

Evading Notice and Comment in the Second Trump Administration

A Three-Branch Strategy to Constrain Public Comment in Agency Rulemakings

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In the past year, the Trump administration has curtailed public participation in agency rulemaking in broad and novel ways.¹ The administration has used tactics that involve all three branches of government, and many of these efforts involve environmental regulatory issues. In this paper, we evaluate some of those strategies, analyzing how the administration has diverged from historical practice as it seeks to achieve quick deregulatory results with limited process or expertise, data, and feedback from stakeholders. We explain how the administration has restricted public participation by: (1) using statutory exceptions, (2) asking courts to intervene, and (3) collaborating with Congress; we also identify legal risks those tactics raise. These approaches share a common feature — many take immediate legal effect, achieving deregulatory outcomes before courts can review them. Even if courts ultimately find that the process is unlawful, the administration's actions may have already caused on-the-ground effects, including, for example, extending compliance deadlines that benefit some regulated industries or undermining regulatory certainty that is necessary for projects to continue.

What is the APA's public participation requirement and what are the narrow exceptions to it?

The Administrative Procedure Act (APA) dictates the public participation process administrative agencies must follow when promulgating rules through “notice-and-comment” rulemaking.² An agency first provides notice to the public through a proposed rule,³ and provides an opportunity for interested parties to comment on the proposal.⁴ The agency then publishes the final rule, which must consider the public's feedback and respond to significant comments.⁵ If an agency seeks to rescind

¹ See, e.g. Jack Jones & Max Sarinsky, *Preventing Public Participation: The Trump Administration's Misuse of the Good Cause Exception to Fast-Track Deregulation*, INSTITUTE FOR POLICY INTEGRITY (Apr. 23, 2025), https://policyintegrity.org/files/publications/Good_Cause_Policy_Brief_vF_A.pdf (describing and explaining the early assertions of good cause in the Trump administration); Darya Minovi, *Access Denied: How the Trump Administration is Eliminating Public Input*, UNION OF CONCERNED SCIENTISTS (Sept. 9, 2025), <https://www.ucs.org/resources/access-denied?read-online-content=1> (analyzing final rules issued between January 20 and July 31 of 2025; reporting that the administration did not use notice and comment in approximately 31% of its final rules).

² Sarah Hart-Curran, *A Step-by-Step Guide to Agency Rulemaking and Rule Rollbacks*, ENVIRONMENTAL & ENERGY LAW PROGRAM (Jan. 17, 2025), <https://eelp.law.harvard.edu/a-step-by-step-guide-to-agency-rulemaking-and-rule-rollbacks/>.

³ 5 U.S.C. § 553.

⁴ *Id.* § 553(c).

⁵ *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015).

or change a regulation, it must go through the same rulemaking process as it did to promulgate the regulation in the first place.⁶ If any person believes the agency violated this process they can seek review of the agency's action in court.⁷

This process helps ensure that agency decisions are informed by and responsive to stakeholders outside the agency. Scientists, public health experts, scholars, regulated entities, community groups, states, Tribes, and other members of the public can explain their position on the rule, suggest changes to it, and provide information or insights for the agency to consider when deciding how to finalize the rule. This input leads to more reasoned decision making, as the agency is informed by and grapples with the perspectives of concerned parties.⁸

However, not all rules are subject to this process, as the APA provides several exceptions to public participation requirements. These include rules involving: "a military or foreign affairs function"; rules "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts"⁹; and "interpretive rules, general statements of policy, or rules of agency organization, procedures, or practice."¹⁰ Some substantive statutes also have their own built-in exceptions.¹¹

An agency may also assert "good cause" to forego the public participation requirements of the APA if it finds "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."¹² The APA's text does not explicitly define "good cause" nor specify what circumstances might give rise to these exceptions. In the absence of such a definition, courts have relied on legislative history and have interpreted the exception as "essentially an emergency procedure."¹³ Courts have reviewed agency assertions of good cause carefully, holding these exceptions are not "'escape clauses' that may be arbitrarily used at the agency's whim,"¹⁴ and should "be 'narrowly construed and only reluctantly countenanced.'"¹⁵ Likewise, the attorney

⁶ *Id.* at 101 (citing *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, (2009)).

⁷ 5 U.S.C. § 702.

⁸ Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237 (1946), <https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/01/act-pl79-404.pdf>; *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1102 (4th Cir. 1985) ("The requirement of notice and a fair opportunity to be heard is basic to administrative law."); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) ("The rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application.")

⁹ 5 U.S.C. § 553(a).

¹⁰ *Id.* § 553(b)(A).

¹¹ See, e.g., 42 U.S.C. § 7412(i)(4).

¹² 5 U.S.C. § 553(b)(B).

¹³ See *N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (10th Cir. 1987) (quoting *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982) and citing legislative history from the APA's passage, S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945)).

¹⁴ *Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) ("As the legislative history of the APA makes clear, moreover, the exceptions at issue here are not "escape clauses" that may be arbitrarily utilized at the agency's whim. S. Rep. No. 752, 79th Cong., 1st Sess. (1945), reprinted in *Administrative Procedure Act, Legislative History, 79th Cong. 1944-46* at 200, 201. Rather, use of these exceptions by administrative agencies should be limited to emergency situations.").

¹⁵ *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001).

general's manual on the APA, published contemporaneous with the statute, includes an example that emphasizes immediate safety as a potential justification for invoking good cause.¹⁶

What regulatory processes do agencies use when invoking an exception to notice and comment?

The Administrative Conference of the United States provides guidance on the processes agencies should use when invoking exceptions to notice-and-comment rulemaking.¹⁷ Those processes fall into three categories.¹⁸

Interim final rules (IFRs) take effect immediately without prior opportunity for public comment and are final agency actions subject to judicial review. IFRs do provide for post-promulgation comment, and the IFR remains in place unless or until the agency responds to comments and finalizes the rule in a "final-final rule."¹⁹ IFRs thus rearrange the notice-and-comment process by making the rule effective prior to allowing public participation. Although this upends the ordinary notice-and-comment process (in which notice and opportunity for comment precede a rule's legal effect), the Supreme Court has suggested that as long as an agency included the substantive elements of a proposed rule in an IFR and finalized the rule by responding to comments "the APA notice requirements were satisfied."²⁰ IFRs are often used when agencies determine expedited rulemaking is necessary, such as when an emergency warrants immediate agency action.²¹

¹⁶ U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31–32 (1947), <https://library.law.fsu.edu/Digital-Collections/ABA-AdminProcedureArchive/AttorneyGeneralsManual.pdf> ("[T]he Civil Aeronautics Board may learn, from an accident investigation, that certain rules as to air safety should be issued or amended without delay; with the safety of the traveling public at stake, the Board could find that notice and public rulemaking procedures would be 'impracticable', and issue its rules immediately.").

