

Administrative Law

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Final Examination

April 4, 2003

Instructions

1. This is a **CLOSED BOOK** examination. You may not consult any external source of information between the time you receive the exam and the time you turn it in. After finishing it, you may not discuss the content or nature of the exam with anyone whom you are not absolutely certain has also completed the exam. You are on your honor and are subject to the Law School Honor Code.
2. The exam consists of 20 numbered pages. Make sure none are missing.
3. There are 18 questions, each worth 3 to 30 points, for a total of 125 points.
4. You have 4 hours to complete the exam.
5. You should answer each question based solely on the reading materials, lectures, and discussions in the course. When a question calls for a true-false response, you must choose one or the other and circle it. You can justify or qualify your choice in the explanatory part of your answer.
6. Answer each question within the space provided. Focus on the core of the question and write as legibly as you can. You must hand write the exam unless you have received prior approval to use a keyboard on hardship grounds. Try to work out your answer before you start writing.
7. Good luck!

Question 1. When an agency makes a rule regarding its administration of public property, loans, grants, benefits, or contracts, the process is exempt from § 553 rulemaking requirements under the terms of the APA.
True or False? Explain (3 points).

Question 2. Although the terms of the APA § 553 rulemaking requirement are quite sparse, cases such as *Nova Scotia Foods* (the whitefish processing case) demonstrate that the words of the statute provide clear guidance as to the required procedures and need no significant elaboration by the courts.
True or False? Explain (5 points).

Question 3. You are an associate with a Washington, D.C. law firm whose clients include a number of labor unions. The unions are concerned about a proposed policy being advocated by a conservative ‘think tank,’ the American Birthright Foundation. The head of the Foundation is a jogging partner of the President and is believed to have considerable influence in the Whitehouse. Moreover, the Administrator of the Occupational Safety and Health Administration recently gave a talk at the Foundation’s offices in which he was reported by the *Washington Post* to have said that he is “ready and willing to take the steps necessary to implement the creative ideas of the Birthright Foundation in the never-never land of the federal bureaucracy.” The proposal at issue argues that recent developments regarding ergonomics standards for workers should become the model for all OSHA regulation.

Ergonomics is a discipline that seeks to minimize workplace repetitive motion injuries such as “carpal tunnel syndrome” — painful inflammation of nerve pathways in and around workers’ wrists caused by long hours of repetitive actions on the job — by redesigning equipment, furniture, and work practices to minimize stress on the joints. Shortly before leaving office, the Clinton

administration adopted a detailed OSHA regulation designed to reduce repetitive motion injuries in all U.S. industries. The rule, which was under development for most of the 1990s, created specific, legally enforceable ergonomic performance standards for power tools, keyboards, chairs and desks, and other common workplace equipment. It was strongly supported by labor unions, but was even more strongly opposed by employers, since it would have entailed considerable expense for modifying or replacing equipment that had not reached the end of its useful life, regardless of whether the company in question had any workers suffering from repetitive motion injuries. The rule was backed up by substantial money penalties for violations and would have been enforced by OSHA field inspectors.

Shortly after the Bush administration took office it withdrew the rule. A couple of months later the rule became the first and only one thus far to be overridden by a joint resolution of Congress signed by the President under the "Corrections Day" procedures. Nonetheless, the agency has remained under pressure to deal with ergonomics problems and has developed the following four part strategy:

