

## FINAL MEMORANDUM, ADMINISTRATIVE LAW SEMINAR

Subject: GEEPS Statute Contribution

Date: 5/16/2012

To: Roberto Corrada

From: [REDACTED]

In detailing my own contribution to the GEEPS project, it would not be complete if I failed to mention the work done by my partner, [REDACTED]. Especially toward the beginning of the project on the Judicial Review portion of GEEPS, [REDACTED] was a great help. I was quite sick during this period of time, and [REDACTED] did excellent work to keep us on pace and get us started.

My personal contribution to the Judicial Review portion and other sections of GEEPS was as follows:

1. Doing initial research for source material upon which to base the Judicial Review section of the statute. A lot of my personal research was spent reviewing the APA and environmental law statutes that I am somewhat familiar with, such as CERCLA, RCRA, CWA, and ESA. Although content from the environmental law statutes didn't end up making a huge impact in GEEPS, they did inform some of the decisions I made down the road. The APA was much more helpful as far as setting a basic framework.
2. Helping review some of the judicial review portions that had been drafted into other sections of GEEPS for incorporation. [REDACTED] did a fair amount of work helping consolidate the judicial review sections that had been drafted by other groups as a part of their sections. After [REDACTED] put them together, I reviewed them to see if they were redundant, how they might be applied better, drafted additions, and determined how they could fit into our initial framework.



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3. Heavily revising the reviewability subsection and drafting an otherwise missing appeals subsection for the Judicial Review section. The basic framework we had wasn't very clear as to these two points and it didn't make very much sense in the grand scheme of the statute. I retooled it heavily, completely drafting or redrafting these sections to be clearer and incorporate some of the case law that we had recently been studying. For example, I attempted to set a reasonable number of inter-agency appeals—a number that was completely missing originally—and make it clear that exhaustion of agency remedies was expressly required in the statute. I posted this on TWEN for feedback and eventually modified it further due to the response, adding more agency appeals.
4. Did an initial, short edit of the early document and revised the Scope of Reviewability section to be clearer on a few points, such as adding express authority to interpret ambiguities in the statute and making clear that the arbitrary and capricious standard was especially applicable during informal rulemaking.
5. Researched a General Rulemaking Grant from several different model statutes, per ██████ request. Drafted a brief yet all-inclusive rulemaking grant with suggestions on where it should be placed based on other statutes. I sent the finished product to ██████ along with examples of already-existing general rulemaking grants and some explanation.
6. Volunteered to complete a project for ██████. He was trying to track down all of the “sharing of information” language that was already present in the Licensing, HEAT, and OCE sections of GEEPS and determine whether they were clear and compatible. I tracked down each bit of sharing language and cited each one with an explanation

- on what effect it had and suggestions on how it could be improved for clarity and compatibility with the rest of the statute. This involved spot-drafting in many areas.
7. Drafted suggested language to be added to §3.2 to try and balance concerns with preemption.
  8. Drafted suggested language for §6.5. There were some concerns in class that the GEEPS statute was too limited as to what could be searched for. I added some language to slightly broaden that area within the constraints that had already been set.
  9. Drafting penalties for noncompliance with HEAT reporting procedures. At the time we had no penalties section, so I drafted §7.5. I did research in several statutes to find good examples, and I finally modeled the section around CERCLA liability. Although not the most obvious source, I found it applied quite well for a “failure-to-report” system. On top of that basic model I drafted language to apply more directly to GEEPS and also drafted language for other penalties dealing with the revocation of licensing.
  10. Did the final, comprehensive edit of the Judicial Review section. This included checking for grammar, consistency, structure, and spelling as well as drafting new, clarifying subsections or even deleting ones that no longer applied. I then submitted the final edit to [REDACTED] for incorporation into the final GEEPS draft.
  11. Completed the second half of an outline for Judicial Review and posted it on TWEN to help inform any further decisions on the Judicial Review section of GEEPS.