¹⁷ Administrative Conference of the United States, *Public Engagement in Agency Rulemaking Under the Good Cause Exemption* (Dec. 17, 2024), <https://www.acus.gov/document/public-engagement-agency-rulemaking-under-good-cause-exemption>.

¹⁸ These regulatory processes originate from agency practice and are not defined in the APA. Agencies are also not consistent in what they call different regulatory processes. For that reason, the actual title in the Federal Register of an agency action may not correlate with the name assigned to an agency practice described here. These three titles provide a framework for understanding what the agency has done and how and when the public may or may not be included in the agency's process. Michael Asimow, *Interim Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 704 (1999), <https://www.acus.gov/sites/default/files/documents/1995-04%20Pt.1%20Procedures%20for%20Noncontroversial%20and%20Expedited%20Rulemaking.pdf>.

¹⁹ Asimow, *supra* note 18 at 705. Research collected in the 1990s and again in 2020 suggest that IFRs are not finalized consistently. One study found that about 60% of IFRs published since the early 1990s were not finalized in final-final rules. Dan Bosch, *Interim Final Rules: Not So Interim*, AM. ACTION FORUM, (Dec. 8, 2020), <https://www.americanactionforum.org/research/interim-final-rules-not-so-interim/>.

²⁰ *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 684 (2020); see also Kristin Hickman, *Did Little Sisters of the Poor Just Gut APA Rulemaking Procedures?*, YALE J. ON REG. NOTICE & COMMENT (July 9, 2020), <https://www.yalejreg.com/nc/did-little-sisters-of-the-poor-just-gut-apa-rulemaking-procedures/>.

²¹ See, e.g., *Air Tour Operators in the State of Hawaii*, 59 Fed. Reg. 49,138 (Sept. 26, 1994); *Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination*, 86 Fed. Reg. 61,555 (Nov. 5, 2021).

Direct final rules (DFRs) provide agencies an opportunity to determine whether notice and comment is unnecessary and to course correct in the event notice and comment is required.²² As with an IFR, agencies promulgate DFRs without prior opportunity for public comment. But DFRs generally do not become effective immediately. Instead, they provide notice to regulated parties and invite comment; if the agency does not receive “adverse” comments, the rule becomes effective and final without any further step from the agency.²³ If the agency receives adverse comments, the agency withdraws the DFR in the Federal Register and proposes the rule using a traditional notice-and-comment process.²⁴ An agency often uses DFRs when it believes notice and comment may be “unnecessary”; the process allows an agency to test whether stakeholders are interested enough in the regulation to submit comments.²⁵

Final rules take immediate legal effect and offer no post-promulgation comment.²⁶ Agencies have historically used this mechanism when they lack discretion to take a different action, rendering public participation futile. This may occur when another branch of government has limited an agency’s options, for example, when Congress vetoed a rule using the Congressional Review Act and the agency must immediately withdraw the rule,²⁷ or when a court has directly ruled that a regulation is unlawful in full and an agency must act to implement that court decision by rescinding the regulation.²⁸ In these instances, the agency action is essentially ministerial, and notice and comment would be “unnecessary” under the good cause exception.

How the Trump administration is limiting public input in rulemakings

In its first year, we have seen the Trump administration develop a three-branch strategy for limiting notice and comment to achieve quick policy — usually deregulatory — outcomes. We focus here on executive branch-centered strategies and then briefly address strategies that involve courts and Congress.²⁹

²² Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 1 (1995-1996).

²³ *Id.*

²⁴ *Id.* at 1–2.

²⁵ *Id.* at 12 (“One can, accordingly, think of the direct final rulemaking process as an imaginative mechanism for implementing the ‘unnecessary’ component of the good cause exemption in a responsible fashion.”).

²⁶ “Final rule,” of course, can refer to a rule that an agency issues after notice and comment. Here, we refer to rules published with no such process.

²⁷ See, e.g., A Joint Resolution Providing for Congressional Disapproval Under Chapter 8 of Title 5, United States Code, of the Rule Submitted by the Environmental Protection Agency relating to “Review of Final Rule Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act.” Pub. L. 119-20, (2025).

²⁸ For an issue brief on these exceptions, see Governing for Impact, *Notice and Comment Part II: Good Cause and Other Exceptions* at 7 (May 2025), <https://governingforimpact.org/wp-content/uploads/2025/05/Notice-and-Comment-Part-II-Good-Cause-and-Other-Exceptions.pdf> (citing *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 134–35 (D.C. Cir. 2015); *Ctr. for Biological Diversity v. Zinke*, 369 F. Supp. 3d 164, 180 (D.D.C. 2019), *aff’d sub nom. Friends of Animals v. Bernhardt*, 961 F.3d 1197 (D.C. Cir. 2020)).

²⁹ Sarah Hart-Curran, *The Congressional Review Act in 2025: Expanding Use and Emerging Questions*, ENVIRONMENTAL & ENERGY LAW PROGRAM, (Feb. 5, 2026), <https://eelp.law.harvard.edu/the-congressional-review-act-in-2025-expanding-use-and-emerging-questions>; Erika Kranz, *A Department Untethered: The Erosion of*

(1) Taking a broad view of statutory exceptions to public participation

Although the APA and some statutes provide for exceptions to the normal rulemaking process, the second Trump administration has taken expansive interpretations of these kinds of exceptions, deprioritizing process and fast-tracking deregulation. We provide some examples of where the administration is trying to apply these exceptions in new ways.

Novel uses of the APA's exceptions for rules governing agency management, agency practice, and foreign affairs

In December 2025, the Department of Justice took a broad view of a notice-and-comment exemption when it issued a final rule — with no opportunity for comment before or after — regarding its interpretation of Title VI of the Civil Rights Act of 1964.³⁰ Whereas DOJ's regulations on how the agency enforces Title VI previously stated that the statute prohibited discrimination through discriminatory effect (not just discriminatory intent), the new rule rescinded the parts of its regulations that created disparate-impact liability.³¹ DOJ asserted that because "Title VI concerns non-discrimination conditions on the receipt of Federal financial assistance," the APA exception for matters relating "to agency management or personnel or public property, loans, grants, benefits, or contracts" applies.³² While the rule does have a nexus to federal grants in that Title VI applies to grant recipients, DOJ's rule constitutes a significant substantive change to its interpretation of a civil rights law and what actions constitute discrimination. Because it is not simply a provision about the administration of grants, it is arguably outside the scope of the exception Congress created.³³

In March 2025, the Department of Health and Human Services (HHS) also took a new approach to the same APA exception. HHS previously — since 1971 — had a policy of not using this exception to avoid notice and comment, and of using the good cause exceptions in the APA only "sparingly."³⁴ Last year, HHS reversed that policy, declaring that "extra-statutory obligations" under its former policy of inviting public participation even when not required "impose costs on the Department and the public, are contrary to the efficient operation of the Department, and impede the Department's flexibility to adapt quickly to legal and policy mandates."³⁵ Accordingly, the agency has stated that it

DOJ Settlement Norms and Implications for Environmental Law, ENVIRONMENTAL & ENERGY LAW PROGRAM (June 2, 2026), <https://eelp.law.harvard.edu/a-department-untethered-the-erosion-of-doj-settlement-norms-and-implications-for-environmental-law/>.

