to other federal agencies).

96. See Biber, *supra* note 50, at 501; Pierce, *Seven Ways*, *supra* note 4, at 61 (suggesting that conditions in fields of environmental protection, health and safety, and economic regulation “change so rapidly that the average rule probably has a useful life of no longer than a decade”).

97. See Blais & Wagner, *supra* note 6, at 1703, 1712–13.

98. Wansley, *supra* note 62, at 403.

99. See *id.* at 403–04, 409. “[C]ost-benefit analysis is particularly unsuited to the regulation of emerging risks” because it would require agencies to engage in an analysis that “would be speculative at best.” *Id.* at 411.

Invocation of emergency authority may be based on specific statutory grants or inherent executive powers. The notion of emergency implies an extraordinary situation warranting an immediate and temporary departure from the normal rule of law. Though agencies should not expect to rely on emergency authorities as a matter of course, the federal government has applied emergency declarations to a broad range of challenges such as terrorism-related military operations, military conflicts in foreign countries, and drug trafficking.<sup>100</sup> In some cases, emergency declarations have persisted for extended periods of time.<sup>101</sup>

Presidential declarations of national emergencies are nominally governed by the National Emergencies Act (“NEA”). The Act sets out procedural requirements governing such declarations but does not itself provide an independent basis for an emergency declaration.<sup>102</sup> The NEA requires that the President transmit to Congress and publish in the Federal Register an emergency proclamation specifying the legal basis for declaring an emergency.<sup>103</sup> The statute further requires that Congress meet every six months to *consider* a vote to terminate an emergency declaration.<sup>104</sup> However, Congress rarely proceeds with an actual vote on whether a declared emergency should continue, and courts essentially have held the requirement to be unenforceable.<sup>105</sup>

One frequently cited authority for declaring a national emergency, the International Emergency Economic Powers Act, defines a national emergency as “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy or economy of the United States if the President declares a national emergency with respect to such threat.”<sup>106</sup> Upon declaring a national emergency under the statute, the government may freeze assets and prohibit financial transactions with designated persons.<sup>107</sup>

Other statutes grant emergency powers to address circumstances narrower than national emergencies. For example, the Public Health Service Act authorizes the Secretary of Health and Human Services to determine that a disease, bioterrorist attack, or other matter presents a public health emergency.<sup>108</sup> Upon such a determination, the federal government may respond with appropriate

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100. See Patrick A. Thronson, *Toward Comprehensive Reform of America’s Emergency Law Regime*, 46 U. MICH. J.L. REFORM 737, 753–56 (2013).

101. See *id.* at 753–56, 769–71; see also Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1404 (1989) (“Emergency rule has become permanent.”).

102. 50 U.S.C. §§ 1621, 1631 (2012); see Lobel, *supra* note 101, at 1413–16; Thronson, *supra* note 100, at 749–51.

103. 50 U.S.C. §§ 1621, 1631 (2012).

104. 50 U.S.C. § 1622 (2012).

105. See Lobel, *supra* note 101, at 1415–17; Thronson, *supra* note 100, at 752–53.

106. 50 U.S.C. § 1701(a) (2012).

107. 50 U.S.C. § 1702(a)(1)(A) (2012); see also Thronson, *supra* note 100, at 758.

108. 42 U.S.C. § 247d(a) (2012).

actions, including making grants and conducting investigations.<sup>109</sup> The statute also authorizes the imposition of quarantines to prevent the introduction and spread of communicable diseases.<sup>110</sup> Another important source of emergency authority, the Stafford Act, empowers the federal government to make federal assistance available to state and local governments through a disaster declaration or emergency declaration.<sup>111</sup> In addition to these general authorities, federal health officials possess more specific authorities to respond to public health emergencies.<sup>112</sup>

Similarly, several statutes grant officials the authority to respond to environmental emergencies. For example, the Comprehensive Environmental Response, Compensation, and Liability Act authorizes the President to respond to any release of a hazardous substance or pollutant that “constitutes a public health or environmental emergency” if no other person will respond in a timely manner.<sup>113</sup> The Resource Conservation and Recovery Act authorizes EPA to issue orders or file legal actions when the “handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment.”<sup>114</sup> The Clean Air Act (“CAA”) authorizes a similar response to air pollution presenting “an imminent and substantial endangerment to public health or welfare, or the environment.”<sup>115</sup> Various environmental laws also contain provisions exempting rescue and recovery operations from complying with regulatory requirements.<sup>116</sup>

Assertions of emergency authority may rest not only on statutory grants, but also on inherent executive powers. The Executive Power Clause, executive authority over foreign affairs, and the Commander-in-Chief Clause have all been cited to support broad assertions of presidential power to act.<sup>117</sup> The first of these—the Executive Power Clause—is arguably the broadest. Because it is not limited to military or foreign affairs, it is also the most pertinent to the issue of how agencies might address urgencies. Under one interpretation, the Executive Power Clause gives the President “inherent power to do either anything necessary to preserve the United States, or, even more broadly, anything not explicitly

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109. *Id.*

110. 42 U.S.C. §§ 264(b), 264(d)(1), 265 (2012); *see also* 42 C.F.R. § 70.6 (2016) (interstate quarantine); 42 C.F.R. pt. 71 (2016) (foreign quarantine).

111. *See* 42 U.S.C. §§ 5121–5207 (2012).

112. *See* STACIE KERSHNER, SELECTED FEDERAL LEGAL AUTHORITIES PERTINENT TO PUBLIC HEALTH EMERGENCIES, PUBLIC HEALTH LAW PROGRAM CENTERS FOR DISEASE CONTROL AND PREVENTION 3-7 (Gregory Sunshine ed., 2014) (2009), <http://www.cdc.gov/phlp/docs/ph-emergencies.pdf>.

113. 42 U.S.C. § 9604(a)(4) (2012).

114. 42 U.S.C. § 6973(a) (2012).

115. 42 U.S.C. § 7603 (2012).

116. *See* Michael B. Gerrard, *Emergency Exemptions from Environmental Laws After Disasters*, 20-SPG NAT. RESOURCES & ENV'T 10, 13–14 (2006).

117. *See* Lobel, *supra* note 101, at 1404.



forbidden by the Constitution.”<sup>118</sup> Such a virtually limitless interpretation risks the abuse of executive power, an issue Part IV will consider further.

Considered collectively, emergency authorities give the government broad powers to respond to emergency situations. But given the danger of abuse, these powers should be wielded cautiously and only in genuine emergencies. Urgencies, though pressing in nature, often may not present the extraordinary circumstances that warrant emergency action.

### **B. Interpretive Rules**

As a second option for responding to urgencies, agencies can interpret existing rules to cover novel situations. Interpretive rules interpret statutory language or previously promulgated rules that have some discernible meaning.<sup>119</sup> They may appear in various forms, including guidance documents, staff manuals, memoranda, and advice letters.<sup>120</sup> In contrast to legislative rules, interpretive rules lack the force of law and the “power to control.”<sup>121</sup> Accordingly, upon judicial review, interpretive rules do not receive the broad *Chevron* deference that legislative rules receive.<sup>122</sup> Rather, courts give interpretive rules *Skidmore* respect—a lesser deference which depends upon the agency’s “power to persuade.”<sup>123</sup>

Although courts struggle to distinguish legislative rules from interpretive rules,<sup>124</sup> the APA makes clear that legislative rules are subject to notice-and-comment requirements, whereas interpretive rules are not.<sup>125</sup> As “a relatively low-cost and flexible way for agencies to articulate their positions,”<sup>126</sup> interpretive rules are critical tools by which agencies respond to unanticipated circumstances, change course, and keep agency personnel and the public apprised of interpretive

118. *Id.* (characterizing contentions of various Presidents).

119. *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 919–20 (2004) (discussing *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1992)); *see also* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1313 (1992).

120. *See* Manning, *supra* note 119, at 893.

121. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also* *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1201–02 (2015); *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979); *Pierce, Distinguishing Legislative Rules*, *supra* note 61, at 552.

122. *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (deferring to an agency’s permissible or reasonable construction of a statute if the statute is silent or ambiguous with respect to a specific issue).

123. *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000); *Skidmore*, 323 U.S. at 140.

124. *See* Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 ECOLOGY L.Q. 657, 675–78 (2008); *Pierce, Distinguishing Legislative Rules*, *supra* note 61, at 547–48.

125. 5 U.S.C. § 553(b) (2012).

126. Manning, *supra* note 119, at 914.

and policy choices.<sup>127</sup> Such rules play an especially important role in implementing the technically complex schemes of environmental and natural resource laws, where changed circumstances and new problems are commonplace.<sup>128</sup>

Because an agency may issue interpretive rules without prior notice and comment, such rules allow for relatively swift agency action. However, agencies' ability to use interpretive rules to address new, unanticipated, or changing circumstances will depend on the substance of existing rules. Agencies may not create new obligations through interpretive rules, and as a result, the scope for using such rules to respond to urgencies may be rather limited. Parties suddenly subject to an interpretive rule will likely challenge the rule, and courts may be particularly skeptical of interpretive rules that reach an area not previously regulated.<sup>129</sup>

### C. Policy Statements

Agencies may also attempt to deal with urgencies by issuing policy statements. "A policy statement is an indication of how an agency intends to exercise discretion that it is given to implement the statutes and regulations it administers."<sup>130</sup> Like interpretive rules, policy statements are exempt from notice-and-comment requirements.<sup>131</sup> But unlike interpretive rules, policy statements create new policy and do not rest upon existing positive legislation.<sup>132</sup> Through policy statements, agencies can limit their employees' discretion, inform the public of those limits, and facilitate long-range planning by industry.<sup>133</sup> However, policy statements cannot bind the public or the courts.<sup>134</sup> An agency statement that has a

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127. See Pierce, *Distinguishing Legislative Rules*, *supra* note 61, at 552; Kalen, *supra* note 124, at 659–60.

128. See Kalen, *supra* note 124, at 672–73.

129. This is especially so in light of the hostility that several Supreme Court justices have expressed to the deference given to interpretive rules. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211–13 (2015) (Scalia, J., concurring); *id.* at 1213–25 (Thomas, J., concurring) (contending that deference to interpretive rules "represents a transfer of judicial power to the Executive Branch" and erodes "the judicial obligation to serve as a 'check' on the political branches"); see also *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., & Alito, J., concurring) (urging reconsideration of such deference); *id.* at 1342 (Scalia, J., concurring) ("He who writes a law must not adjudge its violation.").

130. Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 346 (2011); see also Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667, 670 (1996) ("Policy statements are substantive nonlegislative agency rules that do not interpret existing legislation.").

131. See 5 U.S.C. § 553(b) (2012).

132. See Anthony, *supra* note 119, at 1324.

133. See PIERCE, *supra* note 58, at 423, 426.

134. See *id.* at 419.

binding effect is a rule, and at a minimum must undergo notice-and-comment rulemaking.<sup>135</sup>

In some instances, policy statements may help to address urgencies. A policy statement may steer private conduct in the agency's desired direction by providing guidance or presaging potential future agency actions. The Food and Drug Administration ("FDA"), for example, regularly relies on guidance statements to establish policy on various matters ranging from genetically modified organisms to the advertising of prescription products.<sup>136</sup> Guidance documents have provided the FDA with a degree of flexibility arguably well-suited for dealing with emerging technologies and scientific advances.<sup>137</sup> Not surprisingly, however, the FDA has come under criticism for its heavy use of guidance statements to circumvent procedural rulemaking requirements.<sup>138</sup> Agencies should be careful to avoid crossing the line between tentatively articulating policy preferences and subtly coercing regulated parties or beneficiaries.<sup>139</sup> Ultimately, policy statements are not legally binding, and an agency seeking to legally bind others should proceed instead with notice-and-comment rulemaking or some other technique.

#### *D. Adjudication*

Adjudication, another avenue for agencies to respond to urgencies, can be especially useful in dealing with unforeseen or unique problems.<sup>140</sup> Adjudicative actions involve fact-specific determinations in individual cases, such as penalty or other enforcement proceedings, grants or denials of benefits, or issuance of permits or administrative orders.<sup>141</sup> Articulating policy in an adjudication allows agencies

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135. See *id.* at 420.

136. See Lars Noah, *Governance by the Backdoor: Administrative Law (lessness?) at the FDA*, 93 NEB. L. REV. 89, 113–22 (2014). The IRS also relies heavily on substantive guidance documents. See Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 502–09 (2013). Guidance documents may be characterized either as interpretive rules or policy statements, both of which are exempt from notice and comment. See Seidenfeld, *supra* note 130, at 334.