1. In place of a one-size-fits-all, across-the-board legislative rule on ergonomics, OSHA seeks to work cooperatively on an industry-by-industry basis to develop voluntary "best practices" guidelines. These will not be used in enforcement, but rather will form the basis of educational and voluntary compliance activities. Since adopting this strategy several months ago, OSHA has developed voluntary guidelines for the poultry processing and nursing home industries in a series of closed-door meetings with representatives of major firms in those industries. It has begun similar proceedings with regard to ergonomics issues.
2. OSHA has directed its field inspectors to deal with repetitive stress injuries in the workplace by using the Occupational Safety and Health Act's "General Duty Clause," which provides that "every worker is entitled to a safe and healthy workplace, and every employer has a duty to provide these conditions to its employees." Violations of the general duty clause are punishable by the same fines as violations of specific occupational safety and health rules, but because general duty violations are somewhat more difficult to prove, inspectors are instructed to limit general duty clause citations (the initiation of a penalty action) to cases of willful disregard for worker health or safety, or serious risks to substantial numbers of workers. OSHA's guidance to its enforcement personnel stipulates that any noncompliance with voluntary best-practices guidelines will not be used against employers in enforcement proceedings brought under the general duty clause.
3. OSHA is working cooperatively with public and private colleges, universities, and high schools to provide enhanced education to both

managers and workers regarding the nature and causes of repetitive motion injuries, and the best practices for avoiding them.

4. OSHA has urged the National Institutes of Occupational Safety and Health, a federally funded research institute on worker health and safety, to give priority to funding research on cost-effective ways to avoid repetitive motion injuries.

As noted above, the Birthright Foundation is urging the agency to expand this strategy beyond the field of ergonomics to all areas of occupational safety and health regulation, and to stop trying to promulgate more detailed rules for the workplace. The Foundation also argues that where detailed rules are already in place, enforcement based on the General Duty Clause will be more appropriate and effective, because it demonstrates both to the defendant company and to other companies and the unions that there are significant health or safety risks associated with the practices being challenged.

The unions expect that the policy will be adopted and have asked your firm to assess the prospects for challenging it in court. Because of your high grade in Administrative Law, the firm has given the assignment to you. Please list and briefly describe each type of legal challenge that could be made to the adoption of such a policy and assess its likelihood of success. (30 points)

Question 4. Courts resist claims that rulemaking proceedings must follow formal procedural requirements unless the words “on the record after opportunity for agency hearing” appear in the authorizing statute; but they apply the opposite presumption regarding adjudications. Thus, in the case of an adjudication, the term “on the record” without more is likely to be interpreted as requiring a formal proceeding, whereas in the case of a rulemaking either the exact words above or their close equivalent will be required.
True or False? Explain (3 points).

Question 5. Although administrative law judges in formal adjudications typically are limited to making preliminary or recommendatory decisions which are then reviewed by higher agency officials, the APA bars investigatory or prosecutorial employees from advising ALJs about the merits of cases they are hearing.
True or False? Explain. (3 points)

Question 6. It probably would be a crime for a lawyer to communicate to an agency official that a decision favorable to the lawyer's client in a case before that official would lead the lawyer's firm to look favorably on an employment application from the official.
True or False? Explain. (3 points)

Question 7. *Board of Regents v. Roth* (the case of the Wisconsin college instructor who was not rehired) acknowledged that property rights go beyond narrow definitions of real estate and chattels, but stated nonetheless that what qualifies as property is defined not by the Constitution, but rather by an independent source, typically state law. Assume that a state passes a statute saying that cars purchased after a certain date and operated within the state are held subject to the authority of the state tax collector to seize them for unpaid taxes without providing a hearing. The state can then argue that no property right is infringed when the tax collector seizes an auto without a hearing. If you are a lawyer for someone whose auto is thus seized for nonpayment of taxes, how will you argue that your client in fact had a property interest sufficient to support application of Due Process requirements to the seizure? (10 points)

