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Ex Parte Communications
The Federal Energy Regulatory Commission (FERC) asked me to review its rules and practices with respect to ex parte communications in various types of proceedings to determine whether its rules and practices are consistent with the law. FERC’s request was prompted, in part, by allegations in recent cases that pre-filing meetings between applicants and FERC Commissioners may violate the rules regarding ex parte communications contained in the Administrative Procedure Act (APA). To assist FERC in evaluating the lawfulness of its procedures, I reviewed the statutes administered by FERC, applicable FERC regulations, and the case law respecting ex parte communications in administrative proceedings. I conclude that FERC’s practices respecting ex parte communications are fully consistent with the law. I also conclude that FERC’s ex parte rules are more stringent than those required by the APA.

In offering these conclusions, I wish to emphasize that I am not addressing these issues for the first time in this report. Rather, I first addressed the issues I discuss in this report long before FERC or any other client asked my opinion about them. I have discussed the law governing ex parte communications in the proceedings of regulatory agencies in several scholarly works, including most recently an article that is forthcoming in a Symposium issue of George Washington University Law Review that is devoted to discussion of administrative law issues.

I. THE LAW GOVERNING EX PARTE COMMUNICATIONS

Agency decision-making procedures are governed by three sources of authority – agency rules, statutes, and the Constitution. Some judges once believed that the common law was also a legitimate source on which a court could draw to require an agency to adopt a decision-making procedure preferred by a court, but the Supreme Court held unanimously in 1978 that a court can not require an agency to use a procedure that the court considers necessary or appropriate. Since agency procedural rules must themselves comply with statutes and the Constitution, I will begin with a discussion of statutes as a potential source of limits on ex parte communications in FERC proceedings.

A. STATUTORY RESTRICTIONS ON EX PARTE COMMUNICATIONS

The APA applies to FERC because FERC is an “agency” within the meaning of APA §551(1). APA §551(14) defines an ex parte communication as:

An oral or written communication not on the public record with respect to which reasonable prior notice to

1 E.g., Richard J. Pierce, Jr., Administrative Law Treatise §8.4.
all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.5

The APA definition of ex parte communications is consistent with the general understanding of the term in the Anglo-American legal system.6 The United States has long prohibited ex parte communications in disputes adjudicated by courts for good reason.7 It is fundamentally unfair for a prosecutor, for instance, to engage in ex parte communications with a judge in an effort to persuade the judge to convict a criminal defendant, or for one of the parties to a civil dispute arising from an auto accident to engage in ex parte communications with the judge in an effort to convince him that the accident was the fault of the other party. Without notice and an opportunity to participate in the conversation, the other party has no way of responding effectively to the arguments made in the ex parte communications.

The drafters of the APA recognized that ex parte communications are fundamentally unfair in contexts analogous to a judicial adjudication of a dispute involving the competing rights of two individuals. They prohibited ex parte communications in such circumstances. The drafters of the APA also recognized, however, that many types of agency proceeding are not analogous to a judicial trial and that a ban on ex parte communications would make no sense in the context of those types of agency proceedings. Thus, the APA prohibits ex parte communications in only two types of proceedings – formal adjudications and formal rulemakings.8 As I explain further below, “formal” adjudications and “formal” rulemakings are proceedings that Congress, by statute, has required to be conducted in formal, trial-type proceedings. Congress deemed these trial-type proceedings sufficiently analogous to judicial proceedings to merit a ban on ex parte communications.

The APA does not, however, extend that ban to informal adjudications or informal rulemakings, which, as described below, are the types of proceedings conducted by FERC.

The applicability of the APA’s prohibition on ex parte communications is revealed through the interactions of several of its provisions. APA §557(d)(1) prohibits ex parte communications in any agency proceeding that is subject to APA §557(a).9 That section applies “when a hearing is required to be conducted in accordance with section 556 of this title.”10 APA §556 applies “to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.”11 APA §553(c) makes §§556 and 557 applicable to a rulemaking proceeding “[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing, . . .”12 APA §554(a) makes §§556 and 557 applicable “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . . .

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6 See I Pierce, supra. note 1, at §8.4.
7 E.g., Canon 3A(4), Code of Conduct for United States Judges.
8 For descriptions of formal adjudications and formal rulemakings, see I Pierce, supra. note 1, at §§7.2, 8.2.
12 5 U.S.C. §553(c).
Thus, the APA prohibition on ex parte communications applies only when a statute requires an agency to issue a rule or to resolve an adjudicatory dispute “on the record after opportunity for agency hearing.” Those two classes of agency proceedings are often referred to as formal rulemaking and formal adjudication.

No FERC-administered statute contains the language “on the record after opportunity for agency hearing” or any equivalent language that triggers the prohibition on ex parte communications in APA §557(d). FERC-administered statutes contain many provisions that require FERC to act after a “hearing,” but the Supreme Court held in 1972 that the statutory term “hearing” does not require an agency to engage in formal rulemaking, and the circuit courts have subsequently held that the statutory term “hearing” does not require an agency to engage in formal adjudication. Thus, FERC is not required by statute to engage in formal rulemaking or formal adjudication, and therefore the ex parte provisions of the APA do not apply to FERC proceedings. Despite this, FERC has, as discussed in Section C of my report, adopted restrictions on ex parte communications even in informal adjudications. FERC therefore has adopted restrictions on ex parte communications that go beyond what is required by the APA.

I will now turn to a discussion of the APA’s requirements for informal rulemakings and informal adjudications, neither of which include a ban on ex parte communications. APA §553 governs informal rulemakings and authorizes an agency to use a three-step process to issue a rule – issuance of a notice of proposed rulemaking, receipt and consideration of comments on the agency’s proposed rule, and issuance of the final rule, incorporating a concise general statement of its basis and purpose. There is, however, no statutory prohibition on ex parte communications that applies to informal rulemaking proceedings. That is for good reason. Informal rulemakings bear no relationship to judicial trials to resolve adjudicatory disputes. Informal

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14 The legislative history of the Sunshine Act, which was the source of the APA prohibition, is clear on this point as well. “The [ex parte] prohibition only applies to formal agency adjudication. Informal rulemaking proceedings and other agency actions that are not required to be on the record after an opportunity for agency hearing will not be affected by the provision.” House Judiciary Committee Report at 18; House Government Operations Committee Report at 19; Senate Government Operations Committee Report at 35 (emphasis added).
15 See, e.g., I Pierce, supra. note 1, at §§7.2, 8.2.
17 E.g., Dominion Energy Brayton Point v. Johnson, 443 F. 3d 12,15-19 (1st Cir. 2006); Chemical Waste Management v. EPA, 873 F. 3d 1477, 1480-82 (D.C. Cir. 1989).

18 The courts have explicitly recognized that ex parte communications are not statutorily prohibited in informal adjudications. E.g., District No. 1 v. Maritime Admin., 215 F. 3d 37,42-43 (D.C. Cir. 2000). In Electric Power Supply Ass’n. v. FERC, 391 F. 3d 1255 (D.C. Cir. 2004), the court held that a FERC rule violated the APA restrictions on ex parte communications. The court based its holding on its apparent (but erroneous) belief that the APA restrictions on ex parte communications apply to FERC proceedings. The court was not, however, asked to decide that question because FERC did not argue the point. Because FERC did not argue the point, the court could not consider it. The Supreme Court has long held that a court can uphold an agency action only on a basis stated by the agency. Securities & Exchange Commission v. Chenery Corp., 332 U.S. 194, 196-97 (1947).
rulemakings are analogous instead to the process through which a legislative body chooses rules that apply generally to the conduct of large classes of people. It would be no more appropriate to ban agency decision-makers from engaging in ex parte communications in informal rulemakings than to ban members of Congress from engaging in off-the-record conversations with constituents who are interested in a legislative proposal pending before Congress. Moreover, as the Court of Appeals for the District of Columbia Circuit has recognized, the President and members of Congress often engage in ex parte communications with agency decision-makers about the merits of then-pending informal rulemakings, and communications of that type are indispensable in a democracy in which the people expect their elected representatives to express their views to unelected agency decision-makers.20 Former D.C. Circuit Chief Judge Patricia Wald put the point well in a 1981 opinion:

Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. As judges we are insulated from these political pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at all face-to-face lobbying efforts, regardless of the forum in which they occur, merely because we see them as inappropriate in the judicial context.21

There is also no prohibition on ex parte communications in the APA applicable to informal adjudications. As I explained above, since no provision of any FERC-implemented statute requires FERC to conduct an adjudication “on the record after opportunity for agency hearing,” APA §§554, 556, and 557 do not apply to any FERC adjudication. In 1990, the Supreme Court held that only APA §5522 applies to an agency adjudication in the absence of a provision requiring the agency to conduct adjudications “on the record.”23 Thus, FERC is not required to use formal adjudication to conduct any adjudication. It is free to use informal adjudication, and the APA does not prohibit ex parte communications in informal adjudications.24 As discussed in section C of this report, however, FERC has adopted restrictions on ex parte communications in informal


21 Id. at 400-01.

22 APA §555 authorizes a person who is compelled to appear before an agency to retain a lawyer to accompany him, limits an agency’s ability to require a report or other investigative act to circumstances in which the requirement is authorized by law, authorizes a person who provides a statement, data, or report to an agency to obtain a copy of the statement, data, or report, limits the issuance of subpoenas to circumstances in which there has been a showing of general relevance and reasonable scope, and requires an agency to provide a prompt notice of denial of any written request, accompanied by a brief explanation of the grounds for denial. 5 U.S.C. §555.


adjudications even though the APA does not require such restrictions.

Moreover, as the D.C. Circuit has recognized, even in the context of adjudications, FERC must have the discretion to engage in ex parte discussions of issues of legislative fact. In dismissing a claim that the FERC Commissioners had engaged in illegal ex parte communications in a pipeline certification proceeding in 1992, the court said:

In short, while there were meetings between agency officials and Iroquois and other industry officials, the record supports the Commission’s conclusion that there was nothing improper about those meetings. Agency officials may meet with members of the industry both to facilitate settlement and to maintain the agency’s knowledge of the industry it regulates. As this court has noted before, “such informal contacts between agencies are the ‘bread and butter’ of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness.”

B. CONSTITUTIONAL RESTRICTIONS ON EX PARTE COMMUNICATIONS

I will also, for completeness, review whether there are constitutional restrictions on ex parte communications applicable to FERC proceedings. In some narrow classes of cases, the Due Process Clause of the Constitution can be a source of limits on ex parte communications in agency proceedings. The first step in determining whether Due Process can be the source of such a limit is to determine whether the Due Process Clause applies at all to the class of disputes at issue. Due Process applies only when the government seeks to “deprive” a “person” of “life, liberty, or property.” In 1915, the Supreme Court held that Due Process does not apply to a proceeding in which an agency issues “a rule of conduct [that] applies to more than a few people.” The vast majority of agency rulemaking proceedings fall within the scope of that holding. Thus, there is rarely any arguable basis to apply the Due Process Clause to an agency rulemaking. It is even more rare for an agency rulemaking to involve a pattern of facts that could conceivably support a limit on ex parte communications.

I am aware of only one case in which a court relied on Due Process to support a holding that an agency engaged in illegal ex parte communications in an informal rulemaking. In the 1950s, the FCC used informal rulemaking to decide which of two competing applicants for a broadcast license should receive the license. In 1959, the U.S. Court of Appeals for the D.C. Circuit held that the FCC violated the law when the Commissioners met with the winning applicant in private and accepted Christmas turkeys from the winning applicant during the pendency of the proceeding. The court made it clear that its restriction on ex parte communications applied only when two individuals are “competing for the same valuable privilege.”


26 U.S. Constitution, Amend. V.
27 Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 446 (1915).
28 See II Pierce, supra. note 1, at §9.2.
30 Id. at 224.
has reaffirmed the narrow scope of its restriction on ex parte communications in subsequent cases in which it has explicitly recognized the importance of allowing ex parte communications in most informal rulemakings.\(^{31}\) Thus, with the narrow and rare exception of a case in which an agency uses informal rulemaking to decide which of two individuals will receive a valuable privilege, the Due Process Clause cannot provide the basis for a restriction on ex parte communications in an informal rulemaking.

The Due Process Clause does apply to some classes of agency adjudications. To determine whether Due Process applies to a class of agency adjudications requires a determination of whether the types of adjudications at issue have the potential to “deprive” a “person” of “life, liberty, or property.”\(^{32}\) The law governing that determination is complicated. To implicate the Due Process Clause the agency proceeding must have the potential to deprive a particular individual of an interest in “life,” “liberty,” or “property.”\(^{33}\) Since FERC proceedings do not implicate “life,” only the Due Process Clause’s protection of “property” or “liberty” interests could be relevant to FERC proceedings. The Supreme Court has defined “property” for Due Process purposes to include: (1) something like a house or a car that qualifies as property under state common law, (2) some benefit like social security payments that the individual has been receiving from the government in the past pursuant to a statute that arguably entitles the person to continue to receive the benefit; and, (3) a government job if a statute or contract limits the government’s ability to terminate the individual who holds the job. Some FERC adjudicatory proceedings may involve property interests that fall in the first or second category. The Supreme Court has defined “liberty” to include: (1) freedom from incarceration, (2) freedom from government punishment as a result of exercise of a constitutional right; and, (3) freedom from official stigmatization if that stigmatization is contemporaneous with deprivation of some tangible interest. It is conceivable that a FERC adjudicatory proceeding might involve a liberty interest of the third type.

If the Due Process Clause applies to an agency proceeding, it does not necessarily follow that the agency is prohibited from engaging in ex parte communications in the proceeding. The procedures required by Due Process depend on judicial application of a three-part balancing test that the Supreme Court announced in 1976.\(^{34}\) That test can yield a wide variety of results.\(^{35}\) It rarely produces a prohibition or limitation on ex parte communications. In fact, I have found only one regulatory proceeding (the FCC case discussed supra) in which a court invalidated an agency action based on the court’s conclusion that the agency had engaged in ex parte communications that violated the Due Process Clause.\(^{36}\) That case involved two entities “competing for the same valuable privilege” and the ex parte communications were accompanied by

\(^{31}\) Sierra Club v. Costle, 657 F. 2d 298, 400-410 (D.C. Cir. 1981)

\(^{32}\) U.S. Constitution, Amend. V.

\(^{33}\) For detailed discussion of the definitions of liberty and property for due process purposes, see II Pierce, supra note 1, at §9.4.

\(^{34}\) Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

\(^{35}\) II Pierce, supra. note 1, at §9.5.

secret gifts to the agency decision-makers. Finally, even in the rare instance in which the Due Process Cause might apply to a FERC proceeding, I am unaware of any case that would suggest that FERC’s own regulations would not satisfy the Due Process Clause.

C. REGULATORY RESTRICTIONS ON EX PARTE COMMUNICATIONS

In the prior two sections, I considered whether the APA or the U.S. Constitution places limits on ex parte communications in FERC proceedings. I concluded that the APA’s provision restricting ex parte communications does not apply and that a constitutional limit could arise only in rare cases. Despite this, FERC has adopted regulations regarding ex parte communications that go beyond what is required by the APA or the Constitution. I will now turn to a discussion of those regulations. When FERC conducts its proceedings, it must, of course, abide by its own regulations if they confer important rights on parties even if the rules are not required by statute or by the Constitution.

FERC Rule 2201 governs off-the-record communications. That rule prohibits ex parte communications in “all contested on-the-record proceedings.” It defines a contested on-the-record proceeding as “any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue, any proceeding initiated pursuant to rule 206 by the filing of a complaint with the Commission, or any proceeding initiated by the Commission on its own motion or in response to a filing.” The prohibition on ex parte communications does not apply to “notice-and-comment rulemakings under 5 U.S.C. §553, investigations under part 1b of this chapter, or any proceeding in which no party disputes any material issue.” The prohibition also does not apply to “procedural inquiries” or to “a general background or broad policy discussion involving a substantial segment of an industry, where the discussion occurs outside of any particular proceeding involving a party or parties and does not address the specific merits of the proceeding.”

The rule also specifies the point at which a proceeding begins for purposes of the applicability of the prohibition on ex parte communications. If the Commission initiates the proceeding, it begins when the Commission issues the order in which it initiates the proceeding. If the proceeding takes place after a remand from a court, it begins when the court issues its mandate. If the proceeding is initiated as a result of the filing of a complaint, it begins at the time of the filing of the complaint or at the time the Commission initiates an investigation on its own motion. In any other proceeding to which the prohibition applies, the proceeding begins when an intervention is filed in which the intervenor disputes a material issue.

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37 Id. at 224.
39 18 C.F.R. §385.2201.
40 Id. at §385.2201(a).
41 Id. at §385.2201(c)(1)(i).
42 Id. at §385.2201(c)(1)(ii).
43 Id. at §385.2201(c)(5).
44 Id. at §385.2201(d)(i).
45 Id. at §385.2201(d)(ii).
46 Id. at §385.2201(d)(iii).
47 Id. at §385.2201(d)(iv).
As these regulations indicate, FERC’s ban on ex parte communications does not apply to pre-filing meetings. FERC therefore allows informal communications to occur prior to the time a filing is made and disputed by an intervenor on a material issue. There is, as indicated, nothing unlawful about this practice. Congress did not require that FERC proceedings resemble judicial trials. The fact that FERC has gone beyond what is required by the APA or the Constitution, and adopted ex parte rules that apply once an informal proceeding is initiated does not invalidate its limited exception for pre-filing meetings. There is nothing in the APA, the Constitution, or FERC’s own regulations that preclude such meetings. In sum, I conclude that FERC’s practices respecting ex parte communications, including pre-filing meetings, are fully consistent with the law, provided that FERC follows its own regulations when it conducts proceedings.

ABOUT THE AUTHOR: Richard J. Pierce Jr., Lyle T. Alverson Professor of Law George Washington University has written a dozen books and over one hundred articles on administrative law and government regulation. Professor Pierce is author of the most frequently cited Treatise on administrative law. The U.S. Supreme Court has relied on his writings in a dozen opinions.
606 F.3d 769
United States Court of Appeals,
District of Columbia Circuit.

James LICHOULAS, Jr., Petitioner
v.
FEDERAL ENERGY REGULATORY
COMMISSION, Respondent.

No. 08–1373.
Decided May 28, 2010.

Synopsis

Background: Licensee petitioned for review of orders of Federal Energy Regulatory Commission (FERC), 2008 WL 4279430, terminating his license to operate hydropower project attached to historic mill building for failure to maintain project works in adequate condition of repair, as required by Federal Power Act (FPA), based on doctrine of implied surrender, and 2008 WL 4962558, denying rehearing.

Holdings: The Court of Appeals, Karen LeCraft Henderson, Circuit Judge, held that:

[1] licensee had standing;
[2] termination of license based on implied surrender doctrine was reasonable;
[3] ex parte contacts did not render termination decision unfair; and
[4] evidentiary hearing was not warranted.

Petition denied.

West Headnotes (14)

⇒ Causation; redressability
To have standing, under Article III requirements, plaintiff must show injury in fact, causation, and redressability. U.S.C.A. Const. Art. 3, § 2, cl. 1.

1 Cases that cite this headnote

[2] Electricity
⇒ Licenses and taxes
Former licensee of hydropower project on property that city obtained by eminent domain satisfied injury in fact, causation, and redressability requirements for Article III standing to challenge orders of Federal Energy Regulatory Commission (FERC), terminating license for failure to maintain project works in adequate condition of repair, as required by FPA, based on doctrine of implied surrender, pursuant to FERC's regulations and terms of license, since licensee's injury from termination of license was directly caused by FERC's orders and was redressable by vacating orders, which would significantly increase his likelihood of prevailing in eminent domain litigation to regain ownership of and access to project. U.S.C.A. Const. Art. 3, § 2, cl. 1; Federal Power Act, § 10(c), 16 U.S.C.A. § 803(c); 18 C.F.R. § 6.4.

2 Cases that cite this headnote

⇒ Causation; redressability
A significant increase in the likelihood that the litigant would obtain relief that directly redresses the injury suffered will suffice for Article III standing. U.S.C.A. Const. Art. 3, § 2, cl. 1.

3 Cases that cite this headnote

[4] Electricity
⇒ Regulation in general; statutes and ordinances

1 Cases that cite this headnote

[5] Electricity

 Regulation in general; statutes and ordinances

Under the deferential arbitrary and capricious standard, Court of Appeals must affirm orders of the Federal Energy Regulatory Commission (FERC) as long as FERC has examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made. 5 U.S.C.A. § 706(2)(A).

5 Cases that cite this headnote

[6] Electricity

 Regulation in general; statutes and ordinances

In applying the arbitrary and capricious standard, Court of Appeals defers to Federal Energy Regulatory Commission's (FERC) reasonable application of its precedent but will not approve an unreasoned departure therefrom. 5 U.S.C.A. § 706(2)(A).

Cases that cite this headnote

[7] Electricity

 Licenses and taxes

Federal Energy Regulatory Commission's (FERC) application of doctrine of implied surrender in terminating license to operate hydropower project for failure to maintain project works in adequate condition of repair, as required by FPA and license, was reasonable, under FERC's regulations and terms of license, even though licensee expressed interest in continuing to operate project, since FERC determined that licensee manifested clear intent to abandon project by his actions and inaction over decade of project dormancy and consistent failure to meet repair schedules or timely respond to FERC's inquiries, and city's exercise of eminent domain over project property made any possibility of repairing project and resuming operations even less likely. Federal Power Act, § 10(c), 16 U.S.C.A. § 803(c); 18 C.F.R. § 6.4.

Cases that cite this headnote

[8] Electricity

 Regulation in general; statutes and ordinances

Even if Federal Energy Regulatory Commission (FERC) receives an ex parte communication that violates FERC's regulations, Court of Appeals will not undo FERC's action unless the decisionmaking process was irrevocably tainted so as to make FERC's ultimate judgment unfair. 18 C.F.R. § 385.2201.

Cases that cite this headnote

[9] Electricity

 Licenses and taxes

The fact that Federal Energy Regulatory Commission (FERC) failed to address a hydropower licensee's argument in the first instance does not mean the licensee must press the argument yet again at the agency level to avoid waiving the argument.

Cases that cite this headnote

[10] Electricity

 Licenses and taxes

Even assuming that ex parte communications to Federal Energy Regulatory Commission (FERC) by non-party elected official and members of her staff violated FERC regulations by allegedly putting political pressure on FERC to terminate license to operate hydroelectric project, such communications did not irrevocably taint decisionmaking process so as to make FERC's termination decision unfair, where
communications had not influenced FERC's ultimate decisionmakers. 18 C.F.R. § 385.2201.

Cases that cite this headnote

Administrative Law and Procedure

Bias, prejudice or other disqualification to exercise powers

Under the well-settled presumption of administrative regularity, federal courts assume administrative officials to be men and women of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.

Cases that cite this headnote

Electricity

Regulation in general; statutes and ordinances

In general, Federal Energy Regulatory Commission (FERC) must hold an evidentiary hearing only when a genuine issue of material fact exists, and even then, FERC need not conduct such a hearing if the disputed issues may be adequately resolved on the written record.

Cases that cite this headnote

Electricity

Regulation in general; statutes and ordinances

Court of Appeals reviews a decision by Federal Energy Regulatory Commission (FERC) to deny an evidentiary hearing for an abuse of discretion.

Cases that cite this headnote

Electricity

Licenses and taxes

Licensee for hydropower project did not warrant evidentiary hearing prior to Federal Energy Regulatory Commission's (FERC) termination of his license for failure to maintain project works in adequate condition of repair, as required by FPA and license, based on doctrine of implied surrender, pursuant to FERC's regulations and terms of license, since licensee simply disagreed with FERC's decision and had not identified any issue he could have explored at evidentiary hearing that could not have been adequately addressed on papers. Federal Power Act, § 10(c), 16 U.S.C.A. § 803(c); 18 C.F.R. § 6.4.

Cases that cite this headnote


Attorneys and Law Firms

Brian A. Davis argued the cause for the petitioners. Kenneth L. Wiseman, Mark F. Sundback, Gia V. Cribbs and Jennifer L. Spina were on brief.

Jennifer S. Amerkhail, Attorney, Federal Energy Regulatory Commission, argued the cause for the respondent. Thomas R. Sheets, General Counsel, Robert H. Solomon, Solicitor, and Carol J. Banta, Attorney, were on brief.

Before: HENDERSON, ROGERS and GARLAND, Circuit Judges.

Opinion

Opinion for the Court filed by Circuit Judge HENDERSON.

KAREN LeCRAFT HENDERSON, Circuit Judge:

**3 James Lichoulas, Jr. petitions for review of Federal Energy Regulatory Commission (FERC or Commission) orders that terminate his license to operate a hydropower project attached to a historic six-story mill building in Lowell, Massachusetts. Lichoulas argues that FERC's use of the implied surrender doctrine to terminate his license was arbitrary and capricious. He also argues that FERC engaged in impermissible ex parte contacts and abused its discretion in denying him an evidentiary hearing. Unpersuaded, we deny the petition.
I.

In 1986 FERC issued Lichoulas a license “to construct, operate and maintain the Appleton Trust Project” (Project) under Part I of the Federal Power Act (FPA), 16 U.S.C. §§ 791 a et seq. James Lichoulas, Order Issuing License (Minor Project), 36 F.E.R.C. ¶ 62,047, 63,133, 1986 WL 373956 (July 18, 1986). The Project was designed to generate up to 346 kilowatts of electricity when water from the Hamilton Canal passes through two turbine-generators on its way to the Lower Pawtucket Canal.

In a letter to Lichoulas dated March 6, 1997 FERC noted that the Project had been inactive since January 6, 1996. It requested that he submit plans for future operation by May 15, 1997. In June 1997, before Lichoulas responded, a fire damaged the property on which the Project is located. Despite the damage, on September 22, 1997 Lichoulas told FERC the Project would be “up and running” near the end of March 1998. Letter from James T. Lichoulas, Jr., Appleton Trust, to Victoria Kaye, FERC. In a March 24, 1998 letter to FERC, however, Lichoulas pushed back the target date to Summer 1998.

FERC followed up on March 2, 1999, writing to Lichoulas that he had failed to keep the Commission updated and requesting that he do so before April 16, 1999. Receiving no response, FERC sent Lichoulas a letter on July 8, 1999 expressing “uncertainty” that he would ever resume operation. Letter from Hossein Ildari, Chief, Engineering Compliance Branch, FERC, to James Lichoulas, Jr. at 1. Lichoulas responded within forty-five days either a plan for resuming operation or “a petition for the voluntary surrender” of his license. Id. Fifty-seven days later, on September 3, 1999, Lichoulas told FERC the Project would be operable by March 2000. FERC approved his plan on October 27, 1999.

In October 2000, approximately seven months after Lichoulas's estimated date of resumed operation, he arranged with the city of Lowell (City) to demolish several buildings on or adjacent to the Project property that posed a potential fire hazard. The demolition exposed asbestos, of which remediation began in August 2001.

Since you have not made the necessary repairs to your project to resume operations and the project has not operated regularly since November 1994, pursuant to standard article 16 of your license and section 6.4 of the Commission's regulations, we consider the project
to be abandoned and that it is your intent to surrender your license. Thus, the Commission may terminate your license under an implied surrender proceeding.

Letter from John Estep, Division of Hydropower Administration and Compliance, to James Lichoulas, Jr. at 1.

Lichoulas responded in a letter dated December 1, 2004. He apologized for the “lack of proper response regarding the status” of the Project. Letter from James T. Lichoulas, Jr. to Secretary, FERC (Dec. 1, 2004). He said “[t]he primary problem was that the [Project property] ha[d] been undergoing a major selective demolition.... During that process, asbestos was discovered. The asbestos removal and clean up process went on and on for the last several years.” Id. He said it was his “plan to understand [sic] and develop a full scope of work by early March 2005.” Id. According to FERC, however, “Lichoulas never submitted this information.” James Lichoulas Jr., Order Terminating License by Implied Surrender, 124 F.E.R.C. ¶ 61,255, ¶ 12, 2008 WL 4279430 (Sept. 18, 2008) (Termination Order).

In July 2006 FERC received notice that in April 2006 the City had obtained the Project property by eminent domain as part of an “Urban Revitalization and Development Plan.” See Letter from Stephen Crane, Urban Renewal Project Manager, to Magalie Roman Salas, Secretary, FERC (July 20, 2006). According to the City, at the time of the taking the Project was not functioning; “in fact,” it said, “the entire property [wa]s in a significant state of disrepair.” Id.

On March 23, 2007 FERC issued Lichoulas a “Notice of Termination of License by Implied Surrender and Soliciting Comments, Protests, and Motions to Intervene.” Docket No. P9300–017 (Mar. 23, 2007). Lichoulas protested on April 19, 2007, arguing that the Project's dormancy did not reflect an intent to abandon or surrender it but instead resulted unavoidably from the demolition, the asbestos remediation and the City's exercise of eminent domain. To establish his intent to restore the Project to operation, Lichoulas submitted a letter of intent between him and an engineering firm providing for the rehabilitation of the Project if he retained his FERC license and regained the property from the City. He also represented that he had a bank line of credit ready to finance the rehabilitation. He asked FERC to hold an evidentiary hearing to explore these and other facts.


Meanwhile, over the course of 2008, while working through the implied surrender process, FERC received communications from the office of U.S. Congresswoman Niki Tsongas, in whose district the Project lies. Tsongas sent letters in March and July requesting procedural updates, which FERC provided. Also, on August 6, Tsongas herself telephoned FERC's Acting Director of External Affairs. Later on August 6, Tsongas's office sent the Acting Director an email with a memorandum attached. The memorandum was addressed to Tsongas from one of her staff. It recommended that the Congresswoman call FERC to “put pressure on the Commission to either (a) provide an update on the timetable for issuing the Order which terminates [Lichoulas's] License, or (b) promptly issue an Order which terminates the license.” Mem. from Kate to NT at 1 (attached to email from Brian Martin, District Director, Office of Congresswoman Niki Tsongas, to Patricia Schaub, FERC (Aug. 6, 2008)) (Tsongas Memo). According to FERC, the email with attachment was placed in its “non-decisional record” of this matter. James Lichoulas Jr., Order Den. Reh'g, 125 F.E.R.C. ¶ 61,195, ¶ 1, 2008 WL 1439726, at *1 (Order Den. Reh'g). The Office of External Affairs
received another email from Tsongas's office on August 18, which, according to FERC, merely “ask[ed] about the status of the case” and it responded accordingly. Id.

On September 18, 2008 FERC terminated Lichoulas's license. Termination Order, 124 F.E.R.C. ¶ 61,255. It concluded that he had impliedly surrendered the license pursuant to 18 C.F.R. § 6.4 and standard license article 16. Id. ¶¶ 18–26; see Form L–15, Terms and Conditions of License for Unconstructed Minor Project Affecting the Interests of Interstate or Foreign Commerce, 54 F.P.C. 1792, 1888 (1975) (Article 16). The order also denied his request for an evidentiary hearing. Termination Order, 124 F.E.R.C. ¶ 61,255, ¶ 24. Lichoulas then requested rehearing and FERC denied that request on November 20, 2008. Order Den. Reh'g, 125 F.E.R.C. ¶ 61,195. It repeated its conclusions that he had impliedly surrendered his license and that an evidentiary hearing was unnecessary. Id. ¶¶ 12–17. It also rejected his argument that FERC’s contacts with Tsongas’s office were prohibited communications, stating that they were “[p]rocedural inquiries.” Id. ¶ 21 (alteration in original). Lichoulas timely petitioned this court for review. See 16 U.S.C. § 825l(b).

II.

Lichoulas argues that we should vacate the Termination Order and the Order Denying Rehearing because (1) FERC’s implied surrender determination was arbitrary and capricious, (2) FERC engaged in prohibited “off-the-record communications” while adjudicating the matter and (3) FERC abused its discretion by denying him an evidentiary hearing. FERC contests all three arguments and also maintains we are without jurisdiction to review its action because Lichoulas lacks Article III standing. We address standing first and then reach, seriatim, Lichoulas’s three arguments.

A. Standing

[1] To have standing Lichoulas must show injury in fact, causation and redressability. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); Ass’n of Flight Attendants–CWA v. U.S. Dept of Transp., 564 F.3d 462, 464 (D.C.Cir.2009); Sierra Club v. EPA, 292 F.3d 895, 898–900 (D.C.Cir.2002). FERC argues Lichoulas cannot show redressability because “he has already, separately, lost ownership of and access to the Project.” Resp’t’s Br. 23. It asserts that “Lichoulas has offered no reason to believe that reversal of the license termination would cause the City to return the Project property to him or otherwise to allow him access to repair and operate the Project.” Id. at 24. Because the City obtained the Project property by eminent domain, it argues, reversal of FERC’s orders will not yield the redress Lichoulas seeks.

[2] FERC’s argument fails because it addresses the wrong injury. The injury of which Lichoulas complains here is the termination of his license to operate the Project. FERC directly caused this injury and we can redress it by vacating its orders. Lichoulas does not challenge his “lost ownership of and access to the Project” here; he challenged that injury in separate suits regarding the City’s exercise of eminent domain. See Lichoulas v. City of Lowell, C.A. No. 07–10725–RWZ (D.Mass.); Lichoulas v. City of Lowell, No. 09–MISC–396099–KFS (Mass. Land Ct.). The crucial question here is whether granting his petition would redress the injury caused by FERC—namely, the termination of Lichoulas’s license. Plainly it would. Indeed, “if the complainant is ‘an object of the action (or foregone action) at issue’—as is the case ... nearly always in review of an adjudication—there would be ‘little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.’ ” Sierra Club, 292 F.3d at 900 (quoting Defenders of Wildlife, 504 U.S. at 561–62, 112 S.Ct. 2130).

[3] Moreover, that FERC’s license termination has caused Lichoulas injury is clear because of its effect on his prospects for regaining ownership of and access to the Project. “‘A significant increase in the likelihood that the [litigant] would obtain relief that directly redresses the injury suffered’ will suffice for standing.” Nat’l Parks Conservation Ass’n v. Manson, 414 F.3d 1, 7 (D.C.Cir.2005) (quoting Utah v. Evans, 536 U.S. 452, 464, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002)). In his eminent domain litigation, Lichoulas argued the City’s taking violated the FPA because he holds a valid FERC license. See Lichoulas, 555 F.3d at 12; D. Mass. Order at 1; Mass. Land Ct. Order, 2009 WL 1639726, at *3. Accordingly, both the federal and state courts in Massachusetts have noted that the resolution of Lichoulas’s petition to us will have a significant impact on his eminent domain
challenges. D. Mass. Order at 4 (“[T]he validity of [Lichoulas's] license lies at the heart of this case.”); 

Mass. Land Ct. Order, 2009 WL 1639726, at *2 (“[T]he issue at the heart of this dispute is whether Plaintiff's FERC license was valid at the time of [the] taking.... If Plaintiff is successful before the DC Circuit, then his challenge to Defendant's taking will lie under the FPA.”). Thus, should Lichoulas succeed here, he will significantly increase the likelihood of prevailing in his eminent domain challenges and therefore make it more likely that he will regain “ownership of and access to the Property.” This suffices for redressability and ultimately, because injury in fact and causation are not in question, for standing. 2

B. Implied Surrender


*776 **8 FERC regulations and the standard articles of Lichoulas's license provide for implied surrender. Specifically, 18 C.F.R. § 6.4 3 PROVIDES THAT IF A LICENSEE

shall cause or suffer essential project property to be removed or destroyed, or become unfit for use, without replacement, or shall abandon, or shall discontinue good faith operation of the project for a period of three years, the Commission will deem it to be the intent of the licensee to surrender the license. Article 16 of the license contains language virtually identical to section 6.4 and, in addition, provides for implied surrender if the licensee “shall ... refuse or neglect to comply with the terms of the license and the lawful orders of the Commission.” 54 F.P.C. at 1888; see Order Issuing License, 36 F.E.R.C. ¶ 62,047, 63,134 (license “subject to the articles set forth in Form L–15 (October 1975) ... except Article 15”). FERC's application of implied surrender has evolved over time. In 1993 it noted that it had “only rarely had to resort to the implied-surrender procedure to address a licensee's failure to live up to the obligations of its license.” Mont. Power Co., 62 F.E.R.C. ¶ 61,166, 62,143, 1993 WL 88967 (1993). In a footnote, it elaborated that “[s]uch cases have included situations where licensees had abandoned project operation a number of years earlier, had sold the project without prior Commission approval and then been dissolved as a corporate entity, or had otherwise abandoned the project facilities and could not be located.” Id. at 62,143 & n. 41. Those examples proved to be less than comprehensive, however, when in 1999 the Commission applied the doctrine in Fourth Branch Assoc. (Mechanicville) v. Niagara Mohawk Power Corp., 89 F.E.R.C. ¶ 61,194, 61,597–98, 1999 WL 1063786 (1999), reh'g denied, 90 F.E.R.C. ¶ 61,250 (2000), pet. for rev. denied, 253 F.3d 741 (D.C.Cir.2001). In that case, two FERC licensees were “at loggerheads” after the collapse of several agreements regarding their joint hydropower project. Id. at 61,596. Niagara Mohawk Power Corporation (Niagara Mohawk) wanted to transfer or surrender the license. Id. Fourth Branch Associates (Fourth Branch) wanted to continue as a licensee and “restore the project to full operation.” Id. at 61,592. FERC found implied surrender. Id. at 61,598. It first noted that “[t]he doctrine has typically been invoked when the licensee, by action or inaction, has clearly indicated its intent to abandon the project, but has not filed a surrender petition.” Id. at 61,597. But it also made clear that “the key element is the licensee's failure to live up to the obligations of its license.” Id. at 61,597–98. It noted that Fourth Branch lacked financing, did not own the project property and had been evicted from the site. Id. at 61,593. Thus, FERC concluded that, because “Niagara Mohawk d[id] not want to operate the project, and [Fourth Branch's] desire to continue as a licensee w[as] evidently not matched by an ability to carry out the license terms,” implied surrender applied. Id. at 61,598. FERC recently reaffirmed this expanded application of the doctrine, stating “the key element
[of implied surrender] is the licensee's failure to live up to the obligations of its license, and we have implied surrender even where the licensee has expressed an interest in continuing to operate the project.” John C. Jones, 123 F.E.R.C. ¶ 61,053, ¶ 13 (Jan. 23, 2008).

[7] Here, FERC determined that Lichoulas's actions and—more important—inaction manifested that he had “abandoned good faith operation of his project” and thus impliedly surrendered his license. Termination Order, 124 F.E.R.C. ¶ 61,255, ¶ 25; see 18 C.F.R. § 6.4; Article 16, 54 F.P.C. at 1888; Order Den. Reh'g, 125 F.E.R.C. ¶ 61,195, ¶ 14. It cited over a decade of project dormancy as well as Lichoulas's consistent failure to meet his repair schedules or even timely respond to the Commission’s inquiries. Termination Order, 124 F.E.R.C. ¶ 61,255, ¶ 20; Order Den. Reh'g, 125 F.E.R.C. ¶ 61,195, ¶ 14 n. 19. It also noted that the City's taking of the Project property "makes any possibility of repairing the project and resuming operations even less likely." Termination Order, 124 F.E.R.C. ¶ 61,255, ¶ 21. Lichoulas counters that his inchoate efforts to repair the Project do not reveal intent to abandon it but instead reflect a series of obstacles beyond his control, including fire, demolition, asbestos abatement and the City's exercise of eminent domain. According to him, "the vast weight of the record evidence is that [he] very much wishes to retain the Project, and is fully capable of returning it to operation (as he has done in the past) if permitted to do so." Pet'r's Br. 37. In response, FERC maintains that it considered the obstacles Lichoulas identified but they “fail to negate the conclusion that [his] inaction demonstrated a clear intent to abandon the project.” Order Den. Reh'g, 125 F.E.R.C. ¶ 61,195, ¶ 15.

In light of the foregoing, we conclude that FERC's application of the implied surrender doctrine here was not arbitrary and capricious; the Commission “examine[d] the relevant data and articulat[ed] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’ ” State Farm, 463 U.S. at 43, 103 S.Ct. 2856 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)). The orders reflect reasoned application of FERC's precedent, which makes clear that "the key element" for implied surrender "is the licensee's failure to live up to the obligations of its license," Fourth Branch, 89 F.E.R.C. ¶ 61,194, 61,597–98, and that the implied surrender doctrine may be applied “even where the licensee has expressed an interest in continuing to operate the project,” John C. Jones, 123 F.E.R.C. ¶ 61,053, ¶ 13. Given Lichoulas's consistent unwillingness or inability to meet his own repair schedules or timely respond to FERC, it reasonably concluded that he had “abandoned good faith operation of his project.” Termination Order, 124 F.E.R.C. ¶ 61,255, ¶ 25; see 18 C.F.R. § 6.4; Article 16, 54 F.P.C. at 1888; Order Den. Reh'g, 125 F.E.R.C. ¶ 61,195, ¶ 14. And while it is true that the Project suffered unforeseen setbacks, the correspondence between Lichoulas and FERC reveals that it was not those setbacks as much as Lichoulas's repeated failure to follow through on his commitments that led to the termination. See supra Part I. Thus, on these admittedly unusual facts, we do not believe that FERC's application of the implied surrender doctrine was arbitrary and capricious.

**10 *778 C. Ex Parte Communications

FERC regulations provide that, generally, “no person outside the Commission shall make or knowingly cause to be made to any decisional employee ... any off-the-record communication.” 18 C.F.R. § 385.2201(b). The prohibition does not apply, however, to “[p]rocedural inquiries, such as a request for information relating solely to the status of a proceeding, unless the inquiry states or implies a preference for a particular party or position, or is otherwise intended, directly or indirectly, to address the merits or influence the outcome of a proceeding.” Id. § 385.2201(c)(5)(i); see also Elec. Power Supply Ass'n v. FERC, 391 F.3d 1255, 1259 (D.C.Cir.2004) (ostensibly procedural inquiry “may in effect amount to an indirect or subtle effort to influence the substantive outcome of the proceeding” (quoting H.R.Rep. No. 94–880, pt. 2, at 20 (1976), reprinted in 1976 U.S.C.C.A.N. 2212, 2229)). If a decisional employee receives an off-the-record communication, FERC must “place the communication [if written] or [a] summary [if oral] in the public file associated with, but not part of, the decisional record of the proceeding.” 18 C.F.R. § 385.2201(f)(2). FERC must also instruct the source of a written off-the-record communication to serve it on all record parties. Id. § 385.2201(f)(4). An “off-the-record written communication from a non-party elected official” is not prohibited under the regulations but FERC must place a copy of any such communication in the “decisional record.” Id. § 385.2201(e)(1)(iv). (g)(1).
[8] Even if FERC receives an ex parte communication that violates 18 C.F.R. § 385.2201, the court will not undo FERC's action unless “the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair.” Press Broad. Co. v. FCC, 59 F.3d 1365, 1369 (D.C.Cir.1995) (quoting Prof'l Air Traffic Controllers Org. v. FLRA, 685 F.2d 547, 564 (D.C.Cir.1982) (footnote omitted)); see Freeman Eng'g Assocs., Inc. v. FCC, 103 F.3d 169, 184 (D.C.Cir.1997).

Press Broadcasting is particularly instructive. In that case, the FCC reversed its decision to cancel a broadcasting permit after receiving ex parte communications from Senate staff and representatives of the permit holder, which “discussed the substance of the cancellation” and sought advice from FCC officials on how to obtain reversal. Press Broad., 59 F.3d at 1368. A competing broadcasting company protested, arguing that the ex parte contacts had tainted the adjudication. Id. Although it was undisputed that the permit holder had violated the FCC's ex parte rules, we held that the contacts were not fatal to the agency's decision because the “contacts extended only to persons who played no role in the Commission's ultimate decision.” Id. at 1369. The contacts had not “impermissibly 'intruded into the calculus of consideration of the individual decisionmaker' ” and had not irrevocably tainted the adjudication. Id. at 1370 (quoting Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs, 714 F.2d 163, 170–71 (D.C.Cir.1983) (internal quotation marks omitted)). We emphasized that “an improper attempt to influence an adjudication is not a concern if it does not reach the ultimate decision maker” and that “judicial evaluation of ex parte pressure must focus on the nexus between the pressure and the actual decision maker.” Id. (quoting ATX, Inc. v. U.S. Dep't of Transp., 41 F.3d 1522, 1527 (D.C.Cir.1994) (emphasis in original)).

[9] Lichoulas argues that FERC received prohibited off-the-record, ex parte communications from Congresswoman Tsongas and members of her staff. Specifically, he points to an August 6, 2008 telephone conversation and an August 18, 2008 email from Tsongas's office. FERC counters that those contacts were “procedural” and thus not “off-the-record communications” under Commission regulations. Order Den. Reh'g, 125 F.E.R.C. ¶ 61,195, ¶ 21. But Lichoulas claims FERC's position is belied by an August 6 email with attachment from Tsongas's office, which references a telephone call, “the purpose [of which] would be to put pressure on the Commission to either (a) provide an update on the timetable for issuing the Order which terminates [Lichoulas's] License, or (b) promptly issue an Order which terminates the license.” Tsongas Memo. Lichoulas says this is strong evidence that the August 6 phone call and August 18 email were not procedural but were instead prohibited off-the-record communications under 18 C.F.R. § 385.2201. According to him, “it is clear that the primary purpose of those communications ... was to put political pressure on FERC to terminate [his] license, which FERC promptly did.” Pet'r's Br. 30.

[10] Lichoulas's argument fails because even assuming arguendo the challenged contacts violated FERC regulations, there is no indication that they influenced the ultimate decision makers. FERC has stated that “none of the members of the Commission” reviewed the email with attachment before approving the order terminating Lichoulas's license and therefore no member was influenced by it. Order Den. Reh'g, 125 F.E.R.C. ¶ 61,195, ¶ 21 & n. 26. And although the Commissioners may have been aware of Tsongas's other contacts, Oral Arg. Recording at 39:14–39:35, without having reviewed the email with attachment they had no reason to conclude that her inquiries were anything but procedural. Moreover, Lichoulas's charge of improper influence is undermined by the fact that the first identified contact from Tsongas's office came in March 2008, while FERC first told Lichoulas that he had implicitly surrendered his license over three years earlier, in September 2004. In sum, there is no indication here of a “nexus” between alleged pressure from Tsongas's office and the Commission's ultimate decision; nor is there any indication that Tsongas's contacts “impermissibly intruded into the [Commission's] calculus of consideration.” Press Broad., 59 F.3d at 1370 (internal quotations and emphasis omitted). We conclude, therefore, that Tsongas's contacts did not irrevocably taint FERC's decision to terminate Lichoulas's license.

D. Evidentiary Hearing

[12] In general, FERC must hold an evidentiary hearing only when a genuine issue of material fact exists, and even then, FERC need not conduct such a hearing if [the disputed issues] may be adequately resolved on the written record.” Cajun Elec. Power Co-op., Inc. v.
**FERC, 28 F.3d 173, 177 (D.C.Cir.1994)** (internal citations and quotations omitted) (modification in original). “We review FERC's decision to deny an evidentiary hearing for an abuse of discretion.” *Id.*

Lichoulas has not identified any issue he could explore at an evidentiary hearing that could not be adequately addressed on the papers. He argues that a hearing would yield evidence of his subjective intent to restore the Project. But this case involves *implied* surrender, which the Commission decides objectively. See 18 C.F.R. § 6.4 (“the Commission will *deem* it to be the intent of the licensee to surrender the license”) (emphasis added). At bottom, Lichoulas's complaint is with the legal conclusion FERC has drawn from the facts. An evidentiary hearing is not warranted simply because he disagrees with that conclusion and FERC did not abuse its discretion in declining to provide one.

For the foregoing reasons, we deny Lichoulas's petition.

*So ordered.*

**All Citations**


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Footnotes

1. While the letter was addressed to the “Appleton Trust,” the entity through which Lichoulas obtained the Project license, we do not hereinafter distinguish between Lichoulas and Appleton Trust.

2. FERC's invocation of *Klamath Water Users Ass'n v. FERC, 534 F.3d 735 (D.C.Cir.2008)*, does not affect our conclusion. In that case, an electricity customer challenged FERC's decision that a utility's license did not restrict its rates. *Id. at 737.* We held that the customer lacked standing because California's and Oregon's utility commissions, not FERC, controlled the rates and thus a favorable ruling by us would not provide redress. *Id. at 740.* Thus, that was not a case where “an order directed to [FERC would] significantly increase the chances of favorable action by a non-party” because there was no reason to think that FERC's decision would affect either state's decision. *Id.*

3. 18 C.F.R. § 6.4 applies to projects, like Lichoulas's, “of not more than two thousand horsepower installed capacity.” 16 U.S.C. § 803(i); see 18 C.F.R. § 6.4; Order Issuing License, 36 F.E.R.C. ¶ 62,047.

4. Lichoulas attempts to distinguish *Fourth Branch* by noting that the licensee in that case had been unable to “obtain the financing necessary to refurbish, expand, and operate the project.” Pet'r's Br. 42–43 n. 114 (quoting *Fourth Branch, 89 F.E.R.C. ¶ 61,194, 61,593*). He insists that he has financing to complete his repairs and has executed a letter of intent with an engineering firm to carry them out. *Id.* This distinction, however, does not make *Fourth Branch* inapposite. Here, as in *Fourth Branch*, FERC found implied surrender from the licensee's inability or unwillingness to follow through on his commitments to the Commission as a licensee. Conditional agreements with banks and engineers do little to affect that analysis, given Lichoulas's history.

5. As defined by 18 C.F.R. § 385.2201(c)(4).

   Off-the-record communication means any communication relevant to the merits of a contested on-the-record proceeding that, if written, is not filed with the Secretary and not served on the parties to the proceeding in accordance with Rule 2010, or if oral, is made without reasonable prior notice to the parties to the proceeding and without the opportunity for such parties to be present when the communication is made.

