The State of Alaska's Power to Petition for Federal Rulemaking under APA §553(e)

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This deceptively simple provision is, on its face, rather limited in its grant of power to petitioners. It possesses, however, a very practical potential for seizing the initiative from inert federal agencies and catalyzing federal rulemaking action. It straightforwardly sets in motion a progression of administrative procedures for putting particular provisions into federal regulations, with distinct tactical and political advantages, backed up by the opportunity for direct oversight by a federal court.

Normal avenues for attempting to induce federal action (appeals to Members of Congress, political inquiries to the administration, less formal approaches to agencies, media campaigns, etc.) all have their place, but are relatively unwieldy, indirect, and unfocused. The 553(e) route is a direct line, and may offer Alaska more bang for its buck.

Procedure and Prospects:

Who can petition for a rulemaking?

Anyone who arguably has an interest in an area of regulation may petition under 553(e). The standing requirement that has to be fulfilled is not very restrictive. The phrase "interested person" has been interpreted to be far broader than the standing requirement in judicial actions. It appears that any person whose "interests are or will be affected by the issuance amendment or repeal of a rule" can use 553(e), and that is a very broad definition indeed. The State of Alaska clearly has the required interest in any imaginable area of policy proposal.

Although any interested person may petition, it is realistic to note that the more substantial the petitioning party, the more likely the agency is to grant it fullest consideration. If a sovereign state makes a well-publicized petition to a federal agency, it is far more likely that the agency will immediately publish notice of the petition in the Federal Register and open a record for comments, and hold hearings, whether formal or informal. The political momentum of the petitioner adds to the seriousness with which 553(e) is considered by the agency, at the same time that 553(e) adds focus and power to the petitioner's request.

Who gets petitioned?

A 553(e) petition is directed to any agency which has statutory authority to promulgate the kind of regulation being proposed. As to oil spill issues, a variety of agencies might be petitioned: the U.S. Department of Interior on pipeline corridor and terminal land management, and the like; the Coast Guard on double-hulling, crew-size, navigation practices, required response equipment; the Department of Commerce on certain transport issues; etc. There is no set form in which petitions proposing rule-making must be made, although a number of agencies have set out

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The petition for rulemaking

A request under 553(e) can probably be made in oral as well as in written form; it might in fact be submitted as just a broad undefined request "that a rule on so-and-be enacted."

Realistically, however, a 553(e) petition should not only be in writing; it should also set out an actual proposed text for regulatory adoption in the exact form in which it could be published in the Federal Register. The drafting of language clarifies issues, pins down a rule's structure and language, advances the review process, and mobilizes momentum in a way that general policy exhortations would not. Even if the proposed text gets amended and reworded in the agency process, its initial existence gets serious attention focused and tends to shape the final product.

A proposal for rulemaking can be substantive or procedural, that is, it can request that an agency apply a new substantive standard to matters it regulates, or it may propose changes for the internal working of the agency or its external procedures for working with regulated parties.

Agency consideration

When a petition is directed to a regulatory agency that possesses statutory power in a field and 553(e) is cited, the specific proposal for rulemaking triggers a much more direct administrative process that substantially increases the chances of serious considerations of the proposal.

When an agency receives a petition, it may make a variety of responses: it may summarily deny the petition, it may publish notice to the public of the petition, request public comments, hold a hearing formally or informally, fold the proposal for rulemaking into ongoing rulemaking procedures, file a notice of proposed rulemaking (NPRM), or go right ahead to issue a final rule in cases where that is statutorily possible.

Once the agency receives a proposal for rulemaking under 553(e) it must consider it. It cannot just receive it pro forma and fail to react to it. (See APA legislative history, 79th Cong., 2d Session, Sen. Document 248, 359.)

The agency must act reasonably promptly: under the terms of APA section 555(b), an agency is required to "proceed to conclude a matter presented to it ... within a reasonable time". Agencies understandably are often not pleased to have to change their agendas or move on issues which they had previously been passive about. When they stall a petition, a court can step in an order them to make a prompt
decision denying or granting the petition proposal. In one case, administrative inaction of eight months produced a federal court injunction against the agency.2

Summary denial

An agency's "consideration" can be quite summary in nature, if circumstances permit especially where the agency is inclined to resist the initiative. There is no statutory requirement that the agency investigate the matter beyond the particulars of whatever the petition presented; that is, an agency which believes that a petition is not supported by sufficient obvious evidence can summarily deny it. The point is, however, that if Alaska accompanies its proposal for rulemaking with extensive evidentiary support, then the agency cannot summarily dismiss it, and must investigate so much of the evidence as is presented. Obviously, even if an agency doesn't wish to do so, the ever-present availability of judicial review will make an agency go through all supporting documentation presented with a petition.