Question 8. Assume I turn highly crotchety one day, implausible as that may seem. I decide that many of my students over the years have failed to meet my finely wrought pedagogical expectations -- and have done so despite the considerable effort I put into teaching them. I decide that I have been doing those students and the public a disservice by not publicizing my ultimate assessment of them. Accordingly, I start a list on my website titled "Underperforming Students of Administrative Law." The list includes your name together with your picture from the law school face book. It is headed with the simple statement: "Below is a list of the students whom I have taught in Administrative Law and who have failed to meet to my reasonable expectations of competence in the field. Although they may have received passing grades, I would not advise retaining them to perform any important administrative law work." You are of course hurt and angry. The grade you received on the exam was bad enough, but this adds insult to injury. You had no prior notice that I might do this. You believe that it could hurt your employment prospects because law firms are likely to be hesitant to employ someone whose name is on such a list, since it could be found by any existing or potential client doing an internet search. To your knowledge, you have not been rejected for employment by any law firm because your name was on the list. You cannot be sure, however, because you have been afraid to ask potential employers whether they know your name is on the list. Have I violated your right to due process? Explain. (10 points)

Question 9. To invalidate an adjudicatory decision on judicial review a challenger must show either that the decision is inconsistent with the facts adduced in the adjudication or that the decision is inconsistent with the governing statute.

True or False? Explain. (3 points)

Question 10. The Sarbanes-Oxley Act of 2002 was passed in the wake of the Enron and other corporate scandals that held this country's attention until it was diverted by the war in Iraq. Among other things, the Act requires the Securities and Exchange Commission to develop rules defining the information that publicly held companies must disclose about the quality of their auditing arrangements. In implementing this requirement, the SEC adopted a legislative rule requiring each covered company to disclose whether it has at least one "audit committee financial expert" (as defined in the regulations) serving on its audit committee, and if so, the name of the expert and whether the expert is independent of management. A company that does not have an audit committee financial expert must disclose this fact and explain why it has no such expert. More recently it published the following text in the federal register:

SUMMARY: We are making technical corrections to rules adopted in Release No. 33-8177 (January 23, 2003), which were published in the Federal Register on January 31, 2003 (68 FR 5110). The rules implement Sections 406 and 407 of the Sarbanes-Oxley Act of 2002 by requiring disclosures regarding audit

committee financial experts and codes of ethics. This document amends an instruction to the rule to clarify that disclosures regarding audit committee financial experts are required only in annual reports.

EFFECTIVE DATE: [Date of publication in the Federal Register]

SUPPLEMENTARY INFORMATION:

I. Background

On January 23, 2003, the Commission adopted, among other things, amendments to Item 401 of Regulations S-K and S-B. These rules require disclosure of whether a company has an audit committee financial expert, as defined in the rule, serving on its audit committee.

Subsequent to the adoption of the amendments, questions arose regarding whether the disclosures required by the new disclosure item must be provided in registration statements under the Securities Act of 1933 and the Securities Exchange Act of 1934. Although the discussion of these provisions in the adopting release makes clear that such disclosure is required only in a company's annual report, the new disclosure item did not clearly state that such disclosure is required only in annual reports.

Accordingly, the amendments set forth in this document clarify that the rules require disclosure of whether a company has an audit committee financial expert serving on its audit committee only in an annual report. Although this disclosure is not required in any document other than the annual report, a company may, at its discretion, include the audit committee financial expert disclosure in its proxy or information statement and incorporate that disclosure into its annual report if it complies with applicable rules for incorporation by reference. The changes are technical corrections to clarify the rules as described in the original adopting release, and do not alter the forms in which the disclosure is required as described in the original adopting release. . . .

[It then published the amended paragraphs of the rule.]

(1) What kind of action is this in APA terms? Explain. (2) Can the agency take this action without going through notice and comment proceedings? Explain. (3) Would the outcome be different if the text required publication of the information in both annual reports and proxy statements? (A proxy statement is a document prepared by a corporation to inform its shareholders about matters relevant to its annual meeting so that they can decide whether to attend or whether to allow another shareholder to vote their shares in the meeting.) Explain. (10 points)

Question 11. How are “public rights” different from “private rights” in administrative law, and what difference does it make whether a right is placed in one category or the other? (5 points)

Question 12. The law firm for which you work also represents an industry association called the Utility Air Regulatory Group (UARG). Recently, your firm’s effort to reverse an EPA initiative that is likely to cost members of the group a considerable amount of money by imposing a “continuous emission monitoring” requirement was rebuffed by the D.C. Circuit in the following opinion:

**Utility Air Regulatory Group, Petitioner v.
Environmental Protection Agency, Respondent;
Clean Air Implementation Project, Intervenor**

320 F.3d 272 (D.C. Cir 2003)

On Petition for Review

KAREN LECRAFT HENDERSON, *Circuit Judge*: The petitioner, the Utility Air Regulatory Group (UARG), a trade association whose members include *inter alia* individual electric utilities, seeks review and vacatur of the interpretation given by the Environmental Protection Agency (EPA or Agency) to its *State Operating Permit Program* regulations, 40 C.F.R. § 70.6(c)(1), and *Federal Operating Permit Program* regulations, 40 C.F.R. § 71.6(c)(1). According to the EPA, the regulations authorize, pursuant to Title V of the Clean Air Act (CAA), 42 U.S.C. §§ 7661 *et seq.*, permit issuing authorities to enhance the conditions included in operating permits issued to facilities that release air pollutants, *viz.* by imposing emission monitoring requirements on a case-by-case basis to "assure compliance" with federal emission standards. 42 U.S.C. § 7661c(a); 40 C.F.R. §§ 70.6(c)(1), 71.6(c)(1). UARG asserts that the EPA's interpretation--which it says is manifested in at least two permit-specific orders as well as an Agency permit instruction manual--effectively, and without required notice and comment, amends operating permit rules the EPA promulgated in 1992 and 1996. Alternatively, UARG asserts, the Agency's interpretation of 40 C.F.R. §§ 70.6(c)(1) and 71.6(c)(1) is unauthorized under the CAA. For the following reasons, we dismiss the petition because UARG lacks standing. In any event, the issue raised by UARG is not ripe for judicial review.

I.

UARG's petition for review is one of various industry groups' challenges to the EPA's implementation of the 1990 amendments to Title V of the Clean Air Act. *See, e.g., Appalachian Power v. EPA*, 341 U.S. App. D.C. 46, 208 F.3d 1015, 1019 (D.C. Cir. 2000); *Clean Air Implementation Project v. EPA*, 331 U.S. App. D.C. 353, 150 F.3d 1200, 1204 (D.C. Cir. 1998). Title V of the CAA and its implementing regulations govern the operating permit issuing process for stationary sources of air pollution. Under Title V, a regulated source of air pollution cannot operate without obtaining an operating permit from the appropriate state or local authority that administers an EPA-approved implementation plan (or from the EPA if no EPA-approved plan exists). 42 U.S.C. § 7661a(a). Although the state or local authority may approve a new permit or a permit submitted for modification or renewal, it must first submit the permit to the EPA for its review. *Id.* § 7661d. The EPA may "object to [the] issuance" of the permit within 45 days; if it does object, "the permitting authority may not issue the permit" unless the permit is "revised to meet the objection." *Id.* § 7661d(b)(3), (c).

Parts 70 and 71 of the EPA's "Air Programs" regulations establish the "minimum elements" of a Title V permit program, including provisions

specifying the contents of each permit. Under the EPA's rules, each permit must specify the permit's duration, the emission limitations and standards applicable to the source of air pollution, monitoring and "measures to assure compliance" (including record keeping and reporting) with the conditions and terms of the permit. 40 C.F.R. §§ 70.6(a)(1)-(3), (c), 71.6(a)(1)-(3), (c).

Because emission standards and monitoring requirements differ depending on the particular source of air pollution, the terms and conditions of each permit also vary. For some sources, in addition to restricting the amount of emitted pollutants, the permit imposes periodic monitoring, testing and recordkeeping requirements. The monitoring and testing requirements ensure that sources continuously comply with emission standards. For other sources no EPA or state-approved standard imposes periodic monitoring or testing; instead, the EPA regulation requires the state or other permit authority to add monitoring and testing conditions sufficient to monitor compliance with the permit. . .

