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Exhaustion of Administrative Remedies: The Lesson from Environmental Cases

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Exhaustion of Administrative Remedies: The Lesson from Environmental Cases

Abstract
The law governing exhaustion of administrative remedies is complex and confusing and fosters needless litigation: litigation that is burdensome to the courts and costly to defendants, that adversely affects agency decision making and that by its very existence, wrongly influences courts to dispense with the exhaustion requirement. Exhaustion remains troublesome to the courts; many of the decisions are confusing and poorly reasoned. A reexamination of the exhaustion doctrine is called for, not only to indicate how the cases should be decided, but also to clarify the issues sufficiently to guide parties' behavior so that they may avoid litigation over exhaustion's requirements. This Article undertakes such an examination, focusing on exhaustion as it arises in environmental cases. This Article examines the rationale underlying the exhaustion requirement. It finds that good reasons support the requirement, though not necessarily the same reasons that are usually recognized.

Keywords
Nader v. Nuclear Regulatory Commission, Reserve Mining Co. v. Minnesota Pollution Control

Disciplines
Environmental Law
Exhaustion of Administrative Remedies: Lessons from Environmental Cases

Marcia R. Gelpe*

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Exhaustion

THE GEORGE WASHINGTON LAW REVIEW

I. Introduction

"Exhaustion of administrative remedies before going to court is sometimes required and sometimes not."¹ This statement is an accurate but disturbing description of the state of the law on an important administrative law doctrine. The issue of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks judicial review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting judicial review only when all available administrative proceedings fail to produce a satisfactory resolution.

Presently, the law governing exhaustion of administrative remedies is complex and confusing and fosters needless litigation: litigation that is burdensome to the courts and costly to defendants, that adversely affects agency decision making, and that by its very existence, wrongly influences courts to dispense with the exhaustion requirement. Exhaustion remains troublesome to the courts; many of the decisions are confusing and poorly reasoned.² A reexamination of the exhaustion doctrine is called for, not only to indicate how the cases should be decided, but also to clarify the issues sufficiently to guide parties' behavior so that they may avoid litigation over exhaustion's requirements. This Article undertakes such an examination, focusing on exhaustion as it arises in environmental cases.³

¹. 4 K. Davis, Administrative Law Treatise § 26:1, at 414 (2d ed. 1983).
². Professor Davis suggests that what the courts say about exhaustion is worse than what they do about it. See 4 K. Davis, supra note 1, § 26:15, at 478.
³. The confusion surrounding the exhaustion doctrine creates more problems than deciding whether a particular case is correctly decided. For example, a lawyer researching the law on exhaustion by a computer research technique that searches by words and phrases must rely on decisions that have the right "buzz words." Yet, some decisions on exhaustion do not even include the term "exhaustion of administrative remedies." See e.g., Reserve Mining Co. v. Minnesota Pollution Control Agency, 294 Minn. 300, 200 N.W.2d 142 (1972) (plaintiff need not exhaust the remedy of seeking an administrative variance before challenging the reasonableness of a regulation as applied). Although both parties briefed the exhaustion issue extensively in Reserve Mining, Appellant's Brief and Appendix at 19-30; Brief and Appendix of Respondent at 108-17; Appellant's Reply Brief at 17-31; Reserve Mining Co. v. Minnesota Pollution Control Agency, 294 Minn. 300, 200 N.W.2d 142 (1972), the court never mentioned the term. In addition, conventional research is aided by appropriate headnotes that are added by the reporter's editors. Many decisions on exhaustion have no headnote on that topic in the West publications.
3. This Article focuses on cases involving the federal Environmental Protection Agency (EPA) and its state counterparts, which have responsibility for controlling most types of pollution, including air, water, and pesticide pollution, and cases involving the federal Nuclear Regulatory Commission (NRC), which has most of the responsibility for controlling radioactive pollution from nuclear power plants. Cases arising under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370
Many administrative law problems are best studied in a specific context. The environmental area presents good material for the study of exhaustion for several reasons. First, it is a highly regulated area in which much litigation also occurs; thus, the issue of allocation of decision-making authority between courts and agencies arises frequently. Litigants, trying to prod a sluggish agency or thwart an active one, tend to seek relief in the courts, bypassing at least some administrative procedures and thus presenting exhaustion issues. Second, the important arguments for and against requiring exhaustion are present in most environmental cases. On one side, the agency has been set up to address the very complex technological, economic, and sociological facts and political values that must be considered in solving environmental problems. On the other side, speedy resolution is needed because of the immediate impact of the action on public and economic health. Third, the environmental area offers material for examining the operation of the doctrine of exhaustion on the state as well as the federal level because both the states and the federal government regulate environmental discharges. Most studies of exhaustion of administrative remedies have been devoted to federal cases. Including state procedures in a consideration of exhaustion problems would be useful. Finally, the law on exhaustion in environmental cases appears to be in terrible disarray. It begs for analysis and guidance for courts and potential litigants.

This Article examines the rationale underlying the exhaustion requirement. It finds that good reasons support the requirement, though not necessarily the same reasons that are usually recognized. Requiring exhaustion helps agencies avoid the cost of making decisions without all interested parties present; increases accuracy, consistency, and public acceptability of administrative decisions; conserves judicial resources; discourages forum shopping; protects all interested parties’ rights to be heard; provides greater expertise in fact finding; and keeps policy judgments closer to the sphere of political influence. The Article then examines the problems that occur when parties litigate over exhaustion and illustrates the need for much greater clarity on exhaustion

(1982), are discussed mainly for the special problems they raise. A few cases consider the natural-resource obligations of the Department of Interior and state natural resources agencies.

4. Cf. S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 12 (1979) (discussing the “interplay between institutional structures, procedures, and substantive policy and the corresponding extent to which general administrative law principles are focused and redefined as they are applied to a given field of administration”).

5. See Comment, The Exhaustion Doctrine and NEPA Claims, 79 COLUM. L. REV. 385, 399 n.81 (1979) (suggesting that even if the agencies that enforce the National Environmental Policy Act have little environmental expertise, they have considerable expertise on other matters related to complying with the Act).

law than is usually recognized. Finally, the Article analyzes the exceptions to the exhaustion requirement. It recommends abolishing most of the common exceptions and narrowly limiting the others.

II. Background

A. Types of Administrative Remedies

Several types of administrative remedies may be available to a litigant. First, the administrative variance allows an agency to grant exceptions to its general rules. An agency may, for example, be authorized to grant variances from its general rules when compliance would cause undue hardship or be unreasonable, impractical, or infeasible.

Participation in a case-specific hearing is a second, similar rem-

7. This section describes six remedies. Other administrative remedies may be available. The relevance of the type of administrative remedy to the determination of whether exhaustion should be required is discussed in Part V of this Article.

Occasionally litigants have tried to assert exhaustion as a defense against an agency's enforcement action. See, e.g., State ex rel Pollution Control Agency v. United States Steel Corp., 307 Minn. 374, 240 N.W.2d 316 (1976). The Minnesota Pollution Control Agency (MPCA) sued U.S. Steel for abatement of air and water pollution and other civil relief. Minnesota law allowed the MPCA to issue an administrative enforcement order to polluters. MINN. STAT. § 115.03 (1(e)) (1978). The state chose not to do so; instead it sought direct judicial enforcement of the law under MINN. STAT. § 115.071 subd. 1 (1978). United States Steel claimed that the MPCA could not sue until it exhausted its administrative remedy of issuing an administrative order. Although the trial court agreed, the Minnesota Supreme Court appropriately rejected the claim. 307 Minn. at 379, 240 N.W.2d at 321; accord, United States v. Frazzo Bros., 602 F.2d 1123 (3d Cir. 1979) (government need not exhaust administrative remedy of giving defendant notice of violation), cert. denied, 444 U.S. 1074 (1980); State v. Dairyland Power Coop., 52 Wis. 2d 45, 55, 187 N.W.2d 878, 883 (1971) (calling the issue more one of primary jurisdiction than of exhaustion); see also United States v. Baker's Port, Inc., 18 Env't Rep. Cas. (BNA) 1871 (S.D. Tex. 1982) (dictum that agency's failure to comply with regulations on procedures to follow in bringing a civil action is not a prerequisite to bringing a civil action because regulations are merely advisory).

In Department of Env't Resources v. Pennsylvania Power Co., 461 Pa. 675, 337 A.2d 823 (1975), the court scolded the agency for not exhausting its remedies, but did not require it to exhaust. An earlier judicial ruling had ordered Penn Power to submit a plan for meeting DER regulations. The DER claimed that the plan which Penn Power submitted could not meet some of the regulations. The DER could have rejected the plan or sued Penn Power for violating the regulations, but instead, it sued for contempt. The court denied the contempt action on the ground that compliance was impossible, but warned "[i]n light of the fact that the parties had the opportunity to resolve their conflict through administrative procedures, we must remind the litigants we do not condone their otherwise proper reliance on the courts." Id. at 695, 337 A.2d at 833. The court's warning was inappropriate. The state had previously sued Penn Power for violating regulations. That suit produced the order to submit a compliance plan. In light of Penn Power's alleged violations of the court order, the resort to court was reasonable. This was not an exhaustion case.

edy. The most common example is a hearing for a permit. The most common example is a hearing for a permit. Many environmental laws use permit hearings to determine how a general statute or regulation applies to a specific case.

Participation in an administrative pre-enforcement conference provides a third, special type of informal hearing remedy. Under section 113 of the Clean Air Act, the Administrator of the federal Environmental Protection Agency (EPA) may issue administrative enforcement orders to persons violating specified provisions of the Act. The Administrator must offer an alleged violator an "opportunity to confer with the Administrator" before the order takes effect. The order then must specify a reasonable time for compliance, considering the seriousness of the violation and good faith efforts to comply. An administrative order may be enforced by a civil action for an injunction or a civil penalty, or for both. The issue of exhaustion would arise if a defendant who chose not to participate in an administrative pre-enforcement conference challenged the validity of an order as a defense to a civil enforcement action.

Review of a decision by an appellate body within the agency is a fourth remedy, which may arise, for example, if an agency's practices allow a party aggrieved by an administrative rule to appeal to an oversight board within the agency. The oversight board might not be able to grant an exception to a rule but could change a rule or an order. In McGrady v. Callaghan the court considered exhaustion of an administrative appeal. The Director of the State Department of Natural Resources issued a mining permit. Owners of property near the mining site brought a mandamus action to require the Director to revoke the permit, claiming that the permit-issuing procedure violated their constitutional rights. The court held, in the alternative, that the plaintiffs were not entitled to mandamus because they had not sought to appeal the permit issuance before the Department, as the agency's regulations allowed.

Participation in an agency's rulemaking procedures provides a fifth administrative remedy, as illustrated by Nader v. Ray. The plaintiffs sought a preliminary injunction restraining the chairperson of the Atomic Energy Commission from permitting the continued operation of twenty nuclear power plants on the grounds that their operating licenses had been issued in violation

11. Id. § 7413(a)(4).
12. Id.
13. Id. § 7413(b)(1).
15. Id. at 795; see also Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3rd Cir. 1972) (unexhausted administrative appeal of variance denial), cert. denied, 409 U.S. 1125 (1973).
of statutory standards. The court denied the injunction, holding that the plaintiffs could have raised their claim in both completed and ongoing administrative rulemaking proceedings. Their failure to do so constituted a failure to exhaust administrative remedies.17

Finally, the only remedy available in some cases is petitioning the agency for a rehearing, a reconsideration of a decision, or a new rulemaking.

B. Origin of the Exhaustion Doctrine

The leading federal decision on exhaustion of administrative remedies is Myers v. Bethlehem Shipbuilding Corp.18 In Myers, the Supreme Court held that a court may not enjoin administrative proceedings on a complaint even if the plaintiff before the court

17. Id. at 953-54. The court listed the following rulemaking procedures in which the plaintiffs could have participated or could still participate: public comment period on adoption of the agency's policy statement interpreting the statute, public rulemaking hearing on whether to retain or revise the agency's policy statement, and public comment period on a draft environmental statement on the rulemaking. Id. The court also noted that the plaintiffs could petition the agency for review of the public policy statement or intervene in the permitting or licensing of the 20 plants. Id.

Subsequently, the plaintiffs chose to request relief from the agency. The agency treated this as a petition to alter a regulation and denied the petition. The plaintiffs sought judicial review of the denial. In Nader v. NRC, 513 F.2d 1045 (D.C. Cir. 1975), the court rejected each of the plaintiffs' claims on the merits. It also said that the nature of at least some of the plaintiffs' claims was an attack on the agency's standards called the “Acceptance Criteria.” Id. at 1054. The agency had just completed a rulemaking on whether to keep or change those standards. Plaintiffs apparently had not participated in these or other related rulemaking proceedings. The court said that under these circumstances it would be inappropriate to engage in judicial review — although it seems to have done so anyway.


18. 303 U.S. 41 (1938). Although Myers is widely regarded as the leading Supreme Court statement on exhaustion, it arose under atypical facts. The only action that the National Labor Relations Board (NLRB) had taken was to schedule a hearing. Plaintiffs sought to enjoin the agency from making any substantive decisions or even determining whether it had jurisdiction over the complaint. The Court found, without discussion, that Congress had vested in the Board exclusive jurisdiction over the issue of whether it has jurisdiction to hear a complaint. Id. at 49-50.

The National Labor Relations Act, 29 U.S.C. § 160 (1982), expressly grants the Board exclusive jurisdiction to consider the merits of a complaint, but does not on its face say anything about the Board's jurisdiction to determine its own jurisdiction. The Court's statement that the statute gave the Board exclusive jurisdiction over the main issue in the case should not be accepted at face value.

Much more typical of exhaustion decisions is United States v. Sing Tuck, 194 U.S. 161 (1904). An administrative official, an immigration officer, denied Sing Tuck entry into the United States. The governing statute provided a right to administrative appeal. Petitioners did not file an administrative appeal but sought judicial review of the inspector's decision. The Court required them to use the available administrative remedy. Id. at 168, 170.
claims that the agency lacks jurisdiction to act. 19 The Court based its decision on what it called "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." 20 The Court provided little exposition of the rationale behind the rule. It indicated that an injunction would interfere with Congress's determination that certain issues should be decided exclusively by the agency in the first instance, but it did not discuss what interests in "judicial administration" were at stake. On this level, requiring exhaustion is no more than complying with congressional intent. Later case law developed the exhaustion doctrine further, basing it on reasons of policy more than on expressed legislative intent. 21

C. Distinguishing Exhaustion From Primary Jurisdiction and Ripeness

The doctrines of exhaustion, primary jurisdiction, and ripeness are closely related. All address the allocation of decision-making authority between courts and agencies. All involve balancing the advantages of maintaining the integrity of an agency's decision-making processes in complex factual areas against the need for speedy resolution of disputes.

The doctrine of primary jurisdiction typically arises when a party asks a court to decide an issue that does not involve judicial review of an administrative action. Primary jurisdiction comes into play if that claim could also be heard initially by an administrative agency. The court must decide whether to give the agency primary jurisdiction over the claim, thereby declining to hear the claim until it is decided by the administrative body. 22 In the typical exhaustion case the agency has already taken some action and the court must decide whether to review the agency's action or require the plaintiff first to invoke further administrative proceedings. 23

19. 303 U.S. at 47.
20. Id. at 50-51.
22. This distinction between primary jurisdiction and exhaustion can be illustrated by a hypothetical. Assume a company that is discharging effluents into a lake in excess of state regulatory standards is seeking an administrative variance that would allow its discharges. Variance proceedings are not yet complete. A citizens' group brings an action under a state's environmental rights act to enjoin the company's discharges in excess of those permitted under the regulatory standard. The environmental rights act gives any person residing within the state standing to seek an injunction against any corporation that is violating an environmental quality standard or rule. The question of whether the company is justified in exceeding the regulatory limits would be before the agency in the variance proceeding and before the court in the suit under the environmental rights act. These circumstances present the court with the issue of primary jurisdiction; it must determine whether to give the agency the first opportunity to decide the question.
23. Wisconsin v. Metropolitan Council, 12 ENVTL. L. REP. (ENVTL. L. INST.) 20,617 (D. Minn. 1982), illustrates how exhaustion and primary jurisdiction issues may overlap. The Metropolitan Council operated a sewage treatment plant that discharged into the Mississippi River. Downstream of the discharge point, the river forms part of
Exhaustion of administrative remedies is also related to the doctrine of ripeness. Courts do not review administrative decisions that are not "ripe," that is, not sufficiently finalized to warrant judicial scrutiny.\textsuperscript{24} The ripeness issue asks whether an agency has reached a decision or is still deliberating. The exhaustion issue asks whether a plaintiff has used all procedures at the agency level to influence the decision.\textsuperscript{25}

When the unexhausted administrative action is an administrative appeal, exhaustion is clearly distinguishable from ripeness. The agency has reached a decision, but could reverse it. When the unexhausted agency action is a variance proceeding, the line between the two doctrines blurs. The agency has reached a decision by promulgating a general regulation. If a plaintiff claims that the regulation should not apply to it, but raises that claim in court rather than in an administrative variance proceeding, the case seems to raise the question of ripeness. The agency never had the opportunity to decide whether the regulation should be altered for that plaintiff. There is no final agency decision on that question to review. The issue could also be characterized as exhaustion. When the agency passed the regulation, it decided that the regulation should apply to all parties. That is a final decision. The agency also provided the variance mechanism to address individ-

the Wisconsin border. Some Wisconsin residents objected to the high level of pollutants in the plant effluent and in the river. The Attorney General of Wisconsin sued the Minnesota Pollution Control Agency (MPCA) for a declaratory order prohibiting the MPCA from reissuing a permit for the Council's sewage treatment plant unless certain conditions were met. At Wisconsin's request, the MPCA had already instituted, but not yet completed, an administrative hearing on the permit. The court denied relief on several grounds: first, that no federal cause of action was available, and alternatively, that primary jurisdiction lay with the MPCA. The court noted that the relief sought might be obtained from the administrative proceeding. Id. at 20,619.

Unlike the typical primary jurisdiction case, this suit was filed against the agency, not against the opposing party in the original dispute. Thus the court was asked to affect the agency's determination directly. Yet, Metropolitan Council is unlike the typical exhaustion case because the plaintiff was not seeking review of an agency's determination. The administrative hearing had not yet been completed. Cf. Izaak Walton League of Am. v. St. Clair, 497 F.2d 849 (8th Cir.) (plaintiff's suit to enjoin federal government from granting mineral permit raises issues of primary jurisdiction), cert. denied, 419 U.S. 1009 (1974); Friends of the Earth v. NRC, 15 Env't Rep. Cas. (BNA) 1110 (N.D. Cal. 1980) (suit to require NRC to prepare environmental impact statement dismissed under doctrine of primary jurisdiction); Honicker v. Hendrie, 465 F. Supp. 414 (M.D. Tenn. 1979) (agency must be allowed to determine whether to revoke its license before court addresses issue). The decision in National Audubon Soc'y v. Superior Court of Alpine County, 21 Env't Rep. Cas. (BNA) 1490 (Cal. 1983) illustrates the difficulty of distinguishing exhaustion from primary jurisdiction in another context. Judge Richardson's concurring and dissenting opinion is more illuminating than the holding of the court.

\textsuperscript{24} See 4 K. Davis, supra note 1, § 25:1; B. Schwartz, supra note 6, § 179.

\textsuperscript{25} For an excellent discussion of the differences between and similarities of exhaustion and ripeness, which is also called "finality," see Bethlehem Steel Corp. v. EPA, 669 F.2d 903, 908 (3d Cir. 1982).
ual cases in which it would be inappropriate to apply to general regulation. This is an administrative remedy and the issue is whether it must be exhausted.26

Exhaustion, primary jurisdiction, and ripeness all ask when a court should exercise its jurisdiction over a claim, and when it should defer to an agency. Although this Article focuses on exhaustion, the analysis should be helpful to an understanding of primary jurisdiction and ripeness as well.