³⁰ Rescinding Portions of Department of Justice Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14281, 90 Fed. Reg. 57,141 (Dec. 10, 2025).

³¹ See generally Environmental & Energy Law Program, *Federal Environmental Justice Regulatory Justice Tracker: DOJ Eliminated Its Disparate Impact Regulations* (last updated Dec. 10, 2025), <https://eelp.law.harvard.edu/tracker/rollback-executive-order-directed-agencies-to-eliminate-use-and-enforcement-of-disparate-impact-standard/>.

³² 5 U.S.C. § 553(a)(2); 90 Fed. Reg. at 57,146.

³³ Separate and apart from the question whether good cause applies here is whether the change without notice and comment complies with a rule that designates procedures — including the opportunity for comment — for agencies changing their Title VI regulations. 28 C.F.R. § 42.403(c)(2). As of this publication, we have not identified any filed challenges to DOJ's December 2025 Title VI rule.

³⁴ Public Participation in Rule Making: Statement of Policy, 36 Fed. Reg. 2532 (Feb. 5, 1971).

³⁵ Policy on Adhering to the Text of the Administrative Procedure Act, 90 Fed. Reg. 11,029 (Mar. 3, 2025).

will now take full use of an exception where it previously showed forbearance and leaned in favor of additional public process.

In contrast, a court recently rejected the Department of Justice’s Executive Office for Immigration Review broad application of the exceptions for “rules of agency organization, procedure, or practice”³⁶ and rules that “involve . . . a military or foreign affairs function of the United States.”³⁷ In February 2026, DOJ issued an IFR that changed how the Board of Immigration Appeals adjudicates appeals from decisions in immigration removal proceedings.³⁸ While the government characterized this change as “streamlin[ing]” “to redress inefficiencies,” the District Court for the District of Columbia agreed with challengers that the rule had substantive effects on parties outside the government — including by mandating that many parties subject to removal orders will lose their appeals as a matter of course.³⁹ The court held that those parts of the rule fell outside the narrow exception for rules of agency procedure.⁴⁰ The court also rejected the government’s invocation of the foreign affairs exception, noting that the government’s broad theory of the exception would have applied to essentially any immigration-related regulation, swallowing up the rule.⁴¹ The court vacated all portions of the rule it had deemed not within a valid notice-and-comment exception and remanded the matter to the agency for further proceedings.⁴² The government has appealed.⁴³

DOJ’s expansive interpretations and HHS’s shift in approach typify the administration’s position that agencies should avoid notice-and-comment procedures if the administration concludes they are not required. The district court’s close look at EOIR’s invocation of these exceptions shows that some courts may continue to read these exceptions narrowly.

Frequent use of the APA’s good cause exception

The Trump administration has also regularly invoked the APA’s good cause exception to amend or rescind rules without public participation.⁴⁴ By promulgating IFRs and asserting good cause (i.e., “that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public

³⁶ 5 U.S.C. § 553(b)(A).

³⁷ *Id.* § 553(a)(1).

³⁸ Appellate Procedures for the Board of Immigration Appeals, 91 Fed. Reg. 5267, 5267 (Feb. 6, 2026).

³⁹ *Amica Ctr. for Immigrant Rights v. Executive Office for Immigration Review*, No. 26-696, 2026 WL 662494, at *1, 22–27 (D.D.C. 2026) (in which challengers had argued that the change will “erode the fundamental fairness of immigration removal proceedings” by depriving “most individuals in removal proceedings of any meaningful administrative appeal”).

⁴⁰ *Id.* at *23–27.

⁴¹ *Id.* at *30–31.

⁴² *Id.* at *33–34.

⁴³ Notice of Appeal, *Amica Ctr. for Immigrant Rights v. Executive Office for Immigration Review*, No. 26-696 (D.D.C. May 8, 2026).

⁴⁴ In addition to the examples discussed below, see, e.g., Revision of National Environmental Policy Act Implementing Procedures, 90 Fed. Reg. 29,676 (July 3, 2025); Restoring Integrity to the Issuance of Non-Domiciled Commercial Drivers Licenses (CDL), 90 Fed. Reg. 46,509 (Sept. 9, 2025).

interest”⁴⁵), the administration has accelerated deregulation and evaded judicial review, stretching past limits courts have placed on use of the exception.

Effecting deregulation by extending compliance deadlines

The administration has asserted good cause when issuing IFRs and final-final rules to alter compliance deadlines for emissions regulations, which has had an immediate deregulatory effect and limited stakeholder involvement and judicial review.

For example, in July 2025, EPA issued an IFR extending deadlines for emitters to meet performance standards for existing oil and gas sources of methane and volatile organic compounds, asserting good cause to do so without prior notice and comment.⁴⁶ The administration stated that prior notice and comment was “unnecessary” because the IFR was only making small changes to compliance deadlines that the agency believed were “impracticable.”⁴⁷ In December 2025, in response to comments on the IFR, EPA promulgated a final-final rule.⁴⁸

Environmental nonprofit organizations challenged the IFR, arguing that the situation presented neither the kind of urgency that might make notice and comment impracticable nor was it an “inconsequential” rule that made notice and comment unnecessary.⁴⁹ The public health implications of the rule, litigants explained, made the rule significant. Citing the D.C. Circuit, litigants argued notice and comment is only unnecessary when a rule is “insignificant in nature and impact,” which litigants stated was “plainly not the case here.”⁵⁰ Litigants also argued that “concerns about compliance deadlines do not rise to the level of an emergency,” citing instances when courts did not permit agencies to skip notice and comment due to impending deadlines.⁵¹ However, when EPA released its December final-final rule, the court ruled the IFR challenge moot, never reaching its merits.⁵² While environmental groups have now challenged the final-final rule,⁵³ the example shows how assertions of good cause — valid or not — can have immediate deregulatory effects and limit opportunity for legal challenges.

⁴⁵ 5 U.S.C. § 553(b)(B).