An Agency's need to support its decision.

The strategic leverage upon the agency comes from the APA's §555(e) legal requirements for an agency to justify its decisions:

"prompt notice shall be given of the denial in whole or in part of a written application [or] petition.... Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial."

The case law under 555(e), incorporating the Supreme Court's decision in the Vermont Yankee case, 435 U.S. 519, 549(1978), establishes that a court will review with some particularity whether or not the agency's decision was reasonable, based on the evidence on the record of the petition. Where an agency decision appears to the court to be arbitrary and capricious, the court can annul the agency denial as unreasonable. See 653 Fed. Supp. 1229(DC 1985). In a very few cases courts have been so impressed with the merits of the proposal that instead of sending it back to the agency for reconsideration, they have directly required the agency to put the rule into effect. (Id.)

More commonly, the court that finds an agency's decision to be insufficiently supported by facts and reason can remand it to the agency demanding an "adequate" explanation for the petition's denial. See State Farm Mutual, 463 U.S. 29, 43, 45-46 (1983). To support its decision, whether denial or otherwise, an agency must be able to show a reasonable basis for the decision. This means that from the moment it receives a nonfrivolous petition under 553(e) an agency must be sure to "build a record," by at least opening a file on it. Where the petitioner has supplied supportive documentation, the file must contain analysis of its merits.

Further agency procedure.

Faced with a serious petition that cannot be summarily denied, an agency must move to further procedures.

The agency may, of course, decide to proceed to enact the proposed rule. The procedure in this case follows two different avenues:

If the rule is purely procedural, without direct impact on regulated parties or the public (being merely "interpretative," a general "statement of policy," or setting out internal rules of agency organization, procedure or practice § 553(b)(3)(A)), or when practicality and public necessity require immediate action (§ 553(b)(3)(B)), then the agency can just go ahead and publish it by a notice of Final Rulemaking (NFRM), in the Federal Register, and that's the end of the process.

If the rule is substantive, as most petitioned rules will be, and not an emergency rule under (b)(3)(B)), then the agency that wants to enact it must publish a Notice of Proposed Rulemaking (NPRM) in the Federal Register setting out a timeline for comments to be received. The agency may also voluntarily schedule formal or informal public hearings. Formal hearings, whether voluntary or required by statute (as they are in some areas,) involve an elaborate trial-type procedure, involving cross examination by all parties, a full stenographic record, etc. (§§ 556, 557). After the comment period or formal hearing, the agency must prepare its responsive comments and then publish them along with the final rule in the Register. At that point the 553(e) petition has directly accomplished what it sought.3

If the agency doesn't want to enact the rule, or is not enthusiastic, receipt of a serious 553(e) petition still requires it to assign staff to analyze the merits. But once that step is taken, most agencies decide to give notice to other interested parties that the petition has been received, by publishing notice in the Federal Register or otherwise. Even in the case of reluctant agencies, a comment period or even a hearing process may be established.

Again it should be noted that where the 553(e) petitioner is a state government, (and even more so if there has been a well-publicized media presence,) even hesitant agencies will tend to provide more process, which means that more of the merits are developed for review on the record. The more merits that are developed (if they are accurate and compelling,) the more constrained the agency will be to go along with those merits. Thus 553(e) initiates a process of rulemaking momentum.

3 It should be noted that some agencies have further procedural constraints imposed on them by their specific organic statutes, or by Executive Orders No. 12,291 and 12,498, by which the Reagan Administration tried to control rulemaking. (It is not clear to what degree subsequent administrations will try to enforce those orders).
The Catalyst: Judicial Review

Agencies will respond to petitions filed under 553(e) because the failure to respond has real consequences to the agency. The ready availability of judicial review is the tail that wags the agency dog in applying 553(e), (and 555(e)), especially when an agency inclines toward denying the petition.

Judicial review, of course, does require some initial steps. Anyone who will challenge the agency's denial must first of all show judicial "standing", an Article III case or controversy injury, although the very fact of having petitioned the agency and been denied may help elevate a person's interest to that level. Alaska's interest, backed by the public trust doctrine and "parens patriae" interests, is quite clearly sufficient for judicial review standing.

The agency decision must be "ripe for review," although a denial of a petition automatically satisfies this, and in some cases even where the agency has not issued a formal denial, courts are willing to say that when action has been substantially delayed it effectively becomes a denial.