III. Rationale Underlying the Exhaustion Requirement

Courts and commentators offer little discussion of the reasons why litigants should be required to exhaust their administrative remedies before obtaining judicial review of administrative action. Yet, the reasons behind the doctrine are not self-evident. The requirement of exhaustion is not a necessary feature of administrative agencies with internal appellate or variance procedures. One can envision a scheme that includes similar administrative procedures but allows petitioners the option to have judicial review of an agency’s initial decisions. This option would not render the internal procedures useless. Many petitioners would choose to have their appeals or requests for variances heard by the agency rather than by a court because of lower costs, more rapid decision making, simpler procedures, and greater ease of self-representation.27 Some parties would choose the agency because they expect it to be more receptive to their claims. Even if exhaustion were never required, legislatures and agencies could reasonably decide to establish procedures for granting administrative remedies simply to benefit parties who cannot afford litigation. Moreover, the cost of resolving a claim may be lower to the government and the taxpayer when petitioners who would otherwise litigate choose instead to rely exclusively on administrative remedies.

What reason is there, then, for making exhaustion mandatory? The authorities offer several explanations: protecting administrative autonomy, preserving the separation of powers, gaining judi-

26. Dow Chem. Co. v. Ruckelshaus, 477 F.2d 1317 (8th Cir. 1973), illustrates another difficulty in distinguishing between exhaustion and ripeness. The EPA issued an order to cancel registration of a Dow pesticide. The cancellation order itself had no effect on Dow’s right to ship and market the pesticide. Id. at 1319. If Dow did nothing, the cancellation order would become effective in 30 days. Id. But Dow had the right to file an objection with the EPA and request a hearing. Dow did both and also sought other relief from the agency. The Administrator of the EPA ordered a hearing. As the court interpreted the governing statute, the EPA could issue a final order of cancellation after the hearing, and only then would the cancellation be effective. Dow also sought judicial review of the cancellation order.

The court refused to review the order. First it treated the issue implicitly as one of ripeness (or finality): whether the cancellation order was a final statement by the agency. It then treated the issue as one of exhaustion: whether the administrative hearing was a remedy that Dow had to exhaust. The issue seems most properly one of ripeness, because the agency never fully formulated a decision, but the distinction is far from clear.

27. For similar reasons, many parties choose arbitration of claims that can be raised either in litigation or arbitration.
cial economy, avoiding administrative inefficiency, and permitting courts to benefit from an agency’s determination of facts and exercise of discretion. This Article re-examines each of these reasons as well as two new ones: preserving the limited scope of judicial review and protecting the representation of diverse interests.

A. Administrative Autonomy

Standing alone, the frequently advanced explanation that exhaustion of administrative remedies is necessary for protection of administrative autonomy is vague and concluorsory. It is unclear what protection of administrative autonomy means. No agency has absolute autonomy because almost every administrative action is subject to judicial review, and all are subject to legislative review. Moreover, why administrative autonomy, whatever it embodies, should be valued and protected is unclear. Therefore, the administrative-autonomy rationale does not on its surface justify the exhaustion doctrine.

B. Separation of Powers

Professor Jaffe suggests that separation of powers is behind the administrative autonomy aspect of the exhaustion requirement:

Under the Anglo-American conception, administrative agencies are distinct entities; they are not a part of the judicial system. Judicial control comes in from the outside. The agency is either within the Executive or, under Humphrey’s Executor “independent.” The Judiciary will not lightly interfere with a job given to the Executive until it is clear that the Executive has exceeded its mandate. The exhaustion doctrine is, therefore, an expression of executive and administrative autonomy.

Separation of powers is a vague doctrine. One of the best definitions asserts that no department of government “should be

28. See McKart v. United States, 395 U.S. 185, 194 (1969), citing L. Jaffe, supra note 6, at 425; see also B. Schwartz, supra note 6, at 498.


permitted to exercise a degree of power . . . which renders it un-
duly dangerous to human freedom."32 Whatever separation of powers means, it does not demand that courts have no involve-
ment in administrative action, or judicial review would be imper-
missible.33 The connection between the doctrines of exhaustion of
administrative remedies and separation of powers needs a clearer
definition in order for the latter to justify the former.34

C. Judicial Economy

Some courts and commentators argue that exhaustion should be
required for reasons of judicial economy.35 Exhaustion require-
ments lighten the judicial workload because the agency may dis-
pose of the problem in a way that satisfies all parties, avoiding
judicial review. The economic advantage that administrative reso-
lution brings to courts still does not explain why administrative
resolution is preferable to judicial resolution. The real issue is
whether the public resources consumed by judicial resolution of a
controversy exceed those consumed by administrative resolution
and, if judicial review is sought, ultimate judicial resolution. Prob-
ably, administrative resolution is less expensive than judicial reso-
lution because administrative proceedings are less formal, ad-
ministrators with greater technical backgrounds can reach fact-
ually accurate decisions more quickly, and administrative vari-
ance and review boards are less costly to maintain than courts.
However, this economy may evaporate when one adds the costs of
ultimate judicial review of the administrative decision discounted
by the probability that judicial review will not be sought.

Requiring exhaustion may sometimes serve judicial economy. In
some cases, a court hearing a case without requiring exhaustion
must decide factual issues de novo. If exhaustion were required,
and followed by judicial review, the court would consider those
issues on a deferential review standard.36 A deferential review is
less demanding for a court.

Of course, enhanced judicial economy does not alone justify re-
quiring exhaustion. Economy is only one of several values a pro-
cedural system should provide.37 We would reject a system that

33. Professor Parker argues that a system with complete separation of powers
would have no judicial review. See Parker, supra note 31, at 476.
34. See generally 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2:6 (2d ed. 1978).
Professor Parker suggests that separation of powers requires at least that courts defer
to agencies' decisions. See Parker, supra note 31, at 479. Exhaustion does sometimes
protect the deferential standard of judicial review. See infra notes 63-85 and accompa-
nying text. See also Strauss, The Place of Agencies in Government: Separation of
Powers and the Fourth Branch, 84 COLUM. L. REV. 573 (1984) (discussing the separa-
tion of powers doctrine as it relates to administrative agencies).
35. See McKart v. United States, 395 U.S. 185, 195 (1969); Bethlehem Steel Corp. v.
EPA, 669 F.2d 903, 907 (3d Cir. 1982); 2 F. COOPER, supra note 29, at 573; 4 K. DAVIS,
supra note 1, § 26.1, at 415; L. JAFFE, supra note 6, at 424-25; B. SCHWARTZ, supra note
6, at 498.
36. See infra notes 73-78 and accompanying text.
37. Economy (or efficiency) is one of three criteria Professor Cramton suggests
provided economical but wrong decisions. Therefore, it is important to consider other values.

D. Administrative Efficiency

The Supreme Court has reasoned that exhaustion of administrative remedies protects efficiency in administrative processes: "[I]t is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals."38

As a general proposition, this reasoning is unpersuasive. Exhaustion cases typically arise when the agency has completed one step or action and the party seeking judicial consideration has failed to invoke another administrative action, usually involving different agency personnel. There is no disruption of the agency's procedures.39 The situation is unlike an interlocutory appeal, where the judicial process at the trial level is stopped in the middle.

Is there any other basis for the administrative inefficiency rationale? Perhaps it would be inefficient for an agency to bear the cost of litigating a problem that might be resolved through the cheaper unexhausted administrative proceedings. This is an "administrative economy" rationale. On the other hand, it might be less expensive for the agency to litigate first if the problem will not be finally resolved by even the full administrative process. If the agency were to deny relief and the plaintiff then sought judicial review of the denial, the agency's costs might be greater.40 The overall impact of the exhaustion doctrine on agencies' costs is sufficiently unclear that it lends no support to the efficiency argument.

for evaluating procedural systems. See Cramton, A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 VA. L. REV. 585, 592 (1972). Both administrative efficiency and judicial economy should be evaluated under this criterion because they both relate to "time, effort, and expense" that go into reaching a final solution. Id. The other criteria are accuracy and acceptability. See infra notes 53-72 and accompanying text.

38. McKart v. United States, 395 U.S. 185, 194 (1969). Similar reasoning is found in Falbo v. United States, 320 U.S. 549, 558 (1944) (Murphy, J., dissenting). Justice Murphy explained, "[t]hose rules [requiring exhaustion] are based upon the unnecessary inconvenience which the administrative agency would suffer if its proceedings were interrupted by premature judicial intervention." See also Bethlehem Steel Corp. v. EPA, 669 F.2d 903, 907 (3d Cir. 1982); 2 F. COOPER, supra note 29, at 573.

39. In this regard, exhaustion seems to be treated like ripeness. Ripeness does involve problems of interrupting agency procedures.

40. Professor Jaffe discussed this problem in analogizing the exhaustion issue to the issue of whether appellate courts should hear interlocutory appeals from trial courts. L. JAFFE, supra note 6, at 424-25.
Real inefficiency occurs if a party initiates administrative remedies and goes to court at the same time, forcing the agency to incur costs in two forums. Although such cases do arise, they are too atypical to justify the whole exhaustion doctrine.

The administrative efficiency argument is convincing in one type of exhaustion case that arises more frequently: when the unexhausted administrative remedy is participation in an agency's hearing or rulemaking proceeding. Typically, the agency has conducted a hearing without the plaintiff's participation; if the plaintiff had participated, the agency might have resolved the issue with little extra work. The agency should not later be required to address the issue in costly and time-consuming litigation.

*Nader v. Nuclear Regulatory Commission* illustrates this particular exhaustion problem. The Atomic Energy Commission issued criteria for judging the acceptability of emergency core-cooling systems in nuclear-reactor licensing procedures. The Commission then initiated a rulemaking proceeding to consider modifying the "Acceptance Criteria." The plaintiffs did not participate in the rulemaking proceeding, but instead petitioned the Commission to shut down or derate twenty nuclear power plants licensed under the Acceptance Criteria on the grounds that the safety of their cooling systems had not been suitably established. The Commission denied the petition, and the plaintiffs sought judicial review. The court characterized their claim as one for a collateral review of the Acceptance Criteria and wrote that it would create an "impossible situation" to allow a person who did not participate in an administrative proceeding to come to court for relief.

*Nader v. Nuclear Regulatory Commission* and other cases involving the unexhausted administrative remedy of participation in rulemaking proceedings differ from cases involving administrative variances, appeals, or rehearings. In the latter cases, litigation substitutes for an unexhausted administrative proceeding. This causes less inconvenience to the agency than in the administrative hearing cases, when the administrative proceeding has been held without the plaintiffs' participation. Litigation is not a substitute

41. See, e.g., Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972) (Getty, after being denied a variance from certain regulations, prosecuted simultaneously an administrative appeal and an action in Delaware Chancery Court), cert. denied, 409 U.S. 1125 (1973).

42. Moreover, under the procedures available in some agencies, other interested parties may have a chance to comment on the plaintiff's position, thus increasing even more the base of information and ideas available to an agency's decision makers. This is true whenever the agency holds open oral hearings and also under some written hearing procedures. See Clean Air Act § 307(d)(3)-(4), 42 U.S.C. § 7607(d)(3)-(4) (1982) (all comments on a proposed rule must be placed on a public docket so that parties can comment on the comments).

43. 513 F.2d 1045 (D.C. Cir. 1975).

44. The Atomic Energy Commission was the predecessor to the Nuclear Regulatory Commission.

45. 513 F.2d at 1054-55, quoting, Red River Broadcasting Co. v. FCC, 98 F.2d 282, 286-87 (D.C. Cir. 1938).
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for the administrative hearing; it is, instead, an added burden. Therefore, requiring exhaustion does avoid inconvenience to the agency.46

Sometimes pre-enforcement administrative conferences are the unexhausted administrative remedy. These cases fall somewhere between the others. If a party chooses not to participate in a conference, none will be held and the situation resembles the variance, appeal, and rehearing cases. On the other hand, the agency will go through the work of formulating an order, possibly without knowing or considering all relevant aspects of the plaintiff's position. The agency may be forced to duplicate its efforts if it must consider some of these aspects in a plaintiff's later court challenge to the validity of the order.47

If the unexhausted remedy is a rulemaking hearing or a pre-enforcement conference, the administrative remedy would have preceded a formulation of the agency's position. In these cases, considerations of administrative efficiency justify requiring exhaustion. In the other, more common types of cases, initial administrative proceedings have been concluded, there has been a distinct cessation in an agency's proceedings, and requiring exhaustion does not protect administrative efficiency.

E. Agency's Opportunity to Correct Its Own Errors

Some authorities argue that exhaustion should be required to give the agency a chance to correct its own errors.48 Presumably, this means that the agency should be able to alter its own unwise decisions through administrative appeals or to provide escape hatches through variance proceedings for individual situations in which the burden of administrative regulation is particularly onerous. Why let an agency make these corrections internally rather than

46. Sometimes the agency will convene a new rulemaking to hear the plaintiff's claims, which would seem to restore the administrative inconvenience. But the agency can hear comments on the plaintiff's claims by all other interested parties in the rulemaking, which is more efficient than litigating only the plaintiff's claims and potentially facing other interested parties' views on those claims if they later prevail in petitions for renewed rulemaking.

47. For example, before an administrative enforcement order is issued under the Clean Air Act, the Administrator must consider the alleged violator's good faith compliance efforts. Clean Air Act § 113(a)(4), 42 U.S.C. § 7413(a)(4) (1982). If the alleged violator does not participate in the pre-enforcement conference, the Administrator must still consider the compliance efforts on the basis of whatever information is available. If a nonparticipating violator later challenges the order on the ground that it does not accurately reflect the compliance efforts, the agency would again have to consider the efforts, at least to formulate its defense. Requiring exhaustion avoids this duplication of effort.

have a court require the agency to make the corrections? Errors will be corrected under either method.

Letting an agency correct its own errors offers several possible advantages. First, it promotes public faith in the agency. People will trust the agency more if they see that it reaches "correct" decisions on its own. This is good in itself if we believe that people should trust their government. It is also good because it will lead people to rely on cheaper administrative rather than more expensive judicial procedures to try to correct the agency's "errors." If people less frequently seek judicial review of administrative decisions, both the government and other parties will save.

An agency may also become better informed on the effects of its activities if it corrects its own errors. Once better informed, it is likely to make wiser decisions in promulgating rules, deciding cases, and determining whether to grant variances and appeals. The presentation of variance requests and administrative appeals to an agency informs the agency of the effects of its actions, which it is less likely to discover if regulated parties could seek judicial relief without seeking an administrative remedy.49

F. Attaining Accurate Determination of Facts

The exhaustion requirement has also been justified as granting the courts the benefit of an agency's factual determinations.50

49. This second argument assumes that agency personnel do not follow the development of facts in litigation as closely as they do in administrative proceedings. This is no doubt more true for some cases and for some agencies than for others. It is likely that in some agencies facts developed in litigation are closely followed by agency personnel who have significant influence on policy development and regulatory decision-making. In other agencies, litigation is managed by lawyers outside the agency or by lawyers lacking policy-making authority, with little oversight by policy makers in the agency.

For example, litigation involving the Minnesota Pollution Control Agency (MPCA) is handled by attorneys in the State Attorney General's Office who are permanently assigned to the MPCA and have their offices in the MPCA building rather than in the Attorney General's office. These lawyers need authorization of the MPCA Board of nine citizen representatives to conduct litigation and they report periodically to the Board on the progress of litigation. They do not participate directly in policy-making. Conversation with Lisa Tiegel, Special Assistant Attorney General, State of Minnesota, assigned to the MPCA (July 15, 1983). Policy is set by the MPCA Board of nine members who serve part time; most have other full time jobs and few are lawyers. It is unrealistic to expect them always to follow the intricacies of environmental litigation. This has been the author's experience as a member of the Board from January, 1984, to the present. It is confirmed by a conversation with Eldon Kaul, Assistant Attorney General, State of Minnesota, serving as chief counsel to the MPCA (July 20, 1983). Once the Board directs the staff to litigate, the staff director, rather than the board, oversees litigation developments.

In contrast, the Board is required to consider facts developed in administrative proceedings. People for Envtl. Enlightenment and Responsibility (PEER), Inc. v. Minnesota Envtl. Quality Council, 266 N.W.2d 858, 873 (Minn. 1978). Because the Board members receive detailed factual summaries and transcripts of these proceedings and hear citizens' testimony on factual issues before they act, it is more likely that the Board members closely review the crucial facts in an administrative context.

50. See McKart v. United States, 395 U.S. 185, 194-95 (1969) (discussing the exercise of an agency's expertise as a reason justifying exhaustion); 4 K. Davis, supra note 1, § 26:1, at 415; L. Jaffe, supra note 6, at 425. Professor Cooper reports that the attitude of state courts is that "the doctrine of exhaustion of administrative remedies
Professor Jaffe observes that this reason parallels an appellate court's reason for refusing interlocutory appeals: the development of facts and exercise of judgment by the lower court may clarify the issues on appeal. But the analogy does not always work. Appellate courts refuse many interlocutory appeals because they need the fact finding and judgment of trial courts. Appellate courts lack fact-finding mechanisms and appellate judges are not in the habit of addressing themselves to factual issues. In addition, trial judges are in a better position to exercise judgment because they see and hear the witnesses; they can temper their discretionary decisions by their impressions of the fact presentations. These reasons do not apply to all exhaustion cases. When a trial court is called on to consider a variance or review an agency's decision prior to exhaustion, that court is well equipped to receive and consider evidence. The interlocutory-appeal analogy is apt in cases in which statutes provide for direct review of an agency's decision before an appellate level court, or allow review only on the record. It cannot explain the need for exhaustion when a case is brought before a trial court that can take additional evidence.

Courts do need prior agency factual determination because the agency's expertise may enable it to make better determinations. Many issues assigned to administrative determination involve complex factual problems that agency personnel have special abilities to solve. The agency's experts can gather, digest, and evaluate information more quickly and, therefore, more economically than a court. Moreover, because the agency's experts can evaluate information more accurately, the agency is more likely to make correct factual determinations.

The factual determination/expertise rationale generally justifies the exhaustion doctrine, subject, however, to two qualifications. First, it applies more strongly to some unexhausted administrative remedies than to others. It clearly applies where the unexhausted administrative remedy entails application of the

is to be applied as a rule of orderly procedure which embodies due and deferential regard for the legislative wisdom and policy in providing expert administrative tribunals to deal with specialized fields.” 2 F. Cooper, supra note 29, at 573, citing Central R.R. v. Neeld, 26 N.J. 172, 139 A.2d 110 (1958); see also Arsenal Coal Co. v. Department of Env'tl Resources, 71 Pa. Commw. 187, 193, 454 A.2d 658, 660-61 (1983) (finding that technical factual issues in the areas of hydrology, soil mechanics, pollution control, and engineering require a decision based on agency expertise), rev'd, 477 A.2d 1333 (Pa. 1984); Fuchs, supra note 6, at 866 (stating that a practical reason for requiring exhaustion exists if the agency possesses technical expertise not possessed by the court but which is necessary for the decision).


52. See, e.g., Clean Air Act § 303(b), 42 U.S.C. § 7607(b) (1982); Clean Water Act § 509(a), 33 U.S.C. § 1369(b) (1982).
agency's expertise to a new factual issue. For example, the state agency in Reserve Mining Co. v. Minnesota Pollution Control Agency \(^{53}\) passed a general limitation on water effluents. Reserve challenged the regulation in court, claiming primarily that it was entitled to a variance because the regulation was unreasonable as applied.\(^{54}\) The same issue could have been raised in an administrative variance proceeding.\(^{55}\) When the agency passed the general effluent limitation regulation, it did not need to consider in detail the effect of the regulation on individual facilities. Individual effects would have been relevant in a variance proceeding. When Reserve sought a judicial variance from the general regulation, it sought to deny the agency the opportunity to address the individual effects issue. Therefore, the court was wrong when it refused to require exhaustion.\(^{56}\)

In contrast, if the administrative remedy open to Reserve were an administrative appeal of the regulation as a whole, the agency's appellate body would not be addressing any new factual issues. In such cases, the factual determination/expertise argument is less compelling, though still persuasive, if an expert within the agency

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\(^{53}\) 294 Minn. 300, 200 N.W.2d 142 (1972).