6. FERC contends that Lichoulas waived this argument because he did not seek rehearing after the Commission rejected it for the first time in the Order Denying Rehearing. Resp't's Br. 40; see 16 U.S.C. § 825(b) (“No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.”); *Cal. Dep't of Water Res. v. FERC, 306 F.3d 1121, 1125 (D.C.Cir.2002)* (“[I]f an order on rehearing modifies the results of the earlier order in a significant way adverse to a party, that party must seek a rehearing of the order before filing a petition for judicial review.”). FERC is wrong. Lichoulas objected to the alleged off-the-record communications in a filing captioned “Response to Off-the–Record Communications and Request for Disclosure of Oral Off–the–Record Communications,” dated September 5, 2008, which predated the Termination Order. He repeated his objection in his rehearing request. The Order Denying Rehearing did not “modify[y] the results” of the Termination Order, *Cal. Dep't of Water Res., 306 F.3d at 1125*; it merely addressed an argument the Termination Order had rejected *sub silentio*. The fact that FERC failed to address his argument in the first instance does not mean he must press it yet again at the agency level.

7. Lichoulas does not object to FERC's handling of the email with attachment itself; he concedes that the Commission properly processed them under section 385.2201(f)(2).
To the extent Lichoulas suggests the Commissioners were in fact aware of pressure from Tsongas's office and FERC has prevaricated or misled the Court, see Reply Br. 25–26, we note that

[i]t would take considerably more than the unsupported allegation in a brief to show that the Commission or any one of its members failed to act impartially. Under the well-settled presumption of administrative regularity, courts assume administrative officials “to be men [and women] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.”

MEMORANDUM

TO: Secretary Kimberly Bose
FROM: Commissioner Neil Chatterjee
RE: Notice of ex parte communication in Monongahela Power Co., EC17-88-000

The purpose of the memorandum is to report an ex parte communication in the above-referenced docket. On January 11, 2018 William Scherman contacted me, indicating his concern that the Commission would shortly issue an order adverse to the interests of Monongahela Power. Mr. Scherman also stated that he would prefer that the Commission set the issue for hearing instead of issue an adverse order. As soon as I realized that Mr. Scherman's communication concerned the merits of the contested proceeding, I terminated the communication and did not respond to Mr. Scherman's statements. I then drafted this memorandum to memorialize the ex parte communication for the record in docket no. EC17-88-000.
Separation of Functions
1. The Commission adopts this statement of administrative policy on the separation of its staff's functions. The Commission believes generally that functions may be combined, that is, the same person may perform more than one function or perform a function that he typically does not otherwise perform, provided (1) such combination enhances the Commission's understanding of energy markets and related issues and (2) parties in individual proceedings appear to and actually receive a fair and impartial adjudication of their claims. Nothing in this statement of administrative policy should be construed as modifying the Commission's existing regulation on separation of functions at 18 C.F.R. 385.2202 (Rule 2202) or on prohibited off-the-record communications at 18 C.F.R. 385.2201 (Rule 2201). In brief, this statement of administrative policy addresses those situations where a Commission staff member may perform multiple functions without running afoul of the Administrative Procedure Act (APA), 5 U.S.C. 554(d)(2) and 557(d). Simply put, it examines “who may talk to whom when.”

I. BACKGROUND

2. The APA recognizes that Congress has generally vested Federal administrative agencies with both the power to initiate actions to enforce compliance with their statutes and the responsibility of ultimately determining the merits in those cases.1 “It is well settled that a combination of investigative and judicial functions within an agency does not violate due process.”2 Nevertheless, APA § 554(d)(2) directs Federal agencies to separate functions to prevent contamination of judging by the performance of inconsistent functions. A bedrock of Anglo-American jurisprudence, the principle briefly stated is that “no person can be a judge in his own cause.”3 The Commission has applied this direction and principle in Rule 2202, which, generally speaking, prohibits communications between its advisory and trial staffs in the same proceeding. This statement of administrative policy is not intended to modify Rule 2202, but rather to elaborate on it. As the Commission gains experience in implementing the policy articulated here, it may consider amending Rule 2202 to codify further its guidance on separation of functions.

3. The Commission's staff performs many functions to enable the Commission to fulfill its responsibilities under its enabling statutes, inter alia, to ensure that public utilities and natural gas and oil pipelines charge just and reasonable rates and provide nondiscriminatory service, and to protect the public and the environment in the construction and operation of hydropower and natural gas pipeline projects. These many functions are frequently complex, and include: (1) the review of rate and other tariff filings; (2) the litigation of rate filings and other matters; (3) the auditing of companies' accounts; (4) the preparation of environmental documents; (5) the economic and engineering analysis of project applications; (6) the promulgation of rules and issuance of policy statements; (7) the resolution of disputes; (8) the monitoring of markets; (9) the enforcement of regulations and law; and (10) the communication with the public on Commission rules and policy.

4. At all times, the Commissioners function as the ultimate decisionmakers.4 Commission staff's functions, however, are varied. Sometimes, as noted, they perform functions simply referred to as either advisory or trial - a bright-
line characterization of the separation of functions principle reflected in Rule 2202. That rule states (with emphasis added):

In any proceeding in which a Commission adjudication is made after hearing, no officer, employee, or agent assigned to work upon the investigation or trial of the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings.

The Commission has generally viewed “hearing” in this context to mean a trial-type evidentiary hearing before an Administrative Law Judge (ALJ), and accordingly has applied Rule 2202 in that context. In addition, the Commission has found that separation of functions is not required in rulemakings.

5. Generally, the Commission's advisory staff literally “advises” the Commission by preparing memoranda and draft orders, opinions, and rules for its consideration in specific docketed proceedings, and the Commission's trial staff literally “tries” cases in such proceedings before the Commission's ALJs. But the Commission has many staff members who are not trial staff but who also are not the traditional advisory staff. These include staff members who monitor the energy markets, investigate and enforce alleged violations of the law, audit companies' books, work with other Federal and state agencies on environmental matters, facilitate resolution of disputes, and communicate agency policy and action to the Congress, state officials, and the public.

6. Separating the Commission's functions has become more challenging recently because of fundamental changes in the industries regulated by the Commission, as well as the imperative for the Commission to oversee markets and reach out to members of the industry, state commissions, and citizen groups in pursuing its market-oriented goals. The Commission wants to be able to be open and responsive to those outside the Commission, and at the same time have access to advisors with the required expertise to aid the decision making process. Thus, as the Commission's resources are limited, a combination of certain functions may be necessary to take advantage of that expertise while ensuring the integrity of the decision making process in pursuit of the important public interest objective of resolving critical matters correctly and on a timely basis.

7. Separating the Commission's functions is also complicated by the important and necessary prohibition of off-the-record communications in Rule 2201. Promulgated to protect the due process rights of those participating in Commission proceedings, Rule 2201 (also known as the ex parte rule) prohibits off-the-record communications between Commission “decisional” staff and persons outside the Commission on the merits of any issue in a contested on-the-record proceeding. A “decisional employee” is defined as a Commissioner or member of his or her personal staff, an administrative law judge, or any other employee or contractor of the Commission, who is or may reasonably be expected to be involved in the decisional process of a proceeding. See 18 C.F.R. 385.2201(c)(3). A “non-decisional employee” is a member of the Commission's trial staff in a proceeding, a settlement judge, a neutral (other than an arbitrator) in an alternative dispute resolution proceeding, or an employee designated as non-decisional in a case. Id. Both definitions presuppose an on-going on-the-record proceeding in which persons have filed a complaint or have intervened and protested a filing or proposal, and the issues are being litigated or have been litigated before an ALJ or are being adjudicated in on-the-record “paper” hearings that will be decided by the Commission.

8. The separation of functions and ex parte rules address two distinct types of situations: one involving communications within the Commission and the other involving communications between Commission personnel and persons outside the Commission, respectively. As described in the House Committee Report on the Government in the Sunshine Act, which amended the APA in 1976, the ex parte “rule forbids . . . communications between interested persons outside the agency and agency decision makers. . . . Communications solely between agency employees are excluded from the section's prohibitions.” Nevertheless, the two rules can collide where a Commission non-decisional employee
engages in a permissible *ex parte* communication but is confronted with the opportunity to discuss the matter with Commission decisional employees. In that situation, as discussed below, the non-decisional employee must separate his function and refrain from conveying the communication to the decisional employee.

9. The two rules can also interact, or at least raise concerns, where an employee's function falls somewhere between the traditional litigation and advisory roles, that is, where the employee is not typically a member of the Commission's litigation staff, but also is not involved in the day-to-day processing of filings and advising the Commission on particular contested cases. In that situation, as also discussed below, the employee is considered decisional for the purposes of Rule 2201. Thus, while he may discuss with the Commission information he has obtained from the industry and the public, he may not receive or convey any information on issues in on-going contested on-the-record proceedings.

II. LEGAL CONSIDERATIONS

10. Against this backdrop, the Commission's objective here is to craft a policy on separation of functions that will balance the imperative to be kept fully informed by the agency's expert staff, who necessarily need to talk to the public and members of the industry, and the requirement to protect the due process rights of persons participating in Commission proceedings. The law on separation of functions is murky at best, in large part because of the incredible variety of functions performed by the many Federal agencies. Consequently, as “one size does not fit all,” the Commission must examine these issues specifically in the context of its own functions and needs, informed as much as possible by APA case law involving other agencies.

11. To this end, the Commission believes that the place to start is the “separation of function” rule in the APA, which provides:

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply (A) in determining applications for initial licenses; (B) to proceedings involving the validity or application of rates, facilities or practices of public utilities or carriers; or (C) to the agency or a member or members of the body comprising the agency.

**4 5 U.S.C. 554(d)(2). Subject to many interpretations and nuances, this rule has generally been viewed as foreclosing staff adversaries from advising the agency's decision making personnel.** While a subordinate purpose is to safeguard the record from off-the-record communications, the rule's “primary purpose is to exclude staff members whose “will to win” makes them unsuitable to participate in decision making.”

12. As a practical matter, the Commission has implemented APA § 554's mandate in Rule 2202 by separating its staff into advisory and trial staff once a filing, complaint, or investigation has been set for a trial-type evidentiary hearing before an ALJ. That has been the case even though APA § 554 explicitly excludes from its coverage the Commission's two major functions - licensing and ratemaking. Thus, for example, the Commission has applied Rule 2202 to electric and gas rate filings and hydropower and gas pipeline licensing applications that were set for trial-type evidentiary hearing; conversely, the Commission has not applied Rule 2202 to such filings and applications - regardless of their complexity or record size - that were processed by its advisory staff through “paper hearings.”

13. As a consequence, for example, the Commission's ALJs currently serve as true trial judges, generally not consulting advisory staff, and ensuring that the trials are a separate and distinct aspect of the decision making process. On the other hand, the Commission's advisory staff conduct technical conferences where they discuss issues with the parties, and
subsequently advise the Commission on the appropriate course of action. The Commission has not separated these latter functions - nor does it intend to do so now - even though staff's participation in the technical conferences may have on occasion appeared to have been adversarial. Furthermore, under APA § 554, the Commission would not necessarily have to separate any functions in the licensing and ratemaking areas. 15 Nevertheless, when the Commission has chosen to set certain cases, in particular rate cases, for hearing, it has separated, or not combined, the trial and advisory functions in factually-related proceedings regardless of the subject matter. 16

14. In sum, especially with respect to regulatory agencies like the Commission, the APA does not require that there be a rigid line drawn between functions. Rather, the APA strikes a balance between “fairness and pragmatism.” 17 Thus, the protection of fair decisions can be balanced against the efficient use of staff resources so that the Commission may have access to the expertise that it needs to make sound decisions in highly technical, complex, or novel situations. At bottom, due process requires that there be an impartial decision maker to ensure that decisions are reasoned and unbiased and that all affected parties can play a meaningful role in the decision making process. 18

III. POLICY ON SEPARATING FUNCTIONS

15. The Commission now adopts the following statement of administrative policy for separating its staff's functions. This statement lays out the function by policy, which for the most part corresponds to the Commission's program and legal offices, and, where relevant, explains the relationship between the function and the ex parte rule. It mainly explores “who may talk to whom when,” and focuses understandably on who may talk to the decision makers and their advisors, as the concern of the APA is the integrity of the decision making process. As noted, the Commission generally believes that functions may be combined provided (1) such combination enhances the Commission's understanding of energy markets and related issues and (2) parties in individual proceedings receive a fair and impartial adjudication of their claims. Nothing in this policy should be construed as modifying either Rule 2202 (separation of functions rule) or Rule 2201 (ex parte rule).

16. For purposes of applying this statement of administrative policy, one may assume that if a staff member who typically performs one function is assigned to perform another function in a specific case, he is bound by the rules applicable to the function for that case. In other words, the policy follows the function. 19 As a separate matter, for purposes of applying this statement of administrative policy, “factually-related” refers to cases triggered by the same filing or arising out of the same set of facts. 20 The Commission recognizes that this is a relatively narrow definition of “factually-related,” but a broader definition could impede the Commission in carrying out its responsibilities, given the tremendous overlap between companies and between issues in Commission cases.

A. Litigation

1. Relevant Offices

17. The litigation function is staffed primarily by the Office of Administrative Litigation (OAL). OAL, which is composed of technical and legal staff members, participates in trial-type evidentiary hearings and settlement judge proceedings, representing the public interest in proceedings related to all areas of the Commission's jurisdiction. 21 (As discussed below in III. B., investigators in Office of Market Oversight and Investigations at times also serve as litigators. Also, as described in Paragraph 45, the Commission may designate an advisor as non-decisional to function as a litigator.)

2. Functions
18. The litigation function begins when the Commission by order sets a matter for trial-type evidentiary hearing before an ALJ or institutes a settlement judge proceeding. See generally 18 C.F.R. Part 385, Subparts D-H. It may also be triggered where the Commission remands a case for further examination at trial. In these situations, litigators take an adversarial role, conducting discovery, negotiating settlements, filing testimony, appearing as witnesses, cross-examining witnesses, and drafting motions, answers, andinitial and reply briefs. The litigation ends when the parties settle or the record closes after the ALJ issues an initial decision and the parties, including the Commission's litigators, have filed briefs on and opposing exceptions. The litigation function, however, for purposes of separation of functions, continues throughout the time that the Commission is considering the case, including the period when any rehearing requests are pending.

3. Who May Talk To Whom When

**6 19. Rule 2202 in particular governs discussions between a litigator and other members of the Commission's staff. As provided there, the litigator must separate his function from other functions once a matter is set for trial-type evidentiary hearing. Accordingly, until that time, a staff member who may ultimately be a litigator in a case may discuss the matter with anyone at the Commission, including the decision makers and their advisors. In effect, until that time, the “litigator,” i.e., typically a staff member in OAL, would not be serving a litigation function. Accordingly, he may analyze tariff filings, review and help draft hearing orders, and participate in technical conferences. At this early stage in a proceeding, a would-be litigator would not have the “will to win” underlying the separation of functions rule so the protection of the process would be fairly balanced by the experience the litigator can contribute. He may also review and help draft other orders, including rehearing orders, provided the case was not set for hearing and did not involve a matter factually related to a case set for trial-type evidentiary hearing.22 Further, he may participate informally in the Commission's rulemakings (that is, he may review and help draft rules, and discuss the issues with the advisors and would not need to file formal comments), and otherwise contribute *62407 to generic policy discussions. In addition, he may perform other functions normally associated with staff who reach out and provide information to the public about Commission action.

20. Once a case is set for trial-type evidentiary hearing, a litigator may no longer serve an advisory function or give advice on the merits in that proceeding or in a factually-related proceeding, even after the record closes before the ALJ. That, of course, is what Rule 2202 requires. The reasons are twofold. Primarily, the litigator is assumed to have the “will to win” that could skew the impartiality of the proceeding if he were to speak to the Commission or its advisors. To do so would mean that he was acting as both prosecutor and judge in the same proceeding. Indeed, while the APA contains an exception for “the agency or a member or members of the body comprising the agency,” see 5 U.S.C. 554(d)(2)(c), that exception is generally believed to preclude the agency's members from receiving advice from staff adversaries.23 Also, as a practical matter, the litigator cannot function efficiently without speaking off-the-record to parties in the proceeding. Accordingly, he would taint the proceedings if he communicates case-specific information gleaned from otherwise permissible communications with persons outside the agency to the decision makers and their advisors. See also infra note 42 and paragraph 27.

21. Additionally, a litigator may not, without the prior agreement of all parties, explain to decision makers and their advisors, off-the-record, a contested settlement agreement.24 The reason is obvious - the proceeding is still adversarial. The same policy is unnecessary, however, for truly uncontested settlements because there no longer exists any controversy.25 Thus, for example, litigators may explain the uncontested settlement to the advisors. Such communication would not impair the Commission's independent obligation to ensure that even uncontested settlements are in the public interest, because, notwithstanding any discussion between these staff members, the Commission always has the “last word.”

**7 22. On the other hand, as noted, the litigator may talk to others at the agency on matters of general policy, as the separation of functions rule does not prohibit such communications as long as they are not a subterfuge for prohibited ex parte communications.26 He may also receive a briefing from advisors on the policy implications of a case, as long
as that communication is from the advisors and not to them. That is, any information flow may be down from the advisors, but never up to them from the litigator. In addition, the litigator may communicate with advisors about strictly-speaking procedural matters, e.g., to inquire about the status of a related proceeding or to convey parts of the record for consideration by the Commission. At all times in these procedural exchanges, the litigator must avoid discussing anything substantive or opining in any way about the issues or the record. 27

B. Investigation and Enforcement

1. Relevant Offices

23. The Commission’s investigation and enforcement function is primarily staffed by the Office of Market Oversight and Investigations (OMOI), which, inter alia, manages the Enforcement Hotline; investigates alleged violations of orders, rules and regulations; informally facilitates resolution of disputes; and advises the Commission on, and at times litigates, formal enforcement cases. In addition, the Office of the Executive Director/Division of Regulatory Audits (OED/DRA) performs a type of investigative function by conducting financial and performance audits of regulated companies.

2. Functions

24. Investigators conduct preliminary and formal investigations, which may be either public or private. See generally 18 C.F.R. Part 1b. 28 They accomplish their mission by gathering information, sometimes obtained initially through the Enforcement Hotline, auditing compliance with Commission rules and reporting requirements, and investigating actions of market participants. Investigators frequently resolve disputes, and reach settlements on violations by market participants, through informal procedures. If such matters cannot be resolved informally, investigators may advise the Commission on how to proceed, e.g., by recommending that the Commission issue a show cause order, set the matter for hearing, direct staff to pursue further a particular matter, or terminate the investigation. 29 As relevant here, there are no parties and no person may participate as a matter of right in an investigation. 30 Sometimes, the Commission also directs its investigators to pursue formal complaints filed with the Commission. 31

25. For their part, OED/DRA auditors perform financial audits by reviewing the accounting records and financial statements of jurisdictional companies to determine if they comply with requirements of the Uniform Systems of Accounts and related Commission regulations. They perform reviews of management operations through performance audits, which are objective and systematic examinations of performance of a program, activity, or function in order to provide information to improve public accountability and facilitate decision-making by parties with responsibility to oversee or initiate corrective action.

3. Who May Talk To Whom When

**8 26. Unless an investigator is assigned to serve as a litigator, she may freely speak to persons inside the Commission about an investigation, and outside the Commission subject to 18 C.F.R. 1b. 9, which requires, inter alia, Commission staff to treat as non-public the existence of an investigation and any information received during it, unless the Commission orders otherwise. 32 (If she serves as a litigator, then she must separate her functions as discussed below in III. A.) Technically, this is the case because there are no parties in an investigation, see Baltimore Gas & Electric v. FERC, 252 F.3d at 461, and nothing has been set for a trial-type evidentiary hearing. Therefore, the investigation triggers neither Rule 2201, which assumes a proceeding with parties, nor Rule 2202, which assumes a trial-type evidentiary hearing. Accordingly, the investigator may speak to decision makers and their advisors throughout her investigation (up to the point where she may be assigned to be a litigator), providing them with details of the investigation, seeking their input on how to proceed, and discussing settlement with them. Proceeding in this way does not compromise the Commission's
decision making process, because the “mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the [Commissioners] at a later adversary hearing.”

27. The freedom that an investigator has to discuss matters with anyone in the Commission derives from the meaning of “adjudication” in the APA, viz., an “agency process for formulation of an order.” See 5 U.S.C. 551(7). Accordingly, “[i]nvestigatory proceedings, no matter how formal, which do not lead to the issuance of an order containing the element of final disposition as required by the definition, do not constitute adjudication.” Indeed, the Commission has found that a staff investigation does “not affect or determine rights, but merely develops facts.” Therefore, as noted, an investigator may discuss issues with and otherwise advise or seek guidance from decision makers and their advisors while the investigation is on-going up to and through the issuance of a show cause order or order instituting a formal investigation, and even thereafter through the issuance of a final Commission order disposing of the investigation, for example, by accepting a settlement of the matter or taking appropriate remedial action. Again, assuming that the matter had not been set for trial-type evidentiary hearing and that the investigator has not served as a litigator, the combination of the investigative and advisory functions under these circumstances would be appropriate.

28. Of course, if the Commission sets a matter that was previously the subject of an investigation for trial-type evidentiary hearing, an investigator who now serves as a litigator or who now works with the litigators during the hearing is foreclosed from discussing the case with the decision makers and their advisors, just as litigators are, because at that point Rule 2202 expressly comes into play. While the Commission's setting a matter for hearing will probably close out the investigator's role under the aegis of OMOI, her experience with the record may prove invaluable to the litigators, who may want to seek her counsel throughout the trial. That too would foreclose her advising the Commission later. On the other hand, if all the investigator does is to turn over information collected during the course of her investigation to the litigators at the beginning of the litigation, she would be allowed to advise the Commission subsequently when the Commission considers the matter after hearing.

29. In the event the investigator continues an aspect of an investigation while other aspects of the investigation are being tried before an ALJ, the investigator may communicate the results of such additional investigation to the litigator, and may answer the litigator's questions about the additional information. The investigator and the litigator may not, however, discuss the issues in or the progress of the litigation. In other words, any communication between them on the litigation must be strictly procedural. If the investigator receives inadvertently an ex parte communication as a result of communication with litigation staff, he is, of course, bound by Rule 2201, and must disclose the communication for publication in the Federal Register. Conversely, the investigator may receive from litigation staff non-case-specific information on possible statutory or other legal violations that came to the litigators' attention during the course of litigation.

C. Dispute Resolution

1. Relevant Offices

30. The dispute resolution function is primarily staffed by the Commission's Dispute Resolution Service (DRS), the Office of the Administrative Law Judges (OALJ), and OAL, although other offices are frequently involved in resolving disputes, as the vast majority of Commission cases are processed outside an adversarial setting. As an independent and neutral office, DRS is not involved in the Commission's decisional processes, does not advocate positions in Commission proceedings (in trial-type evidentiary hearings or elsewhere), and does not conduct investigations. DRS is functionally separate from the rest of the Commission, because the nature of the work requires ex parte contacts. See 18 C.F.R. 385.604. For its part, OALJ provides settlement judges, where appropriate or ordered, to resolve disputes. In this regard, the Commission may direct the appointment of a settlement judge or a judge to act as a mediator in any proceeding, or
the parties or the presiding judge may request the appointment of a settlement judge or a judge to act as a mediator to assist in settlement negotiations. See 18 C.F.R. 385.603. OAL also negotiates settlements, *62410 and assists parties in proceedings in a non-adversarial, facilitative role. In addition, other offices supply neutrals and facilitators, with relevant technical or legal expertise, to assist in resolving disputes.

2. Functions

31. A dispute resolver convenes meetings and otherwise works with parties in a proceeding to facilitate or mediate a resolution of disputes without litigation. His goal is to promote frankness and cooperation among the parties, so anything that a party tells a dispute resolver is protected as confidential. Parties must feel free to be completely forthcoming without fear that their statements may later be used against them if settlement is not achieved. His unique status allows him to assist parties at any time before or after a filing is made at the Commission, or whenever a dispute arises between or among entities that appear before the Commission. If the parties choose to proceed with Alternative Dispute Resolution (ADR), they select a third party neutral (who may be a DRS staff member, an ALJ acting as a mediator, another FERC employee, or an outside person) and define that person's role with the help of DRS. See 18 C.F.R. 385.604. A settlement judge performs in a similar fashion except, as noted, he does not work independent of the Commission action inasmuch as his involvement is ordered either by the Commission *ab initio* or by parties in cases already set for trial-type evidentiary hearing, and replaces or suspends any otherwise pertinent procedures. If negotiations with the settlement judge do not result in a settlement, the matter is returned to the Commission or presiding judge, as appropriate, for further proceedings. See 18 C.F.R. 385.603.

3. Who May Talk To Whom When

**10 32. A dispute resolver must be separated from the rest of staff so that he may facilitate resolution of disputes through *ex parte* contacts, even though participation in settlement discussions is not the equivalent of participation in a trial-type evidentiary hearing for the purpose of Rule 2202. 40 This separation of functions is reflected in the definition of “non-decisional” in Rule 2201, which expressly includes neutrals and settlement judges (as well as trial staff). This separation of functions is also qualified in three ways. First, before he begins his job, the dispute resolver may talk to advisors and other staff members to obtain background information. Second, with the permission of all other parties, he may communicate with decision makers and their advisors about substantive matters. Finally, he may report to decision makers and their advisors on the status of the ADR proceeding at any time, see 18 C.F.R. 385.604(f), provided such discussions do not include any characterizations of the negotiations, including the positions being taken by the parties.

33. Other staff may be brought into the dispute resolution process if their subject matter expertise is needed to assist with resolution of a dispute, although these staff members may not later participate in or advise decision makers in any factually-related proceeding without the permission of the parties. For like reasons, a settlement judge may report to the Commission only the procedural status of the settlement negotiations. See 18 C.F.R. 385.603(g)(2). In order to encourage a free flow of information in the settlement process, the settlement judge is prohibited from discussing the case with the presiding judge and is never the presiding judge. He likewise may not discuss the merits with decision makers or advisors, because he would have been privy to *ex parte* communications, although he may talk to litigators just as he may talk to all parties in the case off-the-record.

D. Market Oversight

1. Relevant Office

34. The market oversight function is staffed primarily by OMOI, which, among other things, produces reports describing the state of energy markets, reviews and analyzes market occurrences and trends, provides early warning of vulnerable market conditions, and makes recommendations to the Commission on the functioning and governance of energy
markets. The Office of Markets, Tariffs and Rates also performs a market oversight function as associated with its review and processing of rate filings from the regulated companies.

2. Functions

35. Market overseers assess market performance through analyzing market structures and proposing policies for improvement; acquire and analyze public and proprietary information data bases; conduct market research and develop market models and simulations; analyze effects of current and proposed regulation, market rules and policy options; and advise the Commission on the market effects of current and proposed policies. For instance, market overseers review bidding anomalies, price spikes, inappropriate use of certain financial instruments, fluctuations in available capacity on electric transmission lines as well as on natural gas pipelines, and market affiliate transactions.

3. Who May Talk To Whom When

**11 36. Market oversight by definition does not involve trial-type evidentiary hearings or other contested on-the-record proceedings. Therefore, as an initial matter, neither Rule 2202 nor Rule 2201 would foreclose a market overseer from talking to any other Commission employee, including decision makers and their advisors, on any matter about which the market overseer has gained insight and information in the course of performing his market oversight function, including talking to people outside the agency. Along the same lines, the market overseer may share written materials that he may obtain in that process with other employees. This is the case even if the information conveyed by the market overseer to other employees ultimately forms the basis for Commission action, for example, the institution of an investigation or the issuance of a show cause order on an anomaly discovered in the operation of the energy markets. At that time, the market overseer would have properly combined his oversight function with an advisory function. Afterwards, he may also assist the investigators without running afoul of either Rule 2202 or Rule 2201. See supra III.B (discussion on investigators).

37. Notwithstanding the freedom the market overseer has to communicate inside FERC in performing his function, he is nevertheless bound, as are all employees, by the prohibitions in Rule 2201 on *ex parte* communications. That is true because, while he does not normally perform a traditional advisory function, such as drafting orders, opinions, and rules, the market overseer is considered a decisional employee for the purpose of that rule. Accordingly, he may at times find himself in a difficult position, because his function will necessarily bring him into contact with members of the industry and public, some of whom may want to talk about specific issues in contested on-the-record proceedings. As a consequence, he must be diligent to avoid discussing issues in such proceedings with persons outside the Commission so as not to jeopardize the integrity of the Commission's decision making process. Of course, as is also true for all employees, the market overseer may freely discuss generic issues, especially as they arise in rulemaking proceedings, with both outsiders and other Commission staff, as Rule 2201 does not apply to such proceedings. Accordingly, he may combine his oversight function with an advisory function, and even assist in drafting rules and policy statements.

E. Environmental Coordination

1. Relevant Office

38. The Commission has a special environmental expert called the Federal Preservation Officer (FPO), who coordinates with various offices regarding the Commission's compliance with the National Historic Preservation Act and related statutes.

2. Functions
39. The FPO is the Commission's technical expert on historic preservation matters, and also ensures that Indian tribes have meaningful and timely input in the Commission's processes that may affect them. The FPO coordinates with (1) the General Counsel on preservation matters requiring legal opinions, (2) the Director of the Office of External Affairs on inter-agency preservation matters, and (3) the Office of Energy Projects on technical responses, guidance, and project-specific matters that are high profile, precedent-setting, or in dispute. The FPO also engages in outreach activities in regard to the National Historic Preservation Act and related statutes.

3. Who May Talk to Whom When

**12 40. The FPO is an advisor and generally may have discussions on the merits of even contested on-the-record proceedings with decision makers and other advisors, even though she may have engaged in off-the-record communications with other Federal agencies. The reason is that, assuming the other agencies have not intervened in the proceeding, those conversations would be exempt from the *ex parte* prohibitions, albeit subject to disclosure and notice, and placed in the decisional record. See 18 C.F.R. 385.2201(e)(1)(v). Accordingly, *62412 she may discuss anything in the record as would be the case for another advisor. In other words, the function of the FPO and other staff members who regularly coordinate with other agencies to ensure FERC compliance with environmental statutes is not separated from other functions, but rather combined with an advisory function that is simply subject to the procedures for exempt communications in Rule 2201, the *ex parte* rule. 43

F. Advisors

1. Relevant Offices

41. The advisory function is staffed primarily by the Office of Market, Tariffs, and Rates (OMTR), the Office of Energy Projects (OEP), the Office of the Executive Director/Division of Regulatory Accounting Policy (OED/DRAP), and the Office of General Counsel (OGC). OMTR is responsible for providing technical advice to the Commission in matters involving electric, natural gas, and oil pipeline rates and services. OEP provides technical guidance related to the certification, construction, acquisition, operation and abandonment of natural gas pipeline facilities and services; the import and export of natural gas; the licensing and related regulation of hydroelectric projects; and hydroelectric safety. OED/DRAP advises the Commission and other offices on the accounting aspects of mergers, acquisitions and dispositions of facilities, rate filings, and gas pipeline certificate applications; develops accounting policy; and responds to requests for accounting approvals and interpretive rulings. OGC is responsible for providing legal advice to the Commission in conjunction with the technical advice and for representing the Commission before the Federal courts in regard to the agency's enabling statutes.

2. Functions

42. Advisors perform both legislative and adjudicative functions. For example, they draft rules and policy statements for the Commission's consideration, and help organize meetings to gather comments from the public. Along the same lines, they prepare interpretive rulings and render advisory opinions in accordance with 18 C.F.R. 388.104. Advisors also process “paper hearings,” which constitute the bulk of Commission action. In this regard, among other things, they prepare initial and rehearing orders, including orders and opinions on ALJ initial decisions, and conduct technical conferences to facilitate resolution of disputes among the parties.

3. Who May Talk To Whom When

**13 43. An advisor may speak to anyone else in the agency on policy matters and on matters not related to the merits of a contested on-the-record proceeding, as the first does not implicate trial-type evidentiary hearings and the second does not implicate prohibited off-the-record communications. In the highly complex technical field of energy regulation,
information sharing is essential and administratively efficient. The advisor may also speak to another staff member on procedural matters, even where the other staff member may have permissibly received information from someone outside the agency because, for example, he was litigating the case before an ALJ. An advisor, of course, must take great care to avoid discussions on the merits in such cases, as such discussions are specifically barred by Rule 2202, and otherwise to avoid any appearance of impropriety. Moreover, as a practical matter, it is very difficult to discuss the facts of a case without getting into the merits of the issues. Frequently, the facts or, more precisely, the relevance of certain facts plays a major role in the ultimate decision by the Commission. Therefore, the advisor should not discuss the facts of a case with the litigator who is trying or has tried the case.

44. An advisor's rendering an interpretive ruling or an advisory opinion will not, as a general matter, trigger either Rule 2201 or Rule 2202. Section 388.104 of the Commission's regulations, which provides that staff may informally advise and assist the general public and applicants, points out that the views expressed by staff do not represent the official views of the Commission. Also, the informal advice that may be sought from staff under this regulation is intended for the sole use of the person requesting the opinion, and is limited to the facts presented in the request. More to the point, with one exception, requesting an opinion does not initiate a proceeding with parties or trigger a trial-type evidentiary hearing, thereby falling outside the scope of both Rule 2201 and Rule 2202 and allowing for *62413 discussions between Commission staff and persons outside FERC and discussions between individual Commission staff members. The exception involves interpretive rulings by the Chief Accountant in OED/DRAP. Even though they respond to individual company requests, the rulings are publicly available and subject to rehearing. If a rehearing application is filed, the matter becomes a contested proceeding, subject to Rule 2201 (the ex parte rule). It is still not a matter in litigation, however, and Rule 2202 (separation of functions rule) is not applicable. Staff members may thus freely talk among themselves about the issues.

45. At times, the Commission designates an advisor as non-decisional for the purpose or Rule 2201, for example, to serve as an expert witness in a trial-type evidentiary hearing or to serve as a facilitator in a contested on-the-record “paper hearing” proceeding. 45 During the time he serves in that capacity and afterwards, the designated non-decisional employee may not advise the Commission on the matter (or a factually-related one). In other words, as is true for the litigator, the road is one-way. Once the advisor becomes a litigator or non-decisional employee, he may not return to advising the Commission on the matter, or a factually-related one, because in addition to the obvious fairness concerns identified above with respect to a litigator's becoming an advisor, he would likely have permissibly engaged in off-the-record communications necessary to litigate a case or he would have probably worked with outside parties off-the-record to resolve issues. Both scenarios implicate possible ex parte concerns.

G. Outreach

1. Relevant Offices

46. The Office of External Affairs (OEA) is the primary source of information regarding Commission matters for the general public; Federal, state, and local governments; news media; and public and private interest groups. The program offices also perform an outreach function as that pertains to the areas of the Commission's jurisdiction or responsibilities for which they are charged to handle, and OGC provides any legal support necessary to ensure that the outreach programs comply with any applicable law.

2. Functions

47. The main function of the out-reacher is to convey the Commission's message to those outside the agency. The out-reacher performs that function in a variety of ways, including issuing news releases and otherwise working with the press; providing instructive materials; fielding calls from the public; responding to correspondence, including inquiries from members of Congress; and organizing meetings, conferences, and workshops to examine issues that range from the
Nation's energy infrastructure to the condition of energy markets. While the out-reacher does not usually participate in the decision making process, he is nonetheless a decisional employee, or at least he is not a non-decisional employee, as defined in Rule 2201. The reason is that he frequently must interact with the Commission and its advisory staff, and he may necessarily be involved in discussions of contested cases in order to be able to explain them to the public.

3. Who May Talk To Whom When

48. An out-reacher's role at the Commission rarely if ever triggers Rule 2202 on separation of functions, as he is never involved in trial-type evidentiary hearings. Of course, as he may be privy to discussions of the merits of pending cases that may have been litigated, he must avoid talking to the litigators about the merits of the issues in those cases or factually-related cases, as required by Rule 2202. By contrast, the out-reacher's job understandably implicates Rule 2201 on ex parte contacts, because that job is to talk to outsiders. The type of communication in which he normally is involved, however, is not on the merits of issues in contested proceedings. Rather, as noted, the out-reacher is primarily charged with conveying information to the public on the Commission's decisions and other agency events, and he should not be receiving information intended to influence the Commission's decision making in contested on-the-record proceedings. Nevertheless, he must be very careful to avoid receiving and then relaying to the Commission such communications received off-the-record.

49. That said, because he understandably will have access to information outside the Commission, the out-reacher may generally speak to anyone in the Commission, even decision makers and their advisors, about issues in contested on-the-record proceedings if that discussion simply reflects, and does not characterize or analyze, what was said at public meetings, which he or others have arranged. These meetings are noticed and frequently transcribed for the record. Even if they are not transcribed, however, their public nature would permit discussion among all staff members, including out-reachers. Again, however, an out-reacher may not be a conduit for prohibited off-the-record communications to the decision makers and advisory staff. He may, on the other hand, discuss with anyone at the agency general policy matters and issues in rulemaking proceedings as both are outside the scope of Rule 2201.

H. Conclusion

**15 50. As is now apparent, while the APA distinguishes between separation of functions and the prohibition against off-the-record communications, as a practical matter at the Commission, the two principles are intertwined because of the interplay between Rule 2202 (separation of functions) and Rule 2201 (ex parte rule). Rule 2202 allows a combination of staff functions in matters or proceedings that do not involve trial-type evidentiary hearings, and contemplates open discussions between the Commission and all staff members about generic matters, market conditions, rulemakings, Part 1b investigations, and non-contested proceedings. Conversely, Rule 2202 clearly requires a separation of functions, and forbids any staff member involved in a trial-type evidentiary hearing from discussing the issues in the case or a factually-related one with the Commission or decisional staff members. Rule 2201 also requires a form of separation of functions, and forbids any non-decisional staff member, defined as a litigator, a settlement judge, a neutral in an ADR process, or an employee designated as non-decisional for a specific proceeding, from discussing the issues in the particular contested proceeding in which the staff member is involved with the Commission or decisional staff members.

51. As described herein, the Commission adopts this statement of administrative policy on separation of functions.

By the Commission.

(SEAL)

Linwood A. Watson, Jr.
Deputy Secretary


Footnotes

2. Id. (internal quotation marks and citations omitted).
4. See Withrow, et al. v. Larken, 421 U.S. 35, 50 (1975) (pointing out that 5 U.S.C. 554(d) expressly exempts “the agency or a member or members of the body comprising the agency”).
5. See, e.g., Panhandle Eastern Pipe Line Co., 41 FERC P 61,202 at 61,525 (1987) (“Since the case was never set for an adjudicatory hearing, the Commission's rules pertaining to separation of functions do not apply. . . .”); Seagull Shoreline System, 41 FERC P 61,325 at 61,860 n.6 (1987) (finding staff panel proceeding to determine whether rates are fair and reasonable under NGPA is an advisory proceeding, not an adjudication, and therefore separation of functions does not apply); Mustang Fuel Corp., 31 FERC P 61,265 at 61,353 (1985) (finding that separation of functions rule does not apply to non-evidentiary proceedings such as staff panel proceedings, but separation of functions was maintained as a matter of administrative discretion); Tenneco Oil Co., et al. 27 FERC P 61,489 at 61,956-57 (1984) (finding that special marketing program proceedings not set for hearing are not adjudicatory and receipt of staff advice was proper); Tenneco Inc., et al. 14 FERC P 61,097 at 61,182 (1981) (finding that declaratory order proceeding is not an adjudication subject to separation of functions).
7. Such proceedings do not include notice-and-comment rulemakings under
8. A “paper hearing” refers to the Commission's adjudicating or processing a filing, complaint, or other claim by using procedures such as technical conferences and data requests, and by analyzing the issues through the review of the various pleadings submitted by the parties. See generally Moreau v. FERC, 982 F.2d 556, 568 (D.C. Cir. 1993) (holding that FERC may resolve factual issues on a written record where no material disputes exist); Louisiana Ass'n of Independent Producers & Royalty Owners v. FERC, 958 F.2d 1101, 1113 (D.C. Cir. 1992) (same).
11. See generally Asimow at 147-52.
12. Id. at 154 (emphasis added).
13. In American Tel. and Tel. Co., et al. v. FCC, 449 F.2d 439 (2d Cir. 1971), the court also observed that “adjudications” under the APA exclude “rulemaking,” and found that Federal Communications Commission orders setting prospective rates have the effect of a rule.
15. Indeed, in the hearings before a Senate Subcommittee to amend the APA in 1965, then Federal Power Commission Chairman Joseph Swidler testified that “[t]he activities of the [Commission], both in the ratemaking areas and in its licensing and certificate work as well, are essentially legislative, with the problems being the application to the complex but normally undisputed facts of record of the policy judgments of the Commissioners . . . .” Administrative Procedure Act: Hearing on Bills S. 1160, S. 1336, S. 1758 and S. 1879 Before the Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, 89th Cong. 464 (1965).
There appears to be no clear definition of a “factually-related” case. In Marshall v. Cuomo, 192 F.3d 473 (4th Cir. 1999), for example, the court found that the Department of Housing and Urban Development (HUD) did not violate the APA separation of functions rule where two HUD employees involved in investigating and prosecuting a Washington case acted as supervisors to the hearing official in a Chicago case related to an affiliated entity, because the matters involved separate subsidized housing and separate agreements about rental assistance payments. Likewise, in Au Yi Lau, et al. v. INS, 555 F.2d 1036, 1043 (D.C. Cir. 1977), the court found no APA violation on the basis of the affidavit of the Chairman of the Immigration Appeals Board, whose previous employment was under challenge, who swore he had no knowledge of the case or any other case arising out of the same transaction prior to his joining the Board. See Environmental Defense Fund, Inc. v. EPA, 510 F.2d 1292, 1305 (D.C. Cir. 1975).

For example, if a market overseer is assigned to work with a litigation team, he would be subject to the rules applicable to a litigator with respect to that litigation.

For example, factually-related cases include: the compliance phase of a proceeding and the original proceeding; and a litigated case on issues carved out of a settlement and the settlement part of the proceeding. Cases that would not be factually-related include: an original licensing proceeding and a relicensing proceeding involving the same hydroelectric project; and a rate case for a locked-in period and a rate case for the same company for a later period.

In addition, the Commission has appellate litigators in its Solicitor's Office. As most cases handled by that office must (or should) be final to be reviewed by the courts, see 16 U.S.C. 824d (Federal Power Act) and 15 U.S.C. 717r (Natural Gas Act), there are generally no ex parte or separation of function issues for the Commission's appellate litigators. Likewise, the appellate litigators are not constrained by either rule where they are called upon to defend the Commission against stay requests or motions to enjoin the agency, or in the rare situation where they file a complaint on behalf of the Commission. In these cases, the appellate litigators must be able to talk to persons inside FERC to understand the issues and to persons outside FERC to facilitate resolving the issues before the court.

While theoretically an OAL staff member could also review and draft final orders in cases set for hearing if he did not participate in the hearing, as a practical matter, such involvement in the order drafting process may be administratively difficult to carry off without running afoul of Rule 2202. An OAL supervisor, however, may discuss a case in litigation with decision makers and their advisors until he participates in the case. See Au Yi Lau v. INS, 555 F.2d at 1043 (permitting uninvolved supervisor of trial division to be appointed as decision maker); R.A. Holman & Co., Inc., v. SEC, 366 F.2d 446, 451-54 (2d Cir. 1966)(allowing former prosecutor supervisor to serve as decision maker provided he had not been personally involved in prosecution). See also Asimow at 157 n. 80.

Axiomatically, the parties in any proceeding may waive or otherwise qualify their protections under Rule 2201 or Rule 2202. Uncontested settlement means just that - no conditional objection or reservation from even one party or from the litigators. See McDowell County Consumers Council, Inc. v. American Electric Power Co., et al., 23 FERC P 61,142 at 61,320 (1983) (finding no unfairness in trial staff's having greater access than persons outside the Commission to policy views and discussions at the Commission).

See Greenburg v. Board of Governors of the Fed. Reserve Sys., 968 F.2d 164, 167 (2d Cir.1992) (finding that law clerk who formerly prosecuted case did not violate the APA separation of functions by performing only a ministerial role in adjudicating case).

For purposes of this statement of administrative policy, unless indicated otherwise, “investigation” refers to 18 C.F.R. Part 1b investigations and “investigators” refer to the staff members who conduct such investigations. This is to be distinguished from the “investigations” that the Commission establishes under the Federal Power Act, the Natural Gas Act, and the Interstate Commerce Act to examine the rates and terms and conditions of service of public utilities, natural gas pipelines, and oil pipelines, respectively. This latter type of “investigations” is initiated by companies’ filing rate changes or in response to a formal complaint, and are traditionally pursued through either trial-type evidentiary hearings, conducted by the Commission's ALJs and litigation staff, or “paper hearings,” processed by the Commission's advisory staff.


32 The investigator also must comply with Rule 2201 when she is staffing the Enforcement Hotline, and avoid receiving and conveying to the Commission communications pertaining to issues in on-going contested on-the-record proceeding. On the other hand, because Rule 2201 does not apply to rulemakings, she may discuss issues in those proceedings with decision makers and advisors.


36 See Withrow, et al. v. Larkin, 421 U.S. at 51-52 (“The case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process . . . .”) (internal citation omitted).

37 See Stephen Melton, Separation of Functions at FERC: does the reorganization of the Office of General Counsel mean what it says?, 5 Energy L.J. 349, 353 (1984) (“FERC has flexibility on the separation of functions issue as long as it has discretion not to hold a ‘hearing.’ But once the FERC sets a case for hearing, separation of functions, in accord with its regulations, is required because an agency must comply with its own Regulations.”).

38 See Trans Alaska Pipeline System, 9 FERC P 61,205 at 61,372 (1979)(ruling that investigative and trial staffs may share information and assist each other).

39 See, e.g., Order on Request for Clarification and Amending Policy Statement Concerning Disclosure of Documents and Information Obtained in Staff Audits, FERC Stats. & Regs. [Regulations Preambles Jan. 1991-June 1996] P 30,972 at 30,848 (1993) (recognizing that all relevant information acquired by investigators, including relevant workpapers pursuant to an investigation, may be used in proceedings set for formal hearing under the Federal Power Act and Natural Gas Act).

40 See generally Edwards Mfg. Co., et al. 76 FERC P 61,027(1996). This is in contrast to advisors' efforts to resolve informally disputes in contested on-the-record proceedings at technical conferences. As these conferences are noticed and open to all the parties, they do not trigger Rule 2201. Likewise, this is in contrast to investigators' efforts to resolve informally Hotline complaints. As investigations do not involve parties, they too do not trigger Rule 2201.

41 The Commission recognizes that market overseers must have the ability to communicate freely with independent market monitors and market monitoring units so that both staff and those individuals and companies may effectively perform their functions. Accordingly, the Commission plans to modify in the near future the application of Rule 2201 (the ex parte rule) to such communications.

42 While a market overseer will probably have few occasions to communicate with the Commission's litigation staff, he may do so, for example, to provide information that may be pertinent to issues in a trial-type evidentiary hearing. The market overseer may not, however, discuss case-specific issues or facts with litigation staff. If he receives inadvertently an ex parte communication as a result of communication with litigation staff, he is, of course, bound by Rule 2201, and must disclose the communication for publication in the Federal Register. Conversely, the market overseer may receive from litigation staff non-case-specific policy suggestions that the litigators have gleaned from their participation in litigation.

43 The significance between exempt and prohibited off-the-record communications is that, while both are subject to disclosure and notice to the public in the Federal Register, exempt communications are placed in the decisional record in that proceeding, and therefore the Commission may base its decision on that communication, whereas prohibited communications are placed in the non-decisional record and, unless it orders otherwise, the Commission will not rely on the communication in the ultimate decision in the case. See 18 C.F.R. 385.2201(e)-(h).

44 Each Commissioner also has a personal staff of technical and legal advisors. In addition, as described above in III. D., OMOI market overseers advise the Commission, although they do not typically perform an advisory function as explained in III. F. 2.

45 In some quarters of the agency, these employees are also referred to as “separated staff.” Frequently, “separated staff” are found in the hydropower area where they assist the parties in the settlement process and do not advise the Commission on the merits of the proceeding.

46 There are other employees who also serve the outreach function of representing the Commission at meetings of inter-agency organizations, such as the Interagency Hydropower Committee and the Interstate Oil and Gas Compact Commission.

47 This would include, for example, the state-federal regional panels. While not open to the public, the discussions there are exempt off-the-record communications and transcribed for the record. See Order Announcing the Establishment of State-Federal Regional Panels to Address RTO Issues, 97 FERC P 61,182 (2001), reh'g denied, 98 FERC P 61,309 (2002), appeal dismissed sub nom. Exelon Corp., et al. v. FERC, No. 02-1154 (D.C. Cir. Sept. 20, 2002).
A decisional employee who represents the Commission at inter-agency meetings similarly may similarly convey the discussions at those meetings to others at the Commission, because such discussions would entail policy and not case-specific matters.

101 FERC P 61340 (F.E.R.C.), 2002 WL 31975205
Allegations of bias in administrative environmental decisions are common and seemingly increasing because of the significant economic and political interests in many disputes. From high profile national oil spills to local land use matters, parties to environmental proceedings allege conflicts of interest, favoritism, prejudgment of outcomes, comingling of prosecutorial and adjudicatory functions, ex parte communications, and improper political influence.

Where bias occurs, it can significantly impact the implementation and enforcement of environmental laws. Biased proceedings can undermine the goals of environmental laws by causing prejudiced decisions not grounded in law or fact, ultimately harming public health and the environment. The mere perception of unfair proceedings can undermine the credibility of environmental agencies and erode support for and compliance with environmental programs.

