Washington and Lee Law Review

Volume 36 | Issue 2 Article 5

Spring 3-1-1979

I. Administrative Law

FOURTH CIRCUIT REVIEW

I. ADMINISTRATIVE LAW

A. Finality of Administrative Action

In *Fort Sumter Tours, Inc. v. Andrus,*[1] the Fourth Circuit determined whether an informal administrative action[2] was "final"[3] within the meaning of the Administrative Procedure Act[4] for purposes of judicial review.

---

[1] 564 F.2d 1119 (4th Cir. 1977).

[2] Section 551(13) of the Administrative Procedure Act (APA), 5 U.S.C. § 551(13) (1976) defines an "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." An "order" is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making. . . ." *Id.* § 551(6). A "rule" is "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." *Id.* § 551(4). Agency proceedings that formulate orders and rules are characterized as formal adjudication and informal rule making, respectively. Formal adjudication requires a quasi-judicial hearing before an administrative law judge. Witnesses appear for both sides, and a record is compiled. *Id.* §§ 556(6), 3105, 5362, 7521. For informal rule making, the APA requires only that the agency publish the proposed rule, including a description of the subjects and issues involved, in the Federal Register. The agency also must give "interested persons" an opportunity to participate and must publish the final regulations. *Id.* § 553(b), (c). The potential for overlap between rules and orders is more than simply a problem of semantics because the APA does not make its minimum procedures for rule making exclusive. Pedersen, *Formal Records and Informal Rulemaking,* 85 YALE L.J. 38, 39-41 (1976). Furthermore, many agency decisions can be characterized as either rules or orders. *Id.* at 41. *See also* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.13 at 206 (Supp. 1970).

Informal rule making has several advantages. Not only does it simplify the agency decision making process and effectuate a speedier, less expensive resolution of legal and policy questions, it also allows for broad public participation in the administrative process and enables agencies to draw upon the expertise of outside parties. Finally, informal rule making permits the formulation of prospective standards and guidelines. Brotman, *Ex Parte Contacts in Informal Rulemaking:* Home Box Office, Inc. v. FCC *and* Action for Children's Television v. FCC, 65 CAL. L. REV. 1315, 1322-23 (1977).

[3] The APA provides for judicial review of any "final agency action. . . ." 5 U.S.C. § 704 (1976). While there is no clear standard for what constitutes a "final agency action," the Supreme Court has indicated that agency actions which are not "final," but which represent an intermediate stage in a series of events which may culminate in a more formal proceeding, are not final orders and are not subject to 5 U.S.C. § 554 governing adjudications. *See* ITT v. Local, 134, 419 U.S. 428, 442-44 (1975).

[4] 5 U.S.C. §§ 551-559, 701-706, 3105, 3344, 5371, 7521 (1976). 5 U.S.C. § 704 (1976) 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. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purpose 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 is meanwhile inoperative, for an appeal to superior agency authority.

Specifically, the court examined the district court's grant of injunctive relief[5] to Fort Sumter Tours, Inc. (Fort Sumter) barring the National Park Service (Park Service) from awarding a concession contract to Gray Line Water Tours, Inc. (Gray Line). The injunction was granted to preserve the plaintiff's statutory right of preference.[6] *Fort Sumter Tours* also furnished the Fourth Circuit with its first opportunity to review an application of the trial court standard for interlocutory injunctive relief formulated in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*[7] The Fourth Cir-

---

The National Park Service, a subsidiary of the Department of the Interior, is bound by the provisions of the APA. 5 U.S.C. § 101 (1976); 16 U.S.C. § 462 (1976).

[5] Fort Sumter Tours, Inc. v. Andrus, 440 F. Supp. 914, 921 (D.S.C. 1977).

[6] The statutory right of preference is delineated in 16 U.S.C. § 20(d) (1976):

> The Secretary [of the Interior] shall encourage continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary. To this end, the Secretary, at any time in his discretion, may extend or renew a contract or permit, or grant a new contract or permit to the same concessioner upon the termination or surrender before expiration of a prior contract or permit. Before doing so, however, and before granting extensions, renewals or new contracts . . ., the Secretary shall give reasonable public notice of his intention so to do and shall consider and evaluate all proposals received as a result thereof.

The statutory right of preference provides that a satisfactory concessioner has a right to preferential treatment in contract renewal proceedings. The purpose of this provision is to ensure the continuity of concessioner services in the national parks. Fort Sumter Tours, Inc. v. Andrus, 440 F. Supp. 914, 919 (D.S.C. 1977); 16 U.S.C. § 20(d) (1976). For the legislative history of § 20(d), see Pub. L. 89-249 § 5, Oct. 9, 1965, 78 Stat. 970. *See also* National Parks and Conservation Assoc. v. Kleppe, 547 F.2d 673, 676 (D.C. Cir. 1976); Southwestern Petroleum Corp. v. Udall, 361 F.2d 650 (10th Cir. 1966).