## **EXHIBITS**

Exhibit 1:

### **TWEN Post:**

Suggested Alterations  (Posting Read)

[Edit](#)  
[Reply](#)  
[Quote](#)

by [REDACTED] - Sunday, April 22, 2012 2:42:59 PM

I think this makes the reviewability and appeals process a bit more clear, but I'd like to hear what people think. It also specifically applies the Exhaustion Doctrine to GEEPS in the statute, which I think we would want to do if we want the appeals process to have any power at all.

This draft only includes one initial agency review and one appeal before a person is permitted to enter federal court. We think that's reasonable.

Suggested alterations:

### **Section 3. Review of Orders, Time, etc.**

(a) On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in an agency proceeding presided over by an administrative law judge. The petition shall contain a concise statement of—

1. the nature of the proceedings as to which review is sought;
2. the facts on which venue is based;
3. the grounds on which relief is sought; and
4. the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency.

### **Section 4. Appeal**

(a) Any ruling in accordance with Section 3(a) of this statute may be subject to one agency appeal to be filed within 60 days of any ruling reached under Section 3(a). All potential agency judicial remedies and appeals must be exhausted before an aggrieved party is permitted to appeal to District Court.

(b) Within 60 days after exhausting all judicial remedies and appeals, an aggrieved party may file a petition to review the order in the court of appeals wherein venue lies. The petitioner shall



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attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.



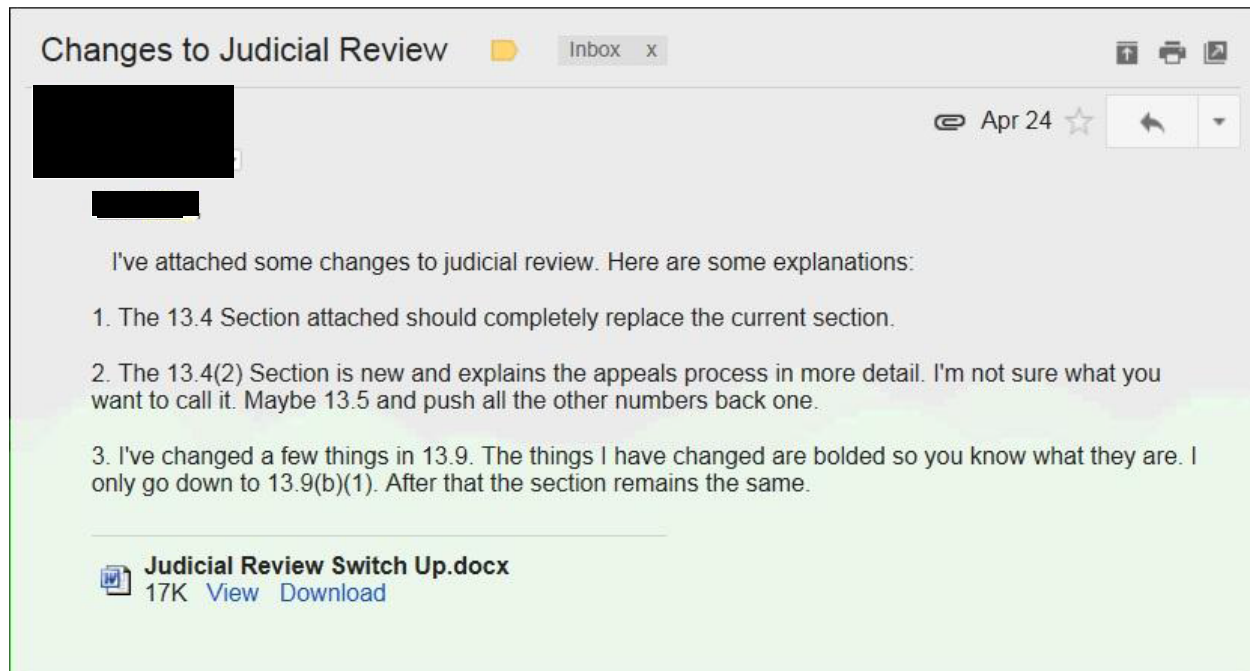
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## Exhibit 2:



### **Judicial Review Switch Up Attachment:**

#### **§13.4 Review of Orders, Time, etc.**

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in an agency proceeding presided over by an administrative law judge. The petition shall contain a concise statement of—

- (a) the nature of the proceedings as to which review is sought;
- (b) the grounds on which relief is sought; and
- (c) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency.