Despite the prevalence of allegations of bias and their impacts, there has been no systematic effort to address the types of improprieties that arise in environmental proceedings and the application of legal rules governing bias in those proceedings. This Article addresses that gap through both a doctrinal and empirical examination. It examines the basic principles governing fairness in administrative proceedings and illustrates how environmental cases have dealt with allegations of biased decision makers. It then provides the results of the first comprehensive empirical study of cases dealing with bias in environmental proceedings, finding that while courts do not often find agency decisions unlawful on grounds of bias, claims have increased over the last four decades and, in some types of cases, have reasonable rates of success. The Article concludes with observations on addressing bias and suggests reforms that would provide greater fairness in the handling of potential bias issues.
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*958 I. INTRODUCTION

When the British Petroleum (BP) Deepwater Horizon drilling rig began leaking oil into the Gulf of Mexico, attention turned to the cozy relationship between BP and officials at the Minerals Management Service (MMS) charged with developing and enforcing environmental and safety regulations for oil operations on federal lands. Inspector General reports revealed that MMS employees had been accepting free gifts from oil and gas firms, many of whom employed their family members and personal friends, and engaging in sexual relationships with industry officials. It was common practice for the regulatory agency, which referred to the oil companies as “clients” and “customers,” to waive environmental reviews and rubber stamp industry-proposed standards as satisfying the federal requirements. One cause of this institutional failure was the conflict created by combining regulatory and revenue-collection functions within the same agency, which is alleged to have created bias within the MMS toward oil industry projects and requests.

*959 In the licensing proceeding for the Yucca Mountain radioactive waste disposal facility, parties alleged that some Nuclear Regulatory Commissioners prejudged whether the Department of Energy could legally withdraw its licensing application. Two counties in the proceeding moved for their recusal based on statements during congressional confirmation hearings that they would not “second guess” the Department of Energy's decision to abandon the project. What looked to the parties like an obvious case where a reasonable person would harbor doubts about the impartiality of the decision maker was, nevertheless, viewed by the commissioners as an impartial commitment not to question the basis for a party's actions.

More recently, critics of the proposed 1,700 mile Keystone XL oil pipeline allege that the environmental review process has been tainted by State Department favoritism toward the company that plans to build the pipeline and by a financial conflict of interest in the company hired to develop an important environmental impact statement. Responding to a request from members of Congress, the State Department's Office of Inspector General conducted an investigation finding neither evidence of improper influence, nor a relationship between the pipeline proponent and the environmental impact statement contractor, nor bias by the Department toward the pipeline company.

Similar issues of bias repeatedly occur in state agency environmental decisions. An agency director mentioned to public officials that a pending landfill permit application seemed like a “political hot potato,” implying that it could be denied for that reason. In another case, a member of a county board was quoted in a newspaper as saying, prior to a hearing on a landfill siting application, that residents in the area “have had enough of landfills.” The heads of state environmental agencies have repeatedly faced calls for their disqualification based on possible conflicts of interest. Governors, with the power to appoint and dismiss agency decision makers, are often aggressive proponents or opponents of projects and have not hesitated to express their opinions, often in very strong terms, on how ongoing disputes regarding those projects should be resolved by state agency officials.

Indicative of the confusing outcomes of many of the court cases dealing with allegations of impropriety in environmental proceedings, the “political hot potato” reference was deemed sufficient evidence of partiality to force the recusal of the agency official. Yet, declaring that there are already enough landfills in the area of a proposed landfill was held not
to indicate to a disinterested observer that the decision maker had in some measure adjudged the merits of the case in advance of the landfill siting hearing.  

Beyond the reported instances, perceptions of bias in environmental proceedings are widespread. Where bias occurs, it can have significant impacts on the implementation and enforcement of environmental laws. Biased proceedings--by prejudicing the outcome and leading to decisions that are not based on the facts or law--can undermine the goals of environmental laws, harming both public health and the environment. Biased processes also interfere with the ability of citizens and regulated entities to obtain a fair hearing and, ultimately, justice. The mere perception of unfair proceedings can undermine the credibility of, and confidence in, environmental agencies and erode support for, and compliance with, environmental programs. Conversely, “enhancing the perceived fairness of the rulemaking process itself can increase the level of voluntary compliance with environmental regulations.”

Yet, environmental decision makers are under substantial, and seemingly increasing, economic and political pressure to favor certain sides in environmental controversies. Consequently, court cases dealing with allegations of improper agency bias in environmental proceedings, a fraction of the instances of environmental agency misconduct alleged to have occurred, are not uncommon. Indeed, administrative law treatises and articles often use cases from environmental agencies to illustrate legal principles dealing with issues of due process and lack of agency impartiality.

In spite of this prevalence, there has been no systematic effort in the academic literature to address the types of improprieties that arise in environmental proceedings and how legal rules governing bias have been applied in environmental proceedings. This Article addresses that gap, taking both a doctrinal and empirical approach. Part II of the Article lays out the basic legal principles that govern fairness in administrative proceedings and illustrates how environmental cases have dealt with allegations of improper agency proceedings. Part III provides the results of the first empirical study of court cases dealing with allegations of bias in environmental proceedings, concluding that while courts do not often find agency decisions unlawful on grounds of bias, reported claims of bias have increased over the last four decades and, in some types of cases, enjoy a reasonable level of success. Finally, Part IV offers observations on addressing bias in environmental agency proceedings and suggests some reforms that would provide greater fairness in the handling of potential bias issues.

II. FAIRNESS IN ADMINISTRATIVE LAW

“Bias,” as used herein, encompasses a number of improper actions by or towards an agency that might affect the fairness, impartiality, or integrity of the agency's decision making. Therefore, bias goes beyond predisposition toward a party and includes matters such as conflicts of interest, ex parte communications, separation of agency functions, and inappropriate efforts to influence an agency decision. By focusing on what some have termed the “integrity of the decisionmaking process,” however, this Article does not address hidden cognitive biases or heuristics that also might influence the decisions of an agency employee or official and tilt a decision in a certain direction.

A. Doctrinal Bases for Requiring an Unbiased Decision Maker

The issue of administrative fairness has been described as “one of the most complex aspects of administrative practice,” and determining if what appears to be a biased government decision unlawfully taints the outcome is a function of characterizing the legal basis for the allegation, the type of proceeding involved, and the type of bias alleged.
Not all governmental decisions made in a biased manner are unlawful. To be impermissible, the biased action must be prohibited by the Due Process Clause, a provision in the underlying substantive statute, an administrative procedure act, regulations implementing the underlying statute, or government codes policing the conduct of the agency or board.

The Due Process Clause requires some type of hearing before the government can deprive a person of life, liberty, or property. In analyzing a government decision under the Due Process Clause, three limitations are relevant. First, the requirement for procedural due process only applies to “individualized fact-based deprivations” and not to “policy-based deprivations.” Thus, when a government decision applies to a class of individuals or entities, rather than to an individual's person or property, the right to procedural due process does not apply. Second, “[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property.” Although courts have moved away from the “right-privilege” distinction by extending due process protection to the denial of government benefits and entitlements, a party claiming a due process right to procedural fairness must still demonstrate that it possesses a liberty or property interest at risk in the proceeding. Finally, where protected interests are implicated by an individualized government action, some kind of hearing is due.

Determining what that hearing must entail involves a balancing of interests under the three-part framework set forth by the Supreme Court in Mathews v. Eldridge. At the very least, “an unbiased tribunal is a necessary element in every case where a hearing is required.” This constitutional guarantee requires not simply an absence of actual bias but also is implicated where “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” Courts note the heightened importance of an impartial decision maker in administrative adjudications where many of the procedural safeguards traditionally found in judicial proceedings are relaxed.

The statute under which the government agency or official is acting also may establish requirements for making a fair decision, though the legislature cannot establish procedures below the minimum required by the Due Process Clause. For example, the legislature may impose conflict of interest restrictions or recusal requirements on government employees and elected officials. In fact, as a way to help avoid biased decisions, a number of federal statutes impose financial disclosure and conflict of interest prohibitions on government officials.

Administrative procedure acts are another important source of rights to an unbiased agency proceeding. The federal Administrative Procedure Act (APA) contains provisions that help ensure adjudications are conducted in an impartial manner, prohibit ex parte communications, and prevent someone engaged in investigative or prosecutorial functions from participating in the decision on the same matter. State administrative procedure acts contain similar safeguards.

An agency also may create rights to an unbiased decision maker through regulations setting forth the process by which decisions must be made. Thus, some agencies have developed regulations guarding against conflicts of interest and prejudgment of the outcome of a proceeding. Other agency regulations govern the behavior of administrative law judges and their duty to act fairly, impartially, and without any interest in the parties or outcome.

Finally, some government ethics codes prohibit government employees and officials from taking part in decisions in which they may appear to be partial. For example, 18 U.S.C. § 208 makes it a crime for an officer or employee of the executive branch to participate personally and substantially in a decision in which the person or her family has a financial interest. Similarly, Executive Order 12,731 and federal regulations set forth provisions “to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties.”
B. Impermissible Bias as a Function of Type of Proceeding

In no government proceeding must a decision maker be free of all bias; indeed, no person can be totally free of biases, particularly towards issues of policy. Rather, a decision maker or proceeding may not be impermissibly biased. Determining what bias is legally impermissible depends in large measure on whether the proceeding adjudicates disputed facts or aims to set policy or general requirements.

Under administrative law, agency actions generally result in either a “rule” or an “order.” A rule, under the APA, is an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization or procedures of an agency. An order is defined as the final disposition of an agency in a matter other than a rule, including licensing. “Adjudication” is the agency process for formulation of an order, which generally resolves particular rights and duties. “[A]djudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful . . . . Or, it may involve the determination of a person's right to benefits under existing law.”

In environmental matters, permits; land use decisions applied to particular pieces of property; and sanctions for violating statutes, regulations, and permits are handled through adjudications by either agencies or legislative bodies acting in an administrative or quasi-judicial capacity. As noted above, it is the individualized determinations addressed in adjudications that are protected by due process; policy decisions handled in rulemaking proceedings are generally not protected.

Because agencies and boards adjudicate millions of matters each year, federal and state administrative procedure acts have divided proceedings into “formal” and “informal” adjudications as a way to define the extent of the procedures required. Under the APA, the procedural requirements for formal adjudication apply when the adjudication is required by statute “to be determined on the record after opportunity for an agency hearing.” Where Congress has not employed the particular words “on the record,” courts disagree over whether an agency must employ formal adjudication procedures; the Supreme Court has not addressed the issue. The trigger for a formal adjudicative hearing under state administrative procedure acts is defined by a statute other than the administrative procedure act, not by the particular use of the term “on the record.”

Where an agency proceeding is deemed formal adjudication, the required process mirrors many aspects of a judicial proceeding, including an oral evidentiary hearing, requirements for an impartial decision maker, a ban on ex parte communications, and separation of the decision maker from investigative and prosecutorial functions on the same matter.

“Informal adjudication” is not formally defined but refers to the agency process for issuing an order when a formal adjudication is not required. It is estimated that 90%-95% of all agency decisions are made through informal adjudication. These include the vast majority of permit and licensing proceedings, as well as agency compliance and remedial orders to address violations of statutes and regulations.

The APA imposes few mandates on informal adjudications, generally only requiring a right to appear in some fashion with counsel, prompt notice of the denial of any written application or request, and some brief statement of the grounds for any denial. Significantly, informal adjudications under the APA are not required to include procedures to protect
against agency bias.\textsuperscript{61} Informal adjudications under state administrative procedure acts similarly do not directly address bias.\textsuperscript{62}

Where adjudication may result in a deprivation of a person's liberty or property interest, due process would apply and require an impartial decision maker, though under \textit{Mathews v. Eldridge}, the procedures to protect those interests in many situations could be minimal.\textsuperscript{63} Agencies are free to devise additional procedural safeguards to protect against bias.\textsuperscript{64} However, under \textit{Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. (Vermont Yankee)},\textsuperscript{65} “absent constitutional constraints or extremely compelling circumstances” reviewing courts cannot compel federal administrative agencies to provide procedures beyond those required by the underlying statute or the APA.\textsuperscript{66}

Agency rulemaking procedures provide few protections against biased decision makers. As noted, the APA defines a “rule” as an agency statement of general or particular applicability and future effect designed to describe the organizational procedures of an agency or implement, interpret, or prescribe law or policy.\textsuperscript{67} “Rulemaking” is simply the process for formulating, amending, or repealing a rule.\textsuperscript{68} As explained in the \textit{Attorney General's Manual}:

\begin{quote}
The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to evidentiary facts, as to which the veracity and demeanor of witnesses would be important, but rather to the policy-making conclusions to be drawn from the facts.\textsuperscript{69} Thus, rules differ from orders because they usually apply to a class, rather than a named person or entity; regulate future conduct; and involve the consideration of legislative rather than adjudicative facts. Although not common, a rule may apply to a single person or entity, provided it exhibits the other characteristics of a rule.\textsuperscript{70}
\end{quote}

As with adjudications, the APA establishes “formal” and “informal” rulemaking proceedings.\textsuperscript{71} Under the APA, when rules are required by a statute to be made “on the record after opportunity for an agency hearing,”\textsuperscript{72} the procedures for formal rulemaking apply, including the right to present evidence and cross-examine witnesses.\textsuperscript{73} This also includes the right to a hearing “conducted in an imp[arit]ual manner” and restrictions on \textit{ex parte} communications.\textsuperscript{74} The Supreme Court has held that a statutory right to a “hearing,” rather than to a hearing “on the record,” is not sufficient to compel formal rulemaking procedures.\textsuperscript{75} Formal rulemaking, with its trial-type procedures, accordingly, is an infrequent method of issuing agency rules.\textsuperscript{76}

Informal rulemaking is the process used to develop almost all rules and requires minimal procedural steps. Known as notice-and-comment rulemaking, informal rulemaking under section 553 of the APA must simply provide general notice of the proposed rule, give interested persons an opportunity to participate through written submissions with or without accompanying oral presentations, and provide a concise general statement of the final rule's basis and purpose.\textsuperscript{77} Even these minimal notice procedures are not required for interpretative rules; general statements of policy; rules of agency organization, procedure, or practice; or when good cause makes the notice and comment procedures impracticable, unnecessary, or contrary to the public interest.\textsuperscript{78} The APA's informal rulemaking provisions impose no requirements for an impartial proceeding or neutral decision maker, reflecting the quasi-legislative nature of the process, and the fact that promulgated rules will generally have a prospective effect and apply to a class of situations, rather than any specific individual.\textsuperscript{79} Congress or agencies may provide additional procedural rights for certain rulemaking proceedings, including requirements for the handling of \textit{ex parte} communications.
parte communications. In addition, because rulemaking does not address individual rights, due process ordinarily does not require more procedural protection in informal rulemaking than that provided by Congress. Courts, therefore, cannot require additional procedural steps.

C. A Taxonomy of Agency Bias

The right of a party to an unprejudiced decision maker is both a feature of due process and set out in parts of administrative procedure acts. Yet determining if there is a requirement for fairness and whether a decision maker or the proceeding was sufficiently unbiased often requires demarcating one type of bias from another. Courts have identified at least six categories of impropriety that can negatively affect the integrity of the decision-making process.

1. Conflict of Interest

A conflict of interest between the official's responsibilities to the public and his or her personal interest where the decision maker stands to gain or lose from the outcome is a source of potential bias. A conflicting interest has been defined as arising “when the public official has an interest not shared in common with the other members of the public.” In effect, there is a conflict between the private interest of the decision maker and the responsibilities that go with the decision maker's official position. The result is a decision influenced, or potentially influenced, by the self-interest of the decision maker and not based on an impartial consideration of the facts and law.

A number of Supreme Court cases relate to financial conflicts of interest by government officials. In Tumey v. Ohio, a mayor was allowed to retain as compensation part of the fines he assessed against defendants in his municipal court, yet received no compensation if the defendant was not convicted. The Court set out the test for determining if a decision maker's interest in the outcome should be disqualifying: whether the procedure “would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused.” In a later case, Ward v. Village of Monroeville, the Court found that even though a mayor's compensation was not directly related to the outcome of a case, because up to one half of the village's revenues came from the fines, forfeitures, costs, and fees imposed by the mayor on convicted defendants in his traffic court, the possible temptation to generate city revenue created too much potential for partisan decision making. In cases involving a financial interest in the outcome, courts do not require proof of actual prejudice but only a showing that there is a possible temptation for the decision maker not to act impartially between the competing parties or interests.

Although these cases involved judicial proceedings, this pecuniary interest rule is applied to administrative proceedings. In Gibson v. Berryhill, the Court held that a state board of optometry composed solely of independent optometrists was disqualified from deciding if other optometrists employed by a company, and therefore not independent, were aiding and abetting a corporation in the illegal practice of optometry. The Court determined that if the board were to find the practice illegal, then the individual members of the board would inherit the business of these company optometrists, stating that “those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.” In contrast, where a majority of the members of an optometry board had to be members of a specific optometry organization, the Court found that a general economic, rather than a personal pecuniary, interest by agency decision makers in the subject they regulate--common with members of appointed boards and commissions at the state and local level-- did not deny regulated optometrists their right to a fair and impartial hearing. Similarly, where the prosecutor performed no judicial or quasi-judicial function, no government official stood to profit economically from
vigorous enforcement, and the enforcing agency was not financially dependent on maintaining a high level of penalties, the possibility of pecuniary bias was too remote to prohibit the agency's practice of keeping part of the civil penalties it collected.98

The significant financial interests at stake in many environmental disputes have made allegations of financial conflicts of interest not uncommon and have resulted in a number of instances where there was a sufficient pecuniary interest to disqualify the decision maker. Land use decisions, in particular, have been problematic where the value of the decision maker's own property would be directly enhanced or reduced by the adjudicated decision.99 So too, where an official has an ownership interest in a party to the environmental proceeding the official is disqualified.100 Applying the “possible temptation to the average man as a judge” test to less direct pecuniary benefits, such as where a relative's land might increase in value from the adjudication or where the decision maker's property was part of a large group of affected properties, has not resulted in disqualification.101

Current or potential future employment also raises conflict of interest concerns. Where a decision maker's current employer or company would benefit directly from the decision or where the decision maker is seeking employment or a contract from a party, the potential for partiality is too great and disqualification is required.102 In contrast, an employment relationship between an official's family member and a party is not necessarily disqualifying, particularly if the family member is not working on the matter under consideration.103 In addition to general government employee conflict of interest prohibitions, a number of environmental statutes mandate that decision makers disclose potential conflicts of interest in a pending matter and refrain from participating in any decision relating to that matter.104 Recently, a number of state environmental officials have faced conflict of interest charges because of prior work relationships.105

Courts have struggled with the due process implications of an environmental board or agency holding a pecuniary interest in the matter pending before it. A series of cases involving the U.S. Forest Service have addressed concerns over the potential conflict arising from the Service's budgeting process, which allows the agency to keep a percentage of the funds it realizes from authorizing timber sales.106 Both the Sixth and Ninth Circuits have noted that this financial interest predisposes the Forest Service toward certain timber proposals.107 The Sixth Circuit has stated that the Service's budgeting process may result in decisions “made, not because they are in the best interest of the American people but because they benefit the Forest Service's fiscal interest.”108 The Ninth Circuit has similarly found that the Service's substantial financial interest in timber harvesting can make it “more interested in harvesting timber than in complying with our environmental laws.”109 Although these appellate decisions were reversed on other grounds, courts continue to note the Forest Service's apparent conflict of interest and the conflict's effect on the agency's duty to objectively evaluate timber proposals.110

The financial interest of the government authority in the underlying property was directly at issue in E & E Hauling, Inc. v. Pollution Control Board,111 where the county board that reviewed the landfill siting application owned the proposed landfill property through another district run by the board and would receive $30,000 per month in revenue from its operation.112 The Illinois Supreme Court was persuaded that the legislature, in giving local authorities the power to approve landfill locations within their jurisdiction, found nothing fundamentally unfair about a local authority passing judgment on property it owned.113 The court also did not find the $30,000 per month a sufficient temptation for the county board not to accord the other parties their due process of law when compared to the authority's $163.5 million total annual budget.114 A later Illinois appellate court similarly held that it was not fundamentally unfair for a landfill site approval decision to be made by the same public body that had recently purchased forty acres of land and spent large sums of public funds for the purpose of constructing that landfill, basing its decision not on the U.S.
Supreme Court's “possible temptation” test but simply deferring to the legislature's decision to vest responsibility for landfill siting decisions with local authorities.  

An extreme example of agency pecuniary bias involved the Puerto Rico Environmental Quality Board (EQB). The EQB proposed a fine of seventy-six million dollars against Esso Standard Oil for fuel leaks from underground storage tanks at one of its service stations. The fine exceeded any previous fine levied by the EQB by 5,000 times, represented twice the EQB's annual budget, and would be placed into a discretionary account administered by the EQB and disbursed by its chairman. Esso sought a permanent injunction against the fine, arguing that the EQB's institutional interest in imposing the hefty fine denied the company its due process of law. The court agreed, holding that although members of the EQB may not stand to gain personally, the potential benefit to the EQB's budget—especially where the EQB had complete discretion over the use of the seventy-six million—made the possibility of temptation and appearance of bias infecting the proceeding undeniable.

Mechanisms whereby the adjudicator of an environmental dispute is funded directly by one party also may raise possible temptations to decision makers and undercut the neutrality required by due process. In contrast, where a board's institutional interest in funds that might result from its decision is minimized by a statute that strictly limits how much the board would receive and how it must be expended, the relationship of the board to the funds is too remote to support a finding of institutional bias.

The slanted composition of environmental boards or commissions raises questions about institutional bias. Local land use boards, in particular, are often made up of persons involved in buying, selling, or developing real estate who, although perhaps not having a personal or financial stake in the particular piece of property at issue, favor such development and minimize health, safety, or welfare concerns. Some state laws seek to obtain a balance of views on environmental boards. However, legislative efforts to address such institutional bias, particularly at the local level, are generally rare, and successful legal challenges to the composition of environmental boards are also seemingly rare.

A number of cases have addressed allegations that the contractor preparing an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) had a disqualifying conflict of interest. NEPA regulations require that contractors execute a disclosure statement specifying that they have no financial or other interest in the outcome of the project, interpreted to mean an agreement, enforceable promise, or guarantee of any future work on the project. Courts draw a distinction between contractors hired to prepare an EIS and those who merely participate by producing background papers used by preparers of an EIS, finding NEPA's conflict-of-interest regulations apply only to actual preparers. Where a conflict of interest exists, “[the contractor] should be disqualified from preparing the EIS, to preserve the objectivity and integrity of the NEPA process.”

Despite this direction, courts repeatedly excuse the failure to execute the disclosure statement, and even excuse clear instances of a conflict of interest under the regulations, focusing not on the conflict but on whether the breach compromised the objectivity and integrity of the NEPA process. They rationalize that any error was harmless, holding that the degree of oversight exercised by the agency over the contractor was sufficient to cure the conflict or failure to file the required disclosure form.

2. Personal Animus or Favoritism

Personal prejudice by a decision maker toward a party, witness, or attorney is what is most often thought of as bias. In those instances, a statement, action, or relationship is believed to evidence personal animus against or improper
favoritism toward a party, thereby interfering with the *980 neutrality required by the law. As one commentator observed, “[t]here is little doubt that a close association or relationship with an interested party will often have a greater impact on a decision than many pecuniary interests.”

Illustrative is *Stivers v. Pierce*, where an applicant for a private investigator license successfully alleged that a soured business relationship between the applicant and a licensing board member resulted in a review that was inconsistent with the requirement that the license application be determined by an impartial decision maker. Employment relationships can also raise problems, as when a person is asked to pass judgment on a decision made by a peer or already approved by the decision maker's boss. To be disqualifying, the personal bias generally must arise in an adjudication and “must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.” Remarks from decision makers during the course of a proceeding, even if disapproving or hostile to a party or cause, do not ordinarily support a bias or partiality challenge unless “they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.”

*981 Allegations of bias must overcome the strong presumption of honesty and integrity that attaches to the decisions of public officials when acting in an adjudicative capacity. As the Supreme Court explained, government administrators “are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.” Consequently, those alleging bias in an administrative proceeding generally have a “difficult burden of persuasion to . . . overcome a presumption of honesty and integrity in those serving as adjudicators.” The presumption, nonetheless, “is not to shield . . . action from a thorough, probing, in-depth review” and can be overcome by showing actual bias or “an unacceptable probability of actual bias.” Although a party generally may not inquire into the mental processes of government decision makers, where there is a “strong showing of bad faith or improper behavior,” a party may be entitled to discovery outside the administrative record and examine government personnel.

Environmental decisions, particularly those dealing with local matters, often involve personal and professional relationships between the decision maker and the parties, giving rise to allegations of bias for or against a party. In particular, the so-called “revolving door” movement of employees between government and regulated industries can create a perception in environmental disputes that a government decision maker may be favoring a former employer. Nevertheless, without some additional evidence suggesting bias, courts have not found past employment relationships sufficient to overcome the presumption that government employees perform their functions without bias.

In local land use matters, it is not unusual for a decision maker to belong to an organization participating in the proceeding. Some courts have found that in a contentious matter a decision maker's membership in an organization might be grounds for disqualification, reasoning that pressures of loyalty to the organization, conscious or not, would have a tendency to influence the official's vote. Others hold that membership alone is not disqualifying, though a more active role in an organization as a director, or a leadership role as an individual in opposing a different project by a party, is problematic.

Personal or business relationships have at times required recusal on contested environmental matters. Some statutes define what relationships are impermissible; others more generally direct a government officer or employee to avoid participating in a decision where a direct or indirect personal relationship “might reasonably be expected to impair [the person's] objectivity or independence of judgment.” Even in the absence of a statute, matters involving a relative or a person with whom a decision maker has a particularly close relationship can impair the required objectivity.
business relationship with a party or its representative, again not uncommon in local environmental matters, may not be disqualifying if the business matter is not related to the underlying proceeding.  

Outright hostility toward a party or its representative is not permitted. In one matter involving an application for a controversial air permit, an agency decision maker wrongly instructed agency staff to meet with only one side to the dispute and to treat the other side's position as adversarial to that of the agency. Impermissible animus has also been found where an agency employee distributed an email demeaning a party's counsel and motives while favoring the interests of his personal friends on the other side of the dispute, as well as where a party had a pending lawsuit against a decision maker on a related matter. On the other hand, courts repeatedly reject claims that efforts by hearing officers in environmental adjudications to control the hearing or clarify testimony constitute impermissible partiality. 

*984 3. Prejudgment of Facts, Law, or Policy

Prejudgment of a matter prior to the close of the evidence or proceeding may also constitute decision-maker bias, particularly in an adjudication. Courts are careful to distinguish, however, between a decision maker who has prejudged facts that are at issue in an adjudication (the “adjudicative facts” of who, what, when, where, how, and why) and prejudgment of the underlying law or policy-- including the general “legislative facts” upon which a decision would be based.

Preconceptions as to matters of law or policy are not a basis to disqualify a decision maker or invalidate a decision. As Judge Jerome Frank explained, while “there can be no fair trial before a judge lacking in impartiality and disinterestedness. . . . [if] ‘bias' and ‘partiality’ be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will.” Thus, an agency decision maker, often appointed because of existing views on a subject, is not “disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not ‘capable of judging a particular controversy fairly on the basis of its own circumstances.’” It is also not improper for an agency adjudicator in the performance of their statutory role to have a general familiarity with the legal and factual issues involved in a case before judging the matter.

Nevertheless, prejudgment of the specific facts of a pending contested case is prohibited. In *Texaco, Inc. v. Federal Trade Commission*, the commission chairman gave a speech, prior to submission of an unfair competition complaint to the commission for decision, which used the respondents as an example of a company that had violated the law. The court held that by appearing to have adjudged the specific facts as well as the law of the case in advance of hearing the evidence, the chairman denied respondents their due process; the court then invalidated the commission's decision. By contrast, a speech by a federal official did not require disqualification where the commissioner was simply stating views on important economic matters at issue and not prejudging the ultimate issue in the dispute. The often stated test from *Cinderella Career & Finishing School v. Federal Trade Commission* is whether “a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.”

Evidence of prejudgment generally must be displayed outside of and prior to the initiation of the adjudicative proceeding. In addition, having decided the same or a similar case against a party does not disqualify an administrative law judge from later deciding the case on remand or rehearing.
The standard for disqualification in rulemaking proceedings is significantly more stringent and requires “a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.” The rationale for treating rulemaking prejudgment claims differently is that, unlike an adjudicator, an administrator seeking to translate broad statutory commands into concrete regulations must be allowed to engage in debate and discussion, and even express opinions, about the policy matters behind a possible rule. As one commentator observed: “A rulemaking decision rarely, if ever, can be infected with impermissible bias because rules rarely depend on agency resolutions of disputed issues of adjudicative fact. Rather, most rules depend entirely on resolution of issues of law, policy, and legislative fact.”

Allegations of prejudgment in environmental matters are not uncommon. Many prejudgment problems result from the challenges faced by local elected officials when required to act at different times as legislators or adjudicators. In their legislative role, and especially in the context of communicating with constituents and publicly expressing their views on matters of policy, pre-hearing opinions on controversial environmental issues are to be expected. Nonetheless, when that elected official then acts in a quasi-judicial role and adjudicates a dispute over that same matter, “the requirements of due process attach, and the proceeding must be fair, open, and impartial,” which precludes prejudgment of the law and facts in dispute.

This distinction between an official's legislative and adjudicative roles can be tricky in land use cases. When the focus of the local governing body shifts from the legislative adoption of a zoning ordinance to a determination about the application of an ordinance or rule to a particular tract of land, the proceeding becomes quasi-judicial in nature. Friction with the legal problems that flow from these different roles led the Illinois legislature, after a number of courts found improper prejudgment statements by local officials, to amend its waste facility siting statute to allow the legislature to express opinions on an issue related to that body's site approval process without being precluded from later voting on that contested matter.

Even in the absence of a statute authorizing expressions of opinion on contested matters, general views on environmental issues or methods should not be regarded as sufficient evidence that the official has prejudged the adjudicative facts of a particular proposal or dispute. Thus, a stated view on a particular policy matter (e.g., landfills are undesirable) does not indicate that the official cannot fairly adjudge the facts and law on a related matter (e.g., whether this landfill proposal fits the criteria for approval). Also, having advance knowledge of certain facts in dispute is not grounds for disqualifying a decision maker, provided that person had not made a prior judgment about the outcome of the matter or a prior commitment to disputed facts. Even a statement of tentative conclusions based on evidence submitted prior to a hearing is permitted, provided the decision maker still has an open mind and considers all evidence presented. An earlier position on environmental issues in the present matter also need not be disqualifying. Moreover, a plaintiff must show that the prejudgment was displayed prior to the hearing, not based on questioning during the hearing.

Thus, an environmental official's statement, upon witnessing black smoke and malfunctioning equipment in an incinerator control room, that she would “use every legal means at my disposal to close this facility and keep it closed,” disqualified her from later reviewing an administrative hearing officer's determination of the legality of a compliance order and penalty assessment against the facility. Surprisingly, even a passing observation that a landfill permit application seemed “like a political hot potato,” which led some listeners to believe that the official had already decided to deny the pending application, was deemed sufficient evidence to disqualify the official.

In contrast, a statement that the residents around a proposed landfill site “have had enough of landfills,” attributed to a board member in a newspaper article prior to the landfill application hearing, was not viewed as sufficient
evidence of prejudgment to overcome the presumption that administrative officials are fair.\textsuperscript{186} Similarly, a statement by the president of the board that the alleged waste disposal violations under review were “pretty blatant” was viewed as simply an explanation that the seriousness of the case caused the board to conduct the hearing in a certain manner.\textsuperscript{187}

These competing results indicate that the outcome of a prejudgment allegation in an environmental adjudication is often hard to predict. This uncertainty results in part from whether the court relies on an appearance of fairness standard or requires proof of actual bias, how strongly the court applies the presumption of honesty and integrity in those serving as adjudicators, whether the statement is treated as expressing views about issues or processes rather than about the particular facts under review, and whether the objecting party has provided concrete evidence of prejudgment rather than asking a court to imply that the adjudicator was biased toward the matter under dispute.\textsuperscript{188}

Successfully challenging an official's participation in an environmental rulemaking proceeding on prejudgment grounds is even more unlikely. An Environmental Protection Agency (EPA) official's prior role in advocating for a more stringent lead air quality standard while with an environmental organization was not deemed clear and convincing evidence of an unalterably closed mind.\textsuperscript{189} Similarly, a federal official's outspoken support for a drift gillnet ban prior to his appointment to a federal agency did not disqualify him from issuing a new regulation banning some drift gillnets.\textsuperscript{190}

If predicting the outcomes of allegations of prejudgment of the facts are uncertain, it is clear that a decision maker's predisposition toward environmental issues or policy, even to the point of being accurately labeled as “anti-environment” or “anti-landfill,” is not grounds for disqualification. Decision makers may have a clear pre-hearing ideological or political bent toward environmental issues, perhaps much to the disappointment of parties appearing before them in an adjudication.\textsuperscript{191}

NEPA cases raise a particular set of prejudgment issues.\textsuperscript{192} One concern is that agencies often have an institutional bias in favor of a project and prejudge the outcome of the environmental review process.\textsuperscript{193} Although NEPA requires agencies to objectively evaluate proposals, the test applied by courts is “good faith objectivity,” not subjective impartiality.\textsuperscript{194} Indeed, courts have observed that NEPA assumes that an agency will inevitably be biased in favor of a project it is promoting and that the required NEPA environmental analysis is intended to help address this inherent bias.\textsuperscript{195} As one court explained: “[I]t is possible for federal officials and federal employees to comply in good faith with [NEPA] even though they personally oppose its philosophy, are ‘anti-environmentalists’, and have unshakable, preconceived attitudes and opinions as to the ‘rightness’ of the project under consideration.”\textsuperscript{196}

Thus, statements or actions by the agency preparing an environmental impact statement that promote the project, show a clear preferred alternative, or express confidence that the project will be approved, while perhaps demonstrating subjective partiality, do not prove lack of good faith objectivity.\textsuperscript{197} Lack of objective good faith has been shown, however, by the agency's failure to follow NEPA's procedural provisions, such as by misrepresenting facts, not acknowledging conflicts created by the proposal, and failing to identify and consider feasible alternatives.\textsuperscript{198}

A second NEPA prejudgment issue is whether the agency committed itself, through an agreement or expenditure of resources, to a certain outcome before the conclusion of the study process. NEPA regulations require that the environmental review process be used to assess environmental impacts, not rationalize decisions already made.\textsuperscript{199} Hence, unlawful predetermination occurs when an agency “irreversibly and irretrievably commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, before the agency has completed that environmental analysis.”\textsuperscript{200}
For example, where the contractor hired to prepare the environmental analysis was contractually obligated to develop a “finding of no significant impact” (FONSI) and the agency committed to having it signed by a set date, the court found unlawful predetermination of the outcome of the NEPA analysis. 201 Entering into a contract to support a project before considering the environmental consequences through the NEPA process also was considered an irretrievable commitment, not simply a stated preference for a preferred course of action. 202 In contrast, spending limited resources to pre- mark trees for harvesting was not considered such an irreversible and irretrievable commitment of resources to foreclose other alternative actions. 203

4. Separation of Functions

Issues of bias may occur where prosecutorial and adjudicatory functions are combined in the same person, creating the possibility of a partial adjudicator. The federal APA prohibits an agency employee engaged in investigative or prosecutorial functions in an agency adjudication from participating or advising in the decision on that or a factually-related case. 204 This separation of functions requirement, sometimes framed as a prohibition against improper commingling of functions, reflects concerns that a prosecutor or investigator, if allowed to serve as the decision maker, might be tempted to rely on facts not in the record or to feel partial toward the prosecution. 205 State administrative procedure statutes similarly preclude a person who has served as an investigator, prosecutor, or advocate in an adjudicative proceeding from serving as a presiding officer in the same proceeding. 206

As stated in the APA, this restriction further prohibits “advising” on a decision. 207 Thus, an agency officer or employee who has served in an investigative or prosecutorial function becomes unavailable not only to decide that matter, but also to consult or advise others making the decision, unless those views are presented as a witness or counsel to a party in the public proceedings. 208

*993 The APA's separation of functions requirement only applies to formal adjudications, not to other types of agency proceedings. 209 It also does not apply to the agency itself, which can combine functions, or to a member or members of the body that comprise the agency. 210 In addition, the separation of functions requirement “does not preclude agency decisionmakers from taking part in a determination to launch an investigation or issue a complaint, or similar preliminary decision, and later serving as a decisionmaker in the same case.” 211 A decision maker is not permitted, however, to review his or her own initial decision. 212

In matters where the APA's requirements do not apply, due process may still require separation of functions. 213 Generally, unconstitutional bias is not created by combining investigative, prosecutorial, and adjudicatory functions in the same agency. 214 Yet, combining those duties in the same *994 person on the same case is “inherently suspect” and does raise due process concerns. 215 Nevertheless, to succeed on a due process challenge the party must show evidence of bias or an intolerably high risk of unfairness from combining functions in a single government employee, and overcome a presumption of honesty and integrity in those who serve as adjudicators. 216

Environmental adjudications reflect the general rule that a combination of prosecutorial and adjudicative functions in the same person is incompatible with due process, such as where the person prosecuting a case on behalf of a public body is also a member of the decision-making body or advisor to it on the same matter. 217 Problems have repeatedly arisen when an attorney represents the government in a proceeding and simultaneously advises the decision-making tribunal in that same proceeding. Thus, a city solicitor improperly represented the town in a zoning application dispute while also acting as legal advisor to the zoning board hearing the matter. 218 This prohibition does not extend, however, where a
person is acting as an advisor to a board in one matter while acting in a prosecutorial capacity before the board in an unrelated matter, reflecting the APA's prohibition of commingling of functions only in “a factually related case.”

Agency officials are allowed to initiate an environmental enforcement action or issue a draft permit without being disqualified from later reviewing that decision in light of more complete information. Courts are divided, however, on whether the separation of functions doctrine prohibits an attorney in an ongoing agency enforcement action from advising agency officials on how related permit matters should be resolved.

Where different persons within a government office or agency assume the conflicting roles, courts have not found an improper commingling, provided the person making the decision or advising the decision-making body is free to act independently of the interests of the agency. In some environmental agencies, separation of functions is achieved by creating a separate adjudicatory office with hearing officers and their legal advisors outside the control of the parties appearing before them. Others rely on attorneys within agency legal counsel offices who are not connected to the underlying case. This latter practice was upheld in *996 V-1 Oil Company v. Department of Environmental Quality*, where the Utah Supreme Court found that the duty of loyalty that a staff attorney might have toward the agency did not prevent that person from presiding at a hearing to decide if a company had violated underground storage tank regulations. The court reasoned that the attorney was segregated from the agency's investigative and prosecutorial activities related to underground storage tank enforcement and that his duty of loyalty to the agency required him to act impartially. Other cases have similarly held that agency attorneys may preside over hearings in which other attorneys from the same agency perform prosecuting or investigative functions, provided that the attorneys serving as presiding officers have no prior connection with the case. This tolerance for separate roles for employees of the same government body may not hold where a party's counsel and the attorney advising the hearing tribunal are from the same law firm, as the practical considerations allowing a public agency to use its staff legal counsel are not present when the government body is hiring outside counsel and can find representation free of any potential conflict.

### 5. *Ex Parte* Communications

*Ex parte* communications occur when a person interested in the outcome of a proceeding makes an off-the-record communication to a decision maker regarding the merits of the proceeding without prior notice to other parties. The one-sided communications create potential bias by communicating facts or views on a contested issue outside the proper channel, thereby excluding other interested parties from effectively participating or responding to the arguments or information.

The federal APA precludes *ex parte* communications, but only in formal adjudications and formal rulemaking. Under section 557(d)(1), an interested person outside the agency is prohibited from making or knowingly causing to be made an *ex parte* communication relevant to the merits to a decision maker or government employee involved in the decision process. Similarly, a decision maker or employee involved in the decision process is not allowed to make an *ex parte* communication to any interested person outside the agency. State administrative procedure acts contain similar prohibitions.

As the ban on *ex parte* communications only addresses communications with persons outside the agency, agency employees and officials are free to communicate with each other, provided they do not run afoul of the separation of functions doctrine. Even where *ex parte* restrictions do apply, only communications that could affect the outcome or decision in a contested case are prohibited, not inquiries about procedural matters, requests for status reports, or background discussions about an industry. Also, the communication must be from an “interested person.”
defined as someone with an interest in the proceeding greater than the general interest of the public. Agencies are not prohibited from having other contacts or general discussions about matters of common interest with interested parties. Nor does the APA prohibit agencies from having ex parte communications in informal adjudications or informal rulemaking.

Where there has been a prohibited communication, an agency decision is not void, but voidable by a reviewing court. Usually, the agency addresses the unfairness by placing the contents of the ex parte communication in the record of the proceeding. The legislative history of the APA indicates that a communication would not be considered ex parte if it were placed in the public record or docket of the proceeding when it was made or if all the parties to the proceeding had advance notice of the communication. However, a proceeding may be set aside if “the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect.” In PATCO, the court set forth the factors to be considered in deciding whether to vacate a voidable agency proceeding:

- the gravity of the ex parte communications;
- whether the contacts may have influenced the agency's ultimate decision;
- whether the party making the improper contacts benefited from the agency's ultimate decision;
- whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and
- whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.

“If the ex parte contacts are of such severity that an agency decision-maker should have disqualified himself, vacation of the agency decision and remand to an impartial tribunal is mandatory.”

Even in proceedings that are not covered by the APA's restriction, due process rights may prohibit ex parte communications. In Sierra Club v. Costle, the court explained that “[w]here agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among ‘conflicting private claims to a valuable privilege,’ the insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process to the parties involved.” However, the court noted that where the agency action involves informal rulemaking, “the concept of ex parte contacts is of more questionable utility.” Nonetheless, ex parte communications in rulemaking are problematic where they deny the court a complete record for judicial review, since an agency's final rule must be supported by its public record.

Agencies are free to adopt rules applying ex parte restrictions to other proceedings, such as informal adjudication or rulemaking, as a number have. Even if a statute only calls for a hearing, an agency may be required to inform parties of, or provide an opportunity to respond to, ex parte communications during the proceeding so that parties are afforded an opportunity for meaningful participation.

Ex parte violations are among the most common bias allegations in environmental proceedings. Whether the type of environmental proceeding is subject to a legislative prohibition on ex parte contacts is a frequent threshold question. A number of significant environmental cases make clear that the APA's strictures on ex parte communications do not apply to informal rulemaking proceedings. Yet, the treatment of ex parte communications in environmental permits or other project approvals through informal processes is less clear. Where the proposal is contested, there is a recognition that ex parte communications may give rise to due process concerns, but those off-record communications are treated more leniently than in the formal adjudication process.
An interesting development in environmental cases is the application of the prohibition on *ex parte* communications to officials outside the agency but still within the executive branch. In *Portland Audubon Society v. Endangered Species Commission*, the court determined that the APA's term “interested person outside the agency” includes the President, thus holding that the President and his staff were not free to attempt to influence the decision-making process of a federal committee through private meetings at the White House. This rationale applies to off-the-record conversations between state agency decision makers and governors. Interested parties may communicate off-the-record with agency employees who are not decision makers, with some state courts suggesting, contrary to the federal APA, that *ex parte* contacts may even be permitted with experts who advise the board if those experts do not vote or otherwise bind the decision maker.

Even where an *ex parte* communication is not prohibited by statute or rule, the decision-making body may still be required by statute to place the substance of the communication in the administrative record and provide parties an opportunity to comment, which generally ameliorates an improper communication. In *Mall Properties, Inc. v. Marsh*, the agency was authorized to seek the views of the governor on the proposed activity, but was required to provide the parties an opportunity to respond to the governor's views. Courts have prescribed a similar process when comments are submitted to an agency after the close of the public comment period.

Although federal courts in environmental cases have followed the approach of the court in *PATCO* and chosen an equitable weighing of prejudice over a mechanical rule on whether the unlawful *ex parte* communication merits vacating the decision, courts in at least one state have placed the burden on the agency to demonstrate that the improper communication did not result in prejudice to a party. Once a party demonstrates that an improper *ex parte* communication occurred, a presumption of prejudice arises, which may be rebutted by showing that the *ex parte* communication was not received or considered by the local agency and, therefore, did not affect the final decision.

Where an agency fails to cure the unlawful *ex parte* communication by documenting the contact in the record and allowing affected parties to comment, the usual remedy is to remand the case to the agency and provide an opportunity for the parties to review and address the communications. Nonetheless, *Greene v. Babbitt* teaches that where an environmental agency repeatedly violates a party's right to an impartial, fair process, a court may “put an end to the matter by using its equitable powers to fashion an appropriate remedy.”

6. Improper Political Influence

Improper influence on decision makers by political figures raises bias concerns distinct from the prohibition on *ex parte* communications. Elected officials are expected to play an important role in the policy decisions of government agencies, boards, and commissions, as those decisions should reflect the preferences of the legislative and executive branches and operate within the confines of constitutional limits and statutory directives. But in proceedings covered by rules on *ex parte* communications, legislators, elected officials, and even government employees at other agencies are “outside the agency” and subject to APA restrictions on *ex parte* contacts, as noted above. The APA's legislative history warns, though, that the effort to avoid improper outside influences on decision makers should not be imposed so stringently as to prohibit legislative oversight of agencies or routine inquiries by members of Congress. Likewise, it is not improper for senior executive branch officials to exercise oversight of agencies and to communicate on matters of policy.
Nevertheless, where a decision maker is acting in a quasi-judicial role by adjudicating disputed facts and not simply making policy choices, the use of political power or official position to influence that decision may deny parties their rights to due process. Even where the merits of a proceeding are not discussed, a procedural inquiry from a political official in a position with influence over the decision maker may be deemed an effort to influence an agency decision. Thus, an administrative adjudication may be “invalid if based in whole or in part on the pressures emanating from [Congress].” The test is whether “extraordinary pressure intruded into the calculus of considerations” such that the decision maker “took into account considerations that Congress could not have intended to make relevant.”

*1004 Pillsbury Co. v. Federal Trade Commission illustrates this concern. In that case, a congressional committee subjected members of the Federal Trade Commission to a searching examination and criticism of decisions in a pending adjudication. The court applied a “mere appearance of bias” standard and held that when a legislative investigation focuses directly and substantially on the mental process of a decision maker in a pending adjudicative case, Congress is not merely engaged in appropriate legislative oversight but is interfering in the agency's judicial function and denying the parties their right to a proceeding “free from powerful external influences.” The court concluded that the denial of procedural due process was so significant that the decision had to be vacated and the case remanded to preserve the integrity of the administrative process. In contrast, in *ATX, Inc. v. U.S. Department of Transportation*, members of Congress and the chairman of the committee with oversight of the department vigorously expressed their opposition to an application of ATX for operation of a new airline. The court found, however, that these nonthreatening legislative actions did not target agency decision makers and were not shown to have affected the outcome on the merits.

*1005 Interference is most likely to be found unlawful where it likely influenced the decision, concerned disputed issues of fact rather than of law or policy, and served no legitimate purpose such as oversight of legislation or agency administration. The timing of such interference is also relevant; interference before the hearing phase is less likely to improperly influence the merits of the agency's decision than interference during or after.*

Although courts have held that improper influence in adjudications can violate due process requirements, “courts have not found congressional contacts in informal rulemaking to be improper,” at least as a denial of procedural due process. Even in cases of adjudication, Professor Asimow warns that “courts must tread lightly in this area because Congressional interference may be a form of legislative oversight.” As one court explained about a controversial environmental rulemaking proceeding, “administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources. To hold otherwise would deprive the agencies of legitimate sources of information and call into question the validity of nearly every controversial rulemaking.”

The political nature of many environmental disputes makes them particularly susceptible to efforts by elected officials to improperly influence agency decision makers. The expressions of opposition made by state and local legislators to EPA regarding a pending sewage treatment plant grant decision in *Town of Orangetown v. Ruckelshaus* are typical of efforts to influence agency decisions. Echoing the standard in *Sierra Club v. Costle*, the court explained that to support plaintiff's claim of improper political influence by these legislators, “there must be some showing that the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute.” Looking at the communications, the court found that because they related to a relevant factor in EPA's decision, the elected officials were not precluded from bringing those factors, and their opinions about them, to the agency's attention.

The court did find impermissible interference in *Esso Standard Oil Co. v. López-Freytes*. Upset with the pace of an enforcement action by the environmental quality board to address a gasoline spill, the Puerto Rico Senate issued a...
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The report directing a government integrity agency to determine which officials on the board were responsible for delays in penalizing the company and to refer those officials to prosecutors to determine if any crime was committed. The court held that disqualification of the board members, who require Senate consent, was necessary because of a clear threat of prosecution and pressure on them to impose an unduly heavy fine against the company.

Even where lacking such a clear threat, efforts of a powerful legislator to influence an environmental decision maker outside the normal hearing process may compromise the appearance of impartiality and merit setting aside an agency decision. In Koniag, Inc. v. Andrus, a letter from a congressman with oversight of the Department of Interior, claiming that the agency was acting improperly on a pending disputed matter, was held to have compromised the required appearance of impartiality and prejudiced the proceeding. Similarly, in Jarrott v. Scrivener, highly placed government officials made clear through ex parte contacts with zoning commission board members that a favorable decision on a pending matter “would be pleasing, and an unfavorable decision displeasing, to persons in very high governmental brackets.” The court held that although there was no explicit threat or command or promise of reward, the pressures were nevertheless real as the board members, two of whom were subordinate government employees, knew that they would incur displeasure with powerful government officials if they did not act accordingly. Although the board members denied being influenced by these contacts, the court found no basis to doubt that the contacts had deprived the plaintiffs of a fair and impartial hearing.

Yet, a political figure's involvement in an indirect way or without any implicit threat may not support a finding of impermissible pressure. In Mallinckrodt LLC v. Littell, a company ordered by a state agency to clean up a former manufacturing facility alleged that the governor's office had improper influence over an environmental appeals board considering his announced preferred remedy. The court noted that, unlike in Esso Standard Oil, there was no allegation that the governor had made any threat against or had any contact with the board. The court further found that although the board members are appointed by the governor, they are unpaid volunteers and there was no reason they would fear adverse action by the governor if they did not act in his favor. Similarly, a governor's public criticism of a commission's preliminary decision on instream flow standards did not constitute the type of direct, focused interference that would violate due process.

