Administrative Agencies and Claims of Unreasonable Delay: Analysis of Court Treatment

(name redacted)
Legislative Attorney

March 21, 2013

Congressional Research Service
7-....
www.crs.gov
R43013

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

One common concern about federal agencies is the speed with which they are able to issue and implement regulations. Federal regulatory schemes can be quite complex, and establishing rules and completing adjudications can sometimes require substantial agency resources and significant amounts of time. However, critics point out that sometimes an agency can simply take too long to a complete task. Commentators and courts have noted that such agency delay can impact the effectiveness of a regulatory scheme. It can also impact regulated entities that must wait for final agency action. In some circumstances, a court may have to determine whether an agency has violated the law by unreasonable delay in taking action. Substantial case law has emerged for how courts will treat agency delay in a variety of circumstances.

Under the Administrative Procedure Act (APA), agency actions must be completed "within a reasonable time." Courts have jurisdiction under the APA to hear claims brought against an agency for unreasonable delay, and the APA provides that courts shall compel any action unreasonably delayed or unlawfully withheld.

When an agency has delayed, but does not have to act by any statutorily imposed deadline, courts are more deferential to the agency's priorities and are less willing to compel an agency to take action. However, if a delay becomes egregious, courts will compel an agency to take prompt action. Generally, courts follow the *TRAC* factors, from *Telecommunications Research & Action Center v. FCC*, to determine whether a delay is unreasonable. The court will see if Congress has established any indication for how quickly the agency should proceed; determine whether a danger to human health is implicated by the delay; consider the agency's competing priorities; evaluate the interests prejudiced by the delay; and determine whether the agency has treated the complaining party disparately from others. A court balances these *TRAC* factors to reach a conclusion on a case-by-case basis. It can be difficult to predict which way a court will decide any particular case. There is no strict rule on how long is too long to wait for an agency action. Therefore, it is important to look at previous cases to see what kinds of delays are determined to be unreasonable.

In addition to the APA's general requirement to act within a reasonable time, Congress may also establish specific deadlines for agency actions by statute. When an agency fails to meet a statutory deadline, courts generally compel the agency to take prompt action. Some courts have determined that a court has no choice but to compel agency action in the face of a missed statutory deadline. For these courts, no balancing is permitted when a deadline has been violated. However, other courts note that a statutory deadline is merely one of the factors to consider when determining whether the delay is unreasonable. For these courts, the *TRAC* factors are still evaluated to determine whether the court should compel the agency to act after a deadline has been missed.

Judicial remedies for delayed agency actions are somewhat limited. The Supreme Court has ruled that a court is permitted to compel an agency to take action, but cannot determine what conclusion the agency shall ultimately reach on the issue. Furthermore, the Supreme Court has also established that agency rules still maintain the force of law, even when they are promulgated after a statutory deadline. Therefore, a court's only remedy for unreasonable agency delay is essentially to impose a deadline on the agency.

Contents

Contacts

Introduction

Congress maintains an active interest in the effective implementation of regulatory systems adopted by federal agencies. A common concern is the pace at which agencies establish rules and complete adjudications. Commentators and courts have noted that agency delay can impact the effectiveness of a regulatory system.[1] Delays can also negatively affect regulated entities that must wait for final agency action. As one court noted: "Quite simply, excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans."[2] Substantial case law has emerged on how courts will treat agency delay in a variety of circumstances.

The Administrative Procedure Act (APA) imposes a general time restraint on administrative agencies—they must act within a "reasonable time."[3] If a person meets the necessary standing requirements, he can sue the agency for failing to act within a reasonable time. However, when there is no hard deadline imposed on the agency, courts are often reluctant to compel an agency to act and often allow an agency to set its own priorities.

In addition to the general timing requirements imposed by the APA, Congress also has the power to require agencies to act on issues within a specific time frame by establishing a statutory deadline in the agency's enabling statute. When an agency fails to meet a statutory deadline, courts are more willing to compel the agency to take prompt action.