A similar concept of preferential contract renewal rights appears in the field of public broadcasting. *See* Note, *Petition to Deny Broadcast License Renewals,* 16 WASHBURN L.J. 375 (1977). *See generally* Citizens Communications Center v. FCC, 447 F.2d 1201, 1214-15 (D.C. Cir. 1971), *clarified on rehearing,* 463 F.2d 822, 823-24 (D.C. Cir. 1972) where the court rejected the Commission's finding that "substantial service" by the holder of a broadcasting license warranted virtually automatic renewal. Rather, the court required a single full comparative hearing in which all applicants would have an opportunity to develop evidence and have their applications evaluated on all relevant criteria. 447 F.2d at 1214-15. Upon rehearing, the court held that where the Commission preferred to develop criteria for license renewals over time by means of an evolving case-by-case analysis, the court would not direct it to devise one established formulation. 463 F.2d at 823-24; *cf.* WHDH Inc., 16 F.C.C.2d 1 (1967), *aff'd sub nom.* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 855 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971) (FCC provisions for preferential consideration in licensing renewal proceedings are inapplicable where the renewal applicant, by virtue of his peculiar circumstances or past performance, is to be treated as a new applicant); Wabash Valley Broadcasting Corp., 35 F.C.C. 677, 678-81 (1963) (upholding the licensee's preferential right to renewal, despite more appealing features in a competitive bid); Hearst Radio, Inc., 15 F.C.C. 1149, 1175 (1951) (a licensee's past performance is to be given considerable weight in renewal proceedings).

[7] 550 F.2d 188, 196 (4th Cir. 1977). In Universal Leaf Tobacco Co. v. Congoleum Corp., 554 F.2d 1283, 1285 (4th Cir. 1977), the Fourth Circuit instructed the district court to apply the *Blackwelder* test on remand, but *Fort Sumter Tours* is the first case reviewing an application of the test.

There is considerable disagreement among the circuits and among courts within the

cuit held that the *Blackwelder* balance-of-hardship test had been applied properly and that the district court correctly granted Fort Sumter injunctive relief.[8]

Fort Sumter provided boat transportation to and from the Fort Sumter National Monument, an island in the Charleston Harbor.[9] All parties to the controversy stipulated that Fort Sumter's performance of its ten-year contract with the Park Service had been satisfactory and thus, Fort Sumter was statutorily entitled to preferential rights in negotiation of a new contract.[10] Several months before the contract expired, the Park Service informed Fort Sumter of its intention to negotiate a new contract, provided Fort Sumter agreed to modify its proposals to match certain provisions included in a competing bid submitted by Gray Line.[11] Fort Sumter was also advised that a refusal to accept the additional provisions would be construed as an automatic waiver of its preferential negotiating rights.[12] Furthermore, a refusal by Fort Sumter would cause the Park Service to commence negotiations with Gray Line.[13] Fort Sumter informed the Park Service that it agreed to the conditional offer to negotiate and would match the additional terms, but only if it were unsuccessful in its suit alleging that the Park Service's offer and accompanying ultimatum constituted an arbitrary and capricious denial of statutory rights.[14] The Park Service construed Fort Sumter's response as a rejection of the additional terms and a waiver of preferential rights. The Park Service subsequently initiated ne-

---

circuits regarding the criteria for granting preliminary injunctions. *See* Leubdorf, *The Standard for Preliminary Injunctions,* 91 HARV. L. REV. 525, 525-26 (1978). *Blackwelder* is a four-fold test, evaluating the petitioner's probable right to relief, the likelihood of irreparable injury if interim relief were denied, the potential harm to other parties as a consequence of the injunction being granted, and the impact of injunctive relief upon the public interest. Blackwelder Furniture Co. v. Seilig Mgf. Co., 550 F.2d at 193. Special emphasis is placed upon the plaintiff's likelihood of injury if relief is denied as contrasted with any harm to the defendant if the relief is granted. *Id.* at 196. *Compare* Morgan v. Fletcher, 518 F.2d 236, 239 (5th Cir. 1975) (four-fold test for issuance of preliminary injunctions: substantial likelihood that plaintiff will prevail on the merits; substantial threat that plaintiff will suffer irreparable harm if relief is denied; potential harm to plaintiff outweighs potential harm to defendant; granting relief will not injure the public interest) *and* Brown v. Callaway, 497 F.2d 1235, 1241 (6th Cir. 1974) (four-fold test: substantial question at issue; plaintiff demonstrates a possibility of success on the merits; balancing potential injuries to the parties requires relief be granted; public interest would be served by the relief) *with* Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687, 692-93 (2d Cir. 1973) (two-fold test: probability of plaintiff's success on the merits; and a showing that irreparable harm will result if relief is denied).

[8] 564 F.2d at 1125.

[9] *Id.* at 1121.

[10] *Id.*

[11] *Id.* at 1122.

[12] *Id.* at 1121-22; 16 U.S.C. § 20(d) (1976). The Secretary argued that Fort Sumter's preference right was a right of first refusal. Brief for Appellee at 6-7. Fort Sumter argued that it had not been afforded its right of first refusal. The Secretary had not submitted to it a proposal package which any other company, including Gray Line, was ready, willing, and able to perform. *Id.* The scope of plaintiff's statutory right of preference was not addressed by the Fourth Circuit, which declined to decide the merits of the litigation. 564 F.2d at 1125.

[13] *Id.* at 1122.

