Appendix of Cases

- Good Cause Standard of Review and Overview of the Three Prongs
  - 5 U.S.C. 553(b)(B)
  - Mack Trucks, Inc. v. EPA, 682 F.3d 87 (D.C. Cir. 2012)
- Impracticable
  - Good Cause Accepted
    - Nat'l Fed. of Federal Emp. v. Devine, 671 F.2d 607 (D.C. Cir. 1982)
    - Northwest Airlines v. Goldschmidt, 645 F.2d 1309 (8th Cir. 1981)
    - Tri-Cty. Tel. Ass'n, Inc. v. FCC, 999 F.3d 714 (D.C. Cir. 2021)
  - Good Cause Denied
    - Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141 (D.C. Cir. 1992)
    - Action on Smoking & Health v. CAB, 713 F.2d 795 (D.C. Cir. 1983) (per curiam)
    - *See also*
      - Mack Trucks, Inc. v. EPA, 682 F.3d 87 (D.C. Cir. 2012)
      - Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749 (D.C. Cir. 2001)
- Unnecessary
  - Good Cause Denied
    - Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749 (D.C. Cir. 2001)
    - Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141 (D.C. Cir. 1992)
    - Action on Smoking & Health v. CAB, 713 F.2d 795 (D.C. Cir. 1983) (per curiam)
  - *See also*
    - Mack Trucks, Inc. v. EPA, 682 F.3d 87 (D.C. Cir. 2012)
    - Mid-Tex Elec. Co-op., Inc. v. FERC, 822 F.2d 1123 (D.C. Cir. 1987)
    - Am. Fed'n of Gov't Emp., AFL-CIO v. Block, 655 F.2d 1153 (D.C. Cir. 1981)
- Contrary to Public Interest
  - Good Cause Denied
    - Mid-Tex Elec. Co-op., Inc. v. FERC, 822 F.2d 1123 (D.C. Cir. 1987)
    - Cap. Area Immigrants Rts. Coal. v. Trump, 471 F. Supp. 3d 25 (D.D.C. 2020)
- Other Considerations
  - Public Emergency
    - Good Cause Accepted
      - Am. Fed'n of Gov't Emp., AFL-CIO v. Block, 655 F.2d 1153 (D.C. Cir. 1981)
      - Jifry v. FAA, 370 F.3d 1174 (D.C. Cir. 2004)
    - *See also*
      - Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702 (D.C. Cir. 2014)
      - Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749 (D.C. Cir. 2001)
      - Tri-Cty. Tel. Ass'n, Inc. v. FCC, 999 F.3d 714 (D.C. Cir. 2021)
  - Sufficient Evidence
    - Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702 (D.C. Cir. 2014)
    - Biden v. Missouri, 142 S. Ct. 647, 654 (2022) (per curiam)
    - *See also*
      - Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141 (D.C. Cir. 1992)
      - Cap. Area Immigrants Rts. Coal. v. Trump, 471 F. Supp. 3d 25 (D.D.C. 2020)
  - Congressional Intent and Statutory Deadlines

        - Statutory Deadlines Overview
            - New Jersey v. EPA, 626 F.2d 1038 (D.C. Cir. 1980)
        - Statutory Deadline as a Factor in Good Cause Analysis
            - Philadelphia Citizens in Action v. Schweiker, 669 F.2d 877 (3d Cir. 1982)
            - Methodist Hospital of Sacramento v. Shalala, 38 F.3d 1225 (D.C. Cir. 1994)
            - Natural Resources Defense Council, Inc., v. Evans, 316 F.3d 904 (9th Cir. 2003)
            - Chamber of Commerce of U.S. v. SEC, 443 F.3d 890 (D.C. Cir. 2006)
        - Express Direction
            - Asiana Airlines v. FAA, 134 F.3d 393 (D.C. Cir. 1998)
        - Agency Diligence
            - Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573 (D.C. Cir. 1981)
    - Congressional Intent, Prior Notice Undermines Statutory Scheme
        - *See*
            - Mobil Oil Corp. v. Dep't of Energy, 728 F.2d 1477, 1490 (Temp. Emerg. Ct. App. 1975), *cert. denied*, 467 U.S. 1225 (1984)
            - Nader v. Sawhill, 514 F.2d 1064, 1068 (Temp. Emerg. Ct. App. 1975)
            - DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1332 (Temp. Emerg. Ct. App. 1975)
            - Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141 (D.C. Cir. 1992)
            - Cap. Area Immigrants Rts. Coal. v. Trump, 471 F. Supp. 3d 25 (D.D.C. 2020)
- Good Cause, Procedural
    - Rule Document Must Contain Basis for Good Cause
        - Action on Smoking & Health v. CAB, 713 F.2d 795 (D.C. Cir. 1983) (per curiam)
        - N.C. Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755 (4th Cir. 2012)
        - *See also*
            - Am. Fed'n of Gov't Emp., AFL-CIO v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981)
    - New Jersey v. EPA, 626 F.2d 1038 (D.C. Cir. 1980)

I. Introduction

Under 5 U.S.C. 553, federal agencies engaged in informal rulemaking must provide the public with a notice of proposed rulemaking and an opportunity for public participation. 5 U.S.C. 553(b)(B) exempts a rule from these requirements "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Courts find this exception "is to be narrowly construed and only reluctantly countenanced," and are therefore reluctant to accept good cause claims. *See* Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93 (D.C. Cir. 2012). Agencies tend to argue for good cause under multiple prongs of "impracticable, unnecessary, or contrary to public interest," and courts often analyze the prongs together, state the facts, and make general "good cause" determinations. *See*, *e.g.* Am. Fed'n of Gov't Emp., AFL-CIO v. Block, 655 F.2d 1153, 1157 (D.C. Cir. 1981). As a result, only some conclusions can be reached about each of the factors independently. This memorandum provides caselaw that illustrates how courts approach each factor and describes overarching themes of the good cause caselaw and how those themes play into the statutory factors. These themes include: public emergencies, evidentiary concerns, Congressional intent and statutory deadlines, and procedural considerations.

II. Good Cause Standard of Review

Courts reviewing agency rules issued without notice and comment based on good cause differ on the appropriate standard of review to apply. Some courts apply arbitrary and capricious review while others apply *de novo* review.[1] The D.C. Circuit applies the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard from 5 U.S.C. 706(2)(A) to factual issues and good cause determinations as agency discretionary actions, and reviews associated legal conclusions *de novo*. *See* Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 706 (D.C. Cir. 2014) and Util. Solid Waste Activities Grp., v. EPA, 236 F.3d 749, 754 (D.C. Cir. 2001). Courts are consistent, however, that the good cause exception "is to be narrowly construed and only reluctantly countenanced." *See* Mack Trucks, 682 F.3d at 93; Util. Solid Waste Activities Grp., 236 F.3d at 754; Alcaraz v. Block, 746 F.2d 593, 612 (9th Cir.1984). The legislative history of the APA suggests that good cause was not meant to be an "escape clause" from notice and comment. New Jersey v. EPA, 626 F.2d 1038, 1046 (D.C. Cir. 1980) (quoting S.Doc. No. 248, 79th Cong., 2d Sess. 200 (1946). Courts further emphasize that the review is "meticulous and demanding[,]" Sorenson Commc'ns, Inc., 755 F.3d at 706 (quoting New Jersey, 626 F.2d at 1046). As a result of this high standard, the good cause exception is generally limited to "emergency situations" or to situations "where delay could result in serious harm." Jifry v. FAA, 370 F.3d 1174, 1179 (D.C. Cir. 2004). Furthermore, courts emphasize that "the limited nature of the rule cannot itself justify a failure" to follow procedures. Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 582 (D.C. Cir. 1981).