Judicial remedies available for delayed agency actions are somewhat limited. Generally, a court is restricted to ordering an agency to act by a specific deadline. The following sections outline the timing requirements imposed by the APA, discuss the available judicial remedies when actions are found to be unreasonably delayed, and provide an examination of cases where courts have been asked to compel agency action. Finally, the report concludes with a discussion of legislative tools that Congress can use to try to set agency priorities.

Administrative Procedure Act (APA)

The APA does not provide any concrete time limits for agency actions. Instead, the APA leaves most deadlines to be established in the particular agency's enabling statute, if at all. However, the APA states that "within a reasonable time, each agency shall proceed to conclude a matter presented to it."[4] Further, the APA states that courts shall "compel agency action unlawfully withheld or unreasonably delayed."[5] As such, the APA provides individuals with a cause of action when agency action has been unreasonably delayed.

---

[1] *See, e.g.*, Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 Geo. Wash. L. Rev. 1381; Potomac Electric Power Co. v. ICC, 702 F.2d 1026, 1034 (D.C. Cir. 1983).

[2] Potomac Electric Power Co. v. ICC, 702 F.2d 1026, 1034 (D.C. Cir. 1983).

[3] 5 U.S.C. §555(b).

[4] 5 U.S.C. §555(b).

[5] *Id.* at §706(1).

A court may hear a claim for unreasonable delay despite the fact that the agency has yet to take a final action on the subject. Generally, under Section 704 of the APA, a court does not have jurisdiction over an agency matter until the agency action is final.[6] However, a court can have jurisdiction over a matter pending before an agency when a party claims that there has been an unlawful or unreasonable delay. In *Norton v. SUWA*, the Supreme Court stated that "when an agency is compelled by law to act within a certain time period ... a court can compel the agency to act."[7] The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has also noted that the language of the APA indicates that Congress intended the courts to play a role in ensuring that agencies fulfill their obligation to act within a reasonable time,[8] and other circuits have noted that a claim of unreasonable delay qualifies for judicial review despite a lack of "final agency action."[9]

Claims for unreasonable delay can be brought under the APA against an agency in court. However, a claim of unreasonable delay can only be brought against an agency for actions that the agency is legally obligated to take. The Supreme Court has stated that "a claim under § 706(1) [of the APA] can proceed only when a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take."[10] If taking a certain action is "committed to agency discretion by law," then no claim can be made against the agency for failing to take such an action.[11] In other words, an agency must be required to act by law in order to establish a claim that the agency has unreasonably delayed in acting.

Remedies for Unreasonably Delayed Actions

Before discussing how a court determines whether an unreasonable delay has occurred, it is important to understand the limitations on available judicial remedies. When a court determines that an action has been unreasonably delayed, it must then decide what remedy to provide the plaintiff. First, although a court can order an agency to take prompt action on an issue, the Supreme Court has declared that a court cannot dictate what conclusion the agency should reach.[12] The Court stated that when an agency misses a deadline, a court can issue "a judicial decree under the APA requiring the prompt issuance of regulations, but not a judicial decree setting forth the content of those regulations."[13] For example, if an agency must determine critical

[6] *Id.* at §704 ("[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review.").

[7] Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 65 (2004).

[8] Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 77–78 (D.C. Cir. 1984) ("*TRAC*") ("[S]ection 706(1) coupled with section 555(b) does indicate a congressional view that agencies should act within reasonable time frames and that courts designated by statute to review agency actions may play an important role in compelling agency action that has been improperly withheld or unreasonably delayed."). Section 555(b) states that agencies should conclude matters "within a reasonable time," and Section 706(1) states that courts "shall ... compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. §§555(b), 706(1).

[9] *See, e.g.* Gordon v. Norton, 322 F.3d 1213, 1220 (10th Cir. 2003) ("An agency's failure to act ... can become a final agency action in three situations: 1) if the agency "affirmatively rejects a proposed course of action; 2) if the agency delays unreasonably in responding to a request for action; and 3) if the agency delays in responding until the requested action would be ineffective.").

[10] *Norton v. SUWA*, 542 U.S. at 64 (emphasis in original).

[11] 5 U.S.C. §701(a)(1), (2).

[12] *Norton v. SUWA*, 542 U.S. at 65.