\(^{54}\) Reserve Mining Co., No. 05011, slip op. at 1 (Dist. Ct. Minn. 1970) (reprinted in Appellant's Brief and Appendix, supra note 2, at A-21). Reserve also challenged the validity and applicability of an anti-degradation provision. Id. at 1 (reprinted in Appellant's Brief, supra note 2, at A-21). The agency conceded that the provision applied only to discharges that began or increased after the state's adoption of the amendment and did not apply to Reserve. Id. at 13.


hears administrative appeals. That expert is more adept than a judge at factual determination on matters within the agency's jurisdiction.\textsuperscript{57}

The second qualification is that some agencies are more expert than others. Initial factual determination by an agency is less important if the agency's personnel lack real expertise. At one end of the spectrum, some federal agencies have a great deal of expertise. For example, the EPA had a staff of 12,403 people in 1982,\textsuperscript{58} including many highly trained scientists, engineers, and lawyers. At the other end of the spectrum, in an area not usually labelled as environmental but contributing to environmental decisions, are local zoning boards of appeal, which consider applications for zoning variances. These boards are generally acknowledged to have no expertise at all.\textsuperscript{59} State environmental agencies typically lie between these two extremes;\textsuperscript{60} they have enough expertise to warrant exhaustion on this ground.

Agencies may be particularly expert at factual determinations even when the agency's officials themselves have little factual expertise. Many administrative remedies are open to participation by others besides the regulated party. For example, anyone may participate in informal rulemaking proceedings. These participants, who often include "public interest" representatives, may provide facts for the agency and may raise questions that lead an agency's officials to seek out more facts on their own. Such broad participation is not generally found in judicial proceedings, where status as an intervenor or an \textit{amicus curiae} is not as readily available as is the right to participate in administrative proceedings. The availability of and active participation by outside experts en

\textsuperscript{57} Similarly, the factual determination/expertise rationale for exhaustion is strong when the unexhausted remedy is participation in an agency's rulemaking procedures. The rationale is very weak when the remedy is a rehearing before the same agency body that previously decided an issue.

\textsuperscript{58} \textit{BUREAU OF THE CENSUS, UNITED STATES DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1984}, at 336 (104th ed. 1982).

\textsuperscript{59} See 3 R. ANDERSON, \textit{AMERICAN LAW OF ZONING} § 17.15, at 113 (2d ed. 1977).

\textsuperscript{60} For example, the Board of the Minnesota Pollution Control Agency is appointed by the Governor. See, e.g., \textit{MINN. STAT.} § 116.02 (1) (1977). Members have no particular expertise by training in the matters decided by the Board, although many pick up a good deal of information on the job. See \textit{supra} note 49. The statute requires that at least one member of the Board be knowledgeable in the field of agriculture. As of December, 1984, the Board consisted of a secretary (as chairperson), physics professor (as vice-chairperson), lawyer specializing in environmental law, carpenter who is a union officer, resource management administrator for the Chippewa tribe, retired Air Force officer who is also an engineer, naturalist-ornithologist, farmer, and writer. The Board is advised by the agency's staff of 363, which has a great deal of expertise. Conversation with John Retzer, Principal Accounting Officer, Minnesota Pollution Control Agency (Aug. 17, 1983) (figures for fiscal year 1984). The Board regularly receives information and advice from the staff, but is not obligated to act upon staff suggestions.
hances factual determination at the administrative level. Requiring exhaustion makes full use of these valuable resources.

G. Promoting Democratic Values

Many administrative decisions turn on exercise of discretion rather than on determination of facts. Exercising discretion involves making and applying policy choices. It does not include factual determinations, but rather decisions on what to do about the facts. The factual determination/expertise rationale, therefore, does not apply and cannot justify the exhaustion requirement in cases concerning discretionary decisions.

Reserve Mining illustrates an agency’s determination based on discretion. The agency’s regulation authorizes the Minnesota Pollution Control Agency to grant variances to individual sources, requiring the agency to consider the difficulty of a source complying with the standards, the effects on the public of requiring or not requiring compliance, and the difficulties and effects of various levels of partial compliance. Then the agency must make a discretionary judgment on whether compliance would cause “undue” hardship and be “unreasonable” and what conditions to prescribe in the variance. These decisions necessarily have to be based not simply on facts, but also on the agency’s determination of tradeoffs between the private and public costs of compliance and the public costs of effluents exceeding the standards. Because the tradeoffs cannot be quantified objectively, this determination is discretionary and ultimately rests on policy choices.

Agencies, rather than courts, should have the major responsibility for making such policy choices. Of the two institutions, agencies have more direct sources of information on political values of people and have more direct political responsibility.  


62. 294 Minn. 300, 200 N.W.2d 142 (1972). See supra notes 53, 54, 56 and accompanying text.


65. But see Bethlehem Steel Corp. v. EPA, 723 F.2d 1303 (7th Cir. 1983). Writing for the court, Judge Posner held that courts may have to enforce people’s political values when an agency has refused.

An agency that may be dominated by one faction in the legislative struggle that led to enactment of a compromise is not authorized to hand that faction a victory that was denied it in the legislative arena through the efforts of another faction. The court must enforce the compromise, not the maximum position of one of the interest groups among which the compromise was struck.

Id. at 1309.

On the other hand, Justice Rehnquist has said that agencies are insufficiently politically responsive to be trusted with important discretionary decisions. Industrial
Presidents and governors who appoint the top officials in environmental agencies are sensitive to these political issues, as are the legislators who regularly review the agency's work. Moreover, major actions by these agencies attract much public attention. Diverse groups participate in hearings, providing agencies with not only technical information but also political views. Officials within the agency who are not responsive to these views risk losing their jobs. Perhaps more importantly, people believe that administrative officials should be politically responsible, and this belief, which we can assume to be shared by those officials, influences their actions. In contrast, judges are appointed for life in some jurisdictions. In other jurisdictions, judges are elected, but the elections are not designed to make judges politically responsive. Judicial terms are long, many elections are uncontested, and the issue in contested elections is usually competence rather than the popularity of decisions. Thus, agencies are more responsive to the political process than are courts and, therefore, are the more appropriate body for deciding discretionary, policy-choice issues.

Requiring exhaustion for claims that present political issues assures that the ultimate decision rests largely on the agency's judgment of those issues. Of course, the doctrine of exhaustion does not bar courts from considering discretionary policy issues. Courts may review almost all administrative decisions based on discretion. But when the court merely reviews the agency's discretionary decision, the standard of review is a narrow one and the ultimate outcome is less likely to reflect a judge's views on policy choices than it would if a discretionary decision is initially made by a court.

H. Preserving a Limited Scope of Judicial Review

Requiring exhaustion of administrative remedies preserves the integrity of the rules setting a limited scope of judicial review of an agency's action. Courts called on to review administrative decisions usually defer to the agency's determination. In the vast majority of cases, review is not de novo, but rather is limited in scope. Review is limited when a court reviews an agency's determination

Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 686-87 (1980) (Rehnquist, J., concurring); see Stewart, The Reformation, supra note 61, at 1676-88 (discussing the "problem of discretion"). Agencies are arguably not as insulated from political winds as these sources suggest.  
66. See generally Stewart, The Reformation, supra note 61 (describing and analyzing the interest representation model of administrative law, characterized by efforts to ensure adequate representation of all those affected by agency actions).
67. Accord, 4 K. Davis, supra note 1, § 26:1, at 415 (noting the importance of an agency's exercise of its policy preferences in reaching a final result).
on a question of fact and in many cases when it reviews a mixed question of law and fact. In theory, courts review administrative determinations on questions of law without deference, but this is not always followed in practice. For example, courts regularly defer to agencies’ interpretations of their own statutes, which is a pure question of law. Engaging in deferential review, a court may articulate a clearly erroneous, substantial evidence, or arbitrary and capricious standard. Under all of these standards, courts defer to agencies’ decisions.

The practice of judicial deference to administrative determinations leads to more accurate decisions by preserving the application of an agency’s expertise to an issue and promotes judicial efficiency when complex factual issues are at stake. In addition, courts sometimes defer to agencies’ interpretation of their regulations. See generally Weaver, Judicial Interpretation of Administrative Regulations: The Deference Rule, 45 U. Pitt. L. Rev. 587 (1984).


72. See SEC v. Associated Gas & Elec. Co., 99 F.2d 795, 798 (2d Cir. 1938) (A. Hand, J.); Steenerson v. Great N. Ry., 69 Minn. 353, 377, 72 N.W. 713, 716-17 (1897); B. Schwartz, supra note 6, § 204, at 579. In Steenerson, the Minnesota Supreme Court said:

How is a judge, who is not supposed to have any of this special learning or experience, and could not take judicial notice of it if he had it, to review the decision of commissioners, who should have it and should act upon it? It seems to us that such a judge is not fit to act in such a matter. It is not a case of the blind leading the blind, but of one who has always been deaf and blind insisting that he can see and hear better than one who has had his eye-sight and hearing, and has always used them to the utmost advantage in ascertaining the truth in regard to the matter in question.

69 Minn. at 876-77, 72 N.W. at 716. This analysis was apparently less compelling to the same court in 1977 when it handed down the last of its Reserve Mining decisions. See supra note 56 and accompanying text.

73. See Hardin, Mayor of Tazewell v. Kentucky Util. Co., 390 U.S. 1, 9 (1968). Once administrators have waded through a complex factual issue, to require a judge to go through the facts again is very time consuming. Not only would a judge duplicate the administrators’ efforts, but, because of the judge’s lack of expertise, the judge
one commentator has suggested, no doubt correctly, that judges invoke the doctrine of limited scope of review to help them dispose of cases quickly and thereby alleviate calendar pressures.\textsuperscript{74} In these ways, deference is related to some of the common justifications for exhaustion. Deference goes further, however, by helping to preserve the consistency of an administrative scheme across judicial jurisdictional boundaries. It decreases the chance that different courts will reach different results in reviewing an administrative action.\textsuperscript{75} Deference also promotes consistency by increasing the likelihood that reviewed and unreviewed cases will reach the same outcome. If an agency treats two like cases in a like manner and judicial review is sought for only one of the cases, deferential review makes it more probable that such consistent treatment will be preserved. It is less likely that the cases would have consistent outcomes if one case were decided by an agency and one de novo by a court.

In some types of exhaustion cases, plaintiffs must be required to exhaust if the rule of limited review and its advantages are to be preserved. This occurs, for example, when a party seeks judicial determination that a regulation does not apply to it without first trying to get an administrative variance, as in \textit{Reserve Mining}.\textsuperscript{76} The issue of applicability there involved complex questions of fact and policy, including the difficulty of compliance and the public and private effects of compliance, noncompliance, and partial compliance.\textsuperscript{77} If Reserve had been required first to seek an administrative variance, the agency would have determined these matters. If Reserve had then sought judicial review of the agency's variance decision, the reviewing court would have considered the agency's determinations on a deferential standard.\textsuperscript{78}

As it was, the \textit{Reserve Mining} court did not require exhaustion and decided the case de novo. It sacrificed the values of accuracy, efficiency, and administrative consistency that the rule of deference seeks to preserve. It also led to a strange standard of judicial review. The trial court employed a deferential standard of review

\textsuperscript{74} B. SCHWARTZ, supra note 6, § 204, at 580.
\textsuperscript{75} See NLRB v. Southland Mfg. Co., 201 F.2d 244, 246 (4th Cir. 1952) (upholding agency's finding of facts as supported by substantial evidence).
\textsuperscript{76} Reserve Mining Co. v. Minnesota Pollution Control Agency, 294 Minn. 300, 309, 200 N.W.2d 142, 147 (1972); see also supra note 62 and accompanying text.
\textsuperscript{77} See supra note 63 and accompanying text.
\textsuperscript{78} In Minnesota the standard would have been substantial evidence. Sunstar Foods, Inc. v. Uhlendorf, 310 N.W.2d 80, 84-85 (Minn. 1981); \textit{MINN. STAT.} § 14.69(e) (1982). Under the standard, the court should have upheld the agency decision if reasonable, even if the court would not have made the same decision if deciding the case de novo.
on the issue of the regulation's facial reasonableness, but, with the Minnesota Supreme Court's blessing, decided de novo the issue of the regulation's reasonableness as applied to Reserve. The issue of the regulation's reasonableness as applied is as dependent on technical facts as is the issue of facial reasonableness and is more subject to inconsistent decisions regarding different parties. If the court had required exhaustion, it would have avoided this incongruous result.79

The need to preserve the limited scope of review does not justify the exhaustion requirement in all cases. For example, when the unexhausted administrative remedy is an administrative appeal, the court will employ a deferential review standard whether it is reviewing the agency's initial decision or the agency's appellate decision. If no new issues would be introduced on administrative appeal, the court will give deferential review to an agency's determination of identical issues with or without exhaustion. However, whenever pursuit of the unexhausted administrative remedy would raise new issues before the agency, the need to preserve the deferential review standard justifies an exhaustion requirement.80

Finally, exhaustion is necessary when deferential review is at stake in order to prevent forum shopping. If, for example, Reserve's attorneys could have predicted that the Minnesota Pollution Control Agency would deny a variance and that the court would uphold the denial on deferential review, then Reserve could have determined the case's outcome by choosing to bypass the administrative remedy and seek a judicial variance.81 Under such a scheme, like cases would not receive like treatment. To avoid this result, exhaustion of administrative remedies must be required.

I. Protecting Representation of Diverse Interests

A current model of administrative law holds that an essential feature of administrative procedure is participation by representa-

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79. One court used a twisted version of the deferential standard of review analysis to justify not requiring exhaustion. In Izaak Walton League of Am. v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1971), the plaintiffs asked the court to order the Atomic Energy Commission to issue an environmental impact statement on a license. The plaintiffs had not participated in the agency's proceedings on the license. The plaintiffs became interested in the proceedings after their right to intervene had expired but while they could still petition the agency for permission to intervene. The court reasoned that they need not petition the agency because a denial of permission by the agency would be reviewable on only a deferential standard. The agency might deny permission and be upheld, preventing the court from ever reaching the merits of the plaintiffs' claims. Id. at 292-93. This reasoning is faulty: the court never explains why its inability to reach the merits of the plaintiffs' claims is undesirable.

80. This includes not only administrative variance cases, but also cases in which the unexhausted agency remedy is an administrative appeal in which new issues will be raised, participation in a permit hearing or other case-specific hearing, participation in an administrative enforcement hearing, or a petition for reconsideration or for a rulemaking on the basis of new evidence.

81. Perhaps Reserve went directly to court for this very reason.
tives of diverse interests. These representatives can check an agency's exercise of discretion more effectively than can courts. They also present a more direct means of political input than do elections, which involve unarticulated voter compromises on multiple issues and give little voice to minority points of view. By resolving competing demands of interest-group representatives, agencies reach decisions that are more broadly acceptable.

This process is furthered by requiring exhaustion whenever an agency's remedy provides for participation by representatives of diverse interests. This occurs, for example, when the remedy is an open informal rulemaking proceeding or some more formal hearing in which it is easy for any interest-group representative to be designated as a party. Even if representatives of diverse interests could participate in court proceedings, they may choose not to do so because it is costlier than appearing before an agency. Therefore, the goals of interest representation are more likely to be achieved if a litigant is remanded to the agency for an open administrative proceeding.

IV. Problems With Exceptions to the Exhaustion Requirement

The sweeping language of Myers v. Bethlehem Shipbuilding Corp., that "no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted," has often been honored in the breach. Many exceptions to the exhaustion requirement are now recognized.

Whenever courts fail to require exhaustion, they sacrifice the benefits behind the doctrine. In individual cases, this sacrifice may be justified to protect countervailing values. The benefits behind exhaustion, however, are so fundamental that the tradeoff should not be made lightly. Moreover, exceptions reach beyond

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83. It is generally easier to be admitted as a participant in an agency's proceeding than as an intervenor or amicus in a judicial proceeding. See supra text following note 60.
85. 4 K. DAVIS, supra note 1, § 26:1, at 414. In fact, in a case with almost the same facts as Myers, the Supreme Court held that a court could decide the issue of the NLRB's jurisdiction prior to a Board decision on that issue. Leedom v. Kyne, 358 U.S. 184, 187-89 (1956); see 4 K. DAVIS, supra note 1, § 26:4, at 426-27.
86. The major conditions under which exhaustion will not be required are if the agency's remedy is inadequate or futile, if the case involves legal rather than factual issues, if the agency lacks jurisdiction, or if exhaustion would lead to irreparable injury. See infra Part V.
individual cases to create systematic problems. When these problems are weighed in balance, few exceptions are justified.

The exceptions to the exhaustion requirement are not clearly delineated.\textsuperscript{87} Courts must sometimes undertake an extensive analysis of the facts of a case to determine whether an exception applies. Moreover, the current trend in the law is to go beyond recognizing stated, albeit vague, exceptions, and instead determine whether to require exhaustion by weighing various considerations as applied to a particular case.\textsuperscript{88}

The vague definitions of the exceptions and the trend toward balancing create numerous problems. They lead to inconsistent treatment of similar cases on the issue of whether exhaustion should be required.\textsuperscript{89} They also lead to inconsistent treatment of

\begin{itemize}
\item how harsh is the penalty that plaintiff will suffer if barred from asserting his claims in court;
\item ... will allowing a by-pass of administrative procedure seriously impair the ability of the agency to perform its functions;
\item does the issue upon which the decision turns involve matters of particular agency expertise;
\item would judicial review be significantly aided by ... allowing the agency to make a factual record, apply its expertise or exercise its discretion;
\item how likely is it that the judiciary will be overburdened with suits stemming from the same administrative failure . . . ;
\item how significant is the role of administrative autonomy — the notion that the courts should not usurp [agency] powers and duties . . . and . . . “the agency [ought to be] given a chance to discover and correct its own errors”?
\end{itemize}

Ecology Center, 515 F.2d at 866; see also Fuchs, supra note 6, at 884.

A balancing test weighted against exhaustion appears in City of Battle Creek v. FTC, 481 F. Supp. 538 (W.D. Mich. 1979), a case brought under the NEPA. The court asserted, “The real test is whether the interests underlying the exhaustion rule clearly outweigh the severity of the burdens that would be imposed upon the plaintiff if it is denied judicial review.” Id. at 544. The MODEL STATE ADMIN. PROC. ACT § 5-107(3), 14 U.L.A. 149 (Supp. 1984), adopts a mini-balancing standard on the irreparable harm exception. Similarly, in discussing whether a litigant risking irreparable injury can have a court consider the jurisdiction of an administrative body without exhausting, Professor Davis proposes that a court consider the extent of injury from pursuit of the administrative remedy, the degree of doubt about the agency’s jurisdiction, and the need for specialized administrative understanding regarding jurisdiction. 4 K. DAVIS, supra note 1, § 26:5, at 432. This test was followed in USI Properties Corp. v. EPA, 517 F. Supp. 1235, 1243 (D.P.R. 1981).

In 1972 Professor Davis observed that the weighing approach, though followed in some cases, had not been widely adopted. He commented, with apparent exasperation: “Perhaps the courts prefer unprincipled discretion on the subject of exhaustion.” K. DAVIS, supra note 68 § 20.03, at 388. By 1983, he had found that, “the courts generally do what they obviously should do” by adopting the weighing approach. 4 K. DAVIS, supra note 1, § 26:1, at 414.

89. In the second edition of his treatise, Professor Davis observes that, although courts do weigh the need for exhaustion in individual cases, there remains as much doubt as predictability of outcome. 4 K. DAVIS, supra note 1, § 26:1, at 414.
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like cases on the merits of the underlying dispute. Because the law on exhaustion is so uncertain, parties deciding whether to pursue an administrative remedy or go to court cannot accurately predict whether a court would require exhaustion. Some parties who would be entitled to a judicial resolution will not seek judicial relief. If a court and an agency would not reach the same result, like cases will be treated differently.

The uncertainty in the law on exhaustion increases a party's cost of determining whether to exhaust an administrative remedy or to seek immediate judicial review. If the law on exhaustion is clear, that decision is easy. If the law is uncertain, the decision is more difficult. Even if application of a vague law results in a just decision in a given case, the holding provides little guidance and imposes decisional costs on parties with subsequent conflicts.

Finally, the uncertainty of the exhaustion exceptions increases litigation over whether exhaustion is necessary. Parties who would prefer judicial resolution of their claims are encouraged to seek judicial review without exhausting hoping that the courts will apply one of the exceptions.90 Litigating exhaustion issues has adverse effects, even if exhaustion is eventually mandated.