While outside the scope of this memorandum, 5 U.S.C. 553 also contains a good cause exception to the 30-days' publication requirement. Courts have disagreed about whether this standard is the same as the standard required to forgo the comment requirements. 5 U.S.C. 553(d)(3); *See, e.g.,* Am. Fed'n of Gov't Emp., AFL-CIO, 655 F.2d at 1156; *See also*, Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479,

[1] A series of cases involving the Attorney General's actions pursuant to the Sex Offender Registration and Notification Act (SORNA) illustrates the variance across Circuits on what standard to apply. In those cases, the Fourth and Sixth Circuits applied *de novo* review, the Fifth and Eleventh Circuits applied arbitrary and capricious review, and the Ninth, Third, and Eighth Circuits simply refused to decide. *See* United States v. Cain, 583 F.3d 408 (6th Cir. 2009); United States v. Gould, 568 F.3d 459, 470 (4th Cir. 2009); United States v. Brewer, 766 F.3d 884, 888 (8th Cir. 2014); United States v. Reynolds, 710 F.3d 498, 507 (3d Cir. 2013); United States v. Johnson, 632 F.3d 912, 928 (5th Cir. 2011); United States v. Dean, 604 F.3d 1275, 1278 (11th Cir. 2010); United States v. Valverde, 628 F.3d 1159, 1162 (9th Cir. 2010). For a deeper discussion of these cases, see Congressional Research Service, *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action*, Jan. 29, 2016, at 14-15.

1485 (9th Cir. 1992). At the same time, agencies who forgo one will often forgo the other, and courts will often discuss good cause as one issue, resulting in muddled caselaw. The courts that have distinguished between them have stated that the standard for good cause on notice and comment is either as strict or stricter than the standard for good cause on 30-days' notice. *See, e.g.*, Northwest Airlines v. Goldschmidt, 645 F.2d 1309, 1320 (8th Cir. 1981) (noting that "some dispute" exists over whether the exception in 553(d)(3) is broader than that in 553(b)(B), but that the circumstances of this case are sufficient to satisfy either standard). Some cases that do not distinguish between the two are included in this memorandum as informative for, at least, how courts approach good cause claims.[2]

Mack Trucks, Inc. v. EPA, 682 F.3d 87 (D.C. Cir. 2012): Recent case that serves as an overview of how the D.C. Circuit approaches many good cause arguments

EPA promulgated, without notice and comment, an IFR that allowed diesel engine manufactures to pay penalties to allow the manufacturer to sell noncompliant engines. EPA argued it had good cause along four lines: (1) Delay in notice and comment could result in a manufacturer being unable to "certify a complete product line" for the next model year; (2) the changes were only "amending limited provisions in existing NCP regulations"; (3) the IFR had limited duration; and (4) no risk to public interest to make it effective immediately. Id. at 90. The court stated plainly that good cause "is to be narrowly construed and only reluctantly countenanced" and took each of "impracticable," "unnecessary," and "contrary to public interest" in turn. On impracticable, the court stated that the analysis is "inevitably fact-or context-dependent." Id. at 93. The court listed several circumstances in which they might hold good cause existed, such as "'imminent hazard to aircraft, persons, and property within the United States' Jifry, 370 F.3d at 1179, 'a safety investigation shows that a new safety rule must be put in place immediately' Util. Solid Waste Activities Grp., 236 F.3d at 755, or a rule of 'life-saving importance' to mine workers in the event of an explosion, Council of the S. Mountains, Inc, 653 F.2d at 581." However, the court rejected impracticable here because only one company, Navistar, had failed to develop a compliant engine, the rule would only "rescue a lone manufacturer from the folly of its own choices." Id. at 93. On "unnecessary," the court echoed earlier caselaw stating that it is "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." Id. at 94 (quoting Util. Solid Waste Activities Grp., 236 F.3d at 755. The court stated that notice and comment was not unnecessary. Regardless of whether the level of the penalty was ministerial, EPA's decision to implement an NCP at all was clearly not inconsequential or routine and the IFR generated great interest for petitioners and the public. The court also held that the rule's interim status is not sufficient to satisfy the unnecessary prong. *See also* Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1144 (D.C. Cir. 1992). The court made clear that they "strongly reject EPA's claim that the challenged errors are harmless simply because of the pendency of a properly-noticed final rule." Id. at 95. On "contrary to the public interest," the court rejected EPA's framing of the rule, clarifying it "is not whether dispensing with notice and comment would be contrary to the public interest, but whether providing notice and comment would be contrary to the public interest." Mack Trucks, 682 F.3d at 95. It stated that "the public interest prong of the good cause exception is met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest. It is appropriately invoked when the timing and disclosure requirements of the usual procedures would defeat the purpose of the proposal." Id. The court rejected EPA's argument here because it was simply a "reincarnation of the impracticability argument we have already rejected." Id. Finding good cause lacking, the court vacated the IFR and remanded to EPA.

III. Impracticable

[2] For a deeper discussion of the distinction between the two "good cause" standards, see Congressional Research Service, *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action*, Jan. 29, 2016, at 3.

5 U.S.C. 553(b)(B) allows an agency to bypass notice and comment if the agency finds for good cause that notice and comment is "impracticable." Courts generally understand this prong to hold "'when an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required in [§ 553],' as when a safety investigation shows that a new safety rule must be put in place immediately." Util. Solid Waste Activities Grp., 236 F.3d at 755-56 (quoting UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30–31 (1947)" (AG's Manual)). Courts emphasize that the analysis of each rule "is inevitably fact- or context-dependent," and don't often hold a situation impracticable or not as a matter of law. Mack Trucks, 682 F.3d at 93. While each case is context-specific, courts have accepted certain circumstances more consistently than others. Common "impracticable" contexts are emergencies, which are discussed in more detail later in this memorandum. Courts often analyze this prong in tandem with "contrary to the public interest." Id. at 94-95. Circumstances in which notice and comment has been found to be impracticable include: (1) litigation results combined with market factors creating a significant risk to the integrity of a Federal program (Nat'l Fed'n of Fed. Emp. v. Devine, 671 F.2d 607 (D.C. Cir. 1982)); (2) failure of airlines to reach a slot agreement and a short time window to put one in place (Northwest Airlines, 645 F.2d 1309); (3) telecommunications repairs following major hurricanes in anticipation of future hurricane season (Tri-Cty. Tel. Ass'n, Inc. v. FCC, 999 F.3d 714, 719 (D.C. Cir. 2021) (per curiam)). Situations where courts have rejected impracticability include: (1) agency providing insufficient evidence that an emergency will develop if they publish the rule for comment (Tennessee Gas Pipeline Co., 969 F.2d at 1146); (2) existing comment periods for similar rules gave agency an opportunity to seek comment on rule in question as well (Action on Smoking & Health v. CAB, 713 F.2d 795, 801 (D.C. Cir. 1983) (per curiam)); (3) lack of emergency situation making notice impracticable (Util. Solid Waste Activities Grp., 236 F.3d at 755).