[13] *Id.*

habitat for an endangered species, the court can direct the agency to act immediately, but the court cannot determine which habitat is critical. Furthermore, the Supreme Court has stated that regulations issued after a deadline has passed still maintain the force of law, despite the tardiness of their promulgation.[14] Therefore, a plaintiff cannot challenge the validity of regulations merely based on their promulgation after a deadline. Thus, judicial remedies are generally limited to imposing deadlines on the agency.

Courts take varying approaches when fashioning a remedy for an agency action that has been unduly delayed. In some cases a court will order an agency to act promptly.[15] In other situations, a court might impose a deadline on the agency.[16] Sometimes courts merely direct the agency to impose a deadline on itself, which the court will accept unless the agency's proposed deadline is unreasonable.[17] Additionally, courts will often maintain jurisdiction over the case until the agency action has been completed.[18] In these situations, the court will require the agency to file regular reports with the court detailing the progress the agency has made on the action to ensure the agency is actively working to comply.[19] Examples of how courts fashion remedies are provided in the cases discussed in this report.

Compelling Actions Unreasonably Delayed with No Statutory Deadlines

Generally, courts tend to avoid compelling agency action because they do not want to impose agendas on the more politically accountable regulatory agencies. Courts will look to enabling statutes to see if there are statutory time requirements imposed on the agency. When there is no statutory deadline for the agency action, courts tend to be more deferential to the agency's priorities. According to the *Blackletter Statement of Federal Administrative Law* from the American Bar Association:

> An agency's delay in completing a pending action as to which there is no statutory deadline may not be held unlawful unless the delay is unreasonable in light of such considerations as the agency's need to set priorities among lawful objectives, the challenger's interest in prompt action, and any relevant indications of legislative intent. In considering such challenges courts are deferential to agencies' allocation of their own limited resources.[20]

[14] Barnhart v. Peabody Coal Co., 537 U.S. 149, 155, 171-72 (2003).

[15] *See, e.g.*, Forrest Guardians v. Babbitt, 174 F.3d 1178, 1193 (10th Cir. 1998) (ordering agency to issue a final rule "as soon as possible").

[16] *See, e.g.*, Public Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1158–59 (DC. Cir. 1983) (ordering agency to promulgate a notice of proposed rulemaking within 30 days).

[17] *See, e.g.*, In re International Chemical Workers Union, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (holding that the agency's estimated need for additional time is reasonable, but any additional postponement would be a violation of the court's order).

[18] *See, e.g.*, In re United Mine Workers of America International Union, 190 F.3d 545, 546 (DC Cir. 1999).

[19] *Id.*

[20] Section of Administrative Law & Regulatory Practice, American Bar Ass'n, *A Blackletter Statement of Federal Administrative Law*, 54 Admin L. Rev. 1, 44 (2002).

The D.C. Circuit, in *Telecommunications Research & Action Center v. FCC* ("*TRAC*"),[21] established guidelines to consider when determining whether an agency delay warrants mandamus[22] compelling the agency to act. The court stated that "[i]n the context of a claim of unreasonable delay, the first stage of judicial inquiry is to consider whether the agency's delay is so egregious as to warrant mandamus."[23] The court then enumerated several factors, known as the *TRAC* factors, to consider when answering this question:

> (1) the time agencies take to make decisions must be governed by a "rule of reason;" (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.[24]

Although the *TRAC* factors are widely cited with regard to whether a court should issue mandamus to compel agency action, courts have also been quick to point out that "mandamus is a drastic remedy, suitable only in extraordinary situations."[25]

Delay in Adjudication Proceedings with No Statutory Deadline

In cases where there are no statutory deadlines imposed, agency delay of several years on an adjudication may pass before a court issues a writ of mandamus. Decisions seem to vary, and it can be difficult to predict how a court will rule on a question of unreasonable delay. The D.C. Circuit has noted that "[t]here is no per se rule as to how long is too long to wait for agency action,"[26] and it can be hard to determine which *TRAC* factor a court will decide to rely on most heavily. As a result, it appears that each claim of agency delay is determined on a case-by-case basis. This section explores some court decisions to illustrate the difficulty in determining which way a court will rule on a claim of unreasonable delay. For example, in one circumstance, a court determined a delay of 10 years on reaching a decision to be reasonable,[27] while in another situation, a court determined an eight-year delay to be unreasonable.[28]

In *TRAC*, the petitioners claimed that the Federal Communications Commission (FCC) had unreasonably delayed in determining whether AT&T should reimburse ratepayers for certain alleged overcharges.[29] Despite the fact that the proceeding had taken five years and had not yet

[21] 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*").