A concept related to interference in some states is disqualification due to duress. Duress occurs in the administrative context “when the decision maker is improperly pressured to serve an interest other than that of ‘the voters, taxpayers, members of the general public, justice, and due process.’” This can occur when an elected official with power over the decision makers appears on behalf of a private party, such as when the official represents someone before a zoning board over which the official has appointment powers. However, where the elected official is appearing on behalf of the municipality's interest rather than representing or pursuing a private or personal interest, duress has not been found as the official is not encouraging board members “to serve an interest other than that which they were bound to serve.”

A final issue in ensuring a fair and impartial process for resolving environmental disputes arises where the government is seeking approval for or promoting its project. In this situation, the pressure on the decision makers to favor the state's interests may be so great as to create a potential conflict between their personal interest in the outcome and their duty to be impartial. This is especially present where the decision makers are state employees. As a general matter, “the fact that an application is made by an employing unit of government does not in and of itself constitute impermissible bias.”

The issue of institutional or promotional bias was addressed in Hammond v. Baldwin, where landowners challenged a state wastewater permit issued in connection with a new manufacturing facility. Plaintiffs alleged that the state's
heavy promotion of the facility, including financial guarantees and a contractual pledge to use its best efforts to expedite review of permits and resolution of lawsuits relating to the facility, made any administrative proceeding by the state's environmental agency biased.\footnote{307} The court explained that while the administrative process required the appearance of fairness and did not require plaintiffs to prove actual partiality, “bias must be more than a general tendency of an administrative agency to serve the executive under which it derives its authority.”\footnote{308} Finding no personal pecuniary interest on the part of state officials who would preside over the permit proceeding and noting no irregularities in the administrative process, the court held that it would not disqualify the government agency from decision making when there is only an alleged general bias in favor of the state's interests or policies.\footnote{309}

Institutional bias also arose in Louisiana, where an environmental agency's statements and actions in favor of a proposed petrochemical plant and hostility toward residents who opposed the plant was coupled with the governor's heavy-handed promotion of the project and campaign to drive the residents' attorneys off the case.\footnote{310} A court found that the agency's actions in instructing staff not to meet with citizens opposed to the plant and to regard their position as adversarial to that of the agency merited an evidentiary hearing on the apparent lack of impartiality and fairness.\footnote{311} In another instance of pervasive state government bias, a governor's campaign promise to kill a radioactive waste disposal site and questionable behavior by his subordinates to carry out this promise indicated an absence of a good faith effort by the state to provide a fair permitting process.\footnote{312}

III. EMPIRICAL STUDY OF BIAS IN ENVIRONMENTAL PROCEEDINGS

The discussion above illustrates the large body of cases addressing allegations of bias in environmental proceedings and the array of doctrinal bases for such claims. The significant number of cases has led commentators to opine about the prevalence of bias in environmental decisions and the difficulty of prevailing on such claims.\footnote{313} However, there appears to be little data supporting these opinions. The only reported study examined solely whether there was biased membership among Iowa zoning boards toward certain occupations.\footnote{314} While the study found that a significant percentage of zoning board members had occupations that favored development interests,\footnote{315} it did not document whether this occupational tilt resulted in allegations or findings of bias in particular cases.

To address this lack of data and better understand the bias issues arising in environmental decision making and how courts resolve allegations of unlawful bias, I undertook an empirical study of court decisions addressing bias in environmental agency, board, or commission decision making.

\*1010 A. Study Design and Methods

Records from environmental agency, board, and commission proceedings that would identify allegations of bias in the decision-making process are not readily available, at least not in a systematic and comprehensive way across federal, state, and local governments. Therefore, the study focused on court opinions reported in the Westlaw database for the “environmental law” practice area. Within the Westlaw environmental law topic are databases containing federal environmental cases\footnote{316} and state environmental cases.\footnote{317} The study focused on court decisions after 1970, the historical start of federal environmental law, and was calibrated to exclude cases that had common words like “bias” and “prejudice” but were irrelevant to the issue of bias or prejudice by the decision maker.\footnote{318} The final search terms returned over 9,000 cases.\footnote{319}

Due to the significant number of irrelevant cases included in the search results, all cases were screened before they were coded.\footnote{320} To be coded for allegations of bias, cases had to involve an environmental issue. This resulted in the exclusion
of cases dealing with the Occupational Safety and *1011 Health Administration, utility ratemaking, and employment discrimination in environmental agencies. The study included cases that dealt with zoning and land use, although these cases appear underrepresented in the databases. The study included all cases involving challenges under NEPA, regardless of whether or not the NEPA issue involved an environmental agency.

A second criterion was whether the allegation of bias arose from agency or board action during the processes that led to a decision on a rule, permit, or order. Where the issue of bias arose in an agency's study or sampling technique, rather than in its process for making the decision, the case was excluded, as were cases alleging a fear of future bias. In the end, 161 federal and 220 state cases were coded to determine relationships between twelve aspects of the case and the outcome on the bias claim.

B. Study Results

The study confirmed that a party is unlikely to prevail in court on a claim that an environmental agency's decision making process was biased, but also indicated that challenges brought in federal trial courts and the doctrinal bases of prejudgment of the issues and unauthorized ex parte contacts enjoy much higher rates of success.

Overall, courts found in favor of the party claiming bias in 14.1% of the cases, or about a one in seven rate of success. Plaintiffs prevailed in federal courts in 15.7% of cases; in state courts, 13.0% of cases. There does not appear to be any published report on success rates in administrative law cases alleging procedural errors in the decisions of government agencies, although there are a number of studies that show higher success rates for litigants in other types of environmental cases. Yet most cases settle, and plaintiffs are “far more likely” to recover via settlement than a trial.

*1012 The success rate has fallen over time. In the 1970s, plaintiffs prevailed in 27.0% of reported cases; during the decade of the 2000s in 12.4%; in the latest ten-year period from 2004-2013 in only 10.5%. It is not known if this drop is due to agencies doing a better job of avoiding bias, courts showing increased deference to agency claims of neutrality, stronger claims settling before judgment, or some other factor.

The type of reviewing court can significantly affect the likelihood of prevailing. While appellate courts found unlawful bias in only 12.5% of the cases, trial courts found for the complaining party 18.3% of the time, a success rate almost 50% higher.

The difference in outcomes between trial and appellate decisions is most pronounced in federal court. A majority of federal bias cases (55%) are heard by district courts, and federal district courts find bias at twice the rate of federal courts of appeals (20.2% vs. 10.1%). At the state level, trial courts handle just 10% of bias cases and, unlike in the federal system, plaintiffs are somewhat more successful in appellate than trial courts (13.3% vs. 10.0%).

To determine why there is a significantly lower rate of success in federal appellate courts, I investigated whether cases appealed directly from the agency or board to an appellate court were more likely to prevail than cases where the appellate court was reviewing an initial bias determination by a trial court, surmising that the lower success rate in appellate courts might be due to the difficulty of getting a case reversed on appeal. However, the success rate of federal cases appealed directly from an agency or board to an appellate court were comparable to the rates when the appellate court reviewed an initial trial court decision (10.7% vs. 9.5%). Perhaps there is some unmeasured difference between the cases brought in a trial court and those directly appealed to an appellate court that the survey did not reveal. In any event, the greatest likelihood of succeeding on a contested bias claim (one in five) is before a federal trial court.
The rates of success between different levels of government decision makers are minimal. Looking at federal, state, and local government decision makers, bias claims against federal and state decision makers (15.1% and 14.8%) are the most likely to succeed and those against local officials the least (12.5%). More instances of unlawful bias might be expected at the local level, since local officials, who are often volunteers rather than trained government employees, might be less familiar with rules prescribing bias. Local officials also might have greater familiarity with, and a greater potential for a disqualifying connection to, the interests of a local party. Additionally or alternatively, perhaps the lesser amount of local level bias is explained by courts taking account of the local context and holding local decision makers to lower standards. Furthermore, differences in the lawyering for the complaining parties on these more localized, and perhaps less economically significant, environmental matters could explain the lower rates of successful bias claims against local officials.

The survey compared decisions made by executive branch agencies; non-executive branch elected boards or commissions; and non-executive branch, non-elected boards or commissions. Plaintiffs have higher rates of success in cases brought against executive branch agencies than against non-executive boards or commissions (16.0% vs. 11.8%), even though agency officials are paid employees who are presumed to have, or at least could be provided with, more training and experience in making bias-free decisions than those on boards or commissions, which often consist of unpaid volunteers with little professional assistance. Perhaps this difference reflects more tolerance by judges toward possible mistakes by appointed or elected officials in combination with a higher standard of expected behavior, either by statute or the courts, for paid government employees.

Some argue that elected officials may be particularly susceptible to bias, because their positions often require them to assume the dual roles of a legislator and a quasi-judge, each with differing expectations about neutrality. However, cases against elected officials on non-executive branch boards or commissions had a slightly lower success rate than against non-elected officials on similar boards or commissions (11.1% to 12.1%). The data suggest that elected officials are handling their dual roles better than feared or that other factors are confounding the result (e.g., courts holding elected officials to a lower standard because of their need to respond to constituent concerns).

Among types of plaintiffs or appellants, not-for-profit environmental or community organizations bring the greatest number of cases (42%) and have a success rate (14.3%) consistent with the overall average. For-profit entities (i.e., businesses) are the next most active group of challengers, bringing 27% of all cases, yet succeeding the least of any type of plaintiff (10.9%). The greatest success (27.3%) is achieved by not-for-profit business associations, although the number of cases brought is quite small—only 3% of all cases. Individuals bring about 18% of cases and succeed in only 11.9%. Although it is interesting that plaintiffs representing business non-profits enjoy the greatest success, without a qualitative analysis of cases it is not possible to determine if this is due in some way to choosing battles wisely and fighting them well (i.e., with skilled, expensive litigators), to more sympathetic treatment from courts, or to some other factor.

Plaintiffs enjoy their greatest success when challenging bias arising in formal adjudications (16.5%) and least when the underlying proceeding can be characterized as informal adjudication (12.9%), not surprising given the greater procedural rights afforded parties in formal adjudications.

The most prevalent litigated bias claims are prejudgment of facts, prohibited ex parte contacts, and pecuniary conflicts of interest. Nonetheless, claims alleging prejudgment of facts, along with personal animus, are the least likely to prevail (less than 10%). Although not measured in the survey, prejudgment of fact claims appeared to often fail due to a lack of admissible evidence (e.g., newspaper articles) and a willingness of courts to accept a decision maker’s assertion that he or she had not prejudged a contested matter. Plaintiffs are most likely to prevail when alleging that the decision makers prejudged the issue (28.6%), were improperly influenced by government officials (20.0%), or engaged in prohibited ex parte contacts (16.0%), although the numbers of decisions involving prejudgment of issues and improper influence were small.
Federal bias claims arise most often under NEPA (over 60% of all cases) followed by land use cases (over 23%). The most common bases on which NEPA decisions are challenged are prejudgment of facts (i.e., precommitment to an outcome) and pecuniary conflicts of interest (i.e., where the NEPA contractor has a stake in the outcome of the analysis). NEPA cases have a lower success rate (13.2%) than most federal cases. However, in a number of NEPA cases courts were willing to overlook the showing of bias, holding that the agency cured the conflict of interest problem through oversight of the environmental impact statement contractor or that the error was harmless.330

No type of environmental case enjoys a particularly high rate of success compared to the overall rate for plaintiffs. In state courts, bias claims are most likely to arise in zoning and land use cases, constituting over 40% of all bias cases; cases involving waste matters (e.g., landfills) are the next most prevalent at over 18%. Both have above average rates of success—18.6% for zoning/land use; 19.6% for waste.

The most common legal bases for court decisions are the requirements in the agency's or board's underlying statute (39% of cases), such as NEPA, *1015 and due process (31%), although due process claims have a low success rate (12.3%). Claims based on requirements in a state or federal administrative procedure act have the highest success rate (20.5%).

Significantly more cases allege bias by decision makers before or outside of a hearing (72%) than during or in a hearing. But allegations of bias displayed during or in the proceeding are more likely to prevail (18.1%) than those displayed before or outside (12.1%), perhaps because of the difficulty of proving the biased action or statement when it is not in the proceeding's record.

An unexpected observation was how often plaintiffs prevailed when the case only presented a bias claim—without referencing a related environmental claim somewhere in the decision—and how rarely they prevailed if the court held that the plaintiff's other legal ground(s) for challenging the agency's decision was insufficient. Where the court's decision only mentioned a bias claim in the case, plaintiffs prevailed 50.0% of the time, or three times higher than the overall success rate. Similarly, where the court reversed the agency's decision on other grounds and also ruled on the bias claim, plaintiffs prevailed 47.6% of the time. By contrast, when the court upheld the agency's decision on some other ground that had been contested (70% of cases), plaintiffs prevailed only 1.6% of the time. In these last two instances, the bias claim strongly follows the resolution of the other issues in the case. Yet, where the court focuses solely on the bias claim, the result is not subject to the influential guiding force from the merits of plaintiff's other claims in the case.

It is possible that in some of these cases courts simply neglected to mention non-bias claims in the decision. If the results are not significantly skewed by possible selection bias by the court, one interpretation of the data is that if a court otherwise believes that the agency's decision comports with law, it is exceedingly difficult to prevail on a claim of bias. On the other hand, if the court believes the agency's decision is flawed in other respects and must be remedied, there is a reasonable likelihood of prevailing on a related bias claim. The differences also could result from flawed or underdeveloped bias claims often being lumped in, with little additional effort or focus, with weak non-bias claims. It could also be that where the evidence of bias is strongest, some plaintiffs choose to only pursue that claim. The survey did not include a qualitative analysis of the strength of claims or quality of lawyering that might clarify the reasons for such dramatic differences in outcome.

While this empirical study provides insight into how courts resolve bias claims, it has limitations. Not all court cases, particularly not all trial court decisions, end up in the Westlaw database, although it does include a significant number of decisions that are otherwise not published in the federal or state reporter system. Conversely, due to the significant over inclusion of non-environmental cases in the Westlaw environmental cases *1016 database, it is not possible to determine whether the database reliably includes all relevant environmental cases.331
The study is also limited by only including allegations of bias that were filed in a court. Many participants who believe they have been victims of bias in an environmental agency proceeding likely do not bring those claims in court, perhaps because they do not have the resources or time necessary to bring an appeal or choose not to raise the bias claim in the appeal. Parties may even decide not to raise an issue of bias at the time of the agency proceeding, a necessity to avoid waiving the issue for appeal, for fear of antagonizing the decision maker.332

Conversely, for litigants already challenging an agency or board decision, there may be little reason not to include a claim of bias, however well based in law or fact. Bias claims often appeared to be underdeveloped and, perhaps, alleged primarily to color the court's view of other issues in the case. The result can be a summary court dismissal with little discussion or rationale and may misrepresent the likelihood of prevailing on well-founded claims.

The survey is also limited to cases where the allegations resulted in a contested ruling. Most civil cases settle,333 and there is no reason to believe that environmental bias lawsuits are any different. This survey says nothing about the outcomes in cases that settled before a published decision on the merits of the plaintiffs' claims. If, as true in other civil matters,334 plaintiffs in bias cases prevail more frequently in settlement than they do at trial, then the success rate for claims of bias in environmental decision making could be substantially higher than revealed in this study.

For all these reasons, the study does not reveal, and likely understates, the prevalence of bias allegations within agencies, and instead only illustrates the prevalence of bias that results in a reported court decision.

IV. CONCLUSION

If the empirical survey shows the difficulties of prevailing on a claim of bias, the extensive jurisprudence arising from environmental bias disputes and the continuing stories in the press about alleged environmental bias*1017 reinforce the perceived saliency of the problem and the potential benefits of greater government attention to the issue. The rationales courts use to resolve allegations of bias, where clearly articulated, are often contradictory. On the one hand, courts rejecting claims of bias often rely on the “difficult burden of persuasion” necessary to “overcome a presumption of honesty and integrity in those serving as adjudicators.”335 In most instances, this means that the plaintiff needs direct, on-the-record proof of bias, rejecting inferences from circumstantial evidence of bias or remarks reported by the media. Reflecting this strong presumption in more colloquial terms, a hearing officer denied a motion to disqualify with the explanation: “If a guy says he thinks he can be fair, you have to go with that.”336

Yet less deferential courts ask whether a disinterested observer might conclude that the agency or decision maker has in some way prejudged a matter or, in some decisions, rely on the appearance of impropriety standard used with the disqualification of judges.337

Whether related or not to these competing rationales, the frequency of reported bias cases has not declined over time. The number of reported decisions per year more than doubled from the 1970s to the 1980s, climbed again in the 1990s, and remained at the same pace in the 2000s. Throughout the four decades, prejudgment of facts was the most frequently litigated issue (in 40% of all cases), followed by ex parte communication (19%), pecuniary conflict of interest (17%), and personal conflict of interest (12%) claims.

If the primary purpose of rules against bias is to obtain an accurate decision on the merits not skewed on the facts or law by the bias, then perhaps the survey's finding of the low likelihood of winning on bias where the underlying substantive legal claim fails is not troubling. In those cases, the court may believe that any bias was harmless since the legal merits of the environmental decision itself, however muddled the decision making process, are valid. Of course where the bias
prevents a full presentation or open-minded consideration of conflicting positions or evidence, a reviewing court cannot have confidence that bias did not influence the agency's decision on the merits.

And particularly where the concern is not just about the substance of the project but also about a fair process and the perception of fairness, the continuing frequency of bias allegations is reason to consider if decision makers should do more to avoid actions that give rise to bias claims.

*1018 A striking feature of this review is how often outwardly manageable issues of bias continue to arise. Since rules against ex parte contacts in adjudicated proceedings are well established, it is difficult to understand why those claims continue to arise so frequently, unless decision makers are either insufficiently trained or indifferent to the rules. Similarly, while the prohibitions on prejudgment of facts and pre-commitment of resources in NEPA analyses have been well established for decades, parties continue to complain about lack of compliance with these restrictions.

The survey's findings that the greatest likelihood of success is when challenging decisions made by paid executive branch personnel and the most frequently raised claims are those where some public employee or official has indicated a view on the merits in advance of the proceeding suggest that steps could be taken to avoid or minimize bias. One modest step is increased training for decision makers in the restrictions on their decision-making process. This would help avoid, for example, the frequent occurrence of off-the-record communications and premature expressions of opinion.

Requiring decision makers to state at the beginning of a proceeding any prior knowledge or contacts about the matter and the nature of any financial or personal connection to the parties or issues would reinforce the importance of avoiding conflicts of interest and allow the public to learn of, and the parties and other decision makers to discuss, possible disqualifying biases. Permitting the parties to then voir dire the decision makers would provide “a valuable means of discovering individual prejudices-- perhaps hidden to all, including the holder--and of emphasizing to the board the importance of conducting a fair and impartial hearing.”

A more significant step would address the fact that some well-founded bias allegations fail for lack of sufficient proof and move courts beyond simply deferring to an agency or decision maker's claim of neutrality by shifting the burden of proof. In some areas of law, particularly discrimination cases but also in some environmental matters, once a plaintiff makes a prima facie showing of its claim, the burden shifts to the other side to put forth evidence of lawful behavior or motive. Because in bias cases off-the-record information is often given little or no weight by the courts, and discovery into the mental processes of an agency decision maker is severely restricted, allegations of bias are often dismissed for lack of direct evidence. As it is the decision-making body and not the parties who often control information indicating bias, well-founded claims fail simply because of the difficulty of gaining access to credible, admissible evidence. Requiring the decision maker to respond to a prima facie showing of bias with evidence to rebut the claimant's evidence would help the court avoid the risk of error that may be created by the claimant's lack of access to relevant information about the agency's actions, particularly in claims based on ex parte communications and prejudgment of the facts.

Reform of governmental practices relating to bias in environmental decision making would come with a price--increased training costs, time, and money. Subjecting decision makers to greater scrutiny of their personal and professional ties may discourage talented persons from participating on unpaid boards and provide fodder for more non-meritorious claims. Loosening the evidentiary burden on a claimant would likely increase the burdens on decision makers and courts.

These efficiency considerations are not insurmountable. Research supports the notion that people “rebel against a system that does not comport with their notions of procedural justice.” Hence, the result of more effort to avoid bias and its perception may be reduced attacks on environmental decisions, not just on the issue of bias but also on the underlying substantive issues. But enhanced efforts to avoid bias first require a discussion about the incidence of improper bias and
how courts treat those claims. The doctrinal and empirical analysis presented herein hopefully can inform that debate and help make environmental decisions both more substantively and procedurally just.

Footnotes

a1 Professor of Law, Washington University School of Law in St. Louis. The author thanks John Galanek, Tobias Gillett, Stephen Hirsch, Daniel Kempland, and Ryan McPeek for their invaluable research assistance.


When the Fukushima Daiichi nuclear power plant began emitting radiation after it was severely damaged by an earthquake, reports surfaced about the collusive relationship in Japan between the nuclear power industry and government regulators. As with the oil and gas industry in the United States, the agency in Japan charged with regulating nuclear power is part of the ministry charged with promoting the use of nuclear power. Norimitsu Onishi & Ken Belson, Culture of Complicity Tied to Stricken Nuclear Plant, N.Y. TIMES, Apr. 27, 2011, at A1.


6 Elizabeth Rosenthal & Dan Frosch, Pipeline Review is Faced with Question of Conflict, N.Y. TIMES, Oct. 8, 2011, at A11 (explaining that the contractor hired to analyze environmental impacts of the TransCanada pipeline was recommended by TransCanada, had worked on previous projects with the company, and referred to TransCanada as a customer in marketing
materials); see also Elisabeth Rosenthal, Cozy U.S. Tie to Builder Is Seen By Resisters of Pipeline Project, N.Y. TIMES, Oct. 4, 2011, at A1 (highlighting State Department e-mails that demonstrate coordination between TransCanada and Department officials).


12 American Waste, 581 So.2d at 741-42.


See, e.g., Jerry L. Anderson & Erin Sass, Is the Wheel Unbalanced? A Study of Bias on Zoning Boards, 36 URB. LAW. 447, 448 (2004) ("[T]here is a widespread perception that zoning boards are often biased."); Charlie Savage, Sex, Drug Use and Graft Cited in Interior Department, N.Y. TIMES, Sept. 11, 2008, at A1 (quoting U.S. Department of Interior lawyer: "the fix [of the agency decision-making process] is in throughout--this is tainted from the beginning, that is totally improper"); Mike Taugher, Decision on Splittail Raises Suspicions, CONTRA COSTA TIMES, May, 20, 2007 (reporting on improper actions of political appointee who participated in decision affecting her own property and gave preferential treatment to certain parties); JONATHAN LASH, A SEASON OF SPOILS (1984) (chronicling numerous conflicts of interest and biased decisions by federal environmental agency officials).

See generally Tom R. Tyler, Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority, 56 DEPAUL L. REV. 661, 663-64 (2007) (finding that people are more likely to defer to decisions when viewed as fair, and that a neutral decision maker is a critical factor in whether a process is judged as fair); Martin H. Redish & Lawrence C. Marshall, Adjudicatory Independence and the Values of Procedural Due Process, 96 YALE L.J. 455, 483 (1986) (noting the importance of the appearance of fairness in adjudicatory proceedings).


See infra Part III.

20 See A GUIDE TO FEDERAL AGENCY ADJUDICATION, supra note 19, § 7.01, at 98.

21 See, e.g., SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 109-88 (1993) (discussing the heuristics used by decision makers and the biases that can result from these processes); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, Inside the Judicial Mind, 86 CORNELL L. REV. 777 (2001) (reporting the results of a survey showing that cognitive illusions influence the decision-making processes of judges and produce systematic errors in judgment).


23 U.S. CONST. amend. V (“No person shall be... deprived of life, liberty, or property, without due process of law.”).

24 PIERCE, supra note 19, § 9.2, at 737; see also A GUIDE TO FEDERAL AGENCY ADJUDICATION, supra note 19, § 2.06, at 25 (“Due process does not apply when courts characterize agency action as quasi-legislative rather than adjudicative. In general, quasi-legislative action is applicable to a class of persons, while adjudication is targeted at specific persons.”).

25 Compare Londoner v. Denver, 210 U.S. 373 (1908) (holding that because the tax assessment board determined whether, in what amount, and upon whom a property tax should be levied, the taxpayer had a due process right for an opportunity to be heard), with United States v. Fla. E. Coast Ry. Co., 410 U.S. 224 (1973) (holding that because the agency's rule did not single out a particular railroad for special consideration, there was no due process right for an oral evidentiary hearing).

26 Bd. of Regents v. Roth, 408 U.S. 564, 569 (1972).

27 See id. at 570 (“[T]he range of interests protected by procedural due process is not infinite.”); id. at 571-72, 577 (“[P]roperty interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.... [But] a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it.”); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (holding that welfare benefits are property interests).

28 Roth, 408 U.S. at 569-70.

29 424 U.S. 319, 334-35 (1976) (“[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

30 Henry J. Friendly, “Some Kind of Hearing,” 123 U. PA. L. REV. 1267, 1279 (1975) (listing an unbiased tribunal as the most important element of a fair hearing). The Court asserts that it has jealously guarded the requirement of a neutral decision maker to preserve “both the appearance and reality of fairness, ‘generating the feeling, so important to a popular government, that justice has been done....’” Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 (1951)); see also Clements v. Airport Auth. of Washoe Cty., 69 F.3d 321, 333 (9th Cir. 1995) (“A biased proceeding is not a procedurally adequate one. At a minimum, Due Process requires a hearing before an impartial tribunal.”); Martin H. Redish & Lawrence C. Marshall, Adjudicatory Independence and the Values of Procedural Due Process, 95 YALE L.J. 455, 477 (1986) (arguing that “the use of an ‘independent’ adjudicator is a sine qua non of procedural due process”); PIERCE, supra note 19, § 9.8, at 846 (“Due process requires a neutral, or unbiased, adjudicatory decision-maker.”).
31 Withrow v. Larkin, 421 U.S. 35, 47 (1975); see also In re Murchison, 349 U.S. 133, 136 (1955) (stating that an absence of bias is a necessity for due process).

32 See, e.g., Hummel v. Heckler, 736 F.2d 91, 93 (3rd Cir. 1984) (“Indeed, the absence in the administrative process of procedural safeguards normally available in judicial proceedings has been recognized as a reason for even stricter application of the requirement that administrative adjudicators be impartial.”); Nat'l Labor Relations Bd. v. Phelps, 136 F.2d 562, 563 (5th Cir. 1943); Reid v. N.M. Bd. of Exam'rs in Optometry, 589 P.2d 198, 200 (N.M. 1979).


34 See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543 (1978) (recognizing that, absent constitutional constraints or extremely compelling circumstances, Congress should be free to fashion its own decision-making procedures); Marcello v. Bonds, 349 U.S. 302, 309-10 (1955) (recognizing Congress's right to establish administrative hearing procedures); Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2349 (2011) (rejecting a constitutional challenge to a Nevada conflict of interest statute that prohibits a public officer from voting on or advocating for the passage of a matter in which the official might have a conflict of interest).

35 See, e.g., Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1314(i) (2012) (prohibiting any person who received a significant portion of his or her income from a Clean Water Act permit holder or applicant from serving as a member of the state board or body that approves permit applications); Clean Air Act, 42 U.S.C. § 7428(a) (2012) (requiring disclosure of conflicts of interest by members of Clean Air Act state boards or bodies that approve permits or enforcement orders).


37 Id. §§ 554(d), 556(b), 557(d)(1).

38 See MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 9, 13 (1961); MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 4-202(b), 4-213 to 4-214 (1981); MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 402(b)-(c), 408 (2010).

39 See Vermont Yankee, 435 U.S. at 543 (stating that agencies should be free to fashion their own rules of procedure, provided they comport with constitutional constraints).


44 See In re J.P. Linahan, Inc., 138 F.2d 650, 651-52 (2nd Cir. 1943). In J.P. Linahan, the court explained:
If, however, “bias” and “partiality” be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are pre-judices. Without acquired “slants,” pre-conceptions, life could not go on. Every habit constitutes a pre-judgment; were those pre-judgments which we call habits absent in any person, were he obliged to treat every event as an unprecedented crisis presenting a wholly new problem he would go mad. Interests, points of view, preferences, are the essence of living.
Id. See also infra notes 160-161 and accompanying text.

45 See PIERCE, supra note 19, § 9.2, at 455-56.
46  Id. at 457-58.


48  5 U.S.C. § 551(6). Where they define the term, state administrative procedure acts define order more affirmatively as an agency action that determines rights, duties, privileges, immunities, or other interests of a specific person or persons. See MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1-102(5) (1981); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 102(23) (2010).

49  See 5 U.S.C. § 551(7); see also Am. Bar Ass’n, Section of Admin. Law and Regulatory Practice, A Blackletter Statement of Federal Administrative Law, 54 ADMIN. L. REV. 17, 18, 22-25 (2002) [hereinafter ABA Blackletter Statement]; MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 102(1) (2010) (defining adjudication more specifically as “the process for determining facts or applying law pursuant to which an agency formulates and issues an order”).


51  PIERCE, supra note 19, § 3.7, at 74; Id. § 6.4, at 279; see also People v. Village of Lisle, 781 N.E.2d 223, 233-34 (Ill. Sup. Ct. 2002) (holding that a legislative body acts administratively when it rules on applications for permits).

52  See supra notes 24-25 and accompanying text. “The distinction between individualized deprivations, that are protected by procedural due process, and policy-based deprivations of the interests of a class, that are not protected by procedural due process, is central to an understanding of the U.S. legal system. At least as a first approximation, it underlies both the distinction between legislation and judicial trial and the distinction between rulemaking and adjudication.” PIERCE, supra note 19, §9.2, at 737. The Supreme Court has noted, however, that a in a rulemaking proceeding where “an agency is making a ‘quasi-judicial’ determination by which a very small number of persons are ‘exceptionally affected... upon individual grounds’... additional procedures may be required in order to afford the aggrieved individuals due process [rights].” Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 542 (1978).


54  Compare U.S. Steel Corp. v. Train, 556 F.2d 822, 833-34 (7th Cir. 1977) (holding that statute requiring agency to provide an “opportunity for public hearing” required the procedural safeguards of formal adjudication set forth in the APA), with Chemical Waste Mgmt. v. U.S. Envtl. Prot. Agency, 873 F.2d 1477, 1480-83 (D.C. Cir. 1989) (holding that a requirement to provide a “public hearing” does not require agency to provide a formal adjudication process), and Dominion Energy Brayton Point v. Johnson, 443 F.3d 12, 14-19 (1st Cir. 2006) (holding that, although the statute required an “opportunity for public hearing,” formal adjudication was not required because the statute did not require that the hearing be “on the record”). See also A GUIDE TO FEDERAL AGENCY ADJUDICATION, supra note 19, §3.01, at 30-31 (observing that the methodology used by courts to determine if formal adjudication is required where the statute does not use the words “on the record” is not clear and that present case law supports several different approaches); KOCH, supra note 19, §5.13[2] at 15-16 (“When the statute calls for adjudication the magic words ‘on the record’ may not be necessary to establish the formal adjudication requirement.”). As one commentator explained: “The Supreme Court has not yet addressed the question whether a statutory requirement of a ‘hearing,’ used in the adjudicatory context, means an ‘on the record’ hearing, including an oral evidentiary hearing. The Court has issued numerous opinions, however, that suggest the Court would hold that the requirement of a ‘hearing’ can be satisfied by an informal written exchange of views in most adjudicatory contexts.” PIERCE, supra note 19, § 8.2, at 712.

55  See MODEL STATE ADMINISTRATIVE PROCEDURE ACT §1(2) (1961) (defining “contested case” as a proceeding in which legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-201 (1981) (requiring a formal adjudicative hearing for formulating and issuing an order unless otherwise provided by another statute); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 401 (2010) (requiring a formal adjudication in a “contested case,” defined as an adjudication in which an opportunity for an evidentiary hearing is required by a federal or state constitution or statute).
5 U.S.C. §§ 554(d), 556(b), 557(d) (2012). More generally, sections 554 through 557 of the APA set forth the processes for formal adjudications.

See Izaak Walton League of America v. Marsh, 655 F.2d 346, 361-62 n.37 (D.C. Cir. 1981) (“The APA itself does not use the term ‘informal adjudication.’ Informal adjudication is a residual category including all agency actions that are not rulemaking and that need not be conducted through ‘on the record’ hearings.”); see also Paul R. Verkuil, A Study of Informal Adjudication Procedures, 43 U. CHI. L. REV. 739, 739 n.1 (1976) (“The term ‘informal adjudication’ has no commonly accepted meaning...[but] does not mean rulemaking, either formal or informal.”).

Verkuil, supra note 57, at 741; Ronald J. Krotoszynski, Jr., Taming the Tail That Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjudication, 56 ADMIN. L. REV. 1057, 1058 n.7 (2004).

See, e.g., Everett v. United States, 158 F.3d 1364, 1368 (D.C. Cir. 1998) (upholding use of informal adjudication to resolve dispute over an application for a special use permit); City of West Chicago v. U.S. Nuclear Regulatory Comm'n, 701 F.2d 632, 643-45 (7th Cir. 1983) (upholding use of informal adjudication in licensing proceeding); Chemical Waste Mgmt. v. U.S. Envtl. Prot. Agency, 873 F.2d 1477, 1479-80 (D.C. Cir. 1989) (holding that informal adjudication can be used to issue a corrective action order).

5 U.S.C. § 555 (2012). Section 558 of the APA provides additional procedures for the withdrawal, suspension, revocation, or annulment of a license, including notice in writing of the facts or conduct that warrant the agency action and an opportunity to demonstrate or achieve compliance. 5 U.S.C. § 558(c) (2012).

See Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 655 (1990) (explaining that the minimal requirements for informal adjudication are set forth in 5 U.S.C. § 555); ABA Blackletter Statement, supra note 49, at 30 (observing that informal adjudication may include ex parte contacts and active involvement by the decision maker in the investigation and prosecution of the case).

See MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 9-13 (1961) (setting forth procedures only for contested cases); MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 2-104(2), 4-401 to 4-403, 4-502 to 4-506 (1981) (setting forth procedures for adjudicative hearings and requiring the adoption of some rules of practice for informal proceedings but not requiring provisions addressing bias); MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 102(27), 401-19 (2010) (referencing informal agency processes and requiring that the agency publish a list of all informal procedures available, but only specifying requirements for contested cases).

See supra notes 30-32 and accompanying text. “Administrative decisionmakers do not bear all the badges of independence that characterize an Article III judge, but they are held to the same standard of impartial decisionmaking.” Barry v. Bowen, 825 F.2d 1324, 1330 (9th Cir. 1987) (citing Schweiker v. McClure, 456 U.S. 188, 195 (1982), which held that “due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities”).

ABA Blackletter Statement, supra note 49, at 29 (“More detailed procedures for informal adjudication [beyond sections 555 and 558 of the APA] are typically found in particular agency statutes and agency rules....”).


Id. at 543-48.

See supra note 47 and accompanying text. State administrative procedure acts define a rule only to mean a statement of general, not particular, applicability. See MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1(7) (1961); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 102(30) (2010).


ATTORNEY GENERAL’S MANUAL, supra note 50, at 14.

See, e.g., Hercules, Inc. v. U.S. Envtl. Prot. Agency, 598 F.2d 91, 118 (D.C. Cir. 1978) (holding that the fact only one company manufactured the chemical subject to the rule did not mandate the use of adjudicatory procedures as many other entities are affected by the standards); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1306 (10th Cir. 1973) (“The fact that Anaconda...”)
alone is involved is not conclusive on the question as to whether the hearing should be adjudicatory, for there are many other interested parties and groups who are affected and are entitled to be heard.”).


Id. §§ 556-557. Unlike the APA, state administrative procedure acts do not distinguish between formal and informal rulemaking, instead only establishing procedures for informal rulemaking but sometimes mandating oral proceedings on a proposed rule where interested persons may present oral argument and data. See MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3 (1961); MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 3-101-117 (1981); MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 301-18 (2010).


JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 59 (4th ed. 2006) (“Formal rulemaking always has been the exception rather than the norm, and it is used infrequently today.”).


Id. § 553(b).

See ABA Blackletter Statement, supra note 49, at 31 (explaining purpose and scope of informal rulemaking); PIERCE, supra note 19, § 7.6, at 478 (discussing efforts to compel agencies to adopt procedures to protect against ex parte communications); Sierra Club v. Costle, 657 F.2d 298, 396-409 (D.C. Cir. 1981) (rejecting claim that post comment period communications invalidated rule and recognizing the legitimacy and value of such contacts during rulemaking). Similarly, state administrative procedure acts do not address bias in agency rulemaking. See MODEL STATE ADMINISTRATIVE PROCEDURE ACT 13 (1961) (applying restrictions on ex parte consultations only to contested cases); MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 4-202, 213, 214 (1981) (applying provisions to avoid bias only to adjudicative hearings); MODEL STATE ADMINISTRATIVE PROCEDURE ACT§§ 402, 408 (2010).

LUBBERS, supra note 76, at 341-42 (providing examples from the Department of Transportation, EPA, and the Federal Emergency Management Agency); PIERCE, supra note 19, § 7.7, at 650-52 (identifying additional procedures required by Congress in some statutes, including the Toxic Substances Control Act and Clean Air Act).

Vermont Yankee, 435 U.S. 519, 542 (1978) (“In prior opinions we have intimated that even in a rulemaking proceeding when an agency is making a ‘quasi-judicial’ determination by which a very small number of persons are ‘exceptionally affected, in each case upon individual grounds,’ in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process.” (citing United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 242-45 (1973)).

Id. at 543 (“Absent constitutional constraints or extremely compelling circumstances the ‘administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’” (citing Fed. Commc’n Comm’n v. Schreiber, 381 U.S. 279, 290 (1965) (quoting Fed. Commc’n Comm’n v. Pottsville Broad. Co., 309 U.S. 134, 143 (1940))).

PIERCE, supra note 19, § 9.8, at 846; 5 U.S.C. § 556(b) (2012); MODEL STATE ADMIN. PROCEDURE ACT § 4-202(b) (1981); MODEL STATE ADMIN. PROCEDURE ACT § 402(c) (2010); cf. MODEL STATE ADMIN. PROCEDURE ACT § 13 (1961) (addressing only ex parte communications).

PIERCE, supra note 19, § 9.8, at 847.

Professor Richard Pierce ascribes five meanings in administrative law to the term “bias”: 1) prejudgment or point of view about a question of law or policy; 2) prejudgment about legislative facts that help answer a question of law or policy; 3) advance knowledge of adjudicatory facts; 4) personal prejudice toward a person; and 5) standing to gain or lose by a decision. Id. § 9.8, at 847; see also id. § 9.9, at 882-85 (observing that due process and the APA may also require separation of functions to ensure
an unbiased proceeding). Professor Asimow observes that the integrity of agency decision making in adjudications is addressed in four administrative law doctrines: 1) bias, which includes personal animus, pecuniary bias, and prejudgment of facts; 2) ex parte communications; 3) legislative interference; and 4) separation of functions. A GUIDE TO FEDERAL AGENCY ADJUDICATION, supra note 19, at 97-98. The American Bar Association explains that the integrity of the decision-making process may be tainted when the decision maker has: a pecuniary or other personal interest in the case; prejudged the facts against a party; developed personal animus against a party, witness, counsel, or group to which they belong; engaged in ex parte communications with an interested person; been subject to legislative interference or pressure; or engaged in an adversary function in the same case. ABA Blackletter Statement, supra note 49, at 22-24. Judge Judith Meierhenry divides bias claims into four categories: 1) prejudgment of issues; 2) personal prejudice toward a party; 3) conflict of interest and ex parte communications; and 4) appearance of impropriety. Judith K. Meierhenry, The Due Process Right to an Unbiased Adjudicator in Administrative Proceedings, 36 S.D. L. REV. 551, 555 (1991). Professor Mark Cordes characterizes bias and conflicts of interest in zoning decisions as encompassing financial conflicts, associational conflicts, prejudgment and bias, ex parte contacts, and campaign contributions. Mark Cordes, Policing Bias and Conflicts of Interest in Zoning Decisions, 65 N.D. L. REV. 161, 163 (1989).

See In re Murchison, 349 U.S. 133, 136 (1955) (“[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.”). See National Conference of State Legislatures, Conflict of Interest Definitions, http://www.ncsl.org/legislatures-elections/ethicshome/50-state-table-conflict-of-interest-definitions.aspx (last visited Nov. 21, 2015) (providing a list and examples of conflict of interest statutes and ordinances for government officials and employees).

Wyzykowski v. Rizas, 626 A.2d 406, 413 (N.J. 1993) (internal citation omitted).

Id. at 510 (1927).

Id. at 520.

Id. at 532.

409 U.S. 57 (1972).

Id. at 60; see also United Church of the Med. Ctr. v. Med. Ctr. Comm'n, 689 F.2d 693, 699-700 (7th Cir. 1982) (holding that an improper pecuniary interest can be present even if the interest is only an indirect outgrowth of a public official's desire to protect or enhance public funds and will not inure to the personal benefit of the official). But see Dugan v. Ohio, 277 U.S. 61, 65 (1928) (finding no violation of due process where the judge's salary was paid out of a fund to which fines were contributed where the fund was a general fund for the city and the judge received a fixed salary not dependent on whether he convicts in any case or not).

Tumey, 273 U.S. at 532; see also Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 824-25 (1986) (holding that because the judge's interest in the case was direct, personal, substantial, and pecuniary, the Court was not required to decide whether in fact the judge was influenced by this interest).

If a court finds that a member of a board or commission was biased and should have recused or been disqualified but was not, the decision is usually reversed, even where the vote of the biased member was not necessary for the majority's decision. A GUIDE TO FEDERAL AGENCY ADJUDICATION, supra note 19, at 105; accord KOCH, supra note 19, § 6:10[2](c)(vi).

See Gibson v. Berryhill, 411 U.S. 564, 579 (1973) (“It has also come to be the prevailing view that ‘[m]ost of the law concerning disqualification because of interest applies with equal force to... administrative adjudicators.’” (quoting K. DAVIS, ADMINISTRATIVE LAW TEXT, § 12.04, at 250 (1972))); accord MFS Secs. Corp. v. Sec. Exch. Comm'n, 380 F.2d 611, 617-18 (2d Cir. 2004) (stating that the prohibition on personal bias is applicable to administrative agencies in much the same way as applied to courts).

Gibson, 411 U.S. at 576-79.

Id. at 579. See also Yamaha Motor Corp. v. Riney, 21 F.3d 793, 798 (8th Cir. 1994) (finding that a commissioner who owned a competing motorcycle dealership had a disqualifying pecuniary interest in judging whether a competing motorcycle company had violated the law); United Church of the Med. Ctr., 689 F.2d at 699-700 (finding that where the commission determined whether property should revert to it for nonuse or disuse created a disqualifying financial stake in outcome); Hass v. City, of
San Bernardino, 45 P.3d 280, 289 (Cal. 2002) (holding that when plaintiffs or prosecutors are free to choose their judge and the judge's income depends on the number of cases handled the judge has a disqualifying financial interest).

Friedman v. Rogers, 440 U.S. 1, 18 (1979). “Friedman stands for the principle that a general economic interest in the subject matter is insufficient to disqualify a decision-maker.” PIERCE, supra note 19, § 9.8, at 855.

Marshall v. Jerrico, Inc., 446 U.S. 238, 247-51 (1980); see also Van Harken v. City of Chicago, 103 F.3d 1346, 1353 (7th Cir. 1997) (“[T]he mere fact that an administrative or adjudicative body derives a financial benefit from fines or penalties that it imposes is not in general a violation of due process, though in exceptional cases... it may be.” (internal citation omitted)).

See, e.g., Leverett v. Town of Limon, 567 F. Supp. 471, 474-75 (D. Colo. 1983) (finding disqualifying interest where official was also landowner's neighbor and a plaintiff in nuisance suit against landowner); Clark v. City of Hermosa Beach, 48 Cal. App. 4th 1152, 1172 (1996) (holding that council member, although only a renter, had disqualifying interest where proposed project would directly hinder his ocean view); Kovalik v. Planning and Zoning Comm'n, 234 A.2d 838 (Conn. 1967) (holding that commission chair was disqualified from acting because of ownership of substantial amount of land affected by proposed zoning change); Springwood Dev. Partners, L.P. v. Bd. of Supervisors, 985 A.2d 298, 305-06 (Pa. Commw. Ct. 2009) (enjoining board member from participating in land-development decision where member's property values would be harmed and member was involved in litigation opposing development). The ABA’s “Model Statute on Local Land Use Process” requires recusal where a decision maker has a direct or indirect financial interest in the subject property; is related by blood, adoption, or marriage to the person who owns the property; or resides or owns property within 500 feet of the property. AM. BAR ASS'N., MODEL STATUTE ON LOCAL LAND USE PROCESS §§ 204(3), 207(8) (2008).

See, e.g., Zehring v. City of Bellevue, 663 P.2d 823, 828-29 (Wash. 1983) (holding planning commissioner's participation in decision on company's application violated appearance of fairness doctrine because he had committed to purchasing stock in the company).

See, e.g., Harrington v. N.Y. State Adirondack Park Agency, 24 Misc. 3d 550, 558 (N.Y. Sup. Ct. 2009) (finding agency attorney's family members' ownership of land near property was insufficient to demonstrate bias); Levitt & Sons, Inc. v. Kane, 285 A.2d 917, 922 (Pa. Commw. Ct. 1972) (holding decision maker's ownership of land in area considered for rezoning was not disqualifying without showing of immediate and direct private interest).

See, e.g., In re Bergen Cty. Utils. Auth., 553 A.2d 849, 853 (N.J. Super. Ct. App. Div. 1989) (finding commissioner should have recused himself from organization's case when he had been approached by the organization regarding a vacant management position); Hayden v. City of Port Townsend, 622 P.2d 1291, 1294 (Wash. Ct. App. 1981) (disqualifying board member from voting and participating in hearings where member's employer would substantially benefit from rezoning); N.Y. Pub. Interest Research Grp., Inc. v. Williams, 127 A.D.2d 512, 513 (N.Y. App. Div. 1987) (finding administrative law judge disqualified where applicant was client of judge's company); City of Hobart Common Council v. Behavioral Inst. of Ind., LLC, 785 N.E.2d 238, 253-54 (Ind. Ct. App. 2003) (disqualifying councilwoman who was at-will employee of school system that sought to influence her vote); Sohocki v. Colorado Air Quality Control Comm'n, 12 P.3d 274, 278 (Colo. App. 2000) (holding commissioner should have disclosed she was seeking employment with applicant agency); Wyzykowski v. Rizas, 626 A.2d 406, 414-15 (N.J. 1993) (holding that building official who holds salaried position appointed by major is disqualified from reviewing mayor's application to develop property as it would constitute voting on a matter that benefits one's employer).


Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1314(i)(D) (2012) (establishing the state permit program disclosure requirements); 40 C.F.R. § 233.4 (2014) (describing what constitutes a conflict of interest under the Clean Water Act Section 404 state program); 40 C.F.R. § 123.25(c) (2014) (providing that Clean Water Act National Pollutant Discharge Elimination System programs shall ensure that no board or board member in charge of permit approval has received income...
from a permit applicant in the previous two years); Clean Air Act, 42 U.S.C. § 7428 (2012) (establishing state air board disclosure requirements).


106 See, e.g., Sierra Club v. Thomas, 105 F.3d 248, 251 (6th Cir. 1997) (finding conflict of interest in budgeting process whereby Service keeps percentage of timber sales and receives higher congressional subsidy when employing expensive techniques such as clearcutting), vacated on other grounds sub nom., Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 739 (1998).


108 Sierra Club v. Thomas, 105 F.3d at 251.

109 Earth Island Inst., 442 F.3d at 1178 (finding Ninth Circuit used an overly lenient standard for preliminary injunction).

110 See, e.g., Sierra Forest Legacy v. Rey, 577 F.3d 1015, 1026 (9th Cir. 2009) (Noonan, J., concurring) ("Could an umpire call balls and strikes objectively if he were paid for the strikes he called?"); Sierra Club v. Bosworth, 465 F. Supp. 2d 931, 941 (N.D. Cal. 2006) ("[T]he Forest Service's interest in harvesting timber has trampled the applicable environmental laws."). See also Austin D. Saylor, The Quick and the Dead: Earth Island v. Forest Service and the Risk of Forest Service Financial Bias in Post-Fire Logging Adjudications, 37 ENVTL. L. 847 (2007) (discussing financial incentives that cast doubt on the Forest Service's capacity to act neutrally).

111 481 N.E.2d 664 (Ill. 1985).

112 Id. at 665.

113 Id. at 668.

114 Id. at 667.


116 Esso Standard Oil Co. v. Cotto, 389 F.3d 212, 213-14 (1st Cir. 2004).

117 Id.


119 Esso Standard Oil Co. v. López-Freytes, 522 F.3d 136, 146-47 (1st Cir. 2008) (affirming district court's order permanently enjoining defendants from imposing fine).


121 Mallinckrodt LLC v. Littell, 616 F. Supp. 2d 128, 144-47 (D. Me. 2009) (observing that the board would receive its statutorily allowed annual appropriation regardless of whether the party was ordered by the board to pay into a board fund).

122 See, e.g., Anderson & Sass, supra note 14, at 466 (finding that "a significant percentage of zoning board members arguably have an occupational bias in favor of development").

123 See, e.g., MO. REV. STAT. § 644.021.1 (2014) (requiring that of seven members of the Clean Water Commission, two shall be knowledgeable about the needs of agriculture, industry, or mining; one shall be knowledgeable about the needs of publicly-owned wastewater treatment works; and four shall represent the public); 1970 PA. LAWS 275, § 471 (requiring that the
Environmental Quality Board consist of eleven members from state agencies or commissions, four from the General Assembly, and five from the Citizens Advisory Council).

124 Anderson & Sass, supra note 14, at 451, 453.

125 See, e.g., id. at 454 (“There are no common law restrictions regarding institutional bias, and even direct bias tests reach only the most egregious cases of conflict of interest.”); Humane Soc'y v. N.J. State Fish & Game Council, 362 A.2d 20, 27 (N.J. 1976) (applying the rational basis test to a challenge to the statutory membership of a state council that excluded plaintiff, and holding that “[o]pening the Council's membership to persons with differing philosophies might reflect the art of public relations, but it is not a constitutional necessity.”). But see Bayside Timber Co., Inc., v. Bd. of Supervisors, 97 Cal. Rptr. 431, 438 (Cal. Ct. App. 1971) (holding that delegation of rulemaking power to forest practice committee of private timber interests with a pecuniary interest subject matter, coupled with lack of standards to prevent abuse, was unconstitutional).


