This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

Administrative Conference of the United States

Adoption of Statement

Agency: Administrative Conference of the United States.

Action: Notice.


For Further Information Contact: Gisselle Bourns, Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW, Washington, DC 20036; Telephone 202–480–2080

Supplementary Information: The Administrative Conference Act, 5 U.S.C. 591–596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations for improvements to agencies, the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 594(1)). For further information about the Conference and its activities, see www.acus.gov.

The Conference’s Sixty-Third Plenary Session was conducted, for the first time, as a virtual meeting, held via the Internet, in accordance with the Conference’s earlier Recommendation, 2011–7, The Federal Advisory Committee Act—Issues and Proposed Reforms. The plenary session was open for participation by Conference members and the public for the period of September 18 through September 25, 2015. The Assembly of the Conference adopted one formal statement. Statement #19, "Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking," examines judicial application of an issue exhaustion requirement in preenforcement review of administrative rulemaking. It invites courts to consider a series of factors when examining the doctrine of issue exhaustion in the context of preenforcement review of agency rules. The Appendix below sets forth the full text of this statement. The Conference will transmit the statement to federal agencies, relevant committees of Congress, and the Judicial Conference of the United States, as appropriate, for their consideration. The statement is not binding, but it represents the collective views of the membership of the Administrative Conference of the United States. The research report prepared for the Conference on this subject is posted at: www.acus.gov/63rd.

Dated: October 2, 2015.

Shawne C. McGibbon,
General Counsel.

Appendix—Statement of the Administrative Conference of the United States

Administrative Conference Statement #19

Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking

Adopted September 25, 2015

The doctrine of issue exhaustion generally bars a litigant challenging agency action from raising issues in court that were not raised first with the agency. Although the doctrine originated in the context of agency adjudication, it has been extended to judicial review of challenges to agency rulemakings. Scholars have observed that issue exhaustion cases "conspicuously lack discussion of whether, when, why, or how [the issue] exhaustion doctrine developed in the context of adjudication should be applied to rulemaking."1 The Administrative Conference has studied the issue exhaustion doctrine in an effort to bring greater clarity to its application in the context of preenforcement review of agency rules. The Conference believes that this Statement may be useful by setting forth a series of factors that it invites courts to consider when examining issue exhaustion in that context.2

Evolution of the Issue Exhaustion Doctrine

The requirement that parties exhaust their administrative remedies (“remedy exhaustion”) is a familiar feature of U.S. administrative law. This doctrine generally bars a party from appealing a final agency action to a court unless the party exhausts prescribed avenues for relief before the agency.3

The related but distinct concept of “issue exhaustion” prevents a party from raising issues in litigation that were not first raised before the agency, even if the petitioner participated in the administrative process.4 As with remedy exhaustion, the issue exhaustion doctrine initially arose in the context of agency adjudications.5

As the Supreme Court has recognized, “administrative issue-exhaustion requirements are largely creatures of statute.”6 In several judicial review provisions adopted during the 1930s, prior to the advent of the Administrative Procedure Act of 1946, Congress expressly required parties to raise all their objections to agency action before adjudicatory agencies. Since that time, Congress has included issue exhaustion provisions in many statutes governing review of agency orders.7 The typical statute contains an exception for “reasonable grounds” or “extraordinary circumstances” and permits the court to review the agency action.8


2. This Statement does not address the application of the doctrine in the context of a challenge to a rule in an agency enforcement action, where the passage of time and new entrants may complicate the inquiry. The Conference has previously identified issues that Congress should not ordinarily preclude courts from considering when rules are challenged in enforcement proceedings. See Admin. Conf. of the U.S., Recommendation 82–7, Judicial Review of Rules in Enforcement Proceedings (Dec. 17, 1982), http://www.acus.gov/82-7.


4. See Fiber Tower Spectrum Holdings, LLC v. FCC, No. 14–1039, slip. op. at 9 (D.C. Cir. Apr. 3, 2015), Issue exhaustion statutes may not always be jurisdictional. E.g., EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1602–03 (2014) (“A rule may be ‘jurisdictional,’ we have explained. Section7607(d)(7)(B), we hold, is of that character. It does not speak to a court’s authority, but only to a party’s procedural obligations.”) (citations omitted); see also Advocates for Highway and Auto Safety v. FHMSCA, 429 F.3d 1136, 1148 (D.C. Cir. 2005) (“as a general matter, a party’s presentation of issues during a rulemaking proceeding is not a jurisdictional matter”) (emphasis in original).

5. See Lubbers Report, supra note 1, at 2-3.


7. See Lubbers Report, supra note 1, at 4-6.
require an agency to take new evidence under certain conditions.8

Courts have also imposed issue exhaustion requirements in the adjudication context in the absence of an underlying statute or regulation requiring it. The Supreme Court early on held that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice9 as one of "simple fairness," emphasizing that issue exhaustion promotes orderly procedure and good administration by offering the agency an opportunity to act on objections to its proceedings.10 But questions about the common law application of the doctrine were later raised in Sims v. Apfel, where the Court held that a judicial exhaustion requirement was inappropriate on review of the Social Security Administration’s informal, non-adversary adjudicatory benefit determinations, reasoning that "the desire to impose a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." 10