A. Good Cause Accepted

Nat'l Fed'n of Fed. Emp. v. Devine, 671 F.2d 607 (D.C. Cir. 1982): change in provided services due to litigation and collapse of a major provider was good cause to delay an enrollment period for federal health benefit program

The Office of Personnel Management, without notice and comment, issued an interim rule to defer the start of a federal health benefit plan enrollment period. OPM argued that the terms of the benefit plans that would have been offered were uncertain because of recent district court orders and subsequent appeals related to them. Furthermore, a major provider in the service had recently suffered massive losses and it would not be able to participate in the enrollment period without time to manage its actuarial risks, threatening the stability of the entire federal health benefit program. The court stated that these circumstances constituted an emergency and were impracticable, because the "[t]he agency's action was required by events and circumstances beyond its control, which were not foreseen in time to comply with notice and comment procedures." Id. at 611. Finally, the court noted that it was significant that the agency "intended its action to be temporary" and prior actions indicated OPM would institute notice and comment for future scheduling of the open season. Id. at 611-12.

Northwest Airlines v. Goldschmidt, 645 F.2d 1309 (8th Cir. 1981): failure of carriers to agree on slot allocation made it impracticable to conduct notice and comment to assign slots because of necessary lead time and value of rapid resolution to the issue

After the National Air Scheduling Committee failed to reach an agreement for slot allocations at National Airport, the Secretary of Transportation issued a temporary rule to assign slots. The comment period lasted only 7 days. When the rule was challenged, DOT argued that good cause under 553(b)(B) existed for the shortened comment period and the court agreed. It reasoned that because slot allocation was set to expire in a month, "lead time was required to enable the carriers to make any necessary

schedule adjustments, to notify the traveling public, and to rearrange ticket reservations." Id. at 1321. The court emphasized that "the rapid resolution of the slot allocation problem at National was not only in the interest of the traveling public, particularly on the eve of the winter holiday season, but also consistent with the national interest in the efficient utilization of the navigable airspace." Id.

Tri-Cty. Tel. Ass'n, Inc. v. FCC, 999 F.3d 714 (D.C. Cir. 2021) (per curiam): damage from hurricanes and upcoming hurricane season created an emergency sufficient to make notice and comment impracticable to issue funds

After hurricanes Maria and Irma caused major damage to telecommunications networks in Puerto Rico, the FCC issued a series of orders providing subsidies to rebuild and strengthen the networks. The agency did not follow standard notice and comment procedures for subsequent follow-up orders. The agency claimed good cause due to impracticability, noting that there was an "emergency situation" because many customers lacked service and "[d]elaying these funds could result in serious harm if carriers [we]re not able to restore and fortify their service before the start of the next hurricane season." Id. at 719-20. The court rejected the challenger's contentions that the agency needlessly delayed in issuing the order and that a new hurricane season was too speculative to be a basis for good cause. The court did not address the speculative question but stated that "the Commission reasonable determined that an emergency continued to exist" due to "persistent power outages and other logistical challenges." Id. It also noted that although the order at issue was months after the initial hurricane, the agency did not delay because it was follow-up order to one issued within two weeks of Maria's landfall.

B. Good Cause Denied

Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141 (D.C. Cir. 1992), *See "Unnecessary"*: one instance of damage unrelated to agency's theory is insufficient evidence to demonstrate that agency's anticipated environmental risks would occur

FERC issued, without notice and comment, an interim rule that required pipeline operators to make disclosures and provide prior notice before construction of new facilities or replacement of existing facilities. FERC argued that notice was impracticable because it would create an emergency environmental situation if operators attempted to accelerate construction projects before a final rule was implemented. FERC's evidence for this theory was a single case of environmental damage due to new construction that was unrelated to a new rulemaking or rushed construction, as well as the agency's "ample practical experience on which to support its claim" of environmental harm. The court rejected good cause, stating that FERC cannot claim good cause "without offering any evidence, beyond its asserted expertise." Id. at 1146. The court noted that "evidence of a single violation in the case of new construction, while not insubstantial, is a thin reed on which to base a waiver of the APA's important notice and comment requirements." Id. at 1145. The court stated plainly that the agency's practical experience "does not excuse the Commission's failure to cite such examples." Id. at 1146.

Action on Smoking & Health v. CAB, 713 F.2d 795 (D.C. Cir. 1983) (per curiam), *See "Unnecessary" and "Procedural Requirements"*: not impracticable to seek comment because existing comment periods on similar rulemakings could be used to seek comment on rule at issue

CAB issued a rule relaxing the restrictions related to smoking on airplanes by revoking "unreasonable burden" rule for impacts of smokers on nonsmokers. The rule was vacated and remanded for inadequacy of its statement of basis and purpose. CAB reissued the rule without opening a new period for notice and comment. While the three bases for good cause were not explicitly invoked, the court interpreted CAB's arguments for why it did not have to do notice and comment as directed toward each of the three prongs. The court rejected impracticable because CAB was already "providing a comment

period with respect to its renewed proposals to revoke two other protections, … [and] could readily incorporate a proposal to revoke the 'unreasonably burdened' language in the same notice and comment proceedings." Id. at 801.

IV. Unnecessary

Under 5 U.S.C. 553(b)(B), a rulemaking can be exempt from notice and comment if an agency finds for good cause that notice and comment is unnecessary. Understanding that good cause is to be read narrowly, courts have held this exception "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." Mack Trucks, 682 F.3d at 94 (quoting Util. Solid Waste Activities Grp., 236 F.3d at 755). Courts have also described unnecessary as "the issuance of a minor rule in which the public is not particularly interested." Util. Solid Waste Activities Grp., 236 F.3d at 755 (quoting AG's Manual). Agencies have attempted to argue that this standard is met where the action is an IFR instead of a final rule, but courts have mostly rejected this argument. *Id*. (but see Mid-Tex Elec. Co-op., Inc. v. FERC, 822 F.2d 1123, 1131 (D.C. Cir. 1987) (finding interim status of the rule was a "significant factor" in upholding good cause claim, but focused primarily on "public interest" prong). They state that while it can be a factor in the good cause analysis, it cannot, on its own, be sufficient grounds for good cause because it would allow good cause to "swallow" notice and comment. Mack Trucks, 682 F.3d at 94 (quoting Tennessee Gas, 969 F.2d at 1145). Courts have also rejected claims that certain rules were "ministerial," although not as a matter of law, instead simply disagreeing with the agency and finding that the changes in the rule are significant enough that notice and comment should occur. *See, e.g.* Mack Trucks, 683 F.3d at 94.

Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749 (D.C. Cir. 2001): change to trigger for PCB regulations had no emergency sufficient to render good cause impracticable and was too significant too qualify for unnecessary

EPA issued a rule to allow the use of porous substances contaminated by polychlorinated biphenyls (PCB) if they have been cleaned, painted, and marked, so long as certain surface concentration levels were not met. Previously, the rule allowed use only if the PCB concentration in the spilled material was below a certain level. EPA did not specify which of the three bases for good cause it was relying on. The court, therefore, analyzed each. The court rejected impracticability because "[t]here is no indication that [the rule], as it stood before the amendment, posed any threat to the environment or human health or that some sort of emergency had arisen. And EPA made no finding to this effect." Id. On "unnecessary," EPA's only statement in support of its good cause argument was that the rule was "minor, routine clarifications that will not have a significant effect on industry or the public." Id. at 754. The court rejected the claim, finding that removing the surface contamination trigger is a change that "without a doubt" members of the community would be interested in because it "greatly expanded the regulated community and increased the regulatory burden." Id. at 755.

Action on Smoking & Health v. CAB, 713 F.2d 795, 801 (D.C. Cir. 1983) (per curiam), *See "Impracticable" for facts*: 2.5 year-old comment period for a rule that was vacated did not render new comment period unnecessary when agency reissued identical rule

CAB argued that good cause existed to forgo notice and comment because there had been a prior comment period for the rule before it was vacated. CAB stated, "the applicable notice of proposed rulemaking and record are still outstanding ...," they "have decided to explain and affirm our earlier decisions…," and were "satisfied with the present record and doubt that further comments would produce any additional light." Id. at 800. The court interpreted this theory to mean that CAB believed it had good cause to skip a new comment period because the existing one made it unnecessary. The court rejected the argument, stating, "CAB may not avoid the notice and comment requirements of section 4 simply because

the Board questions the utility of those requirements." Id. It also added, "[b]ald assertions that the agency does not believe comments would be useful cannot create good cause to forgo notice and comment procedures." Id. The court noted that "[a]lthough the Administrative Procedure Act does not establish a 'useful life' for a notice and comment record, clearly the life of such a record is not infinite." Id. at 800. In this case, there had been 2.5 years between that comment period and the current action. The court determined that new evidence could have been developed and therefore a new comment period was required.

Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141 (D.C. Cir. 1992), *See "Impracticable"*: interim status of a rule is not sufficient grounds, on its own, to justify "unnecessary" prong

FERC argued that notice and comment was unnecessary because this was an interim rule and comment could be sought later. The court agreed that the interim status of rule is a "significant factor" in the good cause analysis, Mid–Tex Elec. Coop., Inc., 822 F.2d at 1132, and that the less expansive the interim rule, the less the need for public comment. *See* Am. Fed'n of Gov't Emp., AFL-CIO, 655 F.2d at 1156. However, The court rejected the idea that a rule's interim status would be enough to satisfy good cause, because "if a rule's interim nature were enough to satisfy the element of good cause, then "agencies could issue interim rules of limited effect for any plausible reason, irrespective of the degree of urgency" and "the good cause exception would soon swallow the notice and comment rule.'" Mack Trucks, 682 F.3d at 94 (quoting Tennessee Gas, 969 F.2d at 1145).

V. Contrary to Public Interest, *see Impracticable and Prior Notice Undermines the Statutory Scheme*

Under 5 U.S.C. 553 (b)(B), a rulemaking is exempt from notice and comment requirements if, for good cause, an agency finds notice and comment to be "contrary to the public interest." Courts have interpreted this to be "met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest. It is appropriately invoked when the timing and disclosure requirements of the usual procedures would defeat the purpose of the proposal." Mack Trucks, 682 F.3d at 95. Courts emphasize that "[t]he question is not whether dispensing with notice and comment would be contrary to the public interest, but whether providing notice and comment would be contrary to the public interest." Id. at 93. Most often, this prong is argued and analyzed together with the "impracticable" prong. Id. (rejecting public interest argument because it was the same argument already rejected under impracticable).

Mid-Tex Elec. Co-op., Inc. v. FERC, 822 F.2d 1123 (D.C. Cir. 1987): industry reliance, interim nature of the order, broad existing record, and continuity interest sufficient to constitute good cause for substantial reissuance of a rule without comment after existing rule was vacated

FERC issued a rule allowing utilities to include certain "construction work-in-progress (CWIP) costs in rate base." Id. at 1124. The DC Circuit vacated and remanded portions of the rule. FERC then issued an interim rule without notice and comment that mirrored the substance of the original and requested comment for a permanent rulemaking. FERC argued, and the court agreed, good cause existed because notice and comment would be contrary to the public interest. The court emphasized three factors FERC cited in support. First, "the interim nature of [the order], and the ongoing public procedures designed to assist FERC in formulating a permanent CWIP policy." Id. at 1131. Second, "the fundamental approach" of the rule was "supported by a broad and substantial record" and had been approved 'in substantial measure' by the first Mid-Tex court." Id. at 1131-32. Third, utilities placed "considerable reliance" on the CWIP rule prior to its remand, and to "'delay readoption of any generic rule or policy until completion of all notice and comment procedures,…'" could produce "'irremedial financial consequences and regulatory confusion.'" Id. at 1132. The court also noted that while the "limited nature

of the rule cannot itself justify a failure to follow notice and comment…we have consistently recognized that a rule's temporally limited scope is among the key considerations in evaluating an agency's 'good cause' claim." Id. The court was clear that while "none of the other factors FERC pressed would constitute 'good cause' standing alone, the combined effect of the cited considerations leads us to accept FERC's conclusion that delaying its interim rule would be contrary to the public interest." Id. at 1133. On this final point, the court emphasized that there was a clear need for regulatory guidance because CWIP had been in place for two years and was designed to encourage efficient long-range investment decisions, creating a "continuity interest" that heightened the "consequences of delay" such as "'skew[ed] ... decisionmaking"' and over- or under-investment in new generating facilities." Id. at 1133-1134 (citing Mid-Tex Elec. Co-op., Inc. v. FERC, 773 F.2d 327, 345 (D.C. Cir. 1985)).

Cap. Area Immigrants Rts. Coal. v. Trump, 471 F. Supp. 3d 25 (D.D.C. 2020): one newspaper article with no data was insufficient evidence to support impracticable or contrary to public interest claims that announcing a border restriction would increase migrant flow prior to the effective date of the rule

DHS issued a rule that took effect the day it was published making it a categorical bar to seek asylum on the southern US border unless an individual had first applied for asylum in a country that they had traveled through. DHS argued good cause existed under the impracticable and contrary to public interest prongs because, given prior notice, smugglers would rush migration and create a surge. The court rejected DHS's claim. It stated that "[c]ommon sense dictates that the announcement of a proposed rule may, at least to some extent and in some circumstances, encourage those affected by it to act before it is finalized. But this rationale cannot satisfy the D.C. Circuit's standard in this case unless it is adequately supported by evidence in the administrative record suggesting that this dynamic might have led to the consequences predicted by the Departments—consequences so dire as to warrant dispensing with notice and comment procedures." Id. at 46. The court pointed out that the "only specific evidence the Department cited when promulgating the Rule…" was a "single newspaper article." Id. at 46-47. Furthermore, while the article suggested that after family separation ended there was an effort by smugglers to speed up arrivals at the border, the article "lack[ed] any data" suggesting the number of asylum seekers increased. Id.