128 40 C.F.R. § 1506.5(c) (2011).

129 Ass'n Working for Aurora's Residential Env't (AWARE) v. Colo. Dep't of Transp., 153 F.3d 1122, 1128 (10th Cir. 1998); see also Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (“Forty Questions”), 46 Fed. Reg. 18026, 18031 (Mar. 23, 1981) (defining interests requiring disclosure to include “any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of (e.g., if the project would aid proposals sponsored by the firm's other clients”).

130 Sierra Club v. Marsh, 714 F. Supp. 539, 552 (D. Me. 1989); see also Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263, 34266 (July 28, 1983) (codified at 40 C.F.R. pt. 1500) (stating § 1506.5(c) does not apply when lead agency prepares EIS based on information from “a contractor hired... to do... studies necessary to provide sufficient information to the lead agency to prepare an EIS”).


132 See, e.g., Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 202 (D.C. Cir. 1991) (finding Federal Aviation Administration violated Council on Environmental Quality regulations by not picking contractor itself, but the “error did not compromise the ‘objectivity and integrity of the [NEPA] process’” and allowing after-the-fact filing of disclosure statement to remedy failure to file (alteration in original)); Valley Cty. Pres. Comm'n v. Mineta, 246 F. Supp. 2d 1163, 1174-75 (D.N.M. 2002) (finding “objectivity and integrity of the NEPA process” uncompromised where contractor who prepared EIS also had contract to work on final design and construction of project).

133 See, e.g., AWARE, 153 F.3d at 1128-29 (“[T]he degree of oversight exercised by defendants... is sufficient to cure any defect arising from [the contractor's expectation of future work].”); Life of the Land v. Brinegar, 485 F.2d 460, 467-68 (9th Cir. 1973); Valley Cnty. Pres. Comm'n, 246 F. Supp. 2d at 1176.

134 BLACK'S LAW DICTIONARY 162 (6th ed. 1990) (“As used in law regarding disqualification of judge, [bias] refers to mental attitude or disposition of the judge toward a party to the litigation, and not to any views that he may entertain regarding the subject matter involved.”).

135 See ABA Blackletter Statement, supra note 49, at 22. This parallels the disqualification of judges where they have a “personal bias or prejudice concerning a party.” 28 U.S.C. § 455(b)(1) (2012). “Impermissible personal bias includes: (1) bias against an individual based on a prior hostile unofficial relationship with the individual; (2) bias against an individual based on the individual's personal characteristics (e.g., race, religion, or ethnic origin); and (3) bias toward an individual based on a prior unofficial positive relationship with the individual (e.g., a close friendship or an amorous relationship).” 2 PAUL R. VERKUIL ET AL., THE FED. ADMIN. JUDICIARY, ADMIN. CONFERENCE OF THE U.S., RECOMMENDATIONS AND REPORTS 971 (1992).
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136 Cordes, supra note 85, at 205.
137 71 F.3d 732 (9th Cir. 1995).
138 Id. at 744; see also Withrow v. Larkin, 421 U.S. 35, 47 n.15 (1975) (noting that decision maker should be disqualified where the target of personal abuse or criticism from a party); Hall v. Marion School Dist. No. 2, 31 F.3d 183, 191 (4th Cir. 1994) (holding that a board member's hostility toward a school teacher demonstrated that the board was not a neutral and detached arbiter). But see Aetna Life Ins. v. Lavoie, 475 U.S. 813, 820-21 (1986) (holding that allegations of bias or prejudice based on a judge's general hostility towards insurance companies was insufficient to establish a constitutional violation).
139 See Johnson v. U.S. Dep't of Agric., 734 F.2d 774, 782-83 (11th Cir. 1984), But cf. Amundsen v. Chi. Park Dist., 218 F.3d 712, 716 (7th Cir. 2000) (holding the mere fact that the administrative hearing officer was hired and paid for by an agency party is insufficient to establish actual bias and overcome the presumption of honesty and integrity in adjudicators).
140 United States v. Grinnell Corp., 384 U.S. 563, 583 (1966) (holding that any adverse attitudes were based on the judge's study of the depositions and briefs); see also Bowens v. N.C. Dept. of Human Res., 710 F.2d 1015, 1020 (4th Cir. 1983) (“An individual is not disqualified, however, because he has formed opinions about a case based on his or her participation in it.”); PIERCE, supra note 19, § 9.8, at 865 (“To be disqualifying, personal bias usually must have a prior unofficial source.”); VERKUIL, supra note 135.
141 Liteky v. United States, 510 U.S. 540, 555-56 (1994) (“Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after being confirmed as federal judges, sometimes display.” (emphasis in original)); see also Nat'l Labor Relations Bd. v. Pittsburgh S.S. Co., 337 U.S. 656, 659-60 (1949) (holding that a hearing officer's total rejection of the view of one party cannot of itself impugn the integrity of the trier of fact). But see Ventura v. Shalala, 55 F.3d 900, 902-04 (3d Cir. 1995) (finding that an administrative law judge's coercive, intimidating, and irrelevant questioning of a claimant and his representative violated claimant's right to a full and fair hearing).
142 United States v. Morgan, 313 U.S. 409, 421 (1941). But cf. Haas v. Cnty. of San Bernardino, 45 P.3d 280, 286 (Cal. 2002) (explaining that “while adjudicators challenged for reasons other than financial interest have in effect been afforded a presumption of impartiality... adjudicators challenged for financial interests have not”).
143 Withrow, 421 U.S. at 47.
145 United States v. Oregon, 44 F.3d 758, 772 (9th Cir. 1994). In Withrow, the Court explained that the presumption of impartiality can be overcome by a finding of actual bias or a showing that the probability of actual bias on the part of the decisionmaker “is too high to be constitutionally tolerable.” 421 U.S. at 47; see also Hall v. Marion School Dist. No. 2, 31 F.3d 183, 192 (4th Cir. 1994).
146 Citizens to Preserve Overton Park, 401 U.S. at 420; see Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7, 14-16 (2d Cir. 1997) (finding an insufficient showing of bad faith to permit extra record evidence that agency used environmental assessment as a post hoc tool to justify a decision already made); Sokaogon Chippewa Cmty. v. Babbitt, 961 F. Supp. 1276, 1279-81, 1286 (W.D. Wis. 1997) (allowing extra-record discovery to determine if improper political pressure may have influenced agency decision making).
See, e.g., Million Bucks, Inc. v. Borough of Seaside Park Zoning Bd. of Adjustment, No. L-162108, 2009 WL 3762702, *9 (N.J. Super. Ct. App. Div. Nov. 10, 2009) (holding that “mere membership” in activist organization merits disqualification because of “potential for a division of loyalties” and showing of actual bias not required); Zell v. Borough of Roseland, 125 A.2d 890, 893 (N.J. Super. Ct. App. Div. 1956) (interpreting statute requiring disqualification for a direct or indirect personal or financial interest in a matter as meaning that all members of a nonpecuniary organization have the same relative interest as stockholders have in a corporation and therefore are disqualified to act as a member of the governing body on matters where the organization has a direct interest).

See, e.g., Ctr. Square Ass’n, Inc. v. Corning, 105 Misc. 2d 6, 13 (N.Y. Sup. Ct. 1980) (holding that board chairman's membership in association seeking relief did not merit disqualification).

See, e.g., MONT. CODE ANN. § 2-2-121(5) (2013) (“A public officer... may not participate in a proceeding when an organization... of which the public officer... is an officer or director is: (a) involved...; or (b) attempting to influence [the proceeding].”); Ripley Cty. Bd. of Zoning Appeals v. Rumpke of Ind., Inc., 663 N.E.2d 198, 209-10 (Ind. Ct. App. 1996) (disqualifying board member who had led effort against another landfill owned by party and expressed desire to run party out of the county); Danis Clarkco Landfill Co. v. Trs. of German Twp., 1997 U.S. Dist. LEXIS 21081, at *40-42 (S.D. Ohio Apr. 16, 1997) (emphasizing board member's active participation and leadership role in organization as rationale for finding partiality); cf. Columbia Gorge United--Protecting People & Prop. v. Yeutter, 1990 WL 357613, *3, *10 (D. Or. 1990) (holding commissioners not disqualified where they were former board members and founders of activist organization, even where they did not resign until after proceeding began).

See, e.g., N.J. STAT. ANN. § 40A:9-22.5(d) (West 2014); See also N.M. STAT. ANN. § 21-211(A)(2)(a) (West 2010).

See, e.g., Los Chavez Cmty. Ass'n v. Valencia Cty., 277 P.3d 475, 483 (N.M. Ct. App. 2012) (holding, on case law, state constitution, and due process grounds, that commissioner should have recused herself from voting on first cousin's rezoning application).

See, e.g., Furtney v. Simsbury Zoning Comm'n, 271 A.2d 319, 323 (Conn. 1970) (holding that commissioner's position at bank used by applicant did not merit disqualification where bank was not financing the proposed project and commissioner never dealt with applicant); Anderson v. Zoning Comm'n of Norwalk, 253 A.2d 16, 20 (Conn. 1968) (finding no need for recusal where law firm representing applicants also represented commissioner's company); see generally Hughes v. Monmouth Univ., 925 A.2d 741, 744 (N.J. Super. Ct. App. Div. 2007) (holding no disqualification necessary where board members were alumni of university applicant, attended university events, and had alumni children who had received merit-based tuition credit).

St. James Citizens for Jobs & the Env't v. La. Dep't of Envtl. Quality, No. 448,928 (La. 19th Jud. Dist. Ct. Aug. 31, 1998) (copy on file with author), vacated on jurisdictional grounds sub nom. In re Shintech, 734 So. 2d 772 (La. Ct. App. 1999). Compare this demonstrated hostility to the situation in Dirt, Inc. v. Mobile County Commission in which the court held that the mere presence of an applicant's "political enemy" on the relevant decision-making boards--without evidence of outright hostility--did not violate due process, although it "may not have been entirely proper." 739 F.2d 1562, 1566 (11th Cir. 1984).


Springwood Dev. Partners, L.P. v. Bd. of Supervisors, 985 A.2d 298, 306 (Pa. Commw. Ct. 2009) (disqualifying decision maker because “the lawsuit concerned his actions with respect to [the proposal] at issue before the Board”); Lake Garda Improvement Ass’n v. Town Plan and Zoning Comm’n, 199 A.2d 162, 163-64 (Conn. 1964) (holding that pending legal action against party is sufficient to warrant disqualification of commission member); cf. Bluff Neighborhood Ass’n v. City of Albuquerque, 50 P.3d 182, 194 (N.M. Ct. App. 2002) (holding disqualification of commissioner unnecessary where member of organization before council had previously intervened in unrelated lawsuit in which commissioner was a party).

589 (N.M. Ct. App. 2003) (finding no bias in hearing officer's warning against “turn[ing] the proceedings into a rally” where the statement was simply an effort to establish decorum); Davis v. Wood, 427 A.2d 332, 337 (R.I. 1981) (holding that hearing officer may question and interrupt witnesses in effort to conduct hearing in orderly and expeditious fashion).

See K OCH, supra note 19, § 1.2, at 7-8 (discussing the differences between adjudicative and legislative facts).

In re J.P. Linahan, Inc., 138 F.2d 650, 651 (2nd Cir. 1943). Former Chief Justice Rehnquist expressed a similar view in rejecting a motion to disqualify himself from a case because of his previously expressed views on the general subject of the case: Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias. Laird v. Tatum, 409 U.S. 824, 835 (1972).

Hortonville Joint School Dist. v. Hortonville Educ. Ass'n., 426 U.S. 482, 493 (1976) (quoting United States v. Morgan, 313 U.S. 409, 421 (1941)). The Court has held that it would not violate due process “for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law,” noting that no stronger rule would apply to an agency adjudicator. Fed. Trade Comm'n v. Cement Inst., 333 U.S. 683, 702-03 (1948).

Hortonville Joint School Dist., 426 U.S. at 493; see also Faultless Div. v. Sec'y of Labor, 674 F.2d 1177, 1183 (7th Cir. 1982) (explaining that familiarity with legal or factual issues alone does not demonstrate that an adjudicator is predisposed to bias).

336 F.2d 754 (D.C. Cir. 1964).

Id. at 759-60, 764.

Id. at 759-60, 763; see also Valley v. Rapids Parish School Bd., 118 F.3d 1047, 1050, 1053 (5th Cir. 1997) (finding no abuse of discretion by district court in granting preliminary injunction enjoining board from terminating superintendent); American Cyanamid Co. v. Fed. Trade Comm'n, 363 F.2d 757, 767-68 (6th Cir. 1966) (finding that chairman's previous involvement with facts of case while counsel to Senate subcommittee disqualified him from participating in hearing).

Skelly Oil Co. v. Federal Power Comm'n, 375 F.2d 6, 17-18 (10th Cir. 1967) (“In our opinion no basis for disqualification arises from the fact or assumption that a member of an administrative agency enters a proceeding with advance views on important economic matters in issue.”). An agency is permitted to issue a press release indicating that it has reason to believe a respondent has engaged in unlawful activities without later having to recuse from adjudicating those charges. Fed. Trade Comm'n v. Cinderella Career & Finishing School, Inc., 404 F.2d 1308, 1314-15 (D.C. Cir. 1968); see also Kennecott Copper Corp. v. Fed. Trade Comm'n, 467 F.2d 67, 80 (10th Cir. 1972) (holding that statements about what was in a complaint, without commenting or editorializing about the case, do not show prejudgment).


Id. at 591 (alteration in original) (quoting Gilligan, Will & Co. v. Sec. Exch. Comm'n, 267 F.2d 461, 469 (2d Cir. 1959)); accord Antoniu v. Sec. Exch. Comm'n, 877 F.2d 721, 725 (8th Cir. 1989). A few courts have ignored the Cinderella Career & Finishing School test and instead required a showing that the decision maker's mind was “irrevocably closed.” See, e.g., Madison River R.V. Ltd. v. Town of Ennis, 994 P.2d 1098, 1100 (Mont. 2000) (stating unequivocally that “[t]o prevail on a claim of prejudice or bias against an administrative decision maker, a petitioner must show that the decision maker had an ‘irrevocably closed’ mind on the subject under investigation or adjudication”). This phrase was used in passing by the Court in Federal Trade Commission v. Cement Institute to address allegations that the commission had fixed views about price fixing or whether certain types of conduct were unlawful. 333 U.S. 683, 700-01 (1948). However, the Court used the phrase to refer to a decision maker's views about legislative facts, not the contested facts that are the subject of an adjudication. Thus, the “irrevocably closed mind” test is properly applied to a rulemaking proceeding, not an adjudication. Ass'n of Nat'l Advertisers v. Fed. Trade Comm'n, 627 F.2d 1151, 1168-70 (D.C. Cir. 1979).
See MICHAEL ASIMOW, ARTHUR EARL BONFIELD & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 129 (2d ed. 1998) (observing that most prejudgment cases arise from unguarded statements made out of the decision maker's statutory role); WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW 231 (5th ed. 2008) (observing that predecisional bias arises mainly from remarks outside of the hearing); Cioffoletti v. Planning & Zoning Comm'n, 552 A.2d 796, 802 (Conn. 1989) (noting that decisive question in prejudgment case was whether decision maker had made up mind prior to the public hearing).

Nat'l Labor Relations Bd. v. Donnelly Garment Co., 330 U.S. 219, 236-37 (1947) (finding no reason for disqualifying examiners from rehearing a case because they ruled strongly against a party in the first hearing).

Ass'n of Nat'l Advertisers, 627 F.2d at 1170; accord United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1210 (D.C. Cir. 1981) (observing that “[j]udicial review of rulemaking, unlike the ABA Canon of [Judicial] Ethics, does not attack the mere appearance of impropriety”);

Ass'n of Nat'l Advertisers, 627 F.2d at 1168-69, 1173 (noting that the court “never intended the Cinderella rule to apply to a rulemaking procedure such as the one under review”); see also LUBBERS, supra note 76, at 372-74 (stating that the disqualification standard applicable to adjudication is inappropriate for rulemaking because an agency official must engage in debate and discussion about the policy to be effective); Peter L. Strauss, Disqualifications of Decisional Officials in Rulemaking, 80 COLUM. L. REV. 990, 993-94 (1980) (acknowledging that while tentativeness during discussions and judgments antecedent to a proposal may be important, such actions do not disqualify the official).

PIERCE, supra note 19, § 9.8, at 877.

See Strauss, supra note 172, at 993 (noting the “significant structural differences between rulemaking and adjudication,” and explaining that the expertise required to carry out policymaking decisions can cause agency administrators to appear biased; however, none of the administrators discussed were disqualified as adjudicators after being accused of unlawful bias.).

See, e.g., City of Farmers Branch v. Hawnco, Inc., 435 S.W.2d 288, 291-92 (Tex. Civ. App. 1968) (holding that campaign promises did not disqualify local officials from performing zoning-related legislative duties when in office); Kramer v. Bd. of Adjustment, Sea Girt, 212 A.2d 153, 158-61 (N.J. 1965) (finding campaign statement that mayor had “realistic attitude” toward hotel proposal was simply the view of a public official on a matter of deep concern to community and did not indicate that mayor had prejudged the merits of the hotel's variance application); Municipalities--Administrative Law--Disqualification of Legislator in Quasi-Judicial Proceeding, 82 Md. Op. Att'y Gen. 94, 97 (Oct. 2, 1997) (“A legislator generally is free to make up his or her mind about an issue long before the vote and... is also free to say what he or she wishes, as part of the legislative process”).


Golden v. City of Overland Park, 584 P.2d 130, 135 (Kan. 1978) (“When... the focus shifts from the entire city to one specific tract of land for which a zoning change is urged, the function becomes more quasi-judicial than legislative.”). But see DANIEL MANDELKER ET AL., PLANNING & CONTROL OF LAND DEVELOPMENT: CASES & MATERIALS 609 (8th ed. 2011) (observing that several courts do not view rezoning map amendments as quasi-judicial).


Dist. v. Wyoming, 513 N.W.2d 847, 866 (Neb. 1994) (holding that general bias in favor of instream flows would not show disqualifying prejudgment of ideal flow level for particular river).


See, e.g., Wagner v. Jackson Cty. Bd. of Zoning Adjustment, 857 S.W.2d 285, 289 (Mo. Ct. App. 1993) (holding that reaching tentative conclusion prior to hearing based on familiarity with facts does not necessitate disqualification when decision maker's mind is “open to change based upon the evidence presented at the hearing”).

See, e.g., City of Alma v. United States, 744 F. Supp. 1546, 1561 (S.D. Ga. 1990) (holding that EPA administrator's prior expressions of opposition to project while in different agency role did not overcome presumption of good faith); Marine Shale Processors, Inc. v. U.S. Envtl. Prot. Agency, 81 F.3d 1371, 1385 (5th Cir. 1996) (holding that official's prior conclusion based on some evidence did not prevent him from fairly deciding the issue later based on all evidence).

In re Rollins, 481 So. 2d 113, 121 (La. 1985) (“The secretary's statements have made it extremely difficult for her to change her position even in the event that evidence adduced at the hearing should warrant it.”); see also Nasha L.L.C. v. City of L.A., 125 Cal. App. 4th 470, 484 (2004) (holding that clearly advocating position against project in newsletter article prior to hearing “gave rise to an unacceptable probability of actual bias” requiring recusal); Mun. Servs. Corp. v. State, 483 N.W.2d 560, 562, 564 (N.D. 1992) (ruling that hearing officer's statement of firm opposition to permitting landfill prior to hearing constituted precommitment to adjudicative facts).


Compare Organized Fishermen of Fla., Inc. v. Franklin, 846 F. Supp. 1569, 1575 (S.D. Fla. 1994) (finding inference from actions of decision maker insufficient to establish convincing evidence of prejudgment), with Charlotte Cty. v. IMC-Phosphates Co., 824 So. 2d 298, 300-01 (Fla. Dist. Ct. App. 2002) (inferring prejudgment from agency official's actions where official, tasked with final adjudicative review of the administrative law judge's 117-page order, announced decision to approve on same day he received order).

Lead Indus. Ass'n, Inc. v. U.S. Envtl. Prot. Agency, 647 F.2d 1130, 1172, 1179-80 (D.C. Cir. 1980) (relying on the Ass'n of Nat'l Advertisers prejudgment test for rulemaking); see also Iowa Farm Bureau Fed'n v. Envtl. Prot. Comm'n, 850 N.W.2d 403, 421-22 (Iowa 2014) (holding that a commission member's advocacy prior to appointment on the rulemaking matter did not disqualify her from voting on the final rule).

C & W Fish Co., Inc. v. Fox, 931 F.2d 1556, 1564-65 (D.C. Cir. 1991).

See, e.g., In re Me. Clean Fuels, Inc., 310 A.2d 736, 750-51 (Me. 1973) (holding that composition of environmental commission may include persons with preconceived policy views, provided the statutory qualifications for holding position are not
arbitrary and appointment complies with them); PIERCE, supra note 19, § 9.8, at 871 (“A previously announced position on a disputed issue of law, policy, or legislative fact does not disqualify a decisionmaker.”).

See generally DANIEL R. MANDELMAN, NEPA LAW & LITIGATION §§ 8:58, 10:46 (2d ed. 2011) (“The question of agency bias, predetermination and prior commitment permeates judicial review of the adequacy of impact statements.”).

Id.


See, e.g., Carolina Envtl. Study Grp., 510 F.2d at 801 (holding that agency's statutorily-prescribed responsibility to promote atomic energy did not show lack of good faith objectivity in approval of license for nuclear reactors); Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1201, 1206 (4th Cir. 1975) (holding that state official's initial, pre-EIS location decision for highway did not show lack of good faith objectivity in his department's participation in EIS); EDF II, 492 F.2d at 1129 (holding that agency documents conveying confidence that project would be approved did not necessarily establish lack of good faith objectivity of subsequent agency studies); Conservation Law Found. v. Fed. Highway Admin., 630 F. Supp. 2d 183, 202 (D.N.H. 2007) (holding that agency's initial view that highway expansion was best alternative provided no evidence of bad faith in its analysis of rail alternative); Australians for Animals v. Evans, 301 F. Supp. 2d 1114, 1127 (N.D. Cal. 2004) (holding that agency's public statement in support of project under consideration did not prove bad faith in decision to approve project); Nashvillians Against I-440 v. Lewis, 524 F. Supp. 962, 986-87 (M.D. Tenn. 1981) (holding fact that agency completed plan for highway prior to preparation of EIS insufficient to prove lack of objective good faith).

See, e.g., Int'l Snowmobile Mfrs. Ass'n v. Norton, 340 F. Supp. 2d 1249, 1261 (D. Wyo. 2004) (holding that official's definitive, public statements prior to completion of final EIS showed EIS was merely “pro forma compliance” with NEPA to validate prejudged political conclusion); Cedar-Riverside Envtl. Def. Fund v. Hills, 422 F. Supp. 294, 322-23 (D. Minn. 1976) (finding lack of good faith objectivity where EIS contained significant misrepresentations of fact favoring proposal, showed biased selection of evidence, and failed to evaluate or even acknowledge alternatives). See generally Envtl. Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army, 342 F. Supp. 1211, 1214 (E.D. Ark. 1972) (finding good faith where the EIS was not “consciously slanted or biased” and defendants had not “consciously or intentionally made any misrepresentations” or “intentionally withheld any pertinent information required by the NEPA”); WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 868-69 (2d ed. 1994) (observing that bad faith is usually reserved for flagrant violations of NEPA's procedural provisions).

40 C.F.R. § 1502.2(f)-(g) (2014); 40 C.F.R. § 1502.5 (2014).

Forest Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d 692, 714 (10th Cir. 2010) (emphasis in original); see also Conner v. Burford, 848 F.2d 1441, 1451 (9th Cir. 1988) (holding that issuance of oil and gas development leases without stipulations constitutes irretrievable commitment because it fails to reserve right to prevent development activity if deemed environmentally harmful).

Davis v. Mineta, 302 F.3d 1104, 1112 (10th Cir. 2002) (“The decision whether to prepare a FONSI should be based on the [environmental analysis], of course, not the other way around.”).

Metcalf v. Daley, 214 F.3d 1135, 1143-44 (9th Cir. 2000); see also Conner, 848 F.2d at 1451 (finding that issuance of leases without reserving right to prevent activity constitutes precommitment); Save the Yaak Comm. v. Block, 840 F.2d 714, 718-19 (9th Cir. 1988) (finding irretrievable commitment in award of contracts and commencement of construction prior to preparation of environmental analysis); Fund for Animals v. Norton, 281 F. Supp. 2d 209, 229-30 (D.D.C. 2003) (issuing permits prior to environmental analysis amounted to waiver of right to prevent activity within scope and duration of permits);
cf. Friends of Se.’s Future v. Morrison, 153 F.3d 1059, 1063 (9th Cir. 1998) (holding that agency’s preparation of tentative schedule for fulfillment of long-term contract did not constitute irretrievable commitment because retained right to prevent activity).

203 Wildwest Inst. v. Bull, 547 F.3d 1162, 1169 (9th Cir. 2008) (“Forest Service’s expenditure of $208,000 to pre-mark trees was clearly not so substantial an investment that it limited [the choice of reasonable alternatives].”); Headwaters v. Forsgren, 219 F. Supp. 2d 1121, 1129 (D. Or. 2002); see also Burkholder v. Wykles, 268 F. Supp. 2d 835, 845 (N.D. Ohio 2002) (finding no irreparable commitment of federal resources prior to FONSI because only state funds were committed, not federal).

204 5 U.S.C. § 554(d) (2012). Section 554(d) also protects administrative law judges from the effects of commingling functions by prohibiting the judge from being responsible to or subject to the supervision or direction of someone engaged in the performance of investigative or prosecuting functions.

205 A GUIDE TO FEDERAL AGENCY ADJUDICATION, supra note 19, § 120, at 120 n.74. As Justice Brennan observed: “In a sense the combination of functions violates the ancient tenet of Anglo-American justice that ‘No man shall be a judge in his own case.’” In re Larsen, 86 A.2d 430, 435 (N.J. Super. Ct. App. Div. 1952) (Brennan, J., concurring).

206 See MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-214 (1981); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 402(b) (2010).


208 ATTORNEY GENERAL’S MANUAL, supra note 50, at 57; see also A GUIDE TO FEDERAL AGENCY ADJUDICATION, supra note 19, § 7.0632, at 123 (citing Greene v. Babbitt, 943 F. Supp. 1278, 1285-86 (W.D. Wash. 1996)). Instead, agency decision makers must consult with staff members who have not performed investigative or prosecuting functions in that or a factually-related case, or organize staff assignments so that the staff members it desires to consult are free of investigative and prosecuting functions. ATTORNEY GENERAL’S MANUAL, supra note 50, at 56-57.


210 5 U.S.C. § 554(d)(C) (2012); see also PIERCE, supra note 19, § 9.9, at 888 (“The APA does not require separation of functions at the highest level of the agency, i.e., the cabinet officer, administrator, or collegial body that has overall responsibility for the agency.”) The restriction also does not apply “in determining applications for initial licenses.” 5 U.S.C. § 554(d)(A) (2012).

211 ABA Blackletter Statement, supra note 49, at 24-25; see Withrow v. Larkin, 421 U.S. 35, 55 (1975) (“The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing.”); Simpson v. Office of Thrift Supervision, 29 F.3d 1418, 1424-25 (9th Cir. 1994) (finding no due process violation where the director of the Office of Thrift Supervision both commences proceedings by issuing notices of charges and makes the final administrative determination); Morris v. City of Danville, 744 F.2d 1041, 1045-46 (4th Cir. 1984) (holding that official who gave employee notice of his proposed termination was not disqualified from later participating in hearings on that termination).

212 See Withrow, 421 U.S. at 58 n.25 (observing that Morrissey v. Brewer, 408 U.S. 471 (1972), “held that when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review”); Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (“We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review.”).

213 A GUIDE TO FEDERAL AGENCY ADJUDICATION, supra note 19, § 7.062, at 121; see also Walker v. City of Berkeley, 951 F.2d 182, 185 (9th Cir. 1991) (finding due process violation “in allowing the same person to serve both as decisionmaker and as advocate for the party that benefited from the decision” (emphasis in original)).

214 In Withrow v. Larkin, the Court observed that while the combination of investigative and adjudicative functions alone does not constitute a due process violation, that “does not, of course, preclude a court from determining from the special facts and
circumstances present in the case before it that the risk of unfairness is intolerably high.” Withrow, 421 U.S. at 58. Professor Pierce notes that “[t]he Supreme Court has never held a system of combined functions to be a violation of due process, and it has upheld several such systems.” PIERCE, supra note 19, § 9.9, at 892. However, some state courts have found that commingling prosecutorial and adjudicative functions in a single administrative board does violate state due process guarantees. See, e.g., Lyness v. State Bd. of Med., 605 A.2d 1204, 1210 (Pa. 1992) (“[W]here the very entity or individuals involved in the decision to prosecute are ‘significantly involved’ in the adjudicatory phase of the proceeding, a violation of due process occurs.” (quoting Commonwealth Dept. of Ins. v. Am. Bankers Ins., 387 A.2d 449, 456 (Pa. 1978))).

See KOCH, supra note 19, § 6:11[1][a], at 382 (“Allowing the same person to serve both as a decisionmaker and as an advocate for a party is inherently suspect.”); Sheldon v. Sec. Exch. Comm’n, 45 F.3d 1515, 1519 (11th Cir. 1995) (observing that “[a]n agency may combine investigative, adversarial, and adjudicative functions as long as no employees serve in dual roles”); Beer Garden, Inc. v. N. Y. State Liquor Auth., 590 N.E.2d 1193, 1198-99 (N.Y. 1992) (holding that even if someone appeared as counsel for the prosecution in form only, that person cannot later adjudicate that same dispute).

Withrow, 421 U.S. at 47, 55, 57. The court in In re Seidman rejected the argument that bias is inherent in a process that allows a single person to act as prosecutor, investigator, and adjudicator, holding that “actual bias or a likelihood of bias must appear if an otherwise valid administrative sanction is to be overturned because of a denial of due process.” 37 F.3d 911, 925 (3rd Cir. 1994). However, the Pennsylvania Supreme Court has held that the mere potential for bias and appearance of nonobjectivity from commingling is sufficient to create a fatal due process defect under the Pennsylvania Constitution. Lyness, 605 A.2d at 1210; see also Allen v. State Bd. of Dentistry, 543 So.2d 908, 915 (La. 1989) (using an appearance of complete fairness standard to determine if commingling prosecutorial and adjudicative functions denied due process); Beer Garden, Inc., 590 N.E.2d at 1198 (rejecting argument that mere appearance of impropriety was not sufficient to require recusal).


Horn v. Twp. of Hilltown, 337 A.2d 858, 860 (Pa. 1975); see also Kerr-McGee Nuclear Corp. v. N. M. Envtl. Improvement Bd., 637 P.2d 38, 46 (N.M. Ct. App. 1981) (holding that the board should not have looked to a division that prepared regulations for legal guidance during a hearing on those regulations); In re Wash. Cty. Cease, Inc., 473 N.Y.S.2d 610, 615 (App. Div. 1984) (holding that commissioner should recuse himself from deciding whether to approve an application when he also serves as applicant’s general counsel).


See, e.g., Marine Shale Processors, Inc. v. U.S. Envtl. Prot. Agency, 81 F.3d 1371, 1385 (5th Cir. 1996) (holding that participation of decision maker who earlier referred applicant’s facility to EPA’s enforcement arm and made initial determination against applicant did not violate due process); Marathon Oil v. U.S. Envtl. Prot. Agency, 564 F.2d 1253, 1265 (9th Cir. 1977) (finding that review of permits after hearings before administrative law judge by same official who initially issued draft permits did not violate due process). However, as noted above, review of an agency decision must be made by someone other than the person who made the decision under review. See supra note 21; see also Due Process and Administrative Hearings, 1991-1992 Mich. Op. Atty. Gen. 6742 (Dec. 4, 1992), available at http://www.ag.state.mi.us/opinion/datafiles/1990s/op06742.htm (“[D]ue process requires that a member... refrain from participating in the review of any decision in which the member has previously participated as a member of the county zoning commission.”).

Compare Bethlehem Steel Corp. v. U.S. Envtl. Prot. Agency, 638 F.2d 994, 1010 (7th Cir. 1980) (vacating EPA’s disapproval of issuance of compliance order to company because attorneys engaged in enforcement action against company advised on the disapproval, casting a shadow over the appearance of fairness), with Marine Shale Processors, 81 F.3d at 1385-86 (finding no violation of due process where attorney in enforcement action against company drafted justifications for denial of permit to same company, because she merely articulated thoughts and decisions of others), and United States v. Keystone Sanitation Co., Inc., 1996 WL 33410105,*1 (M.D. Pa. Aug. 27, 1996) (finding no violation of due process in commingling of investigatory, prosecutory, and adjudicatory functions in EPA staff members conducting remedy selection and enforcement actions relating
to Superfund site, noting that no case law supported claim that constitutional separation-of-functions requirement applies in informal adjudication). See also Envtl. Def. Fund, Inc. v. U.S. Envtl. Prot. Agency, 510 F.2d 1292, 1305 (D.C. Cir. 1975) (holding that enforcement staff in pesticide cancellation proceeding could advise officials on decision to bring suspension proceeding because there was no allegation of communication regarding final decision in either proceeding).

222 See FR & S, Inc., 537 A.2d at 964 (“Where there is not an identity of persons in the two conflicting roles, the test is whether the relationship is one in which influence over the decision-maker's vote is likely.”). The California Supreme Court has held that it does not violate due process for an attorney to prosecute a matter before the State Water Resources Control Board while simultaneously serving as an advisor to the board on an unrelated matter. Morongo Band of Mission Indians, 199 P.3d at 1146 (explaining that “any tendency for the agency adjudicator to favor an agency attorney acting as prosecutor because of that attorney's concurrent advisory role in an unrelated matter is too slight and speculative to achieve constitutional significance”).


224 Id.

225 Id. at 1202-03; accord Mallinckrodt LLC v. Littell, 616 F. Supp. 2d 128, 141-43 (D. Me. 2009) (holding that different assistant attorneys general could simultaneously represent a state agency and the board reviewing the agency's order).

226 See, e.g., Chem. Waste Mgmt., Inc. v. U.S. Envtl. Prot. Agency, 873 F.2d 1477, 1484 (D.C. Cir. 1989) (upholding EPA regulations that “allow agency attorneys to serve as Presiding Officers, provided only that they have ‘had no prior connection with the case’” (quoting 40 C.F.R. § 24.09 (1988)); United Cement Co. v. Safe Air for the Env't, Inc., 558 So. 2d 840, 842-43 (Miss. 1990) (holding the fact that the hearing officer and attorney representing the party were both special assistant attorneys general assigned to the environment section did not alone overcome the presumption of impartiality); In re Fiorillo Bros. of N.J., Inc., 577 A.2d 1316, 1321 (N.J. Super. Ct. App. Div. 1990) (finding no impropriety in the fact that the advisor to the board and the prosecutor before the board were both deputy attorneys general, provided that the connection did not compromise the attorneys' independent judgment or result in actual bias).

227 See Sultanik v. Bd. of Supervisors of Worcester Twp., 488 A.2d 1197, 1201-02 (Pa. Commw. Ct. 1985) (holding that because the township hired the attorney to play an adversary role, other attorneys from the same firm were barred from serving in adjudicative capacity).

228 APA, 5 U.S.C. § 551(14) (2012) (“‘Ex parte communication’ means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.”).

229 See Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth. (PATCO), 685 F.2d 547, 563 (D.C. Cir. 1982); A GUIDE TO FEDERAL AGENCY ADJUDICATION, supra note 19, § 7.042, at 107.


231 See MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-13 (1961); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-213 (1981); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 408 (2010).

effectively apply to all communications of fact with an administrative law judge, including to agency attorneys trying a matter before that decision maker).

234 H.R. REP. NO. 94-880, pt 1, at 19 (1976), reprinted in 1976 U.S.C.C.A.N. 2183, 2202. The House Report provides that: The phrase [ex parte]... excludes procedural inquiries, such as requests for status reports, which will not have an effect on the way the case is decided. It excludes general background discussions about an entire industry which do not directly relate to specific agency adjudication involving a member of that industry, or to formal rulemaking involving the industry as a whole. It is not the intent of this provision to cut an agency off from access to general information about an industry that an agency needs to exercise its regulatory responsibilities. So long as the communication containing such data does not discuss the specific merits of a pending adjudication it is not prohibited by this section. Id.

See also La. Ass'n of Indep. Producers and Royalty Owners v. Fed. Energy Regulatory Comm'n, 958 F.2d 1101, 1112 (D.C. Cir. 1992); PATCO, 685 F.2d at 563-64 (D.C. Cir 1982); Elec. Power Ass'n v. Fed. Energy Regulatory Comm'n, 391 F.3d 1255, 1259 (D.C. Cir. 2004) (holding that the key to determining if an ex parte communication is prohibited is “whether there is a possibility that the communication could affect the agency's decision in a contested on-the-record proceeding.”)

235 PATCO, 685 F.2d at 562 (“The term [interested person] includes, but is not limited to, parties, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated. The term does not include a member of the public at large who makes a casual or general expression of opinion about a pending proceeding.”) (citing H.R. REP. NO. 94-880(I), at 19-20 (1976), reprinted in 1976 U.S.C.C.A.N. 2183, 2202).

See La. Ass'n of Indep. Producers, 958 F.2d at 1112.

236 A GUIDE TO FEDERAL AGENCY ADJUDICATION, supra note 19, § 7.049, at 114 (“The APA adjudication provisions do not apply to informal adjudication.”); LUBBERS, supra note 76, at 335 (“The APA places no restriction on ex parte communications made in informal rulemaking.”); see also Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981) (“Oral face-to-face discussions [during informal rulemaking proceedings] are not prohibited anywhere, anytime, in the Act”).

237 PATCO, 685 F.2d at 564-65; Sw. Sunsites, Inc. v. Fed. Trade Comm'n, 785 F.2d 1431, 1436 (9th Cir. 1986).


239 Id. at 565 n.33.

240 Id. at 565 n.33.

241 657 F.2d 298 (D.C. Cir. 1981)

242 Id. at 400 (quoting Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1978)); see also Appeal of Pub. Serv. Co. of N.H., 454 A.2d 435, 441-43 (N.H. 1982) (holding that even in the absence of procedures by the legislature, due process requires commission members to refrain from ex parte communications when they act in an adjudicative capacity); PIERCE, supra note 19, § 8.4, at 715 (opining that an ex parte communication may violate due process in narrow circumstances).

243 Sierra Club, 657 F.2d at 400; see also United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1215 n.28 (D.C. Cir. 1980) (“As a general rule, due process probably imposes no constraints on informal rulemaking beyond those imposed by statute.”); LUBBERS, supra note 76, at 339 (“Thus, neither the APA nor the case law establish a broad ban on off-the-record communications in rulemaking.”). Although the D.C. Circuit's earlier decision in Home Box Office, Inc. v. Fed. Comm'n, 567 F.2d 9, 57 (D.C. Cir. 1977), suggested a broad prohibition on ex parte contacts in rulemaking proceedings, the
See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971) (requiring agency to provide full administrative record before the agency at the time the decision was made); *Home Box Office*, 567 F.2d at 54 (describing as “intolerable” the possibility that there is one administrative record for the public and the court and another for the agency). As explained in *U.S. Lines v. Federal Maritime Commission*, undocumented ex *parte* contacts “foreclose effective judicial review of the agency's final decision according to the arbitrary and capricious standard of the Administrative Procedure Act. Under this standard the reviewing court must test the actions of the FMC for arbitrariness or inconsistency with delegated authority against ‘the full administrative record that was before the [agency official] at the time he made his decision.’” 584 F.2d 519, 541 (D.C. Cir. 1978) (quoting *Citizens to Preserve Overton Park*, 401 U.S. at 420).


See *U.S. Lines*, 584 F.2d at 540-41 (holding that even though the proceeding was quasi-adjudicatory and not governed by the APA's prohibition on ex *parte* communications, the communications denied the participants their right to the hearing required by the underlying statute).

See, e.g., *Sierra Club*, 657 F.2d at 401 (“Regardless of this court's views on the need to restrict all post-comment contacts in the informal rulemaking context, however, it is clear to us that Congress has decided not to do so...”); *Hercules, Inc. v. U.S. Envtl. Prot. Agency*, 598 F.2d 91, 124-25 (D.C. Cir. 1978) (noting that APA section prohibiting intra-agency ex *parte* contacts--5 U.S.C. § 554(d)--does not extend to rulemaking proceedings); *Parra v. Babbit*, 837 F. Supp. 1034, 1048 (N.D. Cal. 1993) (stating that 5 U.S.C. § 557(d)(1), prohibiting ex *parte* contacts, only applies to adjudications and formal rulemaking proceedings).

See, e.g., *No Oilport! v. Carter*, 520 F. Supp. 334, 345, 371 (W.D. Wash. 1981) (characterizing informal agency action as “non-adjudicatory, non-rulemaking,” outside reach of APA, and subject to “more lenient standard than is applicable to agency adjudication”); *Worman Enters., Inc. v. Boone Cty. Solid Waste Mgmt. Dist.*, 805 N.E.2d 369, 375-76 (Ind. 2004) (finding application of strict ex *parte* rules improper because local officials played a hybrid legislative-adjudicatory role in permitting process); *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188-89 (2d Cir. 1984) (holding that, because the EPA was not performing an adjudicatory function in awarding sewage treatment grants, ex *parte* contacts between agency administrators and public officials were not proscribed).

984 F.2d 1534 (9th Cir. 1993).

Id. at 1546; see also *PATCO*, 685 F.2d 547, 562 (D.C. Cir. 1982) (holding that “interested person” includes public officials with special interest in an agency proceeding greater than that of the general public).

See *Champlin's Realty Assocs. v. Tikoian*, 989 A.2d 427, 441 (R.I. 2010) (holding that governor's sharing opinion on application with decision maker off the record violated prohibition of ex *parte* contacts).

See, e.g., *Fairview Area Citizens Taskforce v. Ill. Pollution Control Bd.*, 555 N.E.2d 1178, 1181-82 (Ill. App. Ct. 1990) (holding that board's expert advisor's ex *parte* contacts with applicant and alleged predisposition were not relevant because advisor did not have a vote); *Forelaws on Bd. v. Energy Facility Siting Council*, 760 P.2d 212, 227-28 (Or. 1988) (finding agency auditor's communication with party did not constitute prohibited ex *parte* contact because auditor was an expert witness, not a decision maker, and noting that the communication was simultaneously served on other parties); *In re SDDS, Inc.*, 472 N.W.2d 502, 511 (S.D. 1991) (holding in contested permit proceeding where agency acts in role of advocate rather than decision maker, that agency may have ex *parte* contacts with other parties). But see *Coal. Advocating a Safe Env't v. Tex. Water Comm'n*, 798 S.W.2d 639, 642-43 (Tex. App. 1990) (holding that where agency served as party rather than decision maker but decision-making commission was bound by statute to adopt findings of agency absent its own independent review, ex *parte* contacts between agency and party were prohibited because agency's findings may bind commission to particular decision). The federal APA is clear that the ex *parte* restrictions extend beyond the actual decision makers to any “employee who is or may reasonably be expected to be involved in the decisional process of the proceeding.” 5 U.S.C. § 557(d)(1)(A)-(B) (2012) (emphasis added).
See, e.g., Sierra Club v. Costle 657 F.2d 298, 397 (D.C. Cir. 1991) (citing 42 U.S.C. § 7607(d)(4)(B)(i) to find that documents that become available after proposed rule is published, and which decision maker deems of central relevance, must be placed in record as soon as possible and reopening of comment period may be required); Mauna Kea Power Co., Inc. v. Bd. of Land & Natural Res., 874 P.2d 1084, 1087 (Haw. 1994) (holding that an agency's improper consultation of outside sources in making decision can be cured by further proceedings affording parties an opportunity to cross-examine and rebut).


See, e.g., Air Pollution Control Dist. v. U.S. Envtl. Prot. Agency, 739 F.2d 1071, 1081 (6th Cir. 1984) (holding that decision-making process was not tainted by acceptance of data after close of comment period because EPA placed data in record and conducted two additional comment periods); See Mauna Kea, 874 P.2d at 1087 (holding that further proceedings could cure agency's consideration of comments received after close of comment period).


See Martone v. Lensink, 541 A.2d 488, 491 (Conn. 1988) ("[O]nce a violation of the statute [prohibiting ex parte communications in contested administrative proceedings] has been proved by the party seeking relief, the burden shifts to the agency to prove that no prejudice has resulted from the prohibited ex parte communication.").

Id. at 492-93; see also Blaker v. Planning & Zoning Comm'n, 562 A.2d 1093, 1097-98 (Conn. 1989) (applying presumption-of-prejudice rule articulated in Martone to land use cases); Dlugokecki v. Inland Wetlands & Watercourses Comm'n, 2008 WL 588707, at *8 (Conn. Super. Ct. 2008) (setting aside decision because commission failed to provide evidence demonstrating plaintiff was not prejudiced by ex parte communication).

See, e.g., Monongahela Power Co. v. Marsh, 699 F. Supp. 324, 327-28 (D.D.C. 1988) (finding uncured ex parte contacts and remedying matter for new proceeding to provide opportunity for adversarial comment based on complete record); Greene v. Babbitt, 943 F. Supp. 1278, 1287 (W.D. Wash. 1996) ("In most cases where a litigant successfully challenges an agency's action, the appropriate remedy is to remand the proceeding.").

Greene, 943 F. Supp. at 1288.

See Richard J. Pierce, Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta, 57 U. CHI. L. REV. 481, 486 (1990); see generally Peter L. Strauss, Overseer, or "The Decider"? The President in Administrative Law, 75 GEO. WASH. L. REV. 696 (2007); Ctr. for Auto Safety v. Peck, 751 F.2d 1336, 1368 (D.C. Cir. 1985) ("There seems to us nothing either extraordinary or unlawful in the fact that a federal agency opens an inquiry into a matter which the President believes should be inquired into. Indeed, we had thought the system is supposed to work that way."); Sec. Exch. Comm'n v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 126 (3d Cir. 1981) (observing that "members of Congress are requested to, and do in fact, intrude, in varying degrees, in administrative proceedings"); Natural Res. Def. Council, Inc. v. Hodel, 865 F.2d 288, 315 (D.C. Cir. 1988) (noting that an agency acts permissibly when its policy decision accords with the President's wishes or directive and does not disregard its statutory mandate).

A GUIDE TO FEDERAL AGENCY ADJUDICATION, supra note 19, § 7.0433, at 110 n. 40; H.R. REP. NO. 94-880(I), at 21 (1976), reprinted in 1976 U.S.C.C.A.N. 2183, 2203. See also 5 U.S.C. § 551(14)(2012) (excluding “requests for status” reports from the definition of ex parte communication); Id. § 557(d)(1)(A)-(B) (2012) (prohibiting only ex parte communications “relevant to the merits of the proceeding”); Id. § 557(d)(2) (2012) (“This subsection does not constitute authority to withhold information from Congress.”).

A GUIDE TO FEDERAL AGENCY ADJUDICATION, supra note 19, § 7.0431, at 108 n.33. Professor Peter Strauss concludes “that in ordinary administrative law contexts, where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President's role-- like that of the Congress and the courts--is that of overseer and not decider.” Strauss, supra note 264, at 704-05.


Pillsbury Co., 354 F.2d at 962-63 (finding a Senator's questions regarding the ability of the FTC Commissioner to speed up the adjudicatory process to be “an improper intrusion into the adjudicatory processes”). One court observed the limited role legislators should have in influencing agency decisions, even in the more open rulemaking context:

An agency has an obligation to consider the comments of legislators, of course, but on the same footing as it would those of other commenters; such comments may have, as Justice Frankfurter said in a different context, “power to persuade, if lacking power to control.” Hazardous Waste Treatment Council v. U.S. Envtl. Prot. Agency, 886 F.2d. 355, 365 (D.C. Cir. 1989) (quoting Skidmore v Swift & Co., 323 U.S. 134, 140 (1944)). See also Sec. Exch. Comm'n v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 126 (3rd. Cir. 1981) (noting that the duty of an agency is to give congressional comments “only as much deference as they deserve on the merits”).

D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1971); see ATX, Inc., 41 F.3d at 1527.


Pillsbury Co., 354 F.2d at 964.

Id.

Id. at 964-65.

41 F.3d 1522 (D.C. Cir. 1994).

Id. at 1527.

Id. at 1529-30 (finding the nexus between the pressure exerted by the legislators and the agency decision makers too tenuous to conclude that political influence entered into the decision maker's “calculus of consideration”). The court did find evidence that congressional letters influenced the agency to set the application for a hearing but concluded that the court was only concerned about influences shaping the agency's decision on the merits. Id. at 1528; see also Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs, 714 F.2d 163, 170 (D.C. Cir. 1983) (finding no violation where there was no evidence the decision was influenced by congressional pressure); Koniag, Inc. v. Andrus, 580 F.2d 601, 610 (D.C. Cir. 1978) (finding no impermissible congressional interference where none of the persons called before the subcommittee was a decision maker on the matter).

ABA Blackletter Statement, supra note 49, at 24. One court described the test as whether “the communications posed a serious likelihood of affecting the agency's ability to act fairly and impartially in the matter before it. In resolving that issue, one must look to the nature of the communications and particularly to whether they contain factual matter or other information outside of the record, which the parties did not have an opportunity to rebut.” Power Auth. of N.Y. v. Fed. Energy Regulatory Comm'n, 743 F.2d 93, 110 (2d Cir. 1984).
See DCP Farms v. Yeutter, 957 F.2d 1183, 1187 (5th Cir. 1992) (holding that due process rights were not violated by pressure from a congressman because the contact occurred well before any proceeding that could be considered judicial or quasi-judicial).