137. See Noah, *supra* note 136, at 120–22 (noting FDA's exclusive use of guidance documents to address genetically modified organisms and advances in pharmacogenomics, nanotechnologies, and xenotransplantation).

138. See Noah, *supra* note 136, at 90, 137; Lars Noah, *The Little Agency that Could (Act with Indifference to Constitutional and Statutory Strictures)*, 93 CORNELL L. REV. 901, 904–05 (2008).

139. See PIERCE, *supra* note 58, at 423; Anthony & Codevilla, *supra* note 130, at 671 (suggesting that the "key characteristic" of policy statements is that "issuing agencies treat them as tentative"); Seidenfeld, *supra* note 130, at 347 ("[B]inding legal force comes in many flavors and intensities.").

140. See William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351, 359–60 (2000).

141. See Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They're Not*, 59 ADMIN. L. REV. 79, 98–100 (2007).

to address statutory or regulatory gaps with the benefit of a full factual record.<sup>142</sup> Although agencies generally have the discretion to act through rulemaking or adjudication,<sup>143</sup> courts and commentators strongly prefer that agencies make policy through rulemaking. As compared to adjudication, the rulemaking process generally offers more political accountability, greater efficiency, and higher-quality rules.<sup>144</sup> In addition, the prospective nature of rulemaking better protects reliance interests than after-the-fact adjudication.<sup>145</sup>

The strengths—and weaknesses—of adjudication as a means of policy making are magnified in the context of urgencies. If an urgency presents an unforeseen situation, an agency can develop a response tailored to that situation. However, any principles developed through adjudication obtain a binding effect only on a case-by-case basis and thus may not represent an efficient means of addressing a class of problems.<sup>146</sup> Additionally, these so-called adjudicative rules are more difficult to enforce than rules established through rulemaking procedures.<sup>147</sup> Moreover, individual cases often require drawn-out, fact-specific, and resource-intensive inquiries.<sup>148</sup> The devotion of an agency's efforts to adjudication may detract from the agency's focus on developing a sensible general policy.<sup>149</sup> Rulemaking, by contrast, allows agencies to tackle a category of urgencies head-on rather than responding after the fact to what may be a *fait accompli*.<sup>150</sup>

#### ***E. Proposed Rules***

A further possibility for responding to urgencies relies on proposed rules—rather than final rules—to drive the behavior of regulated parties. A proposed rule is only a proposal, of course, and by itself has no binding legal effect. Agencies are expected to consider and respond to thoughtful public comments submitted on a proposed rule. Moreover, agencies sometimes change or even abandon a proposed rule after receiving comments.

Proposed rules nonetheless can influence conduct before they become final. The subjects of a proposed rule may begin to conform their conduct with

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142. See Russell L. Weaver & Linda D. Jellum, *Chenery II and the Development of Federal Administrative Law*, 58 ADMIN. L. REV. 815, 824–25 (2006).

143. See SEC v. *Chenery Corp.*, 332 U.S. 194, 209 (1947); Manning, *supra* note 119, at 896.

144. See *PIERCE*, *supra* note 58, at 496–501.

145. See Seidenfeld, *supra* note 130, at 341.

146. See Russell L. Weaver, *Chenery II: A Forty-Year Retrospective*, 40 ADMIN. L. REV. 161, 201–03 (1988) (characterizing adjudicative rules as “less binding” than legislative rules in that they “are treated like precedent” and “may be followed in subsequent cases”).

147. See *PIERCE*, *supra* note 58, at 499.

148. See, e.g., *id.* at 498–99.

149. See 32 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FED. PRAC. & PROC. JUDICIAL REVIEW § 8123 (1st ed. 2015).

150. See 2 GLENDA HARNARD, ET. AL., AM. JUR. 2D ADMIN, L. § 134 (2d ed. Supp. 2016).

proposed standards if they anticipate finalization of those standards without significant change. Such anticipatory compliance is especially likely when an industry expects to need significant time and resources to comply with any standards that are finalized. For example, owners of aging power plants that are nearing the end of their useful lives often must decide whether to retrofit, replace, or shut down their facilities. These decisions, which involve substantial investments, are affected by many factors, including anticipated future regulations.<sup>151</sup>

The potentially coercive effect of proposed rules was at the core of recent efforts by the coal industry and electric utilities to invalidate EPA's proposed rules limiting greenhouse gas ("GHG") emissions from power plants. In June 2014, EPA proposed the Clean Power Plan, a rule that would require states to develop GHG emissions standards for existing power plants.<sup>152</sup> Industry contended that the plan—though not yet final—was so unprecedented in its scope and consequences that it warranted immediate review.<sup>153</sup> Specifically, utility companies, already engaged in the process of making long-term investment decisions regarding how their facilities would comply with existing mandates, alleged that their decisions would necessarily have to account for the proposed rule's potential further mandates as well.<sup>154</sup> States likewise would have to begin compliance efforts immediately, given their relatively short deadlines for completing complex planning requirements.<sup>155</sup> The D.C. Circuit nonetheless refused to review the proposed rule. Though the court "recognize[d] that prudent organizations and individuals may alter their behavior (and thereby incur costs) based on what they think is likely to come in the form of new regulations," the court flatly stated that EPA "has issued only a proposed rule," and the court "do[es] not have authority to review proposed agency rules."<sup>156</sup>

Proposed rules ultimately offer a very limited option for addressing urgencies. First and foremost, they are not legally binding. Furthermore, by giving regulated entities notice of intended future regulation, proposed rules sometimes

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151. See Dalia Patino-Echeverri, *Feasibility of Flexible Technology Standards for Existing Coal-Fired Power Plants and Their Implications for New Technology Development*, 61 UCLA L. REV. 1896, 1909–10 (2014).

152. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

153. See Final Opening Brief of Petitioner at 43, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015) (No. 14-1112, 14-1151), 2015 WL 1022477 at \*43.

154. *Id.* at \*41–42.

155. *Id.* at \*42–43.

156. *In re Murray Energy Corp.*, 788 F.3d 330, 333–35 (D.C. Cir. 2015). EPA subsequently issued its final Clean Power Plan rule in October 2015. See Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015). Based on arguments analogous to those summarized above, industry sought and obtained a stay of the rule by the Supreme Court. See Jonathan H. Adler, *Supreme Court Puts the Brakes on the EPA's Clean Power Plan*, WASH. POST (Feb. 9, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/>.

may trigger the very behavior the regulation is intended to prevent.<sup>157</sup> Finally, although proposed rules may foster anticipatory compliance in some circumstances, those circumstances are likely to be narrow. Indeed, the challengers to the Clean Power Plan proposal contended that their case presented extraordinary circumstances warranting intervention by the court.<sup>158</sup> Regulated entities generally can and will wait until a rule is finalized before complying with it.<sup>159</sup> As the following Part explains, other options allow agencies to act with the speed of proposed rules to address urgencies, but with the force of law.

### III. USING THE GOOD CAUSE EXCEPTION TO ADDRESS URGENCIES

Each of the preceding avenues for making policy in urgent circumstances faces significant limitations or objections. Emergency authorities should be confined to genuine emergencies. Interpretive rules lack the force of law and cannot be used to create new obligations. Policy statements likewise are nonbinding. Adjudications offer only a piecemeal approach. Proposed rules are neither final nor binding. None of these options provide agencies with the authority and flexibility necessary to respond to urgencies. Rather, the good cause exception to the APA's notice-and-comment requirements offers the most promising approach for urgent agency rulemaking.

#### A. *The Good Cause Exception*

Under the good cause exception, an agency may promulgate a rule without notice and comment “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.”<sup>160</sup> Invocation of the good cause exception may excuse the agency from certain other procedural mandates as well, including the RFA and the UMRA.<sup>161</sup>

The APA does not define the key terms of the good cause exception—“impracticable, unnecessary, or contrary to the public interest”—but the Senate Judiciary committee report provides guidance:

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157. See PIERCE, *supra* note 58, at 674–75 (discussing use of “good cause” exception to notice-and-comment rulemaking in cases where prior notice of rule would cause harm by distorting the temporal pattern of a class of transactions).

158. See Final Opening Brief of Petitioner, *supra* note 153, at \*43.

159. Cf. Patino-Echeverri, *supra* note 151, at 1916 (noting that uncertainty about future regulation “may make investors prefer to wait until more information becomes available” before committing to decisions regarding whether to replace existing power plants).

160. 5 U.S.C. § 553(b)(3)(B) (2012). A similar “good cause” provision exempts qualifying agency rules from the requirement that rules be published in the Federal Register at least thirty days before taking effect. *Id.* § 553(d)(3).

161. See Asimow, *supra* note 58, at 709–10, 729–33 (suggesting that an agency is excused from the RFA and UMRA at the interim-final rule stage but perhaps not at the final-final rule stage).

“Impracticable” means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. “Unnecessary” means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. “Public interest” supplements the terms “impracticable” or “unnecessary”; it requires that public rule-making procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure.<sup>162</sup>

These terms have some overlap, and the statute does not require agencies to categorize their actions under any single term. Nonetheless, agencies tend to deem notice and comment “impracticable” for rules subject to short statutory deadlines or similar constraints, “contrary to the public interest” for emergencies or threats to public safety, and “unnecessary” for technical corrections or where the agency lacks discretion over the content of a rule.<sup>163</sup> Legislative history further indicates that the exception should not serve as an “escape clause” from notice-and-comment procedures; rather, “a true and supported or supportable finding of necessity or emergency must be made and published.”<sup>164</sup>

Agencies often issue rules under the good cause exception in the form of direct final rules or interim final rules.<sup>165</sup> A direct final rule is published without prior notice and becomes effective on a specified future date unless the agency receives substantive adverse comment.<sup>166</sup> Should adverse comment be received, the agency withdraws the direct final rule and instead proceeds with ordinary notice-and-comment rulemaking.<sup>167</sup> Agencies typically use a direct final rule to address matters they believe to be sufficiently uncontroversial that notice and

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162. Report of the Senate Committee on the Judiciary, Administrative Procedure Act, S. REP. NO. 79-752, at 200 (1945) [hereinafter S. REP. NO. 79-752], <http://www.justice.gov/sites/default/files/jmd/legacy/2014/03/20/senatorept-752-1945.pdf>.

163. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 16 (2012) [hereinafter GAO-13-21]. Agencies also invoke the good cause exception where prior notice of a proposed rule would “cause harm by distorting the temporal pattern of a class of transactions.” PIERCE, *supra* note 58, at 674–75.

164. S. REP. NO. 79-752, *supra* note 162, at 200. The House committee report reads similarly. See Report of the House Committee on the Judiciary, Administrative Procedure Act, 79th Cong., 2d Sess., Rpt. No. 1980, at 258 (1946), <http://www.justice.gov/sites/default/files/jmd/legacy/2014/06/09/housept-1980-1946.pdf>.

165. See OFF. OF THE FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS 9 (2013), <https://www.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf>.

166. See *id.*; Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 1 (1995) (noting that a rule is usually scheduled to become effective sixty days after publication of the direct final rule); Administrative Conference of the United States, 60 Fed. Reg. 43,108, 43,110 (Aug. 18, 1995) [hereinafter ACUS] (adoption of recommendations).

167. See Asimow, *supra* note 58, at 706 n.12.

comment is unnecessary.<sup>168</sup> These matters may include correcting typographical errors or making other changes with little impact on the regulated community.<sup>169</sup>

Interim final rules are generally used by agencies to address more substantial matters in which notice-and-comment is impracticable or contrary to the public interest. An interim final rule becomes effective immediately upon publication, without prior notice and comment.<sup>170</sup> At the time it publishes the rule, the agency invites public comment and expresses its intent to adopt a final rule reflecting any changes it decides to make in light of comments received.<sup>171</sup> An interim final rule reflects “a compromise between a perceived need for immediate adoption of a rule and the values of public participation and regulatory analysis.”<sup>172</sup> The agency is able to respond promptly to an urgent situation and also to adjust its response in light of public comment and further analysis.