Although the issue exhaustion doctrine originated in the adjudication context, it has been extended to preenforcement review of agency rulemakings. Two statutes have been identified by the Conference as explicitly originating in the adjudication context, it has been extended to preenforcement review of agency rulemakings. Two statutes have been identified by the Conference as explicitly requiring issue exhaustion for review of agency rules—the Clean Air Act and the Security Act. Both statutes were amended to incorporate issue exhaustion provisions in the 1970s, when Congress enacted numerous regulatory statutes with significant rulemaking requirements in the adjudication context.11

The doctrine has also been extended to the rulemaking context through common law. Despite Sims’ focus in the adjudication context on the extent to which the underlying administrative proceeding resembled adversarial litigation for purposes of determining whether the doctrine applied, appellate courts have increasingly applied the doctrine in the absence of a statute requiring it when reviewing preenforcement challenges to agency rules enacted via notice-and-comment proceedings. And at least

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9 United States v. L. T. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952) (reviewing an adjudicative order issued by the Interstate Commerce Commission after an adversarial hearing); see also Advocates for Highway and Auto Safety v. FMCSA, 429 F.3d 1136, 1149 (D.C. Cir. 2005) (applying the same rationale to rulemaking).
13 Lubbers Report, supra note 1, at 4, 11, 13.
15 Although Sims was recently cited by the Ninth Circuit as militating against issue exhaustion in an informal rulemaking issued without prior notice or comment, the Ninth Circuit’s analysis may be limited to the specific statutory context, as it did not address the underlying administrative proceeding in which the issue exhaustion requirement was found to be inappropriate on review of the Social Security Administration’s informal, non-adversarial administrative proceeding. See generally Gage v. Atomic Energy Comm’n, 479 F.2d 1214, 1217–19 (D.C. Cir. 1973).
16 See William Funk, Exhaustion of Administrative Remedies Since Darby, 18 Pace Envtl. L. Rev. 1, 17 (2000) ("[u]nfortunately, some courts have ignored the specific statutory authority for [issue exhaustion] and have applied a similar exhaustion requirement in cases totally unrelated to that statute, while citing cases involving application of that statute.")
17 The impact of such barriers can fall most heavily on persons for whose interests are not in close alignment with the interests that have been advanced most forcefully by other participants in a given proceeding. See Koroefot v. Vilsack, 707 F.3d 394, 401 (D.C. Cir. 2013) (Williams, J., concurring).
If an issue exhaustion question arises in litigation, litigants should be given an opportunity to demonstrate that some participant adequately raised the issue during the rulemaking or that circumstances exist to justify not requiring issue exhaustion. And if a court declines to apply issue exhaustion principles to preclude review of new issues, the agency should be given an opportunity to respond to new objections on the merits. Where application of the issue exhaustion doctrine forecloses judicial review, the Administrative Procedure Act, 5 U.S.C. 553(e), provides a procedural mechanism for the public to raise new issues that were not presented to the agency during a rulemaking proceeding: The right to petition agencies for amendment or repeal of rules.

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2015–0062]

Availibility of an Environmental Assessment and Finding of No Significant Impact for Field Use of Vaccines Against Avian Influenza H5 Virus Strains

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability and request for comments.

SUMMARY: We are advising the public that an environmental assessment has been prepared by the Animal and Plant Health Inspection Service relative to the use of one or more veterinary biological products as a treatment for and as an aid in the reduction of highly pathogenic avian influenza (HPAI) incidence caused by strains such as Eurasian H5 viruses of clade 2.3.4.4 lineage. Any biological products would become part of the measures to reduce the incidence of HPAI in the nation’s commercial poultry flocks. Based on the environmental assessment, we have concluded that the use of vaccines as described in the environmental assessment will not have a significant impact on the human environment. We are making this environmental assessment and finding of no significant impact available to the public for review and comment.

DATES: We will consider all comments that we receive on or before November 6, 2015.

ADDRESSES: You may submit comments by either of the following methods:

• Federal eRulemaking Portal: Go to http://www.regulations.gov/
  #docketDetail;D=APHIS-2015-0062.

• Postal Mail/Commercial Delivery: Send your comment to Docket No. APHIS–2015–0062, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at http://www.regulations.gov/
  #docketDetail;D=APHIS-2015-0062 or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. Donna Malloy, Operational Support Section, Center for Veterinary Biologics, Policy, Evaluation, and Licensing, VS, APHIS, 4700 River Road Unit 148, Riverdale, MD 20737–1231; (301) 851–3426, fax (301) 734–4314.

SUPPLEMENTARY INFORMATION: Under the Virus–Serum–Toxin Act (21 U.S.C. 151 et seq.), the Animal and Plant Health Inspection Service (APHIS) is authorized to promulgate regulations designed to ensure that veterinary biological products are pure, safe, potent, and efficacious. Veterinary biological products include viruses, toxins, and analogous products of natural or synthetic origin, such as vaccines, antitoxins, or the immunizing components of microorganisms intended for the diagnosis, treatment, or prevention of diseases in domestic animals.

APHIS issues licenses to qualified establishments that produce veterinary biological products and issues permits to importers of such products. APHIS also enforces requirements concerning production, packaging, labeling, and shipping of these products and sets standards for the testing of these products. Regulations concerning veterinary biological products are contained in 9 CFR parts 101 to 124.

Veterinary biological products meeting the requirements of the regulations may be considered for addition to the U.S. National Veterinary Stockpile (NVS). The NVS is the nation’s repository of vaccines and other