⁴⁶ Extension of Deadlines in Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review Final Rule, 90 Fed. Reg. 35,966 (July 31, 2025).

⁴⁷ *Id.* at 35,979–80.

⁴⁸ Oil and Natural Gas Sector Climate Review: Extension of Deadlines in Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources, 90 Fed. Reg. 55671 (Dec. 3, 2025).

⁴⁹ Motion for Summary Vacatur at *16, *Env’t Def. Fund v. Zeldin*, Nos. 25-1164, 25-1168 (D.C. Cir. Aug. 18, 2025), https://library.edf.org/AssetLink/g283jkq65n61cxstv425scr0f6vkb2g8.pdf?_gl=1*1omfabcb*_gcl_au*MTc1NTk1MTEONC4xNzU0MzI0NjIw*_ga*MTcyODQ0MDU1Ni4xNzU0MDE2MjM0*_ga_2B3856Y9QW*_czE3NTU2MTAzNDUkbzM2JGcxJH0xNzU1NjEwODE4JGo1NiRsMCRoMA.

⁵⁰ *Id.* at *15 (citing *Mack Trucks v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012)).

⁵¹ *Id.* at *17–*18 (citing *Union of Concerned Scientists v. Nuclear Regul. Comm’n*, 711 F.2d 370, 382 (D.C. Cir. 1983)).

⁵² Order at *1, *Env’t Def. Fund v. Zeldin*, 25-01275 (D.C. Cir. Dec. 3, 2025).

⁵³ *Env’t Def. Fund v. Zeldin*, No. 25-01275 (D.C. Cir. Dec. 3, 2025).

Courts are differing, however, in their approach to whether final-final rules moot review of an IFR. On July 3, 2025, EPA promulgated an IFR for a 2024 rule regulating emissions from integrated iron and steel manufacturing facilities.⁵⁴ The agency asserted that prior notice and comment was impracticable because the 2024 rule “pose[d] compliance challenges that must be resolved before regulated parties w[ould] be able to comply with . . . the 2024 rule.”⁵⁵ Petitioners challenged the IFR at the end of July 2025, arguing that EPA’s assertion of good cause was invalid.⁵⁶ As with the oil and gas methane rule discussed above, in December 2025, EPA finalized the IFR in a final-final rule,⁵⁷ which petitioners also challenged.⁵⁸

In contrast to the court’s approach to the oil and gas rule challenge, the court hearing the iron and steel rule challenge consolidated the case challenging the IFR with the case challenging the final-final rule. The court heard oral argument on May 11, 2026; it remains to be seen whether the court will evaluate the legality of the IFR and assertion of good cause or whether the court focuses its review on the final-final rule.⁵⁹

Although the challenges have proceeded differently, as a practical matter both compliance deadline IFRs allowed the administration to achieve its objective of immediately delaying compliance requirements for these environmental rules without stakeholder comment.

Adopting broad interpretations of Supreme Court decisions to determine a rule is unlawful

The Trump administration has also asserted that if a regulation is unlawful — as determined by the administration — then notice and comment is “unnecessary” to rescind it.⁶⁰ While the White House

⁵⁴ National Emission Standards for Hazardous Air Pollutants: Integrated Iron and Steel Manufacturing Facilities Technology Review: Interim Final Rule, 90 Fed. Reg. 29,485 (July 3, 2025).

⁵⁵ *Id.* at 29,489.

⁵⁶ Motion for Summary Vacatur or, in the Alternative, a Stay Pending Judicial Review at *9-*11, *Clean Air Council v. EPA*, No. 25-01163 (D.C. Cir. Jul 28, 2025).

⁵⁷ National Emission Standards for Hazardous Air Pollutants: Integrated Iron and Steel Manufacturing Facilities Technology Review, 90 Fed. Reg. 55,681 (Dec. 3, 2025).

⁵⁸ *Clean Air Council v. EPA*, No. 25-01286 (D.C. Cir. Dec. 18, 2025).

⁵⁹ It will also be interesting to see what remedy the court orders if it determines that the assertion of good cause—and thus the IFR—was invalid. [July 27, 2026, update: The D.C. Circuit dismissed the challenge to the IFR as moot because the agency promulgated a final rule. In addressing the question of relief, the court stated, “Even assuming EPA lacked good cause for the Interim Rule, we could provide no meaningful relief for that alleged defect because EPA later promulgated the Final Rule after notice and comment.” *Clean Air Council v. EPA*, No. 25-1163, at *18 (D.C. Cir. July 17, 2026)].

⁶⁰ In the examples we have identified as possibly resting on this justification for forgoing notice and comment, the agency’s reasoning is not always clearcut. For instance, when the Council for Environmental Quality (CEQ) issued an interim final rule withdrawing its NEPA-implementing regulations, it cited multiple “good cause” justifications, including that the president had withdrawn the executive order that had charged CEQ with issuing those regulations. *Removal of National Environmental Policy Act Implementing Regulations*, 90 Fed. Reg. 10,610, 10,615 (Feb. 25, 2025).

has pushed this theory of the good cause exception through several memoranda, few agencies have used it so far.⁶¹

Beginning in February 2025, the White House issued a series of increasingly forceful directives instructing agencies to identify regulations made unlawful by ten recent Supreme Court decisions and to repeal them without notice and comment using the good cause exception.⁶² While there may be authority to rescind a rule without notice and comment if Congress or a court decide the rule is illegal in full, the approaches put forth by the Trump administration extend far beyond implementing what Congress or a court has required it to do: the Office of Information and Regulatory Affairs (OIRA) has directed agencies to forgo notice and comment in far broader instances where an agency itself believes a court decision might counsel for a new interpretation of an agency's authority. To the extent agencies do follow OIRA's direction, there are likely significant legal questions if the agency does not have additional justifications to avoid notice and comment.

First, the Supreme Court cases cited in OIRA memos do not necessarily provide a valid basis for deeming a regulation unlawful, and OIRA's approach would effectively have agencies step into a court's role. For instance, while OIRA directs agencies to use *Loper Bright Enterprises v. Raimondo* as a basis for rescinding regulations, the decision does not support that approach. As an initial matter, the decision is about how courts, not agencies, approach questions of interpretation: *Loper Bright* directs that courts need not defer to agencies' interpretation of ambiguous statutes, as they had under *Chevron*, but the decision says nothing about what agencies should do if they adopt a new statutory interpretation.⁶³

Even in the context of judicial review, the decision does not require discarding past agency interpretations that courts had upheld under *Chevron*. To the contrary, the Court clarified that its decision did not "call into question prior cases that relied on the Chevron framework. The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory stare decisis despite our change in interpretive methodology."⁶⁴ Far from requiring agencies to alter existing regulations if an agency later deems a past statutory interpretation incorrect, the decision instead

⁶¹ Robert Iafolla, *Trump's Swift Deregulation Strategy Falls Flat With Agencies*, BLOOMBERG LAW (May 26, 2025), <https://news.bloomberglaw.com/daily-labor-report/trumps-swift-deregulation-strategy-falls-flat-with-agencies> (identifying very limited instances of agencies using the theory described here to justify "quickie deregulation").