The major potential judicial review problem lies with with "reviewability", in that courts have regularly said that the decision whether to take administrative action lies within the discretion of the agency, and there is a presumption against broad reviewability of such decisions. In cases involving Section 553(e) and Section 555(e), however, courts have seemed willing to enter into the review of agency action with the purpose of enforcing the policy goals of the Administrative Procedure Act. In a recent case, American Horse Protection Association, 812 Fed. 2d 1 (D.C. Circuit 1987), the Court undertook a particularized review to determined whether or not the agency had a taken a "hard look" at the proposal, reviewed the evidence presented by the petitioner in favor of the rule and the materials presented by the agency to explain why they had not promulgated the rule, and the Court decided that the agency's denial was "unreasonable" and "arbitrary and capricious," sending it back to the agency for reconsideration. The APA's Section 706 provides for courts' review of "abuses of discretion." The Horse Protection case indicates that judicial review is realistically available and potentially effective.

Summary:

The APA's Section 553(e) holds real potential for Alaska, enabling the State to proceed directly for federal rulemaking on particular regulatory recommendations. When the State, as a substantial petitioner, is well-prepared, drafts a specific text for a rule, backs it up with documentation, and follows through, the 553(e) avenue shifts the tactical and procedural balance, enhancing the possibilities for putting a particular rule on the books, thereby mobilizing desired applications of federal regulatory power.

Appendix:

1 CFR 305.86-6
The Administrative Procedure Act (APA) requires each Federal agency to give interested persons the right to petition for the issuance, amendment, or repeal of a rule, 5 U.S.C. § 553(e). The APA also requires that agencies conclude matters presented to them within a reasonable time, 5 U.S.C. § 558(e), and give prompt notice of the denial of actions requested by interested persons, 5 U.S.C. § 555(f). The APA does not specify the procedures agencies must follow in receiving, considering, or disposing of public petitions for rulemaking. However, agencies are expected to establish and publish such procedures in accordance with the public information section of the APA. See Attorney General's Manual on the Administrative Procedure Act 38 (1947). An Administrative Conference study of agency rulemaking petition procedures and practices found that while most agencies with rulemaking power have established some procedures governing petitions for rulemaking, few agencies have established sound practices in dealing with petitions or responded promptly to such petitions.

This Recommendation sets forth the basic procedures that the Conference believes should be incorporated into agency procedural rules governing petitions for rulemaking. In addition, the Conference encourages agencies to adopt certain other procedures and policies where appropriate and feasible. The Conference feels that, beyond this basic level, uniform specification of agency petition procedures would be undesirable because there are significant differences in the number and nature of petitions received by agencies and in the degree of sophistication of each agency's community of interested persons.

Agencies should review their rulemaking petition procedures and practices and, in accordance with this Recommendation, adopt measures that will ensure that the right to petition is a meaningful one. The existence of the right to petition reflects the value Congress has placed on public participation in the agency rulemaking process. The Administrative Conference has recognized, in past recommendations, the benefits flowing from public participation in agency rulemaking and from publication of the means for such participation. The absence of public, petition procedures, excessive or rigidly-enforced format requirements, and the failure to act promptly on petitions for rulemaking may undermine the public's right to file petitions for rulemaking.

Some agencies currently have petition-for-rulemaking procedures that are more elaborate than those recommended in this Recommendation. This Recommendation is not intended to express a judgment that such procedures are inappropriate or that the statutes mandating particular procedures should be amended. Nor is the Recommendation intended to alter the prior position of the Conference recommending elimination of the categorical exemptions of certain types of rulemaking from the APA's rulemaking requirements. See Recommendations 69-6 and 73-5. To the extent Congress or agencies adopt these recommendations, they should also expressly apply the right to petition to those types of rulemaking.

RECOMMENDATION

1. Agencies should establish by rule basic procedures for the receipt, consideration, and prompt disposition of petitions for rulemaking. These basic procedures should include: (a) Specification of the address(es) for the filing of petitions and an outline of the recommended contents of the petition, such as the name, address, and telephone number of the petitioner, the statutory authority for the action requested, and a description of the rule to be issued, amended, or repealed; (b) maintenance of a publicly available petition file; and (c) provision for prompt notification to the petitioner of the action taken on the petition, with a summary explanatory statement.

2. In addition, agencies should, where appropriate and feasible:
   a. Make their petition procedures expressly applicable to all types of rules the agency has authority to adopt;
   b. Provide guidance on the type of data, argumentation, or other information the agency needs to consider petitions;
   c. Develop effective methods for providing notice to interested persons that a petition has been filed and identify the agency office or official to whom inquiries and comments should be made; and,
   d. Establish internal management controls to assure the timely processing of petitions for rulemaking, including deadlines for completing interim actions and reaching conclusions on petitions and systems to monitor compliance with those deadlines.

[51 FR 46958, Dec. 30, 1986]