[14] *Id.*

gotiations with Gray Line.[15]

Fort Sumter brought an action challenging the Park Service's negotiations with Gray Line, and the district court held that the matter was ripe for review.[16] The court also held that the decision to negotiate with Gray Line as a result of Fort Sumter's conditional acceptance was a violation of the concessioner's statutory right of preference. The district court therefore issued a preliminary injunction restraining the Park Service from contracting with Gray Line to provide boat transportation.[17] Gray Line sought a stay pending appeal of the injunction.[18] On appeal, the Fourth Circuit confronted initially the frequently litigated issues of ripeness and standing for judicial review.[19]

In its appeal, Gray Line argued that the district court had failed to recognize that an agency decision is not reviewable until actually made.[20] According to Gray Line, the Park Service's decision to discontinue contract talks with Fort Sumter and negotiate exclusively with Gray Line was not a "final agency action" within the Administrative Procedure Act and hence not reviewable.[21] Gray Line also contended that the issuance of the injunction effectively discontinued the administrative process, which had not yet proceeded to any conclusion.[22]

In determining whether the controversy was ripe for judicial review, the Fourth Circuit was first required to decide whether the plaintiff should be compelled to exhaust any additional administrative remedies.[23] The court emphasized that while most agency decisions are not ripe for judicial re-

---

[15] *Id.*

[16] Fort Sumter Tours, Inc. v. Andrus, 440 F. Supp. 914, 919-21 (D.S.C. 1977).

[17] *Id.* at 920-21. The initial temporary restraining order was later extended. The district court then issued a preliminary injunction. *Id.* at 915.

[18] 564 F.2d at 1121.

[19] Principles governing direct judicial review of informal agency decisions are still in the formative stages. Vickery, *Judicial Review of Informal Agency Action: A Case Study of Shareholder Proposal No-Action Letters,* 28 HASTINGS L.J. 307, 355 (1976). The traditional requirements that a controversy be ripe for review, that the parties exhaust all administrative remedies, and that challengers of the agency action be proximately affected in order to establish standing for judicial review, have been relaxed in recent years. The requirement of sufficiently probable injury as a prerequisite to judicial review requires subjective judgment on the part of judges and prospective litigants alike. *See* Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action,* 51 IND. L.J. 817, 938-84 (1976) [hereinafter cited as Fuchs]. *See generally* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, 469-528 (1976), (Supp. 1978) [hereinafter cited as DAVIS]; Note, *Administrative Law—Ripeness—Agency Head's Informal Opinion Letters Held Unripe for Review When No Substantial Hardship Placed on Parties,* 30 VAND. L. REV. 1249, 1250-55 (1976).

[20] 564 F.2d at 1123-24. The federal law of exhaustion is substantially unclear. The timeworn adage that the parties must exhaust all administrative remedies before going into court is false almost as often as it is true. Courts are usually allowed considerable discretion in determining whether or not to require exhaustion, and decisions frequently are influenced by considerations other than exhaustion. Even the basic question of whether exhaustion is governed by rule or discretion remains unanswered. DAVIS, *supra* note 19, at 446, 449-50.

[21] 5 U.S.C. § 704 (1976); notes 3-4, *supra.*

[22] 564 F.2d at 1123.

[23] *Id.*

view until a formal administrative order is issued against a person or class of persons, a formal order is not an absolute prerequisite to review.[24] The Fourth Circuit, applying the criterion established by the Supreme Court in *Abbott Laboratories v. Gardner*,[25] noted that in analyzing whether the parties should exhaust additional remedies, a court must balance considerations of finality against the hardship to the parties caused by withholding judicial consideration and the suitability of issues for judicial decision.[26]

The exhaustion doctine is intended to avoid interruption of the administrative proceedings before the agency has had an opportunity to utilize its expertise in a given area.[27] The doctrine enables the agency to complete its investigation of the controversy prior to any final administrative decision and to uncover and correct its own mistakes, thereby conserving judicial time.[28] The exhaustion requirement is also intended to avoid deliberate abuse of the administrative process by parties seeking to bypass agency proceedings.[29] The Supreme Court, however, has indicated that the exhaustion doctrine is not inflexible.[30] In deciding whether the doctrine bars judicial review of a controversy at a given point in time, the court must

---

[24] *Id.; see* note 2 *supra. See generally* Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967); Bradley v. Weinberger, 483 F.2d 410, 416-17 (1st Cir. 1973); *see also* Fuchs, *supra* note 19, at 859-91; Griffin, *The District of Columbia Administrative Procedure Act: Its History, Provisions, and Interpretation,* 61 GEO. L.J. 575, 608 (1973).

[25] Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). The plaintiff, a drug manufacturer, challenged a Food and Drug Administration (FDA) regulation which mandated that the generic name of a drug appear on the label in addition to the brand name. *Id.* at 148-49. The lawsuit commenced before the regulation actually had been enforced. The FDA argued that the regulation would not be ripe for challenge until such time as it was enforced against a drug company for criminal misbranding. The Supreme Court disagreed, holding that because the manufacturer's complaint presented a question of law that did not turn on the facts of the particular case, the issues were fit for review. *Id.* In addition, if the regulations were enforced at a later date, the manufacturer would be obligated to invest in relabelling. Furthermore, a criminal proceeding might tarnish the company's public image. *Id.* at 152-53.