#### **§13.4(2) Appeals and Exhaustion**

Any ruling in accordance with §13.4 of this statute may be subject to two interagency appeals to be filed within 60 days of any ruling reached under that section or subsequent to the first appeal. Only after exhausting all agency remedies and appeals, an aggrieved party may file a petition to review the order in the court of appeals wherein venue lies. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a



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true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt. The petition shall contain a concise statement of—

- (a) the nature of the proceedings as to which review is sought;
- (b) the facts on which venue is based;
- (c) the grounds on which relief is sought; and
- (d) the relief prayed.

### **§ 13.9 Scope of Review**

**The GEEPS Commission has explicit authority to interpret ambiguities in this statute in a reasonable manner based on specialized expertise.** To the extent necessary (**cut out “to decision” here. Didn’t seem to make sense**) and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

- (a) compel agency action unlawfully withheld or unreasonably delayed; and
- (b) hold unlawful and set aside agency action, findings, and conclusions found to be -
  - (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

**This standard of review extends particularly to appeals of informal rulemaking;**



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### Exhibit 3:

Apr 24


Okay, I've attached information relating to the General Rulemaking Grant and the information you wanted about sharing information language between those three departments. Some notes:

1. General Rulemaking Grant - I have my draft written in the attached word document. I looked at a few statutes and most seem to keep this pretty short. As for guidance on where to put it, most seem to place it in the area governing the Commission. That seems to make the most sense to me, and I've referenced the rulemaking section in the General Rulemaking Grant so it isn't confusing about where the actual Rulemaking Procedures are located.
2. There was actually quite a bit of sharing language in licensing, OCE, and HEAT. However, a lot of it was pretty non-specific. I have suggested some language to make it a bit more clear how and when this information is supposed to be shared. However, some of what I added is very specific and is more in the spirit of "You WILL share" instead of "You can share if you want." Hopefully that's how we envision the statute. At the very least I've highlighted the areas in each section that talk about sharing information.
3. The "suggested language" is bolded. I wrote it in the context of the current language and bolded the new language so you know what is new and what was already there.
4. There were also two parts where I noticed a typo with letters missing. I just typed in the letters in red so you know where they need to be added.

Thanks, and like I said in class, let me know if you need anything else drafted.

Thanks again,

\*\*\*

 **Rulemaking Grant-Sharing Information.docx**  
17K [View](#) [Download](#)

Apr 24

Solid work man. Appreciate the detail of the changes. I'll take a look at it and get back to you.

### **Rulemaking Grant-Sharing Information Attachment:**

#### Examples of General Rulemaking Grants:

The Secretary is authorized to make such rules and regulations as may be necessary to carry out the provisions of this chapter.

“to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions” of the Act



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(a) Promulgation; applicability of section 553 of Title 5 (Nuclear Regulatory Act) The Secretary of Labor and the Secretary of Health and Human Services are authorized to issue such regulations as each deems appropriate to carry out the provisions of this subchapter. Such regulations shall be issued in conformity with section 553 of Title 5, notwithstanding subsection (a) thereof.

(included in general provisions under “Commission”) - “[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”

#### General Rulemaking Grant Draft:

The Commission is authorized to perform any and all acts not inconsistent with this chapter and the intent of Congress as well as issue orders and make, amend, and rescind such rules and regulations deemed necessary to carry out the provisions of the statute. Such rules and regulations shall be issued in conformity with §8 of this Act.