Judicial decisions involving the good cause exception “necessarily have an ad hoc quality” because of the differing factual settings in which the exception arises.<sup>173</sup> Nonetheless, courts generally construe the exception narrowly, requiring agencies to follow ordinary notice-and-comment procedures when feasible.<sup>174</sup> Courts tend to uphold reliance on the exception if an agency demonstrates it is addressing “an immediate threat to public health, safety, or welfare.”<sup>175</sup> In addition, courts look favorably on the fact that an agency has invited post-adoption comment or limited a rule’s duration when invoking the exception.<sup>176</sup> The statutory text does not limit the exception to emergency situations, but commentators sometimes suggest that its “impracticable” and “public interest” language should be interpreted as referring only to emergencies.<sup>177</sup> When all is said and done, courts apply a subjective test that balances the urgency of the regulatory need against the loss of public notice and participation.<sup>178</sup> Even when upholding an agency rule, courts sometimes “have tried to accommodate the value

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168. See ACUS, *supra* note 166, at 43,111; Levin, *supra* note 166, at 2–3.

169. See Boliek, *supra* note 12, at 3356.

170. See ACUS, *supra* note 166, at 43,111; Asimow, *supra* note 58, at 704. The label “interim-final” is interchangeable with the label “final rule; comments requested.” Asimow, *supra* note 58, at 705 n.7.

171. See Asimow, *supra* note 58, at 704.

172. *Id.* at 710.

173. Jordan, *supra* note 58, at 120.

174. See *id.* at 169; James Kim, Comment, *For a Good Cause: Reforming the Good Cause Exception to Notice and Comment Rulemaking Under the Administrative Procedure Act*, 18 GEO. MASON L. REV. 1045, 1046, 1054, 1058 (2011).

175. Kim, *supra* note 174, at 1053–55; see also PIERCE, *supra* note 58, at 672–74.

176. See Asimow, *supra* note 58, at 723–24.

177. See, e.g., Boliek, *supra* note 12, at 3348; Jordan, *supra* note 58, at 121–23; Michael A. Rosenhouse, *Construction and Application of Good Cause Exception to Notice and Comment Rulemaking Under Administrative Procedure Act (APA)*, 5 U.S.C.A. § 553(b)(B), 26 A.L.R. FED. 2D 97, § 2 (2008).

178. See PIERCE, *supra* note 58, at 672; Jordan, *supra* note 58, at 135–36.



of public participation by insisting that [emergency] rules be no broader and last no longer than necessary to meet the emergency.”<sup>179</sup>

### ***B. EPA’s Use of the Good Cause Exception***

#### *1. Setting the Parameters for Analysis*

In light of the oft-expressed concern that agencies will rely excessively on the good cause exception, it is instructive to examine actual agency practice. One review suggested a “dramatic” rise in use of the exception since the 1990s.<sup>180</sup> Based on a tabulation of Federal Register notices, Professor Babette Boliek found that overall use of the exception by federal agencies rose sharply between 1999 and 2001, both in absolute numbers and as a percentage of overall rulemaking activity.<sup>181</sup> Boliek further noted that agencies have continued to invoke the good cause exception in approximately 10% of total rulemakings since 2001.<sup>182</sup> From this data, Boliek concluded that “the efficiency/public participation balance has tilted severely toward efficiency,” a trend she found “troubling.”<sup>183</sup>

Increased use of the exception, however, does not establish overuse. Agencies simply may be more aware of the exception and appropriately applying it where notice-and-comment rulemaking is unwarranted. Though sometimes referred to as an “emergency rulemaking” exception,<sup>184</sup> the good cause exception indisputably can be used to make nonsubstantive or minor corrections as well. Because the exception applies to rather divergent circumstances, disaggregation of those circumstances may help to accurately evaluate agency practice.<sup>185</sup> Furthermore, an assessment of agency reliance on the good cause exception should consider the capacity for judicial review and public scrutiny to serve as powerful checks against abuse.

In sum, to understand whether agency reliance on the good cause exception is appropriate, we should look beyond the overall rise to see what agencies are actually doing when they invoke the exception. To make the inquiry manageable and sharpen its focus, this Article examines EPA’s use of that exception between 1994 and 2014.<sup>186</sup> EPA regulates a wide range of health and environmental risks and presumably would be responsible for addressing many of the risks posed by emerging technologies. EPA has been strongly affected by regulatory ossification,<sup>187</sup> and it invented direct final rulemaking in response.<sup>188</sup> At

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179. Jordan, *supra* note 58, at 136.

180. Boliek, *supra* note 12, at 3343.

181. *Id.* at 3348–49.

182. *Id.* at 3348–51 fig.2 (examining use of the exception through 2011).

183. *Id.* at 3343.

184. *See, e.g., id.* at 3348–49 nn.42, 45–46.

185. Boliek asserts that it is “unlikely” that the increase can be attributed to an increase in uncontroversial, bureaucratic “clean up” measures. *Id.* at 3349 n.46.

186. The GPO’s online Federal Register database includes entries from 1994 to the present. FEDERAL REGISTER, <https://www.federalregister.gov/> (last visited Oct. 10, 2016).

187. *See supra* Part I.C.

the same time, the agency is frequently criticized for overregulating.<sup>189</sup> Examining EPA's use of the good cause exception sheds light on agency practice and potential abuse.

Using the U.S. Government Printing Office's ("GPO") database of Federal Register notices, the Author searched for instances in which EPA invoked the good cause exception in the course of issuing a final rule.<sup>190</sup> The Author then placed each rule within one of eight categories:

- Nonsubstantive housekeeping changes
- Technical corrections
- Extensions of time
- Ministerial rules involving nondiscretionary changes
- Corrections or clarifications to previously issued regulations
- Cooperative federalism determinations
- Substantively significant rules
- Other rules with substantive effects<sup>191</sup>

These categories were not necessarily used by EPA itself, but rather reflect an analysis of EPA's proffered explanations of good cause. The first three

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188. See Levin, *supra* note 166, at 4–6 (also noting that EPA, as of 1995, was “overwhelmingly the principal user of the technique [of direct final rulemaking] in the federal government”).

189. See, e.g., RON JOHNSON (CHAIRMAN, SEN. CMTE. ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS), DIRECT FROM THE SOURCE: UNDERSTANDING REGULATION FROM THE INSIDE OUT (MAJORITY STAFF REPORT), 1 (2016), [http://www.eenews.net/assets/2016/01/20/document\\_daily\\_01.pdf](http://www.eenews.net/assets/2016/01/20/document_daily_01.pdf) (stating that “[e]nvironmental regulations are a top concern of industry leaders” and noting specific EPA rules that industry has criticized).

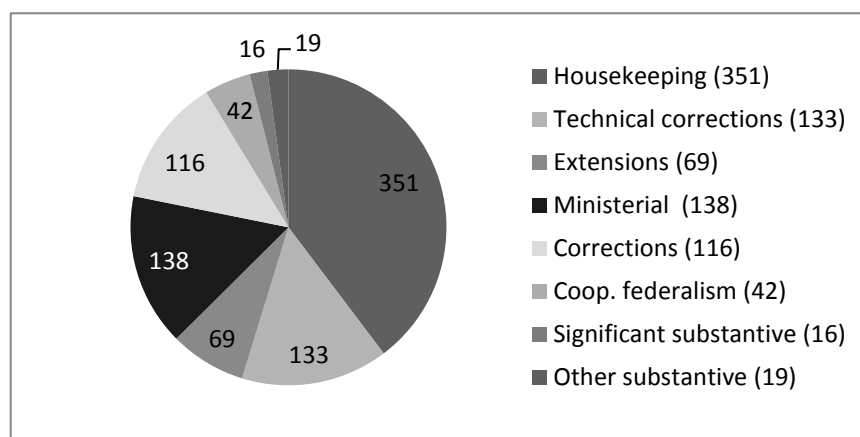
190. The findings in this section are based on applying a search methodology somewhat similar to that used by Prof. Boliek. See Boliek, *supra* note 12, at 3348–50. The Author and research assistant conducted searches of the GPO website (<http://www.gpo.gov/fdsys/search/advanced/advsearchpage.action>), Collection of the Office of the Federal Register, searching for the term “553(b)(3)(B)” or “553(b)(B)” [using quotation marks] in the “Full Text of Publications and Metadata” and limiting the search to Federal Register notices issued by EPA. Whereas the former search term reflects the technically correct citation to the good cause exception, EPA and other agencies have used both citations in their Federal Register notices. These searches yielded over 900 data points, each of which was coded for the type of change being effectuated by the notice. Those data points that in fact did not involve reliance on the good cause exception—for example, the agency sometimes discussed a prior rulemaking that relied on the good cause exception or suggested potential use of the exception for specified future actions—were excluded from further analysis.

191. In the occasional (ten) instances where EPA provided more than one basis for invoking good cause, the rule was included within both categories.

categories refer to rules not involving any substantive changes to the law, and the rest to rules involving substantive changes.

## 2. Results

Between 1994 and 2014, EPA invoked the good cause exception on 874 occasions (Figure 1). Well over half of the instances (543) involved no substantive changes at all. In these instances, EPA typically reasoned that notice and comment was unnecessary because the Agency was merely updating cross-references, correcting minor errors, or making other insignificant changes. Rules with substantive effects tended to involve clarifications to previously issued regulations or ministerial changes where the Agency was implementing a nondiscretionary congressional directive or court order. On a small handful of occasions, which will be discussed in more detail, EPA did issue a rule of significant import, usually in response to pressing circumstances. To summarize, the analysis did not find evidence that EPA has abused the good cause exception to circumvent ordinary rulemaking processes.



**Figure 1:** EPA Use of Good Cause Exception by Category

### a. Nonsubstantive Rules

In many instances (351), EPA made nonsubstantive “housekeeping” changes—changes that merely updated contact information or cross-references, corrected typographical or citation errors, reformatted existing law, or removed obsolete provisions.<sup>192</sup> While such changes may require issuance of a rule, EPA’s justification for doing so without notice and comment is clear. The same is true for the 133 “technical” corrections that were found. Clearly nonsubstantive in nature, these technical corrections consisted exclusively of amendments to the table of

192. See, e.g., Environmental Protection Agency, Control of Air Pollution; Removal of Legally Obsolete Rules, 60 Fed. Reg. 33915 (June 29, 1995) (to be codified at 40 C.F.R. pts. 51, 52, 60, 65, 85, 86).

approved information collection request (“ICR”) control numbers issued by the OMB.<sup>193</sup>

A modest number of cases (69) involved rules that moved forward, delayed, or suspended the effective date of a new regulation, extended the time that preexisting regulations would remain effective, or extended the time for regulated entities to comply with the law. Courts and commentators generally agree that such actions are a form of rulemaking.<sup>194</sup> Some of these actions involved brief extensions with little practical effect. Others represented reasonable agency responses to recent developments. For example, one rule temporarily stayed the effectiveness of an earlier rule that had been the subject of a recently completed rulemaking in order to conduct a new notice-and-comment rulemaking to address issues arising from recent court rulings.<sup>195</sup> Another rule permanently approved a state’s air-pollution permitting programs, where those state programs were already in place under an interim approval.<sup>196</sup> Potentially the most questionable instances in the time-extension category were the eight rules issued by incoming presidential administrations that postponed the effective date of a previous administration’s rules.<sup>197</sup> These delays were designed to allow new agency officials an opportunity to reevaluate the rules and thus were arguably supported by good cause, but they also gave the appearance of being politically motivated.<sup>198</sup>

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193. The Paperwork Reduction Act requires federal agencies to prepare an ICR whenever an agency activity involves collecting information from ten or more non-federal respondents. 44 U.S.C. § 3506(c) (2002). An agency must submit the ICR to OMB for approval. 44 U.S.C. § 3507 (2002). Upon approval, OMB assigns a control number, which is then published in the Federal Register or Code of Federal Regulations. 44 U.S.C. § 3507(a)(3); OMB Approvals Under the Paperwork Reduction Act, 40 C.F.R. § 9.1 (2016) (listing control numbers for EPA ICRs). In each instance reported above, the information-collection request itself had been subject to notice and comment; EPA relied on the good cause exemption only to update the C.F.R. to accurately display the OMB control number, as required by the Paperwork Reduction Act.

194. See JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 105–08 (5th ed. 2014).

195. Interim Final Stay of Action on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport, 64 Fed. Reg. 33956 (June 24, 1999) (to be codified at 40 C.F.R. pt. 52).

196. Clean Air Act Full Approval of 34 Operating Permits Programs in California, 66 Fed. Reg. 63503, 63509 (Dec. 7, 2001) (to be codified at 40 C.F.R. pt. 70).