VI. Other Considerations

A. Public Emergency

Courts have held that a public emergency or threat to the human environment or health can be good cause under 5 U.S.C. 553(b)(B) because in such circumstances notice and comment is either impracticable, contrary to public interest, or both. Tri-Cty. Tel. Ass'n, Inc., 999 F.3d at 719. In fact, the emergency concept is so core to the good cause analysis that some courts have stated that the use of the good cause exception "should be limited to emergency situations." Am. Fed'n of Gov't Emp., AFL-CIO, 655 F.2d at 1156. The same courts have also accepted circumstances in which a delay, while not a threat to health or the environment, could result in other serious harm. *See e.g.* Am. Fed'n of Gov't Emp., AFL-CIO, 655 F.2d 1153, and Jifry, 370 F.3d 1174. These circumstances can take many different forms, including economic concerns, so long as the need for immediate action is not the result of agency conduct. Id. Courts will generally reject good cause claims that are based on a time-crunch theory if there is any indication that the agency failed to adequately spend its time or could have used its time more effectively.[3] *See* Natural Resources Defense Council, Inc., v. Evans, 316 F.3d 904, 912 (9th Cir. 2003).

[3] Note also that this does not necessarily depend on how short the time period is. For example, in Riverbend Farms, Inc., 958 F.2d 1479, the court rejected a good cause argument that written comments could not be taken because there was a weekly turnaround. The court stated that "[i]t's clear that given even a few days' notice, members of the

Courts generally require that rules issued under good cause pursuant to emergency be temporary, and that comment be sought on any related permanent rules. Am. Fed'n of Gov't Emp., AFL-CIO, 655 F.2d at 1157-58.

Am. Fed'n of Gov't Emp., AFL-CIO v. Block, 655 F.2d 1153 (D.C. Cir. 1981): judicial order nullifying industry regulation created emergency situation where temporary rules could be issued without notice and comment to resolve confusion and protect consumers

Based on an order which formalized prior guidance, USDA began applying different maximum allowable inspection rates on certain poultry processing plants. After the district court voided the order, USDA quickly finalized, without notice and comment, two rules effective immediately establishing uniform maximum inspection rates for poultry and an alternate inspection method where efficient. Upon challenge, USDA argued that it had good cause to issue the rules "to assure that the consumer is adequately protected" and that there was an emergency situation. Id. at 1155. The court upheld the rule. They held that promulgating emergency rules was a "reasonable and perhaps inevitable response to the injunctive court order." Id. at 1157. The court added that "the absence of specific and immediate guidance from the Department in the form of new standards would have forced reliance by the Department upon antiquated guidelines, thereby creating confusion among field administrators, and caused economic harm and disruption…" Id. The court added that the harm would likely extend to "consumer[s] in the form of poultry shortages or increases in consumer prices." Id. The court also held, however, that USDA did not have good cause to issue permanent rules to that effect. Instead, the court found that "[c]ommon sense suggests that any administrative action taken in a rare 'emergency' situation such as the one at hand, while perhaps necessarily 'immediately effective,' need only be temporary, pending public notice-and-comment procedures." Id. (quoting Valiant Steel and Equipment, Inc. v. Goldschmidt, 499 F.Supp. 410, at 412-413 (D.D.C. 1980). The court emphasized, "we hold only that detailed regulations which respond as these do to much more than the exigencies of the moment must be promulgated through public procedures before they are chiseled into bureaucratic stone." Id. Further, "once an emergency situation has been eased by the promulgation of interim rules, it is crucial that the comprehensive permanent regulations which follow emerge as a result of the congressionally-mandated policy of affording public participation that is embodied in section 553[,]" because once interim rules are published, notice and comment is no longer "impracticable, unnecessary, or contrary to the public interest." Id. at 1158.

Jifry v. FAA, 370 F.3d 1174 (D.C. Cir. 2004): post 9/11 rule allowing for automatic pilot suspension if there are security concerns upheld due to security risks if rule implementation delayed

FAA issued a post-9/11 rule that provides "for automatic suspension by the FAA of airman certificates upon written notification from the TSA that the pilot poses a security threat and, therefore, is not eligible to hold an airman certificate." Id. at 1177. The rule was issued without notice and comment procedures. FAA argued that the rule was "necessary to prevent a possible imminent hazard to aircraft, persons, and property within the United States." Id. at 1179. The court accepted this argument, stating that "legitimate concern over the threat of further terrorist acts involving aircraft in the aftermath of September 11, 2001" supported the good cause finding. Id.

B. Agency Must Supply Sufficient Evidence of Harm

In order to meet the standard that good cause be "narrowly construed and only reluctantly countenanced," courts require that agencies have good, evidence-based grounds for claiming a harm will result from a delay in implementation. Mack Trucks, 682 F.3d at 93. Courts will not simply rely on the

public would have sufficient opportunity to submit written comments to the NOAC before the weekly meeting." Id. at 1486.

agency's internal expertise that a harm is likely. Sorenson Commc'ns Inc., 755 F.3d at 707. Courts note that while risk determinations "necessarily involve deductions based on expert knowledge of the Agency," a court must "satisfy itself that the agency explains the facts and policy concerns it relies on and that, given these, a reasonable person could have made the judgment the agency did." Mobil Oil Corp. v. Dep't of Energy, 728 F.2d 1477, 1490 (Temp. Emerg. Ct. App. 1975), *cert. denied*, 467 U.S. 1225 (1984) (upheld rule on the grounds that advanced notice of the rule would cause "price discrimination and other market dislocation"). This is not an exceedingly high standard, and courts will be satisfied so long as the agency can point to "something specific" illustrating the anticipated harm will be caused by the delay. Biden v. Missouri, 142 S. Ct. 647, 654 (2022) (per curiam) (quoting United States v. Brewer, 766 F.3d 884, 890 (8th Cir. 2014)). Critically, this point applies generally to agency basis for good cause, not just claims of emergency. *See* Tennessee Gas Pipeline Co., 969 F.2d at 1146 and Cap. Area Immigrants Rts. Coal., 471 F. Supp. 3d at 46.

Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702 (D.C. Cir. 2014): agency did not provide evidence that fund was going bankrupt to support argument that impending financial collapse of the program was good cause

The FCC, concerned that the telecommunications relay services (TRS) fund, which compensates phone providers to provide captioned telephone services for the deaf and hard of hearing, was running out of money, passed an interim order without notice and comment to deter fraud and misuse of the IP captioned telephone service (CTS). The rules required users to register their CTS devices and for the devices to arrive "off" which made users activate the CTS themselves. The FCC argued that notice and comment was impracticable because the TRS fund was in jeopardy. However, the agency provided little to no evidence regarding the status of the fund. The court rejected the agency's argument. The court noted that while the possibility of a fiscal calamity "could conceivably justify bypassing the notice and comment requirement," the record in this case "is simply too scant to establish a fiscal emergency"… because it "does not reveal when the Fund was expected to run out of money, whether the Fund would have run out of money before a notice-and-comment period could elapse, or whether there were reasonable alternatives available to the Commission, such as temporarily raising Fund contribution amounts or borrowing in anticipation of future collections. Though no particular catechism is necessary to establish good cause, something more than an unsupported assertion is required." Id. at 707.