#### Sharing Language Between Licensing, OCE, and HEAT:

##### *Licensing –*

- §5.1(d) states that inspections will be done to ensure licensing standards are being met AND that the inspections shall be shared with appropriate Agency departments.
  - o Suggested language: “Inspections, pursuant to the Act, shall be conducted periodically to guaranty that all standards are being met. Data from such inspections shall be shared with appropriate departments within the Agency, **particularly HEAT and the Office of Compliance and Enforcement. Inspection information shall be compiled in a brief report and be provided to the heads of both departments within 10 days after inspection.**”
    - Note – If we want this inspection report to extend to all the departments and not just HEAT and OCE, we may want to say “to the heads of ALL departments” instead of “BOTH departments.”
    - Note – If we don’t want an express time limit, we could replace “within 10 days” to “within a reasonable time after inspection.”
- §5.3(f) talks about an OCE inspection for licensee safety standards. May want to add that this information shall be shared with Licensing Commission.
  - o Suggested language: At the Agency’s discretion, but at least once each year, the Office of Compliance and Enforcement shall send an inspection team to inspect each facility licensee to determine whether the requisite safety standards are kept up to date and to ensure that the facility is complying with the terms of their license, including but not limited to determine what types of species the facility is



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engaged in cloning. **Within a reasonable time after the inspection, the results shall be compiled into a brief report and shared with HEAT and the Licensing Commission.**

### *OCE*

- §6.1(c) says OCE is to coordinate and share information with other branches. May want to be more specific on how the sharing takes place and to which branches this specifically applies.
  - o Suggested Language: The OCE is responsible for GEEPS Enforcement, but is to coordinate and share information with other branches of the agency. **Within a reasonable time after obtaining information, the Executive Secretary shall share obtained information with HEAT or the Licensing Commission if a reasonable person would deem the information relevant to the objectives of the applicable branch.**
- §6.3(f) says the OCE Executive Secretary is to hold monthly meetings to promote cohesive functionality between “the two branches.” I don’t know what the two branches are, but this might be part of this “sharing” concept. More clarity on exactly which branches the “two branches” are would be helpful.
  - o I assume the “two branches” are HEAT and the Licensing Commission. If so, I would just say so.
- §6.4(b)(1) says HEAT will give OCE all information obtained through authorized emergency investigation. Seems like enough. May want to be more specific as to how soon after the “authorized emergency investigation” the information must be shared.
  - o Suggested Language: Heat will turn over all information it obtains through any authorized emergency investigation **within a reasonable time after obtaining the information.**

### *HEAT*

- §7.3(a) says HEAT shall have access to all records and inspection data acquired by other departments.
  - o Suggested Language: To facilitate up to date and efficient emergency response planning, HEAT shall have access to any and all records and inspection data acquired by any other department under this Act. **This information may either be obtained by direct request from HEAT or by personal inspection of another department’s records and inspection data. Both methods should be performed with the greatest possible haste and efficiency by any departments involved.** HEAT shall require, concurrently with the Office of Compliance and Enforcement, any facility where GEEPS are located to report in immediately when a change occurs concerning:



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- §7.3(b) says HEAT will include reported information, excluding formation or genetic make-up of rDNA or GEEPS, in a public, quarterly report. I think this sort of counts as “sharing” language since the publication will be accessible by the public, including other departments.



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#### Exhibit 4:

### More GEEPS Additions and Edits

Apr 26

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Hey [REDACTED]

I looked down the list of things Professor Corrada mentioned in the email and came up with a few things. I'm not sure if people have already drafted some things along these lines, but the wiki didn't have them so I figured I'd give it a try. Some notes:


1. Edits to Sec. 3.2 - This was an attempt to balance Preemption and I assume the least likely to be included. If we decide we want to maintain suits for negligence, especially for human injury, then maybe these changes will be worthwhile. basically it nails down the language more narrowly to include only negligence actions and says all those who bring these actions will be subject to the judicial review process in Section 13, which includes an initial agency hearing and two levels of appeal before you may enter Federal Courts. Maybe this is a middle ground. Maybe we want preemption a bit more solidly like Professor Corrada had discussed and like the statute currently stands. But there's a suggestion.
2. Edits to Sec. 6.5 - I just added a 6.5(b)(5) area to make that search a bit more broad. Right now there are 4 specific things 6.5(b) protects and can authorize a search. But I figure there may be other things that are pretty critical that people might sneak out. So this broadens the search authority a little bit.
3. Drafting of Sec. 7.5 Penalties for HEAT

There's also a part in (b) where I was just more specific that the prohibited actions would be against the GEEPS Commision, just to make it more clear.