Before the EPA employed the interpretation under challenge, it had read 40 C.F.R. § 70.6(a)(3)(i)(B) to authorize the inclusion of supplemental monitoring and testing conditions in a permit even if an EPA or state-approved periodic monitoring or testing requirement was already in place. In 1998 the EPA issued a document entitled *Periodic Monitoring Guidance for Title V Operating Permits Programs* (Guidance), which interpreted 40 C.F.R. § 70.6(a)(3)(i)(B) to require a permit issuer, if existing requirements failed to "yield reliable data from the relevant time period that are representative of the source's compliance," to impose stricter monitoring and testing conditions. *Appalachian Power*, 208 F.3d at 1019-20 (describing EPA's view of 40 C.F.R. § 70.6(a)(3)(i)(B) articulated in Guidance). In *Appalachian Power*, however, electric utilities as well as associations representing the chemical and petroleum industries successfully challenged the EPA's interpretation as an impermissible broadening of the EPA's regulation. 208 F.3d at 1028. We concluded the Guidance effectively, and invalidly, amended 40 C.F.R. § 70.6(a)(3)(i)(B) without complying with the rulemaking requirements of the CAA, 42 U.S.C. § 7607(d). *Id.*

Since *Appalachian Power*, in two permit-related adjudications and in the promulgation of its *Instruction Manual for Permit Application Forms*, the EPA has used a "separate 'sufficiency' requirement" imposed by other regulations (sections 70.6(c)(1) and 71.6(c)(1)) to reach the same interpretation this court rejected in *Appalachian Power*. *PacifiCorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants*, Petition No. VIII-00-1 at 18, at <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf> (Nov. 18, 2000) (order denying in part and granting in part petition challenging state operating permit) (*PacifiCorp* Order), Joint Appendix (JA) at 288; see *Fort James Camas Mill*, Petition No. X-1999-1, at 7 (Dec. 22, 2000) (order denying in part and granting in part petition to object to state operating permit) (*Fort James Camas Mill* Order), JA 29; *Instruction Manual for Permit Application Forms* at 23 (Jan. 2001) (Manual), JA 36.

According to the petitioner, the EPA now interprets section 70.6(c)(1) (as well as section 71.6(c)(1)) to mandate, "where the applicable requirement already requires periodic testing or instrumental or non-instrumental monitoring," that a permit issuer conduct "sufficiency reviews of periodic testing and monitoring in applicable requirements, and enhancement of that testing or monitoring through the permit as necessary to be sufficient to assure compliance with the terms and conditions of the permit." For example, in *PacifiCorp*, where a quarterly monitoring requirement was required by existing standards, the EPA determined the quarterly monitoring to be too "infrequent" to "assure compliance," and, using section 70.6(c)(1), conditioned issuance of the permit on additional monitoring. *PacifiCorp* Order at 19.

UARG challenges the EPA's interpretation of sections 70.6(c)(1) and 71.6(c)(1), maintaining that it resurrects the interpretation we rejected in *Appalachian Power*; that is, it results in the same impermissible broadening of the rule. UARG points out that the regulatory history, the same history applicable to section 70.6(a)(3)(i)(B), does not indicate that section 70.6(c)(1) was meant to impose a separate regulatory standard requiring a permit issuer to conduct sufficiency reviews. Alternatively, UARG argues that the EPA's interpretation results in a regulation unauthorized by the CAA.

II.

"Before we reach the merits of any claim, we must first assure ourselves that the dispute lies within the constitutional and prudential boundaries of our jurisdiction." *La. Env'tl. Action Network v. Browner*, 318 U.S. App. D.C. 370, 87 F.3d 1379, 1382 (D.C. Cir. 1996). A court must confine itself "to adjudicating 'actual cases' and 'controversies,'" *Allen v. Wright*, 468 U.S. 737, 750, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984), and in the administrative context, should avoid "premature adjudication ... until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). For UARG, this means that UARG has standing to challenge the EPA's interpretation, and, if so, that the controversy is ripe for us to review. [*11] Because UARG petitions on behalf of its members, it has standing only if "at least one of its members would have standing to sue in his own right. As an "irreducible constitutional minimum," then, it must meet the Article III requirements for standing; it must have suffered "a concrete and particularized injury that [was]: (1) actual or imminent, (2) caused by, or fairly traceable to an act that [it] challenges in the instant litigation, and (3) redressable by the court."