197. See, e.g., National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring: Delay of Effective Date, 66 Fed. Reg. 16134 (Mar. 23, 2001) (to be codified at 40 C.F.R. pts. 9, 141, 142) (delaying effective date of more stringent drinking water standards for arsenic). The drinking water standards in question eventually did become effective after the incoming Bush administration initially proposed to cancel them. See MARTHA JOYNT KUMAR, BEFORE THE OATH: HOW GEORGE W. BUSH AND BARACK OBAMA MANAGED A TRANSFER OF POWER 76 (2015).

198. See KUMAR, *supra* note 197, at 75–77; see also LUBBERS, *supra* note 194, at 108 (noting that “[t]hese practices tended to evade judicial challenge due to their short time frames, but they did occasion criticism”).

### b. Substantive Rules

EPA made substantive changes on less than half (331) of the occasions that it invoked the good cause exception.<sup>199</sup> On most such occasions, notice and comment would have had little value because of the limited effect of the action or the Agency's limited discretion over the action. In some of these cases, EPA lacked discretion over the substance of a rule, whereas in others, EPA issued corrections or clarifications that were foreseeable from the agency's previous proposed rule. On occasion, EPA did use the good cause exception to promulgate rules with significant substantive effects, as detailed further below.

#### i. Ministerial Changes

Many cases (138) involved substantive changes that were ministerial in nature—i.e., a statute, court decision, or other circumstances mandated the change—and EPA simply had no discretion to do anything other than to issue the rule. For example, EPA's typical response to a court decision vacating a rule was to issue a new rule removing the vacated provisions from the Code of Federal Regulations without notice and comment.<sup>200</sup> In other rulemakings within the category of ministerial changes, EPA corrected the effective date of a rule to reflect the Agency's belated compliance with the Congressional Review Act ("CRA").<sup>201</sup> That statute precludes any rule from taking effect until the promulgating agency submits a copy of the rule to Congress.<sup>202</sup> And in yet other ministerial rulemakings, EPA simply determined that a state had failed under the CAA to submit a state implementation plan;<sup>203</sup> the Agency explained that where

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199. The total number of good cause invocations (874) is equal to the sum of the total instances of nonsubstantive changes (351 + 133 + 69 = 553) and substantive changes (331), minus the ten instances where EPA invoked two distinct grounds for invoking the good cause exception.

200. See, e.g., National Ambient Air Quality Standards for Particulate Matter, 69 Fed. Reg. 45592 (July 30, 2004) (to be codified at 40 C.F.R. pts. 50, 58); Standards of Performance for Electric Utility Steam Generating Units for Which Construction is Commenced After September 18, 1978; and Standards of Performance for Industrial-Commercial-Institutional Steam Generating Units, 66 Fed. Reg. 42608 (Aug. 14, 2001) (to be codified at 40 C.F.R. pt. 60).

201. See, e.g., Technical Amendments to National Emission Standards for Hazardous Air Pollutant Emissions: Group IV Polymers and Resins; Correction of Effective Date Under Congressional Review Act (CRA), 63 Fed. Reg. 9,944 (Feb. 27, 1998) (to be codified at 40 C.F.R. pts. 9, 63).

202. 5 U.S.C. § 801(a)(1)(A) (1996).

203. Section 110 of the Clean Air Act requires states to submit to EPA state implementation plans ("SIPs") designed to achieve federal air quality standards. 42 U.S.C. § 7410(a) (2012). An EPA finding that a state has failed to submit a SIP triggers a federal obligation to prepare a federal implementation plan for achieving the air-quality standards. *Id.* § 7410(c).

no submission was made, such a determination involved no significant agency judgment.<sup>204</sup>

ii. Corrections and Clarifications

Another sizable set of rulemakings (116) corrected or clarified the substance of previously issued regulations that already had been subject to notice and comment. In the majority of these instances, EPA invoked the good cause exception to reinsert language that had been inadvertently omitted, delete language that had been inadvertently included, or fix other typographical errors.<sup>205</sup> One example of a clarifying rule reaffirmed rule revisions that had previously been finalized after notice and comment.<sup>206</sup> EPA explained that the clarification was necessary because the D.C. Circuit had vacated *other* rules that had appeared in the same Federal Register notices as the revisions. The new rule, EPA said, was intended to dispel any doubt regarding the continuing validity of the revisions.<sup>207</sup>

Generally, rulemakings that correct or clarify previously issued regulations are unlikely to involve abuse of the good cause exception because the Agency already made apparent what it intended to do when proposing the underlying rule. In a few cases, however, EPA clarified ambiguities that became apparent only after the underlying regulations were finalized.<sup>208</sup> Such clarifications, if relatively minor, are functionally equivalent to interpretive rules, which are not subject to the APA requirement of notice and comment. Just as agencies sometimes make important substantive changes under the guise of interpretive rules,<sup>209</sup> there is a danger that agencies could use clarifications to make changes that should undergo notice and comment. However, EPA's clarifications under the good cause exception did not stray beyond the bounds of ordinary interpretive rules. Rather, these clarifications typically responded to inquiries

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204. See, e.g., Finding of Failure to Submit State Implementation Plans Required for the 2008 Lead National Ambient Air Quality Standards (NAAQS), 79 Fed. Reg. 10,391 (Feb. 25, 2014) (to be codified at 40 C.F.R. pt. 52).

205. See, e.g., Hydrogen Peroxide; An Amendment to an Exemption From the Requirement of a Tolerance; Technical Correction, 67 Fed. Reg. 41,843 (June 20, 2002) (to be codified at 40 C.F.R. pt. 180) (inserting inadvertently omitted language); Approval and Promulgation of Air Quality Implementation Plans; CO; PM10 Designation of Areas for Air Quality Planning Purposes, Lamar; State Implementation Plan Correction, 70 Fed. Reg. 72,597 (Dec. 6, 2005) (to be codified at 40 C.F.R. pt. 52) (correcting misstatement in preamble regarding scope of EPA authority).

206. Rulemaking To Reaffirm the Promulgation of Revisions of the Acid Rain Program Rules, 73 Fed. Reg. 75,959 (Dec. 15, 2008) (to be codified at 40 C.F.R. pts. 72, 73, 74, 77, 78).

207. *Id.*

208. See, e.g., NESHAPS: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors; Final Rule—Interpretive Clarification; Technical Correction, 65 Fed. Reg. 67,268 (Nov. 9, 2000) (to be codified 40 C.F.R. pt. 63) (clarifying ambiguous provisions in response to inquiries from regulated community).

209. See Pierce, *Distinguishing Legislative Rules*, *supra* note 61, at 558–59.

regarding the specific circumstances under which regulatory obligations might apply or provided further content to narrow but uncertain regulatory language.<sup>210</sup>

iii. Cooperative Federalism Determinations

A further category of substantive rulemakings where notice and comment would serve little purpose involve the 42 instances where EPA acknowledged a state's actions or recognized a state's responsibilities under the CAA or Clean Water Act ("CWA"). As most of these "cooperative federalism determinations" involved the CAA, a brief statutory background is helpful to understand the limited nature of the actions within this category. The CAA directs EPA to establish national ambient standards for air pollutants that may reasonably be anticipated to endanger public health or welfare.<sup>211</sup> Each state plays a central role in achieving these standards through the development and implementation of a state implementation plan ("SIP"), which is subject to EPA approval.<sup>212</sup> A state that fails to timely submit or revise a SIP may be sanctioned through the loss of federal highway funding and other measures. Furthermore, EPA must promulgate a federal implementation plan ("FIP") in the absence of an approved SIP.<sup>213</sup>

In 30 of the 42 cases within this category, EPA made an interim final determination that a state had corrected deficiencies that EPA had previously identified in a SIP.<sup>214</sup> In these cases, EPA simultaneously issued a proposed rule approving the state's SIP revisions and an interim final rule deferring sanctions.<sup>215</sup> The interim final rule relied on the good cause exception, with EPA reasoning that it should not impose further sanctions when a state has done all that it can to correct the deficiencies that would trigger the sanctions.<sup>216</sup> At the same time, the proposed rule allowed the public to comment on whether EPA should approve the SIP revisions. In seven other cases, EPA issued a rule announcing its delegation of authority to a state or Indian tribe to administer specified federal standards under the CAA.<sup>217</sup> Here, EPA explained that good cause existed because the rule merely

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210. See, e.g., NESHAPS, 65 Fed. Reg. 67,268–69 (Nov. 9, 2000) (to be codified at 40 C.F.R. pt. 63) (clarifying definitions of "hazardous waste incinerator" and "reconstructed sources" in response to industry inquiries regarding how emission standards for hazardous waste-burning incinerators, which distinguished between new and existing sources, would apply to modified incinerators).

211. 42 U.S.C. § 7409(a)(1)(A).

212. 42 U.S.C. § 7410(a). EPA treats the approval of a SIP as a rulemaking subject to notice-and-comment requirements. See 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER (WEST) § 3:9 (1st ed. 1986); EPA, SIP PROCESSING MANUAL, CH. 1 (Feb. 3, 2016), <https://cfpub.epa.gov/oarwebadmin/sipman/sipman/mContent.cfm?chap=1&filePos=2>.

213. 42 U.S.C. §§ 7410(c)(1), 7509(b).

214. See, e.g., Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision; Interim Final Determination That State Has Corrected the Deficiency, 60 Fed. Reg. 2523 (Jan. 10, 1995) (to be codified at 40 C.F.R. pt. 52).

215. See, e.g., *id.*

216. See, e.g., *id.* at 2524.

217. See, e.g., Standards of Performance for New Stationary Sources; Supplemental Delegation of Authority to the State of Wyoming, 65 Fed. Reg. 1323 (Jan. 10,

provided notice of the delegation without establishing any new substantive requirements.<sup>218</sup>

The other cooperative federalism determinations involved the CWA, which likewise provides for a significant state role in achieving federal environmental goals. Under the CWA, states may—with EPA’s approval—issue discharge permits and establish and implement water quality standards.<sup>219</sup> In five of the good cause determinations, EPA identified federal standards that would be applicable (or inapplicable) as a result of the Agency’s approval or disapproval of a state’s submissions.<sup>220</sup> Such identification of standards did not establish any new regulatory provisions, as EPA explained, for the federal standards themselves had been subject to an earlier rulemaking.<sup>221</sup>

The cooperative federalism determinations in the cases discussed above created no new regulatory requirements and were likely to be the subject of little or no public comment.<sup>222</sup> As the legislative history of the good cause exception suggests, notice and comment is unnecessary for “a minor or merely technical amendment in which the public is not particularly interested”—a description that generally characterizes these determinations.<sup>223</sup>

#### iv. Significant Substantive Rules

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2000) (to be codified at 40 C.F.R. pt. 60); Announcement of the Delegation of Partial Administrative Authority for Implementation of Federal Implementation Plan for the Nez Perce Reservation to the Nez Perce Tribe, 70 Fed. Reg. 54,638 (Sept. 16, 2005) [hereinafter Delegation for Nez Perce Tribe] (to be codified at 40 C.F.R. pt. 49).

218. See, e.g., Delegation for Nez Perce Tribe, *supra* note 217, at 54,638.

219. 33 U.S.C. §§ 1313, 1342(b) (2015); see also 33 U.S.C. § 1268(c) (2015) (requiring Great Lakes states to adopt standards and policies consistent with EPA guidance).

220. See, e.g., Identification of Approved and Disapproved Elements of the Great Lakes Guidance Submission From the State of Wisconsin, and Final Rule, 65 Fed. Reg. 66,502 (Nov. 6, 2000) (to be codified at 40 C.F.R. pt. 132); Water Quality Standards; Withdrawal of Certain Federal Water Quality Criteria Applicable to Alaska, Arkansas, and Puerto Rico, 69 Fed. Reg. 63,079 (Oct. 29, 2004) (to be codified at 40 C.F.R. pt. 131). EPA has taken the position that the approval and disapproval decisions themselves do not constitute rulemaking, although the Agency in some cases provided notice and comment on these decisions as well. See Identification of Approved and Disapproved Elements of the Great Lakes Guidance Submission From the State of Wisconsin, and Final Rule, 65 Fed. Reg. at 66,511 (Nov. 6, 2000) [hereinafter EPA/Wisconsin] (to be codified at 40 C.F.R. pt. 63).