There was no penalties section for noncompliance with HEAT standards. I drafted a section (and added it at the bottom--7.5) based quite a bit on CERCLA liability. Some of it seems pretty harsh, but I think that is okay because "noncompliance" of HEAT standards basically just means you failed to report a real or potential hazard. So I think the penalties can reasonably be higher since the consequences are great and it is pretty affordable and easy to comply.

Mostly it allows for HEAT to recover the costs for cleaning up the problem from the noncompliant party and authorizes the Licensing Committee to consider revoking the license.

Thanks.  
[REDACTED]

 **GEEPS Edits and Additions.docx**  
20K [View](#) [Download](#)

GEEPS Edits and Additions Attachment:

### § 3.2 Preemption

(a) Except as expressly provided by this Act, the GEEPS Act and rules promulgated pursuant to its authority preempt state law when state law obstructs the purpose and objectives or presents unduly burdensome obstacles to comporting with federal regulations. The GEEPS Act does not preempt ~~state actions~~ legal action against creators of GEEPS biology or technology, or against

park operators for negligent human injury, or for specifically identifiable environmental damage directly resulting from the negligent creation or abuse of GEEPS biology or technology.

However, those who choose to take legal action against such parties will be subject to the agency's judicial review and appeals process outlined in §13 of this Act.

(b) No state action shall be brought or maintained against the GEEPS Commission by creators of GEEPS biology or technology, or by owners or operators of GEEPS facilities, based on allegations that the GEEPS Commission failed to adequately warn of danger, or that that the Commission negligently approved design and construction plans for the facility.

(c) On the five-year anniversary of the date this GEEPS Act is enacted, and every five years thereafter, the GEEPS Commission shall transmit to Congress a report documenting the effect of the interaction of the GEEPS Act and the various state laws, and shall provide to Congress with that report recommendations regarding preemption and other aspects of the GEEPS Act in order to more effectively effectuate the purposes of the GEEPS Act.

## **§ 6.5 Investigation and Inspections**

(b) The Agency is authorized with a warrant to search the person, personal effects, vehicle, or home of such person when the Agency has probable cause, based upon evidence, to conclude that an employer, employee, agent, or contractor working in any facility, compound, vehicle, or other identifiable area involving in the research, development, containment, transportation, or commercial utilization of genetically engineered extinct pre-historic species (GEEPS), has removed from such area:

(1) rDNA or any other genetic material derived from a GEEPS;

(2) embryo(s),

(3) egg(s);

(4) living GEEPS; or

(5) any technology or material deemed by the Executive to be critical to the development and production of living GEEPS or a threat to the health, safety, and welfare of the public.

## **§ 7.5 Penalties for Noncompliance**

(a) Potentially liable persons; scope; recoverable costs and damages

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) Owners and operators of facilities regulated under GEEPS who have failed to comply with the requirements of this chapter; and



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- (2) Any person who owned or operated a facility during a real hazard or change listed under § 7.3 and who failed to comply with the requirements of this chapter, shall be liable for—
  - (A) All costs of remedial action incurred by the HEAT, the United States Government or a State or an Indian tribe;
  - (B) Any other costs of response incurred by any other person;
  - (C) Damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release in violation of this chapter; and
  - (D) The costs of any injury or death of innocent bystanders
- (b) Defenses for failure to report real or potential hazard:
  - (1) An act of God
  - (2) An act of war
  - (3) Technological failures beyond the reasonable control of the potentially liable parties.
- (c) In all cases of noncompliance with this chapter the Licensing Committee shall hold a hearing to determine whether the noncompliant party's license should be revoked or suspended and for how long, not barring permanent revocation. In cases of gross or willful noncompliance there will be a presumption toward revoking the noncompliant party's license permanently or suspended for a time the Licensing Committee deems appropriate. The noncompliant party may attend the hearing in person or by representative and offer evidence.