Biden v. Missouri, 142 S. Ct. 647 (2022) (per curiam): Secretarial finding that rule would cause reduction in COVID-19 cases prior to winter flu season was "something specific" sufficient to satisfy good cause

The Secretary of HHS issued a rule, without notice and comment procedures, requiring all facilities receiving Medicare and Medicaid funding must require that their staff to be vaccinated against COVID-19. The rules were challenged under a variety of theories. In dissent, Justice Gorsuch argued that HHS provided only generalized justifications, and failed to "point to something specific that illustrates a particular harm that will be caused by the delay required for notice and comment." Id. at 660 (Gorsuch, J. dissenting) (quoting Brewer, 766 F.3d at 890 (8th Cir. 2014)). The Court, however, held that the Secretary's finding that accelerated promulgation of the rule in advance of the winter flu season would significantly reduce COVID–19 infections, hospitalizations, and deaths, constitutes the "something specific" required to forgo notice and comment. Missouri, 142 S. Ct. at 654 (2022) (internal citations omitted).

Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141 (D.C. Cir. 1992), *See "Impracticable" and "Prior Notice Undermines the Statutory Scheme*": agency's practical experience was not sufficient evidence that announcing a rule would cause industry to build rapidly and create risks

Cap. Area Immigrants Rts. Coal. v. Trump, 471 F. Supp. 3d 25 (D.D.C. 2020), *See "Contrary to the Public Interest"*: single newspaper article insufficient evidence that smugglers would rush more people to the southern border if notice was given on upcoming new restrictions

C. Congressional Intent and Statutory Deadlines

In certain circumstances, courts have accepted good cause where they have found Congressional intent suggests a desire to forgo notice and comment for a rulemaking. This reasoning primarily arises under "impracticable" and "contrary to public interest" contexts and comes in two main forms. First, agency often argue that good cause exists where a statutory deadline makes compliance with notice and comment procedures impracticable. *See, e.g.* Philadelphia Citizens in Action v. Schweiker, 669 F.2d 877, 885-86 (3d Cir. 1982). However, while some circuits are more open to this argument, the D.C. Circuit has soundly rejected a statutory deadline as a sole basis for good cause. New Jersey, 626 F.2d at 1043. They have stated plainly that "strict congressionally imposed deadlines, without more, by no means warrant invocation of the good cause exception." Id. (quoting Petry v. Block, 737 F.2d 1193, 1203 (D.C. Cir.1984)). All courts, including the D.C. Circuit, consider a tight statutory deadline as a factor in the good cause analysis. *See, e.g.* Natural Resources Defense Council, Inc., 316 F.3d at 912 (requiring "some showing of exigency") and Methodist Hospital of Sacramento v. Shalala, 38 F.3d 1225, 1237 (D.C. Cir. 1994) (court found good cause where agency had to "implement a complete and radical overhaul of the Medicare reimbursement system" in just a few months). The D.C. Circuit will more strongly consider a statutory deadline where Congress makes an "express indication" in rulemaking authority that notice and comment procedures are not required. Asiana Airlines v. FAA, 134 F.3d 393, 398 (D.C. Cir. 1998). Courts will also consider the extent to which the factors that cause an imminent deadline are outside of the agency's control and how diligently the agency acted to comply with the APA in anticipation of a deadline prior to their eventual failure. *See, e.g.* Council of S. Mountains, Inc., 653 F.2d at 581. Second, courts consider Congressional intent where evidence suggests prior notice of a rule may undermine a statutory scheme. *See* Mobil Oil Corp., 728 F.2d at 1490.

a. Overview

New Jersey v. EPA, 626 F.2d 1038 (D.C. Cir. 1980): Statutory deadline alone insufficient for good cause in the D.C. Circuit (this case also demonstrates how varying circuits approach Congressional intent and statutory deadlines)

The Clean Air Act required that the EPA issue the National Ambient Air Quality Standards. After EPA failed to meet certain timeline expectations, Congress passed 42 U.S.C. 7404(d), which required states to send to the EPA administrator a list that designated "nonattainment" areas that did not meet NAAQS. Within 60 days after the deadline for states to submit their information, the administrator was directed to promulgate those lists and designate the nonattainment areas. The EPA did so a month after this 60-day deadline had passed. They were effective immediately and opened a comment period post hoc. The EPA claimed notice and comment would be impracticable and contrary to the public interest because Congress imposed a tight schedule to enable states to prepare revisions to their implementation plans under the Clean Air Act. New Jersey was one of multiple entities to challenge the rule under the APA, and the case was heard in five different circuits.

The Fifth Circuit rejected the EPA's good cause argument, stating plainly that "[T]he mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause for a s 553(b)(B) exception." United States Steel Corp. v. EPA, 595 F.2d 207, 213 (5th Cir. 1979). The court also reasoned that EPA could have published the list as a proposed rule and accepted comments on it, which would have been sufficient to give states guidance in formulating their plans. The Third Circuit also rejected the EPA's good cause argument, stating that "Congress nowhere recorded any express indication that the 1977 amendments should relieve the Administrator from the ordinary

procedures set forth in the APA for rule-making." Sharon Steel Corp. v. EPA, 597 F.2d 377, 380 (3d Cir. 1979). They further stated that EPA could simply have published the designations earlier.

In contrast, the Sixth and Seventh Circuits upheld the rule. They quoted committee reports on the APA which stated that impracticable applies where "due and required execution of the agency functions would be (unavoidably) prevented by its undertaking public rule-making proceedings." S.Doc. No. 248, 79th Cong., 2d Sess. 200, 258 (1946), quoted in United States Steel Corp. v. EPA, 605 F.2d 283, 287 (7th Cir. 1979). It also pointed at two prior cases, Clay Broadcasting Corp. v. United States, 464 F.2d 1313 (5th Cir. 1972), rev'd on other grounds sub nom National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336 (1974) and Energy Reserves Group v. FEA, 447 F.Supp. 1135 (D.Kan.1978), that suggested a statutory deadline could be sufficient for good cause. The Sixth Circuit's reasoning closely tracked that of the Seventh Circuit, in addition focusing on EPA's "long delays in implementation" of the Clean Air Act. Republic Steel Corp. v. Costle, 621 F.2d 797 (6th Cir. 1980).