221. EPA/Wisconsin, *supra* note 220, at 66,510–11.

222. See Levin, *supra* note 166, at 4.

223. Indeed, EPA developed the practice of direct final rulemaking as a response to complaints about the slow pace with which the Agency was approving SIP revisions. See *id.* at 12. In EPA’s first six months of experimenting with the use of direct final rulemaking to approve SIP revisions, EPA received comments on—and thus withdrew—less than 5% of SIP revisions. See Requirements for Preparation, Adoption, and Submittal of State Implementation Plans; New SIP Processing Procedures to Save Time and Resources, 47 Fed. Reg. 27,073–74 (1982) (to be codified at 40 C.F.R. pt. 52).



EPA's use of the good cause exception to issue rules with significant substantive effects requires closer scrutiny because of the potential for such rules to circumvent notice-and-comment rulemaking. Furthermore, such rules most closely correspond to the circumstances with which this Article is concerned: substantive rulemaking to address urgencies. During the period examined, EPA invoked the good cause exception 16 times to issue a rule with significant substantive effects, largely in response to emergency or pressing circumstances. Each instance is briefly summarized below:

- On three occasions, EPA issued an interim final rule allocating or re-allocating allowances for ozone depleting substances after a court ruling, decision by a treaty organization, or other legal action.<sup>224</sup> In the absence of immediate EPA action, industry would have lacked legal authorization to produce or import the substances, potentially causing the unavailability of metered dose inhalers or refrigerants.<sup>225</sup>
- In 1994, EPA issued an interim final rule clarifying testing requirements to obtain ocean dumping permits, after regulatory uncertainty had impeded dredging projects in the Port of New York. EPA explained that delaying the rule would threaten safety and economic harm.<sup>226</sup>
- In 1995, EPA issued an interim final rule revising continuous emission-monitoring requirements under the acid rain program. The original requirements had been the subject of a lawsuit and ongoing settlement discussions with various parties.<sup>227</sup>
- In 1996, EPA approved a SIP revision lowering the allowable vapor pressure for gasoline sold in specified Michigan counties. The state had adopted the revision, after subjecting it to public

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224. Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export, 76 Fed. Reg. 47,451, 47,457 (Aug. 5, 2011) (to be codified at 40 C.F.R. pt. 82); Protection of Stratospheric Ozone: Allocation of Essential Use Allowances for Calendar Year 2000: Allocations for Metered-Dose Inhalers and the Space Shuttle and Titan Rockets, 65 Fed. Reg. 716 (Jan. 6, 2000) (to be codified at 40 C.F.R. pt. 82); Protection of Stratospheric Ozone: Allocation of 1998 Essential Use Allowances, 63 Fed. Reg. 4360 (Jan. 28, 1998) (to be codified at 40 C.F.R. pt. 82).

225. Protection of Stratospheric Ozone, 65 Fed. Reg. 716, 720 (Jan. 6, 2000) (to be codified at 40 C.F.R. pt. 82) (allocating allowances for ODS used in metered-dose inhalers and space rockets); Protection of Stratospheric Ozone, 63 Fed. Reg. 4360, 4362 (Jan. 28, 1998) (to be codified at 40 C.F.R. pt. 82) (same); Protection of Stratospheric Ozone, 76 Fed. Reg. 47,451, 47,457 (Aug. 5, 2011) (to be codified at 40 C.F.R. pt. 82) (allocating allowances for ODS used as refrigerants and in air conditioning).

226. Clarification of Suspended Particulate Phase Bioaccumulation Testing Requirements for Material Dumped in Ocean Waters, 59 Fed. Reg. 26,566, 26,570–72 (May 20, 1994) (to be codified at 40 C.F.R. pt. 227).

227. Acid Rain Program: Continuous Emission Monitoring Rule Technical Revisions, 60 Fed. Reg. 26,560 (May 17, 1995) (to be codified at 40 C.F.R. pt. 75).

comment, in response to violations of federal clean air standards during the previous summer.<sup>228</sup>

- In 1997, EPA promulgated an interim final rule providing for environmental impact assessments of nongovernmental activities in Antarctica for the upcoming summer.<sup>229</sup> This action allowed the United States to deposit its instrument of ratification for the Protocol on Environmental Protection to the Antarctic Treaty and thereby advanced the foreign policy priority of having the protocol enter into force as soon as possible.
- In 1999, EPA issued two interim final rules banning specified chemicals for refrigerant and air conditioning uses based on new toxicity data indicating significant health risks.<sup>230</sup>
- In 1999, EPA issued a final rule establishing default emission limitations on sources of cross-state pollution. EPA explained that good cause was met because the agency faced a court-ordered deadline. EPA further explained that it did not expect these default limitations ever to apply because the limitations would be superseded by a rule that the agency had committed to issuing shortly.<sup>231</sup>
- In 2000, EPA issued a rule revising state pollutant-emission budgets for nitrogen oxide. These revisions were based on public comments that EPA received in response to earlier Federal Register notices, and thus a further opportunity for comment was arguably not required. EPA explained that good cause warranted immediate publication in any case because states were in the process of rewriting their SIPs based on the revised budgets.<sup>232</sup>
- In 2001, EPA established a temporary exemption from the phase-out schedule for methyl bromide, an ozone-depleting substance, to allow additional use for fumigation purposes. The

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228. Promulgation of Reid Vapor Pressure Standard; Michigan, 61 Fed. Reg. 45,893 (Aug. 30, 1996) (to be codified at 40 C.F.R. pt. 52).

229. Environmental Impact Assessment of Nongovernmental Activities in Antarctica, 62 Fed. Reg. 23,538 (Apr. 30, 1997) (to be codified at 40 C.F.R. pt. 8).

230. Protection of Stratospheric Ozone: Listing Hexafluoropropylene (HFP) and HFP-Containing Blends as Unacceptable Refrigerants Under EPA's Significant New Alternatives Policy (SNAP) Program, 64 Fed. Reg. 3865 (Jan. 26, 1999) (to be codified at 40 C.F.R. pt. 82); Protection of Stratospheric Ozone: Listing MT-31 as an Unacceptable Refrigerant Under EPA's Significant New Alternatives Policy (SNAP) Program, 64 Fed. Reg. 3861 (Jan. 26, 1999) (to be codified at 40 C.F.R. pt. 82).

231. Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport, 64 Fed. Reg. 28,250, 28,311 (May 25, 1999) (to be codified at 40 C.F.R. pt. 52).

232. Technical Amendment to the Finding of Significant Contribution and Rulemaking for Certain States for Purposes of Reducing Regional Transport of Ozone, 65 Fed. Reg. 11,222 (Mar. 2, 2000) (to be codified at 40 C.F.R. pt. 51).

action was designed to ensure the chemical would be available in sufficient quantities to treat imported produce.<sup>233</sup>

- In 2010, two months after the Deepwater Horizon explosion, EPA and the Coast Guard jointly issued an emergency rule designed to facilitate cleanup responses to the disaster by temporarily suspending certain regulatory requirements for oil facilities and vessels.<sup>234</sup>
- In 2010, EPA changed its prior approval of a portion of Texas' SIP to a disapproval and promulgated an FIP in its place.<sup>235</sup> The action stemmed from Texas' refusal to assist EPA in applying the CAA's Prevention of Significant Deterioration ("PSD") provisions to GHG emissions.<sup>236</sup> EPA explained that immediate promulgation of an FIP would allow air pollution sources in Texas to obtain PSD permits, notwithstanding the absence of an approved state program.<sup>237</sup>
- In 2012, responding to an explosive growth in fracking operations and accompanying volatile organic compound ("VOC") emissions, EPA issued an interim final rule establishing an FIP to regulate such emissions on the Fort Berthold Indian Reservation.<sup>238</sup>
- In 2012, EPA issued an interim rule making nonconformance penalties available to manufacturers of heavy-duty diesel engines. Such penalties are designed to offer manufacturers a temporary alternative to meeting the CAA's stringent technology-forcing standards while preventing these

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233. Protection of Stratospheric Ozone: Process for Exempting Quarantine and Preshipment Applications of Methyl Bromide, 66 Fed. Reg. 37,752 (July 19, 2001) (to be codified at 40 C.F.R. pt. 82).

234. Temporary Suspension of Certain Oil Spill Response Time Requirements to Support Deepwater Horizon Oil Spill of National Significance (SONS) Response, 75 Fed. Reg. 37,712 (June 30, 2010) (to be codified at 33 C.F.R. pts. 154, 155, & 40 C.F.R. pt. 112).

235. Determinations Concerning Need for Error Correction, Partial Approval and Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program, 75 Fed. Reg. 82,430 (Dec. 30, 2010) (to be codified at 40 C.F.R. pt. 52).

236. *Id.* at 82,432.

237. *Id.* at 82,433.

238. Approval and Promulgation of Federal Implementation Plan for Oil and Natural Gas Well Production Facilities; Fort Berthold Indian Reservation (Mandan, Hidatsa, and Arikara Nations) ("Fort Berthold Interim FIP"), ND, 77 Fed. Reg. 48,878 (Aug. 15, 2012) (to be codified at 40 C.F.R. pt. 49). The main text discusses this rulemaking in more detail below. *See infra* Part III.C.2.a.

manufacturers from thereby obtaining a competitive advantage.<sup>239</sup>

Several of the above instances—such as the Deepwater Horizon response and the ban on specific refrigerants in light of new toxicity data—involved emergency circumstances that clearly constituted good cause. Many of the other cases—such as the rule providing for environmental assessments in Antarctica and the promulgation of an FIP to process PSD permits—involved reasonable agency efforts to respond promptly to an impending deadline or other urgent situation. In general, the above list reflects tempered use of the good cause exception to develop fairly limited responses to specific factual circumstances.<sup>240</sup> Furthermore, even though the APA's notice-and-comment requirements were not strictly followed, some form of public comment was taken in virtually all cases, either before the rule was finalized or after promulgation of an interim final rule.

#### v. Rules with Minor Substantive Effects

Finally, EPA relied on the good cause exception to issue rules with relatively minor substantive effects on 19 other occasions. These rules include:

- Two rules exempting inert ingredients used in food packaging from the definition of “pesticide chemical” in order to avoid duplicating FDA oversight;<sup>241</sup>
- Guidelines for chemical testing that would have no effect on a party until their subsequent incorporation into specific rules which would be subject to notice and comment;<sup>242</sup> and
- A rule setting fees for the accreditation of training programs and certification of contractors in lead-based paint activities.<sup>243</sup>

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239. Nonconformance Penalties for On-Highway Heavy Heavy-Duty Diesel Engines, 77 Fed. Reg. 4678, 4678–80 (Jan. 31, 2012) (to be codified at 40 C.F.R. pt. 86). As explained further below, EPA intended the rule to allow one specific manufacturer to continue production for up to two years, and rival companies successfully challenged EPA's assertion that the manufacturer's inability to meet the emission standards constituted good cause. *See infra* text accompanying notes 307–08.

240. One notable exception, discussed in further detail in the text accompanying notes 307–08, was EPA's 2012 rule that made nonconformance penalties available to manufacturers of heavy-duty diesel engines.

241. Pesticides; Food Packaging Treated with a Pesticide, 71 Fed. Reg. 70,667 (Dec. 6, 2006) (to be codified at 40 C.F.R. pt. 180); Pesticides; FFDCA Jurisdiction Over Food Packaging Impregnated With an Insect Repellent Transferred to FDA, 63 Fed. Reg. 10,718 (Mar. 4, 1998) (to be codified at 40 C.F.R. pt. 180).

242. Toxic Substances Control Act Test Guidelines, 65 Fed. Reg. 78,746 (Dec. 15, 2000) (to be codified at 40 C.F.R. pt. 799).

243. Fees for Accreditation of Training Programs and Certification of Lead-based Paint Activities Contractors, 63 Fed. Reg. 46,668 (Sept. 2, 1998) (to be codified at 40 C.F.R. pt. 745).