LUBBERS, supra note 76, at 349-50. “[I]t seems fairly well settled that, in informal proceedings, courts will tolerate or even endorse congressional contacts, so long as these contacts do not undermine the agency's adherence to the substantive law.” Ronald M. Levin, Congressional Ethics and Constituent Advocacy in an Age of Mistrust, 95 MICH. L. REV. 1, 47 (1996); see also DCP Farms, 957 F.2d at 1187-88 (holding that actual bias standard, rather than more stringent mere appearance of bias standard, applies to allegations of political interference where the agency proceeding is not judicial or quasi-judicial).

A GUIDE TO FEDERAL AGENCY ADJUDICATION, supra note 19, § 7.051, at 115-16.

Sierra Club v. Costle, 657 F.2d 298, 409-10 (D.C. Cir. 1981); see also Envtl. Def. Fund, Inc. v. Blum, 458 F. Supp. 650, 662-63 (D.D.C. 1978) (noting that the congressional communications were not in a formal adversarial context but in informal rulemaking where Congress has given agencies broad discretionary powers).

Id. at 185 (2d Cir. 1984).

Id. at 188-89.

522 F.3d 136 (1st Cir. 2008).

Id. at 148.

Id.

580 F.2d 601 (D.C. Cir. 1978).

Id. at 610-11. The letter was sent after a hearing held by the congressman where he probed critically into details of matters under consideration and expressed his displeasure with some of the agency's initial determinations. Koniag, Inc. v. Kleppe, 405 F. Supp. 1360, 1371-72 (D.D.C. 1975), aff'd sub nom. Koniag, Inc. v. Andrus, 580 F.3d at 610.


Id. at 834.

Id. at 834, 836. The court noted that none of the contacts were recorded in the public file, thus denying the opposition an opportunity to minimize their impact upon the board.


Id. at 148-50.

Id. at 148.

Id. at 148 n.14. In Smith-Berch, Inc. v. Baltimore County, 68 F. Supp. 2d 602, 628-29 (D. Md. 1999), the court held that the mere fact that a hearing commissioner was aware that public officials, including the official who appointed him to the position, had taken a public stance against a party on a zoning matter was not sufficient evidence to support a finding of unconstitutional bias by the commissioner.

In re Water Use Permit Applications, 9 P.3d 409, 435-37 (Haw. 2000). The court noted, but did not give weight to, the fact that the governor appointed all the commissioners. Id. at 436.

See, e.g., Abrahamson v. Wendell, 256 N.W.2d 612, 615 (Mich. Ct. App. 1977); Place v. Bd. of Adjustment, 200 A.2d 601, 605 (N.J. 1964). As explained in Abrahamson, “as a matter of law, the appearance by the supervisor before the body over which he had appointive powers, at least in part, must be deemed an imposition of duress on the members of the zoning board of appeals and, as a result, the action of the board is void.” 256 N.W.2d at 615.

Dept' of Transp. v. Kochville Twp., 682 N.W.2d 553, 556 (Mich. Ct. App. 2004); accord Hughes, 771 N.W.2d at 459. The Delaware Supreme Court held that where an elected official with the power to approve and remove board members made clear he was appearing solely in his individual capacity as a property owner and not representing anyone or stating the views of the town, the official’s participation in the hearing did not constitute duress. Rehoboth Art League v. Henlopen Acres, 991 A.2d 1163, 1166-67 (Del. 2010).


Id. at 611.

Id. at 614-15; see generally Carolina Envlt. Study Grp. v. United States, 510 F.2d 796, 801 (D.C. Cir. 1975) (holding that the fact an agency has displayed a promotional bias toward a matter does not mean it could not fairly consider an application).

866 F.2d 172 (6th Cir. 1989).

Id. at 172.

Id. at 173.

Id. at 176.

Id. at 177.

See Robert R. Kuehn, Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic, 4 WASH. U. J.L. & POL'Y 33, 55-60 (2000) (detailing the governor’s attacks on plant opponents and efforts to drive Tulane law clinic off of the case). The governor had pledged to Shintech “to bring [the] project to a speedy, profitable and mutually beneficial fruition,” and agency staff were instructed “to be sure to do everything we can to prevent [environmentalists and local residents] from tying up the permit application process.” Id. at 42 (second alteration in original); see also LOUISIANA ENVTL. ACTION NETWORK, BIAS BY THE STATE IN THE SHINTECH PERMITTING CONTROVERSY (1998) (on file with author) (listing forty examples of statements or actions by state officials favoring the permit applicant and prejudicing local residents).


Entergy Ark., Inc. v. Nebraska, 46 F. Supp. 2d 977, 990-92, 994-95 (D. Neb. 1999) (characterizing the state’s decision to deny the license application as political rather than a good faith regulatory decision).

See, e.g., Anderson & Sass, supra note 14, at 449 (“[T]here are indications that ethics allegations against zoning board members are increasing.”); Patricia E. Salkin, Avoiding Ethics Traps in Land Use Decisionmaking, SH018 ALI-ABA 535 (Westlaw 2002) (observing a trend for parties to lodge ethics allegations against planning and zoning boards); FOX, supra note 169, at 231 (describing it as “rare” when a decision maker is disqualified because of bias and observing “anyone seeking to overturn an agency action because of bias of any kind will encounter one of the most difficult fights in the book”).

Anderson & Sass, supra note 14, at 462-68.

Id. at 466-67. The survey also found that while zoning boards in small towns in Iowa were fairly representative of a cross-section of the community, there was a pronounced bias toward the “professional/technical/managerial” class in cities. Id. at 464.

Claims, Tax Court, military courts, and related federal and territorial courts that relate to environmental protection and conservation.” Id. at 2. The database includes all cases published in West's National Reporter System as well as some opinions that are not scheduled to be published by West. To determine the best approach for locating relevant cases within those databases, a preliminary search using both Westlaw key numbers and a series of search terms relevant to bias indicated that using search terms provides more relevant cases than using the Westlaw key number search approach.

Id. at 5. The database includes “[c]ases from the state courts of all 50 states and the District of Columbia that relate to environmental protection and conservation.” Id. State cases are primarily from appellate courts, although trial court opinions from a few states are included in the database.

For example, “% ‘ex parte young’” excluded all references to the Ex Parte Young case, “% ‘prejudgment interest’” excluded all references to the award or denial of prejudgment interest, and “% (dismiss! den! /3 prejud!)” excluded references to cases dismissed or denied with or without prejudice.

The search terms were: BIAS! UNBIAS! PREJUD! PREDISPOS! “EX PARTE” IMPARTIAL! (CONFLICT /2 INTEREST) FAVORITISM! (SEPARAT! /3 FUNCTIONS) NEUTRAL DISQUALIF! (FINANC! PECUNIAR! /2 INTEREST) “UNALTERABLY CLOSED” & da(aft 1970) % “EX PARTE YOUNG” % “PREJUDGMENT INTEREST” % (DISMISS! DEN! /3 PREJUD!). The searches yielded 5,471 federal and 3,986 state cases as of July 3, 2014.

The environmental databases contained many cases unrelated to environmental protection or conservation, contrary to the database's definition. For example, one of the first cases in the results of the search in the federal environmental cases database was Camreta v. Greene, 563 U.S. 692 (2011), a civil rights action against a state child protective services caseworker and deputy sheriff. Id. No headnote for that case relates to environmental law, although the opinion does cite two prominent environmental law decisions on the case or controversy requirement in Article III. The degree of non-environmental cases inexplicably placed in the federal environmental cases database is illustrated by the fact that only two of the first ten cases resulting from the search terms could reasonably be characterized as related to the environment or conservation.

The underreporting of land use opinions in the environmental law cases database is demonstrated by a related search in the real property topical database. Using the search terms “(‘conditional use’ zoning variance) & bias! prejud!” in the real property database of state cases returned over 10,000 documents, many times more land use-related cases than resulted from the use of similar terms in the environmental law database of state cases.

In addition to basic information about the case, the coded data included the central environmental issue(s) in the case, type of administrative proceeding, type of bias alleged, and doctrinal basis for the court's ruling on the bias claim.

Cases alleging biased study or sampling techniques do not necessarily show an agency's bias toward one party since it is the method of the study or sampling technique that is alleged to bias the result, not the decision maker itself. This excluded category does not include allegations that an EIS was performed in a biased manner.

In addition to basic information about the case, the coded data included the central environmental issue(s) in the case, type of administrative proceeding, type of bias alleged, and doctrinal basis for the court's ruling on the bias claim.

Courts made a factual finding of bias in 2% more cases-- raising the instances where a court found improper bias to 16.0%-- but excused that bias because the plaintiff had waived the right to raise the issue or the bias error was judged to be harmless.

See, e.g., Peter A. Appel, Wilderness and the Courts, 29 STAN. ENVTL. L.J. 62, 113 (2010) (finding plaintiffs seeking more wilderness protection win 52.0% of cases against the government while those seeking less protection win 13.6%); Shorna R. Broussard & Bianca D. Whitaker, The Magna Charta of Environmental Legislation: A Historical Look at 30 Years of NEPA-Forest Service Litigation, 11 FOREST POL'Y & ECON. 134, 136-37 (2009) (finding that NEPA plaintiffs won 20% of district court and 26% of court of appeals cases against the Forest Service); Christopher M. Schroeder & Robert L. Glicksman, Chevron, State Farm, and EPA in the Courts of Appeals During the 1990s, 31 ENVTL. L. REP. 10371, 10372 (2001) (finding EPA prevailed in 67%, and was reversed in 21%, of appellate cases during 1990s); A.M. ALDEN & P.V. ELLEFSON, NATURAL RESOURCE AND ENVIRONMENTAL LITIGATION IN THE FEDERAL COURTS: A REVIEW OF PARTIES, STATUTES AND CIRCUITS INVOLVED 12 (1997) (finding success rates of 68% for government plaintiffs, 60% for industry, and 45% for individuals and certain public interests). For win rates in non-jury cases, see Joe S. Cecil et al., A Quarter-Century of Summary Judgment Practice in Six Federal District Courts, 4 J. EMPIRICAL LEG. STUD. 861, 886-88 (2007) (finding plaintiffs' motions for summary judgment granted in 29%-36% of cases; defendants' in 40%-49%); Theodore Eisenberg, Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes, 2 J. EMPIRICAL LEG. STUD. 659, 682-83 (2004) (finding plaintiffs prevailed in 19.5% of employment discrimination judge
Trials); see also Donald R. Songer & Reginald S. Sheehan, Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals, 36 AM. J. POL. SCI. 235, 241 (1992) (finding individuals won 12.5% of appeals, business won 22.6%, state and local governments won 41.2%, and the federal government won 58.2%).

326 Theodore Eisenberg & Charlotte Lanvers, What is the Settlement Rate and Why Should We Care?, 6 J. EMPIRICAL STUD. 111, 113 (2009).

327 See A. Dan Tarlock, Challenging Biased Zoning Board Decisions, ZONING & PLAN. L. REP., Feb. 1987, at 97, 98, 102 (discussing how local elected and appointed lay bodies are prone to bias).

328 See, e.g., Cordes, supra note 85, at 196.

329 In denying a motion to disqualify an environmental chairman for comments showing favoritism, a hearing officer explained: “If a guy says he thinks he can be fair, you have to go with that.” Chairman Will Hear Landfill Plea, ARGUS LEADER (Sioux Falls, S.D.), Nov. 20, 1990, at 6C.

330 See EDF II, 492 F.2d 1123, 1129 (5th Cir. 1974) (stating that if an agency complies in “good faith” with environmental requirements (e.g. an EIS) then the agency's actions may be viable even with the presence of bias); see also Sierra Club v. Fed. Highway Admin., 715 F. Supp. 2d 721, 733 (S.D. Tex. 2010), aff'd, 435 F. App’x 368 (5th Cir. 2011) (stating that “diligently” following NEPA regulations may evidence “good faith objectivity”).

331 A Westlaw representative informed us that inclusion in the environmental database is based on West’s Key Number System of classification. Nonetheless, there are many cases in the database with no environmental key numbers. As noted above, one of the first cases returned in the search was a civil rights lawsuit with no environmental law implications.

332 See FOX, supra note 169, at 231 (“Recall the adage: ‘He who shoots at the king should aim carefully.’ Charging a judge with bias and not winning a disqualification on that point will guarantee you a very uncomfortable hearing.”).

333 See, e.g., Eisenberg & Lanvers, supra note 326, at 111 (finding settlement rates of 67% for civil litigation in two U.S. District Courts and little support for claims of settlement rates over 90%).

334 See Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. EMPIRICAL LEGAL STUD. 59, 525 (2004) (reporting that “plaintiffs prevailed in settlement more frequently than they did at trial-- with a single exception... when an individual plaintiff faced a corporate defendant”).


336 Chairman Will Hear Landfill Plea, supra note 329.

337 See, e.g., Cinderella Career & Finishing Sch., Inc. v. Fed. Trade Comm’n, 425 F.2d 583, 590 (D.C. Cir. 1970) (explaining the danger of decision makers becoming entrenched in a position if they prejudge an issue publicly); Pillsbury Co. v. Fed. Trade Comm’n, 354 F.2d 952, 964 (5th Cir. 1966) (stating the “right to the appearance of impartiality” is equal in importance to the right to a fair trial); see also Org. to Preserve Agric. Lands v. Adams Cty., 913 P.2d 793, 805 (Wash. 1996) (stating that quasi-judicial hearings must give “the appearance of fairness and impartiality”); In re Rollins Envtl. Servs., 481 So. 2d 113, 119 (La. 1985) (requiring adjudicatory hearings to have the “appearance of complete fairness”).

338 Professor Patricia Salkin has developed a land use ethics checklist to be used annually with municipal board members in order to avoid potential bias problems. Salkin, supra note 313.

339 Even Supreme Court judges seem to have difficulty holding their opinions on cases until after they are heard. See, e.g., Emma Margolin, Calls Increase for Ginsburg to Recuse Herself in Same-Sex Marriage Case, MSNBC, Feb. 16, 2015, http://www.msnbc.com/msnbc/calls-increase-ginsburg-recuse-herself-same-sex-marriage-case (last visited Nov. 21, 2015) (noting out-of-court statements by Justices Ginsburg and Scalia on issues relating to pending case).

340 See, e.g., VA. CODE ANN. § 15.2-2287.1 (2015) (requiring disclosures by land use board members of business, financial, employee-employer, agent-principal, or attorney-client relationships with interested parties); WASH. REV. CODE §
42.36.060 (2015) (requiring decision makers in quasi-judicial proceedings to publicly announce the content of any ex parte communications and to provide parties the right to rebut the substance of those communications).


343 See United States v. Morgan, 313 U.S. 409, 422 (1941) (holding that “it was not the function of the court to probe the mental processes of the Secretary” in action challenging agency order); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (stating that where the agency issues administrative findings “there must be a strong showing of bad faith or improper behavior” before a party may inquire into the mental processes of the decision maker).

344 Rachlinski, supra note 16, at 354.
Discovery Disputes
HOW WILL THE EXPANDED DISCOVERY PROTECTIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE AFFECT FERC DISCOVERY PRACTICE?

Synopsis: Given that litigation before the Federal Energy Regulatory Commission inevitably involves large amounts of money in controversy and extensive expert testimony, it is no surprise that formal proceedings can generate vast amounts of discovery and, correspondingly, large numbers of discovery disputes. As part of its Rules of Practice and Procedure, the FERC has promulgated Rule 402, which governs the scope of discovery in litigation, including expert witness-related discovery. Rule 402 was explicitly designed by the FERC to mirror Federal Rule of Civil Procedure 26, which governs discovery in federal court. FERC Administrative Law Judges have often looked to FRCP 26 for guidance in adjudicating discovery disputes arising from FERC Rule 402, including, by reference, the amendments to FRCP 26, which post-date the FERC's adoption of FERC Rule 402.

In 2010, the Supreme Court adopted significant amendments to FRCP 26 addressing, among other issues, the permissible scope of expert witness discovery. Whereas previous amendments to FRCP 26 had expanded the scope of discoverable material, the 2010 amendments significantly restricted the type of expert witness material that opposing parties could obtain through discovery. This article examines whether, in light of the provenance and prior interpretation of FERC Rule 402, litigants before the FERC may wish to avail themselves of the expanded protections afforded by the 2010 amendments when served with discovery to which those protections would apply in federal court. This article concludes that, in the absence of specific guidance from the FERC addressing the 2010 amendments, litigants should consider asserting their protections with respect to: (i) drafts and revisions of expert witness materials; (ii) certain communications between experts and counsel; and (iii) certain types of information considered by the expert.

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*538 I. Introduction

In 1993, amendments to Rule 26 of the Federal Rules of Civil Procedure (FRCP) significantly expanded the scope of discoverable material arising from the use of expert witnesses by parties to federal litigation. Among other changes, these amendments permitted opposing counsel to obtain non-final drafts and revisions of an expert witness's reports, as well
as a substantial amount of otherwise privileged attorney-expert communication and related material reviewed by the expert, even where the expert did not ultimately incorporate these communications or materials into his or her opinion or testimony. Ultimately, these amendments produced a surge in litigation expenses and collateral discovery disputes. In late 2009, and upon recommendation of the American Bar Association and other interested groups, the United States Judicial Conference drafted and presented amendments to FRCP 26(a)(2) and (b)(4), limiting the scope of expert witness material subject to discovery. These amendments were ultimately adopted by the United States Supreme Court, and became effective on December 1, 2010.

While the rules governing discovery at the Federal Energy Regulatory Commission (“FERC” or “Commission”) are based on the Federal Rules of Civil Procedure, the question remains as to whether these amendments to the latter will have an effect on discovery practice in FERC litigation and, if so, what that effect will be. This article addresses that question, and concludes that the FERC Rules of Practice & Procedure, which govern discovery, are explicitly based on FRCP 26, and it is likely that the modifications to that rule will serve to substantially limit the scope of discoverable expert witness-related material in three respects.

II. The Relationship Between FRCP 26 and FERC Rule 402

FRCP 26 sets out general provisions for the conduct of discovery, and contains two subsections specifically addressing discovery related to expert testimony. FRCP 26(a)(2) sets out the mandatory disclosures that all testifying expert witnesses must make as a matter of course, while FRCP 26(b)(4) defines the scope of what an opposing party may seek from an expert witness through discovery. These subsections govern, among other matters, three types of expert witness material that are relevant to practice before the Commission: (1) drafts and revisions of an expert witness's reports and testimony; (2) communications between an expert witness and the attorneys representing the expert's client; and (3) information and other data related to the case reviewed by the expert. Before showing the impact that the 2010 amendments to FRCP 26 might have on these three categories, it is first worth examining the historical relationship between FRCP 26 and FERC Rule 402, and how the former rule has influenced the interpretation and enforcement of the latter by the FERC and its Administrative Law Judges (ALJs) in the adjudication of discovery disputes.

A. FERC Rule 402’s Creation was Explicitly Based on FRCP 26

FERC Rule 402 governs the scope of discovery during FERC proceedings, and includes a specific provision addressing expert witness discovery. Rule 402 was originally established as part of the Commission's comprehensive 1982 revisions and reorganization of hearing procedures and rules, and took its current form in 1987 in Order Nos. 466 and 466-A.

In Order No. 466, the Commission observed that litigants had “generally based their discovery requests on the federal rules” in the absence of specific rules promulgated by the Commission prior to 1982, and that “[t]he Federal rules codify discovery procedures in federal courts and thus provide useful guidance for discovery activities in trial-type proceedings before the Commission.” The Commission went on to state that the new rules established by Order No. 466 were designed to “reflect the spirit of the federal rules. Specifically, they [were] loosely patterned after Rules 26 through 37 of the federal rules.” In discussing comments submitted in response to the Commission's Notice of Proposed Rulemaking that resulted in Order No. 466, the Commission observed that the initially-proposed Rule 402, in setting out the standard of relevance for discovery, used the phrase “relevant to the merits of the proceeding” while FRCP Rule 26 used the phrase “relevant to the subject matter involved in the pending action.” The Commission stated, however, that it “intended no departure from the approach of the federal rules. Therefore, to avoid any implication that the difference in language signifies a different standard, the Commission has adopted the suggestion of these commenters that the rule more closely track the language of Rule 26.” The Commission also noted that it had intended to follow
the guidance of FRCP 26(b)(3) and (b)(4) in establishing FERC Rule 402(b) and 402(c)'s respective limitations on the scope of discovery. In sum, FERC Rule 402 was clearly intended to conform to both the letter and the spirit of FRCP 26 as it was written at the time.

B. FERC Rule 402 Has Consistently Been Interpreted by Reference to FRCP 26

Subsequent to its adoption in 1987, FERC Rule 402 has consistently been interpreted by the Commission and by the Agency's ALJs through the lens of FRCP 26, including several instances where post-1987 amendments to FRCP 26 were considered in interpreting FERC Rule 402. As Rule 402's provenance in Order No. 466 would suggest, the Commission has considered FRCP 26 to be a guiding, although non-binding, source of authority for the interpretation of FERC Rule 402. For example, in All American Pipeline Co., the Commission reviewed an interlocutory appeal of an ALJ's denial of a motion to compel the production of expert witness materials under FERC Rule 402. In determining whether the requested information was within the scope of Rule 402, the Commission commented that “[i]n adopting Rule 402(c), the Commission followed the guidance of the Federal Rules,” and based its decision to remand the case back to the ALJ partially on the broad scope of FRCP 26. The Commission has similarly interpreted Rule 402 by reference to federal district and circuit court decisions which interpret FRCP 26. FERC ALJs have also been guided by FRCP 26 to resolve disputes arising from Rule 402.

FERC ALJs have taken this practice a step further by relying on the 1993 amendments to FRCP 26 in adjudicated disputes arising from FERC Rule 402, even though Rule 402 has not been amended since 1987. For example, in Oasis Pipeline, L.P., the presiding ALJ (Birchman) certified the following question to the Commission:

Under the specific circumstances of the proceeding . . . whether Enforcement Litigation Staff (“Staff”) should be required to provide Oasis Pipeline, L.P., et al. (“Oasis”) all information that Staff provided, in writing or verbally, to its designated expert witness, Mr. Norris, regarding the Hotline Call that caused Staff to initiate its nonpublic investigation of Oasis (the “Hotline Call”).

This question arose from a motion to compel, brought by Oasis, seeking information which had been provided by Commission Enforcement Litigation Staff to one of its expert witnesses concerning a “Hotline Call.” Oasis asserted that the information provided to the witness was discoverable under FERC Rule 402(c), which permits discovery of “any facts or known opinions held by an expert concerning any relevant matters, not privileged.” Enforcement Litigation Staff opposed providing the information, arguing that the information was privileged, and that the expert witness did not consider or rely upon the information when preparing his testimony. In accordance with FERC Rule 713(c)(3), the judge included in his order a recommendation on how the Commission should address this issue.

After noting that the Federal Rules can be considered for guidance, and that the Commission has done so in the past, the ALJ resolved the issue of whether the information sought by Oasis was discoverable under Rule 402. The judge ruled that although the information related to the Hotline Call was indeed privileged, the disclosure of that information by the Enforcement Staff to its witness “should be viewed as resulting in a waiver of the privilege otherwise attaching to the Hotline Call information.” Aside from reference to FERC Rule 402 itself, the ALJ based his recommendation exclusively on FRCP 26, the amendments thereto, and the All-American Pipeline Co. order discussed previously. Quoting at length from the Advisory Committee notes to the 1993 amendments to FRCP 26(a)(2)(B), the ALJ explained that:
[The 1993 amendments to Federal Rule 26(a) (2) (B) are quite clear in emphasizing the aim of Rule 26 is for full disclosure of ‘data and other information considered by the expert.’ The Advisory Committee Notes go on to say that ‘Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.’

This is consistent with the same ALJ's earlier 1998 ruling in Grynberg v. Rocky Mountain Natural Gas Co. In that proceeding, the judge ordered the disclosure of a witness's non-final drafts of pre-filed testimony, communications between the witness and counsel regarding the subject matter of the witness's testimony, and related materials that had been shown to the witness by counsel. The judge based his ruling in part on the 1993 amendments to FRCP 26.

More recently, another ALJ (Glazer) relied on the 2010 Amendments to FRCP 26 to resolve a discovery dispute regarding attorney work-product privilege asserted under FERC Rule 402. That proceeding is discussed further in section III.B., below.

So, although the Commission has yet to affirm explicitly a Rule 402 decision which relies on post-1987 FRCP 26 amendments, neither the Commission nor any of its ALJs have rejected the use of the 1993 and 2010 amendments as persuasive authority in resolving FERC Rule 402 disputes. No compelling rationale exists for the Commission not to sanction the application of FRCP 26 amendments in resolving FERC discovery disputes.

C. FERC Uses the FRCP for Guidance on Other Substantially Identical FERC Rules

The applicability of FRCP 26 to FERC Rule 402 is supported by the Commission's use of the FRCP to interpret other analogous FERC rules. The principal criterion upon which the FERC determines whether a federal rule is applicable in interpreting a FERC rule appears simply to be whether the language of the two rules is functionally analogous. For example, a Commission ALJ cited FRCP 26(b)(4) and related precedent for guidance in permitting discovery to be served on an expert witness who had previously been listed and designated to appear at trial, even where that designation was later withdrawn, based on the conformity between FRCP 26(b)(4) and FERC Rule 402(c). The Commission has also found that FERC Rule 217(b), which governs summary dispositions, is functionally analogous to FRCP 56 with respect to the burden of proof and the weighing of evidence, and is governed by the same precedents. Similarly, FRCP 30's provisions governing the appropriate timing of motions to quash subpoenas has been cited for guidance in interpreting the parallel provisions of FERC Rule 410. The Commission and its ALJs have used FRCP 26(b)(3) itself, and federal appellate caselaw interpreting FRCP 26(b)(3), as guidance in interpreting work-product issues arising under the analogous FERC Rule 402(b). The Commission's ALJs have even used the federal rules and related caselaw in numerous instances as guidance where no FERC rule directly addressed a procedural dispute.

Conversely, where the Commission and its ALJs have determined that a FERC Rule and its FRCP counterpart differ materially in some respect, they have declined to use the FRCP and related appellate caselaw as guidance in adjudicating disputes arising under FERC Rules. For example, while the Commission uses FRCP 56 precedent with respect to the burden of proof in motions for summary disposition, the Commission has found that FERC Rule 217 materially differs from FRCP 56 with respect to the type of evidence that should be considered in adjudicating such motions. Specifically, the Commission has found that discovery materials and affidavits do not need to be considered in resolving...
motions for summary disposition of rate cases brought under section 4 of the Natural Gas Act. Unlike federal court proceedings, the FERC reasons that a pipeline filing for new rates under Section 4 “is required to file its case-in-chief at the inception of the proceeding.” Similarly, the Commission has ruled that FRCP 34(a) and (b) do not provide persuasive guidance in adjudicating a motion to compel discovery where the respondent asserts undue burden in compiling requested data. According to the FERC, Rule 410(a)(4) is more expansive in allowing parties to discover information compiled in a form requested, even if the responding party maintains the material in a different form, whereas the FRCP only requires production of material in the form in which they are usually kept.

This use of analogous FRCP provisions and related caselaw by the Commission as non-binding guidance serves important goals in resolving FERC procedural disputes. That practice is consistent with the Commission's reliance on the FRCP for guidance prior to the 1982 codification of FERC procedural rules to ease the transition to the new rules. In addition, the practice promotes predictability in FERC litigation through the use of a more robust body of federal appellate caselaw, which FERC litigants can reasonably expect to be applied consistently in any appellate review of FERC orders.

Conversely, where the Commission believes that its own unique circumstances and goals warrant different procedures than federal court, the Commission has shown no hesitation in crafting rules which clearly reflect those differences from the federal rules, and which litigants need not be overly concerned will be interpreted using a different body of federal caselaw. Where federal circuits have split in their interpretation of federal rules, and where FERC's own rules are not dispositive, the Commission's ALJs have, in at least one instance, adopted one prevailing interpretation over another. The Commission's reliance on FRCP in these different circumstances promotes administrative efficiency and fairness by giving FERC litigants the ability to predict more accurately the outcome of procedural disputes. A decision by the Commission to apply the 2010 amendments to FRCP 26 to disputes arising under FERC Rule 402 would further advance these same goals.

III. How the December 2010 Amendments Will Affect Rule 402 Disputes

As discussed above, FERC Rule 402 was created to mirror FRCP 26, and has been subsequently interpreted by reference to FRCP 26, its 1993 amendments, and federal court decisions interpreting the same. Therefore, it stands to reason that the Commission and its ALJs will consider the December 2010 amendments to FRCP 26 in resolving Rule 402 disputes going forward, as has been done already in one instance. At a bare minimum, in the absence of specific guidance from the Commission or its ALJs on the application of the 2010 federal amendments, litigants before the Commission may wish to raise objections based on the enhanced protections of the 2010 amendments, where failure to do so would result in the disclosure of harmful material.

The December 2010 amendments to FRCP 26 serve to limit substantially three categories of discoverable material arising from expert testimony: (1) drafts and revisions of an expert witness's reports and testimony, (2) communications between an expert witness and the attorneys representing the expert's client, and (3) information and other data related to the case reviewed by the expert. The three categories and their implications for FERC practice are discussed in turn.

*545 A. Drafts and Revisions

Prior to the 2010 amendments, FRCP 26(a)(2) required that a testifying expert file a report containing “a complete statement of all opinions to be expressed and the basis and reasons for them; [and] the data or other information considered by the witness in forming [the opinions].” In promulgating the 1993 amendments to FRCP 26, the Advisory Committee noted that:
Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions - whether or not ultimately relied upon by the expert - are privileged or otherwise protected from disclosure when such persons are testifying or being deposed. Although the comments did not explicitly address drafts and other non-final versions of expert testimony and reports, federal courts interpreted the amendments as requiring disclosure of these drafts. By comparison, FERC Rule 402(c) provides that “a participant may discover any facts known or opinions held by an expert concerning any relevant matters, not privileged.” While initially modeled after FRCP 26 in Order No. 466, the language in FERC Rule 402(c) is significantly more expansive than the language in FRCP 26. As noted earlier, at least one FERC witness was required to disclose non-final drafts of pre-filed testimony based on the 1993 Amendments to FRCP 26.

The 2010 amendments to FRCP 26, however, clearly eliminated this possibility by protecting “drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.” The Advisory Committee noted that “[m]any courts read the disclosure provision [of Rule 26(a)(2)] to authorize discovery of . . . all draft reports. The Committee has been told repeatedly that routine discovery into . . . draft reports has had undesirable effects.” Thus, the Advisory Committee recommended that FRCP 26(a)(2) be amended “to provide that disclosure include all ‘facts or data considered by the witness in forming’ the opinions to be offered, rather than the ‘data or other information’ disclosure prescribed in 1993,” thereby eliminating the specific language relied on by federal courts to authorize the discovery of expert witness drafts. Subsequent federal court decisions have interpreted these provisions as the Committee intended, holding that drafts of expert reports, affidavits, or other FRCP 26 disclosures are not discoverable, “regardless of form.” As such, FERC litigants have a strong basis on which to object to any discovery requests seeking any form of draft or revision created by that litigant's expert witnesses.

B. Communications between Experts and Counsel

FERC Rule 402(b) codifies the attorney work-product doctrine, protecting against the disclosure of all “material prepared for litigation,” absent a dual showing of “a substantial need for the material and that substantially equivalent material cannot be obtained by other means without undue hardship.” This language is substantially identical to FRCP 26(b)(3)(A), changed in neither 1993 nor 2010, both in protecting work-product and in carving out an exception based on substantial need and undue hardship. Prior to the 2010 amendments, controversy existed over whether the Federal Rules exempted material otherwise protected under FRCP 26(b)(3)(A) from discovery when such material had been provided to an expert witness by an attorney. Given the expansive language of FRCP 26(a)(2) and the accompanying Advisory Committee notes, it is unsurprising that a majority of federal courts interpreted FRCP 26(a)(2) as superseding, and ruled that such work-product was discoverable. As noted above, there was at least one instance where a witness was compelled to disclose communications between himself and counsel relating to the subject of his testimony, based in part on the 1993 amendments to FRCP 26. Similarly, a Commission ALJ found that investigatory privilege could be waived by providing a privileged document to an expert witness for consideration in forming his or her expert opinion.

Beyond these specific cases, the discoverability of otherwise-privileged work-product prior to 2010 was supported by FERC Rule 410(d), which provides that “[i]n the absence of controlling Commission precedent, privileges will be determined in accordance with decisions of the Federal courts with due consideration to the Commission’s need to obtain
information necessary to discharge its regulatory responsibilities.” Nevertheless, as a Commission ALJ order from that timeframe noted, the issue was unsettled at the FERC level and in the courts due to the multiple conflicting federal appellate court interpretations being relied upon as precedent. Ultimately, although the ALJ in that proceeding adopted the view of the circuits which held that such documents were protected absent a showing of substantial need and undue hardship, he confined his ruling to the specific facts of that case, and the Commission never provided clear guidance on the issue.

The 2010 amendments to FRCP 26 ostensibly eliminate the discovery of work-product provided to an expert by expressly exempting from discovery “communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications.” However, although this general exemption applies “regardless of form,” three categories of attorney-expert communications are excepted: (i) those “relat[ing] to compensation for the expert's study or testimony,” (ii) those that “identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed,” and (iii) those that “identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.” The expansive language of (ii) and (iii) would, at first glance, effectively seem to nullify the apparent expanded protections of the rule, leaving work-product as vulnerable as it was pre-amendment. Yet a close reading of the language and the related Advisory Committee notes reveals a strong basis for withholding a substantial amount of work-product which would have been discoverable under the 1993 amendments.

In the event that FRCP 26's 2010 amendments would be applied in a FERC context, there are two categories of work-product which a FERC litigant might object to providing. First, although exception (ii) permits discovery of all attorney-expert communications which identify facts and data provided to the expert and which the expert considered (even if not relied upon), it does not extend to all facts that the expert may have discussed with the attorney. Thus, this exception can be narrowly construed such that it does not encompass discussions about the facts and data provided, i.e., concerning their relevancy and usefulness in testimony. This interpretation is supported by the Advisory Committee notes, which provide that “[t]he exception applies only to communications ‘identifying’ the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.” This interpretation is also supported by federal trial court decisions which examine this portion of the 2010 amendments. Litigants should, therefore, be able to withhold critical trial strategy-related communications which occurred in the context of providing an expert with materials to consider in drafting testimony.

Second, exception (iii) only addresses assumptions provided by the attorney on which the witness actually relied, and not those that were considered but ultimately rejected. This interpretation is supported by the Committee notes, which provide that “[t]his exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.”

This interpretation is also supported by a recent discovery order (and related denial of a motion for interlocutory appeal) issued by a FERC ALJ (Glazer) in Missouri Interstate Gas, L.L.C., which addressed the discovery of certain materials prepared by an expert witness over which attorney-client privilege had been asserted. In that proceeding, the Missouri Public Service Commission (“MoPSC”) asserted work-product privilege over a set of documents sought by MoGas Pipeline (“MoGas”), which were prepared by or addressed to MoPSC's witness in the proceeding. Although Judge Glazer relied on pre-2010 federal court decisions in finding that “the underlying information provided by counsel to their expert witness may be discovered by an opposing party,” the judge relied on the post-2010 language of FRCP 26 to hold that the documents were discoverable only “to the extent that they ‘identify facts or data that the party's attorney provided and that the expert considered in forming the opinion to be expressed’ or ‘identify assumptions that the party's attorney
provided and that the expert relied on in forming the opinions to be expressed.” MoPSC subsequently filed a motion to permit interlocutory appeal. In denying MoPSC's motion, the ALJ once again cited pre-2010 federal court decisions for the proposition that “trial preparation materials considered by an expert witness in connection with her testimony, regardless of whether the materials were relied upon by the expert or not in formulating her opinions, are not protected as attorney work-product.” The judge also supported his decision in equal part by *549 reference to the post-2010 language of FRCP 26, although not to the subsection of that rule that was cited in the April 19 Order. Instead, the ALJ relied on FRCP 26(b)(3)(C), which “states that a testifying witness's ‘own previous statement about the action or its subject matter’ is discoverable.” The judge did not specify the extent to which he may have considered the portions of FRCP 26 which he cited in the April 19 Order, or whether the entirety of the documents sought consisted entirely of the MoPSC's witness's own previous statements on the subject of the proceeding. In any event, the May 12 Order directed the disclosure only of those documents “by or to MoPSC's sole witness in this proceeding . . . that do not have any connection to an attorney.” That fact, combined with the prior language in the April 12 Order and the lack of discussion of FRCP Rule 26(a)(2)(B), leaves open the door for FERC litigants to assert privilege over attorney-client discussions about facts and data provided as well as assumptions provided by the attorney that were not ultimately relied upon by the expert.

C. Information Considered by the Expert

Finally, FRCP 26's 2010 amendments significantly reduce the scope of disclosure requirements related to information considered by the expert in forming his or her opinion. Prior to the 2010 amendments, FRCP 26 required the disclosure of all “[d]ata or other information” considered by the expert. As the 2010 Advisory Committee notes discuss, this language was relied on by numerous courts to require the production of draft reports and otherwise-privileged work product provided to the expert. However, the 2010 amendments modified that language to require only the disclosure of “facts or data considered by the [expert]” in forming his or her expert opinion.

In the context of FERC practice, this amendment should largely serve to support the previously-discussed limitations on the discovery of draft reports or testimony and attorney work-product provided to the expert, as the 2003 amendment's “other information” language could easily be construed to encompass both types of information, while the new “facts or data” language implicates neither. Furthermore, the 2010 amendment establishes the objectionable nature of requests that seek information with which the expert may *550 have come in contact, but which was not considered or ultimately relied upon by the expert in forming his or her opinion.

More interesting, however, is the fact that this amendment, along with the amendments addressing work-product doctrine, is one of the only new aspects of FRCP 26 to have been interpreted by a federal court in the time since its enactment. In Sara Lee Corp. v. Kraft Foods, Inc., the District Court for the Northern District of Illinois considered a motion to compel the production of communication between Kraft Foods's counsel and a non-testifying expert regarding how Kraft might conduct a pilot survey of a series of advertisements, which were the subject of the case. The court observed that while “[s]uch expert-attorney communications arguably may have been discoverable under the pre-amendment Rule 26,” the “requested materials contain neither ‘facts or data’ nor ‘assumptions that the party's attorney provided,’ so they are not discoverable.” As such, the court ruled that the communications were work-product protected by FRCP Rule 26(b)(4)(C).

IV. Conclusion

The Commission's Rules of Practice and Procedure are unquestionably and inextricably bound-up with the development and interpretation of the Federal Rules of Civil Procedure. Beyond reliance on the Federal Rules in the creation of the
FERC's rules, the Commission and its ALJs have regularly looked to the Federal Rules in order to resolve discovery disputes. This practice allows the Commission, in effect, to utilize an established body of federal caselaw to deal with issues of first impression. The federal courts, by their sheer size, are both more often involved in the adjudication of discovery disputes, and more likely to come across new and unusual discovery situations which the existing rules do not squarely address. The Commission has given no indication that it wishes to depart from this approach, and there exists no compelling rationale for doing so. It is therefore likely that the 2010 amendments to the Federal Rules will similarly make their mark on FERC litigation.

Footnotes

a1 Trial attorney with the Federal Energy Regulatory Commission's Office of Administrative Litigation. He earned a J.D. from Washington University in St. Louis School of Law in 2008. The views expressed in this article are solely those of the author and do not represent the views of the Federal Energy Regulatory Commission. The author would like to acknowledge the input and comments of his colleague, Derek Anderson.


5 Id.

6 18 C.F.R. § 385.402(c) (2011) provides as follows:
   (c) Expert testimony. Unless otherwise restricted by the presiding officer under Rule 410(c), a participant may discover any facts known or opinions held by an expert concerning any relevant matters, not privileged. Such discovery will be permitted only if:
   (1) The expert is expected to be a witness at hearing; or
   (2) The expert is relied on by another expert who is expected to be a witness at hearing, and the participant seeking discovery shows a compelling need for the information and it cannot practically be obtained by other means.


10 Id.

11 Id. at 30,550-51.

12 Id. at 30,551.

13 Id.
Id. at 30,549 (noting that “while the Commission has been guided by the Federal rules, it is not bound by them”). See also, California, ex rel. Brown v. Powerex, 135 F.E.R.C. P 61,178 at P 116 (2011) (noting that “the Commission is not strictly bound by the FRC”).


Id. at 61,658-59.


See, e.g., Chevron Prods. Co., v. SFPP, L.P., 115 F.E.R.C. P 63,070 at P 6 (2006) (noting that FRCP 26(c) gives discretionary power to courts to address discovery demands); Kansas-Nebraska Natural Gas Co., 24 F.E.R.C. P 63,002, 65,011 (1983) (stating that FRCP 26(b)(4)(A) had been interpreted as limiting discovery to those expert materials specifically noted in the rule itself).

Oasis Pipeline L.P., 125 F.E.R.C. P 63,021 at P 1 (2008) [[hereinafter Oasis].

Id. For text of the regulation establishing the Commission's Hotline Call Process, see 18 C.F.R. §1b.21 (2011).

Id. at P 11 (citing 18 C.F.R. § 385.402(c)(2011)).

Id. at P 26. Enforcement Litigation Staff cited 18 C.F.R. §1b.9, which provides that all materials obtained in enforcement investigations are considered non-public.

Id. at P 15.

The presiding Judge is required to include a recommended disposition of any issue he or she certifies to the Commission. 18 C.F.R. § 385.714(c)(2) (2011).

Oasis, supra note 19, at P 32 (recommending that the Commission authorize disclosure of information from the Staff regarding the Hotline Call). This particular issue was mooted by a settlement of the underlying proceeding before it could be addressed by the Commission. Oasis Pipeline L.P., 126 F.E.R.C. P 61,118 at P 29 (2009).

Oasis, supra note 19, at P 19.

Id. at P 26.

Id. (referencing All-American Pipeline Co., supra note 15).

Id. at P 23.


Id. at 65,152.

Id.


Wyoming Interstate Co., Order Granting Motion to Permit Interlocutory Appeal, FERC Docket No. RP97-375-007 (Sept. 16, 1999). The motion for interlocutory appeal, which was the subject of this order, was ultimately mooted by a settlement of the underlying case, and thus was never ruled on by the Commission. Wyoming Interstate Co., 89 F.E.R.C. P 61,028, at p. 61,089 (1999).
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KN Interstate Gas Transmission Co., supra note 40, at p. 61,828; see also Northern Border Pipeline Co., 115 F.E.R.C. P 63,064, at n. 5 (2006).


Id.

See, e.g., Boston Edison Co., 1 F.E.R.C. P 61,300, at p. 61,762 (1977) (discovery dispute resolved by reference to FRCP 33).

See, e.g., Northern Natural Gas Co., Order Granting Motion to Compel, FERC Docket No. RP10-148-000 at PP 6-7 (Feb. 22, 2010) (holding that the FRCP need not be consulted where FERC rules directly address the issue at hand).


See, e.g., Elm Grove Coal Coal Co. v. Blake, 480 F.3d 278, 301 (4th Cir. 2007); In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375-76 (Fed. Cir. 2001); B.C.F. Oil Refining, Inc. v. Consolidated Edison, 171 F.R.D. 57, 62 (S.D.N.Y. 1997).

18 C.F.R. § 385.402(c) (2011).


Id.


Federal Rule of Civil Procedure 26(b)(3)(A) provides:

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

See supra Section III.A, notes 49-58 and accompanying text.


See id. at P 10 (“Based upon my in camera review of the documents and the circumstances present here, I find that the rationale of the latter line of cases cited in P 9 is best applicable to the case at bar.” (emphasis added)). As evidence of the unsettled nature of expert testimony-related work-product doctrine at the FERC between 1993 and 2010, one need only realize that the ALJ who issued the Connecticut Yankee order protecting work-product from discovery is the same ALJ who compelled discovery of work-product in Grynberg v. Rocky Mountain Natural Gas Co.


Fed. R. Civ. P. 26, advisory committee's note (2010). It should be noted, however, that this provision does not apply to “facts or data” provided to the witness by an attorney, which must be disclosed regardless of whether the expert actually relied upon them. Allstate Ins. Co. v. Electrolux Home Prods., Inc., 840 F. Supp. 2d 1072, 1077-78 (E.D. Ill. 2012).


April 19 Order, supra note 73, at P 6 (citing In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1376 (Fed. Cir. 2001)).

Id. (citing Fed. R. Civ. P. 26 (b)(4)(C)(i)-(ii)).

May 12 Order, supra note 73, at P 25 (citing In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375-1376 (Fed. Cir. 2001); Elm Grove Coal Co. v. U.S. Dep't of Labor, 480 F.3d 278, 301-03 (4th Cir. 2007)).

Id. at P 26 (citing Fed. R. Civ. P. 26 (b)(3)(C)).

MoPSC had argued that, even though its witness was not an attorney and had not prepared the challenged materials at the request of an attorney, MoPSC's witness had prepared the materials in anticipation of litigation and was protected as a “participant” from disclosing such material under FERC Rule 402. Id. at PP 9-10.

Id. at P 3.

MoPSC appealed the May 16 Order. Serving as the FERC Motions Commissioner, FERC Chairman Jon Wellinghoff found that MoPSC had “failed to demonstrate extraordinary circumstances” to warrant “prompt [FERC] review of the contested rulings.” Missouri Interstate Co., “Notice of Determination by the Chairman,” FERC Docket No. CP06-407-007 (May 26, 2011). The notice does not discuss the merits of either order. For additional discussion of this proceeding, see Report of the FERC Practice & Administrative Law Judges Committee, 32 Energy L.J. 659, 668-73 (2011).

See supra text accompanying note 49.


Id. at 420.

Id. at 420-21. The court also determined that the communications were not discoverable due to the expert's status as a consulting (non-testifying) expert.

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Trial Ethics
On February 23, 1989, the Commission issued a Notice of Proposed Penalty to Wolverine Power Corporation pursuant to Rule 1506 of the Commission's Procedures for the Assessment of Civil Penalties under section 31 of the Federal Power Act. The Notice proposed that the Commission assess civil penalties against Wolverine for violation of section 23(b)(1) of the Federal Power Act (FPA), which requires any person operating or maintaining facilities for the purpose of developing electric power on a navigable waterway of the United States to obtain a license (or an exemption from licensing) from the Commission.

In 1976, the Commission determined that Wolverine's four hydroelectric projects were required to be licensed, and ordered Wolverine to file applications for licenses that year for those four projects. Three of those projects are at issue in the case before us, the Edenville, Smallwood and Secord Projects. Wolverine has been operating those three projects from 1976 to the present without a license from this Commission.

The Notice proposed separate penalties for each of the three projects for each day of violation. The Notice proposed penalties totalling $2000 per day as follows: $1400 per day for the Edenville project; $350 per day for the Secord project; and $250 per day for the Smallwood project. The Notice proposed that the penalties would run from October 16, 1986, the effective date of section 31 of the FPA, until Wolverine brings each project into compliance with section 23(b)(1) of the FPA by filing an acceptable application for a license.

Wolverine elected to have this matter resolved through the Commission's administrative procedures under Rule 1508, and filed an answer pursuant to Rule 1507. We set the matter for hearing before an administrative law judge of the Commission.

On May 18, 1990, Judge Alprin issued an Initial Decision imposing on Wolverine a civil penalty of $400 per day for the 993 days from July 31, 1987 through April 19, 1990, a total of $397,200, payable in sixty equal monthly installments, plus a prospective penalty of $1,000 for each day of unlicensed operation of any of the three projects from June 1, 1990, until the submission of an acceptable license application. Briefs on exceptions to the judge's decision, and briefs opposing exceptions, were filed by both Wolverine and the Commission staff.
There is no dispute on the facts and circumstances surrounding the violations. The parties agreed to submit the case to the judge on stipulated facts and cross motions for summary judgment. No one disputes that the violations occurred. During the relevant periods of time at issue herein, Wolverine had a legal obligation to seek and obtain licenses for the three projects, and it operated the projects without such licenses. The principal issue before us, therefore, is the propriety of the civil penalty imposed for those violations.

**2 We note at the outset that Wolverine argues that section 31 of the FPA does not authorize the Commission to assess civil penalties against persons who are not licensees, permittees or exemptees under the FPA. In other words, Wolverine construes section 31 to be limited in scope to enforcement actions for operation of a hydroelectric facility in violation of the terms of a license, permit or exemption, but to exclude from its coverage the operation of a hydroelectric facility without obtaining any license at all when one is required. This issue was raised and resolved in the order setting this matter for hearing: 8

The Commission has already decided in Orders 502 * and 502-A ** that section 31 of the FPA confers authority to assess civil penalties in appropriate circumstances against those who are required to have a license or exemption ... . Wolverine may challenge the Commission's jurisdiction to impose civil penalties on operators of unlicensed projects in any appeal of this matter it may make before a federal appellate court.

*61198 We will not revisit that issue here.

Judge Alprin's decision contains a detailed recitation of the sequence of events from 1976 to the present. The parties do not dispute that description, and we affirm and adopt those factual findings rather than repeating them herein. Those facts may be briefly summarized as follows.

Wolverine filed its application for the first of its four related facilities, Sanford, in 1976; the application was found deficient in 1978; and it was dismissed in 1980. Meanwhile, despite promises and schedules, no applications at all were filed for the other three facilities. Warning letters were issued in 1982. The application for Sanford was refiled in 1983. The applications for the other three facilities were filed in late 1986 and early 1987; they were rejected in 1987 for failure to comply with the consultation requirements; and they were refiled in 1989.

The principal purpose of civil penalties is to deter and penalize unlawful conduct and to uphold the integrity of the Commission's regulatory processes. Within the confines of the particular civil penalties statute at issue, the courts have permitted agencies to exercise a reasonable latitude of discretion in determining the penalty to assess. Section 31(c) of the FPA refers, inter alia, to “the nature and seriousness of the violation, failure, or refusal and the efforts of the licensee to remedy the violation, failure or refusal in a timely manner.” Rule 1505 of the Commission's implementing regulations refers to this statutory standard, and then lists eleven considerations, including actual and constructive knowledge; history of prior violations; loss of life, injury, property damage or endangerment caused by the violation; economic benefits derived from the violation; and timely or untimely remedial efforts.