Similarly, an agency action merely announcing a policy decision not yet in effect also may be ripe for judicial review. *Cf.* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66-69 (1963) (informal sanctions which included threats of legal sanctions held ripe for review); Flemming v. Florida Citrus Exch., 358 U.S. 153, 167-68 (1958) (FDA order revoking certification of certain food coloring ripe for review despite legislative stay postponing enactment of order for three years); Continental Air Lines v. CAB, 522 F.2d 107, 123-24 (D.C. Cir. 1974) (orders of CAB announcing seat configuration policy were ripe for review where there was every indication that Board considered its policy final; where policy had since been applied in two instances; and where hardship to parties of withholding consideration would be substantial).

[26] 564 F.2d at 1123.

[27] *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967); *See generally* Fuchs, *supra* note 19, at 859-91; *see also* DAVIS, *supra* note 19, at 446, 449-50.

[28] *See* note 25 *supra.*

[29] *See* DAVIS, *supra* note 19, at 446, 449-50. *See also* Phillips v. Klassen, 502 F.2d 362, 368-70 (D.C. Cir. 1974) (affirming district court dismissal of a class action for failure to exhaust administrative remedies).

[30] Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41, 148-49 (1967). *See generally* note 25 *supra.*

look to whether the agency's decision making process has reached a point where judicial review will not disrupt the orderly process of adjudication, and whether binding legal consequences have emerged from the agency action.[31]

In *Fort Sumter Tours,* the Fourth Circuit held that legal consequences had emerged from the Park Service decision to discontinue negotiations with the plaintiff and commence negotiations with Gray Line and that the issues were fit for judicial review.[32] Although the Park Service decision was an informal administrative action, its impact upon Fort Sumter and upon Fort Sumter's statutory right of preference was a final agency decision.[33] The district court ruling, affirmed by the Fourth Circuit, expressed doubt concerning whether there were any additional administrative alternatives which Fort Sumter could pursue.[34] Even if alternatives were available, the court reasoned that they were likely to be futile because the Park Service was unlikely to reverse itself and resume negotiations with the plaintiff.[35] The district court concluded that to deny Fort Sumter injunctive relief and to postpone any judicial intervention until a contract was executed between the Park Service and Gray Line effectively would deny plaintiff its statutory preference right and such denial could conceivably cause irreparable harm to plaintiff's business by forcing plaintiff to interrupt operations

[31] 564 F.2d at 1123; Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967). 5 U.S.C. § 703 (1976) provides for review in any court of competent jurisdiction where there is an "inadequacy" in the statutorily prescribed method of review. Arguably, "inadequacy" for purposes of review may exist even when a factual issue remains unresolved, yet remand to an agency is inappropriate. *See* McKart v. United States, 395 U.S. 185, 193 (1969). Indeed, § 704 states that "final agency action for which there is no adequate remedy in court" is "subject to judicial review." *See* note 4 *supra.* The APA's judicial review provisions, incorporated in 5 U.S.C. §§ 701-706 (1976), are to be broadly construed to provide judicial review of administrative decisions whenever a court deems judicial review appropriate. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41, 148-49 (1967); Tempo Trucking & Transfer Corp. v. Dickson, 405 F. Supp. 506, 512-13 (E.D.N.Y. 1975); United States v. One 1957 Buick Roadmaster, 167 F. Supp. 597, 599 (E.D. Mich. 1958). While an agency's interpretation of its own regulations is to be afforded substantial deference, that does not mean unreviewable discretion. Hayes Int'l Corp. v. McLucas, 509 F.2d 247 (5th Cir. 1975). The exception from judicial review of actions committed to an agency's discretion is a narrow one. 5 U.S.C. § 701 (1976). Only in those rare situations where statutes are drawn so broadly that in a given case no law applies is the exception applicable. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1970). *See generally* Associated Elec. Co-op. v. Morton, 507 F.2d 1167 (D.C. Cir. 1974); *see also* Berger, *Administrative Arbitrariness: A Synthesis,* 78 YALE L.J. 965, 999-1000 (1969); Saferstein, *Nonreviewability: A Functional Analysis of 'Committed to Agency Discretion,' 82* HARV. L. REV. 367 (1968).

[32] 564 F.2d at 1123.

[33] *Id.*; *see* note 3 *supra.*

[34] Fort Sumter Tours, Inc. v. Andrus, 440 F. Supp. 914, 919 (D.S.C. 1977); 564 F.2d at 1123.

[35] 440 F. Supp. at 919. The court will not require a party to exhaust additional administrative remedies when such a course would be to no avail. *Id., citing* NLRB v. Industrial Union of Marine and Shipbuilding Workers Local 22, 391 U.S. 418, 427-28 (1968); Marsh v. County School Bd., 305 F.2d 94, 98 (4th Cir. 1962); Quarles v. Philip Morris, 271 F. Supp. 842, 847 (E.D. Va. 1967).

indefinitely.[36] The Fourth Circuit agreed that the agency's decision to discontinue negotiations with Gray Line was a "final agency action" insofar as Fort Sumter was concerned and that the controversy was ripe for review.[37]