In this case the D.C. Circuit agreed with the Fifth and Third circuits to hold that the rule failed under the APA. The court focused heavily on Congress' instruction to construe good cause narrowly, stating that "[I]f the admonition to construe the good-cause exception of section 553(b)(B) narrowly means anything, it means that we cannot condone its invocation where, as here, such a reconciliation is possible." New Jersey, 626 F.2d at 1047. Here, that was possible because, as Fifth circuit noted, there was sufficient time had the rules been published earlier or had the list been published as a proposed rule. The court also distinguished the precedent cited by the Seventh Circuit. The first was actually a case regarding good cause to forgo the 30 days' notice requirement, not the notice and comment requirement. The second case involved a statutory deadline that was fifteen days after passage, which nearly "unavoidably prevented" notice and comment, and was supported by prior notice concerns regarding changes to prices in the oil industry. Id. at 1047.

b. Situations Where Statutory Deadline May be a Factor for Good Cause

Philadelphia Citizens in Action v. Schweiker, 669 F.2d 877 (3d Cir. 1982): good cause existed where Congress imposed a short deadline for budget reductions on a benefit program, which are often exempt from notice and comment requirements

The Omnibus Budget Reconciliation Act passed in August of 1981 required certain benefit reductions for individuals previously eligible under the Aid to Families with Dependent Children program. The statute set the effective date of these changes as October 1, 1981. HHS issued interim rules to implement these changes to the program on September 21 and simultaneously opened a comment period which would inform final rules issued in November. States then issued implementing regulations pursuant to HHS's changes. The District court invalidated the rules under the APA. The Third Circuit reversed and held good cause existed because notice and comment was impracticable. The court stated that "[w]e believe that Congress, by setting an effective date so close to the date of enactment, expressed its belief that implementation of the amendments to the AFDC program was urgent. We cannot say that HHS, by paying heed to that congressional concern in its determination that it had good cause to promulgate interim final rules without full notice and comment, erred as a matter of law." Id. at 85. The court noted a distinction with prior caselaw, that the effective date "does not create a conflict with the APA" because the statute's changes regard grants for which notice and comment are not required, and the APA only applies here because of an HHS policy requiring compliance with the APA. Id.

Methodist Hospital of Sacramento v. Shalala, 38 F.3d 1225 (D.C. Cir. 1994): good cause may exist where congressional deadlines are "very tight and where the statute is particularly complicated"

On April 20, Congress enacted amendments to Medicare that initiated the prospective payment system (PPS), which prospectively "fixed rates for each category of treatment rendered" in contrast to the reasonable-cost method. Id. at 1227. Medicare, by the September 1 date for the first phase of the new

program to begin, had to calculate a federal nationwide cost rate using data collected from hospitals, then calculate an adjustment for regional variations in hospital costs, and weight payments to categories of inpatient treatment. An error related to Sacramento-area hospitals resulted in a challenge to the interim rules issued on September 1 that implemented the new scheme without prior notice and comment. The court noted that "strict congressionally imposed deadlines, without more, by no means warrant invocation of the good cause exception." (quoting Petry, 737 F.2d at 1203 (The Petry court also accepted good cause for a rule implementing what the court viewed as a highly complex statute, amendments to the Child Care Food Program in the Omnibus Budget Reconciliation Act of 1981, the same statute as was at issue in Philadelphia Citizens in Action, where the agency had a 60-day deadline from the statute's enactment). However, the court found that the "daunting" task given to the agency to "implement a complete and radical overhaul of the Medicare reimbursement system" in a few months justified good cause. Id. at 1237. The court noted that the resulting "interim rules took up 133 pages in the Federal Register: 55 pages of explanatory text, 37 pages of revised regulations, and 41 pages of new data tables." Id.

Natural Resources Defense Council, Inc., v. Evans, 316 F.3d 904 (9th Cir. 2003): "some exigency" can allow for good cause, however short rulemaking deadline and limited period of time for data to be useful is insufficient exigency for good cause

NMFS issued and published specifications and management measures for certain pacific fisheries in January 2021 to be effective for that year. NMFS did not take comment before the rules became effective but invited comment until February 12. While not explicitly a statutory deadline, NMFS asserted good cause existed under the APA and the Magnuson Act on the grounds that time constraints required the rule to be effective and that the data involved in the rule would be useful for only that year. The court rejected this reasoning, stating that "good cause requires some showing of exigency beyond generic complexity of data collection and time constraints." Id. The court also noted that "NMFS d[id] not explain why prior notice and comment would have interfered with its ability to promulgate specifications and management measures in 2001, when approximately two months passed between the Pacific Council's final public meeting setting the final recommendations and their issuance by the Secretary in January 2001." Id.

Chamber of Commerce of U.S. v. SEC, 443 F.3d 890 (D.C. Cir. 2006): upcoming change in committee membership is not "exigency" sufficient for good cause.

The SEC issued a rule requiring mutual funds that rely on the Exemptive Rules to adopt various governance practices. After the D.C. Circuit remanded the order to the commission due to failures under the Investment Company Act, the SEC did not reopen the rulemaking record for further comment before issuing a new rule. Upon a challenge, the SEC argued, among other things it had good cause to forgo notice and comment because an incoming set of commissioners would have created uncertainty about the outcome of the rulemaking and unnecessary delays, as well as a "serious breakdown in management controls." Id. The court rejected this argument, stating that membership changes during a rulemaking is a "not uncommon" circumstance and, and not the type of "exigent circumstance" that good cause is designed for. Id. The court distinguished this circumstance from other cases where "exigent circumstances" were found, noting that "[T]hese exigent circumstances are of a far different nature than the not uncommon circumstance facing commissions when their membership changes during the course of a rulemaking…." Id.

c. Express Direction to Skip Notice and Comment

Asiana Airlines v. FAA, 134 F.3d 393 (D.C. Cir. 1998): statute directing agency to "publish" … "as an interim final rule, pursuant to which public comment will be sought" is express direction not to follow APA notice and comment procedures

The Federal Aviation Reauthorization Act, passed in October of 1996, directed the FAA to "publish in the Federal Register an initial fee schedule and associated collection process as an interim final rule, pursuant to which public comment will be sought and a final rule issued." Id. at 396. The statute noted that the fee collection would begin in 1997. FAA issued the IFR without notice and comment, arguing that the Act superseded the APA for this rule. Upon a challenge, the court upheld the IFR. It noted, "[s]tatutory language imposing strict deadlines, standing alone, does not constitute sufficient good cause under § 553 …. But, …when Congress sets forth specific procedures that "express its clear intent that APA notice and comment procedures need not be followed," an agency may lawfully depart…." Id. at 398 (quoting Methodist Hosp. of Sacramento, 38 F.3d at 1237). The court described the FARA language as "express direction" to the FAA regarding its fee setting procedure that "cannot be reconciled" with 553. Id. Further, because the statute clearly expected fee collection to begin in fiscal year 1997, the same year in which the Act passed, the "agency had to move quickly" to "fulfill this statutory goal." Id.

d. Agency Diligence to Meet a Deadline

Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573 (D.C. Cir. 1981): court considered agency's diligent work to avoid a delay when agency delayed effective date without comment period.