Exceptions that are difficult to apply, or that must be weighed and balanced, burden the court's decision-making process.91

90. Cf. Berger, Exhaustion of Administrative Remedies, 48 YALE L.J. 981, 1006 (1939) (retention of discretion in the application of the exhaustion rule constitutes a continuing invitation to litigation); Comment, Limiting Judicial Intervention in Ongoing Administrative Proceedings, 129 U. PA. L. REV. 452, 455-56 (1980) (vague rules on exhaustion give litigants incentive to "challenge agencies at every turn").

91. In discussing his suggested weighing approach, Professor Davis recognized the burden on the judicial process and offered two responses. He suggested that the burden would be lightened as the Supreme Court clarified the law in deciding specific cases. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 20.03, at 73 (1958). See also 4 K. DAVIS, supra note 1, § 26:5, at 432 ("as the precedents accumulate that show how each of the three factors is appraised in varying circumstances, law will in some measure replace discretion"). He also argued that the heavy burden on courts and litigants could not be helped. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 20:03, at 73-74.

The first response is overly optimistic in its assumption that the variety of cases is small enough that the effect of the weighing process can be clarified by a few decisions. Courts have actually found the application of a weighing test extremely burdensome. In USI Properties v. EPA, 517 F. Supp. 1235, 1239 (D.P.R. 1981), the court held a day of hearings and visited the plaintiff's property before determining whether the exceptions of irreparable injury and lack of agency jurisdiction applied. See infra text accompanying notes 123-26. The burden on the courts reached an even greater extreme in Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231 (3d Cir. 1980), cert. denied, 449 U.S. 1096 (1981), which involved a challenge to the NRC's consideration of radioactive pollution problems. The court held that as a general matter the propriety of requiring exhaustion depended on so many specific facts that "analysis is not likely to be thorough if it is attempted at the outset on a motion to dismiss . . . ." Id. at 246. Susquehanna Valley seems to hold that a court must consider the merits of a case before the court can decide whether the plaintiff should have exhausted. Professor Davis's first response also ignores that
Moreover, litigation over exhaustion is costly to defendant agencies. A clear rule on exhaustion would avoid much of this cost.

Even when courts require a litigant to resort to administrative remedies, litigation over exhaustion may affect an agency's determination on the merits. On the one hand, having opposed the litigant in court over the exhaustion issue, agency personnel may view the litigant as "the enemy" and deny a request for administrative relief without seriously considering the merits. On the other hand, agency personnel may fear the applicant's established willingness to litigate and grant requested administrative relief that is unjustified by the merits in order to avoid further litigation. Either result is undesirable; the outcome on the merits of a claim should be independent of whether the exhaustion issue is first litigated.

Litigation over exhaustion puts agencies in a virtually impossible litigation position. The agency must argue both that the litigant should be required to exhaust and, if exhaustion is not required, that the litigant should lose on the merits. The agency's argument on the merits is taken as showing that the agency would not give relief if the administrative remedy were sought, that exhaustion would be futile, and that, therefore, exhaustion should not be required. This problem has troubled both state and federal courts.

North Suburban Sanitary Sewer District v. Water Pollution Control Commission illustrates the conflict. The Commission adopted standards prohibiting sewage discharges into a portion of a river. The regulations also empowered the Commission to grant administrative variances for reasons of undue hardship, unreasonable enforcement, and public necessity. The plaintiff District, which planned to build a sewage treatment plant discharging into the river in the no-discharge zone, sought judicial review of the standard. The trial court set aside the standard as unreasonable and unlawful. On appeal, the Commission argued that, procedurally, judicial review was premature because the plaintiff had not applied for a variance and that, on the merits, the standard was unreasonable. The Minnesota Supreme Court held that review was not premature because the Commission's vigorous defense of the standards through months of litigation persuaded the Court that a variance would be denied.

not only the United States Supreme Court but also the highest tribunal in each state would have to be involved in the clarification process.

The second response is, perhaps, overly pessimistic. This Article suggests that the burden on courts can be reduced.

92. In my experience in the Office of General Counsel of the Environmental Protection Agency, I observed both of these reactions. Although sometimes one reaction cancels the effect of the other, one cannot rely on such cancellation.

93. 281 Minn. 524, 162 N.W.2d 249 (1968). See also W.F. Hall Printing Co. v. EPA, 16 Ill. App. 3d 864, 306 N.E.2d 595 (1973) (exhaustion not required because agency's decision to pursue an appeal on other matters related to the complaint indicated the futility of requiring exhaustion).

94. 281 Minn. at 535, 162 N.W.2d at 256. The court explained:
The court’s holding is understandable. Once an agency argues that prohibition of a discharge is not unreasonable, judges may doubt that the agency would give full and fair consideration to a

We are not persuaded that the Commission would have doggedly supported its findings and standards through months of litigation in the district and supreme courts if, as it now suggests, it was from the inception agreeable to issuing a variance . . . . Technical niceties aside, it is clear from the . . . vigorous defense of [the standards] that the District would have been placed in the same posture in which it now finds itself had it pursued the remedies the Commission contends were proper and available.

Id.

Natural Resources Defense Council v. Train, 510 F.2d 692 (D.C. Cir. 1974), arose when the Natural Resources Defense Council (NRDC), a public interest environmental group, brought an action to compel the Administrator of the EPA to issue effluent-limitation guidelines as required by the Federal Water Pollution Control Act. 33 U.S.C. § 1251-1376 (1982), amended by Clean Water Act of 1977, Pub. L. 95-217, § 1, 91 Stat. 1566, 33 U.S.C. §§ 1251-1376 (1982). The district court granted the relief sought, Natural Resources Defense Council v. Train, 6 Env’t Rep. Cas. (BNA) 1033 (D.D.C. 1973), and the agency appealed, claiming that NRDC did not exhaust its administrative remedy by failing to provide a statutorily specified notice of the lawsuit to the agency. The statute required notice at least 60 days prior to initiation of litigation against the agency in order to allow the agency to act on the matter and obviate the need for litigation. 510 F.2d at 703. Although the court explicitly recognized that Congress designed the administrative remedy to allow the agency to correct its own errors, id. at 700, the court refused to require exhaustion, finding that going back to the agency would be futile. “We are presented with no evidence that the agency desires to reassess its plans . . . [for issuing the guidelines] and the course of the present action clearly indicates that the agency’s position with regard to its discretion . . . [whether to issue guidelines] is firmly rooted.” Id. at 703.

The court based its decision not to require exhaustion on its perception that the agency would not do what the plaintiff wanted, a perception it gained, in part, from the agency’s opposition to the plaintiff’s arguments on the merits of the litigation. The court assumed that, because the agency opposed the plaintiff on the merits in the litigation, it would not give NRDC the relief sought. More specifically, the court must have assumed that the agency fully considered the plaintiff’s position after litigation commenced and before the EPA decided to oppose the NRDC’s argument on the merits. The court’s assumption is not necessarily true. If it were, the 60-day notice provision would be unnecessary because an agency could just as well decide whether to correct its own errors once litigation was initiated.

In this case, the court had a better reason for assuming that the agency would not change its position. The agency’s failure to raise exhaustion at the trial level suggests that the EPA had no real interest in considering the NRDC’s claims but was ready to litigate their validity. Had the EPA raised exhaustion below, the NRDC might have exhausted immediately, saving unnecessary litigation expenses if the agency did change its position. The NRDC could not then have claimed, as reasonably, that EPA led the organization to forego exhaustion. The appellate court should have refused to hear the agency’s argument on exhaustion because it was not raised in the lower court.

The court’s reliance on the agency’s position on the merits of the litigation and its finding of futility is wrong. It encourages other courts reviewing agencies’ actions not to require exhaustion, even if the agency does raise exhaustion from the beginning.

Moreover, one can argue that courts should be particularly rigorous in requiring exhaustion in cases like Natural Resources Defense Council v. Train precisely because the administrative remedy is so simple. The cost of giving the agency 60 days notice is insignificant. Few plaintiffs would suffer any harm from waiting 60 days to file a complaint. The cost of briefing and deciding the exhaustion question far exceeds the cost of exhausting in this case.
discharger's variance application. However, an agency might argue in litigation that a regulation is reasonable as applied even though it would find the same regulation unreasonable were the issue first posed in an administrative forum. The people who make decisions about litigation positions are not always the same as those who participate in decision making when administrative remedies are used. The decision-making processes may also differ. Both people and process may affect a substantive position. In addition, once litigation arises, the issue for the agency may become how to win. A bias against accommodation may set in; the agency may not want to indicate to the public that litigation is the best way to gain concessions. Moreover, once an agency has publicly stated in litigation that a regulation is reasonable as applied, changing that stance becomes politically difficult. The public may not understand that the agency's position on reasonability was only part of a litigation strategy and is not technically inconsistent with a later contrary position in an administrative proceeding.

The litigation itself, therefore, may create the futility. Requiring exhaustion when the issue is first raised, separately from the merits in a motion to dismiss, is the only way to avoid this situation.

The rationale for the exhaustion holding in *North Suburban* may be criticized on the grounds that the court should have recognized the right of the agency to make inconsistent claims in litigation. In other contexts, we allow litigants to make inconsistent claims without acknowledging that one argument undermines the other. For example, federal and state rules of procedure allow defendants to advance inconsistent defenses. See, e.g., *Fed. R. Civ. P. 8(e)(2)*; *Cal. Civ. Proc. Code* § 431.30 (West 1973 & Supp. 1984); *Ill. Ann. Stat. ch. 110, § 2-604* (Smith-Hurd 1983 & Supp. 1984); *Minn. R. Civ. P. 8.05(2)* (West 1979 & Supp. 1984).

The court's decision is also inconsistent with the well-established requirement, at least on the federal level, that the justification for agencies' decisions be found in the administrative record and not just in papers prepared specifically for litigation. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). The rule is designed, in part, to prevent the lawyers from giving a gloss of rationality to an agency's decision originally made without a rationale. The rule recognizes that courts do not trust lawyers in litigation to state the agency's position without a separate administrative record. If this is so in the context of judicial review, it should also be true in the context of exhaustion.

For example, the final decision on the variance that Reserve Mining Company requested of the Minnesota Pollution Control Agency, discussed *supra* in the text accompanying notes 53-56, would have been made by a lay board in a public meeting, whereas decisions on litigation positions were made privately by the legal and non-legal staff.

Decisions such as *North Suburban* and *Natural Resources Defense Council v. Train* can have repercussions beyond the effect on the parties. The holdings effectively preclude an agency's lawyers from appealing adverse exhaustion decisions. If an agency loses on exhaustion and on the merits initially, and appeals on both grounds, a court applying the rationales of these decisions would find against the agency on exhaustion. If an agency appeals on exhaustion and not on the merits, a court might find no reason to require exhaustion because the agency was no longer unhappy with the plaintiff's position on the merits. Sending the plaintiff back to the agency would be senseless if the agency were already willing to accept the plaintiff's position.

The Minnesota Pollution Control Agency (MPCA) followed this course against Reserve Mining Company. In response to Reserve's complaint challenging the validity of the regulation as applied to Reserve, the MPCA moved to dismiss on the grounds

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To encourage courts to require exhaustion where appropriate and to minimize litigation over the exhaustion requirement, this Article proposes abandoning the balancing approach for a straightforward law of exhaustion with clearly defined exceptions recognized only upon strong justification. 99

V. Exceptions

There are two types of exceptions to the exhaustion requirement. First, the court may find that exhaustion would not serve the values that underlie the doctrine. These exceptions should be abolished if re-examination reveals that requiring exhaustion would serve these values.

The second type of exception is more complex. Here exhaustion would serve some value, but at too great a cost. In these cases, courts should recognize an exception if the costs of exhaustion outweigh the benefits. Of course, one of the benefits of requiring exhaustion is avoiding litigation over whether an exception applies. This should be included in the balance. Balancing should be done on definable classes of cases, not on a case-by-case basis, in order to avoid reinstating the present, troublesome uncertainty.

99. Some of the same concerns about identifying an exhaustion standard that leaves less discretion to the courts are expressed in an excellent Comment, supra note 90, at 467-70, that proposes a novel type of solution. It would use section 10(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 704 (1982), to define when exhaustion is required. That section provides: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." The author would define "final agency action" as action with "direct and external effects." Comment, supra note 90, at 478-81. Courts could review actions that have an intended and immediate effect on parties outside the agency that relates to something other than how those parties participate in administrative proceedings. Courts could also grant review in extraordinary cases that do not fall within this definition through mandamus jurisdiction. Id. at 482-85.

This Article suggests a different rule on exhaustion for three reasons. First, the rationale behind the APA-based standard seems unclear. For state as well as federal courts to adopt a standard, it must have some reason behind it other than consistency with the APA. Second, it is preferable to have a more definite standard. Results would be more predictable, reducing the amount and cost of litigation over exhaustion. Third, courts would probably be more willing to adopt a variation of the existing standard than adopt a radically new one.
A. Inadequate Administrative Remedy

One widely recognized exception to the exhaustion requirement is that a litigant need not exhaust if there is no adequate administrative remedy,\(^{100}\) because exhaustion would serve no purpose. Obviously, exhaustion is not required when there is no administrative proceeding in which a litigant's claim can be or could have been heard. This is not a true exception to the exhaustion requirement; it simply states an area in which exhaustion doctrine is inapplicable. Cases of this type do not arise frequently because a party claiming that another has failed to exhaust will point to the available administrative remedy.

_Ecology Center of Louisiana v. Coleman\(^{101}\) arose when the plaintiffs brought an action against the Secretary of Transportation claiming that an environmental impact statement on a proposed highway was inadequate. The agency raised the defense of exhaustion, arguing that the plaintiffs should have brought their claim before the agency by commenting on a draft environmental impact statement and by participating in a public hearing on the location of the highway. The plaintiffs alleged that, despite the agency's regulatory requirement that they receive mailed notice, they had been informed of neither the circulation of the draft statement nor the hearing. The court held that, if the agency did not provide the required notice, the plaintiffs had not failed to exhaust.\(^{102}\) The court's analysis is correct, as is its further observation that, absent notice, the doctrine of exhaustion does not even apply.\(^{103}\) The administrative remedies were the opportunity to comment on a noticed draft and to participate in a noticed hearing. Without notice, the remedies were not available.

A plaintiff may also claim that its administrative remedy is inadequate if the administrative remedy is no longer available: if, for

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\(^{101}\) 515 F.2d 860 (5th Cir. 1975). Although this case is not included within the scope of environmental cases defined _supra_ note 3 and accompanying text, it is included here because its unusual facts illustrate the "no remedy" situation so well.

\(^{102}\) _Id._ at 864-65.

\(^{103}\) _Id._ at 865. _Ecology Center_ has an alternative holding that, if the plaintiff received notice, exhaustion still may not be required. _Id._ at 866; see _supra_ note 88 and accompanying text. Professor Davis characterizes the exception in _Ecology Center_ as "fault of the agency." K. DAVIS, _ADMINISTRATIVE LAW OF THE SEVENTIES_ § 20.01-2 (1976). The court's characterization seems preferable.

The _MODEL STATE ADMIN. PROC. ACT_ § 5-112 (4), 14 U.L.A. 152 (Supp. 1984), is similar but broader. It says a person who was not notified "in substantial compliance with this Act" need not exhaust. This exception is unnecessarily generous to the person who knew of the administrative remedy but heard of it unofficially.

Pacific Legal Found. v. Watt, 529 F. Supp. 982, _modified on other grounds_, 539 F. Supp. 1194 (D. Mont. 1982), also rests on the absence of a remedy to exhaust. The court excused the plaintiff from exhausting, finding that exhaustion would be futile, but it really found that all relevant administrative procedures had been terminated by the agency. _Id._ at 995; _accord_ State _ex rel._ Scott v. Butterfield, 396 F. Supp. 632 (N.D. Ill. 1975) (no administrative procedures available to allow parties to comment on whether an environmental impact statement is required or to question otherwise an agency's decision not to prepare a statement).
example, the plaintiff failed to invoke an administrative remedy that was available for a limited period, which has elapsed. This situation differs from the absence of an administrative remedy to which the exhaustion doctrine does not apply. If an administrative remedy no longer exists, the exhaustion doctrine not only applies but appears to preclude the plaintiff from obtaining any relief. For this reason, courts may create an exception to the exhaustion doctrine or treat such a case as if there were no remedy at all. They should not do so. The purposes behind the exhaustion doctrine are served if it is applied even when the remedy is no longer available.

_Gage v. United States Atomic Energy Commission_ denied relief to the petitioners who had failed to exhaust a remedy no longer available to them. The petitioners challenged the AEC's regulations implementing the National Environmental Policy Act (NEPA), claiming that both the substance of the regulations and the procedure by which they were adopted violated NEPA. The regulations were adopted through informal notice and comment rulemaking. The AEC published a notice of proposed regulations in the Federal Register, took written comments, then promulgated final regulations. _Gage_ is distinguishable from _Ecology Center_ because the petitioners in _Gage_ were aware of the rulemaking procedure although they did not participate in it. The petitioners then sought review of the regulations on the grounds that they were substantively inadequate and that NEPA required an environmental impact statement. The court held that exhaustion was required and that the petitioners' failure to participate in the rulemaking proceeding precluded them from invoking judicial review even though the unexhausted administrative remedy was no longer available.

104. For a discussion of these decisions, see Fuchs, _supra_ note 6, at 869-70.
105. 479 F.2d 1214 (D.C. Cir. 1973).
107. _See_ Ecology Center of Louisiana v. Coleman, 515 F.2d 860 (5th Cir. 1975). _See supra_ notes 101-03 and accompanying text. The _Gage_ court rejected the petitioners' arguments that they did not participate because they thought the proposed regulation was on a different subject and because they thought their participation would not influence the agency. The court found that the facts would not justify either reason. 479 F.2d at 1217 n.11.
108. 479 F.2d at 1216.
109. _Id._ at 1217-18. The court relied on a jurisdictional statute in reaching this conclusion, which granted the court of appeals exclusive jurisdiction over the issue and allowed "any party aggrieved" by the AEC's action to invoke jurisdiction. _Id._ at 1218 (emphasis added by the court). The court held that "party" meant party to the rulemaking proceeding. Petitioners were not parties because they did not participate in the rulemaking. The court went on to state that good policy reasons supported the statute and its interpretation of it. Mainly, it found that judicial review, particularly by an appellate court, required a well-developed agency record on the claims raised.
The *Gage* decision is correct. The usual reasons for requiring exhaustion apply. The court's ruling will in the future encourage parties concerned about agencies' decisions to participate in rulemaking proceedings. This participation will avoid imposing on agencies the cost and inconvenience of making decisions without all interested parties present, assure that the courts have the full benefits of the agency's expert analysis and political judgment on the plaintiffs' claims, preserve limited review, reduce costs of judicial decision making, and avoid forum shopping. The *Gage* ruling is also necessary to protect the rights of other participants in the administrative hearing to comment on both the facts and the values that the plaintiffs would raise.

The only issue remaining in *Gage* is whether the court should overlook the factors underlying the exhaustion requirement in fairness to the petitioners, who could no longer correct their mistakes. Three arguments support the court's determination. The petitioners chose to bypass the administrative proceeding. Having done so, they should not be able to complain later that the proceeding is no longer available. Moreover, the petitioners were not totally without any remaining administrative remedy. As the court pointed out, they could petition the AEC to institute a new rulemaking proceeding. Although less satisfactory, this is still a remedy. In most situations in which a party has missed the opportunity for the best administrative remedy, some other remedy is available. The remedy of petitioning the agency to act is widely available under federal and state administrative procedure acts. Finally, the values behind exhaustion outweigh any residual in-
No constitutional problem results from applying the exhaustion doctrine to parties who failed to invoke an administrative remedy that is no longer available even though it limits the availability of judicial review. If there is no alternative administrative remedy, the doctrine may even preclude judicial review, which is also constitutionally permissible. First, due process does not necessarily require availability of judicial review for all administrative decisions. Second, even if due process requires review, it does not require that the right to judicial review be held open for a party who has failed to follow reasonable procedures in a timely manner. It is sufficient if a reasonable opportunity for judicial review existed at some point.

A person may file a petition for judicial review under this Act only after exhausting all administrative remedies . . . but:

(1) a petitioner for judicial review of a rule need not have participated in the rule-making proceeding upon which that rule is based, or have petitioned for its amendment or repeal.