While UARG identifies several instances in which the EPA has applied the "interpretation" it seeks to have overturned, it does not specify how any particular action(s) has injured it or its members. Of the three Agency actions [*12] UARG discusses in its brief, we need consider only whether the EPA's issuance of the Manual has caused it injury because it expressly disavows any challenge of the two permit proceedings. Brief for Petitioner at 30; Reply Brief for Petitioner at 9. n8 UARG's petition, however, fails to allege any "concrete and particularized" injury that is

"actual or imminent[] [and] not conjectural or hypothetical" based on the EPA's interpretation contained in its Manual. *Panhandle E. Pipeline Co. v. FERC*, 339 U.S. App. D.C. 94, 198 F.3d 266, 268 (D.C. Cir. 1999). UARG does not assert that the interpretation in the Manual has affected any Title V permit of any UARG member or the Title V permitting process. Although UARG contends that the EPA's interpretation has caused "permitting authorities to continue to be under pressure to issue final Title V permits consistent with EPA's new statement of the law," Brief for Petitioner at 23, it has not presented one instance in which any of its members has felt so pressured.

-----Footnotes-----

n8 UARG's disavowal is understandable for it would face a serious venue problem if it did challenge the two regional orders since a challenge to a "locally or regionally applicable" action must be brought in the appropriate regional circuit court. 42 U.S.C. § 7607(b).

-----End Footnotes-----

Furthermore, UARG does not assert injury based on the EPA's adoption of the Manual *qua* an amendment to sections 70.6(c)(1) and 71.6(c)(1) without providing the notice and comment procedures required by 42 U.S.C. § 7607(d) for any CAA regulation because the Manual constitutes neither a regulation nor an amendment thereto. It is instead an agency policy statement--issued without the signature of any Agency official and applied, it appears, on a purely ad hoc basis--and in no way binds the Agency or regulated entities. *Cf. Gen. Elec. Co. v. EPA*, 351 U.S. App. D.C. 291, 290 F.3d 377, 382-84 (D.C. Cir. 2002) ("Guidance Document" binding both EPA and applicant under Toxic Substances Control Act is, on its face, regulation, not policy statement); [*14] *Molycorp v. EPA*, 339 U.S. App. D.C. 73, 197 F.3d 543, 545-46 (D.C. Cir. 1999) ("the ultimate focus of the inquiry [is] whether agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law."); *see also Kennecott Utah Copper Corp. v. Dep't of the Interior*, 319 U.S. App. D.C. 128, 88 F.3d 1191, 1207 (D.C. Cir. 1996) ("We have interpreted 'regulation' to mean a statement that has 'general applicability' and that has the 'legal effect' of 'binding' the agency or other parties.") (citations omitted). *Compare Panhandle E. Pipeline Co.*, 198 F.3d at 269-70 (FERC opinions rendered moot by settlement although they "offered useful discussions of recurring issues" and may have had future value as policy statements only), *with Appalachian Power*, 208 F.3d at 1023 (because Guidance "reads like a ukase" and "State authorities, with EPA's Guidance in hand, are insisting on [additional monitoring]," document was binding in effect and thus subject to notice and comment requirements). Accordingly, the EPA's interpretation as set forth in the Manual is "merely an announcement to the public [*15] of the policy which the agency hopes to implement in future rulemakings or adjudications," *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 164 U.S. App. D.C. 371, 506 F.2d 33, 38 (D.C. Cir. 1974), and does not injure UARG in any imminent or redressable manner.