The Mine Safety and Health Administration (MSHA) issued regulations which required, within two years, oxygen equipment to be provided to underground miners. As the deadline was approaching, the Secretary of Labor delayed the implementation of the rule by six months. This delay was done without notice and comment and the Secretary argued there was good cause to do so due to the imminent deadline. The court noted that while it was a "very close" question, good cause existed based on five factors. First, the agency noted that there were significant delays in the field-testing program for the required devices that were not the fault of the MSHA. Id. at 581. Second, the agency "worked diligently" to overcome those delays. Id. Third, the agency intended to implement the rule on time and made plans "to complete as many of the tests as possible" within the deadline. Id. at 582. Fourth, the delay was relatively short. The court added that while "the limited nature of the rule cannot itself justify a failure" to follow procedures, "the limited scope of the [delay] order influences our finding that the Secretary possessed good cause to dispense with prior notice and comment." Id. Fifth, at oral argument agency counsel assured the court that the testing had at that time been completed and final implementation of the rule was anticipated on time, which convinced the court that the agency had acted with good faith throughout the process. Id.

e. Prior Notice Undermines the Statutory Scheme

Based primarily in the "public interest" and "impracticable" prongs of 553(b)(B), this argument maintains that good cause exists where providing prior notice and the time necessary to receive comments will allow affected parties to respond in a way that would defeat the purposes of the statute the rule is meant to enforce. The primary line of caselaw accepting this argument involved price and supply controls on oil during the 1970's oil crisis.[4] More recently, courts have been open to this line of reasoning but they

[4] In the 1970's, temporary emergency courts of appeals were established to hear wage and price matters under the Economic Stabilization Act of 1970. These courts upheld a variety of emergency price controls placed on oil issued without notice and comment based on the reasoning that prior notice would case various issues with the price, market, or supply of oil. *See* Mobil Oil Corp., 728 F.2d at 1490; Nader v. Sawhill, 514 F.2d 1064, 1068 (Temp. Emerg. Ct. App. 1975) (upheld the rule on the grounds that notice would worsen the oil shortage); and DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1332 (Temp. Emerg.

will reject it if the agency fails to provide sufficient evidence to support its claim. *See*, *e.g.* Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1146 (D.C. Cir. 1992); Cap. Area Immigrants Rts. Coal. v. Trump, 471 F. Supp. 3d 25, 46 (D.D.C. 2020).

VII. Procedural Requirements for Good Cause Arguments

Occasionally, courts will deny good cause due to an agency's failure to properly present the argument. Courts advise that "the grounds justifying the agency's use of the exception should be incorporated within the published rule." Am. Fed'n of Gov't Emp., AFL-CIO, 655 F.2d at 1156. Courts prefer an explanation for good cause that the agency has "advanced at the time of the rule making" and view post-hoc explanations with "skepticism." N.C. Growers' Ass'n, inc. v. United Farm Workers, 702 F.3d 755, at 767 (4th Cir. 2012); Action on Smoking & Health, 713 F.2d at 800. Courts have also been consistent that opening a comment period after a rule goes into effect will not, by itself, cure a rule without other basis for good cause. *See*, *e.g.* New Jersey, 626 F.2d at 1049. Beyond that, the general administrative law principle applies that a court may not "supply a reasoned basis" for agency action "that the agency itself has not given." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Additionally, if a rule has been vacated and remanded, especially with a time delay between the original rule and the reissuance, the original comment period is unlikely to render notice and comment "unnecessary." Action on Smoking & Health,713 F.2d at 800.

Action on Smoking & Health v. CAB, 713 F.2d 795 (D.C. Cir. 1983) (per curiam), *See "Impracticable" and "Unnecessary"*: after a rule is vacated and remanded, the document reissuing the rule, if done under a good cause theory, must have sufficient explanation for good cause

The court emphasized that "[w]e do not hold that an agency must start from scratch in every situation in which rules are vacated or remanded due to the absence or inadequacy of their statement of basis and purpose." Id. at 800. The good cause exception will provide circumstances in which such procedures will not be required. However, CAB's rule "contain[ed] not a single word of explanation as to why new notice and comment proceedings are impracticable, unnecessary, or contrary to the public interest." Id.

N.C. Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755 (4th Cir. 2012): agency failed to invoke good cause argument in rule, or even allude to it, so court would not assume agency implicitly relied on it

In 2009, DOL suspended certain 2008 wage regulations regarding H-2A temporary farm workers without fully considering substantive comments. After the suspension was enjoined, DOL passed new regulations in 2010. Workers later brought suit for the difference in appropriate wages during the interim period, with the main issue on appeal being whether the 2009 regulations were passed in compliance with the APA. The Farm Workers, who had intervened as defendants, argued that the Department's failure to properly consider comments was immaterial because the action was exempt from notice and comment under the good cause exception. The agency itself had never articulated such a position, and this was a theory put forward by the Farm Workers. The court rejected the Farm Worker's argument and noted that the APA requires the agency relying on good cause "incorporate[ ] the finding [of good cause] and a brief statement of reasons therefor in the rules issued." 5 U.S.C. § 553(b)(B). The court noted that "the Department did not expressly invoke the good cause exception" and "nowhere did the Department state" that notice and comment would be "impracticable, unnecessary, or contrary to the public interest." Id. at 767. The court ruled that "[w]e cannot lightly accept arguments that an agency, while failing to refer to the good cause exception, nevertheless implicitly relied on the exception. The statutory requirements in §

Ct. App. 1975) (upheld on the ground that "announcement of a future price freeze would generate a 'massive rush to raise prices.'")

553(b)(3)(B) are clear, and they constitute an important part of the APA's procedural safeguards related to agency rule making." Id. The court stated a rule that while "we do not impose a rigid requirement that an agency must explicitly invoke the good cause exception, the contemporaneous agency record must manifest plainly the agency's reliance on the exception in its decision to depart from the required notice and comment procedures." Id.

New Jersey v. EPA, 626 F.2d 1038 (D.C. Cir. 1980), *See "Congressional Intent and Statutory Deadlines"*

EPA also argued that the comment period opened after the rule became effective obviated the notice and comment issues. The court rejected this argument, holding that post hoc comment periods will not cure a failure to follow 553's requirements because there is a "presumption that post hoc comment was not contemplated by the APA and is generally not consonant with it." Id. at 1049.

Am. Fed'n of Gov't Emp., AFL-CIO v. Block, 655 F.2d 1153 (D.C. Cir. 1981), *See "Public Emergency"*

VIII. Conclusion

Under 5 U.S.C. 553(b)(B), agencies are exempt from the notice and comment requirements in section 553 if they, for good cause find, that notice and comment is "impracticable, unnecessary, or contrary to the public interest." Courts hearing challenges to rules issued under this provision are clear that good cause "is to be narrowly construed and only reluctantly countenanced." *See* Mack Trucks, 682 F.3d at 93. For "impracticable" and "contrary to the public interest," which are often analyzed together, courts, emphasizing that each case is "inevitable fact-or context-dependent," will most often grant good cause in circumstances involving public emergencies. Id. These emergencies can be financial, but the short time cannot be due to the agency's failure to move quickly. Statutory deadlines cannot, on their own, create good cause, although they can be a factor in a good cause determination. "Unnecessary" is limited to those rules that are a "routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." Id. at 94. This standard cannot be met simply with an IFR and follow-up comments, and prior comments on a vacated rule that is to be reissued is unlikely to satisfy a court.