113. An issue slightly different from that in Gage arises when the plaintiff did not participate in the rulemaking, but raises an issue for judicial review that another party did raise in the rulemaking. This situation occurred in Kennecott Copper Corp. v. EPA, 612 F.2d 1232 (10th Cir. 1979). The court heard the claims of the plaintiff corporation, which had not participated in the rulemaking. Id. at 1237; accord Asarco, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978). This result is correct. None of the purposes of exhaustion would be served by deciding otherwise. Arguably, the plaintiff could have pressed its claims more forcefully before the agency than someone else did, but that is not persuasive. If the plaintiff provided new facts or arguments to support its claims, however, the court should require it to exhaust. The court also held that non-participation did not matter because the agency should have considered on its own the issues that the plaintiff raised. Id. at 320-21 n.1. This is not a good reason for waiving the exhaustion requirement. See infra text accompanying notes 204-09.


115. Duquesne Light Co. v. EPA, 698 F.2d 456, 462 (D.C. Cir. 1983). Duquesne arose from a challenge to EPA's regulations implementing section 120 of the Clean Air Act, 42 U.S.C. § 7420 (1982). The Clean Air Act specified that petitions for review of general regulations implementing section 120 could be filed only in the District of Columbia Circuit and only within 60 days of promulgation unless based on grounds arising later. Id. § 7607(b)(1). Section 120 gives EPA authority to impose noncompliance penalties on sources violating the Act. After EPA notifies a source that it is not in compliance with the Act and may be assessed a penalty, the source may petition for a hearing. The EPA's regulation in question, 40 C.F.R. § 66.4 (1984), prohibited sources from raising at the hearing any issue that could have been raised in a petition for review under section 307(b)(1). The court in Duquesne held that this regulation did not deny due process to those sources. 698 F.2d at 481; see also Yakus v. United States, 321 U.S. 414, 433 (1944) (discussed infra notes 176-80 and accompanying text); Currie, Judicial Review Under Federal Pollution Laws, 62 IOWA L. REV. 1221, 1259 (1977) (recommending lengthening the period for judicial review of agency regulations under the CAA and FWPCA).
Of course, if a plaintiff shows that there never was a reasonable opportunity to obtain an administrative remedy that would have been subject to judicial review, the court must consider the claim. Then the issue is whether the case resembles the facts of *Ecology Center* or those of *Gage*. An administrative remedy that was not reasonably available should not be treated as a viable administrative remedy. No exhaustion is required. But courts should find that no administrative remedy was reasonably available only in extreme cases; that the plaintiff can no longer seek the remedy is not enough.

Once cases resembling the facts of *Ecology Center* and *Gage* are eliminated, the exception of inadequate administrative remedy fades into the other exceptions that authorities have recognized. A party challenging an agency's decision may claim that, though an administrative remedy exists, it is inadequate because the agency lacks jurisdiction to hear the claim or grant the relief sought; because the agency has jurisdiction but clearly will not grant the relief; because the issue raised is one of law that the agency cannot resolve; because the agency is acting in bad faith; or because the party will sustain irreparable injury from the process of seeking administrative relief, even if the relief is granted.116

### B. Agency's Lack of Jurisdiction

An agency's lack of jurisdiction is a variation of the "inadequate agency remedy" claim that arises more frequently.117 The defendant claims that the plaintiff must exhaust an administrative remedy. The plaintiff then claims that the administrative body that would be involved lacks jurisdiction to provide the plaintiff with the proposed administrative remedy so that exhaustion would serve no purpose.118

Lack of jurisdiction was the very issue raised in *Myers v.*

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116. Another variation exists. A plaintiff may claim that an administrative remedy is inadequate because it objects to the procedure the agency will use, as occurred in *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alaska 1971). The plaintiffs argued that they should not have to seek an administrative appeal because a formal hearing on appeal was discretionary, not mandatory. *Id.* at 117. The plaintiffs also objected that if they were granted a hearing, they would not have a right to conduct discovery. The court rejected these arguments, in part because the appeal may have given the plaintiffs what they wanted in substance even without a hearing, and in part because the plaintiffs might have received a formal hearing from the agency. *Id.* This response was appropriate. Unless administrative procedures cannot produce any relief and cannot supplement the record, courts should not find them inadequate. If the administrative procedures can do neither, then there is no administrative remedy or the agency is acting in bad faith in claiming that one exists.

The court in *Sierra Club v. Hardin* undercut its own decision, without an explanation of why it was doing so, by going on to decide the merits of the plaintiffs' claims. 117. *See 2 F. COOPER*, supra note 29, at 577; *Fuchs*, supra note 6, at 892-96; *see also* *MODEL STATE ADMIN. PROC. ACT* § 5-112(1) and commissioners' comment, 14 U.L.A. 152 (Supp. 1984).

118. Whether an agency lacks jurisdiction is really part of a broader question: whether exhaustion should be required when the plaintiff's claim presents only issues of law. *See infra* notes 136-50 and accompanying text.
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Bethlehem Shipbuilding Corp.,119 the foundation of modern exhaustion doctrine. In Myers the Supreme Court held that a party must go first to the agency and ask it to determine whether it has jurisdiction to hear the claim.120

This approach is correct. It serves the purposes behind the exhaustion requirement and avoids the disadvantages of litigation over whether exhaustion is required. The issue of whether an agency has jurisdiction over a claim should be decided first by the agency in order to give the court the insight of the agency's expertise on the facts and legal issues relevant to the issue of jurisdiction, to preserve the limited scope of review, and to avoid forum shopping.121

One expects many cases to arise in which the agency's jurisdiction to grant a remedy is unclear. If courts are willing to determine an agency's jurisdiction without prior resort to the agency, litigation on exhaustion will increase with the attendant ill-effects.122

The USI Properties v. Environmental Protection Agency decision123 illustrates the mischief that can be done when a court recognizes an exception for an agency's lack of jurisdiction, even if the court eventually holds that the exception does not apply and

119. 303 U.S. 41 (1938); see supra at text accompanying notes 18-20.
120. More recently, a federal district court came to the opposite conclusion in State of Illinois ex rel. Scott v. Butterfield, 396 F. Supp. 632 (N.D. Ill. 1975). The State of Illinois sued the Federal Aviation Administration and the Civil Aeronautics Board, claiming that they failed to comply with NEPA in not issuing an environmental impact statement on various actions involving O'Hare Airport. The defendants raised exhaustion of administrative remedies as a defense. They argued that the plaintiffs could seek an administrative remedy under a statute providing that "[a]ny person may file with the Administrator or the Board . . . a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provision of this chapter . . . ." Id. at 638-39 (quoting 49 U.S.C. § 1482(a) (1976)). Public Law No. 89-670, § 6(c)(1), 80 Stat. 937 (1966), substituted "Secretary of Transportation" for "Administrator" in this statute. The court held that this statute did not provide a means to force the agencies to act but only provided a tool for agency investigation of violations by regulated parties. 396 F. Supp. at 639, citing International Navigator's Council v. Shaffer, 444 F.2d 904 (D.C. Cir. 1971). If it were clear from International Navigator's Council v. Shaffer that there was no remedy, then exhaustion should not have been required because the agency claimed in bad faith that it would provide an administrative remedy. See infra text accompanying notes 151-53.
122. The requirement that a litigant go first to an administrative forum to allow the agency to determine its jurisdiction is, of course, subject to abuse. A defendant agency could always claim that some procedure or another affords an administrative remedy for any plaintiff's claim. Courts must decline to require exhaustion whenever the agency's argument that it has jurisdiction to grant a remedy is clearly frivolous because the agency is acting in bad faith. Determination of whether the argument for an agency's jurisdiction is frivoulous should not be difficult and should not entail extended judicial proceedings.
exhaustion is required. The EPA ordered the plaintiff to cease discharging pollutants into navigable waters without obtaining a permit under the Clean Water Act.\(^{124}\) The plaintiff sued to quash the order. EPA sought to have the complaint dismissed on the ground that the plaintiff had not exhausted its administrative remedy: applying for a permit under the Clean Water Act. The plaintiff argued that it did not have to exhaust because EPA lacked jurisdiction to issue the permit: the Act requires permits only for discharges into navigable waters, and the plaintiff claimed that the receiving waters were not navigable.\(^{125}\)

In order to resolve the issue of whether to apply the exception for lack of jurisdiction the court conducted an on-site inspection of the plaintiff’s land and surrounding property. It held a hearing, received documentary evidence, and heard at least three witnesses testify, with cross-examination. The court finally determined that EPA probably had jurisdiction and required the plaintiff to exhaust so that the agency itself could consider the jurisdictional issue.\(^{126}\) It is hard to imagine a clearer example of why litigation over an agency's jurisdiction should be discouraged.

Some cases purport to address a “clear” lack of jurisdiction.\(^{127}\) In fact, an agency’s lack of jurisdiction will not be clear unless the agency is acting in bad faith in asserting that the plaintiff should exhaust. An agency will raise the failure to exhaust as a reason to dismiss an action only when it can point to some administrative procedure the plaintiff should use. If the agency has made this initial decision, either the agency’s lack of jurisdiction is unclear or it is clear and the agency is acting in bad faith. Exhaustion should not be required when the agency acts in bad faith, but this is a distinct and limited exception to the exhaustion requirement. There should be no separate exception for clear lack of an agency's jurisdiction.\(^{128}\)

\(^{124}\) 33 U.S.C. § 1319 (a)(3) (1982). The Clean Water Act prohibits all pollutant discharges into navigable waters without a permit, but allows discharges from sources that have permits as long as they comply with permitting conditions. Id. §§ 1311(a), 1342 (1982).

\(^{125}\) 517 F. Supp. at 1239.

\(^{126}\) Id. at 1245.


\(^{128}\) Courts have carved out an exception when the agency's decision-making body is unconstitutionally constituted. E.g., Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973) (state board so biased by personal interests of members it could not constitutionally determine issues); Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962) (participant in investigation or prosecution of SEC revocation proceedings may not later participate as commissioner in adjudication of same proceedings without violating due process); Trans World Airlines v. CAB, 254 F.2d 90 (D.C. Cir. 1958) (fundamental fairness requires that counsel for Postmaster General in dispute over compensation to TWA may not later participate as member of CAB in its decision of the same issue); see Schweiker v. McClure, 456 U.S. 188 (1982) (absence of proof of bias or financial interest of private insurance companies under contract with HHS to administer payment of
A party may also allege that an agency lacks jurisdiction by claiming that the agency has jurisdiction to provide a remedy but not to grant adequate relief. In order to decide whether such a claim should be honored, a court would have to determine what relief the plaintiff wants, what relief the agency can grant, and whether the plaintiff’s demand for relief beyond the agency’s power is justified. These are difficult issues that are likely to require determinations of both fact and law. Courts should avoid making these determinations de novo and refuse to recognize this as an exception to the exhaustion requirement.

The court should allow the agency to make the initial determination of what relief it can grant. This rule is analogous to allowing the agency to make the initial determination of its own jurisdiction. Whether the agency’s statute or its regulations seem to limit the relief, the agency should have the opportunity to apply its own interpretive expertise. If only regulations are involved, the agency may decide to correct its own error by altering the regulations if it sees that they yield unfair results. Furthermore, facts developed before the agency are likely to bear on the issue of adequacy of relief. These facts may show that the plaintiff is not entitled to any relief or that the relief which the agency can grant is appropriate. When these facts are developed, the plaintiff may decide not to seek judicial review. If there is review, the court will have the benefit of the agency’s expert analysis of the facts. 129

Medicare claims result in no violation of due process when hearing officer appointed by carrier, whose salary the government pays, renders a decision adverse to the claimant. Professor Schwartz comments that for courts to allow a party to bypass exhaustion, the unconstitutionality must be facially clear and must not depend on resolution of facts. B. SCHWARTZ, supra note 6, at 502-03.

This exception falls into the lack of the agency’s jurisdiction/bad faith realm and should be treated as such. If the unconstitutionality is so clear, the agency is acting in bad faith in seeking to act and exhaustion should not be required. Other cases should be treated as described infra text accompanying notes 145-50. 129. Professor Jaffe has raised a related problem. He argues that in the zoning area a plaintiff need not exhaust a remedy of seeking a variance if that plaintiff claims that the zoning law is invalid as applied. The argument seems to be that an invalid law strips the agency of jurisdiction to grant any remedy:

[If a zoning ordinance is basically unreasonable in its application to a person’s property, he is not required to seek an administrative variance or dispensation. Such a variance might meet his immediate need more or less. But he will not be compelled to seek a dispensation, to put to the uncertainty of administrative discretion when he is entitled (as he claims) to a ruling that there is no valid discretion to exercise. L. JAFFE, supra note 6, at 426-27 (footnote omitted).

There are two problems with this analysis, in addition to those raised by the discussion in the text. First, it is contrary to prevailing law. See, e.g., Frisco Land & Mining Co. v. State, 74 Cal. App. 3d 736, 141 Cal. Rptr. 820 (1977); Northwestern University v. City of Evanston, 74 Ill. 2d 80, 383 N.E.2d 964 (1978); Bruni v. City of Farmington Hills, 96 Mich. App. 664, 293 N.W.2d 609 (1980); Pine County v. State Dep’t of Natural Resources, 280 N.W.2d 625 (Minn. 1979); Forsyth County v. York, 19 N.C. App. 361,
C. Futility

Courts and commentators recognize an exception when exhaustion would be futile because the agency apparently will not grant relief. The appearance of futility may come from evidence of bad faith on the part of the agency, past patterns of an agency's decision making, the agency's position on the merits of a case in litigation over exhaustion, or other statements by the agency on the issue. In all cases, the exception rests on the idea that requiring exhaustion would not preserve the values that exhaustion should protect.

Courts should not allow a litigant to avoid exhaustion merely because the past pattern of an agency's decisions shows that the agency will probably deny relief. An unfavorable past pattern of decision making is not accepted as a valid reason for bypassing steps in proceedings in other contexts. In litigation, a plaintiff may bring a suit knowing that, based on precedent, a loss at the trial level is likely, but hoping for a favorable holding on appeal. A plaintiff who hopes to convince the appellate court that the precedent should be changed, but knows that trial courts are unlikely to make that judgment, may not waive the trial and go directly to an appeal. If there is a three step process of trial, intermediate level appeal, and supreme court review, litigants must follow all three steps. This procedure allows full development of facts for the appellate courts to consider, provides an opportunity for settling the case without action by the final appellate court, and avoids litigation over whether going directly to an appellate court is appropriate.

The same reasons support requiring exhaustion. Indeed, they make a stronger case for exhaustion if, as seems reasonable, an agency is less likely than a court to act as though bound by prece-

198 S.E.2d 770 (1973). Second, it gives too much weight to the burden of uncertainty on the plaintiff.

Overall, seeking a variance is probably no more burdensome than seeking judicial review, even if one considers the chance that the variance will be denied and review of that denial sought in the courts. Administrative variance proceedings are usually faster and cheaper than judicial proceedings. Moreover, in most cases, if a plaintiff seeks a variance, it will be granted, so judicial review will not be needed. See Bryden, A Phantom Doctrine: The Origins and Effects of Just v. Marinette County, 1978 AM. B. FOUND. RESEARCH J. 397, 413-27; Bryden, Zoning: Rigid, Flexible, or Fluid?, 44 J. URB. L. 287, 293 & n.32 (1967); Dukeminier & Stapleton, The Zoning Board of Adjustment: A Case Study in Misrule, 50 KY. L.J. 273 (1982); Note, Syracuse Board of Zoning Appeals — An Appraisal, 16 SYRACUSE L. REV. 632, 645-46 (1965).


131. See infra text accompanying notes 151-53.

132. See B. SCHWARTZ, supra note 6, at 501.

133. See supra notes 93-97 and accompanying text.
In addition, to the extent that the administrative forum would consider new facts or make discretionary judgments, as does an agency in a variance proceeding, exhaustion is necessary to preserve the limited scope of judicial review and to keep the discretionary judgments closer to the political realm. Finally, if an agency's past pattern of decision making is wrong, the agency should hear the arguments and correct its own errors in order to educate the agency's personnel and to increase confidence in the agency's decision making. The law should not encourage litigants with strong cases against a prior pattern of administrative decisions to turn immediately to the courts for relief. That would rob the agencies of the best opportunities to see and correct their own errors.

Courts should not except a plaintiff from exhausting on the grounds of futility shown by informal statements of the agency, including statements to the press. Unless these statements demonstrate bad faith, they should not be interpreted as predicting the agency's action on an individual party's claim in an appropriate forum.

D. Issues of Law

Some authorities do not require exhaustion when the issue is one

134. For example, an agency can depart from precedent it established more easily than a lower court can violate precedent established by a higher appellate court.

135. See Gage v. United States Atomic Energy Comm'n, 479 F.2d 1214 (D.C. Cir. 1973). The petitioners claimed they did not participate in the agency's rulemaking because they were unsuccessful when they informally presented their views to the AEC's staff. The court declared:

At best, this argument amounts to a claim that, once certain in their own minds that the AEC would reach a result contrary to their views in the rule-making, petitioners had no further obligation to participate in order to preserve their right to petition for review. We reject that contention.

Id. at 1217 n.11.

The decision in Colorado-Ute Elec. Assoc. v. Air Pollution Control Comm'n, 648 P.2d 150 (Colo. Ct. App. 1982), vacated, 672 P.2d 993 (Colo. 1983) (en banc), presents an example of a case that is inappropriately interpreted as involving futility. The Air Pollution Control Division administered regulations adopted by the Commission. The plaintiff obtained a construction permit which included a specific compliance provision from the Division. After the construction permit was issued, the Commission issued a regulation requiring such a condition in all permits. The plaintiff objected to the condition in the construction permit and appealed to the Commission, which denied relief. The Commission then ordered the Division to issue an operating permit with the same condition. When the plaintiff challenged the operating permit in court, the Commission argued that the plaintiff should have exhausted its remedy of seeking an administrative appeal on the regulations to the Commission. The court held exhaustion was not required, in part because the appeal would have been futile. Id. at 153.

A more appropriate response would have been that the plaintiff had already exhausted its administrative remedy. It appealed to the Commission on the construction permit, apparently raising the same objections it would raise to the later-promulgated regulation.
They argue that administrative agencies are constituted for their factual, not legal, expertise and, therefore, requiring prior resort to the administrative body is useless.

A better rule would require exhaustion without inquiring whether the issue is one of law. Many agencies have considerable legal expertise, particularly about their own enabling statutes, their own regulations, and related law, which is the law most likely to be involved in an exhaustion case. The United States Supreme Court, which often defers to agencies' interpretations of their own statutes, has long recognized this administrative legal expertise. Administrative officials work with these laws regularly; it is likely that they participated in drafting them. Leaving the exhaustion requirement in place will ensure that courts gain the agency's insight into the meaning of such laws. It will place the courts in the position of applying the appropriate deferential standard when the case eventually undergoes judicial review.

Furthermore, many claims involve mixed issues of law and fact. The factual parts of these issues may illuminate the legal claims, so exhaustion is appropriate. Moreover, issues of law are often difficult to distinguish from issues of fact. If there were an exception to the exhaustion requirement for issues of law, courts would have to determine in each case whether the issues were legal or factual. This encourages complex preliminary litigation.


138. For a discussion on the distinction between questions of fact and of law, see L. JAFFE, supra note 6, at 546-55. But see Bethlehem Steel Corp. v. EPA, 723 F.2d 1303, 1309 (7th Cir. 1983) (distinguishing between statutory interpretations that involve technical issues and those that involve political issues).

139. The difficulty of distinguishing legal from factual issues is illustrated by the decision in Bethlehem Steel Corp. v. EPA, 669 F.2d 903 (3rd Cir. 1982). The EPA issued a notice to Bethlehem Steel that the company was violating federal emission standards. The EPA's regulations gave sources that received a notice of violation the right to petition for a hearing on whether the source was in compliance or was entitled to an exemption. If the source did not petition for a hearing, it was required to submit information on which the agency would base a penalty for the violation. Bethlehem Steel responded to the notice with an "Application For Agency Relief From The Issuance Of A Notice of Noncompliance," alleging that EPA exceeded its statutory authority under section 120 of the Clean Air Act, 42 U.S.C. § 7420 (Supp. V 1981), in issuing the notice. 669 F.2d at 905. EPA elected to treat the response as a request for reconsideration and suggested the company provide information on compliance and eligibility for an exemption. Bethlehem Steel provided the information and EPA ordered a hearing. Before it was completed, Bethlehem Steel sought judicial review of the notice of violation on the grounds that the notice exceeded the agency's statutory authority. Id.