[22] Mandamus is an order from a court directing a party to take a certain action, such as commence a rulemaking or complete an adjudication.

[23] *Id.* at 79.

[24] *Id.* at 80 (internal quotations omitted).

[25] Wellesley v. FERC, 829 F.2d 275, 277 (1st Cir. 1987); *see also, e.g.*, Kerr v. United States District Court, 426 U.S. 394, 402 (1976).

[26] In re Barr Laboratories, Inc., 930 F.2d 72, 76 (D.C. Cir. 1991).

[27] Debba v. Heinauer, 366 Fed. Appx. 696 (8th Cir. 2010). This case is discussed below.

[28] Potomac Electric Power Co. v. ICC, 702 F.2d 1026 (D.C. Cir. 1983). This case is discussed below.

[29] *TRAC*, 750 F.2d at 72.

been resolved, the court decided that the delay did not warrant mandamus in light of the fact that mere economic interests were involved and that the agency had assured the court that it was working expeditiously to resolve the proceeding.[30] Instead of compelling the agency to act, the court required the FCC to provide the anticipated date of resolution and maintained jurisdiction in order to ensure that the agency proceeded accordingly.[31]

In *Potomac Elec. Power Co. v. ICC*,[32] a court found an eight-year adjudication to determine the justness and reasonableness of a railroad's rates to be unreasonable.[33] In this case, the court issued a writ of mandamus and required a final agency order to be issued within sixty days.[34] In justifying the writ of mandamus, despite the fact that the matter merely involved economic interests, the court pointed to legislative history that indicated that Congress wanted the Interstate Commerce Commission (ICC) to act quickly in these rate proceedings.[35] However, in *Kokajko v. FERC*,[36] despite the presence of similar legislative history—"FERC is statutorily required to give preference and speedy consideration to questions concerning increased rates or charges for the transmission or sale of electric energy"—the court determined that five years was not an unreasonable amount of time to wait for a final agency determination[37] and dismissed the petitioner's claim.[38] In *Kokajko*, the court focused on the fact that the case merely involved an economic interest and that there was no "significant length of unexplained agency inaction."[39] The court stated, however, that "a five year delay is approaching the threshold of unreasonableness."[40]

The United States Court of Appeals for the Fourth Circuit, in *In re City of Virginia Beach*,[41] determined that mandamus was not warranted for a four and one-half year wait for approval of a water pipeline construction project.[42] Although the court noted that the water pipeline affected "human health and welfare," the court declined to compel immediate agency action in light of the Federal Energy Regulatory Commission's (FERC) assurances that the project was a high priority and would be expedited.[43] Because the delay was not entirely caused by FERC, the court determined that mandamus was not warranted despite the fact that the court was "[not] happy about the overall time elapsed."[44]

---

[30] *Id.* at 80–81.

[31] *Id.* at 81.

[32] 702 F.2d 1026 (D.C. Cir. 1983).

[33] *Id.* at 1027–28.

[34] *Id.* at 1035.

[35] *Id.* at 1033–34.

[36] 837 F.2d 524 (1st Cir. 1988).

[37] *Id.* at 526.

[38] *Id.*

[39] *Id.*

[40] *Id.*; *see also* Wellesley v. FERC, 829 F.2d 275 (1st Cir. 1987) (holding that a 14 month delay on a rate proceeding did not warrant mandamus, despite legislative history suggesting that FERC should act quickly, and stating "the cases in which courts have afforded relief have involved delays of years" not months).

[41] 42 F.3d 881 (4th Cir. 1994).

[42] *Id.*

[43] *Id.* at 886.