⁶² Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative, 90 Fed. Reg. 10,583 (Feb. 19, 2025); Presidential Memorandum, Directing the Repeal of Unlawful Regulations (Apr. 9, 2025); Office of Management and Budget, Office of Information and Regulatory Affairs, Memorandum: Guidance Implementing the President's Memorandum Directing the Repeal of Unlawful Regulations, M-25-28 (May 7, 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-28-Guidance-Implementing-the-Presidents-Memorandum-Directing-the-Repeal-of-Unlawful-Regulations.pdf>; Office of Management and Budget, Office of Information and Regulatory Affairs, Memorandum: Streamlining the Review of Deregulatory Actions, M-25-36 (Oct. 23, 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/10/M-25-36-Streamlining-the-Review-of-Deregulatory-Actions.pdf>.

⁶³ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

⁶⁴ *Id.* at 412.

allows existing regulations to stand even if a court, were it presented with a statutory interpretation question post-*Chevron*, might have adopted a different interpretation.⁶⁵

OIRA's suggestion that agencies rely on *West Virginia v. EPA* is also suspect. *West Virginia* directs the application of the major questions doctrine in “extraordinary cases” where an agency’s interpretation of its powers under a statute are “unheralded” and “transformative,” deviating significantly from an agency’s past assertion of power, and where the matter is of vast economic and political significance.⁶⁶ Again, OIRA’s approach would have agencies, rather than courts, make the initial determination of how *West Virginia* applies to a particular regulatory context. And the agency would do so without the benefit of public input on how *West Virginia* might apply — or about any other impacts of the regulatory change.

Second, even if an agency adopted a new view of the lawfulness of a regulation based on one of the Supreme Court cases listed in the memoranda, fast-tracked rescission without notice-and-comment rulemaking is likely inappropriate. There is no exception from the APA’s notice-and-comment requirements (or more broadly the APA’s requirement that an agency provide a reasonable explanation for its decision) for a repeal based on a new legal interpretation. Unlike a situation in which a court has ruled directly on the lawfulness of a regulation or Congress has disapproved a regulation in full and an agency is merely implementing that decision, an agency that has adopted a new legal interpretation would often retain some level of discretion about what action to take. The APA requires agencies to make a reasoned decision about how to use that discretion. As with any other rulemaking, an agency must consider alternatives to repeal, including partial rescission or some other change that brings the regulation in line with the agency’s new reading of a statute, and must explain its choices.⁶⁷ Notice and comment is part of that process, allowing an agency to vet its new legal interpretation, to consider alternatives to complete repeal, to understand the consequences of different regulatory options, and to fully consider reliance interests as is required for any change in direction.

In a somewhat analogous situation, the D.C. Circuit held that even where a rule was “defectively promulgated,” notice-and-comment procedures are still required for rescission.⁶⁸ But this area of law

⁶⁵ For a deeper treatment of this issue, see Jack Jones & Max Sarinsky, *Statutory Interpretation and Deregulation: Key Considerations from Recent Supreme Court Decisions*, Institute for Policy Integrity, at 1–4 (June 2025),

[https://policyintegrity.org/files/publications/Statutory Interpretation and Deregulation Issue Brief.pdf](https://policyintegrity.org/files/publications/Statutory%20Interpretation%20and%20Deregulation%20Issue%20Brief.pdf).

Although we have not identified examples of agencies relying on new statutory interpretations—reinforced by *Loper*—to assert good cause to bypass notice and comment, agencies have been using *Loper* arguments as a basis for deregulatory actions more generally. See, e.g., Erika Kranz, Carrie Jenks & Sara Dewey, *Eliminating the Foundation: Vulnerabilities in and Implications of EPA’s Endangerment Finding Rescission*, ENVIRONMENTAL & ENERGY LAW PROGRAM (March 2, 2026), <https://eelp.law.harvard.edu/eliminating-the-foundation-vulnerabilities-in-and-implications-of-epas-endangerment-finding-rescission/> (explaining EPA’s argument that its new interpretation of the Clean Air Act as limiting EPA’s authority to regulate greenhouse gas emissions from vehicles is required by *Loper*).

⁶⁶ See *West Virginia v. EPA*, 597 U.S. 697, 722–24 (2022). See also Jones & Sarinsky, *supra* note 65 at 5–7.

⁶⁷ See Jack Jones & Max Sarinsky, “Nondiscretionary” Repeals, Institute for Policy Integrity, at 5 (Dec. 2025), [https://policyintegrity.org/files/publications/Non-Discretionary Repeals Issue Brief.pdf](https://policyintegrity.org/files/publications/Non-Discretionary%20Repeals%20Issue%20Brief.pdf).

⁶⁸ *Consumer Energy Council v. Fed. Energy Regulatory Comm’n*, 673 F.2d 425, 447 n. 79 (D.C. Cir. 1982); see also *National Treasury Employees Union v. Cornelius*, 617 F. Supp. 365 (D.D.C. 1985) (holding that even where

may be shifting: the D.C. Circuit recently rejected a challenger’s argument that an agency had failed to adequately explain its change in position where the court agreed with the agency’s new legal interpretation — suggesting a no-harm-no-foul approach.⁶⁹ However, the reach of this case may be limited: the court agreed that the government’s new legal interpretation left the agency with no discretion,⁷⁰ but if a legal interpretation requires even a minimal exercise of agency discretion, the same theory may not apply. Until there is clear precedent that normal rulemaking procedures do not apply where an agency has a new legal interpretation, challengers may view as suspect any agency assertions that notice and comment is unwarranted because new legal interpretations make repeals nondiscretionary.

Although we have not seen widespread agency reliance on arguments that “unlawful” regulations are good cause for forgoing notice and comment, continued pressure from OIRA may lead more agencies to take this step. At a minimum, President Trump’s and OIRA’s directives signal a White House-led push to turn its legal interpretations and policy priorities into regulatory reality with little to no process for public comments.

Claiming an agency has no discretion because of presidential direction

The Trump administration has also issued rules without notice and comment while asserting no specific APA exception except to say the agency has no discretion “because the President said so,” testing the limits of presidential authority when it intersects with agency processes.