**3 Judge Alprin, in determining what civil penalty to impose, carefully considered each of these factors. To the extent not discussed herein, we affirm and adopt his analysis without repeating it here. We disagree, however, with the weight that Judge Alprin placed on several factors.

Judge Alprin apparently gave at least some weight to considerations of environmental damage arising from the violations. Staff stresses that factor on brief, and Wolverine disputes it.

The allegations of damage to the environment focus on loss of fishery resources attributable to Wolverine's operation of its four hydroelectric facilities in a peaking mode instead of in a run-of-the-river mode. Because of their close proximity
to each other, the four facilities are operated in a coordinated manner. Historically, they have all been operated in a peaking mode.

In 1987, the Director of the Commission's Office of Hydropower Licensing issued a license to Wolverine to operate the Sanford facility, but conditioned the license so as to require Wolverine to operate Sanford in a run-of-the-river mode. Wolverine filed a timely appeal of staff action and a request for stay of the mode of operation condition in the license. The Commission issued a notice of intent to act on the appeal, and granted the stay, and that matter is currently pending before the Commission for decision.

Applications for licenses to operate the other three facilities are also currently pending before the Commission. The choice between the historical peaking mode and the proposed (not by Wolverine) run-of-the-river mode is a central issue in all three of those license application proceedings. We have not yet decided that issue in any of the four proceedings. Inasmuch as the issue of environmental damage in the enforcement case before us now derives from the controversy over the mode of operation of these facilities, and because we do not wish to in any way prejudge that issue as it affects the licensing proceedings, we explicitly disavow those portions of the Initial Decision that imply that considerations of environmental damage attributable to the violations are relevant to the penalty imposed.

The real issue here, however, is not whether Wolverine's conduct caused environmental damage, but whether Wolverine's conduct precluded timely assessment and resolution of the potential environmental impact. Wolverine's delay in filing its applications made it impossible for the Commission to assess the impact of its operations on a timely basis, and to timely remedy such adverse impact if it was occurring. That factor we do indeed take into account.

A related problem occurs in the judge's discussion of economic benefits derived from the violations. Wolverine has asserted, both here and in the licensing proceedings, that a condition requiring run-of-the-river operation would reduce its income by half. Both staff and the judge appear to accept this assertion at face value. Staff argues that if the three facilities involved in this enforcement proceeding had been licensed in a timely manner, the licenses would have contained the same run-of-the-river condition as the Sanford license, and therefore Wolverine has unjustly doubled its income by operating the facilities without licenses. Wolverine responds by pointing to the stay of the condition in Sanford.

**We will not speculate as to what might have been required in licenses Wolverine didn't obtain. As explained above, the mode of operation issue is before the Commission in those license application proceedings, and we wish to avoid any prejudgment of that issue here. Accordingly, we disavow any references in the judge's decision that could be construed as considering the economic benefits of not operating the facilities in a run-of-the-river mode as in any way relevant to determining an appropriate civil penalty for operating the facilities without any licenses at all.

In deriving an appropriate penalty, Judge Alprin multiplied $400 per day times the number of days that elapsed (993) during the period from July 31, 1987 (the day after the date on which the three applications were dismissed), to April 19, 1990 (the date replacement applications were conditionally accepted, which was also the date of oral argument at the hearing and the date on which the hearing record was closed). Staff argues that the judge should also have included the period from October 16, 1986 (the effective date of section 31), to July 31, 1987. We agree that it would be appropriate to consider that period as well. It is a period during which the facilities were operated without a license long after Wolverine should have obtained a license.

Neither section 31 nor the Commission's regulations require consideration of a violator's ability to pay a civil penalty. The Commission noted in Order No. 502, adopting the regulations implementing section 31, that the regulations also do not preclude consideration of such a factor.
Wolverine argues strenuously that “[a]ny significant penalty . . . would cripple Wolverine's ability” to retrofit its generating facilities to operate in a run-of-the-river mode, and delay its ability to finance lesser mitigative measures. Wolverine also contends that the penalty advocated by the staff (as proposed in the Commission's Notice) would render the projects economically unviable and drive Wolverine out of business. The staff argues that Wolverine has the burden of proof and hasn't met it.

Judge Alprin concluded that, “[b]ecause of extensive intercorporate transactions, including trades and transfers of stock and extension and forgiveness of loans, it is not possible from the record to give an accurate picture of the current financial status of the hydroelectric operations.” For purposes of determining ability to pay, Judge Alprin estimated the net income figure utilized by the owner, Mr. Kuhns, in computing his offer for the purchase of Wolverine's total stock in 1986. This estimate of “net after tax income” is $320,000 per year. Judge Alprin cited “the murky nature of Wolverine's true financial position” as the reason for adopting the 60-payment monthly installment plan for the penalty.

On the day the record closed, Wolverine filed an uncertified financial document showing, inter alia, interest expenses of $414,000 in 1988 and $44,000 in 1989, with a net loss in 1988 and a net gain before taxes of $148,000 in 1989. Much of the argument in the briefs on and opposing exceptions to the judge's decision consist of elaborate — and dramatically different—financial calculations by the staff and Wolverine.

This is an enforcement case, not a licensing case. As Judge Alprin aptly noted, lack of financial ability to pay an otherwise appropriate penalty cannot be permitted to serve as justification for not penalizing flagrant abuse of legal requirements. Inasmuch as “ability to pay” is a discretionary consideration at best, we need not delve into an inquiry as to who has the “burden of proof.” While we are not precluded from considering ability to pay, we are certainly not obligated to do so on a record so “murky” that the presiding judge is unable to ascertain the financial status of the violator's operations. Suffice it to say that Wolverine had ample opportunity at the hearing to submit a clear picture of its financial status, and for whatever reason it did not. Therefore, Wolverine's ability to pay is not a factor in our consideration of the civil penalty imposed. 12

As noted above, the Notice proposed that the penalties would run until Wolverine brings each project into compliance by filing an acceptable application for a license. The Initial Decision imposed a prospective penalty of $1,000 for each day of unlicensed operation of any of the three projects from June 1, 1990, until the submission of an acceptable license application. By letter dated July 13, 1990, the Director, Division of Project Review, Office of Hydropower Licensing, notified Wolverine that its license applications for the Edenville, Secord and Smallwood Projects had been accepted for filing as of July 24, 1989. Accordingly, the portion of the Initial Decision imposing a prospective civil penalty for violations *61200 occurring after June 1, 1990, has been rendered moot, and no civil penalty will be applied with respect to the period subsequent to the date of issuance of the Initial Decision.

In this regard, on July 27, 1990, Wolverine filed a motion to lodge the July 13, 1990 letter in the record of this enforcement proceeding. On August 8, the staff filed an answer to the motion. Staff has no objection to including the letter in the record, but objects to a perceived “inference” in the motion that the letter provides a basis for terminating the penalties on July 24, 1989. Staff argues that Wolverine did not file all the information needed to complete the applications until May 31, 1990. On August 13, Wolverine filed a motion to strike the answer on grounds that it constitutes an illegal brief; Wolverine states that its July 27 motion “made no assertions as to the legal implications of the letter.” On August 28, staff filed an answer opposing the motion to strike.

We will include the July 13 letter in the record of this proceeding. It is obviously relevant, and no party opposes its inclusion.

Inasmuch as the staff's August 8 answer was precipitated by Wolverine's July 27 motion, we will deny the motion to strike. Since Wolverine's August 13 motion disavows any argument that penalties should terminate on July 24, 1989, we
will disregard the staff's response to that nonexistent argument. We note, however, that the July 13, 1990 letter explicitly accepted the three applications for filing as of July 24, 1989. Thus, regardless of what was or wasn't filed during the period from July 24, 1989 to May 31, 1990, the record before us indicates that the three applications were accepted for filing as of July 24, 1989.

We recognize that determination of an appropriate civil penalty is not a mathematical science. Ultimately, it reflects an element of experienced and reasoned judgment.

The factual record before us in this case, as elucidated in detail in Judge Alprin's decision, reveals a flagrant, sustained, knowing, concerted, “contumacious” pattern of conduct that challenges the fundamental integrity of the Commission's regulatory processes, and of the statutory authority we are charged with implementing. Wolverine has manipulated and abused our regulatory processes for fourteen years, while operating its hydroelectric facilities without the licenses required by the Federal Power Act. That fundamental challenge to the integrity of our legal system substantially outweighs all of the other considerations argued to us.

We believe that the judge may have been unduly influenced by concern with Wolverine's ability to pay a civil penalty, and by other factors that he construed as serving to mitigate the violation. We have carefully examined the record and do not find any evidence to justify mitigation. Our inability to reliably ascertain the history and present status of Wolverine's financial operations is due in part to Wolverine's failure to utilize the standard accounting practices that it would have been required to use had it obtained the licenses. Failure to obtain the licenses also perpetuated the regulatory limbo in which we were unable to properly carry out our statutory responsibility to monitor and regulate the safety and environmental sufficiency of the facilities. This created at least a potential for injury, loss of life, or damage to property or the environment whether or not any actually occurred.

Based on the evidence in the record, we impose a civil penalty of $2,024,000. This total penalty is based on a penalty of $2,000 per day for the three projects collectively, multiplied by the 1,012 days that elapsed from October 16, 1986 (the effective date of section 31 of the FPA), through July 23, 1989 (the day before the date as of which the applications were accepted for filing).

The Commission orders:

(A) As modified by this order, the May 18, 1990 Initial Decision of the presiding judge is adopted and affirmed.

(B) Except to the extent granted by this order, the exceptions to the Initial Decision are denied.

Commissioner Trabandt dissented with a separate statement attached.

Charles A. Trabandt, Commissioner, dissenting:

As stated in my dissent to the Commission's recent decision in *Cameron Gas & Electric Company, 52 FERC P 61,335 (1990)*, I believe the plain language of §31 of the Federal Power Act limits the Commission's authority to assess civil penalties against licensees, permittees, or exemptees only. Consequently, with respect to owners of projects illegally operating, I prefer strong enforcement action in another form. Parenthetically, in the instant case, the Commission had other options long before §31 was *61201* enacted to compel Wolverine's compliance with §23(b) of the Act. See *Cameron Gas* (dissenting opinion), and Order No. 502-A, Order on Rehearing (dissenting opinion), *45 FERC P 61,407 (1988)*.

For these reasons, I dissent.
Footnotes


7  51 *FERC P 63,012* (1990).

8  48 *FERC P 61,112*, at p. 61,403.


11  *FERC Statutes and Regulations* P 30,828, at p. 31,218.

12  For the same reasons, we do not consider any particular level of unjust economic benefits of the violations, and in particular we disregard the allegations that Wolverine's owner utilized ill-gotten revenues to finance affiliated corporate expansion.

13  Wolverine itself, in its brief on exceptions (at p. 11), characterizes Judge Alprin's Initial Decision as “prompt and well thought out.”

14  “Wolverine engaged in the violations with full knowledge of their impropriety, contumaciously and over a long period of time.” Initial Decision at pp. 26-27, *51 FERC P 63,012*, at p. 65,065.

   3 FERC P 61062 (F.E.R.C.), 1990 WL 318777

FEDERAL ENERGY REGULATORY COMMISSION
**1 Commission Opinions, Orders and Notices

Wolverine Power Company

Docket No. E-7319-002#
Order Denying Rehearing
(Submitted December 13, 1990)

*62303 Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler, Jerry J. Langdon and Branko Terzic.

On October 16, 1990, the Commission issued an order modifying the Initial Decision in this proceeding. As modified, the Commission imposed on Wolverine Power Company a civil penalty of $2,024,000, for violation of section 23(b)(1) of the Federal Power Act (FPA) during the period October 16, 1986, through July 23, 1989. Section 23(b) (1) of the FPA requires any person operating or maintaining facilities for the purpose of developing electric power on a navigable waterway of the United States to obtain a license (or an exemption from licensing) from the Commission.

Wolverine has filed a timely request for rehearing of the October 16 order. For the reasons discussed below, in the October 16 order, and in the Initial Decision as modified by the October 16 order, we deny rehearing.

In the October 16 order, we explained the basis for our assessment of the civil penalty:

The factual record before us in this case, as elucidated in detail in Judge Alprin's decision, reveals a flagrant, sustained, knowing, concerted, "contumacious" pattern of conduct that challenges the fundamental integrity of the Commission's regulatory processes, and of the statutory authority we are charged with implementing. Wolverine has manipulated and abused our regulatory processes for fourteen years, while operating its hydroelectric facilities without the licenses required by the Federal Power Act. That fundamental challenge to the integrity of our legal system substantially outweighs all of the other considerations argued to us.

We believe that the judge may have been unduly influenced by concern with Wolverine's ability to pay a civil penalty, and by other facts that he construed as serving to mitigate the violation. We have carefully examined the record and do not find any evidence to justify mitigation. Our inability to reliably ascertain the history and present status of Wolverine's financial operations is due in part to Wolverine's failure to utilize the standard accounting practices that it would have been required to use had it obtained the licenses. Failure to obtain the licenses also perpetuated the regulatory limbo in which we were unable to properly carry out our statutory responsibility to monitor and regulate the safety and environmental sufficiency of the facilities. This created at least a potential for injury, loss of life, or damage to property or the environment whether or not any actually occurred.

**2 On rehearing, Wolverine has not advanced any new arguments or issues of law, fact or policy that would persuade us to alter these fundamental conclusions, and they fully justify the penalty imposed.

Wolverine devotes a substantial portion of its request for rehearing to reiteration of its argument that violations of the FPA in the nature of operating hydroelectric facilities without the license mandated by section 23(b)(1) fall outside the scope of the civil penalty provisions of section 31. As explained in our October 16 order, that issue was raised
and resolved in the order setting this matter for hearing, and in Order Nos. 502 and 502-A. As explained therein, Wolverine may challenge the Commission's jurisdiction to impose civil penalties on appeal before a federal appellate court. We will not reopen that issue here.

The October 16 order derived the penalty by multiplying the number of days between October 16, 1986, and July 23, 1989, times $2,000. October 16, 1986, is the effective date of section 31 of the FPA, which authorizes the assessment of civil penalties. July 23, 1989, is the day before the date on which Wolverine's applications for license were accepted for filing.

Wolverine argues, first of all, that the period between October 16, 1986, and July 30, 1987, should be excluded because during that period Wolverine had applications for license on file at the Commission. Those applications were rejected as unacceptable on July 30, 1987. The violation upon which the civil penalty is predicated is operating hydroelectric facilities without a license. We do not regard the filing of unacceptable applications for license to be a mitigating factor. Section 23(b)(1) of the FPA requires a license; the filing of unacceptable applications does not satisfy that requirement.

Wolverine also argues on rehearing that the period prior to December 13, 1988, should be excluded. December 13, 1988, is the date on which the Commission issued an order on rehearing on the procedural regulations implementing section 31 of the FPA. Wolverine advances several arguments along these lines:

Even if Section 31 can properly be interpreted to apply to those who should be licensed, however, by its terms penalties can be assessed against them only on the basis of a violation of a Commission rule or regulation. See 16 U.S.C.A. §823b(c). Thus, as to unlicensed non-exemptees, the penalty provisions of Section 31 could not be effective until the Commission's order in the civil penalty rulemaking was final. . . .

**3 It is undeniable that before that date, Section 31 “fail[ed] to give a person of ordinary intelligence fair notice that his . . . conduct is forbidden by the statute.” United States v. Harriss, 347 U.S. 612, 617 (1954). Thus, any assessment of penalties running from a date prior to December 13, 1988, would be an application of Section 31 that is constitutionally void for vagueness. See Keeffe v. Library of Congress, 777 F.2d 1573, 1582 (D.C. Cir. 1985) (application of regulation held unconstitutional due to lack of fair notice of and delay in agency's interpretation of facially constitutional regulations).

This position is confirmed by the language of the Commission's order on rehearing. The Commission stated:

[W]e affirm that licensees, permittees, or exemptees are subject to assessment of civil penalties for improper conduct occurring on or after the date of enactment of ECPA. Regarding projects that should have a license or exemption but do not, civil penalties will be assessed in these situations after issuance of an order establishing Commission jurisdiction . . .

45 FERC at p. 62,273 (emphasis added). Under the most liberal interpretation, this passage contemplates a program of prospective selective enforcement with respect to unlicensed nonexemptees, under which the order on rehearing itself “establishing Commission jurisdiction” would constitute the earliest possible official notification that such a party were subject to civil penalty liability under section 31. Accordingly, that liability should run only from the date of the order on rehearing. See S & H Riggers & Erectors, Inc. v. OSHA, 659 F.2d 1273, 1282 (5th Cir. 1981) (where “selective enforcement” of a regulation “provides insufficient notice of such a requirement”, the regulation is unconstitutional).
All of these arguments are misguided. First of all, the regulations implementing section 31 are procedural regulations. The authority to impose civil penalties comes from section 31, not from the regulations. This issue was thoroughly litigated and resolved in the order on rehearing in the rulemaking proceeding: 10 Project owners were on notice from the enactment of ECPA that they might be subject to civil penalties for violations of the Act. The Commission's regulations simply established the procedures for assessing these civil penalties. . .

It is disingenuous for those subject to the requirements of the Act to claim that prior to adoption of our regulations here, they had no notice that violations of the Act could subject them to assessment of civil penalties. ECPA clearly places violators of the Act at risk for assessment of civil penalties, and those operating under the Act should have known upon its enactment that as of that date they ran the risk of being assessed civil penalties for improper conduct.

**4 We will not reopen this issue here. It was resolved in the rulemaking.

The cases cited by Wolverine in the above-quoted portion of its request for rehearing are inapposite. In U.S. v. Harriss, the issue was whether the Federal Regulation of Lobbying Act, on its face, provided fair and clear warning to the appellees that, under the facts and circumstances of their particular activities, they were required to register as lobbyists. In Keefe v. Library of Congress, the issue was whether the Library had provided fair notice to its employee that it would apply its new interpretation of its conflict of interest regulations to her particular activities. “On the eve of her departure for the [Democratic National] Convention, therefore, Keefe had not received the constitutionally mandated reasonable opportunity to know what is prohibited . . . that was necessary in order for her to conform her conduct to law.” 177 F.2d at 1582. And in S&H Riggers & Erectors, Inc v. OSHA, the issue was whether, “at least in the absence of clear articulation by [OSHA] of the circumstances in which industry practice is not controlling. . . the employer either failed to provide personal protective equipment customarily required in its industry or had actual knowledge that personal protective equipment was required under the circumstances of the case.” 659 F.2d at 1275. In all three of these cases, the issue was whether the statute or regulation provided fair notice and warning of what conduct was prohibited, so as to provide a fair opportunity to conform to the legal requirement at issue.

The contrast between those cases and the case before us is both obvious and basic. Wolverine had actual notice in 1976 that it was required by section 23(b)(1) of the FPA to obtain a license for the operation of its hydroelectric facilities, and it concedes that its operation of those facilities without a license violates the FPA.

The violation at issue in the case before us is not violation of the procedural regulations implementing the statute authorizing civil penalties. The violation is Wolverine's operation of hydroelectric facilities without a license. The statutory provision that was violated is section 23(b)(1) of the FPA. The regulations that implement section 23(b)(1) are the regulations implementing the license application process. 11 Section 23(b)(1) of the FPA, as well as the regulations implementing it, have been in effect for many years, including all of the periods of time relevant to this proceeding.

The order establishing the Commission's jurisdiction over Wolverine's hydroelectric facilities at issue herein, and requiring Wolverine to apply for a license, was issued on February 18, 1976. 12 Wolverine does not dispute the fact that it violated section 23(b)(1) by operating its hydroelectric facilities without a license during the period from October 16, 1986, through July 23, 1989. Wolverine has had actual notice of that violation since 1976.

**5 Finally, we will clarify one point that was left unclear in our October 16 order. The Initial Decision provided for a five-year, 60-month installment schedule for paying the civil penalty. Our October 16 order modified the penalty, but was silent on the payment schedule. We will clarify here that the civil penalty of $2,024,000 is payable in one lump sum. However, if Wolverine so requests, the penalty can be paid in installments over a period of up to five years, provided that Wolverine agrees to pay interest on the unpaid balance as each installment payment becomes due.
The Commission orders:

(A) The request for rehearing filed by Wolverine Power Company is denied.

(B) The civil penalty of $2,024,000 shall be paid no later than 30 days after the date of issuance of this order. Pursuant to section 385.1511 of the Commission's regulations, interest on the full amount of the civil penalty will accrue from the date of issuance of this order. If Wolverine prefers to pay the penalty in installments over a period of up to five years, it may do so provided that it pays interest (calculated pursuant to applicable Commission regulations) on the unpaid balance of the penalty each time an installment payment is due.

Commissioner Trabandt dissented with a separate statement attached.

Charles A. Trabandt, Commissioner, dissenting:

**6 For the reasons stated in my dissents to Order Nos. 502, [FERC Statutes and Regulations P 30,828], and 502-A, 45 FERC P 61,407 (1988), and my dissent in Cameron Gas & Electric Company, 52 FERC P 61,335 (1990), I cannot support the instant order.

Footnotes
13 Wolverine itself, in its brief on exceptions (at p. 11), characterizes Judge Alprin's Initial Decision as “prompt and well thought out.
14 “Wolverine engaged in the violations with full knowledge of their impropriety, contumaciously and over a long period of time.” Initial Decision at pp. 26-27, 51 FERC P 63,012, at p. 65,065.
1 53 FERC P 61,062.
3 Slip. op. at p. 8.
4 Slip. op. at pp. 2-3.
5 48 FERC P 61,112 (1989), at p. 61,403.
9 Request for rehearing at pp. 41-45 (footnote omitted) (emphasis is in the original).
11 See 18 C.F.R. Part 4, subpart D.
12 55 FPC 673. Contrary to Wolverine's suggestion in the above-quoted portion of its request for rehearing, the Commission's reference in Order No. 502-A to “issuance of an order establishing Commission jurisdiction . . .” does not refer to Order No. 502-A itself, but to case-specific orders notifying operators of hydroelectric facilities that their particular facilities are jurisdictional and are required to be licensed. In the case of Wolverine's facilities, such an order was issued on February 18, 1976.

53 FERC P 61371 (F.E.R.C.), 1990 WL 319031
KeyCite Yellow Flag - Negative Treatment
Distinguished by Elaine Hitchcock, F.E.R.C., April 18, 1995
963 F.2d 446
United States Court of Appeals,
District of Columbia Circuit.

WOLVERINE POWER COMPANY, Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

No. 90–1597.


As Amended June 17, 1992.

Synopsis
Owner/operator of unlicensed hydroelectric plants petitioned for review of orders of the Federal Energy Regulatory Commission (FERC) assessing civil penalties against it. The Court of Appeals, Karen LeCraft Henderson, Circuit Judge, held that Electric Consumers Protection Act did not give FERC the authority to impose civil penalty on owner/operator of unlicensed hydroelectric plants that were required to be licensed under Federal Power Act; FERC's civil penalty authority was limited to violations committed by “licensee, permittee or exemptee.” Federal Power Act, § 31(c), as amended, 16 U.S.C.A. § 823b(c).

Petition granted and orders vacated.

West Headnotes (2)

[1] Electricity

In “peaking” operations, hydroelectric plant uses its dam to store water, thereby disrupting natural flow of river and potentially endangering river’s aquatic habitat below dam; “peaking” allows plant to release water needed to power its turbines during hours of peak demand.

2 Cases that cite this headnote

[2] Electricity

Licenses and Taxes

Electric Consumers Protection Act did not grant Federal Energy Regulatory Commission (FERC) the authority to impose civil penalty on owner/operator of unlicensed hydroelectric plants that were required to be licensed under Federal Power Act; FERC’s civil penalty authority was limited to violations committed by “licensee, permittee or exemptee.” Federal Power Act, § 31(c), as amended, 16 U.S.C.A. § 823b(c).

Cases that cite this headnote


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Before MIKVA, Chief Judge, HENDERSON and RANDOLPH, Circuit Judges.

Opinion

Opinion for the court filed by Circuit Judge HENDERSON.

KAREN LECRAF HENDERSON, Circuit Judge:

added section 31(c) of the FPA, 16 U.S.C. § 823b. Section 31(c) grants the Federal Energy Regulatory Commission (FERC) the authority to assess a civil penalty of up to $10,000 a day against “[a]ny licensee, permittee, or exemptee who violates or fails or refuses to comply” with, inter alia, FERC’s regulations governing hydroelectric facilities. FERC assessed a civil penalty ($2,024,000) against Wolverine Power Company (Wolverine), an unlicensed utility, based on Wolverine's long-time failure to obtain the licenses required to operate several of its hydroelectric plants. 1 The issue in this petition for review is whether section 31(c) authorizes FERC to assess a civil penalty against Wolverine. Because we conclude that section 31(c) does not authorize the imposition of a civil penalty on an unlicensed individual or entity, we grant the petition.

I.

Petitioner Wolverine owns and operates four hydroelectric plants on the Tittabawassee River in east-central Michigan. The plants are located at Sanford, Edenville, Smallwood and Secord, Michigan.

In February 1976, the Federal Power Commission, FERC’s predecessor, ordered Wolverine to obtain licenses for its four plants. In December 1976, Wolverine filed an application for the Sanford plant and also proposed a filing schedule for the remaining plants which FERC accepted in February 1977. In April 1978, however, FERC found the Sanford application deficient. FERC dismissed the application in May 1980, after Wolverine failed to correct the deficiencies.

Then, in January 1983, Wolverine, having received several letters from FERC threatening civil and criminal action for failing to obtain licensure, filed a revised application for the Sanford plant. In October 1983, FERC accepted the application. For over three more years, however, Wolverine did not file license applications for its other three plants. Finally, in 1986, during a field inspection, FERC expressed its concern with Wolverine’s failure to file the applications. In September 1986, Wolverine pledged to file the remaining applications by March 1, 1987. Wolverine filed the applications by January 7, 1987.

On March 30, 1987, FERC rejected the remaining applications because Wolverine had failed to provide necessary information and to consult with the United States Fish and Wildlife Service (FWS) and the Michigan Department of Natural Resources (MDNR) as required by 18 C.F.R. § 4.38. In response, FERC gave Wolverine 45 days to file additional information. When Wolverine failed to comply by July 30, 1987, FERC dismissed the three pending applications and advised Wolverine that its continued operation of the unlicensed plants would violate section 23(b) of the FPA, 16 U.S.C. § 817.

Shortly thereafter, on August 12, 1987, Wolverine informed FERC of its desire to comply with the licensing requirements and proceeded to prepare new applications. In brief, Wolverine conducted additional environmental studies, consulted as required with FWS and MDNR and revised its applications, filing them on July 24, 1989. On April 19, 1990, FERC conditionally accepted the applications as of their filing date and formally accepted them on July 13, 1990.

During the course of these events, as we noted initially, Congress enacted the ECPA, which amended the FPA by adding section 31. Thereafter, on August 6, 1987, FERC issued a notice of proposed rulemaking providing that, under the authority of section 31, it would assess civil penalties against “a person who engages in conduct requiring a license or exemption but fails to obtain one.” Procedures for the Assessment of Civil Penalties Under Section 31 of the Federal Power Act, 52 Fed.Reg. 29,216, 29,217 (1987). “On August 17, 1988, the rule became final, Procedures for the Assessment of Civil Penalties Under Section 31 of the Federal Power Act, 53 Fed.Reg. 32,035 (1988), and is codified at 18 C.F.R. § 385.1502(b). 3”

On February 23, 1989, FERC issued a notice of proposed penalty charging Wolverine with violating section 23(b) of the FPA, 16 U.S.C. § 817, for its failure to obtain licenses for the Edenville, Smallwood and Secord plants. The notice proposed penalties totalling $2,000 a day, with the violations running from the date of the ECPA’s enactment (October 16, 1986) until Wolverine filed acceptable applications. The case was set for hearing before an administrative law judge (ALJ).

On February 23, 1989, FERC issued a notice of proposed penalty charging Wolverine with violating section 23(b) of the FPA, 16 U.S.C. § 817, for its failure to obtain licenses for the Edenville, Smallwood and Secord plants. The notice proposed penalties totalling $2,000 a day, with the violations running from the date of the ECPA’s enactment (October 16, 1986) until Wolverine filed acceptable applications. The case was set for hearing before an administrative law judge (ALJ).

[I] The hearing was held and on May 18, 1990, the ALJ concluded that Wolverine had violated the licensing requirements of section 23(b) of the FPA, 16 U.S.C. §
Wolverine Power Co. v. F.E.R.C., 963 F.2d 446 (1992)

817. Wolverine Power Corp. 51 Fed.Energy Reg.Comm'n Rep. (CCH) ¶ 63,012, 65,061 (1990) (initial decision). The ALJ noted Wolverine's "long continuing violations in the face of its actual knowledge" of the licensing requirements. Id. at 65,062. He also found there had been some environmental damage from Wolverine's operations even though the extent could not be fully determined because Wolverine had failed to perform the studies required by FWS and MDNR. Id. He further found that Wolverine had gained economic benefits as a result of its unlicensed operations and that Wolverine had failed to make "meaningful remedial attempts" to obtain the required licenses. Id. at 65,062–64. The ALJ then reduced the penalty amount from $2000 to $400 a day and recommended that no penalty be imposed for the period from October 16, 1986, the date section 31 was enacted, until July 30, 1987, when FERC dismissed Wolverine's three applications. Id. at 65,066.

On review, FERC began by rejecting Wolverine's claim that section 31 does not authorize the imposition of a civil penalty against an unlicensed operator. Wolverine Power Corp., 53 Fed.Energy Reg.Comm'n Rep. (CCH) ¶ 61,062, 61,197 (1990) (order modifying initial decision). FERC then reviewed the ALJ's findings. It rejected the finding that Wolverine had caused environmental damage, terming "the real issue" as "whether Wolverine's conduct precluded timely assessment and resolution of the potential environmental impact." Id. at 61,198. FERC concluded that "Wolverine's delay in filing its applications made it impossible for the Commission to assess the impact of its operations on a timely basis, and to timely remedy such adverse impact if it was occurring." Id. FERC also rejected the ALJ's finding that Wolverine had benefited economically by delaying licensing and continuing "peaking operations," stating that it could not speculate whether the licenses for Wolverine's remaining plants would limit them to "run of the river" operations. Id. at 61,198–99. FERC thus found this factor irrelevant to the sanction issue. Id.

FERC then lowered the boom. First, it rejected the ALJ's decision that the violation period run from July 31, 1987, until April 19, 1990. Id. at 61,199. Instead, FERC decided that the violations subject to sanction occurred from October 16, 1986, the date section 31(c) was enacted, until July 31, 1987. Id. FERC then noted that it did not consider Wolverine's ability to pay because of the "murky" evidence on that factor. Id.

Finally, FERC summarized its view of the record:

The factual record before us in this case ... reveals a flagrant, sustained, knowing, concerted, "contumacious" pattern of conduct that challenges the fundamental integrity of the Commission's regulatory processes, and of the statutory authority we are charged with implementing. Wolverine has manipulated and abused our regulatory processes for fourteen years, while operating its hydroelectric facilities without the licenses required by the Federal Power Act. That fundamental challenge to the integrity of our legal system substantially outweighs all of the other considerations argued to us.

Id. at 61,200. FERC then assessed a $2,024,000 civil penalty against Wolverine for its operation of the three unlicensed plants from October 16, 1986, through July 23, 1989. Id. Wolverine brought this petition for review, challenging FERC's interpretation of its authority under section 31(c) to impose a civil penalty on an unlicensed individual or entity required to be licensed under the FPA.

II.
In reviewing an agency's interpretation of a statute it is charged with administering, this Court must apply the methodology prescribed by the Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Under Chevron, we must first determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842, 104 S.Ct. at 2781. If so, our task is at an end for we "must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842–43, 104 S.Ct. at 2781–82. But "if the statute is silent or ambiguous with respect to the specific issue," we defer to the agency if its construction of the statute is reasonable. Id. at 843, 104 S.Ct. at 2782.
Our starting point is the language of section 31(c). *Watt v. Alaska*, 451 U.S. 259, 265, 101 S.Ct. 1673, 1677, 68 L.Ed.2d 80 (1981); *Church of Scientology v. IRS*, 792 F.2d 153, 157 (D.C.Cir.1986). This section provides in relevant part:

(c) Civil penalty

Any *licensee*, permittee, or exemptee who violates or fails or refuses to comply with any rule or regulation under this subchapter, any term, or condition of a license, permit or exemption under this subchapter, or any order issued under subsection (a) of this section shall be subject to a civil penalty in an amount not to exceed $10,000 for each day that such violation or failure or refusal continues.... In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation, failure, or refusal and the efforts of the *licensee* to remedy the violation, failure, or refusal in a timely manner. No civil penalty shall be assessed where revocation is ordered.

16 U.S.C. § 823b(c) (emphasis added). The statutory text expressly restricts FERC’s civil penalty authority to violations committed by three types of hydroelectric plants: *licensees*, permittees and exemptees. Therefore, we must first decide whether Congress intended the term “licensee” to embrace an unlicensed operator required to be licensed.

“Person” and “licensee” also appear in several pre-ECPA enforcement provisions of the FPA. For example, in section 314, Congress gave FERC authority to seek an injunction or restraining order in district court “[w]henever it shall appear to the Commission that *any person* is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation or order thereunder.” 16 U.S.C. § 825m(a) (emphasis added). In the same section, Congress also empowered FERC to seek “writs of mandamus commanding *any person* to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.” 16 U.S.C. § 825m(b) (emphasis added). Nor did Congress, in the pre-ECPA FPA, limit FERC’s authority to seeking equitable remedies in enforcing the act against “any person.” In section 316, Congress provided for criminal penalties, including fines and imprisonment. 8

Standing between, and in contrast to the enforcement provisions of sections 314 and 316, is section 315, 16 U.S.C. § 825n. Unlike sections 314 and 316, which authorize enforcement action against “any person,” this section provides that “[a]ny *licensee* or public utility which willfully fails ... to comply with any order of the Commission ... shall forfeit to the United States an amount not exceeding $1,000 to be fixed by the Commission after notice and opportunity for hearing.” 16 U.S.C. § 825n (emphasis added). That Congress chose to use the term “person” in sections 314 and 316 and “licensee” in section 315 and also differentiated the two in the definitional section of the FPA, 16 U.S.C. § 796, not only manifests a general distinction between the two terms but also demonstrates that Congress knew how to draft an enforcement provision applicable to a “licensee” but not a “person.” Accordingly, we believe that, in enacting section 31(c), Congress meant what it said. It

subjected only “licensee[s], permittee[s], or exemptee[s]” to civil penalties. 9

B.

In an effort to invoke the deference owed under the second step of Chevron, FERC argues that we should ignore the plain language of section 31(c) because Congress's intent is actually ambiguous. In so urging, FERC makes two arguments.

First, FERC points to the assessment provisions of section 31(d), noting Congress's use of “person” in several of the section's paragraphs. For example, paragraph (d) (1) provides that “[b]efore issuing an order assessing a civil penalty against any person under this section, the Commission shall provide to such person notice of the proposed penalty.” 16 U.S.C. § 823b(d)(1) (emphasis added); see also 16 U.S.C. § 823b(d)(2) & (5). Thus, FERC argues, Congress's use of “person” in the assessment provisions demonstrates, at a minimum, that its use of the term “licensee” in section 31(c) is ambiguous. The short answer to this argument is that section 31(c) authorizes the assessment of a civil penalty not only against a “licensee” but also against a “permittee” or “exemptee.” See 16 U.S.C. § 823(c). Congress thus used the broader term “person” in this provision because it includes all three types of entities. In any event, the best evidence of Congress's intent in enacting section 31(c) is, of course, the text of the section itself. West Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 111 S.Ct. 1138, 1147, 113 L.Ed.2d 68 (1991). This is especially so in defining the scope of an agency's authority. The best evidence of the scope of authority is found not in the statutory language spelling out the process for executing that authority but instead in the language establishing the authority. Where, as here, that language unambiguously uses a statutorily defined term, that definition controls the scope of authority.

FERC also argues that it was entitled to “look[] beyond the precise words of [section 31(c)] ‘to the design of the statute as a whole and its object and policy’ in determining its meaning.” Brief of FERC at 23 (citing Crandon v. United States, 494 U.S. 152, 110 S.Ct. 997, 1001, 108 L.Ed.2d 132 (1990) and McCarthy v. Bronson, 500 U.S. 136, 111 S.Ct. 1737, 1740, 114 L.Ed.2d 194 (1991)). FERC specifically argues that its civil penalty authority must be measured by the broad grant of authority contained in section 31(a) to “conduct such investigations as may be necessary in accordance with” the FPA. See 16 U.S.C. § 823(b).

*452 **349 Undoubtedly, there are times that we legitimately look beyond the literal terms of a statute to determine congressional intent. See, e.g., Public Citizen v. Department of Justice, 491 U.S. 440, 454–55, 109 S.Ct. 2558, 2566, 105 L.Ed.2d 377 (1989) (rejecting literal reading of Federal Advisory Committee Act). But because “the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting any writing,” id. (quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), aff'd, 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165 (1945)), we do so only in the most limited circumstances, such as when its literal meaning leads to an odd or irrational result. Id.; see also Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509, 109 S.Ct. 1981, 1984, 104 L.Ed.2d 557 (1989); Watt v. Alaska, 451 U.S. 259, 267, 101 S.Ct. 1673, 1678, 68 L.Ed.2d 80 (1981) (when literal terms of two statutes result in conflict, court must look beyond text to determine Congress's intent); Church of the Holy Trinity v. United States, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892); Conrail v. United States, 896 F.2d 574, 578 (D.C.Cir.1990) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989)).

FERC argues that a “literal and mechanical reading” of section 31(c) will lead to the “irrational result” of rewarding those plants which do not comply with the licensing requirements of the FPA, because, until they become licensed, FERC will lack the authority to assess civil penalties against them. We disagree.

FERC's argument ignores the extensive enforcement authority Congress provided in sections 314 and 316 of the act. 10 Not only does FERC have the authority to seek criminal fines 11 for violations of the act committed by unlicensed entities like Wolverine, it is also authorized to seek to enjoin Wolverine's operation of its unlicensed plants. 12 FERC was not powerless to curtail Wolverine's operations. As the record indicates, as early as 1982, FERC threatened Wolverine with “civil and criminal enforcement action resulting in substantial penalties.” Initial Decision at 65,057. FERC has often used this authority, see, e.g., FPC v. Arizona Edison Co., 194 F.2d 679 (9th Cir.1952); McRae Energy, Inc., 44 Fed. Energy

Congress has similarly limited FERC's authority to levy civil penalties in another context. In addition to authorizing the assessment of civil penalties, section 31 authorizes FERC to revoke a plant's license. 16 U.S.C. § 823(b). But section 31(c) further provides that "[n]o civil penalty shall be assessed where revocation is ordered." 13 Presumably, Congress determined that additional penalties were unnecessary in the case of revocation, a rational approach and one consistent with the notion that the applicability of civil penalties is tied to one's status as a licensee. It is equally rational to foreclose this measure here where other enforcement measures

*453  **350  are available. 14

Having concluded that the language of section 31(c) is clear, we decline FERC's invitation to review its reading of the legislative history. The terms of section 31(c) limit FERC's civil penalty authority to violations committed by a "licensee, permittee, or exemptee," none of which includes Wolverine. FERC's rule authorizing the imposition of civil penalties against "a person who engages in conduct requiring a license or exemption but fails to obtain one" is ultra vires and its order assessing a civil penalty against Wolverine is void. We therefore invalidate both that portion of FERC's rule codified at 18 C.F.R. § 385.1502(b) and its order imposing a civil penalty on Wolverine. Accordingly, Wolverine's petition for review is granted, FERC Orders No. 502 and No. 502–A, to the extent they authorize assessments against unlicensed operators, are vacated and the assessment orders in Docket No. E–7319–001 and No. E–7319–002 are vacated.

Vacated.

III.

Footnotes

1 According to section 23(b) of the FPA, 16 U.S.C. § 817, it is "unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto, across, along or in any of the navigable waters of the United States" without a license.

2 The information related to the impact of the plants' operations on water quality, fisheries and recreational use of the river.

3 Joint Appendix (JA) 571–77.


5 In setting the amount, FERC considered the following factors: (1) Wolverine's knowledge of the violations, (2) its history of violations, (3) the absence of any personal injury or loss of life as a result of the violations, (4) the economic benefits received from the violations, (5) its failure to make timely efforts to remedy the violations and (6) the risk of environmental damage created by the plants' use of peaking operations as determined by both FWS and MDNR. JA 33–38.*FERC* also noted that because Wolverine had not filed acceptable environmental studies, it could not determine whether Wolverine's unlicensed operations had "caused damage to property or to the environment or endangered persons, property, or the environment." JA 37.

6 The benefits occurred because Wolverine's unlicensed plants engaged in “peaking” rather than “run of the river” operations, to which the Sanford plant had originally been restricted under its license. In “peaking” operations, a plant uses its dam to store water, thereby disrupting the natural flow of the river and potentially endangering the river's aquatic habitat below the dam. “Peaking” allows the plant to release the water needed to power its turbines during hours of peak demand.

7 The per day amount was $2,000, the amount originally proposed by the Commission. Unlike the ALJ, FERC did change the end of the penalty period from April 19, 1990, the day the applications were conditionally accepted, to July 23, 1989, the day before the applications were filed. 53 Fed. Energy Reg. Comm'n at 61,200.

All Citations

Wolverine Power Co. v. F.E.R.C., 963 F.2d 446 (1992)

7 Wolverine also challenges (1) FERC's imposition of the civil penalty covering the period from ECPA's enactment until promulgation of its rule interpreting section 31; (2) FERC's abandonment, on review, without notice of its original standard for imposing the penalty and its insertion of a new factor; and (3) the amount of the penalty as not supported by the record. Because we conclude that section 31 does not authorize the civil penalty assessed here, we do not reach these other issues.

8 Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by FERC ... shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs. 16 U.S.C. § 825o (b). In the case of a willful and knowing violation, Congress provided for imprisonment of not more than two years. See 16 U.S.C. § 825o (a).


10 For this reason, we find FERC's reliance on CFTC v. Savage, 611 F.2d 270 (9th Cir.1979), misplaced. The Savage court upheld the Commodity Futures Trading Commission's interpretation of 7 U.S.C. § 6o (1), forbidding “any commodity trading advisor ... registered under th[e] Act ... to employ any device, scheme or artifice to defraud any client,” as applying to unregistered trading advisors. 611 F.2d at 281. In Savage, a contrary interpretation would have led to the irrational result that the agency could enjoin fraudulent activity committed by registered advisors but was powerless to enjoin such activity when committed by unregistered advisors. Id. at 282. FERC, in contrast to the CFTC, is not powerless to enjoin violations of the FPA's licensing requirements.


13 The hypothetical case of a plant which has lost its license demonstrates the fallacy of FERC's argument. Under the statute, an odd result would occur if FERC could assess a civil penalty against a plant once its license was revoked even though, at the time FERC revoked the license, it could not have imposed a civil penalty.

14 We acknowledge that Congress, in enacting the ECPA, expressed its concern that environmental safety was not being adequately considered in FERC's licensing process. See 16 U.S.C. § 797(e). But Congress had no need to supplement the injunction provision with civil penalties in order to deal with its environmental concerns.
It is longstanding Federal Energy Regulatory Commission ("FERC" or "the Commission") policy to promote settlement of contested matters. In order to promote settlements, the Commission has long protected from public disclosure all communications exchanged in the settlement process. This allows the free and candid exchange of views and promotes a conducive
settlement environment. Conversely, anyone violating the sanctity of the settlement process undermines the Commission’s pro-settlement goals and policies.

Regrettably, that is what has occurred in the process of settling disputes arising from Trans Bay Cable LLC’s (“Trans Bay”) proposed increase in its base transmission revenue requirement (“TRR”) filed in Docket No. ER16-2632-000. Indeed, by their own admission in a publicly filed pleading, the California Department of Water Resources State Water Project (“SWP”) and the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (“Six Cities”) (collectively, “Complainants”) disclosed in their Complaint in Docket No. EL17-66-000 confidential settlement information of Trans Bay obtained only through the settlement discussions in Docket No. ER16-2632-000. This admission is a direct violation of Rule 606(b) of the Commission’s Rules of Practice and Procedure.

The harm caused by this intentional disclosure and violation is not cured by Complainants’ filing of an amended complaint that redacts the wrongfully disclosed information nor can it be addressed through merely striking the unlawfully disclosed information. The bell cannot be unrung. Rather, dismissal of the Amended Complaint with prejudice is necessary in order to preserve the integrity of the Commission’s settlement procedures and to effectuate the Congressional objectives pursuant to which the Commission established those procedures. Further, the Commission should dismiss Complainants as parties from Trans Bay’s rate case

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4 Cal. Dep’t of Water Res. State Water Project v. Trans Bay Cable LLC, Complaint and Motion to Consolidate, Docket No. EL17-66-000 (Apr. 18, 2017) (the “Complaint”).

5 Although the California Public Utilities Commission (“CPUC”) joined in the Complaint, Trans Bay understands that the CPUC was not aware of the improper disclosure and was first made aware of it as a result of discussions it had with Trans Bay. As a result, insofar as Trans Bay does not believe that the CPUC was involved in this improper disclosure, it is not requesting sanctions against the CPUC.

6 18 C.F.R. § 385.606(b).

7 Cal. Dep’t of Water Res. State Water Project v. Trans Bay Cable LLC, Amended Complaint and Motion to Consolidate, Docket No. EL17-66-000 (May 18, 2017) (the “Amended Complaint”).
proceeding in Docket No. ER16-2632-000 as a consequence of their violation of settlement confidentiality.

Commission action here must be quick, direct, and consequential. The offending Complainants have now conceded that they improperly disclosed settlement information. And given the specificity and analysis of the improper material in their Complaint to support their position, it defies credulity that the disclosure was inadvertent or a mistake. Thus, any response by the Commission short of the foregoing will provide Complainants a license to violate Rule 606(b) in the future. It would also send a clear signal to the FERC community at large that violations of the FERC settlement rules are not taken seriously. This would have a chilling effect on settlement processes, which, of course, are fully voluntary and only as productive as the parties themselves make them. And without a robust settlement process, the Commission will be forced to litigate far more cases than it has in the past.

Trans Bay respectfully submits therefore that the Commission must thus look beyond the immediate case to the broader implications of the violations that have occurred here, and must act in a manner that sends a clear message to both Complainants and the FERC community at large that Rule 606(b) violations will not be tolerated.

I. BACKGROUND

On September 20, 2016, Trans Bay filed a proposed increase in its TRR with the Commission pursuant to Section 205 of the Federal Power Act.⁸ Complainants were among the several entities that filed motions to intervene in that proceeding (the “Rate Proceeding”), and

⁸ See Trans Bay Cable LLC, Revisions to Appendix I of the Trans Bay Transmission Owner Tariff, Docket No. ER16-2632-000 (Sept. 20, 2016).
Complainants submitted protests on Trans Bay’s proposed increase to its TRR. Six Cities, in addition to submitting a protest, also requested that the Commission initiate a Section 206 investigation of Trans Bay’s then-current TRR.

On November 22, 2016, the Commission accepted Trans Bay’s proposed rate increase for filing, suspended it for five months, and directed the parties to engage in settlement discussions pursuant to Rule 603 of the Commission’s Rules of Practice and Procedure. Specifically, the Commission “encourage[d] the parties to make every effort to settle their dispute” through the Rule 603 discussions. Finally, the Commission rejected Six Cities’ request to initiate a Section-206 proceeding, finding that, “[b]ased upon the record of this case . . . further investigation into previously settled rates is unwarranted.”

Trans Bay, in accordance with the Commission’s November 22 Order, began in December 2016 to engage in a good faith effort to settle the rate case proceeding with all intervenors, including Complainants, under the supervision of Administrative Law Judge Steven A. Glazer. As part of this extensive effort, Trans Bay responded to numerous discovery requests from intervenors and Commission Trial Staff, hosted a teleconference regarding initial questions and responses, and participated in three settlement conferences with intervenors. The intervenors in the Rate Proceeding, including Complainants, had access to a voluminous amount of confidential

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9 Trans Bay Cable LLC, 157 FERC ¶ 61,133 at P 13 (2016) (“November 22 Order”).
10 Trans Bay Cable LLC, Protest on Behalf of the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California at 37-38, Docket No. ER16-2632-000 (Oct. 11, 2016) (“Six Cities Protest”).
11 November 22 Order at PP 28, 35.
12 November 22 Order at P 35.
13 November 22 Order at P 34.
14 See Trans Bay Cable LLC, Order Scheduling Settlement Activities, Docket No. ER16-2632-000 (Dec. 13, 2016); Trans Bay Cable LLC, Report by Settlement Judge, Docket No. ER16-2632-000 (Feb. 27, 2017); Trans Bay Cable LLC, Report by Settlement Judge, Docket No. ER16-2632-000 (Apr. 28, 2017); Trans Bay Cable LLC, Order Scheduling Settlement Activities, Docket No. ER16-2632-000 (May 24, 2017).
information, including detailed information on Trans Bay’s forecasted costs, as a result of Trans Bay’s effort to explore the possibility of settlement.


In the originally-filed Complaint, Complainants presented a host of Trans Bay’s forecasted financial and cost data. While most of these data were filed by Trans Bay with the Commission in the Rate Proceeding or are otherwise publicly available, the originally-filed Complaint included specific forecasted costs for four projects—the Geomagnetic Disturbance Study, the Stockton Dredging Impact Assessment, the Costs to Swap Spare Transformers, and the Renewal of the Power Module Warranty—that are not publicly available, either through Trans Bay’s filings in the Trans Bay Rate Proceeding or otherwise. Indeed, Complainants cited to no source for these data (unlike other data included where Complainants cited the source).