As a defense to the action for judicial review, the EPA claimed that Bethlehem Steel had not exhausted its administrative remedy of a hearing. Bethlehem Steel responded that exhaustion was not necessary because the issue was purely legal. The
There are contrary arguments to this position. Some would object that courts should not defer to agencies' interpretations of statutes. Agencies may seem too politicized to be trusted with statutory interpretation. Thus, a "liberal" may distrust the Nuclear Regulatory Commission and a "conservative" may distrust the EPA. Second, some agencies may seem to have too little legal expertise to be given deference on issues of law. State pollution control agencies are comprised solely or largely of nonlawyers. Finally, the confusion of legal and factual questions does not necessarily support the rule that exhaustion is required for legal and factual claims. A simple rule that exhaustion would not be necessary in any case that raised legal issues would avoid confusion.

Considering these objections, the balance of interests still favors exhaustion of legal claims. The political distrust argument is not fully persuasive, judicial deference does not mean judicial capitulation. If an agency's determination on an issue of law is inappropriately biased, the court should overturn it even on deferential review after exhaustion. If the agency is only reflecting a politically popular opinion, the objection that someone will not like it is insufficient. Political considerations are appropriate in agencies as long as they do not infringe on statutory or constitutional protections. The expertise argument is also weak, at least within the scope of this Article: environmental agencies have sufficient expertise on issues of law to deserve deference. Lay board members do not operate in a vacuum; they have expert advice. Finally, it is important to ensure that facts get before the agency when the court rejected Bethlehem Steel's response on the grounds that the EPA might find in its favor on issues of fact, that is, on compliance or entitlement to an exemption, and found there would then be no need for judicial review. *Id.* at 909.

The court overlooked the fact that Bethlehem Steel never asked the EPA to consider the issues of compliance or entitlement to an exemption. The EPA considered them on its own. Bethlehem Steel simply supplied information relevant to these factual issues at the suggestion of the agency.

If the rule on exhaustion were that exhaustion is not required on purely legal issues, the court would have had to determine whether Bethlehem Steel's claims were only legal ones, or whether, by responding to the EPA's request for factual information, Bethlehem Steel had raised factual issues. If the court held that Bethlehem Steel raised only legal claims, it would have had to determine whether these claims had factual components. For example, one of Bethlehem Steel's "legal" claims was that the EPA's findings of noncompliance were not supported by the record. This seems to have the factual component of identifying the facts in the record and the findings that they support. These inquiries into what is law and what is fact are themselves complex and difficult to determine. They are best avoided.

140. This is the rationale behind the proposed Bumpers Amendment to the federal Administrative Procedure Act, which would instruct courts to give less deference to an agency's position on issues of law. See S. 1080, 98th Cong., 1st Sess., 129 Cong. Rec. S4,903, S4,914 (1983); H.R. 746, 97th Cong., 2d Sess. as amended, reprinted in H.R. Rep. No. 433, 97th Cong., 2d. Sess. 1 (1982). See also Bethlehem Steel Corp. v. EPA, 723 F.2d 1303, 1309 (7th Cir. 1983) (courts should not defer on statutory interpretations involving political issues).
claim involves mixed factual and legal issues; otherwise, the agency’s expertise is sacrificed and deferential review on factual issues is lost.

The most difficult cases on the “issue of law” exception concern constitutional questions. They present the strongest argument that the agency lacks credentials or authority to decide an issue. An agency would not hold its own enabling statute unconstitutional even if it had the authority to do so. Further, one tends to regard courts as the exclusive arbiters of constitutional disputes more than as exclusive arbiters of other types of legal problems. On the other hand, courts should avoid unnecessary constitutional decisions. If exhaustion is required, the agency may satisfy the plaintiff on some other ground, avoiding the need for judicial consideration of the constitutional claim. In addition, the agency's record might help bring the facts into focus so that eventual judicial resolution of the constitutional claim will be as well founded and narrow as possible. Moreover, there appears to be no constitutional prohibition against allowing agencies to decide constitutional issues initially.

Some courts distinguish between a challenge to the constitutionality of a statute as applied and a challenge to the constitutionality of a statute on its face. They require exhaustion in the former case, but not in the latter. This distinction is reasonable.

141. See Public Util. Comm’n v. United States, 355 U.S. 534, 539-40 (1958) (governmental challenge to state statute held not barred by failure to exhaust administrative remedies); First Jersey Sec. v. Bergen, 605 F.2d 690, 696 (3rd Cir. 1979) (exhaustion not required if there is a clear and unambiguous statutory constitutional violation); Virginia Surface Mining & Reclamation Ass’n v. Andrus, 483 F. Supp. 425, 429 (W.D. Va. 1980), rev’d on other grounds sub nom. Hodel v. Virginia Surface Mining & Reclamation Ass’n, 452 U.S. 264 (1981); W.F. Hall Printing Co. v. EPA, 16 Ill. App. 3d 864, 306 N.E.2d 595 (1973). See also CAL. CONST. art. III, § 3.5(b) (prohibiting agencies from declaring statutes unconstitutional); Rader, Lewis & Ehlke, OSHA Warrants and the Exhaustion Doctrine: May the Occupational Safety and Health Review Commission Rule on the Validity of Federal Court Warrants?, 84 Dick. L. Rev. 567 (1980) (the purposes of the exhaustion doctrine are not fulfilled when constitutionality of warrants is challenged). But see Southern Pac. Transp. Co. v. Public Util. Comm’n, 18 Cal. 3d 308, 556 P.2d 289, 134 Cal. Rptr. 189 (1976) (commission may determine validity of statutes when legislature establishes suitable safeguards to guide use of power); Fuchs, supra note 32, at 184 (questioning why all constitutional issues need be reserved to courts); Note, The Authority of Administrative Agencies to Consider the Constitutionality of Statutes, 90 Harv. L. Rev. 1682 (1977) (recommending that agencies be allowed to consider constitutionality if there is evidence that the agency has the capacity to do so). See generally L. Jaffe, supra note 6, at 438-40 (outlining when exhaustion should not be required).


144. See Note, supra note 141, at 1682-91. Allowing agencies to decide constitutional issues assumes that judicial review of the agency’s determination will be available. A separate issue is whether that review would be de novo or under a deferential standard.

145. See, e.g., Key Haven Assoc. Enters. v. Bd. of Trustees, 427 So. 2d 153, 157-58 (Fla. 1982). This distinction is found most frequently in zoning cases, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926); County of Pine v. State Dep’t of Natural Resources, 280 N.W.2d 625, 629 (Minn. 1979); Scarsdale Supply Co. v. Village...
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argument that relief is outside the power of the agency is strongest when a statute is challenged on its face. In addition, the agency can add little that will illuminate the controversy. Neither its factual expertise nor its political status is likely to be helpful.

By contrast, if a statute is challenged as applied, facts are important, and the administrative remedy will probably help to develop the facts.\(^{146}\) This is especially true if the administrative remedy is a variance proceeding. Because a variance provision is arguably an integral part of a statute, a court cannot tell how the statute would be applied until the plaintiff applies for a variance. Other administrative remedies may also be useful. For example, a statute's applicability to a specific party may not be finally decided prior to administrative appeal.

A plaintiff challenging the facial validity of a statute should not have to exhaust an administrative remedy that considers only the validity of the statute as applied. Otherwise, an invalid statute could remain on the books without any opportunity for judicial review of its constitutionality. If the agency provided a variance mechanism, every potential plaintiff who wanted to raise the statute's facial unconstitutionality would have to apply for a variance. If the variances were granted, the constitutional claim would become moot. If this happened to all potential plaintiffs, no one could challenge constitutionality. Yet, the unconstitutional statute would remain and would guide the behavior of those who did not seek variances. This problem does not arise if the statute is unconstitutional only as applied. Then it is valid as to most parties and may go unchallenged without objection.

Arguments against adopting a distinction based on whether a challenge is to the constitutionality of a statute on its face or as applied favor requiring exhaustion in both situations. In both, the administrative remedy may provide a satisfactory result, eliminat-
ing the necessity for a court to reach the constitutional issue.\textsuperscript{147} Moreover, a plaintiff usually presents both types of constitutional claims in one case. Requiring exhaustion will allow the court to treat all constitutional claims at the same time and to select the narrowest grounds for constitutional decision. Otherwise, the court would have to decide the broader claim of facial unconstitutionality first.\textsuperscript{148} Finally, it is sometimes difficult to tell if a claim attacks a statute's constitutionality on its face or as applied, particularly at the preliminary stage in litigation when exhaustion is considered.\textsuperscript{149} A single rule will help courts avoid determining this difficult issue in litigation over exhaustion, thus avoiding vague standards and providing predictability.

On balance, the rule that exhaustion is not required for constitutional challenges to the facial validity of a statute, such as an agency's enabling statute, seems reasonable. Exhaustion should not be required if the challenge is clearly to facial constitutionality. To avoid preliminary litigation over the nature of the claim, the burden of clear identification of the claim should be on the plaintiff. Exhaustion should be required if the plaintiff raises

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\item \textsuperscript{147} For example, the plaintiffs in County of Pine v. State, 280 N.W.2d 625 (Minn. 1979), challenged the validity of an ordinance establishing land-use controls near a scenic river. The plaintiffs could have applied to the county for a variance on the grounds of "unnecessary hardship." \textit{Id.} at 628. If they had applied and received a variance, they would have had no standing to raise their claim that the ordinance on its face was not a valid exercise of the police power.
\item \textsuperscript{148} The plaintiff in County of Pine v. State, 280 N.W.2d 625 (Minn. 1979), attacked the statute on its face and as applied. Because the court required exhaustion only for the latter claim, it decided the facial constitutionality issue. \textit{Id.} at 629-30.
\item \textsuperscript{149} See, e.g., McGrady v. Callaghan, 244 S.E.2d 793 (W. Va. 1978). Neighboring property owners asked the court to order a state agency to revoke a mining permit. They claimed that the permitting procedure was unconstitutional for failure to give them a hearing. The state claimed that the plaintiffs had failed to exhaust their administrative remedy of seeking an administrative appeal. The court found the procedure constitutional and ruled that the plaintiffs must exhaust their administrative remedies before the court could act on the revocation question. \textit{Id.} at 796-97. The issue in McGrady appears to be a challenge to the statute's facial validity because the plaintiffs seemed to allege that the procedures were unconstitutional no matter to whom they applied. The court apparently held that the question of constitutionality can only be answered by considering the rights affected, that is, as applied.
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nonconstitutional issues as well as the constitutional claim. If both aspects of a statute's constitutionality are challenged, the court should decide only the question of facial constitutionality and avoid the temptation also to consider the constitutionality of the statute as applied. Otherwise, the court will lose the value of the agency's expertise on the related factual issues and encourage parties to devise challenges to facial constitutionality to get claims of unconstitutionality as applied before the court without exhausting.

Challenges to the constitutionality of an agency's regulations, rather than statutes, should be handled differently. Here, the agency has the credentials and authority to act on both facial and applied challenges. Agencies frequently consider the constitutionality of their rules and decisions as part of the process of developing a rule or reaching a decision. They can also change their own rules. Thus, the balance tilts to the other side, favoring exhaustion for all constitutional challenges to regulations.150

E. Bad Faith

Evidence that an agency acts in bad faith is rare.151 One would not expect to find blatant evidence of bad faith in environmental cases involving relatively expert agencies with personnel who have received either training or at least more than perfunctory political scrutiny. If there is strong evidence of bad faith, it is appropriate to dispense with the exhaustion requirement. For example, if a plaintiff can show that the majority of the members of an agency board are insane or are taking bribes, the plaintiff should not be forced to bring a case to the board. Similarly, if a plaintiff has filed an administrative appeal but the agency has failed to act on it for a long time, exhaustion of the appeal should not be required.152

This exception is narrow and should be applied only in the most outrageous cases. Courts should refuse to engage in detailed analysis of whether agencies have acted in bad faith and should require exhaustion if bad faith is not clear on the face of the evidence.153 Doing otherwise invites litigation over exhaustion.


151. Few cases litigating this factor are known. Cf. 2 F. COOPER, supra note 29, at 585 (discussing cases where agencies impose unnecessary obstacles to petitioners).

152. In this situation, the plaintiff has conceivably exhausted the administrative remedy. Cf. Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1099 (D.C. Cir. 1970) (at some point, agency's failure to act becomes final decision not to act and is reviewable).

153. This standard is followed, although not articulated, in Stabatrol Corp. v.
and the disadvantages that attend such litigation, regardless of the outcome.

**F. Irreparable Injury**

Several authorities suggest that a litigant need not exhaust its administrative remedies when doing so would cause irreparable injury. In this situation, even if exhaustion would serve the values behind the doctrine, the cost to the plaintiff is so high that, on balance, it is best not to require exhaustion. Although sensible on its face, this exception withstands close scrutiny in only a few situations.

Courts should not recognize claims that the plaintiff will suffer solely because the administrative agency will not grant the desired relief or because the administrative remedy is no longer available. The substance of a real "irreparable injury" claim is not that the plaintiff will fail before the agency, but that the process of seeking agency relief will cause injury.

In considering other claims of irreparable injury, a court should always look only at the position the litigant would have been in had that party first exhausted the administrative remedies. Otherwise, parties will be encouraged to bypass exhaustion, knowing that they can urge the courts not to remit their cases to the agencies because the cost and delay of seeking administrative remedies in addition to the current attempt to obtain judicial relief constitute irreparable injury. Litigants should not be allowed to bootstrap themselves into an exhaustion exception.

Generally, the scheme of administrative remedies that is provided by statute or by regulation puts all those who come under the scheme at some risk of injury. The cost may be as small as the expense of going before the administrative body or it may be larger. The pecuniary hardship of following the procedure established by a statute or regulation that provides an administrative

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Metzval Corp., 72 Pa. Commw. 188, 456 A.2d 252 (1983). The petitioners asked the court to enjoin the state's Department of Environmental Resources and its Secretary from enforcing orders relative to a hazardous waste disposal site owned by petitioners. The court required the petitioners to exhaust their administrative remedy of an administrative appeal. It considered the petitioners' claims that the actions of the Department and the Secretary constituted malfeasance or misfeasance, but found:

> Here, the specific allegations against DER as set forth in . . . the petition . . . are allegations which would be the proper basis for an administrative appeal, nothing more. The allegations against the Secretary, demonstrate nothing in the way of a corrupt motive or the breach of any of his specific statutory duties. Again, we say that the averments in the petition may constitute grounds for an administrative appeal, but they do not make out a cause of action for misfeasance or malfeasance against the Commonwealth Respondents.

Id. at 193-94, 456 A.2d at 255 (footnote omitted).


remedy does not justify allowing parties to bypass the administrative scheme and go straight to the courts for relief.\footnote{156}{See Noble Automotive Chem. & Oil Co. v. EPA, 19 Env't Rep. Cas. (BNA) 1044, 1046 (D.N.J. 1982) ("It is well settled that additional pecuniary hardships and stress imposed upon a party by requiring exhaustion of administrative remedies does not constitute irreparable harm."); Berger, supra note 90, at 1006 ("The expense to the litigant must yield, the courts have said, to the necessity of preserving orderly procedure, the need for preserving the efficacy of the administrative process.").}

If a statute or a regulation explicitly requires exhaustion of the administrative remedy prior to judicial review, the essence of the plaintiff’s irreparable injury claim is that the statutory or regulatory scheme should be ignored because it necessarily creates irreparable injury. This claim is valid only if the statute or regulation is unconstitutional, or the agency lacked authority to adopt the regulation.

\textit{Bethlehem Steel Corp. v. Environmental Protection Agency}\footnote{157}{669 F.2d 903 (3d Cir. 1982). See generally supra note 139.} addresses this issue. The EPA issued a notice of noncompliance to Bethlehem Steel under section 120 of the Clean Air Act. The statute gave the company the right to petition the agency for a hearing on whether the notice was appropriate and whether it was entitled to an exemption.\footnote{158}{Clean Air Act, 42 U.S.C. § 7420(b)(4)(B) (1982); 40 C.F.R. § 66.12(a)(4) (1984); see 669 F.2d at 906.} Bethlehem Steel also had the right to appeal the decision on the hearing to the Administrator of the agency. The EPA’s regulations allowed judicial review only if all administrative remedies were exhausted.\footnote{159}{See 40 C.F.R. § 66.81(b) (1984); see also 669 F.2d at 906-07.}

Bethlehem Steel did not submit a formal petition for a hearing, but instead submitted a document entitled “Application For Agency Relief From The Issuance Of A Notice Of Noncompliance.”\footnote{160}{669 F.2d at 905.} It simultaneously challenged the notice in court. The EPA treated the company’s application as a petition for reconsideration and refused to withdraw the notice, but ordered a hearing on whether Bethlehem Steel was in compliance and whether the company was entitled to an exemption.

Bethlehem Steel argued that judicial determination of the validity of the notice without requiring exhaustion was necessary to prevent the company from suffering irreparable injury. The Clean Air Act imposes daily penalties for noncompliance commencing on the date the notice is issued.\footnote{161}{42 U.S.C. § 7420(d)(3)(C) (1982).} Bethlehem Steel claimed that, without an immediate judicial determination of the validity of the notice, its only choices were to comply with the agency's interpretation of the standards by installing pollution...
control equipment or by shutting down, or to risk incurring ever-increasing penalties. The court rejected this argument:

Allowing interlocutory review by the court every time EPA issues a notice of noncompliance would permit the exception to swallow the rule. Bethlehem's choice between risking mounting fines or yielding to coerced compliance is the same alternative presented to every alleged violator, because that plan of enforcement is built into the Act. . . . Adoption of Bethlehem's position would nullify the statutory enforcement plan.162

Bethlehem Steel could have raised the issue of regulatory validity by claiming that the administrative scheme adopted by the agency was so injurious as to deny the company due process of law. This claim, however, was rejected in Myers v. Bethlehem

162. 669 F.2d at 910. The court gave several subsidiary reasons for rejecting Bethlehem Steel's claim of an exception to the exhaustion requirement based on irreparable injury. The court found that immediate judicial review "'would delay resolution of the ultimate question whether the Act was violated.'" Id. (quoting FTC v. Standard Oil Co., 449 U.S. 232, 242 (1980)). Presumably, this means that if the EPA found for Bethlehem Steel at the hearing, final disposition would be faster than if the court considered Bethlehem's claims. But that is not necessarily so. The court completed its consideration of the exhaustion issue before EPA completed the hearing. The court might also have completed its consideration of the merits of Bethlehem Steel's claim before the hearing finished. Moreover, if Bethlehem Steel went to the agency first and lost, then went to court, final disposition might take longer than if Bethlehem Steel could bypass the agency.

The court in Bethlehem Steel incorrectly stated that no injury results from exhaustion. Id. at 911. The amount of the noncompliance penalty under the Clean Air Act is the amount the company gains by violating the law. 42 U.S.C. § 7420(d)(2) (1982). If the agency ultimately finds that Bethlehem Steel is not violating standards, the company would suffer no costs except those of appearing in the administrative and judicial proceedings. Those costs alone do not constitute irreparable injury. 669 F.2d at 911 (citing Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974)). If the agency finds Bethlehem Steel in violation, its penalty plus operating costs will equal the costs of compliance. But, as the court observed elsewhere, the company, hesitant to risk administrative challenges and litigation, may comply with the agency's demands and install the desired control equipment. 669 F.2d at 909. If Bethlehem Steel really were in compliance initially, this would be a legally unnecessary expense and an injury.