Some rules with relatively minor substantive effects had already undergone notice and comment, so further notice and comment arguably was not required. These rules include:

- Revisions to statewide pollution-emission budgets based on public comments received during and after an extended comment period;<sup>244</sup>
- A rule withdrawing specified chemicals from a list of substances previously subject to reporting requirements, where members of the chemical industry committed to sponsor those chemicals under a voluntary reporting program;<sup>245</sup>
- Amendments to emission standards for hazardous air pollutants, where negotiations with interested parties regarding the amendments provided actual notice;<sup>246</sup> and
- Approval or disapproval of SIP revisions where those revisions were substantially the same as those for which notice and comment had previously been afforded.<sup>247</sup>

### c. Summing Up

On average, EPA invoked the good cause exception just over 41 times per year. Use of the exception peaked in 1998 and remained at an elevated level until 2001, but since has hovered near the annual average (Figure 2). The trend in EPA's use of the exception differs somewhat from the overall federal trend described by Boliek, who found a rise in use of the exception from 1999 to 2001,

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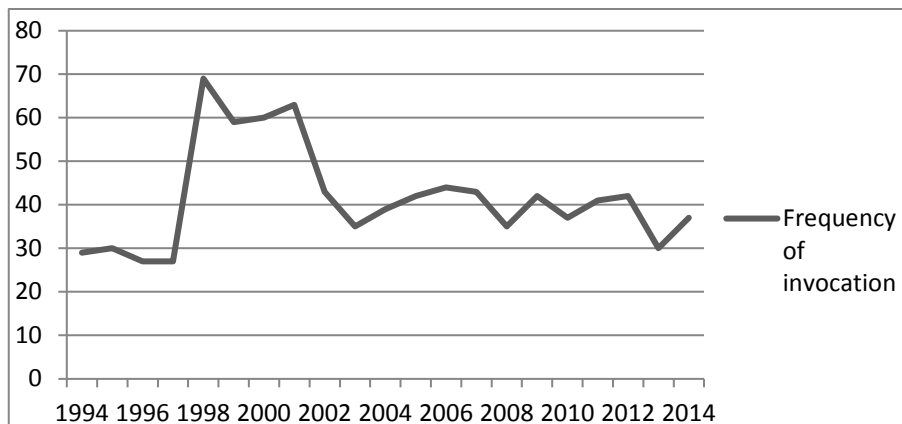
244. Technical Amendment to the Finding of Significant Contribution and Rulemaking for Certain States for Purposes of Reducing Regional Transport of Ozone, 64 Fed. Reg. 26,298 (May 14, 1999) (to be codified at 40 C.F.R. pt. 51).

245. Withdrawal of Certain Chemical Substances from Preliminary Assessment Information Reporting and Health and Safety Data Reporting Rules, 71 Fed. Reg. 57,439 (Sept. 29, 2006) (to be codified at 40 C.F.R. pts. 712, 716).

246. *See, e.g.*, NESHAP: Interim Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Interim Standards Rule), 67 Fed. Reg. 6792, 6794 (Feb. 13, 2002) (to be codified at 40 C.F.R. pts. 63, 264–66, 270–71) (finding good cause because industry, environmental groups, and EPA had negotiated contents of interim rule after the court had vacated prior rule); Land Disposal Restrictions; Treatment Standards for Spent Potliners From Primary Aluminum Reduction (K088), 63 Fed. Reg. 51254, 51263–64 (Sept. 24, 1998) (to be codified at 40 C.F.R. pts. 268, 271) (finding good cause because EPA “has been in protracted discussions with the regulated community both directly and through court pleadings”).

247. Approval and Promulgation of Implementation Plans; Revisions to the Nevada State Implementation Plan; Stationary Source Permits, 73 Fed. Reg. 20,536 (Apr. 16, 2008) (to be codified at 40 C.F.R. pt. 52). *Cf.* Approval and Promulgation of Air Quality Implementation Plans; Delaware; Enhanced Motor Vehicle Inspection and Maintenance Program, 64 Fed. Reg. 52,657 (Sept. 30, 1999) (to be codified at 40 C.F.R. pt. 52) (final rule approving revisions to SIP under CAA, where proposed approval had been subject to notice and comment and EPA approved all revisions except those applicable to federal facilities).

followed by continued elevated levels of use thereafter.<sup>248</sup> The period of elevated use by EPA corresponds roughly to the latter part of the Clinton Administration, which was more favorable to environmental regulation than its immediate successor. While EPA's relatively constant use of the exception under the Bush and Obama Administrations might cut against a purely political explanation, a focus on the 16 significant substantive rules EPA issued under the exception provides further insight. Ten of these rules were issued during the Clinton Administration, five during the Obama Administration, and one during the Bush Administration. The Bush-era EPA appeared especially reluctant to rely on the good cause exception to make substantive policy changes.



**Figure 2:** EPA Use of Good Cause Exception by Year

In sum, EPA has made frequent use of the APA's good cause exception, but mostly for minor clerical or technical changes. Substantive use of the exception has often involved corrections or clarifications, or matters where statutory amendments or court decisions dictated the Agency's course. EPA has applied the exception to make substantive changes in time-sensitive situations, but usually to allow the continuation of preexisting practices or to delay forthcoming regulatory requirements. Only in a handful of cases has EPA used the exception to impose new regulatory requirements in emergencies or urgencies. Furthermore, there is little evidence that EPA has sacrificed the participatory interests of regulated parties for the sake of efficiency.

These results are consistent with a 2012 Government Accountability Office review, which found that EPA followed notice-and-comment procedures for all 30 major rules (as defined by the CRA) that it issued between 2003 and 2010.<sup>249</sup> A frequent rhetorical target of would-be deregulators, EPA is surely

248. See *supra* text accompanying notes 181–85.

249. GAO-13-21, *supra* note 163, at 12. During the same period, approximately 35% of major rules issued by federal agencies were published without notice and comment. See *id.* at 8.

aware that its actions will be carefully scrutinized by industry and Congress. Mindful also of potential judicial challenges, the Agency may be especially sensitive to—and leery of—criticism that it is ignoring procedural requirements. EPA’s restrained approach to the good cause exception also may flow from the complicated and technical matters the Agency addresses; confronted with rapid changes and scientifically taxing mandates, the Agency may prefer to have more time to deliberate before it can act.

### *C. Urgencies as Good Cause*

As the above analysis indicates, EPA has been quite measured in invoking the good cause exception. In fact, the Agency may not be fully utilizing the authority available under the exception to deal with pressing circumstances. The statutory language and court interpretations of the text<sup>250</sup> leave a modest space for agencies to invoke the exception outside of emergencies to address the urgencies that agencies increasingly face. As already noted, the statutory text makes no mention of emergencies, but instead exempts rulemaking from notice and comment when “impracticable, unnecessary, or contrary to the public interest.”<sup>251</sup> While courts often have interpreted the “impracticable” and “contrary to the public interest” language to refer to emergencies, they also have been receptive to arguments for applying that language where delay “would do real harm.”<sup>252</sup>

#### *1. Crafting the Case of Urgencies as Good Cause*

In dealing with rapid developments and changing circumstances, one factor that may help to establish good cause is the protracted nature of contemporary rulemaking. For EPA, the fact that a typical rulemaking takes five to six years<sup>253</sup> may be quite relevant to a decision to rely on the good cause exception. Furthermore, congressional inaction on an emerging issue also may be relevant to good cause in some situations, as such inaction may justify the Agency’s prompt filling of statutory gaps.

Ultimately, agencies possess the expertise to address matters within their statutory mandates, and they should have some leeway to act in rapidly developing situations characterized by substantial uncertainty. The danger, of course, is that agencies will be tempted to make self-serving determinations of good cause in order to bypass notice-and-comment requirements.<sup>254</sup> To curb this danger, spelling out the circumstances that constitute an urgency—i.e., when ordinary rulemaking

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250. See *supra* Part III.A.

251. See *supra* Part III.A.

252. See *United States v. Dean*, 604 F.3d 1275, 1281 (11th Cir. 2010); *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (stating that exception may apply “in emergency situations . . . or where delay could result in serious harm”).

253. See *supra* text accompanying notes 94–96.

254. See, e.g., *Boliek*, *supra* note 12, at 3355–56 (“[T]he combination of a permissive statutory standard with an agency-determined trigger increases the opportunity for agency overreach.”).

cannot meet the need for relatively quick regulatory action—is an important but necessarily imprecise task.

The role of agencies in responding to urgencies is roughly analogous to the role of courts in deciding whether to issue a preliminary injunction. In each instance, a court or agency must make a decision quickly, on less than the full facts, but retains the authority to take subsequent action after further deliberation. Accordingly, agencies assessing whether an urgency constitutes good cause should undertake a multi-factor balancing analysis akin to the inquiry courts apply to a preliminary injunction request.<sup>255</sup> The factors relevant to this analysis may include: the extent of delay from following ordinary notice-and-comment procedures, the consequences of failing to act in a timely fashion, the public and private ramifications of the contemplated agency action, and the public interest. While some of these factors are fairly self-explanatory, two of these factors—extent of delay and consequences of failing to act in a timely fashion—merit further discussion.

The time saved by invoking the good cause exception includes more than the public comment period itself, which agencies often set at 30 or 60 days, but may be longer in more complex cases.<sup>256</sup> A full rulemaking can take several years once one considers the time necessary to gather and analyze data, develop a regulatory approach, respond to stakeholder concerns, and revise a proposed rule. Proceeding via the good cause exception will not eliminate the full process, as an agency must still act reasonably and have a reasonable basis for acting. However, use of the good cause exception can drastically shorten the timeframe for agency action.

Of course, any assessment of the consequences of delayed agency action should consider potentially significant threats to human health, public safety, and the environment. Agencies should receive some leeway in assessing the potential hazards associated with emerging technologies and new developments, which will often involve substantial uncertainty.<sup>257</sup> Furthermore, less obvious—and more systemic—consequences of inaction should be considered as well. In particular, the failure to regulate risks early on can lead to the entrenchment of interest groups and social norms.<sup>258</sup> While emerging technologies initially may lack the backing of major firms or trade associations, the passage of time may allow the formation of

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255. See *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 32 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”).

256. OFF. OF THE FED. REGISTER, *supra* note 165, at 5. The APA does not specify the length of the public comment period, although Executive Order 12,866 recommends a comment period of at least 60 days. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 at Sec. 6(a)(1) (Sept. 30, 1993); see also Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821–22 (Jan. 18, 2011). For complex rulemakings, agencies often provide for longer comment periods, sometimes exceeding 180 days. OFF. OF THE FED. REGISTER, *supra* note 165, at 5.

257. See Wansley, *supra* note 62, at 422 (recognizing the “pervasiveness of scientific uncertainty, especially with respect to emerging risks”).

258. See *id.* at 414–16.



powerful interest groups that could obstruct future regulatory efforts.<sup>259</sup> Similarly, the spread and growing social acceptance of a new technology may make future oversight more politically difficult even if the technology is later found to have harmful consequences.<sup>260</sup> As with court-issued preliminary injunctions, an appropriate objective of preliminary injunctive regulation may be to preserve the status quo until the agency can fashion a more deliberate and permanent response.

Ideally, agencies would proceed by issuing interim final rules, as opposed to permanent rules, and by soliciting comments after issuing each interim rule.<sup>261</sup> Although the APA does not require an agency to take comment when it invokes the good cause exception, agencies often do so voluntarily because public comment can bolster a rule's effectiveness and acceptability.<sup>262</sup> An interim final rule has an immediate effect on stakeholders and thus may generate even more public input and more extensive comments than a proposed rule.<sup>263</sup> Interim final rules offer a mechanism for balancing the objectives of addressing urgent situations, soliciting public input, and acting on a well-informed basis.<sup>264</sup>

Nonetheless, interim final rules do not offer a perfect solution for agencies confronted with urgencies. An interim final rule is by definition only an interim measure, and the potential for changes in the rule may weaken the incentive of regulated entities to implement—and the agency to enforce—an interim rule, particularly if substantial investments would be required.<sup>265</sup> In some instances, however, reliance interests and a desire to avoid confusion may make an agency hesitant to depart too dramatically from the substance of that rule when it proceeds to a permanent final rule.<sup>266</sup> If potential commenters believe that the agency has already committed to a course of action, an interim final rule may attract less public input or less thoughtful input than a proposed rule.<sup>267</sup> Notwithstanding the possibility that elements of an interim rule will become

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259. *See id.* at 414–15.

260. *See id.* at 415–19.

261. *Cf. Jordan, supra* note 58, at 172–73 (recommending limits on the scope of an interim rule or the duration of its validity).

262. *See Asimow, supra* note 58, at 711.

263. *See id.* at 716.

264. *See PIERCE, supra* note 58, at 676 (characterizing issuance of a temporary rule, followed by a permanent rule shaped by notice and comment, as “a practical compromise between the need for temporal urgency and the desirability of public participation in the rulemaking process”); *Asimow, supra* note 58, at 707; *Jordan, supra* note 58, at 169–70 (discussing legislative proposal to require agencies relying on the good cause exception in urgent situations “to comply with notice-and-comment requirements to the maximum extent feasible prior to the promulgation of the final rule” and “to fully comply as soon as reasonably practicable thereafter”).