15 See supra n.4.
18 Complaint at 17.
19 See, e.g., Complaint at 18 (citing Exh. No. TBC-101 in Docket No. ER16-2632-000 in support of its claim that “Trans Bay’s TO-3 TRR filing shows total O&M and A&G costs of approximately $25.6 million for Period I[.]”).
Trans Bay identified these four projects in its initial filing in the Rate Proceeding. However, and very importantly, the specific forecasted costs were not included in that filing, as Six Cities admits in its protest in the Rate Proceeding:

While Mr. O’Reilly provides limited descriptions of each of these projects, Trans Bay does not provide sufficient evidence that would allow the Six Cities to determine if the projected increase is reasonable. Trans Bay failed to include any evidence supporting the estimates for each project, such as responses to requests for proposals or other means of estimating the projected costs. Thus, Six Cities will require discovery to assess the reasonableness of the significant increase in Account 570 costs.

Consistent with this admission, the only source from which Complainants could have obtained the specific forecasted costs for these four projects—as they now concede—is Trans Bay’s responses to informal data requests served by Commission Trial Staff and Six Cities on Trans Bay as part of the confidential settlement discussions in the Rate Proceeding.

On May 18, 2017, Complainants filed their Amended Complaint, noting that “[i]t ha[d] come to Complainants’ attention that the Complaint inadvertently contained information protected under Rule 606” and that the Amended Complaint “remove[d] all references to the privileged information.” The Commission subsequently labeled the initial complaint as “erroneously filed” and removed it from the public docket.

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21 Six Cities Protest at 30.

22 Amended Complaint, Transmittal Letter at 1.

23 See FERC, Docket Sheet, Docket No. EL 17-66-000.
II. PROTEST

Trans Bay protests the Commission’s acceptance of the Amended Complaint without consequence to Complainants. Complainants admit to obtaining certain information through the Commission’s settlement process and improperly disclosing that information to the public in violation of Rule 606(b).24 The Amended Complaint and the Commission’s subsequent removal of the initial Complaint from the public docket does not remedy the harm caused by Complainants’ egregious violation of the Commission’s rules.

Trans Bay’s confidential business information was available to the public for approximately one month between the filing of the initial Complaint and the filing of the Amended Complaint. There is simply no way to know who accessed Trans Bay’s confidential information in that time period or who may still have that information after downloading the Complaint. Indeed, the Commission’s public docket information is available via the internet to the public at large, not just regulated entities or persons who have registered with the Commission. The Commission therefore has no ability to require the destruction of the confidential information that may have been obtained during the one month the information was in the public domain.

As discussed further below, the disclosure of this information harms Trans Bay’s negotiating position with vendors, which in turn harms ratepayers by preventing Trans Bay from obtaining necessary services for the lowest price possible. Moreover, Complainants’ disregard for the Commission’s rules harms the integrity of the Commission’s settlement process and will hinder the Commission’s ability to utilize this valuable resource in the future.

The Complaint caused significant damage that cannot be undone, and Complainants must suffer real and meaningful consequences for their actions. The Commission, as a result, should

24 Amended Complaint, Transmittal Letter at 1.
not blithely accept the Amended Complaint but, rather, should grant the relief sought by Trans Bay in its Motions below.

III. MOTION TO DISMISS

The Complaint should be dismissed, with prejudice, as a direct consequence of Complainants’ violation of Rule 606(b).

Rule 606(b) strictly prohibits “voluntar[y] disclos[ures]” by “participant[s] in a dispute resolution proceeding” of “any information concerning any dispute resolution communication.” The non-public, confidential cost information included in the Complaint is such information. The rule is unequivocal, requires no finding of intent to disclose or recklessness—even though that occurred here—and requires no finding of harm as a result of disclosure. Complainants admit that the Complaint publicly disclosed information protected under Rule 606, and so their actions are a clear violation of Rule 606(b).

25 18 C.F.R. § 385.606(b).
26 There is an older case that suggests that Rule 606 does not apply to settlement negotiations conducted pursuant to Commission Rule 603, *Aquila Power Corp. v. Entergy Servs. Inc.*, 90 FERC ¶ 61,260, 61,858 (Mar. 16, 2000), but this is incorrect. This reading is inconsistent with the plain text of the Commission’s rules, which define “dispute resolution proceeding” as “any alternative means of dispute resolution that is used to resolve an issue in controversy” and further define “alternative means of dispute resolution” to include “settlement negotiations,” 18 C.F.R. § 385.604(b). This reading is also inconsistent with Commission precedent and practice regarding settlement negotiations. *See, e.g.*, *Cal. Indep. Sys. Operator Corp.*, 140 FERC ¶ 63,019 at P 19 (2012) (Certification of Uncontested Settlement) (“This Settlement represents the discussions between CAISO and the parties, which were conducted with the explicit understanding, pursuant to Rules 602 and 606 of the Commission’s Rules of Practice and Procedure, that all offers of settlement and discussions relating thereto are and shall be privileged . . . and shall not be used in any manner in these proceedings or otherwise[,]” (emphasis added); *Southwest Power Pool, Inc.*, 118 FERC ¶ 63,012 at P 6 (2007) (Certification of Uncontested Offer of Settlement) (“Article 2.5 states that all discussions between SPP, Occidental and [Commission Trial] Staff that have produced the offer have been conducted in accordance with Rule 606 . . . and are subject to the applicable confidentiality and privilege protections of that rule.”). *See also FERC, Common Dispute Resolution Approaches, https://www.ferc.gov/legal/adr/continuum/com-dra.asp#settle* (including the “settlement judge process” within the “continuum” of alternative dispute resolution).
27 Amended Complaint, Transmittal Letter at 1.
While Rule 606(b) does not require a finding of intent or recklessness, the facts present here belie Complainants’ claims that the violation was an inadvertent error or an “oversight.” Rather, they establish that (1) Trans Bay took great care to keep its confidential information regarding project costs out of the public domain; (2) Complainants knew that the projected costs for these specific four projects were confidential and thus “require[d] discovery” to obtain; and (3) Complainants then, as they admit, obtained and disclosed this information in violation of Rule 606. It simply cannot be that Complainants’ impermissible disclosure was inadvertent or an oversight in light of Complainants’ prior acknowledgement that the disclosed information was not public and thus “require[d] discovery.” These facts instead support a finding of an intentional or reckless violation of the Commission’s rules and demonstrate the egregiousness of Complainants’ conduct.

Complainants’ disclosure of projected costs also risks significant harm to ratepayers. It is critical to Trans Bay that such information be kept confidential in order to preserve the company’s negotiating position with its vendors, which ultimately will enable Trans Bay to obtain the prices most beneficial to consumers. Complainants had notice of the importance to Trans Bay of maintaining the confidentiality of forecasted costs generally, but also, as discussed above, knew or should have known that the forecasted costs for these specific four projects were not in the public domain. Complainants’ disclosure of these forecasted costs may compromise Trans Bay’s negotiating strategy, thereby harming the very ratepayers Complainants purport to protect.

28 Id.
30 Six Cities Protest at 30.
31 Amended Complaint, Transmittal Letter at 1.
Rule 606(c) provides that any information disclosed in violation of Rule 606 “shall not be admissible in any proceeding,” and Complainants will likely argue that their Amended Complaint and the Commission’s removal of the initial Complaint from the public docket is sufficient to remedy the harm here. But it is not. The bell cannot be unrung and dismissal of the Complaint can and should be imposed as a sanction here.

The Commission promulgated Rule 606 in order to implement the Alternative Dispute Resolution Act of 1990 (“ADRA”), which “require[d] each agency to adopt a policy that addresses the use of alternative means of dispute resolution and case management in connection with the agency’s administrative actions.” The Commission noted that its policy was “to conclude its administrative proceedings as fairly, effectively, efficiently, and expeditiously as possible,” and that the Commission would use the ADRA as an “opportunity to further develop and refine its policies to achieve less costly, less contentious, and more timely decisions in its proceedings.” Indeed, the Commission “intend[ed] to foster the effective and sound use of innovative ADR procedures pursuant to the guidelines established in the ADRA.” Violations of Rule 606(b) undermine the integrity and purposes of settlement and other alternative dispute resolution procedures.

It is well established that:

[T]he breadth of agency discretion is, if anything, at [its] zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but

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32 18 C.F.R. § 385.606(c).
34 Id. at 59,716-17.
35 Id. at 59,717.
rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.36

Because Rule 606(b) is the direct result of the Commission’s efforts to achieve Congress’ objective of greater implementation and use of alternative dispute resolution techniques in agency proceedings, the Commission’s discretion to impose sanctions for violations of Rule 606(b) is at its “zenith.”

Dismissal of the Complaint with prejudice is necessary to preserve the integrity of the Commission’s settlement and other alternative dispute resolution processes and to effectuate Congress’ objectives as set forth in the ADRA. The Commission states that “[o]ne of the major advantages of [its alternative dispute resolution procedures] is that parties can agree . . . to keep the process confidential[, which] allows all sides in a dispute to speak more openly, share more information, and explore ideas and options in order to come to a resolution.”37 Rule 606 preserves this benefit by allowing participants in settlement negotiations to “feel free to be forthcoming and frank without fear that their statements may later be used against them.”38 As the Commission acknowledges, “[k]nowing that communications will remain confidential during the negotiation process is necessary to ensure continued confidence of the participants in that process.”39

If Complainants’ blatant disregard for Rule 606(b) is not addressed through dismissal of the Complaint with prejudice, it will send a message to parties before the Commission that their good faith participation in the Commission’s alternative dispute resolution processes can and will


38 ADR NOPR at 59,723.

be used as a weapon against them in future litigation. This in turn will have an extreme chilling effect on participation in settlement processes,\textsuperscript{40} thereby frustrating the Commission’s policy of “achiev[ing] less costly, less contentious, and more timely decisions in its proceedings,”\textsuperscript{41} the Commission’s intent “to foster the effective and sound use of innovative ADR procedures,”\textsuperscript{42} and the objectives of the ADRA.

Trans Bay respectfully requests that the Commission dismiss the Complaint with prejudice for the foregoing reasons.

IV. MOTION FOR SANCTIONS

The Commission should also, independent of and in addition to dismissal of the Complaint, sanction Complainants for their violation of Rule 606(b).

Commission Rule 2101(c) requires that “[a] person appearing before the Commission . . . must conform to the standards of ethical conduct required of practitioners before Courts of the United States. . . .”\textsuperscript{43} Those standards, embodied in Rule 11 of the Federal Rules of Civil Procedure, require that any court filing by an attorney not be made “for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation”\textsuperscript{44} and only contain “factual contentions [that] have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”\textsuperscript{45} In other words, “Rule 11 imposes a duty on attorneys to certify that they have

\begin{itemize}
\item \textsuperscript{40} See Sierra Pacific Power Co., 2007 WL 1670046 at *4 (Nev. P.U.C. Apr. 9, 2007) (“A ‘chilling effect’ . . . would be imposed on settlement negotiations at FERC if the [Nevada PUC] attempted to contravene FERC Rule 606.”).
\item \textsuperscript{41} ADR NOPR at 59,716-17.
\item \textsuperscript{42} Id. at 59,717.
\item \textsuperscript{43} 18 C.F.R. § 385.2101(c).
\item \textsuperscript{44} Fed R. Civ. Pro. 11(b)(1).
\item \textsuperscript{45} Id. at 11(b)(3).
\end{itemize}
conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact and legally tenable.”

There are a number of reasons why the Complainants’ use of confidential settlement information for litigation purposes squarely calls into question whether Complainants engaged in good faith settlement negotiations with Trans Bay in the Rate Proceeding as required by the Commission.

First, it is clear that the Complainants used the discovery obtained through negotiations for the improper purpose of enhancing and supplementing their Complaint following the Commission’s rejection of Six Cities’ previous request for a Section 206 proceeding seeking the same relief and based on the same record.

Second, the Complaint includes extensive discussion of an analysis “based on the application of the Commission’s preferred two-step DCF formula adopted in Opinion No. 531,” but never discusses that the D.C. Circuit vacated Opinion No. 531 and its progeny four days before Complainants filed their Complaint. Complainants barely acknowledge that this tectonic shift in the law on which they rely even occurred, mentioning only in a footnote that Opinion No. 531 was vacated. Complainants’ substantial reliance on a vacated Commission order, without any attempt

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46 Ramirez v. Fox Television Station, Inc., 998 F.2d 743, 750 (9th Cir. 1993) (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990)) (alterations omitted). See also Ridge v. U.S. Postal Serv., 154 F.R.D. 182, 184 (N.D. Ill. 1992) (stating rule that a filing is frivolous, and therefore violates Rule 11, when the party fails to make “a reasonable inquiry into the governing law”).

47 Carmen A. Cintron, Chief Administrative Law Judge, Clarification and Revision of Previous Notice to the Public on Settlement Negotiations Before Administrative Law Judges (Dec. 6, 2016).

48 Six Cities Protest at 37-38.

49 Complaint at 10-14.


51 Complaint at 12 n.13.
to justify their continued reliance, strongly suggests that Complainants failed to conduct the reasonable inquiry necessary to ensure that the Complaint was legally tenable.52

Third, the Commission already denied Six Cities’ request that the Commission “initiate a Section 206 investigation to determine whether Trans Bay’s current rate is just and reasonable,” finding that “[b]ased upon the record of [the Rate Proceeding] . . . a further investigation into previously settled rates is unwarranted.”53 Complainants persisted in filing the Complaint despite this finding and despite the fact that the record has not changed.54 The Complaint’s rehashing of arguments that the Commission already rejected based on the exact same record (but for the confidential information obtained in settlement)55 is clear evidence of Complainants’ intent to harass, delay and drive up litigation costs.56


53 November 22 Order at PP 24, 34.

54 Complainants’ reliance on the Commission’s acceptance of a Section 206 filing in Trans Bay’s last rate case after initially declining to investigate previously settled rates is misplaced. See Cal. Dep’t of Water Res. v. Trans Bay Cable, LLC, Motion to Respond and Response to Trans Bay at 3-5, Docket No. EL17-66-000 (May 22, 2017) (“Response”). In the last rate case, the Commission declined to initiate a Section 206 investigation because “Trans Bay ha[d] complied with the Commission’s directives” as set forth in prior Commission orders. Trans Bay Cable LLC, 145 FERC ¶ 61,151 at P 21 (2013). In contrast, as explained above, the Commission declined to initiate a Section 206 investigation in the Rate Proceeding “[b]ased upon the record,” November 22 Order at P 34, and the record has not changed since the Commission made that determination.

55 Compare Complaint at 2 (“Based on Trans Bay’s own data, the currently-effective $131 million TO-2 TRR is excessive and no longer just and reasonable . . . Complainants thus file this Complaint asking that the Commission . . . find that Trans Bay’s TO-2 TRR is unjust and unreasonable given current cost information, such that a reduction below the last clean rate and associated refunds is warranted.”) with Six Cities Protest at 37 (“Trans Bay’s currently-effective TRR is $131.1 million . . . Trans Bay’s Period I cost of service information, however, supports a Period I TRR of $126.7 million. . . . Thus, the Six Cities request that the Commission initiate an investigation under Section 206 of the Federal Power Act.”). See also November 22 Order at P 34 (“Based upon the record of this case, [the Commission] find[s] that a further investigation into previously settled rates is unwarranted.”).

56 See McLaughlin v. Bradlee, 803 F.2d 1197, 1205-06 (D.C. Cir. 1986) (affirming imposition of sanctions for filing of post-judgment motions where “three previous suits had resolved the questions in this case” and “plac[ing] attorneys on notice that [the Court] intend[s] to impose sanctions as a matter of course for such ‘harassment by litigation’”). Complainants’ claim that “[t]he Complaint is intended to protect Complainants and other customers
Fourth, Complainants filed the Complaint on the same day as Judge Glazer’s deadline for Trans Bay to respond to discovery requests in the Rate Proceeding and before Trans Bay provided responses to outstanding requests from Six Cities and SWP. If Complainants truly were engaged in discovery in the Rate Proceeding in order to explore settlement options, then Complainants would not have filed a complaint pursuant to Section 206 until after obtaining the discovery that they requested in order to determine whether Trans Bay’s costs supported its requested TRR. Instead, it appears that Complainants used discovery to “fish” for additional information to use in their Complaint, and filed it once they felt they had sufficient information.

The foregoing conduct, combined with Complainants’ violation of Rule 606(b), shows that Complainants did not comport with the requirements of Rule 2101. Trans Bay requests that the Commission impose sanctions on Complainants for their conduct.

V. MOTION FOR DISMISSAL FROM RATE PROCEEDING

The Commission should also, independent of and in addition to dismissal of the Complaint and the imposition of sanctions, dismiss Complainants from the Rate Proceeding. As noted, they have violated Rule 606(b) through their disclosure in the Complaint of confidential information of Trans Bay that was obtained in the settlement proceedings before Judge Glazer in the Rate Proceeding. There must therefore be consequences for these actions not only in the Complaint proceeding but in the Rate Proceeding as well.

Again, the Commission’s authority is at its “zenith” when fashioning remedies.57 It is thus well within the Commission’s discretionary authority to dismiss Complainants from the Rate Proceeding by enabling them to collect refunds for the full amount of any reduction as of the date of the Complaint” is unavailing. Response at 7. The Commission determined, based upon the record of the Rate Proceeding, that an investigation into previously settled rates was unwarranted. November 22 Order at P 34. Because the record has not changed, Complainants cannot obtain reductions below the previously settled rate based upon this record. The Complaint, therefore, serves no purpose other than to harass.

57 See supra n.36 and accompanying text.
Proceeding as a consequence of their violation of Rule 606(b). Complainants will surely argue that this is a harsh remedy because they are necessary to the Rate Proceeding with an interest in keeping Trans Bay’s rates in check. But such an argument would be a red herring. Commission Trial Staff is a participant in the Rate Proceeding and would remain even after dismissal of Complainants. While Trans Bay cannot predict how Trial Staff here will act, Commission Trial Staff in other FPA Section 205 rate cases have been very active in opposing rate transmission rate increases.\footnote{See, e.g., Potomac-Appalachian Transmission Highline, LLC & PJM Interconnection, L.L.C., Initial Brief of the Commission Trial Staff at 23-25, Docket Nos. ER09-1256-002, \textit{et al.} (June 26, 2015) (arguing, among other things, that the transmission owner improperly recovered certain expenses through its transmission rates and that the expenditures should be refunded with interest). See also Northwestern Corp., Initial Brief of the Commission Trial Staff at 5-8, Docket Nos. ER10-1138-001, \textit{et al.} (July 23, 2012); Old Dominion Elec. Cooper., \textit{et al. v. Virginia Elec. & Power Co.}, Commission Trial Staff’s Prehearing Brief at 4-5, Docket No. EL10-49-005 (Sept. 24, 2015).} In addition, there will still be numerous other intervening parties that remain in the proceeding, including the California Public Utilities Commission, the City and County of San Francisco, DATC Path 15, Modesto Irrigation District, Pacific Gas and Electric Company, Southern California Edison, Startrans IO, LLC, The City of Santa Clara, California and the M-S-R Public Power Agency, and Transmission Agency of Northern California. The majority of these parties will pay Trans Bay’s TRR through the California Transmission Access Charge and thus have interests aligned with those of Complainants.

Additionally, Complainants would have no reasonable grounds to quibble with their dismissal because it would be a consequence of their own unlawful actions. It was entirely within their power and ability to vet carefully their Complaint before filing to make sure that it did not contain any confidential information. They clearly failed to do so. And, as a result, any consequence of their lack of due diligence is a consequence of their own making.
VI. COMMUNICATIONS

Service is to be made and communications related to this filing are to be directed to:

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VII. CONCLUSION

The Commission’s action here in response to Complainants’ violation must be quick, direct, and consequential. The Commission should thus: (i) dismiss the Amended Complaint with prejudice, (ii) impose sanctions on Complainants, and (iii) dismiss Complainants from Trans Bay’s rate proceeding in Docket No. ER16-2632-000. Any response by the Commission short of the foregoing will provide Complainants and others a license to violate Rule 606(b) in the future and is necessary to preserve the integrity and benefits of the Commission’s settlement processes.

/s/ William S. Scherman

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Dated: Washington, D.C. June 6, 2017

Counsel for Trans Bay Cable LLC

59 Trans Bay respectfully requests waiver of the Commission’s regulations, to the extent necessary, to permit more than two persons to be placed on the service list for this proceeding.
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document on the listserv established for this proceeding as well as the official service list for these proceedings as established and maintained by the Commission’s Secretary.

Dated at Washington, DC, this 6th day of June, 2017.

/s/ Jennifer C. Mansh

Jennifer C. Mansh
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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Department of Water Resources State Water Project, the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California, and the California Public Utilities Commission,

Complainants,

v.

Trans Bay Cable LLC,

Respondent.

Trans Bay Cable LLC

Docket No. EL17-66-000

ER16-2632-000
(Not Consolidated)

COMPLAINANTS’ ANSWER TO TRANS BAY CABLE LLC’S PROTEST AND MOTION TO DISMISS AMENDED COMPLAINT; MOTION FOR SANCTIONS; MOTION FOR DISMISSAL OF PARTIES FOR VIOLATION OF COMMISSION RULE 606(b)

Pursuant to Rule 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213, the California Department of Water Resources (“CDWR”) State Water Project (“SWP”); the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (the “Six Cities”); and the California Public Utilities Commission (“CPUC”) (collectively, “Complainants”)¹ submit this answer to the Protest and Motion

¹ Trans Bay Cable LLC (“Trans Bay”) seeks sanctions only against SWP and the Six Cities; however, the CPUC was an equal partner in the Complaint, shares in responsibility for the inadvertent disclosure of information, and therefore joins this response.
to Dismiss Amended Complaint; Motion for Sanctions; Motion for Dismissal of Parties for Violation of Commission Rule 606(b).

Trans Bay’s Motion responds to the Amended Complaint and Motion to Consolidate filed by Complainants on May 18, 2017. Complainants filed the Amended Complaint in order to remove privileged information protected under Rule 606 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.606, from their initial April 18, 2017 Complaint.

As described in the Transmittal Letter accompanying the Amended Complaint, Complainants deeply regret their inadvertent inclusion of settlement-privileged information in the Initial Complaint. The disclosure was unintentional, and Complainants took steps to remedy the mistake as soon as they learned of it. Trans Bay’s Motion is an unwarranted response to an inadvertent error that Complainants immediately reported to the Commission and corrected. Trans Bay offers no evidence to support its allegation that this disclosure was intentional, and the sanctions it seeks are excessive and unjustified. Complainants respectfully request that the Commission reject Trans Bay’s Motion in its entirety and decline to impose Trans Bay’s requested sanctions.

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2 Pursuant to Rule 215 of the Commission’s Rule of Practice and Procedure, 18 C.F.R. § 385.215, the Complainants’ amendment became “effective as an amendment at the end of 15 days from the date of filing,” because “no motion in opposition to the acceptance of [the] amendment . . . [was] filed within the 15 day period,” 18 C.F.R. § 385.215(d); see also 18 C.F.R. § 385.215(c). Based on Rule 215, the Complainants’ amendment became effective no later than June 2, 2017.

3 Trans Bay Cable LLC, Protest and Motion to Dismiss Amended Complaint; Motion for Sanctions; Motion for Dismissal of Parties for Violation of Commission Rule 606(b) (June 6, 2017), eLibrary No. 20170606-5162 (“Trans Bay’s Motion”).

4 See Complainants’ Amended Complaint and Motion to Consolidate (May 18, 2017), eLibrary No. 20170518-5185 (“Amended Complaint”).

5 See Complainants’ Complaint and Motion to Dismiss (Apr. 18, 2017), eLibrary No. 20170418-5343 (“Initial Complaint”).
I. ANSWER

A. The circumstances surrounding the disclosure of information protected by Rule 606 show that Trans Bay’s claims of intentional misconduct are unfounded.

Without proffering any supporting evidence, Trans Bay characterizes Complainants’ disclosure of settlement-privileged information as “intentional,” claiming that it “defies credulity that the disclosure was inadvertent or a mistake.” 6 Trans Bay is wrong. As explained in Complainants’ May 18 Transmittal Letter to the Commission, 7 this disclosure was inadvertent and was remedied as soon as it was brought to Complainants’ attention. Trans Bay’s accusations of intentional misconduct by Complainants are not based in any evidence or fact and should be disregarded by the Commission. Complainants provide below a description of the factual circumstances surrounding the inadvertent disclosure.

When drafting the Initial Complaint, Complainants included specific forecasted costs for four of Trans Bay’s planned maintenance projects 8 without recognizing that these forecasts were settlement-privileged. Trans Bay answered the Initial Complaint on May 8, 2017, but raised no objection to inclusion of the data and did not mention that the Initial Complaint contained privileged information. 9 Complainants therefore did not have reason to question the content of the Initial Complaint at that time.

On May 16, 2017, approximately one month after the Initial Complaint was filed, a corporate officer of Trans Bay informed counsel for the CPUC that the Initial

6 Trans Bay’s Motion at 2-3.
7 Amended Complaint, Transmittal Letter at 1.
8 The projects included the Geomagnetic Disturbance Study, the Stockton Dredging Impact Assessment, the Costs to Swap Spare Transformers, and the Renewal of the Power Module Warranty.
9 Trans Bay Cable LLC, Answer (May 8, 2017), eLibrary No. 20170508-5226 (“Trans Bay’s Answer”).
Complaint contained settlement-privileged information. Complainants were not told, however, what specific content in the Initial Complaint was privileged. In light of Trans Bay’s information, counsel for SWP reviewed the Initial Complaint to identify whether, in fact, it contained any privileged information. Late in the evening on May 16, counsel for SWP determined that the per-project cost information located on page 17 of the Initial Complaint had been provided in a document covered by the settlement privilege and had not been included in Trans Bay’s filing in the Rate Case.10

Upon identifying the settlement-privileged information, Complainants immediately undertook corrective action to remedy this disclosure. On the morning of May 17, counsel for SWP emailed FERC Online Support, as instructed by staff at the Commission, and requested that the security settings for the Initial Complaint be changed to “Privileged” in the Commission’s eLibrary system to protect the privileged information from further public exposure. (A copy of this communication is attached as Attachment A.) FERC Online Support staff did not take action on that request until after Complainants submitted the corrected version of the Complaint. (A copy of this communication is attached as Attachment B.) That same day, Complainants revised their Complaint to remove the privileged information.

The very next day, on May 18, Complainants filed the Amended Complaint without the privileged information, along with a Transmittal Letter explaining the basis for the amended filing and a redacted redline showing the changes made. On May 19, counsel for SWP was notified by FERC Online Support staff that the designation of the

10 As used herein, “Rate Case” refers to the proceeding in Docket No. ER16-2632.
Initial Complaint had been changed to “Privileged” in the eLibrary system. (A copy of this communication is attached as Attachment C.)

Trans Bay did not contact Complainants at any time between May 18, 2017 and the filing of its Motion on June 6 regarding the disclosure of the privileged information, nor were Complainants aware of the improper disclosure prior to May 16, 2017, at which time they acted as quickly as possible to remedy the error. Had Complainants learned of the error sooner, they would have removed the settlement-privileged information even earlier than May 18.

Settlement negotiations among the parties to the Rate Case continued until June 1, when the Settlement Judge declared an impasse\textsuperscript{11} and recommended that settlement procedures be terminated.\textsuperscript{12} On June 2, the Chief Administrative Law Judge formally terminated settlement proceedings in the Rate Case.\textsuperscript{13} On June 6, Trans Bay filed its Motion.

Complainants’ actions to cure the inadvertent disclosure as promptly as possible are inconsistent with Trans Bay’s accusations of intentional misconduct. Assertions that this disclosure was anything other than a mistake are unfounded.

\textsuperscript{11} Trans Bay Cable LLC, Final Report Recommending Termination of Settlement Judge Procedures (June 1, 2017), eLibrary No. 20170601-3021.

\textsuperscript{12} Trans Bay Cable LLC, 159 FERC ¶ 63,021 (2017).

\textsuperscript{13} Trans Bay Cable LLC, Order of Chief Judge Terminating Settlement Judge Procedures, Designating Presiding Administrative Law Judge, and Establishing Track II Procedural Time Standards (June 2, 2017), eLibrary No. 20170602-3009.
B. The sanctions Trans Bay seeks are disproportionate to the harm caused and would provide Trans Bay an unwarranted litigation advantage.

The gross disproportionality between the error at issue and the sanctions Trans Bay proposes is alone sufficient reason to reject Trans Bay’s Motion. Commission precedent reflects this core principle. Trans Bay’s Motion has no basis in Commission precedent and, indeed, Trans Bay cites no cases in which the Commission has imposed sanctions under similar circumstances.

A common limitation on sanctions is that they must bear some rational relationship to the wrong committed or the harm caused. See, e.g., Fresh Kist Produce, LLC v. Choi Corp., 362 F. Supp. 2d 118, 134 (D.C. Cir. 2005) (“[T]he central principle animating the award of sanctions is that they must always be proportionate to the wrong and damage done”) (citing Bonds v. Dist. of Columbia, 93 F.3d 801, 808 (D.C. Cir. 1996), reh’g denied, 105 F.3d 674 (D.C. Cir. 1996)); Ill. Tool Works, Inc. v. Metro Mark Prods., Ltd., 43 F. Supp. 2d 951, 962 (N.D. Ill. 1999) (“[A]n award of sanctions must be proportionate to the circumstances surrounding the failure to comply with discovery”) (citing Crown Life Ins. Co. v. Craig, 995 F.2d 1376, 1382 (7th Cir. 1993); Second Chance Body Armor, Inc., 177 F.R.D. 633, 637 (N.D. Ill. 1998)). Consistent with this principle, the Commission previously has declined to impose even less severe sanctions. For example, in Pennsylvania Power Co., the Commission denied a sanction request seeking attorneys’ fees, emphasizing that “[r]elief of so extraordinary a character can be
granted only in the clearest of cases.”

See also Fourth Branch Assocs. (Mechanicville) v. Niagara Mohawk Power Corp., 89 FERC ¶ 61,194 (1999) (declining to impose sanctions or further investigate parties’ allegations of impropriety where party disclosed privileged and confidential documents produced in the course of mediation), reh’g denied, 90 FERC ¶ 61,250 (2000), petition for review denied, 253 F.3d 741 (D.C. Cir. 2001). Trans Bay’s Motion and the sanctions it seeks are even more extraordinary given that Trans Bay fails to demonstrate that disclosure of the settlement-privileged information in any way prejudices or adversely impacts Trans Bay’s ability to prosecute the Rate Case or defend against the Complaint.

The only harm to Trans Bay asserted in its Motion is the speculative contention that the project-specific cost data may adversely impact Trans Bay’s dealings with vendors going forward. Yet, Trans Bay proffers nothing to support its contention, and there is no reason to believe this would be the case. The privileged information was public for a limited period of time during which Trans Bay itself took no action to mitigate the disclosure, and none of Trans Bay’s prospective vendors appear to have intervened in either the Rate Case or the Complaint docket.

Trans Bay’s initial inaction regarding the disclosure cannot be reconciled with its current claims of harm. Trans Bay could have, but did not, immediately call to Complainants’ attention the inclusion of settlement-privileged information in the Initial Complaint. Either Trans Bay overlooked this information, which undermines its

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contention that Complainants could not possibly have disclosed the information inadvertently, or Trans Bay made a calculated decision not to raise the issue, which undermines its claims of potential commercial harm.\(^\text{15}\)

Trans Bay’s accusations that Complainants failed to participate in settlement negotiations in good faith\(^\text{16}\) are similarly groundless. As they have done in Trans Bay’s two prior rate proceedings, which each resulted in a settlement, Complainants actively engaged in settlement discussions, including discovery and the exchange of multiple settlement offers.\(^\text{17}\) Trans Bay’s statements to the contrary are wrong.

Moreover, Trans Bay identifies no way in which Complainants have been advantaged by the disclosure. The error was rectified, and the Amended Complaint does not rely upon the privileged information. Even before it was redacted, the settlement-privileged information was not essential to the claims raised in the Complaint. Had the Complaint omitted this information entirely—as the Amended Complaint does—it would still show that the Transmission Revenue Requirement (“TRR”) in effect at the time the Initial Complaint was filed (the “TO-2 TRR”) and the TRR included in Trans Bay’s Rate

\(^{15}\) Complainants also note that Trans Bay’s Motion was filed two business days after the termination of settlement discussions in the Rate Case.

\(^{16}\) See Trans Bay’s Motion at 13.

\(^{17}\) See Trans Bay Cable LLC, Order Scheduling Settlement Activities (Dec. 13, 2016), eLibrary No. 20161213-3015 (setting forth dates for discovery and initial settlement offer); Trans Bay Cable LLC, Report by Settlement Judge (Feb. 27, 2017), eLibrary No. 20170227-3007 (reporting that “parties have exchanged preliminary discovery requests and responses”); Trans Bay Cable LLC, Order Scheduling Settlement Activities (Apr. 5, 2017), eLibrary No. 20170405-3009 (scheduling additional discovery dates); Trans Bay Cable LLC, Report by Settlement Judge (Apr. 28, 2017), eLibrary No. 20170428-3054 (reporting that the “participants have exchanged counter-offers”); Trans Bay Cable LLC, Order Scheduling Settlement Activities (May 24, 2017), eLibrary No. 20170524-3032 (referencing counter-offer made by Complainants and FERC Trial Staff).
Case (the “TO-3 TRR”) are excessive.\textsuperscript{18} To illustrate, the Amended Complaint, which does not rely on any settlement-privileged information, shows that Trans Bay’s TO-2 TRR exceeds the just and reasonable rate by at least $43,445,832, and that Trans Bay’s proposed TO-3 TRR exceeds the just and reasonable rate by at least $59,795,632.\textsuperscript{19} The amount by which Trans Bay’s TRR is excessive was only impacted by the privileged information to a \textit{de minimis} extent.

Trans Bay has requested sanctions that are wildly disproportionate to Complainants’ inadvertent mistake. Trans Bay’s principal request is that the Complaint be dismissed with prejudice and that two of the Complainants, SWP and the Six Cities, be dismissed as parties from Trans Bay’s Rate Case.\textsuperscript{20} This request is not just extraordinary, it is inconsistent with legal precedent. In the face of “litigation-ending sanctions,” like Trans Bay requests, courts typically have insisted that “‘since our system favors the disposition of cases on the merits, dismissal is a sanction of last resort to be applied only after less dire alternatives have been explored without success’ or would obviously prove futile.” \textit{Bonds v. Dist. of Columbia}, 93 F.3d at 808 (citing \textit{Shea v. Donohoe Constr. Co.}, 795 F.2d 1071, 1075 (D.C. Cir. 1986)). The sanctions Trans Bay seeks would afford it an unfair litigation advantage by eliminating two of the three parties—SWP and the Six Cities—that filed protests of its proposed rate. Rather than

\textsuperscript{18} The TO-2 TRR was in effect through April 22, 2017, and the TO-3 TRR became effective April 23, 2017. The TO-2 TRR was subject to a three-year rate moratorium, which expired on November 23, 2016.

\textsuperscript{19} \textit{See} Amended Complaint at 21.

\textsuperscript{20} Trans Bay’s Motion at 12-16. Trans Bay also alludes to unspecified sanctions that it apparently believes should be levied against counsel for Complainants (who bear the responsibility for the inadvertent disclosure of settlement-privileged information). \textit{Id.} at 12.
redressing any alleged harm to Trans Bay, the proposed sanctions would smooth its path through its current contested Rate Case, to the potential detriment of ratepayers.

At most, an appropriate sanction for Complainants’ disclosure in this case could be refusal to consider the privileged information in acting on the Complaint, not the extreme penalties Trans Bay seeks.\(^{21}\)

\section*{C. Trans Bay’s other arguments for sanctions are equally unfounded and should be rejected.}

Trans Bay makes two additional arguments in support of its request for sanctions and dismissal. First, Trans Bay objects to Complainants’ reliance on the Commission’s preferred two-step Discounted Cash Flow (“DCF”) analysis to support their showing that the return on equity (“ROE”) embedded in Trans Bay’s TRR is unjust and unreasonable. Second, Trans Bay claims that Complainants filed the Complaint despite the Commission’s earlier determination that a further investigation into Trans Bay’s rates was unwarranted. Both of these arguments are without merit.

The cases Trans Bay cites in support of its claims of vexatious litigation\(^{22}\) do not even remotely resemble the facts of the present case. For example, \textit{Ridge v. U.S. Postal Service}\(^{23}\) involved a petition to vacate an arbitrator’s award in which the attorneys “[did] not cite a single case supporting the use of 9 U.S.C. § 10 as a jurisdictional basis for vacating the arbitrator’s award,” offered no legal support for their theory supporting vacatur of the award, and had done little more than conduct a “cursory glance” at the

\footnotesize{\begin{enumerate}
\item \textit{See Fourth Branch Assocs. (Mechanicville)}, 89 FERC ¶ 61,194, at 61,411 (striking from the record a letter containing information confidentially produced in the course of mediation but declining to impose additional sanctions).
\item \textit{See Trans Bay’s Motion at 13-14.}
\end{enumerate}}
United States Code Annotated. Likewise, Ramirez v. Fox Television Station, Inc.\textsuperscript{24} involved a plaintiff’s attempt to re-argue a remand request under the guise of responding to a motion for summary judgment that the court had already considered and rejected. And in McLaughlin v. Bradlee,\textsuperscript{25} the court refused to overturn sanctions where “three previous suits had resolved the questions in [that] case.”

Here, Complainants relied on the two-step DCF analysis that the Commission adopted in Opinion No. 531.\textsuperscript{26} Trans Bay is correct, as Complainants acknowledged in the Complaint, that the D.C. Circuit vacated that opinion a few days before Complainants filed their Initial Complaint. What Trans Bay fails to acknowledge is that the Commission’s preferred two-step DCF analysis was not a subject of either the briefing and argument in that case or of the Court’s \textit{vacatur} order.\textsuperscript{27} While the Commission could, of course, choose on remand to adopt another methodology for establishing ROE, it is not sanctionable for Complainants to rely on a methodology that has never been declared unlawful by either the courts or the Commission. In fact, one of the Commission’s Administrative Law Judges has already ruled that parties should continue

\textsuperscript{24} Ramirez v. Fox Television Station, Inc., 998 F.2d 743, 750 (9th Cir. 1993).

\textsuperscript{25} McLaughlin v. Bradlee, 803 F.2d 1197, 1205-06 (D.C. Cir. 1986).


\textsuperscript{27} Emera Maine v. FERC, 854 F.3d 9 (D.C. Cir. 2017) involved a question of whether the Commission had satisfied the statutory requirements under section 206 of the Federal Power Act when it set a new ROE for the New England Transmission Owners. \textit{Id.} at 14-16. The Transmission Owners argued that the orders should be vacated because the Commission failed to find the Transmission Owners’ existing ROE unjust and unreasonable before setting a new ROE. \textit{Id.} Customers argued that FERC acted arbitrarily when it set the new ROE at the midpoint of the upper half of the zone of reasonableness. \textit{Id.} The D.C. Circuit found that “while the evidence in this case may have supported an upward adjustment from the midpoint of the zone of reasonableness, FERC failed to provide any reasoned basis for selecting 10.57 percent as the new base ROE,” and thus vacated the decision and remanded the case to the Commission for further consideration. \textit{Id.} at 30.
to use the two-step DCF analysis in an ongoing hearing addressing ROE.\footnote{See, e.g., Concurrence of the Presiding Judge, PP 2-3, \textit{Belmont Mun. Light Dep’t v. Cent. Me. Power Co.}, Order of the Chief Judge Confirming Rulings and Adopting Revised Procedural Schedule (May 26, 2017), eLibrary No. 20170526-3025 (finding that “\textit{Emera Maine} does not overrule the Commission’s adoption of the ‘two-step’ DCF methodology” and that it “is unnecessary for the parties or Staff to re-do their [two-step] DCF analyses that have been submitted in already-existing pre-filed testimony.”).} The Commission will presumably choose to address Complainants’ continued reliance on its two-step DCF methodology when it considers the merits of the Complaint.

Additionally, Trans Bay argues that Complainants “rehash[]” arguments that the Commission has already rejected in order to “harass, delay and drive up litigation costs.”\footnote{Trans Bay’s Motion at 14.} Trans Bay is wrong, and, in fact, the Commission has already found as much. In both this Rate Case and in the prior TO-2 Proceeding,\footnote{As used herein, “TO-2 Proceeding” refers to the proceeding in Docket No. ER13-2412.} Complainant the Six Cities (and the CPUC in the TO-2 Proceeding) asked the Commission, through its protests in both proceedings, to initiate a section 206 investigation \textit{sua sponte}. In both cases, the Commission denied the request. In both the Rate Case and the TO-2 Proceeding, the Six Cities (and in this case other Complainants as well) subsequently filed a section 206 complaint. Then, as now, Trans Bay argued that the complaint was vexatious because the Commission had already decided the issue of whether further investigation into Trans Bay’s rates was warranted.

The Commission disagreed. In its order setting Trans Bay’s TO-2 Proceeding for hearing and settlement, the Commission dismissed the Six Cities’ and CPUC’s requests for a section 206 investigation into the justness and reasonableness of Trans Bay’s then-effective TRR.\footnote{\textit{Trans Bay Cable LLC}, 145 FERC ¶ 61,151, P 21 (2013).} The Commission later emphasized, however, that it had “made no
finding that other parties were precluded from initiating their own FPA section 206 complaints.” This statement is consistent with the fact that the Commission does not use the same standard when considering whether to initiate a section 206 investigation or to act on a complaint. In the former case, it acts based on its unreviewable discretion; in the latter case, it “must hold an evidentiary hearing whenever a complainant raises a genuine issue of fact that is material to the justness and reasonableness of a rate and cannot be resolved upon the written record.”

Trans Bay attempts to distinguish the Commission’s prior and directly on-point decision by arguing that, in the TO-2 Proceeding, the Commission declined to initiate a section 206 investigation because Trans Bay “ha[d] complied with the Commission’s directives” and that in the Rate Case, it did so “[b]ased upon the record.” Trans Bay fails to engage with the fundamental fact that the standard is different when the Commission considers whether to initiate its own proceeding sua sponte than when it considers a complaint under section 206. It instead points to an irrelevant difference in the Commission’s wording of its orders setting Trans Bay’s rate cases for hearing and

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32 Cities of Anaheim v. Trans Bay Cable LLC, 146 FERC ¶ 61,100, P 20, reh’g denied, 147 FERC ¶ 61,189 (2014). The Commission often advises parties who request that the Commission initiate a section 206 investigation or who otherwise raise issues relating to the existing filed rate in protests of section 205 filings that a section 206 complaint is the proper vehicle for seeking redress relating to the existing rate. See, e.g., Yankee Atomic Elec. Co., 60 FERC ¶ 61,316, at 62,096 (1992). The fact that the Commission did not expressly do so here is of no import, because parties retain their statutory rights unless they are expressly waived. See, e.g., Sithe/Indep. Power Partners, L.P. v. Niagara Mohawk Power Corp., 76 FERC ¶ 61,285, at 62,458 (1996) (subsequent history omitted).

33 See Cities of Anaheim, 146 FERC ¶ 61,100, P 20 (citing Port of Seattle v. FERC, 499 F.3d 1016, 1027 (9th Cir. 2007)).


35 Trans Bay’s Motion at 14 n.54.
settlement. Trans Bay argues that sanctions should be imposed for Complainants’ reasonable disagreement over the interpretation of that wording.

Further, the Commission already addressed and rejected an argument similar to Trans Bay’s claims here that “[t]he Complaint’s rehashing of arguments that the Commission already rejected” is intended to “harass, delay and drive up litigation costs.” In the TO-2 Proceeding, Trans Bay claimed that the complaint filed there was “frivolous” and “administratively inefficient” because it “unduly burdened” Trans Bay and the Commission by requiring them to “respond to allegations that the Commission already previously dispensed with, and which are unsupported by sufficient evidence.” Rather than the sanctions it is seeking here, there Trans Bay sought attorneys’ fees based on the “frivolous” nature of the complaint. The Commission specifically rejected Trans Bay’s request for attorneys’ fees, finding that it did “not view the Complaint as ‘clearly frivolous.’” Trans Bay’s arguments in its current Motion are equally fallacious and should be rejected.

II. CONCLUSION

For the above reasons, Complainants respectfully request that the Commission deny Trans Bay’s Motion in its entirety.

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36 Id. at 14.
37 Trans Bay Cable LLC, Motion to Dismiss Complaint, Answer to Complaint, and Answer to Motion to Consolidate Proceedings at 21-22 (Jan. 6, 2014), eLibrary No. 20140106-5160.
38 Cities of Anaheim, 146 FERC ¶ 61,100, P 25.
Respectfully submitted,

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June 12, 2017
Good morning:

I write to request that the security settings for the complaint filed in Docket No. EL17-66-000, eLibrary accession no. 20170418-5343 (acceptance for filing forwarded below), be changed to “privileged.” Due to an oversight, this filing inadvertently contains privileged information that should be shielded from public disclosure. The complainants in this proceeding plan to re-submit an amended complaint later today to correct this error, but would like to take immediate action to protect the privileged information from further exposure. Should you have any questions regarding this request, please do not hesitate to contact me directly via phone at (202) 879-4021.

Thank you in advance,

Amber Martin

-----Original Message-----
From: eFiling@ferc.gov [mailto:eFiling@ferc.gov]
Sent: Wednesday, April 19, 2017 6:55 AM
To: Baird, Renae L.; eFilingAcceptance@ferc.gov
Subject: FERC Acceptance for Filing in EL17-66-000

Acceptance for Filing

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The FERC Office of the Secretary has accepted the following electronic submission for filing (Acceptance for filing does not constitute approval of any application or self-certifying notice):

-Accession No.: 201704185343
-Docket(s) No.: EL17-66-000
-Filed By: California Department of Water Resources State Water Project, Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California, California Public Utilities Commission
-Signed By: Katharine Mapes, Katharine Mapes, Katharine Mapes
-Filing Type: Complaints

-Submission Date/Time: 4/18/2017 4:47:16 PM - Filed Date: 4/18/2017 4:47:16 PM

Your submission is now part of the record for the above Docket(s) and available in FERC's eLibrary system at:


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E-Mail: efiling@ferc.gov (do not send filings to this address) Voice Mail: 202-502-8258.
From: Shirley Armstrong <Shirley.Armstrong@ferc.gov> on behalf of FERC Online Support <FERCOnlineSupport@ferc.gov>
Sent: Thursday, May 18, 2017 11:21 AM
To: Martin, Amber L.
Subject: FW: Request to change security of Complaint filed in EL17-66-000; eLibrary accession no. 20170418-5343

Good morning,

It has been requested from program office, you will need to resubmit the corrected version before this change is made.

From: Martin, Amber L. [mailto:Amber.Martin@spiegelmc.com]
Sent: Wednesday, May 17, 2017 9:56 AM
To: FERC Online Support <FERCOnlineSupport@ferc.gov>
Cc: Mapes, Katharine M. <Katharine.Mapes@spiegelmc.com>
Subject: Request to change security of Complaint filed in EL17-66-000; eLibrary accession no. 20170418-5343
Importance: High

Good morning:

I write to request that the security settings for the complaint filed in Docket No. EL17-66-000, eLibrary accession no. 20170418-5343 (acceptance for filing forwarded below), be changed to “privileged.” Due to an oversight, this filing inadvertently contains privileged information that should be shielded from public disclosure. The complainants in this proceeding plan to re-submit an amended complaint later today to correct this error, but would like to take immediate action to protect the privileged information from further exposure. Should you have any questions regarding this request, please do not hesitate to contact me directly via phone at (202) 879-4021.

Thank you in advance,

Amber Martin

AMBER L. MARTIN  |  202.879.4021
Associate
amber.martin@spiegelmc.com

SPIEGEL & MCDIARMID LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
Phone: 202.879.4000
Fax: 202.393.2866
www.spiegelmc.com

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-----Original Message-----
From: eFiling@ferc.gov [mailto:eFiling@ferc.gov]
Sent: Wednesday, April 19, 2017 6:55 AM
To: Baird, Renae L.; eFilingAcceptance@ferc.gov
Subject: FERC Acceptance for Filing in EL17-66-000

Acceptance for Filing

The FERC Office of the Secretary has accepted the following electronic submission for filing (Acceptance for filing does not constitute approval of any application or self-certifying notice):

- Accession No.: 201704185343
- Docket(s) No.: EL17-66-000
- Filed By: California Department of Water Resources State Water Project, Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California, California Public Utilities Commission
- Signed By: Katharine Mapes, Katharine Mapes, Katharine Mapes
- Filing Type: Complaints
- Submission Date/Time: 4/18/2017 4:47:16 PM
- Filed Date: 4/18/2017 4:47:16 PM

Your submission is now part of the record for the above Docket(s) and available in FERC's eLibrary system at:


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Thank you again for using the FERC Electronic Filing System. If you need to contact us for any reason:

E-Mail: efiling@ferc.gov (do not send filings to this address) Voice Mail: 202-502-8258.
Good morning,

We have changed the security to Privileged and included “Erroneously filed” in the description.

Good morning:

I write to request that the security settings for the complaint filed in Docket No. EL17-66-000, eLibrary accession no. 20170418-5343 (acceptance for filing forwarded below), be changed to “privileged.” Due to an oversight, this filing inadvertently contains privileged information that should be shielded from public disclosure. The complainants in this proceeding plan to re-submit an amended complaint later today to correct this error, but would like to take immediate action to protect the privileged information from further exposure. Should you have any questions regarding this request, please do not hesitate to contact me directly via phone at (202) 879-4021.

Thank you in advance,

Amber Martin

AMBER L. MARTIN | 202.879.4021
Associate
amber.martin@spiegelmcd.com

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-Submission Date/Time: 4/18/2017 4:47:16 PM -Filed Date: 4/18/2017 4:47:16 PM

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated on this 12th day of June, 2017.

/s/ Amber L. Martin

Amber L. Martin

Law Offices of:
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1875 Eye Street, NW
Suite 700
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(202) 879-4000