The Fourth Circuit adopted the *Abbott Laboratories* "functional approach" to the ripeness question. Such an approach disregards the form of the agency action, which was admittedly an informal agency decision, and focuses instead on its essence and impact upon the plaintiff.[38] The *Fort Sumter* court emphasized that the issues before the district court were strictly legal in nature. Specifically, the Fourth Circuit had to determine the scope of Fort Sumter's statutory entitlement and whether the entitlement had been improperly denied. Such issues are peculiarly within the court's competence and not restricted to an agency's expertise.[39] Furthermore, the plaintiff had established standing for judicial review based upon the hardship it would suffer if relief were denied.[40] Fort Sumter would lose its preferential rights under the statute and sustain a severe financial loss, regardless of the final outcome of the litigation.[41] Moreover, the statute was clearly intended to insure continuity of concessioner services in the national parks.[42] The injury Fort Sumter would experience if relief were denied was arguably the type of injury which the statute was intended to prevent.[43] Thus, the issues presented satisfied the two criteria for ripeness set forth in *Abbott Laboratories:* suitability for judicial decision and potential hardship to the plaintiff from denial of judicial review.[44]

Having decided that the plaintiff did not have to exhaust additional remedies and that the Park Service decision to discontinue contract negotiations with Fort Sumter was ripe for judicial review, the Fourth Circuit considered whether the district court correctly applied the *Blackwelder* balance-of-hardship test for injunctive relief.[45] The *Blackwelder* test provides that a preliminary injunction will be issued when the plaintiff is able

---

[36] Fort Sumter Tours, Inc. v. Andrus, 440 F. Supp. 914, 919-20 (D.S.C. 1977).

[37] 564 F.2d at 1123; *see* note 3 *supra.*

[38] *Id.*; Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).

[39] 564 F.2d at 1123. *But see* American Gen. Ins. Co. v. FTC, 496 F.2d 197, 200 (5th Cir. 1974) (exhaustion of remedies requirement is not inapplicable merely because controversy contains only questions of law).

[40] 564 F.2d at 1124.

[41] *Id.*

[42] *See* note 6 *supra.*

[43] 5 U.S.C. § 702 (1976) reads in part: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review." *Cf.* Association of Data Processing Serv. Organization v. Camp, 397 U.S. 150, 154 (1970) (trend is toward enlargement of class of individuals who may protest administrative actions pursuant to a given statute); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 868-69, 872 (D.C. Cir. 1970) (bidder denied government contract as result of alleged illegal activity on part of Federal Aviation Administration had standing pursuant to 5 U.S.C. § 702 (1976) to bring suit to determine validity of agency action).

[44] 564 F.2d at 1123; *see* Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967).

[45] 564 F.2d at 1124; Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 193 (4th Cir. 1977).

to demonstrte that it has a probable right or interest which may be defeated if relief is not granted.[46] Considerable weight is given to the plaintiff's need for protection as contrasted with the probable injury to the defendant if relief is granted.[47] The plaintiff need not demonstrate a likelihood of success on the merits as under other tests.[48] The *Blackwelder* test also requires the court to evaluate whether the public interest will be advanced by a granting of injunctive relief.[49]

In affirming the district court's issuance of the preliminary injunction pursuant to the *Blackwelder* test, the Fourth Circuit emphasized that Fort Sumter faced a possible loss of its entire operation if relief were denied. At the very least, Fort Sumter would be forced to suffer protracted administrative procedures and perhaps be forced to sell part of its assets.[50] The only harm to Gray Line stemming from the injunction would be a temporary suspension of any plans to expand its operations pending the outcome of the suit.[51] The court also pointed out that public service would not be interrupted as a result of the injunction because Fort Sumter agreed to continue its operations until the litigation was concluded.[52]

While the Fourth Circuit did not decide the merits of the controversy, the court indicated that the Park Service failed to observe Fort Sumter's statutory preference. The court noted that Gray Line's bid did not respond to the bid specifications of the Park Service. The bid also failed to finalize provisions for a docksite within the city of Charleston.[53] Furthermore, the court severely questioned whether Fort Sumter had been afforded its statutory preference when the plaintiff was informed that it would be compelled

---

[46] *Id.*, *citing* West Virginia Conservancy v. Island Creek Coal Co., 441 F.2d 232, 235 (4th Cir. 1971); Sinclair Refining Co. v. Midland Oil Co., 55 F.2d 42, 45 (4th Cir. 1932).

[47] Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 196 (4th Cir. 1977).

[48] *Id. See generally* note 7 *supra.*

[49] 550 F.2d at 197; 564 F.2d at 1125. The district court also applied the *Blackwelder* test, but stated that if the test were inapplicable, Fort Sumter was nonetheless entitled to injunctive relief based upon its strong showing that it was likely to prevail on the merits, the likelihood of irreparable harm if relief were denied, the likelihood that the defendant would not be injured by the injunction, and the fact that there was no potential harm to the public interest. 440 F. Supp. at 920-21. The only significant difference between the district court's analysis and the *Blackwelder* test in *Fort Sumter Tours* is that the district court relied upon a "likelihood of success" rationale specifically rejected by the Fourth Circuit in *Blackwelder.* Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d at 195-96; 440 F. Supp. at 920-21.

[50] 564 F.2d at 1124-25.

[51] *Id.* at 1124. *See also* 440 F. Supp. at 921.