Exhibit 5:



**GEEPS Judicial Review Final Edit Attachment:**

**§13.1 Actions reviewable.**

- (a) The following Commission actions shall be subject to judicial review in the manner prescribed under this chapter [the following judicial review provisions]:
- (1) Any final order entered in any proceeding of the kind previously specified in this section.
  - (2) Any final order allowing or prohibiting a facility to build or operating a GEEPS facility
  - (3) Any final rule or regulation establishing standards to govern GEEPS facilities, including any such facilities leased to an operator, or the creation or use of any GEEPS biology or technology;
  - (4) Any final determination made under this title relating to whether a GEEPS facility, including any such facility leased to an operator, are in compliance with the Commission's standards governing the facility and all applicable laws.



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- (b) Final rules promulgated after any kind of negotiated rulemaking shall be reviewable pursuant to paragraph (a), above, but no court shall review a challenge to the negotiated rulemaking process itself unless the petitioner can demonstrate, on the face of the complaint, that the agency conducted or participated in the negotiated rulemaking process in bad faith.

### § 13.2 Right of Review

Any person suffering legal wrong because of any action of the Commission, or adversely affected or aggrieved by action of the Commission, is entitled to judicial review thereof. Nothing herein

- (a) affects other limitations on judicial review or the power or duty of the court or administrative law judge to dismiss any action or deny relief on any other appropriate legal or equitable ground; or
- (b) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought

### §13.3 Jurisdiction of Courts of Appeals; Venue

- (a) The United States courts of appeal (other than the United States Court of Appeals for the Federal Circuit) have exclusive jurisdiction over any other state or federal courts to hear any action to enjoin, set aside, suspend (in whole or in part), determine the validity of, or review in any other way, any challenge pursuant to Section-§ 13.1 [Actions reviewable] of this chapter. Jurisdiction is invoked by filing a petition under Section-§ 13.4 [Review of orders, etc.] of this chapter.
- (b) The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, where the injury alleged in the proceeding occurred or will occur, or in the United States Court of Appeals for the District of Columbia Circuit.
- (c) Notwithstanding the previous two subsections, the United States courts of appeal will only have jurisdiction to hear any action to enjoin, set aside, suspend, determine the validity of, or review any other way, any challenge pursuant to § 13.1 of this chapter after the petitioner has exhausted all agency remedies and appeals outlined in §13.4 and § 13.5 of this chapter.

### §13.4 Review of Orders, Time, etc.

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in an agency proceeding presided over by an administrative law judge. The petition shall contain a concise statement of—



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- (a) the nature of the proceedings as to which review is sought;
- (b) the grounds on which relief is sought; and
- (c) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The Federal Rules of Evidence shall not apply to agency hearings or appeals, but a residuum of competent evidence must support the decision.

### **§ 13.5 Appeals and Exhaustion**

Any ruling in accordance with §13.4 of this statute may be subject to two interagency appeals to be filed within 60 days of any ruling reached under that section or subsequent to the first appeal.

Only after exhausting all agency remedies and appeals, an aggrieved party may file a petition to review the order in the court of appeals wherein venue lies. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt. The petition shall contain a concise statement of—

- (a) the nature of the proceedings as to which review is sought;
- (b) the facts on which venue is based;
- (c) the grounds on which relief is sought; and
- (d) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency.

### **§ 13.6 Petitions to Review; Proceedings**

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter and after satisfying the requirements of § 13.5 are heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

- (1) remand the proceedings to the agency to hold a hearing in accordance with § 13.4 and §13.5 of this chapter, when a hearing is required by law;



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~~(2)pass~~ on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

~~-(3)transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.~~

(c)If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1)the additional evidence is material; and

(2)there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

### **§ 13.7 Representation; Intervention**

The Attorney General is responsible for and has control of the interests of the Government in all appeals court proceedings under this chapter. The GEEPS Commission, and any party in interest in the proceeding before the Commission whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

### **§ 13.8 Jurisdiction**

(a)The Court of Appeals has jurisdiction of the proceeding on the filing and service of a petition to review an agency ruling or appeal. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the Commission, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application.