In April 2025, the Department of Energy rescinded a regulation that had regulated the amount of water that may flow from a multi-nozzle shower head.⁷¹ It did so just one week after President Trump issued an executive order that directed the rescission and asserted that notice and comment was unnecessary.⁷² DOE issued a final rule, providing no opportunity for public comment and also providing no explanation for its decision beyond that the agency was acting “in compliance with [the President’s] directive.”⁷³ That rule rescission did not result in legal challenges, perhaps because the legal change had little practical effect, as virtually all showerheads already comply with the now-

an agency asserts that a rule is defective because it is beyond an agency’s regulatory authority, notice and comment procedures are still required for rescission); *Humana, Inc. v. Becerra*, 801 F.Supp.3d 624, 634–35 (N.D. Tex. 2025) (rejecting the government’s argument that it need not provide an opportunity for public comment on a new statutory interpretation”). *Cf.* *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 33 (2020) (noting that an agency’s decision that a policy is illegal does not on its own “foreclose[] or even address[] the option[] of . . . accommodating particular reliance interests”); *A.C.R. v. Noem*, No. 25-CV-3962, 2025 WL 3228840, at *121 (E.D.N.Y. Nov. 19, 2025) (“[A]n agency must always consider serious reliance interests, even when it concludes an earlier policy was unlawful.”)

⁶⁹ *Centro de Trabajadores Unidos v. Bessent*, 167 F.4th 1218, 1238–39 (D.C. Cir. 2026).

⁷⁰ See Reed Shaw, *The Change-in-Position Doctrine After Centro de Trabajadores* (D.C. Cir.), YALE J. ON REG. NOTICE & COMMENT (Mar. 3, 2026), <https://www.yalejreg.com/nc/the-change-in-position-doctrine-after-centro-de-trabajadores-d-c-cir/>.

⁷¹ Repeal of the Definition of Showerhead, 90 Fed. Reg. 15,647 (Apr. 15, 2025).

⁷² Maintaining Acceptable Water Pressure in Showerheads, Exec. Order 14,264 (Apr. 9, 2025).

⁷³ Repeal of the Definition of Showerhead, 90 Fed. Reg. 15,647. While DOE asserted that there was “good cause to skip notice and comment,” it neither cited the good cause provision in the APA nor made a “finding and a brief statement of the reasons therefore” as required by that section.

repealed standard.⁷⁴ However, the administration may look to deploy this strategy in more consequential ways.

A second example is working its way through courts now. In February 2026, President Trump issued a proclamation directing that commercial fishing be allowed in the Northeast Canyons and Seamounts Marine National Monument.⁷⁵ The National Marine Fisheries Service then published a final rule rescinding a regulation that had prohibited commercial fishing within the monument, stating that it was altering the fishing regulations to reflect that change effected by the presidential proclamation.⁷⁶ The agency asserted that it had “good cause” to forego notice-and-comment rulemaking because it had no discretion to reach a different result.⁷⁷ Challengers have raised several claims, including about the failure to provide an opportunity for public comment.⁷⁸

When tested, courts have rejected the theory underlying this kind of process-skipping, holding that even where agencies are implementing a presidential directive, the APA’s normal requirements apply.⁷⁹ For example, in December 2025, the District Court for the District of Massachusetts rejected agencies’ orders pausing all federal authorizations that would facilitate wind energy development, holding that the basis for the agencies’ decisions — that the President had directed the pause — was not a sufficient explanation, and the agencies had also failed to consider other options or other factors, including reliance interests.⁸⁰ Though the context of the wind pause decision was different, the court’s reasoning applies with equal force to the question of whether a presidential directive obviates the need for notice and comment and reasoned agency decision making.

First application of Clean Air Act’s presidential exemptions to alter regulatory obligations

In addition to the APA’s exceptions, some substantive statutes have express provisions that allow administrations to bypass notice and comment. Section 112(i)(4) of the Clean Air Act, for example, allows the president to exempt certain sources from air regulations for two years if the technology is not available to comply with the standard and “it is in the national security interests of the United

⁷⁴ See Christa Marshall, *Trump Signs Order to Make ‘Showers Great Again,’* POLITICO (Apr. 10, 2025).

⁷⁵ Proclamation No. 11,009, 91 Fed. Reg. 6489 (Feb. 6, 2026).

⁷⁶ Modifications To Conform U.S. Fishery Regulations With the Presidential Proclamation Unleashing Commercial Fishing in the Atlantic, 91 Fed. Reg. 17,159 (Apr. 6, 2026).

⁷⁷ *Id.*

⁷⁸ Complaint at 65–68, *Conserv. Law Found. v. Trump*, No. 1:26–cv-01528 (D.D.C. May 4, 2026), <https://www.clf.org/wp-content/uploads/2026/05/2026.05-NECSM-Complaint.pdf>.

⁷⁹ Jack Jones & Max Sarinsky, *Preventing Public Participation: The Trump Administration’s Misuse of the Good Cause Exception to Fast-Track Deregulation*, at 6–7 INSTITUTE FOR POLICY INTEGRITY (Apr. 23, 2025), https://policyintegrity.org/files/publications/Good_Cause_Policy_Brief_vF_A.pdf.

⁸⁰ See Erika Kranz, *Federal Court Vacates Wind Energy Authorization Pause*, ENVIRONMENTAL & ENERGY LAW PROGRAM (Dec. 16, 2025), <https://eelp.law.harvard.edu/wp-content/uploads/2025/12/Federal-Court-Vacates-Wind-Energy-Authorization-Pause.pdf>.

States to do so.”⁸¹ President Trump is the first to invoke this exemption,⁸² using it in 2025 to exempt certain coal-fired power plants,⁸³ chemical manufacturers,⁸⁴ commercial sterilization facilities,⁸⁵ copper smelters,⁸⁶ taconite ore processing facilities,⁸⁷ and coke ovens⁸⁸ from hazardous air pollutant emission standards.

The coke oven exemptions exemplify how the administration has used this provision to avoid notice and comment even when the administration itself has reached conflicting conclusions. In July 2025, EPA promulgated an IFR, without prior notice and comment, delaying 2024 emissions standards for coke oven facilities and asserting the deadlines were “impracticable under the circumstances,” and “infeasible.”⁸⁹ In October 2025, EPA changed its mind and rescinded the IFR, explaining that “EPA [did] not believe that . . . regulated parties would face significant immediate compliance challenges.”⁹⁰

Nevertheless, in November 2025, the administration again used Clean Air Act section 112(i)(4) to exempt all coke oven processing facilities from the 2024 emissions standards for two years,⁹¹ essentially reinstituting delayed compliance deadlines via a different mechanism. President Trump

⁸¹ 42 U.S.C. § 7412(i)(4).