[52] 564 F.2d at 1125; *cf.* Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 197 (4th Cir. 1977) (federal statute prohibiting alleged acts of defendant and providing plaintiff with grounds for complaint, aligned plaintiff, if only provisionally, on side of public interest and weighed in favor of granting injunctive relief); West Virginia Conservancy v. Island Creek Coal Co., 441 F.2d 232, 236 (4th Cir. 1971) (public interest in preservation of forests provided additional authority to justify district court's granting of injunctive relief ordering defendant to halt all mining and timber-cutting in Monongahela National Forest prior to submission of environmental impact statement); Vanadium Corp. v. Susquehanna Corp., 203 F. Supp. 686, 696 (D. Del. 1962) (public interest in guarding against violations of antitrust statutes justified granting of injunctive relief).

[53] 564 F.2d at 1125.

to match provisions in the Gray Line offer but denied an opportunity to see the bid and to protest its deficiencies.[54]

The Fourth Circuit decision in *Fort Sumter Tours, Inc. v. Andrus* establishes that to determine whether an administrative action is ripe for review, a court must balance considerations of finality against the likelihood of injury to the plaintiff if interim relief is denied.[55] Judicial review usually is unavailable to litigants until they have exhausted all administrative procedures,[56] and agency expertise typically is afforded considerable deference in statutory construction.[57] Where the plaintiff has demonstrated a likelihood of serious harm, however, the *Blackwelder* test will operate to allow injunctive relief to preserve the status quo, pending a judicial decision on the merits.[58]

B. Publication Requirements for Federal Agency Regulations

The Administrative Procedure Act (APA) requires administrative agencies to publish substantive rules of general applicability, statements of general policy, and interpretations of general applicability formulated and adopted by the agency.[1] These rules, statements and interpretations

[54] *Id. See generally* note 12 *supra.* The courts usually have held that an unsuccessful bidder for a government contract has standing to challenge the procedure whereby the contract was awarded. *See* William F. Wilke, Inc. v. Department of the Army, 485 F.2d 180, 183 (4th Cir. 1973); Blackhawk Heating & Plumbing Co. v. Driver, 433 F.2d 1137, 1140 (D.C. Cir. 1970); Ballarina Pen Co. v. Kunzig, 433 F.2d 1204, 1206-09 (D.C. Cir. 1970); Ellsworth Bottling Co. v. United States, 408 F. Supp. 280, 282-83 (W.D. Okla. 1975); Keco Indus., Inc. v. Laird, 318 F. Supp. 1361, 1363 (D.D.C. 1970).

[55] 564 F.2d at 1123. *See generally* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967); *see also* Port of Boston Marine Terminal Assoc. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970); ICC v. Atlantic Coast Line R.R., 383 U.S. 576, 602 (1966); Frozen Food Express v. United States, 351 U.S. 40, 44 (1956); Rochester Tel. Corp. v. United States, 307 U.S. 125, 143 (1939); Brooks v. Clifford, 412 F.2d 1127, 1138 (4th Cir. 1969).

[56] *See* Phillips v. Klassen, 502 F.2d 362, 368-70 (D.C. Cir. 1974); Bradley v. Weinberger, 483 F.2d 410, 416-17 (1st Cir. 1973).

[57] *Cf.* New Orleans Public Serv., Inc. v. Brown, 507 F.2d 160, 165 (5th Cir. 1975) (the agency, not court, is to determine in first instance the coverage of regulatory statute in preliminary investigation of possible violations); American Gen. Ins. Co. v. FTC, 496 F.2d 197, 200 (5th Cir. 1974) (the agency's interpretation of statute entitled to "great deference"); Brannon v. Stark, 185 F.2d 871, 875 (D.C. Cir. 1950), *aff'd,* 342 U.S. 451 (1952) (agency construction of statute is entitled to great weight, but agency may not decide limits of its statutory power).

[58] 564 F.2d at 1124-25. *See generally* McKart v. United States, 395 U.S. 185, 193 (1969) (controversy is ripe for review where matter in question cannot be resolved by subsequent agency action, or where agency has clearly circumvented administrative due process).

[1] 5 U.S.C. § 552(a)(1)(D) (1976); *see* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, § 3A.7 (1976 & Supp. 1978). Davis explains that the APA does not distinguish clearly between the meaning of "statements of general policy or interpretations" and "interpretations which

are generally issued in the form of regulations. The regulations are published in the Federal Register "for the guidance of the public."[2] Publication in the Federal Register is required in order to protect a citizen from being affected adversely by regulations of which he has no knowledge.[3] Information which either creates or delimits methods of determining the scope of substantive rights and liabilities constitutes a form of law which cannot be withheld from the public.[4] In *Appalachian Power Co. v. Train,*[5] the information contained in a Development Document,[6] pertaining to cooling water intake structures and effluent limitations, was not reported in the Federal Register by the Environmental Protection Agency (EPA).[7] Instead, the EPA intended that germane portions of the Development Document be incorporated by reference into the Code of Federal Regulations.[8] The Fourth Circuit held that the EPA had failed to comply with the publication requirements necessary to incorporate documents by reference, and indicated that it would strictly enforce APA publication provisions.[9] Thus, effluent limitation standards issued pursuant to section 316(b) of the Fed-

---

have been adopted by the agency." The "statements" must be published in the Federal Register, pursuant to section 5 U.S.C. § 552(a)(1)(D) (1976), whereas the "interpretations" need be only generally available to the public, pursuant to 5 U.S.C. § 552(a)(2) (1976). Davis concludes that no authoritative answer can be given to the simple question of whether an agency's interpretive rules must be published. *Id.; see generally* Warren, *The Notice Requirement in Administrative Rulemaking: An Analysis of Legislative and Interpretive Rules,* 29 AD. L. REV. 367 (1977) [hereinafter cited as Warren].