[44] *Id.*

The United States Court of Appeals for the Eighth Circuit upheld a ten-year delay by the Citizenship and Immigration Services (CIS) on an application for permanent residence.[45] The court noted that the application was given considerable attention by the agency and that the delays were partially caused by changes in legislation regarding required investigations of applicants.[46] The court held that the agency had thus not unreasonably delayed in reaching a final determination on the proceeding within 10 years.[47]

Delay in Rulemaking Proceedings with No Statutory Deadline

Courts have treated an agency's delay in promulgating rules similarly to agency delay in adjudication procedures. Courts still apply the *TRAC* factors when determining whether a delay is unreasonable in the rulemaking setting. Again, it can be difficult to predict whether a court will compel an agency to act on a claim for unreasonable delay when there is no statutory deadline.

In one case involving rulemaking proceedings, the court found that a three-year delay by the Environmental Protection Agency (EPA) was reasonable.[48] The EPA had undertaken a rulemaking to determine if it should regulate strip mines under the Clean Air Act. The court noted that "absent a precise statutory timetable or other factors counseling expeditious action, an agency's control over the timetable of a rulemaking procedure is entitled to considerable deference."[49] The court again applied the *TRAC* factors and considered the fact that human health and welfare was at stake. It also noted that the agency had been progressing on the rule by holding public meetings, accepting comments, and issuing reports on the issue. After weighing all the considerations, the court stated "given the complexity of the issues facing EPA and the highly controversial nature of the proposal, agency deliberation for less than three years ... can hardly be considered unreasonable."[50]

However, in a different case, *Public Citizen Health Research Group v. Auchter*,[51] the same court held that the Occupational Safety and Health Administration's (OSHA) three-year delay in promulgating a final rule for ethylene oxide (EtO) safety standards was unreasonably delayed. Although this case was decided prior to *TRAC*, the court still made reference to the same factors. It stated that "[d]elays that might be altogether reasonable in the sphere of economic regulation are less tolerable when human lives are at stake."[52] Emphasizing the delay's potential impact to human health,[53] the court ordered that a notice of proposed rulemaking be issued within thirty days and stated that it expected a final rule within a year.[54]

[45] Debba v. Heinauer, 366 Fed. Appx. 696 (8th Cir. 2010).

[46] *Id.* at 699.

[47] *Id.*

[48] Sierra Club v. Thomas, 828 F.2d 783 (D.C. Cir. 1987).

[49] *Id.* at 797.

[50] *Id.* at 799.

[51] 702 F.2d 1150 (D.C. Cir. 1983).

[52] *Id.* at 1157.

[53] *Id.* ("Three years from announced intent to regulate to final rule is simply too long given the significant risk of grave danger EtO poses to the lives of current workers and the lives and well-being of their offspring.").

[54] *Id.* at 1158–59.

In *In re International Chemical Workers Union*,[55] the court determined that a six-year delay in promulgating a rule regarding cadmium exposure safety standards was unreasonable. In this case the agency acknowledged that a new standard for cadmium exposure limits was necessary, but repeatedly pushed back the expected release date for the final rule. The court used the *TRAC* standards and noted that the purpose of the OSHA statute was to protect the health of American workers. It balanced this against the agency's limited resources and other competing activities. In the end, the court accepted the agency's "estimate of the additional time it needs to complete the final stages of the rulemaking," but warned that any additional postponement "would violate [the] court's order."[56] The agency was forced to promulgate a final standard within seven months of the court order.

These few examples show that it can be challenging to pinpoint when a court will compel agency action in both rulemaking and adjudication proceedings when there are no statutory deadlines in place.

Compelling Delayed Actions That Violate Statutory Deadlines

Courts more readily compel agencies to act in cases where there is a statutory deadline imposed on an agency.[57] The Supreme Court declared, in *Norton v. SUWA*, that "when an agency is compelled by law to act within a certain time period ... a court can compel the agency to act."[58] Some lower courts have made a distinction between actions "unlawfully withheld" (actions that are delayed beyond a statutory deadline) and actions "unreasonably delayed" (actions that are only governed by the APA's "reasonable time" provision) and have determined that a missed statutory deadline compels the court to mandate prompt agency action. Although it is commonplace for courts to compel agencies to act if a deadline has been missed, some courts, as illustrated below, may decline to compel an agency to act in such circumstances. For example, despite the existence of a statutory deadline, the D.C. Circuit still applies the *TRAC* test to determine whether it is appropriate to issue an order compelling the agency to act.