⁸² Complaint at ¶7, Greater-Birmingham Alliance to Stop Pollution v. Trump, No. 1:25-cv-04469 (D.D.C. Dec. 23, 2025).

⁸³ Presidential Proclamation, *Regulatory Relief for Certain Stationary Sources to Promote American Energy* (April 8, 2025), <https://www.whitehouse.gov/presidential-actions/2025/04/rregulatory-relief-for-certain-stationary-sources-to-promote-american-energy/>.

⁸⁴ Regulatory Relief for Certain Stationary Sources to Promote American Chemical Manufacturing Security, 90 Fed. Reg. 34,587 (July 23, 2025).

⁸⁵ Presidential Proclamation, *Regulatory Relief for Certain Stationary Sources to Promote American Security with Respect to Sterile Medical Equipment* (July 17, 2025), <https://www.whitehouse.gov/presidential-actions/2025/07/regulatory-relief-for-certain-stationary-sources-to-promote-american-security-with-respect-to-sterile-medical-equipment/>.

⁸⁶ Presidential Proclamation, *Regulatory Relief for Certain Stationary Sources to Promote American Mineral Security* (Oct. 24, 2025), <https://www.whitehouse.gov/presidential-actions/2025/10/regulatory-relief-for-certain-stationary-sources-to-promote-american-mineral-security/>.

⁸⁷ Presidential Proclamation, *Regulatory Relief for Certain Stationary Sources to Promote American Iron Ore Processing Security* (July 17, 2025), <https://www.whitehouse.gov/presidential-actions/2025/07/regulatory-relief-for-certain-stationary-sources-to-promote-american-iron-ore-processing-security/>.

⁸⁸ Presidential Proclamation, *Regulatory Relief For Certain Stationary Sources To Promote American Coke Oven Processing Security*, (Nov. 21, 2025), <https://www.whitehouse.gov/presidential-actions/2025/11/regulatory-relief-for-certain-stationary-sources-to-promote-american-coke-oven-processing-security/>.

⁸⁹ National Emission Standards for Hazardous Air Pollutants for Coke Ovens: Pushing, Quenching, and Battery Stacks, and Coke Oven Batteries; Residual Risk and Technology Review, and Periodic Technology Review, 90 Fed. Reg. 29,997, 30,002 (July 8, 2025).

⁹⁰ National Emission Standards for Hazardous Air Pollutants for Coke Ovens: Pushing, Quenching, and Battery Stacks, and Coke Oven Batteries; Rescission of Extension of Compliance Deadlines for Coke Oven Facilities, 90 Fed. Reg. 56,010, 56,011 (Dec. 5, 2025).

⁹¹ Presidential Proclamation, *Regulatory Relief for Certain Stationary Sources to Promote American Coke Oven Processing Security* (Nov. 21, 2025), <https://www.whitehouse.gov/presidential-actions/2025/11/regulatory-relief-for-certain-stationary-sources-to-promote-american-coke-oven-processing-security/>; see also Complaint at ¶5, Greater-Birmingham Alliance to Stop Pollution v. Trump, No. 1:25-cv-04469 (D.D.C. Dec. 23, 2025)

stated that the compliance timeline set out in the 2024 rule was “onerous” and put “coke production facilities [] in the impossible position of designing and engineering novel systems with unproven technology within a short time frame.”⁹²

Environmental nonprofits challenged the coke oven proclamation as a violation of the Clean Air Act and “exceed[ing] the President’s lawful authority.”⁹³ In response, the administration has argued that the presidential determination is essentially unreviewable and that the national security basis of the exemptions makes them especially unfit for judicial review.⁹⁴ As the litigation progresses, the exemptions remain in effect, illustrating how the administration has deployed this never-before-used tool to achieve immediate deregulatory effect without public input (and, in this instance, inconsistent with the EPA’s reasoning when it rescinded the IFR).

(2) Asking courts to vacate rules

A second part of the administration’s three-branch strategy to avoid notice-and-comment rulemaking involves the judicial branch. [The administration has attempted to use judicial processes](#) to affect the rescission of a regulation without normal administrative processes — for example, asking a court to vacate a rule, rather than using an administrative process to rescind it — or by using litigation with aligned parties to achieve policy outcomes through settlement.⁹⁵

A notable example is pending now. In 2024, EPA issued a rule that strengthened the standards for fine particulate matter under the Clean Air Act.⁹⁶ Some states and industry groups challenged the rule, arguing that EPA lacked authority for its rule change.⁹⁷ EPA defended the rule in the D.C. Circuit through briefing and oral argument in December 2024. But in November 2025, before the court issued a decision in the case, EPA told the court that it had now determined that the 2024 rule was unlawful, that it would no longer defend the rule, and that it was joining the rule’s challengers in asking the court to vacate the rule. EPA had previously indicated that it intended to “revisit[]” the Biden-era rule, presumably through a rulemaking.⁹⁸ If the court takes EPA’s requested step — which

⁹² Presidential Proclamation, Regulatory Relief for Certain Stationary Sources to Promote American Coke Oven Processing Security (Nov. 21, 2025), <https://www.whitehouse.gov/presidential-actions/2025/11/regulatory-relief-for-certain-stationary-sources-to-promote-american-coke-oven-processing-security/>.

⁹³ Complaint at ¶10, Greater-Birmingham Alliance to Stop Pollution v. Trump, No. 1:25-cv-04469 (D.D.C. Dec. 23, 2025). This challenge has been consolidated with challenges to the exemptions for chemical manufacturers, commercial sterilization facilities, and taconite ore processing facilities. Texas Env’t Justice Advocacy Servs. v. Trump, 1:25-cv-03745 (D.D.C. Oct. 22, 2025).

⁹⁴ See Defendants’ Memorandum in Support of Motion to Dismiss, Texas Env’t Justice Advocacy Servs. v. Trump, No. 1:25-cv-03745-CRC (D.D.C. filed Jan. 29, 2026). For a discussion of judicial review of national security justifications for administrative actions, see Kendall McPherson, *The Limits of Deference: Judicial Review of Pretextual National Security Rationales*, ENVIRONMENTAL & ENERGY LAW PROGRAM (May 11, 2026), <https://eelp.law.harvard.edu/the-limits-of-deference-judicial-review-of-pretextual-national-security-rationales/>.

⁹⁵ For a fuller treatment of this issue, see Kranz, *supra* note 29.

⁹⁶ See generally Environmental & Energy Law Program, *Regulatory Tracker: National Ambient Air Quality Standards (NAAQS) for Particulate Matter (PM)*, <https://eelp.law.harvard.edu/tracker/epa-finalized-strict-national-ambient-air-quality-standards-naaqs-for-particulate-matter-pm/>.