[2] 5 U.S.C. § 552(a)(1) (1976).

[3] Foreman & Clark, Inc. v. NLRB, 215 F.2d 396, 410 (9th Cir. 1954). *See generally* T.S.C. Motor Freight Lines, Inc. v. United States, 186 F. Supp. 777, 786 (S.D. Tex. 1960), *aff'd sub nom.* Herrin Transp. Co. v. United States, 366 U.S. 419 (1961); Pinkus v. Reilly, 157 F. Supp. 548, 551 (D.N.J. 1957).

[4] *See* Cuneo v. Schlesinger, 484 F.2d 1086, 1091 n.13, 1091-92 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974); Getman v. NLRB, 450 F.2d 670, 679 (D.C. Cir. 1971). *See generally* Vaughn v. Rosen, 484 F.2d 820, 823-28 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974); Gonzalez v. Freeman, 334 F.2d 570, 578 (D.C. Cir. 1964); United States v. Hayes, 325 F.2d 307, 309 (4th Cir. 1963); Lewis v. Weinberger, 415 F. Supp. 652, 658-60 (D.N.M. 1976); *see also* Ditlow v. Shultz, 517 F.2d 166, 169-72 (D.C. Cir. 1975); Ethly Corp. v. EPA, 478 F.2d 47, 48-51 (4th Cir. 1973); Soucie v. David, 448 F.2d 1067, 1071-73 (D.C. Cir. 1971); B&C Tire Co. v. IRS, 376 F. Supp. 708, 711 (N.D. Ala. 1974); Petkas v. Staats, 364 F. Supp. 680, 682-84 (D. D.C. 1973), *rev'd on other grounds,* 501 F.2d 887 (D.C. Cir. 1974).

[5] 566 F.2d 451 (4th Cir. 1977).

[6] The EPA implemented 33 U.S.C. § 1326(b) (1976), pertaining to cooling water intake structures and effluent emissions, by issuing regulations which provided that in determining the best available technology for the intake structures, "[t]he information contained in the Development Document shall be considered." 40 C.F.R. §§ 402.10-.12 (1977). Information in the Development Document was intended by the EPA to provide general guidance in the issuing of discharge permits on a case-by-case basis. 566 F.2d at 454 n.4.

[7] *Id.* at 455.

[8] *Id.; see* EPA Effluent Guidelines and Standards, 40 C.F.R. § 402 (1977).

[9] 566 F.2d at 457. The Fourth Circuit also held that regulations implementing 33 U.S.C. § 1326(b) (1976) are not restricted to steam-electric generating plants, but include steel mills. *Id.* at 457-58. Furthermore, the court refused to review the merits of the regulations because any ruling at that point in time would have constituted an advisory opinion. *Id.* at 458-59.

eral Water Pollution Control Act Amendments of 1972 were unenforceable.[10]

The EPA stressed that an unpublished regulation may be nonetheless effective against persons with actual and timely notice of its terms.[11] Specifically, the EPA noted the availability of the document and the petitioners' cognizance of its existence.[12] The Fourth Circuit, however, emphasized that the APA distinguishes between actual notice of the pertinent date and the reasonable availability of the document containing the data.[13] Actual notice satisfies the APA publication provision and an unpublished regulation is binding upon parties who are aware of both its specific contents and its applicability to them.[14] However, an unpublished regulation which is merely reasonably available to the parties is not binding due to a failure to satisfy publication requirements.[15]

The Fourth Circuit emphasized that nothing in the EPA's brief suggested that the petitioner had actual notice of the information contained in the Development Document.[16] Furthermore, the EPA did not explain what it intended the term "information" to encompass, and the Development Document referred to over fifty other documents, including some not currently available.[17] Notice requirements are not satisfied where unpublished procedures are imprecisely delineated, if at all, to the affected parties.[18] Even when actual notice is conveyed to interested parties, the notice

---

[10] *Id.* at 457; *see* 33 U.S.C. § 1326(b) (1976). For a discussion of statutory construction problems in the Federal Water Pollution Control Act, see Parenteau & Tauman, *The Effluent Limitations Controversy: Will Careless Draftsmanship Foil the Objectives of the Federal Water Pollution Control Act Amendments of 1972?*, 6 ECO. L.Q. 1 (1977); Comment, *The Application of Effluent Limitations and Effluent Guidelines to Industrial Pollutors: An Administrative Nightmare*, 13 HOUS. L. REV. 348 (1976); Note, *Judicial Maelstrom in Federal Waters: A Composite Interpretation of the Federal Water Pollution Control Act Amendments of 1972*, 45 FORDHAM L. REV. 625 (1976).