265. *See Jordan, supra* note 58, at 173–74.

266. *See Asimow, supra* note 58, at 716; *Jordan, supra* note 58, at 174.

267. *See Asimow, supra* note 58, at 715.

locked in place over time, agencies frequently incorporate changes into permanent final rules that respond to public comments on interim final rules.<sup>268</sup>

## 2. Examples

To illustrate how the good cause exception could be applied to urgencies, the following discussion considers one instance where EPA invoked the exception, as well as a situation where the exception could prove useful.

### a. Fracking on the Fort Berthold Indian Reservation

EPA's response to the explosive growth in fracking operations on the Fort Berthold Indian Reservation demonstrates the good cause exception's potential as a vehicle for preliminary injunctive regulation. The reservation's wells, which exceed 1,000 in number and are responsible for a third of North Dakota's oil production,<sup>269</sup> cumulatively emit large volumes of volatile organic compounds ("VOCs") and thereby create a public health hazard.<sup>270</sup> Until recently, regulation of air emissions from fracking was left largely to the states; on Native American reservations, such regulation may be undertaken by tribal authorities.<sup>271</sup>

However, in the absence of active tribal oversight, the federal government has asserted a role in regulating air emissions on the Fort Berthold reservation. In August 2011, EPA and well operators entered into one-year consent agreements that established emission-control requirements with the understanding that operators would apply for individual air pollution permits.<sup>272</sup> Though EPA planned to issue the permits before the consent agreements expired, the Agency was overwhelmed by the hundreds of permit applications it received and the difficulty of tailoring each permit to the specific facts of each application.<sup>273</sup> Faced with the unpalatable alternatives of either disrupting existing operations or allowing emissions to resume unabated, EPA issued an interim final rule in August 2012 directly restricting VOC emissions from the wells. At the same time, EPA issued a notice soliciting public comment on a proposal that the interim final rule be made

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268. See GAO-13-21, *supra* note 163, at 25–27, 43. Because designating a rule as interim signals an agency's willingness to take seriously any comments it receives on the rule, such a designation may increase the likelihood that the rule will survive judicial review. See Kim, *supra* note 174, at 1076.

269. See Deborah Sontag & Brent McDonald, *In North Dakota, a Tale of Oil, Corruption and Death*, N.Y. TIMES, Dec. 29, 2014, at A1.

270. Fort Berthold Interim FIP, 77 Fed. Reg. at 48,879.

271. See Hannah J. Wiseman, *Risk and Response in Fracturing Policy*, 84 U. COLO. L. REV. 729, 805–06 (2013); 42 U.S.C. § 7601(d) (1990) (authorizing EPA to treat tribes as states for purposes of implementing CAA).

272. Fort Berthold Interim FIP, 77 Fed. Reg. at 48,879–80. For further background regarding the regulation of air emissions from oil and gas facilities on Indian lands, see Morgan Lewis, *The Clean Air Act's Application to Oil and Gas Facilities on Indian Lands: An Evolving Regulatory Scheme* (Feb. 21, 2013), <https://www.morganlewis.com/pubs/the-clean-air-acts-application-to-oil-and-gas-facilities-on-indian-lands>.

273. Fort Berthold Interim FIP, 77 Fed. Reg. at 48,880.

final.<sup>274</sup> Seven months later, EPA issued a final rule that revised the VOC emissions restrictions in light of public comment.<sup>275</sup>

The Fort Berthold example illustrates a suitable agency response to an urgent situation. While it may be debatable whether the circumstances constituted an emergency, the rapid rise in drilling activity, enabled by new techniques and technologies, generated the need for swift agency action. Alternative responses to the situation were either infeasible (because the agency simply could not individually process hundreds of permit applications) or inadequate (because unabated emissions would resume if EPA had proceeded with notice and comment before finalizing the rule). Moreover, the Agency's solicitation of post-promulgation comment and its subsequent publication of a permanent final rule demonstrate a tempered use of the exception that enabled the Agency to take a more deliberate and participatory approach.

#### b. Nanomaterials Oversight

Nanomaterials regulation provides a further example of how the good cause exception could prove useful. Chemical substances manufactured at the nanoscale possess different or enhanced properties that have led to their incorporation in numerous products in a wide range of sectors.<sup>276</sup> Advances in material science and chemical engineering have brought about the rapid development of possibly tens of thousands of new nanomaterials, with more constantly being introduced.<sup>277</sup> However, the unique and enhanced properties of nanomaterials also have resulted in growing concerns regarding novel health and environmental risks.<sup>278</sup> Lab tests suggest that some nanomaterials may be toxic and others may not, but scientists have not yet developed methods of predicting toxicity based on the properties of a specific nanoparticle.<sup>279</sup> Thus, although

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274. Approval and Promulgation of Federal Implementation Plan for Oil and Natural Gas Well Production Facilities; Fort Berthold Indian Reservation (Mandan, Hidatsa, and Arikara Nations), North Dakota, 77 Fed. Reg. 48,923, 48,924 (Aug. 15, 2012) (to be codified at 40 C.F.R. pt. 49).

275. Approval and Promulgation of Federal Implementation Plan for Oil and Natural Gas Well Production Facilities; Fort Berthold Indian Reservation (Mandan, Hidatsa, and Arikara Nation), North Dakota, 78 Fed. Reg. 17,836 (Mar. 22, 2013) (to be codified at 40 C.F.R. pt. 49).

276. See Chemical Substances When Manufactured or Processed as Nanoscale Materials; TSCA Reporting and Recordkeeping Requirements ("Nanoscale Materials"), 80 Fed. Reg. 18,330, 18,332 (Apr. 6, 2015) [hereinafter *Nanoscale Materials*] (to be codified at 40 C.F.R. pt. 704).

277. See Ryan Bradley, *The Great Big Question About Really Tiny Materials*, FORTUNE (Mar. 6, 2015, 12:30 PM), <http://fortune.com/nanomaterials/>.

278. See *Nanoscale Materials*, *supra* note 276, at 18,333; Bradley, *supra* note 277.

279. See Bradley, *supra* note 277.

toxicity concerns have been expressed for over a decade,<sup>280</sup> the risks remain poorly understood and surrounded by vast uncertainty.<sup>281</sup>

The Toxic Substances Control Act (“TSCA”) establishes federal authority to regulate chemical substances, including nanomaterials. Although the statute has been widely criticized,<sup>282</sup> it does offer several tools that EPA could invoke to address nanomaterials’ potential hazards. Section Four authorizes EPA to issue rules or orders mandating testing of a chemical.<sup>283</sup> Section Five authorizes EPA to issue rules establishing that a particular use of a chemical constitutes a significant new use, thereby requiring manufacturers to file a notice with EPA.<sup>284</sup> Section Six authorizes EPA to regulate a chemical that presents unreasonable health or environmental risks.<sup>285</sup> Finally, Section Eight authorizes EPA to promulgate rules requiring manufacturers to submit specified information regarding a chemical’s production, use, and other relevant information.<sup>286</sup> Most of these provisions require EPA to proceed via the rulemaking process.

Despite longstanding concerns about the potential adverse effects of nanomaterials, EPA has moved with extreme caution to exercise even the modest authority it has under TSCA. In April 2015, EPA published a draft rule under TSCA Section Eight that would require manufacturers to report on a nanomaterial’s identity, production volume, exposure and release information, and existing data concerning environmental and health effects.<sup>287</sup> This modest reporting requirement—which is yet to be finalized—has been years in the making. An EPA advisory committee first called for such a requirement in 2005, and EPA sent a prepublication draft of the rule to OIRA for review in 2010. A related proposal that EPA sent to OIRA in 2010—which would have required a significant-new-use notice for new nanomaterial uses—has apparently been abandoned.<sup>288</sup>

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280. See Albert C. Lin, *Size Matters: Regulating Nanotechnology*, 31 HARV. ENVTL. L. REV. 349, 356–61 (2007) (citing various references dated 2006 or earlier).

281. See *Nanoscale Materials*, *supra* note 276, at 18,333–34; Bradley, *supra* note 277; Daniel A. Farber, *Uncertainty*, 99 GEO. L.J. 901, 947 (2011).

282. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-428T, CHEMICAL REGULATION: OPTIONS FOR ENHANCING THE EFFECTIVENESS OF THE TOXIC SUBSTANCES CONTROL ACT 3 (2009); see generally Noah M. Sachs, *Jumping the Pond: Transnational Law and the Future of Chemical Regulation*, 62 VAND. L. REV. 1817 (2009); John S. Applegate, *Synthesizing TSCA and REACH: Practical Principles for Chemical Regulation Reform*, 35 ECOLOGY L.Q. 721 (2008).

283. 15 U.S.C. § 2603 (2016).

284. *Id.* § 2604(a).

285. *Id.* § 2605(a).

286. *Id.* § 2607(a).

287. *Nanoscale Materials*, *supra* note 276, at 18340–42.

288. See Richard Denison, *Environmental Defense Fund, A Hint of Movement in the Super Slo-Mo that is Nanoregulation at EPA under TSCA*, ENVTL. DEF. FUND: EDF HEALTH (Oct. 8, 2014), <http://blogs.edf.org/health/2014/10/08/a-hint-of-movement-in-the-super-slo-mo-that-is-nanoregulation-at-epa-under-tsca/>. EPA apparently decided not even to bother with sending to OIRA a third proposal that would have required industry to test certain nanomaterials. See *id.*

The sluggish nature of notice-and-comment rulemaking is not the only reason, or even the main reason, for EPA's inaction on nanomaterials. A number of other factors, including industry opposition and TSCA's relatively burdensome standards, are also to blame.<sup>289</sup> Notice-and-comment requirements nonetheless protract an already cumbersome process. If EPA someday musters the will to use TSCA to gather information on nanomaterials, require testing, or impose restrictions, the rapidly changing nanomaterials market and nanotechnology's uncertain hazards could provide EPA with good cause to act without notice and comment. EPA has had reasonable grounds since at least 2005 to require industry to submit data on nanomaterials, and it would be logical for EPA to invoke the good cause exception to gather the information it lacks. As things stand today, EPA struggles to collect data on the potential hazards of nanomaterials while those materials proliferate on the market.

#### IV. FURTHER REFLECTIONS

The specific proposal of this Article is for EPA to consider more aggressive use of the good cause exception to respond to urgencies resulting from rapid technological developments and environmental changes. This final Part steps back from the details of that proposal to situate it in the context of debates over executive power and legislative proposals for addressing urgencies.

##### A. *Dangers of the Emergency Executive?*

An expansive interpretation of the good cause exception may raise concerns regarding potential abuse as well as the aggrandizement of executive power. For genuine emergencies, reliance on emergency authority seems appropriate. In recent years, however, various commentators have criticized broad presidential assertions of emergency authority.<sup>290</sup> These commentators describe the rise of "an increasingly executive-dominated political apparatus" that threatens to undermine the rule of law, separation of powers, and other basic tenets of liberal democracy.<sup>291</sup> Although many of these criticisms are aimed specifically at the President, similar concerns may apply to the modern administrative state. Indeed, thanks to OIRA review and other mechanisms for exercising greater presidential control over the executive branch,<sup>292</sup> distinctions between the President and administrative agencies are becoming less meaningful. Against the backdrop of an

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289. *See id.*

290. *See, e.g.,* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1038–39 (2004) ("A grant of *carte blanche* poses obvious risks of abuse, and many thoughtful constitutionalists have insisted on protecting core civil and political liberties during even the most severe crises."); David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1335 (2008) (contending that "we cannot trust the executive to balance liberty and security fairly on its own" in an emergency); Lobel, *supra* note 101, at 1427–28 (advocating procedural and substantive restrictions on emergency executive power); Scheuerman, *supra* note 14, at 747 (warning of dangers of corruption, abuse, and oppression).

291. Scheuerman, *supra* note 14, at 744–45.

292. *See* SHANE, *supra* note 38, at 158.

increasingly unitary executive, agency reliance on the good cause exception to address emergencies might be as troubling as presidential assertions of emergency authority.