In *Forrest Guardians v. Babbitt*,[59] the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) stated that when an agency fails to act by a "statutorily imposed absolute deadline," the action has been "unlawfully withheld" and the court has no choice but to compel the agency to act.[60] The Tenth Circuit noted that Section 706(1) of the APA states that courts "shall compel agency action unlawfully withheld," and declared that the court, because of Congress's use of the

[55] 958 F.2d 1144 (D.C. Cir. 1992).

[56] *Id.* at 1150.

[57] Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 Geo. Wash. L. Rev. 1381, 1414 (2011) ("Courts will generally compel agency action that violates a clear statutory deadline."); Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 Admin. L. Rev. 1, 39 (2008) (noting that claims become significantly easier to win when there is a statutory deadline involved).

[58] *Norton v. SUWA*, 542 U.S. at 65.

[59] 174 F.3d 1178 (10th Cir. 1998). This case involved the U.S. Fish and Wildlife Service's failure to make a final determination on petitions to list certain species as endangered or threatened under the Endangered Species Act by the statutorily imposed twelve-month deadline. *Id.*

[60] *Id.* at 1190.

word "shall," had no discretion on the issue.[61] The court stated that although the *TRAC* factors might be helpful when considering action guided by a mere general timing provision, the court could not apply the *TRAC* test to situations where an agency has failed to meet a specific statutory deadline.[62] The court remanded the case and directed the district court to order the Secretary to "issue a final critical habitat designation ... as soon as possible, without regard to the Secretary's other priorities under the [Endangered Species Act]."[63]

Similarly, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) has held that a court must compel agency action when the agency fails to comply with a statutory deadline. In *Biodiversity Legal Foundation v. Badgley*,[64] the Ninth Circuit found that it was required to issue an injunction to require the Fish and Wildlife Service (FWS) to comply with a twelve-month deadline imposed by the Endangered Species Act.[65] Although the Ninth Circuit acknowledged that it follows the *TRAC* standard in cases involving general timing provisions, the court stated that "Congress has specifically provided a deadline for performance by the Service, so no balancing of factors is required or permitted."[66] The court stated that the missed deadline "compelled the court to grant injunctive relief" and that the "court had no discretion to consider the Service's stated priorities."[67]

Other courts, however, do not follow this distinction. For these courts, a statutory deadline acts only as one of the *factors* to consider when applying the *TRAC* test for unreasonable delay and is not, by itself, determinative. Although a deadline will weigh heavily in favor of compelling an agency to act, some courts have declined to order an agency to take action even in the face of deadlines that have long passed.[68]

The United States District Court for the District of Columbia, in *Ctr. for Biological Diversity v. Pirie*,[69] criticized the reasoning followed by the Tenth Circuit in the *Forrest Guardians* decision. Although the court acknowledged that Section 706 of the APA states that the courts "*shall* compel agency action unlawfully withheld or unreasonably delayed,"[70] the court determined that courts still have discretion when determining whether to issue a writ of mandamus or injunction against an agency.[71] The court pointed to Section 702 of the APA,[72] and declared that the language of this

[61] *Id.* at 1187–93. However, the Tenth Circuit noted that when an agency is only guided by a "general timing provision," such as a requirement to act "within a reasonable time," the court does have discretion to decide whether the delay has been unreasonable. *Id.* at 1190–91.

[62] *Id.* at 1191.

[63] *Id.* at 1193.

[64] 309 F.3d 1166 (9th Cir. 2002).

[65] *Id.* at 1178.

[66] *Id.*

[67] *Id.* at 1178.

[68] *See* In re Barr Laboratories, Inc., 930 F.3d 72, 74 (D.C. Cir. 1991) ("The issue before us, then, is not whether the FDA's sluggishness has violated a statutory mandate—it has—but whether we should exercise our equitable powers to enforce the deadline."). This case is discussed below.