[11] 566 F.2d at 456. 5 U.S.C. § 552(a)(1) (1976) states that persons possessing "actual and timely notice of the terms" of unpublished regulations are required to comply with those provisions. United States v. Aarons, 310 F.2d 341, 348 (2d Cir. 1962) (unpublished coast guard order restricting harbor access during submarine launchings binding on defendants who were aware of its promulgation); *c.f.* Rodriguez v. Swank, 318 F. Supp. 289, 295 (N.D. Ill. 1970), *aff'd mem.*, 403 U.S. 901 (1971) (unpublished aid benefit regulations binding upon parties with actual notice of their contents); Timber Access Indus. Co. v. United States, No. 180-75 (Ct. Cl. April 20, 1977) (rate predeterminations not published in the Timber Regulations or the Federal Register binding upon parties with actual notice).

[12] 566 F.2d at 456.

[13] *Id. See generally* 5 U.S.C. § 552(a)(1), (a)(2); *see also* Warren, *supra* note 1, at 367.

[14] 566 F.2d at 456. *See generally* note 11 *supra.*

[15] 566 F.2d at 456; *see* Timber Access Indus. Co. v. United States, No. 180-75 (Ct. Cl. April 20, 1977) (noting that ordinarily a rule cannot bind or adversely affect a person absent publication).

[16] 566 F.2d at 456. The electric utilities did not contend that they were unaware of the Development Document's existence, only that they were without knowledge of the specific sections of the document which the EPA viewed as incorporated by reference into the 33 U.S.C. § 1326(b) (1976) regulations. Reply Brief for Petitioner-Appellants at 8. *See generally* text accompanying notes 17-20 & 24-27 *infra.*

[17] 566 F.2d at 457.

[18] *Id.* at 456-57; *cf.* City of Santa Clara, Cal. v. Kleppe, 418 F. Supp. 1243, 1258-59 (N.D.

requirement is not discharged if the procedures to be followed are incomplete or inexact.[19] Instead, a reasonably exhaustive code of procedures is contemplated which will serve as an adequate guideline for interested parties.[20]

Where no actual notice has been conveyed to the parties and where the pertinent information has not been published, unpublished regulations still may bind affected persons if the regulations are incorporated by reference into the Federal Register.[21] A valid incorporation by reference must be approved by the Director of the Federal Register.[22] The Fourth Circuit in *Appalachian Power Co. v. Train* stressed that the EPA's failure to procure the director's approval could not be disregarded.[23] Furthermore, the EPA did not satisfy regulations of the Office of the Federal Register which dictate that language incorporating material by reference be precise and complete.[24] Each incorporation by reference must include an identification and brief subject description of the matter incorporated.[25] In the instant controversy, provisions in the Code of Federal Regulations pertaining to structures used to withdraw water for cooling and effluent limitation standards did not delineate which portions of the two hundred seventy-three page Development Document constituted relevant information to be regarded by those requesting and issuing discharge permits.[26] Moreover, the document was incomplete insofar as it referred to other documents, some of which were unavailable to the public.[27] Thus, the court held that the language of the incorporation was neither precise nor complete, and therefore invalid.[28]

Having failed to satisfy the provisions for incorporation by reference,

---

Cal. 1976) ("frequent contacts" between the Bureau of Reclamation and its customers held an insufficient justification for failure to publish power allocation procedures); Northern Cal. Power Agency v. Morton, 396 F. Supp. 1187, 1191 (D.D.C. 1975), *aff'd*, 539 F.2d 243 (D.C. Cir. 1976) (where the Bureau of Reclamation failed to publish descriptions of the rate-making procedures and the procedures outlined informally were "incomplete, imprecise, and inaccurate," the rate increases promulgated pursuant to unpublished procedures were invalid).

[19] 566 F.2d at 456; *cf.* Cuneo v. Schlesinger, 484 F.2d 1086, 1092 (D.C. Cir. 1973) (information which is in effect substantive law must not be concealed beneath a mass of extraneous material).

[20] 566 F.2d at 456-57. No administrative course of action instituted pursuant to unpublished procedures can be permitted to stand against persons adversely affected thereby. Northern Cal. Power Agency v. Morton, 396 F. Supp. 1187, 1191 (D.D.C. 1975). *See also* Cuneo v. Schlesinger, 484 F.2d 1086, 1092 (D.C. Cir. 1973); W. G. Cosby Transfer & Storage Corp. v. Froehlke, 480 F.2d 498, 501-02 (4th Cir. 1973).

[21] Office of the Federal Register, Incorporation by Reference, 1 C.F.R. § 51 (1978).

[22] 5 U.S.C. § 552(a) (1976); *see* 1 C.F.R. § 51.4 (1978). *See also* 566 F.2d at 455.

[23] 566 F.2d at 455.

[24] 1 C.F.R. § 51.6 (1978).

[25] *Id.* § 51.7.

[26] 566 F.2d at 457. 40 C.F.R. § 402.12 (1977) provides in part: "[t]he information contained in the Development Document shall be considered in determining whether the location, design, construction and capacity of a cooling water intake structure of a point source . . . reflect the best technology available for minimizing adverse environmental impact."

[27] 566 F.2d at 457.

[28] *Id.*