⁹⁷ Kentucky v. E.P.A.A., No. 24-01050 (D.C. Cir. filed Mar. 6, 2024).

⁹⁸ Press Release, Environmental Protection Agency, Trump EPA Announces Path Forward on National Air Quality Standards for Particulate Matter (PM_{2.5}) to Aid Manufacturing, Small Businesses (Mar. 12, 2025),

is far from assured⁹⁹ — EPA will have achieved its goal under this administration of rescinding a rule without going through any administrative process.

(3) Using congressional disapproval mechanisms

Finally, Congress — in coordination with the Trump administration — used the Congressional Review Act (CRA) to summarily repeal agency actions that had been enacted with comprehensive public participation, circumventing the opportunity for comment that would have been required in an administrative process.

The CRA allows Congress to veto certain types of agency rules through a bare majority vote. Historically, the CRA was used much more sparingly.¹⁰⁰ It applied only to a narrow set of rules deemed eligible by the Senate parliamentarian and the Government Accountability Office (GAO) and promulgated within the last 60 legislative days of the previous administration. [This administration has used the CRA](#) to veto years-old rules¹⁰¹ and to veto actions the GAO and parliamentarian had determined were not eligible for rescission under the CRA.¹⁰² This expansive interpretation of the CRA potentially plows a broad new avenue for disapproval of past agency decisions without any public

<https://www.epa.gov/newsreleases/trump-epa-announces-path-forward-national-air-quality-standards-particulate-matter>.

⁹⁹ The D.C. Circuit recently rejected a similar EPA request to vacate parts of a Safe Drinking Water Act rule regulating certain per- and polyfluoroalkyl substances. In that case, unlike the particulate matter challenge, merits briefing was not complete; while the court denied EPA's request for vacatur ahead of considering the merits in full, it may consider EPA's change of position when it rules on the merits of the challenge. Order, *Am. Water Works Ass'n v. EPA*, No. 24-1188 (D.C. Cir. Jan. 21, 2026). In another case, some justices criticized the Biden administration for acquiescing in an adverse court order — not present in the particular matter challenge now pending — as a way to effect repeal of a rule without notice and comment. *Arizona v. City and County of San Francisco*, No. 20-1775, 596 U.S. ____ (2022) (Roberts, C.J., concurring, joined by Thomas, Alito, and Gorsuch, JJ.). The Eighth Circuit also recently rejected the Securities and Exchange Commission's request that it vacate a rule the agency no longer supported. Order, *Iowa v. U.S. Sec. & Exch. Comm'n*, No. 24-1522 (8th Cir. Sept. 12, 2025). See Kranz, *supra* note 29 (providing more analysis of both of these examples and how they fit into a larger pattern).

¹⁰⁰ Congress used the CRA once before 2017, 16 times in 2017, and three times in 2021. Maeve P. Carey & Christopher M. Davis, *The Congressional Review Act (CRA): A Brief Overview*, CRS (Aug. 29, 2024), <https://www.congress.gov/crs-product/IF10023>.

¹⁰¹ See e.g. Providing Congressional Disapproval Under Chapter 8 of Title 5, United States Code, of the Rule Submitted by the Environmental Protection Agency Relating to “California State Motor Vehicle and Engine Pollution Control Standards; Heavy-Duty Vehicle and Engine Emission Warranty and Maintenance Provisions; Advanced Clean Trucks; Zero Emission Airport Shuttle; Zero-Emission Power Train Certification; Waiver of Preemption; Notice of Decision,” Pub. L. 119-15 (2025) (vetoing EPA's notice of approval of a Clean Air Act California Waiver published in 2023).

¹⁰² *Observations Regarding the Environmental Protection Agency's Submission of Notices of Decision on Clean Air Act Preemption Waivers as Rules Under the Congressional Review Act*, GAO (Mar. 6, 2025), <https://www.gao.gov/assets/880/875948.pdf>. For more analysis, see Sarah Hart-Curran, *The Congressional Review Act in 2025: Expanding Use and Emerging Questions*, ENVIRONMENTAL & ENERGY LAW PROGRAM (Feb. 5, 2026), <https://eelp.law.harvard.edu/the-congressional-review-act-in-2025-expanding-use-and-emerging-questions>; Jack Jones & Ricky Revesz, *The Weaponization of the Congressional Review Act in 2025*, THE REGULATORY REVIEW (Feb. 3, 2026), <https://www.theregreview.org/2026/02/03/jones-revesz-the-weaponization-of-thecongressional-review-act-in-2025/>.

process. Because the CRA prevents courts from reviewing most categories of challenges to its use, there are few to no judicial guardrails on this practice.

What do these examples illustrate about public participation in 2026 and beyond?

As we move through the second year of this administration, these examples reveal a systematic, multi-branch strategy to curtail stakeholder involvement in regulatory decision making. Rather than isolated procedural workarounds, the administration has coordinated three pathways – statutory exceptions, litigation strategy, and congressional mechanisms – to achieve rapid deregulation without notice-and-comment rulemaking.

This efficiency comes at a cost. Public participation strengthens regulatory processes by providing opportunities for agencies to refine rules, better understand their effects, and gain new ideas. The loss of these opportunities may mean agency rules that are weaker, less reasonable, and harder for agencies to defend. The coke oven exemption illustrates this loss: EPA issued an IFR without notice and comment based on infeasibility of compliance; EPA later withdrew its IFR, finding compliance was feasible; and finally the administration reversed course again, issuing Clean Air Act exemptions and claiming the original standards were impossible. A standard notice-and-comment process may have allowed EPA to avoid this regulatory see-saw and develop a single, reasoned decision about feasibility with the advantage of stakeholder feedback on a proposed rule.

The APA was drafted with release valves, allowing exceptions in limited circumstances. But the administration has stretched these exceptions beyond their past use. Courts may agree with challengers that these exceptions have enforceable limits, as courts have in the past. But the administration's strategies are in some cases without precedent, so it is difficult to predict how courts will respond.

Courts, however, face a structural problem: the administration can deploy IFRs to achieve immediate policy effects, mooted at least some process-based challenges by issuing a final rule before litigation concludes. The administration thus wins on the ground simply by acting, regardless of eventual legal outcome. If courts are unable to hold the administration to the limits of exceptions and exemptions it seeks to exploit, Congress may conclude that statutory changes are needed to rein in the administration.

Given the administration's wide-ranging strategies for achieving its deregulatory goals and its lack of interest in public participation, we expect to see more of the same (and more of the unusual – perhaps unprecedented) uses of exemptions, exceptions, and court- or Congress-centered strategies to circumvent otherwise required administrative process.

EELP will continue to analyze if and how this pattern develops and how courts and Congress respond.