### § 13.9 Relief Pending Review

When the Commission finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial or agency review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court or administrative law judge, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings

### § 13.10 Scope of Review

The GEEPS Commission has explicit authority to interpret ambiguities in this statute in a reasonable manner based on specialized expertise. To the extent necessary and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

- (a) compel agency action unlawfully withheld or unreasonably delayed; and
- (b) hold unlawful and set aside agency action, findings, and conclusions found to be -
  - (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law—this standard of review extends particularly to appeals of informal rulemaking;
  - (2) contrary to constitutional right, power, privilege, or immunity;
  - (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

- (4) without observance of procedure required by law;
  - (5) unsupported by substantial evidence in a case subject to ~~sections 8 or 9~~formal rulemaking according to § 8 or adjudication under § 9 of this Act or otherwise reviewed on the record of created during or in furtherance of such a proceeding; or
  - (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
  - (7) In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.
- (c) For the purposes of this section, “substantial evidence” means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of the record considered as a whole, taking into account whatever in the record fairly detracts from the weight of the evidence relied upon by the agency to support its decision.

### § 13.11 Review in Supreme Court

Any final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

### § 13.12 Enforcement in District Courts

The several district courts have jurisdiction specifically to enforce, and to enjoin and restrain any person from violating any order issued by a court under this chapter.



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Exhibit 6:

Judicial Review Outline, Pt. 2

I. STANDARDS OF REVIEW/DEFERENCE

a. APA § 706

**§ Section 706. - Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

**b. Arbitrary and Capricious Review**

- i. RULE: A "reviewing court shall...hold unlawful and set aside agency action, findings, and conclusions found" if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if the action failed to meet the statutory, procedural, or constitutional requirements."

1. Determine whether the Secretary acted within the scope of his authority;

- a. Whether on the facts, the Secretary's decision can reasonably be said to be within that range;

- b. The court must be able to find that the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems.



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2. Court must determine whether the choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."
    - a. Whether the decision was based on a consideration of the relevant factors; AND
    - b. Whether there has been clear error of judgment.
  3. The Court is not empowered to substitute its judgment for that of the agency.
- ii. *Citizens to Preserve Overton Park v. Volpe* (Applying the rule)
1. Department of Transportation Act/Federal-Aid Highway Act – Secretary of Transportation may not build highways through public parks if a “feasible and prudent” alternative exists.
  2. If no such place exists, construction can only take place if there has been “all possible planning to minimize harm.”
  3. Secretary approved highway through Overton Park, gave no explanation on whether a “feasible and prudent” alternative existed or about planning to minimize harm.
  4. Court deemed it arbitrary and capricious, because no way to tell how Secretary made the decision.

**c. Statutory Deference**

i. *Skidmore v. Swift and Co.*

1. RULE: Agency interpretation of the statute receives deference based on the level of persuasion.
  - a. The rulings, interpretations, and opinions of the Administrator, while not controlling upon the courts, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.
  - b. The weight of such a judgment will depend upon:
    - i. The thoroughness evident in its consideration;
    - ii. The validity of its reasoning;
    - iii. Its consistency with earlier and later pronouncements; AND
    - iv. All those factors which give it power to persuade, if lacking power to control.

ii. *Chevron v. National Resources Defense Counsel*

1. Steps: (Chevron Deference)
  - a. Determine whether the agency has been expressly charged by Congress to interpret the act.



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- i. However, "sometimes the legislative delegation to an agency on a particular question is **IMPLICIT** rather than **EXPLICIT**."
  - ii. Court will only give Chevron deference to agency decisions that carry the force of law, because that indicates that Congress has given the agency authority to interpret the act.
- b. Has Congress spoken specifically on this issue? (In the statute, legislative history, etc.)
  - i. If yes, no deference. Do what Congress says.
- c. Is the statute ambiguous?
  - i. If it is clear, no deference. Do what Congress says.
  - ii. If the statute is silent or ambiguous with respect to the issue, the question for the court is whether the agency's interpretation is based on a permissible construction of the statute.
    - 1. Congress cannot simply impose its own construction of the statute.
- d. Check whether the agencies interpretation is reasonable. If it is, deference to their interpretation.
  - i. What is Unreasonable? - "Arbitrary, capricious, or manifestly contrary to the statute."