The court in Dow Chem. Co. v. Ruckelshaus, 477 F.2d 1317 (8th Cir. 1973), addressed a similar irreparable injury issue. The Administrator of the EPA issued an order under the authority of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135b(c) (1970) (currently codified at 7 U.S.C. § 136d(c) (1982)), cancelling the registration of the pesticide 2, 4, 5-T for some uses. Dow was entitled under the statute to an evidentiary hearing before the cancellation became effective. Before the hearing, Dow sued to have the order withdrawn on the grounds that it was unsupported by the evidence. Dow claimed that it would suffer irreparable injuries if it had to exhaust. Although the nature of the irreparable injury claim was not specified, it seems that Dow was concerned that if it continued to manufacture 2, 4, 5-T, it risked accumulating stocks it could not sell if registration were finally cancelled. If Dow discontinued manufacture and the registration were not cancelled, it risked economic loss from lost sales. The company apparently went to court instead of to the agency in hopes of getting a quicker final resolution.

The court rejected the irreparable injury claim and required exhaustion. The court said any injury to Dow was at most "indirect" because the cancellation order does not preclude Dow from selling 2, 4, 5-T. 477 F.2d at 1326. This reason is correct, but it is not a sufficient reason or the best reason to reject the irreparable injury claims. What matters is that the injury at issue in Dow Chemical, as in Bethlehem Steel, was inherent in the statutory scheme, so the injury alone was not sufficient reason to dispense with exhaustion.
The Supreme Court held that Bethlehem Shipbuilding's constitutional rights were not infringed even if the company would suffer irreparable damage from having to revert to an administrative proceeding to raise the issue of the agency's jurisdiction. The result makes sense. Even if due process requires that judicial review of certain agencies' decisions be available, it does not require that judicial review come after the agency's initial decision. In civil cases generally, there is no due process right to judicial determination of a controversy within a limited time. In many jurisdictions, it takes a long time to obtain a trial of a civil case. Moreover, if the mounting penalties are seen as a constitutional problem, the correct result is to enjoin accrual of the penalties pending exhaustion of the administrative remedies.

If a statute or regulation provides an administrative remedy but does not explicitly require exhaustion prior to judicial review, courts have discretion to dispense with exhaustion in such a case without finding the statute or regulation invalid, but they should not do so. If courts do not require exhaustion, they will be forced into a case-by-case examination of the degree of injury to determine whether the injury outweighs the value of exhaustion. This case-by-case analysis, as previously argued, has significant adverse effects.

The only other solution, to require exhaustion in all cases, is acceptable as long as the overall burden on plaintiffs does not outweigh the overall benefit from exhaustion. Because the burden in this class of cases is, by definition, common to all parties subject to the administrative scheme, it is unlikely to be too large. The legislature presumably considered this burden in establishing the administrative remedy. Any residual risk of injury is justified in order to protect the values behind exhaustion and avoid the adverse effects of case-by-case determinations.

A claim that the penalty for violation of the regulation itself is an irreparable injury presents special problems. Suppose an agency passes an emissions limitation and the administrative scheme provides for variances. A regulated source violates the limitation but does not seek a variance. The agency brings a civil or criminal enforcement action. May the source defend against the enforcement action by challenging the regulation on grounds

163. 303 U.S. 41, 48 (1937) (rejecting a similar argument made in relation to the National Labor Relations Act).
164. Id. at 50-51.
165. See supra note 114 and accompanying text.
166. Under many of the environmental statutes, a private citizen may also bring a civil enforcement action. See, e.g., Clean Air Act, 42 U.S.C. § 7604(a)(1) (1982).
it could raise in a variance proceeding without seeking a variance? Should the source be able to claim that enforcement itself constitutes irreparable injury so that exhaustion should not be required?

Courts should require exhaustion in civil enforcement cases. All regulated pollution sources risk the injury that comes from enforcement. Usually, sources could avoid the injury by using their administrative remedies. If exhaustion were not required, they would be allowed to create their own exceptions.

*Getty Oil Co. v. Ruckelshaus*, while not strictly an enforcement case, is helpful. Delaware adopted a regulation limiting the sulphur content of fuel burned in a power plant owned by Delmarva Power and Light Company. Delmarva obtained its fuel, which did not comply with the regulation, under special contract from Getty. The EPA adopted Delaware's regulation as federal law. Although the regulation nominally applied to Delmarva, Getty, as producer of the fuel, was the real party in interest. Getty and Delmarva sought a variance from the state's Secretary of Natural Resources and Environmental Control. When the variance was denied, Getty followed state procedures and appealed to the state’s Water and Air Resources Commission. Thereafter the EPA notified Delmarva that it was violating the sulphur limitation standard. Getty then asked the Commission to defer action on its appeal. When the EPA issued an order to Delmarva requiring compliance with the standard, Getty sued to enjoin the effect of the order. Under the Clean Air Act, violation of an administrative compliance order is subject to judicial enforcement by injunction, criminal fine, and imprisonment.

Getty argued that the regulation was invalid as applied to Delmarva. The court declined to decide that issue because

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167. 467 F.2d 349 (3d Cir. 1972), cert. denied, 409 U.S. 1125 (1973). Although no claim of "irreparable injury" is explicitly raised in *Getty Oil*, this is the underlying issue.

168. Under section 110 of the Clean Air Act, 42 U.S.C. § 7410 (1982), the Administrator of the EPA is to approve state air pollution control rules called the "state implementation plan" if they meet statutorily specified criteria. Approved plans are enforceable as federal law.

169. Delmarva was apparently willing to comply with the order and took no appeal. 467 F.2d at 353 n.5. Getty apparently objected because it would lose its arrangement with Delmarva. Getty supplied Delmarva with a high sulphur fuel, a by-product of Getty's oil refinery operation. In return, Delmarva provided Getty with power. All parties seemed willing to recognize that this arrangement gave Getty standing to object to the regulation in all forums.

170. Getty sued in state court to enjoin enforcement of the regulation before requesting the deferral. After requesting the deferral, Getty brought the federal action. 467 F.2d at 354-55. Getty asked the Commission to delay action on the appeal pending a determination by the courts. *Id*. at 354 n.7.


172. See 467 F.2d at 358. The opinion is confusing on the nature of Getty's claim. Getty argued that it was challenging the regulation only as applied. *Id*. at 355. The court found in one place that the only challenge was to the regulation on its face. *Id*. In another place, the court says, "Getty has sought to litigate the merits of its variance application on this appeal." *Id*. at 358. Generally variances are available only for relief from a regulation as applied. The difficulty of sorting out the claim is com-
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Getty had not exhausted its administrative remedy: completing the appeal of the variance-denial. If the appeal were successful, the variance would also have to be approved by the EPA to modify the federal law. The court held that it would not consider the issue of the validity of the regulation as applied, even in the context of a challenge to an enforcement action, until administrative remedies were exhausted. Furthermore, the court held that this entailed no infringement of Getty's procedural due process rights.\(^\text{173}\)

The facts of Getty Oil are distinguishable from a case in which the defendant has tried to get a timely administrative remedy but has been thwarted by administrative delay. Even the defendant who has not created its own injury, who has made reasonable efforts to gain an exception, and who may be injured by having to exhaust should be required to do so. In the typical variance case, exhaustion would allow the court to gain the value of an agency's determination of facts and exercise of discretion on political policy. It would preserve the limited scope of review, thereby promoting judicial economy and preventing forum shopping. For administrative appeals, exhaustion is justified because it allows agencies to correct their own errors. Therefore, courts should require exhaustion. They may avoid imposing unfair injuries not by dispensing with exhaustion but by deferring action in the enforcement proceeding until the administrative remedy is complete. This deferral should be available only if the defendant's own actions or delays have not led to its injuries.\(^\text{174}\)

A harder variation on the facts of Getty Oil arises if the administrative remedy is no longer available. For example, this would

\(^{173}\) Getty Oil may be distinguished from the prototype case because it involved no judicial enforcement action. Administrative orders are not self-enforcing. But they are serious and were treated seriously by the court. Indeed, the court even treated the case as it would a criminal enforcement case. On the constitutional issue, the court said it was determining "whether Getty's constitutional right to a due process hearing prior to the imposition of criminal sanctions for non-compliance was satisfied." Id. at 356.

\(^{174}\) This might have been the appropriate remedy in Getty Oil. Although Getty created its own injury by asking that its administrative appeal be deferred, it did this in the spring of 1972, only fifteen and a half months after the major and complex provisions of the Clean Air Act were enacted. This was a new type of statutory scheme. Getty Oil's lawyers can hardly be blamed for choosing the wrong forum for their claims.
have occurred if Getty had a right to appeal the variance-denial to the Commission within sixty days, had chosen not to appeal, and had then been subject to an enforcement action for an injunction. Even in these cases it seems best to require exhaustion. Thus, the court should refuse to review the standard or regulation which is being enforced. Otherwise, the defendant's own actions would force the court to create an exception and the value of the agency's remedy would be lost.

In a few cases, the defendant may appear not to be responsible for its own actions. For example, the defendant may reasonably not have known of the administrative remedy or the time limits on its exercise. Courts should handle these few cases by giving the agency the option of providing some sort of administrative remedy outside the usual time limits if the statute allows. If the statute does not allow, the court must respect the legislative decision that the purpose behind the statute requires limiting the time for administrative appeal or some other remedy and deny review. Although these cases will necessitate case-by-case judgments by courts, they do not carry much risk of encouraging excessive litigation. Once the government has initiated an enforcement action, litigation is likely. Exhaustion in this context is relevant only as to the availability of a defense.

Although the dicta in Getty Oil seem to reach criminal as well as civil cases, it is much more troublesome to say that a criminal defendant may be precluded from raising a defense for failure to exhaust. Here, the argument is strongest that the defendant is entitled to have all arguments heard in the context of the criminal trial, even if the administrative remedy is still available. Yet, the leading Supreme Court decision seems to allow courts to demand exhaustion whether or not the administrative remedy is still available. In Yakus v. United States, the Supreme Court upheld the constitutionality of the World War II Emergency Price Control Act which gave any person sixty days to seek administrative review of regulations of the Office of Price Administration, subject to judicial review in a special court. The statute provided that no other court had jurisdiction to review the regulations. The petitioners did not seek administrative review of a regulation. The government later brought criminal enforcement actions against them for violating the regulation. The Supreme Court held that the statute precluded the petitioners from raising the invalidity of the regulation as a defense to the criminal action and that this preclusion did not violate the petitioners' due process rights.

It is unclear whether the Yakus holding is still good law or

175. This situation differs from the facts in Gage v. United States Atomic Energy Comm'n, 479 F.2d 1214 (D.C. Cir. 1973), discussed supra text accompanying notes 105-12. There the plaintiffs who were unable to obtain judicial review were not regulated parties, so they did not risk injury from enforcement.
177. Id. at 423-27.
178. Id. at 423.
whether it applies to statutes whose legislative purpose is less compelling than the national defense.\textsuperscript{179} Even if it is still viable, \textit{Yakus} may not mean that it is always constitutional to preclude a nonexhausting defendant from raising the validity of a statute or regulation as a defense. The Emergency Price Control Act, at issue in \textit{Yakus}, explicitly precluded review at enforcement. In most exhaustion cases, the statute only sets out an administrative remedy, and neither explicitly makes it exclusive nor precludes judicial review at the time of enforcement. Moreover, even as applied to statutory preclusion cases, \textit{Yakus} arguably oversteps constitutional limitations, at least when national defense is not at stake. Professor Schwartz contends that it deprives a criminal defendant of the right to have all issues decided in one proceeding under the procedural safeguards of a criminal trial.\textsuperscript{180} This objection has merit. Courts should allow unexhausted claims to be made as a defense in a criminal enforcement proceeding.

There is no compelling reason to extend this exception to civil

\textsuperscript{179} A more recent environmental decision, Adamo Wrecking Co. v. United States, 434 U.S. 273 (1978), arose out of a similar issue. Five members of the Supreme Court construed the Clean Air Act in a way that allowed them to avoid deciding whether the \textit{Yakus} rule survives.\textsuperscript{See id. at 289-91 (Powell, J., concurring). The issue was particularly difficult because the statute made the remedy available for only 30 days. The issue in \textit{Adamo} did not address exhaustion of an administrative remedy, but addressed an unexhausted judicial remedy. Under section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 1857h-5(b)(1) (1970 & Supp. 1975) (currently at 42 U.S.C. § 7607(b)(1) (1982)), any party could petition for judicial review of a standard within 30 days of promulgation. If review were available under section 307(b)(1), then it was not available in an enforcement proceeding.\textsuperscript{See 42 U.S.C. § 1857h-5(b)(2) (currently at 42 U.S.C. § 7607(b)(2) (1982)). The issue of constitutionality is not affected by this difference. In this case and in exhaustion cases, the issue could have been raised at one time before a court. In exhaustion cases, this would have occurred on judicial review of the unexhausted administrative remedy. In \textit{Adamo} and in exhaustion cases, the issue is the constitutionality of precluding a court, in an enforcement action, from considering whether the administrative action was valid when validity could have been determined in a separate proceeding.

In addition to the time period allowed for review, two other distinctions separate \textit{Yakus} and \textit{Adamo}. The purpose of the statute at issue in \textit{Yakus} was national security; the purpose of the statute at issue in \textit{Adamo} was arguably less important (and arguably more important) — health protection.\textsuperscript{See 434 U.S. at 289-90 (Powell, J., concurring). Also, in \textit{Adamo} it was questionable whether most parties in the defendant's position would even become aware of the regulation within the 30 days allowed for judicial review.\textsuperscript{See id. at 283 n.2, 289-90 (Powell, J., concurring).}

The \textit{Adamo} majority avoided deciding the issue of constitutionality by finding that the EPA's regulation in question was not a standard and therefore was not subject to the section 307(b)(2) preclusion. \textit{Id.} at 289. Four justices would have found the regulation a standard. Of these, three argued that the court need not reach the constitutional issue because it was not raised by the defendant originally. \textit{Id.} at 293 (Stewart, Brennan, and Blackman, JJ., dissenting). Justice Stevens apparently saw no constitutional problem. \textit{Id.} at 293-307 (Stevens, J. dissenting).

\textsuperscript{180} B. SCHWARTZ, supra note 6, § 194, at 553-54; see also Currie, supra note 115, at 1258-60 (arguing that it is too harsh to deprive a defendant of rights even for negligent failure to seek pre-enforcement review).
enforcement actions. Professor Schwartz's argument does not speak to such actions. In civil enforcement cases, courts should not hear claims that could have been raised through an unexhausted administrative remedy.

In one other particularly difficult type of irreparable injury case, a plaintiff also claims that the agency lacks jurisdiction over the controversy. In this situation, it is insufficient to tell the plaintiff, "We are sorry about your injury, but the law establishing the administrative remedy makes that injury unavoidable," because the plaintiff's claim is that the law does not establish the administrative remedy.

Professor Davis recognizes the difficulties these cases present. He recommends that courts balance the extent of injury, degree of doubt as to administrative jurisdiction, and "involvement of specialized administrative understanding in the question of jurisdiction." This solution, however, lacks guidance for potential litigants and encourages litigation. It also requires a multifactored and difficult balancing process. On the other hand, an exception for irreparable injury plus asserted lack of administrative jurisdiction is unlikely to apply in more than a few cases. It seems inappropriate to impose such a heavy burden of detection on the courts for the benefit of so few parties. As long as the agency points to an administrative proceeding which it claims has jurisdiction, and is not in bad faith, there should be no special exception.

The cases discussed thus far involve plaintiffs with injuries of a type common to all parties subject to the administrative scheme. The situation is different if exhaustion would expose a plaintiff to a unique injury, one that is not inherent in the administrative scheme itself. Such a plaintiff has a more compelling argument for an exception. An exception would not overturn a statutory or regulatory scheme, but would grant relief in particular circumstances in which the scheme imposed unusual hardship. On the other hand, a court might have to undertake a careful investigation of possibly complex facts before recognizing the exception in an individual case. This might encourage litigation over exhaustion. On balance, it seems appropriate to recognize an exception, but only if the plaintiff makes a clear showing that exhaustion would cause significant and irreparable injury peculiar to the plaintiff. Such cases will probably be rare.

Even in cases involving irreparable injury in which waiver of the exhaustion requirement would be appropriate, courts may be

181. Professor Currie's argument, that precluding review of the validity of a regulation at the enforcement stage is unfair, would apply as well to civil cases. See Currie, supra note 115, at 1259. He illustrates his argument with the example of shutting down a valuable plant because the owners or operators failed to seek pre-enforcement review of a regulation. Id. One could also argue that it is unfair to deprive workers of their jobs and society of the plant's products.
182. 4 K. DAVIS, supra note 1, § 26.5, at 432.
183. The treatise cites several decisions that follow this recommendation. Id.
able to fashion a remedy that prevents irreparable injury but allows exhaustion. If the injury comes mainly from unjustified delay in administrative proceedings, the court could order the agency to complete its proceedings and reach a determination by a set date. The court could retain jurisdiction to review the agency’s decision without compounding the injuries from the delay of refiling. In other cases, the court could enjoin the effect of the administrative decision pending completion of the administrative remedy. This solution preserves the values behind requiring exhaustion, although it does little to reduce uncertainty in the law. It also risks encouraging excessive litigation, although perhaps not greatly. Parties who know courts are likely to fashion a remedy that includes exhaustion might be less anxious to seek early judicial review.

G. Type of Administrative Remedy

The type of administrative remedy available may affect the issue of whether exhaustion is necessary when the remedy is an administrative appeal, a petition for reconsideration, a petition for a new rulemaking, or a proceeding separate from that for which judicial review is sought.

Exhaustion should usually be required if the remedy is administrative appeal. This procedure would allow the agency to correct its own errors, give courts the fullest benefit of the agency’s expertise, keep policy judgments in the political realm, and help avoid forum shopping. The Administrative Procedure Act (APA), however, seems to dispense with exhaustion for cases involving administrative appeals before federal agencies. Section 10(c) provides:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are

184. The court used both techniques in Coalition for Safe Nuclear Power v. Atomic Energy Comm’n, 463 F.2d 954 (D.C. Cir. 1972). Petitioners sought suspension of a construction permit for a nuclear power project pending full review of the project under NEPA. The petitioners had not taken an administrative appeal. The court required exhaustion. Pending the appeal, continued construction would substantially increase the permittee’s investment in the project. The substantive decision under NEPA could be affected by this irretrievable investment. To reduce the chance that ongoing activity during the exhaustion period would change the ultimate substantive outcome, the court gave the agency 60 days to decide the appeal. After that, the record was to be returned to the court. Id. at 956.

185. This would be helpful in a case like Southeast Alaska Conservation Council, Inc. v. Watson, 697 F.2d 1305 (9th Cir. 1983). The plaintiffs challenged a decision of the Forest Service allowing mineral sampling without an environmental impact statement. The plaintiffs had also taken an administrative appeal of the decision. A company had begun sampling. Id. at 1306-07. The court held that the plaintiffs did not have to wait until the administrative appeal was decided because the sampling was irreparable injury. Id. at 1309. It could have enjoined the sampling and required completion of the administrative appeal before considering the merits of the claim.
subject to judicial review. . . . Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.\textsuperscript{186}

This means that exhaustion of administrative appeals is required only if a statute other than the APA so requires or an agency’s rule so requires and suspends the original administrative decision pending that appeal. Professor Davis reports that this provision is honored mainly in the breach.\textsuperscript{187} This is hardly surprising because the APA’s exception for administrative appeals makes no sense.\textsuperscript{188} Congress should eliminate that provision, but until it does, federal courts will have to honor it. State courts should require exhaustion if an administrative appeal to a state agency is available.

When the only administrative remedy is a petition to the agency for reconsideration or for a new rulemaking,\textsuperscript{189} the circumstances are distinguishable from administrative appeals cases. Administrative appeals usually go to an administrative panel or a person different from the initial decision maker. The appellate authority usually is “higher up” in the agency and so should have a broader overview of related facts, although no greater knowledge of a case’s specific facts. The appellate authority typically will also have greater political responsibility. By contrast, a petition for reconsideration or for a new rulemaking is addressed to the same administrative body that made the initial decision.

Whether the administrative remedy of a petition for reconsideration or for a new rulemaking should be exhausted depends on whether the plaintiff presents any new factual or legal claims. Exhaustion should not be required if there are no new claims: there is no reason to require the body of people who made the initial decision to have a second opportunity to make a decision. The val-

\textsuperscript{188} Even the court in Consolidated Mines said it expected agencies to avoid the effect of section 10(c) by promulgating rules requiring administrative appeals prior to judicial review. 455 F.2d at 452.
\textsuperscript{189} E.g., Honicker v. Hendrie, 465 F. Supp. 414 (M.D. Tenn. 1979). The plaintiff wanted the Nuclear Regulatory Commission (NRC) to revoke the licenses of all nuclear power plants on the grounds that they were so dangerous that they violated the plaintiff’s constitutional and statutory rights. See S. Doc. No. 248, 79th Cong., 2d Sess. 369 (1946).