Furthermore, even if UARG has standing, the claim that it has raised is not ripe for judicial review. Courts are obliged to avoid "entangling themselves in abstract disagreements over administrative policies[] and ... to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.*, 387 U.S. at 148-49. In determining whether a case is ripe, we consider "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149. In considering whether an issue is fit for review, "we look to see whether the issue 'is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final.'" *Clean Air Implementation Project*, 150 F.3d at 1204 (D.C. Cir. 1998) [*16] (quoting *Natural Res. Def. Council, Inc. v. EPA*, 306 U.S. App. D.C. 43, 22 F.3d 1125, 1133 (D.C. Cir. 1994)). Of these three criteria, the third, at least, is not satisfied. The EPA is currently undertaking a rulemaking to amend section 70.6(c)(1) and 71.6(c)(1). Revisions To Clarify the Scope of Sufficiency Monitoring Requirements for Federal and State Operating Permits Programs, 67 Fed. Reg. 58,561 (proposed Sept. 17, 2002). It would be a waste of judicial resources for us to reach the merits of UARG's petition while the rulemaking is pending. *Ciba-Geigy Corp. v. EPA*, 255 U.S. App. D.C. 216, 801 F.2d 430, 436 (D.C. Cir. 1986) ("The interest in postponing review is powerful when the agency position is tentative. Judicial review [then] improperly intrudes into the agency's decisionmaking process. It also squanders judicial resources since the challenging party still enjoys an opportunity to convince the agency to change its mind.") (citing *Pub. Citizen Health Res. Group v. FDA*, 238 U.S. App. D.C. 271, 740 F.2d 21, 31 (D.C. Cir. 1984); *Cont'l Air Lines, Inc. v. CAB*, 522 F.2d 107, 125, 173 U.S. App. D.C. 1 (D.C. Cir. 1974) [*17] (en banc)).

Finally, we note that UARG is not without remedies to address the present situation. At least until the ongoing rulemaking is complete, UARG, or one of its members, can seek relief from a regional circuit court *if* the EPA takes action affecting a permit pursuant to the challenged interpretation. For this reason, we find no hardship to the petitioner in withholding judicial review. 42 U.S.C. § 7607(b).

For the foregoing reasons, we dismiss the petition for review.

So ordered.

Your job is to answer three questions for the senior partner handling the case: (1) What would be the best strategy or strategies for overcoming the holding that the group does not have standing? (2) What would be the best way of overcoming the holding that the case is not ripe? (3) What would be the likelihood of succeeding if the decision were appealed to the Supreme Court? (20 Points)

Question 13. Agency decisions not to bring enforcement actions against individuals or organizations, even if the agency has reason to believe that they are violating applicable laws, are presumptively unreviewable by the federal courts.

True or False? Explain. (3 points)

Question 14. Congress could, if both houses agreed and President signed the legislation, vest the appointment of the General Counsel of the Department of Defense in the Chief Justice of the Supreme Court. (The General Counsel is the Department's chief legal officer, and is responsible for, among other things, giving legal advice to the Secretary and setting departmental policy on legal issues.)

True or False. Explain. (5 points)

Question 15. When an agency decision not to disclose a record requested under the Freedom of Information act is challenged in court, the court performs a *de novo* review.

True or False? Explain. (3 points)

Question 16. Although the APA allows members of the public to participate in agency rulemaking proceedings, it fails to provide them with a way to get the agency to commence one.
True or False? Explain. (3 points)

Question 17. In the American administrative law system each party to a judicial proceeding must pay its own attorney's fees, except in egregious cases such as bad faith litigation.
True or False? Explain. (3 points)

Question 18. Although citizen suit provisions typically provide that "any person" may bring suit to enforce the provisions of the provisions of the underlying statute, the courts generally use their prudential powers to limit plaintiffs to the types of people the statute clearly was intended to benefit, e.g., nature lovers in the case of the Endangered Species Act.
True or False? Explain. (3 points)

End of Exam