[69] 201 F. Supp. 2d 113 (D.D.C. 2002). Although this case did not involve an agency delay, it does show that the court found that Section 706 does not require a court to issue a writ of mandamus or an injunction when an agency is in violation of a statute.

[70] *Id.* at 118.

[71] *Id.* at 119 (Citing Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207–08 (D.C. Cir. 1985).

[72] Section 702 of the APA states that "Nothing herein affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. §702 (continued...)

section preserved the courts' equitable discretion in these cases: "Because 702 of the APA explicitly states that a court retains equitable discretion, this Court cannot hold that Congress has clearly and unequivocally limited that discretion under the APA."[73] Therefore, the court determined that it is not forced to compel agency action, even if the agency has missed a statutory deadline.

In its opinion from *In Re Barr Laboratories, Inc.*,[74] the D.C. Circuit noted that "a finding that delay is unreasonable does not, alone, justify judicial intervention."[75] In this case, the Food and Drug Administration (FDA) had missed a statutory deadline for reviewing "generic drug" applications.[76] By statute, the FDA was supposed to review these applications within 180 days.[77] However, the FDA estimated that its response time could range from 389 to 669 days.[78] Barr Laboratories sought mandamus compelling the agency to review its application and claimed that, by missing the statutory deadline, the FDA had unreasonably delayed.[79] The court responded: "Though we agree with Barr that FDA's sluggish pace violates a statutory deadline, we conclude that this is not an appropriate case for equitable relief."[80] The court looked at all of the *TRAC* factors and determined that mandamus was not appropriate despite the fact that the FDA failed to meet their statutory deadline by a significant margin.[81] The court noted that simply putting one drug manufacturer's case to the front of the line would necessarily push other similar cases further back and would not ultimately promote Congress's objective of having all applications dealt with swiftly.[82] The court did not want to determine the agency's priorities;[83] however, the court did note that if Barr Laboratories had been singled out for mistreatment, an order of mandamus might have been appropriate.[84]

Finally, the D.C. Circuit held that a nine-year delay by the United States Coast Guard, in the face of a one-year deadline for promulgating regulations regarding oil tanker standards, was unreasonable.[85] The court ordered the agency to take "prompt" action.[86] However, it applied the

(...continued)

(2006).

[73] Ctr. for Biological Diversity v. Pirie, 201 F. Supp. at 119.

[74] 930 F.2d 72 (D.C. Cir. 1991).

[75] *Id.* at 75.

[76] *Id.* at 73–74.

[77] *Id.* at 74.

[78] *Id.*

[79] *See id.* at 73.

[80] *Id.*

[81] *Id.* at 74–76.

[82] *Id.* at 75.

[83] "The agency is in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack.... While Congress clearly intended a faster track for generic drug applications in general, it did not choose a super-priority for Barr, and it did not address the trade-off between strict compliance with the 180-day deadline and the FDA's disposition of its other projects with enough clarity to guide judicial intervention." *Id.*

[84] *Id.* at 75-76; *but see* Sandoz, Inc. v. Leavitt, 427 F. Supp. 2d 29 (D.D.C. 2006) (applying the *TRAC* factors and holding that a 1000 day response time by the FDA on a similar generic drug application was unreasonable in light of the fact that the FDA seemed to treat the plaintiff disparately from other generic drug applicants).

[85] In re Blue Water Network and Ocean Advocates, 234 F.3d 1305 (D.C. Cir. 2000).

[86] *Id.* at 1316.

TRAC factors, indicating that merely missing the deadline was not, by itself, enough for the court to issue mandamus to compel the agency to act.[87]

The *TRAC* factors remain the most common approach to determining whether agency actions have been unreasonably delayed in both rulemaking proceedings and adjudicatory proceedings. One potential problem with the *TRAC* test is that it fails to provide any clear answer to whether an agency has delayed unreasonably.[88] Even the D.C. Circuit acknowledges "[t]here is no per se rule as to how long is too long to wait for agency action"[89] and that the *TRAC* balancing test "sometimes suffers from vagueness."[90] With no clear standard, it can be difficult for regulated entities to estimate when they could expect agency action finally to occur or when it would be appropriate to sue an agency for their delays. However, it seems that two factors always tend to receive ample discussion from the courts. First, statutory deadlines appear to be a significant factor in determining a case of unreasonable delay. When Congress signifies that it wants an agency to prioritize an action, the courts are more willing to enforce that priority. Second, courts appear to be more willing to compel an agency to act when the action involves public health or safety, compared to mere economic interests. Ultimately, however, the determination is made on a fact specific, case-by-case basis.