The legislative history of section 10(c) is unilluminating. The Attorney General reported to the Senate Judiciary Committee that the provision was intended to codify existing law. See S. Doc. No. 248, 79th Cong., 2d Sess. 369 (1946).

E.g., Honicker v. Hendrie, 465 F. Supp. 414 (M.D. Tenn. 1979). The plaintiff wanted the Nuclear Regulatory Commission (NRC) to revoke the licenses of all nuclear power plants on the grounds that they were so dangerous that they violated the plaintiff’s constitutional and statutory rights. The Atomic Energy Act, 42 U.S.C. § 2239(a) (1976) (as amended by Act of Jan. 4, 1983, Pub. L. 97-415, § 12(a), 96 Stat. 2073) and NRC regulations, 10 C.F.R. §§ 2.200-2.206 & 2.802 (1978), allowed any person to request the NRC to institute a license-revocation proceeding. The plaintiff had made such a request, which the NRC was evaluating. 465 F. Supp. at 417. See generally Fuchs, supra note 6, at 871-74; Rames, Exhausting the Administrative Remedies: The Rehearing Bog, 11 Wyo. L.J. 143 (1957).
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ues behind the exhaustion doctrine are not served. The only advantage is that the agency would be given a chance to correct its own errors, but no change in the agency's position is likely when the same administrative body addresses the same facts and law.190

If the plaintiff introduces new facts or claims, exhaustion should be required because then the agency has not had a chance to consider all the issues.191 Exhaustion will give the courts the

190. This limited exception should not be confused with the broad exception courts sometimes recognize for futility. Courts sometimes hold that exhaustion is not required because the agency would give no relief. The real question is what indicates that the agency would not give relief. A court should not grant an exception just because the judges guess that the agency will not be helpful. An exception is warranted if the only remedy is to ask the same agency personnel to reconsider an issue they have already decided.

Porter County Chapter of the Izaak Walton League of Am. v. Costle, 571 F.2d 359 (7th Cir.), cert. denied, 439 U.S. 834 (1978), illustrates the distinction. The Izaak Walton League sought judicial review of the EPA's decision to issue a discharge permit under the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251-1376 (1982). In the original hearing in the regional office of EPA on whether to issue the permit, the hearing officer certified to the General Counsel of the EPA the issue of whether the Rivers and Harbors Act (RHA), 33 U.S.C. §§ 401-418 (1982), imposed a more stringent standard than the FWPCA for this permit. The General Counsel decided that the RHA did not. The League asked the Administrator of the EPA to review the General Counsel's decision, and the Administrator approved it. The regional office then issued the permit. The League had a right to appeal to the Administrator the issuance of the permit. It did not do this. Instead, it sought judicial review, claiming that the permit failed to meet the more stringent requirements of the RHA. 571 F.2d at 362-63.

The court considered whether it should address the League's claim, even though the League did not exhaust its administrative remedy of appealing the grant of the permit. The court held that exhaustion was not required because it would be futile. Id. at 363.

The result is correct but, the reason given is not sufficient. The question is why exhaustion would be futile. The reason is that the same issue had been raised by the same party before the same administrative decision maker. Thus, the appeal was really like a petition for reconsideration.


The Clean Air Act and Clean Water Act both address the need for reconsideration by the agency. Section 307(c) of the Clean Air Act, 42 U.S.C. § 7607(c) (1982), and section 509(c) of the Clean Water Act, 33 U.S.C. § 1369(c) (1982), apply to determinations that the statutes require EPA to make "on the record after notice and opportunity for hearing ..." In addressing judicial review of these determinations, both statutes provide: "if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence ... to be taken before the Administrator ... ." Id. The "may order" language is ambiguous. It may be read to give the court the option of hearing the new evidence itself or requiring resort to the agency. A better reading is that the court has discretion whether to permit consideration of the new evidence at all; if the evidence

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benefit of the agency's expertise, keep policy judgments close to
the political realm, preserve the limited scope of review, avoid fo­
rum shopping, and protect the representation of diverse interests.
To prevent overbroad application of this exception, a plaintiff
seeking not to exhaust should have the burden of showing that all
claims have been brought before the agency.

The APA provides generally that "agency action otherwise final
is final for the purposes of this section whether or not there has
been presented or determined an application . . . for any form of
reconsiderations. . . ."192 This provision can and should be inter­
preted as limited to applications involving no new claims, because
there has been no "agency action" as to a new claim. This inter­
pretation reconciles the APA with the present analysis.193 Simi­
larly, a litigant should not be required to file a petition for
rulemaking that raises no new issues. Such a petition should be
treated as an application for a form of reconsideration.

A harder question arises if the administrative remedy is not a
review of an agency's prior decision or the application of a general
decision to a specific case, but is a separate administrative proceed­
ing. Riverside Irrigation District v. Stipo194 addresses this prob­
lem. The plaintiffs planned to build a dam and reservoir. Sections
301 and 404 of the Federal Water Pollution Control Act require
anyone discharging dredged or filled material from dam construc­
tion into waters of the United States to obtain a discharge permit
from the Corps of Engineers.195 The Corps had by regulation is­

is to be considered, it must be considered first before the agency. This is consistent
with the recommendation in the text.

The Clean Air Act has a more specific scheme for "an objection to a rule or proce­
sideration on judicial review to objections raised with reasonable specificity during
public comment. Other objections must be raised first before EPA. The agency must
convene a proceeding for reconsideration if it was impractical to raise such objections
during public comment or if the grounds arose after the comment period "and if such
objection is of central relevance to the outcome of the rule . . . ." Id. (emphasis ad­
ded). In other words, exhaustion of the remedy of reconsideration is required only for
new and important information: for such information, exhaustion is mandatory. See

Section 307(d)(7)(B) was enacted in 1977 to incorporate into the statute the holding
of Oljato Chapter of the Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975) (court
refused to consider challenge to Clean Air standard based on new information until
agency addressed new factual issues and created a record). See H.R. REP. NO. 95-294,

192. 5 U.S.C. § 704 (1982); see supra text accompanying note 186. The MODEL ADM­
MIN. PROC. ACT § 4-218(1), 14 U.L.A. 134 (Supp. 1984), is similar. It provides: "The
filing of the petition [for reconsideration] is not a prerequisite for seeking administra­
tive or judicial review."

193. The MODEL ADMIN. PROC. ACT § 5-112, 14 U.L.A. 152 (Supp. 1984), does not
allow this interpretation, at least as to review of rules. It allows a person to obtain
judicial review of issues not raised before the agency if the person was not a party to
an adjudicative proceeding in which the issues could have been raised or if the con­
trolling law changed after the agency's action.

194. 658 F.2d 762 (10th Cir. 1981).

sued certain nationwide discharge permits. Anyone qualifying for a nationwide permit under the terms of the regulation may discharge under it without making a specific application to or even notifying the Corps. Plaintiffs determined that they qualified and began construction. The Corps learned of the project, determined that the plaintiffs were not qualified, and told them to modify the project in specific ways to qualify it or to apply for an individual permit. The plaintiffs sought judicial review of the determination that their project did not qualify for a nationwide permit. One issue was whether the plaintiffs had to exhaust the individual permit-application procedure. The court held that they did not. It regarded that individual permit application as "something else and something different" from the original proceeding.196

On one hand, the court's decision seems correct. The available administrative remedy could not address the issue the plaintiffs wanted to raise: the correctness of the Corps' decision that the project did not qualify for a nationwide permit. On the other hand, the *Riverside Irrigation* decision invites courts to engage in detailed and difficult consideration of which administrative remedies are "something else" and which are not. This analysis proposed in *Riverside Irrigation* is bound to lead back into the morass of confused law and burdensome decisions.

Consideration of the rationales behind the exhaustion requirement as they apply to these cases helps in choosing the correct outcome. Here, exhaustion will not avoid the inconvenience and cost to an agency from having to make decisions without all interested parties present. Nor will exhaustion allow the agency to correct its own errors because the issue in the second, unexhausted proceeding is different from the issue the plaintiff alleges was wrongly decided in the first.197 For the same reason, the agency has already provided its factual and policy judgment, although more relevant facts could be developed in the second proceeding, even if the issues were not the same. Finally, exhaustion is not needed to preserve the limited scope of review, although it might help prevent forum shopping.

Overall, the court's decision not to require exhaustion in *Riverside Irrigation* is probably correct because the circumstances do not fit the usual conception of an exhaustion case. The administrative remedy does not require the agency to review or apply its own prior decision, and there are no strong policy reasons for forc-

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196. 658 F.2d at 767.
197. The original issue in *Riverside Irrigation* was whether the plaintiff's project qualified for a nationwide permit. In the application for an individual permit the issue would be whether the project qualified under the different criteria for the individual permit. *Id.* at 764.
ing the facts into the exhaustion mold. 198

Yet, the potential pitfall of creating an ill-defined exception and generating excess litigation over exhaustion remains. Comparing Riverside Irrigation with Signal Properties v. Alexander 199 illustrates the difficulty of identifying those remedies which are “something else.” Signal Properties also arose out of a challenge to the Corps’ discharge-permit authority. The Corps’ regulations required anyone discharging fill material onto wetlands to obtain a permit. The plaintiffs sought a declaratory judgment that their lands were not wetlands and no permit was required for discharging. The court required the plaintiffs to apply for a permit. 200

Signal Properties is correctly decided. It differs from Riverside Irrigation in a crucial way. The Riverside Irrigation court assumed, apparently correctly, that the permitting authority could not consider the issue that the plaintiff raised: whether it was entitled to a nationwide permit. 201 The Signal Properties court recognized that the permitting authority could resolve whether the plaintiff was discharging onto a wetland. 202 Therefore, the administrative remedy was not “something else.”

Although courts should not require exhaustion of a separate administrative proceeding, they should require a clear showing both that the unexhausted proceeding is sufficiently associated with a different responsibility of the agency to be considered separate and that the agency cannot consider the plaintiff’s claim in that separate proceeding. If there is a reasonable doubt whether the proceeding is separate, the plaintiff should have to exhaust. 203

198. Buccaneer Pt. Estates, Inc. v. United States, 17 Env’t Rep. Cas. (BNA) 1973 (S.D. Fla. 1982), reached a similar resolution, although the court did not characterize the issue in the same manner. The Corps of Engineers told Buccaneer to apply for a permit for a fill project. Buccaneer asked the court to hold that no permit was needed, arguing that the Corps should be estopped from requiring a permit because the Corps had previously assured Buccaneer that the permit was unnecessary. The Court rejected this argument. Id. at 1976.

The court then considered whether Buccaneer should have to exhaust its administrative remedy of seeking a permit. Although the court purported to require exhaustion, it did so only as to a different claim. Id. at 1975. The court itself resolved the estoppel claim against the plaintiff. Under the analysis in the text, this was the appropriate result.


200. Id. at 1854. But see P.F.Z. Properties., Inc. v. Train, 393 F. Supp. 1370 (D.D.C. 1975). The EPA ordered P.F.Z. to stop discharging without a permit. P.F.Z. sought a declaratory judgment that the EPA and the Corps lacked jurisdiction over the waters in question. The court decided the jurisdictional issue, holding the agencies had jurisdiction. Id. at 1381. It did not consider whether P.F.Z. should have been required to exhaust.

201. The court concluded, “final action has been taken . . . . No other adequate remedy exists.” 658 F.2d at 768. If the permitting authority could have considered the plaintiffs’ claim, then the case was wrongly decided.

202. 17 Env’t Rep. Cas. (BNA) at 1854.

203. In White Fence Farm, Inc. v. Land & Lakes Co., 99 Ill. App. 3d 234, 424 N.E.2d 1370 (1981), the court required exhaustion of a separate remedy. White Fence claimed that the Illinois Environmental Protection Agency erred in issuing a sanitary landfill permit to Land & Lakes. Illinois law allowed any person to ask a separate agency, the Illinois Pollution Control Board, to bring an enforcement action against any person
H. Statutory Obligation to Consider Issues

In Sierra Club v. ICC \(^{204}\) the District of Columbia Circuit held that exhaustion is less important if a statute mandates that an agency consider certain matters than if it requires only that the agency consider certain parties' views. The court reasoned that a party claiming that an agency failed to give adequate consideration to statutorily relevant matters need not participate in all administrative proceedings before raising its claims in court.\(^ {205}\)

The distinction is invalid. The issue in deciding if exhaustion should be required is not whether the agency acted appropriately, but whether the agency had a full opportunity to consider the claim that it acted inappropriately. To give the agency this opportunity, the plaintiff must exhaust.\(^ {206}\)

The standard of Sierra Club v. ICC should be rejected because its broad implications could destroy much of the concept of exhaustion. It is not limited, as the court seems to suggest, to NEPA. NEPA puts agencies under a duty to consider certain matters, threatening pollution. The court reasoned that White Fence had a right to be free from pollution but not from a nonpolluting landfill, so the remedy was adequate.

Under the analysis in the text, this result is inappropriate. The White Fence court interpreted a statute to preclude White Fence from taking an administrative appeal on the permit to the Board. The proceeding required by the court was separate from the initial proceeding. Yet, the court required it, in part because the court interpreted the statute to preclude direct judicial review of the Board's action. The plaintiff claimed its constitutional rights of due process would be infringed if it could receive no review of the Board's action. By holding that the enforcement request provided an administrative remedy for the plaintiff, the court avoided the constitutional issue.

The exception for a separate administrative proceeding is different from that for lack of an adequate remedy or lack of jurisdiction to grant a remedy. The exception for a separate agency proceeding should apply only where there is a separate proceeding in which the plaintiff's claim cannot be considered. Courts should not require exhaustion even if the agency in the separate proceeding could grant some other form of relief. If the agency can consider the plaintiff's claim in the separate proceeding, courts should require exhaustion even if the plaintiff is unhappy with the relief the agency could give.

204. 8 ENVTL. L. REP. (ENVTL. L. INST.) 20,265 (D.C. Cir. Feb. 21, 1978) (plaintiffs had participated in some but not all stages of agency proceedings).


206. Another decision interpreting NEPA, City of Battle Creek v. FTC, 481 F. Supp. 538 (W.D. Mich. 1979), is consistent with this analysis.
such as alternatives to a proposed course of action. \footnote{207} All agencies have some such duty, if only to consider whether their proposed actions are arbitrary and capricious. \footnote{208} The analysis in Sierra Club \textit{v. ICC} incorrectly suggests that a plaintiff can always challenge an agency's action as arbitrary and capricious without exhausting. \footnote{209}

\section*{VI. Conclusion}

This discussion has reduced the number of appropriate exceptions to six that are narrowly drawn and dependent on specific facts: challenges to the constitutionality of a statute on its face; an agency's bad faith; irreparable injury in the form of subjection to criminal enforcement; irreparable injury peculiar to the plaintiff that is not generally shared by other parties subject to the administrative scheme, provided that the court cannot fashion a remedy that avoids significant injury; a petition for reconsideration or new rulemaking that raises no new claims; and an unexhausted remedy that is a separate, substantially unrelated proceeding in which the plaintiff's claims may not be heard. Identification of the facts crucial to determining whether these exceptions apply should not require a broad-ranging judicial inquiry. In all cases, if there is significant doubt whether the facts fall into an exception, courts should require exhaustion. The burden of showing that an exception applies should fall on the party seeking not to exhaust.

Finally, courts must resist the temptation to delve into the merits of a case before deciding the exhaustion issue or, worse yet, after deciding that exhaustion is required. \footnote{210} Courts should de-

\footnote{207}{See National Environmental Policy Act, 42 U.S.C. § 4332(C)(iii) (1982).}


\footnote{209}{See 8 ENVTL. L. REP. at 20,267. The court in Small Refiner Lead Phase-Down Task Force \textit{v. EPA}, 705 F.2d 506, 534-35 (D.C. Cir. 1983), allowed the plaintiffs to raise the issue on judicial review of whether it was arbitrary and capricious for EPA to use a certain methodology, even though the plaintiffs had failed to object to the methodology during the rulemaking process.}

\footnote{210}{In McGrady \textit{v. Callaghan}, 244 S.E.2d 793, 860 (W. Va. 1978), the court inappropriately decided the merits after determining that the plaintiffs had failed to exhaust. The plaintiffs challenged an agency's issuance of a surface mining permit to a third party on the grounds that the procedure used violated the plaintiffs' constitutional rights to a hearing prior to issuance of the permit, the permit was inconsistent with several mandatory obligations of the agency, and the permit was issued in violation of statutory procedures. The court held that the plaintiffs had no right to a hearing prior to issuance. \textit{Id.} at 795. It also held that they had an administrative remedy — an administrative appeal with a full evidentiary hearing — which they had to exhaust. \textit{Id.} at 797. But the court continued: "We have considered the other grounds relied upon for the relief sought and find them to be without merit." \textit{Id.} See also League to Save Lake Tahoe \textit{v. Trounday}, 588 F.2d 1164 (9th Cir.) (noting that plaintiffs failed to exhaust administrative remedies but also speculating that plaintiffs would have failed to state a claim in federal court), \textit{cert. denied}, 444 U.S. 943 (1979); Sierra Club \textit{v. Hardin}, 325 F. Supp. 99 (D. Alaska 1971) (plaintiff failed to exhaust administrative remedies by failing to exhaust regulatory appeals).}
develop rules on exhaustion that will guide parties trying to decide whether to go to court or to an agency and will encourage them not to go to court in inappropriate circumstances. Decisions that say that exhaustion is required but decide the merits anyway do not serve this objective; rather, they encourage litigation in cases in which a party should exhaust. They also undercut the purposes of the exhaustion requirement.

Courts should be more insistent on requiring exhaustion of administrative remedies in environmental cases. They should waive the requirement only for cases that are clearly within the limited exceptions defined in this Article.

The framework for analysis presented here is not limited to environmental cases, but can be used for any agency. Exhaustion preserves fact-finding and policy-making in the administrative realm. The importance of this function varies according to the agency's technical expertise, political awareness, and political responsiveness; the analysis of how strictly to apply exhaustion requirements will vary accordingly. The arguments in this Article suggest that courts and scholars should address the issues of agency factual and political competence explicitly, rather than allow them to lie as the unexpressed concerns behind unnecessarily complex and indefinite exhaustion doctrine.

Some may object that the suggestions of this Article, if actually applied, will make judicial review less available. Parties unhappy with an agency's determination will realize that an attempt to obtain an administrative remedy is more frequently a prerequisite for judicial review. Convinced that the agency will not provide a solution and discouraged by financial or temporal costs, they will give up. This will have two adverse effects. It will produce parties who not only have failed to get what they want but who also feel that they were denied a fair hearing. Moreover, it will lessen opportunities for courts to correct agencies' errors and teach agencies how better to do their jobs. This will injure not only the parties involved in a particular case, but also all parties who will be subject to the continuing uncorrected administrative action.

These concerns are well taken. The first is particularly troublesome; the second, less so because the impact of lost opportunities for judicial review on agency decision making is uncertain. An important goal of judicial review is to make agencies function well, but one could argue that an agency would learn the most after it has tried its best. In addition, if we seriously want agencies to function well, we must seek more direct means of achieving this

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remedies, yet the court considers the suit's merits and ultimately approves the agency's conduct).
goal. Reform of an agency's structure and better pay for its decision makers would probably do more to improve administrative functioning than would judicial review that occurs long after the agency has acted.

To the extent that the two objections remain, the issue is whether their importance justifies a less stringent exhaustion doctrine than this Article recommends. This Article argues that the values behind exhaustion are important, that these values are ill-served if courts do not require exhaustion, and that the process of deciding whether exhaustion is warranted in individual cases introduces major problems of its own. The values underlying the exhaustion doctrine are sufficiently important and the problems with the liberal granting of exceptions are sufficiently troublesome to outweigh these objections. Courts should adopt these clearer and stricter standards on requiring exhaustion of administrative remedies.