Recent scholarship on emergency executive powers has drawn on the work of Weimar and Nazi jurist Carl Schmitt, who once suggested that emergencies “pose an insuperable problem for the aspiration of liberal democracies to govern through the rule of law.”<sup>293</sup> This problem, Schmitt contended, is rooted in the inherent difficulties of defining an emergency and of enforcing procedural limits in an emergency.<sup>294</sup> In his view, only an authoritarian executive can adequately deal with the crises that arise rapidly and with greater frequency in modern society.<sup>295</sup>

Schmitt’s views have provoked a wide range of responses. Some defend the possibility of liberal democratic control through a more rigorous application of administrative law principles to emergency situations.<sup>296</sup> Others suggest the establishment of new mechanisms to check executive branch excesses.<sup>297</sup> Still others agree with Schmitt on the limits of liberal legal constraints, but argue that political checks effectively constrain the executive in an emergency.<sup>298</sup>

However controversial Schmitt’s ultimate prescriptions may be, there is some truth to his observations regarding the difficulty of imposing enforceable constraints on executive action. This difficulty applies not only to emergency authorities belonging to the President, but also to other executive branch authorities. Eric Posner and Adrian Vermeule have criticized the APA’s good cause exception along these lines, asserting that the standard is too “amorphous” to serve as an effective constraint on agencies “whenever government’s interests become pressing.”<sup>299</sup> In times of perceived crisis, Posner and Vermeule contend, agencies rely on the broad and flexible language of the good cause exception to bypass ordinary administrative law requirements.<sup>300</sup>

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293. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1099 (2009) (discussing Schmitt’s views).

294. See *id.* at 1099–1100.

295. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 33 (2010); Scheuerman, *supra* note 14, at 755. Schmitt’s argument may carry even greater force today, in light of Scheuerman’s suggestion that “the pace at which major crises happen is probably undergoing intensification.” *Id.* at 743.

296. See Vermeule, *supra* note 293, at 1101–03 (discussing proposals to eliminate emergency exceptions to administrative law).

297. See Scheuerman, *supra* note 14, at 763 (discussing Bruce Ackerman’s proposals to create a “Supreme Executive Tribunal” that would determine the legality of proposed executive action and to establish clear congressional oversight of presidential emergency authority).

298. See Scheuerman, *supra* note 14, at 756 (discussing views of Eric Posner and Adrian Vermeule).

299. Posner & Vermeule, *supra* note 295, at 89.

300. *Id.* at 99–101 (discussing *Jifry v. FAA*, 370 F.3d 1174 (D.C. Cir. 2004)). In *Jifry*, the D.C. Circuit upheld the FAA’s reliance on the good cause exception to revoke the commercial operating licenses of pilots who were aliens. *Jifry*, 370 F.3d at 1181–82. Rather

The good cause exception does offer a temptation for agencies to assert the existence of a crisis even when the facts may not demonstrate genuinely urgent circumstances. However, the courts, Congress, and the public serve as important checks against potential abuse.<sup>301</sup> Courts frequently are called on to review agencies' use of the exception, and though the proper standard for reviewing agency findings of good cause remains unsettled, agencies typically receive some degree of deference.<sup>302</sup> Nonetheless, in a number of instances, courts have struck down an agency's reliance on the good cause exception even when the agency asserted the existence of an emergency.<sup>303</sup> The holdings of the cases, which very much depend on the specific facts, demonstrate a judicial willingness to guard against abuse of the exception.

For example, in recent years several federal appellate courts have rejected the Attorney General's contention that public safety justifications warranted immediate application of the registration requirements found in the Sex Offender Registration and Notification Act. Specifically, the Third, Fifth, Sixth, Eighth, and Ninth Circuits explained that the government's asserted rationale for proceeding without notice and comment—public safety—was undermined by the fact that Congress had not made the requirements immediately effective and that other laws could be applied against sex offenders.<sup>304</sup> As the Third Circuit declared, "Urgency for urgency's sake, or 'an agency's perception of urgency,' without any supporting evidence" does not establish good cause.<sup>305</sup> Nor may an agency establish good cause merely by pointing to serious harm that the underlying statute is meant to address; rather, the agency "must explain why the harm targeted by the regulation will worsen unless notice and comment is dispensed with."<sup>306</sup>

Other cases—including several in the environmental arena—similarly demonstrate courts' willingness to scrutinize agency assertions of good cause closely. In *Mack Trucks, Inc. v. EPA*, for example, the D.C. Circuit rejected EPA's promulgation (without notice and comment) of a rule permitting heavy-duty diesel

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than advocate elimination of the good cause exception, however, Posner and Vermeule acknowledge its practical inevitability. Posner & Vermeule, *supra* note 295, at 106–12.

301. Adrian Vermeule goes even further in arguing for an "optimal" level of abuse of power by agencies as an inevitable byproduct of furthering other goals, including advancing social welfare and limiting oversight costs. Vermeule, *supra* note 39, at 676.

302. *United States v. Reynolds*, 710 F.3d 498, 506–09 (3d Cir. 2013) (discussing various possible standards of review but ultimately concluding that government's good cause determination "will not pass muster under any of the available standards"); *see also Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (rejecting EPA's finding of good cause even if reviewed under arbitrary or capricious standard).

303. *See PIERCE*, *supra* note 58, at 674–75 (discussing cases).

304. *United States v. Brewer*, 766 F.3d 884, 888–90 (8th Cir. 2014); *United States v. Reynolds*, 710 F.3d 498, 509–14 (3d Cir. 2013); *United States v. Johnson*, 632 F.3d 912, 928–29 (5th Cir. 2011); *United States v. Valverde*, 628 F.3d 1159, 1165–68 (9th Cir. 2010); *United States v. Cain*, 583 F.3d 408, 420–24 (6th Cir. 2009). *But see United States v. Dean*, 604 F.3d 1275, 1282 (11th Cir. 2010) (same); *United States v. Gould*, 568 F.3d 459, 470 (4th Cir. 2009) (upholding Attorney General's reliance on good cause exception).

305. *Reynolds*, 710 F.3d at 512.

306. *Id.* at 514.

engine manufacturers to pay penalties in exchange for the right to sell noncompliant engines.<sup>307</sup> The rule was aimed at assisting one particular manufacturer who had failed to develop a technology that would meet regulatory requirements, and EPA asserted that the manufacturer, its employees, customers, and suppliers would suffer serious harm in the rule's absence. The court nonetheless rejected EPA's claim that such harm established an emergency or otherwise constituted good cause.<sup>308</sup> Other courts have rejected EPA claims of good cause where EPA could have met statutory deadlines through the ordinary notice-and-comment process.<sup>309</sup> Similarly, in *NRDC v. Evans*, the Ninth Circuit rejected the National Marine Fisheries Service's invocation of good cause to issue annual rules limiting the rate of take of various fish species.<sup>310</sup> The court acknowledged that "the intricacy of the rules may have some bearing on the good cause calculus," but explained that good cause "requires some showing of exigency beyond generic complexity of data collection and time constraints."<sup>311</sup>

Analyzing the broader issue of how federal agencies use outdated statutes to cope with new regulatory challenges, Professors Jody Freeman and David Spence concluded that "agencies are surprisingly accountable, not just to the President, but also to Congress, the courts, and the public."<sup>312</sup> Freeman and Spence specifically focused on two examples: EPA's use of the CAA to address climate change and the Federal Energy Regulatory Commission's use of the Federal Power Act to modernize electricity policy.<sup>313</sup> In each example, the respective agency addressed new challenges by adapting old statutes that Congress had failed to update.<sup>314</sup> Freeman and Spence found that "internal and external checks on reckless action" lead agencies to "tread carefully" even if they think it unlikely that Congress will override their decisions.<sup>315</sup> Namely, congressional committees and individual members possess various tools—oversight hearings, funding decisions, and the like—to oversee or rebuke agencies.<sup>316</sup> Additionally, "guided by general counsel and by career attorneys with long-term institutional perspective," agencies themselves cautiously construe their authorizing statutes in anticipation of judicial review.<sup>317</sup> Particularly when the stakes are high, agencies like EPA "demonstrate acute sensitivity to countervailing pressures and heightened responsiveness to legal and political risk."<sup>318</sup> These pressures and dynamics also are likely to be at work when agencies contemplate reliance on the good cause exception.

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307. 682 F.3d 87 (2012).

308. *Id.* at 94.

309. *See, e.g., Sharon Steel v. EPA*, 597 F.2d 377, 379–81 (3d Cir. 1979); *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 292 (3d Cir. 1977).

310. *Nat. Res. Def. Council v. Evans*, 316 F.3d 904, 910–12 (9th Cir. 2003).

311. *Id.* at 906, 912.

312. Freeman & Spence, *supra* note 3, at 3.

313. *Id.* at 19.

314. *Id.* at 22–43, 47–63.

315. *Id.* at 67.

316. *Id.*

317. *Id.* at 68.

318. *Id.* at 75–76.



### *B. Additional Approaches*

This Article has considered several possible avenues under existing law for agencies to respond nimbly to the challenges posed by emerging technologies and other rapidly changing circumstances. For comparison purposes, this Section briefly considers additional options that would require new legislation. These options may address more directly some of the concerns raised in this Article, but are politically unlikely.

One possibility would be for Congress to give agencies the explicit ability to act on a limited basis under truncated procedural requirements, perhaps subject to a very deferential form of judicial review. Although it is quite unlikely that Congress would enact such authority in a freestanding form, Congress might accomplish the equivalent through amendments to the good cause provision. One proposal, for example, would give agencies the express authority to rely on the good cause provision if notice-and-comment rulemaking would “substantially frustrate legislative policies.”<sup>319</sup> Others suggest that the good cause provision be amended to specify more narrowly the conditions under which it can be invoked, to require that agencies publish a formal statement of reasons justifying their good cause findings, or to mandate public comment after issuance of a rule under the provision.<sup>320</sup> While many of these latter proposals would impose additional burdens on agencies’ uses of the exception, they might also facilitate increased use of the exception by assuring the courts that agencies are reasonably relying on the exception.

A more radical proposal would grant agencies the power to organize regulatory experiments involving risky new technologies.<sup>321</sup> This proposal by Matthew Wansley contemplates three sets of experimental conditions: in the first, limited use of a new technology would be allowed with no regulatory oversight; in the second, use of the new technology would be allowed under a range of regulatory constraints; and in the third, use of the technology outside of these experiments would be subject to a moratorium.<sup>322</sup> This approach would help fill the information gaps that often characterize emerging technologies and provide specific data regarding the effectiveness of different possible regulatory responses.<sup>323</sup> It would also combat the tendency for concentrated interest groups to become entrenched while regulators await the development of further risk

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319. Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 331–32 (1989).

320. See Boliek, *supra* note 12, at 3343 (recommending substitution of “good cause” standard with “imminent peril” standard); Kim, *supra* note 174, at 1072–75; Nathanael Paynter, *Flexibility and Public Participation: Refining the Administrative Procedure Act’s Good Cause Exception*, 2011 U. CHI. LEGAL F. 397, 417–19 (2011) (making a similar proposal to clarify “good cause” standard); see also Lavilla, *supra* note 319, at 324–26 (summarizing the history of proposed amendments).

321. See Wansley, *supra* note 46, at 404, 430–42.

322. *Id.* at 430, 433.

323. *Id.* at 434.

information.<sup>324</sup> However, it is not clear that experimental conditions could be adequately controlled amid rapidly changing circumstances and complex regulatory environments. Furthermore, as Wansley himself concedes, the prospects for adoption of his proposal are slim.<sup>325</sup> For the foreseeable future, regulators will have to work with existing tools, including the good cause exception, to address the potential hazards of emerging technologies.

### CONCLUSION

Ultimately, regulators must be able to respond in a timely manner to the rapidly developing challenges of the twenty-first century. The APA requires notice and comment for good reason, but to paraphrase Justices Robert Jackson and Arthur Goldberg, the statute is “not a suicide pact.”<sup>326</sup> Interim final rules promulgated under the good cause exception can serve as an important tool for protecting public welfare while also accounting for the values of public participation and regulatory analysis. EPA should use the exception judiciously when confronted with urgencies posed by emerging technologies or other sources.

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324. *Id.* at 438–41.

325. *Id.* at 473.

326. There is some dispute regarding the original source of this phrase, as used to describe the Constitution. *See* David Corn, *The Suicide Pact Mystery*, SLATE (Jan. 4, 2002, 11:04 AM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2002/01/the\\_suicide\\_pact\\_mystery.html](http://www.slate.com/articles/news_and_politics/politics/2002/01/the_suicide_pact_mystery.html).