Legislative Tools to Compel Agency Action

Congress often attempts to press agencies to resolve issues and promulgate rules in swift fashion. Perhaps Congress's most effective tool, discussed above, is the statutory deadline. Although in some circumstances courts will decline to enforce the deadline on the agency, claims for unreasonable delay are vastly more successful when there is a statutory deadline imposed by Congress.[91] Recent scholarship also notes that rulemakings that are undertaken with an imposed statutory deadline are, on average, completed sooner than similar rules with no deadline imposed.[92] It is important to note, however, that when overly imposing deadlines are placed on agency action, agencies often have to act hastily and may reduce the time available for public participation in a rulemaking.[93] In some circumstances, a tight deadline can lead an agency to avoid normal notice and comment procedures by invoking the "good cause" provision under the APA.[94]

---

[87] *Id.* at 1315–16.

[88] Professor Sant'Ambrogio notes that "[d]ue to the lack of clarity in the doctrine, courts can use the *TRAC* analysis to support virtually any conclusion they want to reach." Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 Geo. Wash. L. Rev. 1381, 1443 (2011).

[89] In re Am. Rivers & Idaho Rivers United, 372 F.3d 413, 419 (D.C. Cir. 2004).

[90] *TRAC*, 750 F.2d at 80.

[91] *See* Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 Geo. Wash. L. Rev. 1381, 1414 ("Courts will generally compel agency action that violates a clear statutory deadline."); Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 Admin. L. Rev. 1, 39 (2008) (noting that claims become significantly easier to win when there is a statutory deadline involved).

[92] Jacob E. Gerson & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. Pa. L. Rev. 923, 945–950 (2008).

[93] *Id.* at 945.

[94] *Id.* at 956–59; 5 U.S.C. §553(b)(3)(B) (an agency may avoid notice and comment procedures "when the agency for good cause finds ... that notice and public procedure thereon are impracticable").

Another tool available to Congress is the imposition of "hammer" provisions.[95] These provisions, which may be written in tandem with a statutory deadline, dictate what is to happen if a regulatory deadline is missed. These provisions, therefore, impose a consequence if the agency fails to meet the statutory deadline. The consequences for missing a deadline vary. Some laws establish a regulatory scheme that will be put in place if a deadline is missed;[96] others mandate that the agency's *proposed* rule would go into effect if a final rule is not promulgated by the deadline.[97] At least one law has withheld funding from an agency until certain rules are promulgated.[98] Although these provisions can force an agency to act quickly, they can also be difficult for Congress to establish. For example, for laws that require a congressionally mandated regulatory scheme to go into effect if the agency misses a deadline, subject matter expertise may be helpful or necessary to establish a statutorily imposed regulatory scheme.

Congress also maintains the "power of the purse" and can place restrictions on appropriations or threaten to do so if Congress determines that an agency is failing to act in a timely manner. Finally, in the event that an agency is taking too long to take an action, Congress also has the ability to exert political pressure on the agency. Congressional committees can call oversight hearings to question an agency leader regarding delays.[99] Individual members are also permitted to express their concerns to agencies and often send letters to pressure agencies to act promptly on certain issues.[100] Although courts will ultimately determine whether an action has been delayed unreasonably, Congress is able to use these tools to try to establish priorities for the federal agencies' agendas.

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

[95] *See* Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking 15–16 (4th ed. 2006).

[96] *See, e.g.*, 42 U.S.C. §6924(d)(1-2).

[97] *See, e.g.*, The Nutrition Labeling and Education Act of 1990, P.L. 101-535.

[98] *See* Department of Transportation and Related Agencies Appropriations Act, 1988, P.L. 100-202, Title 1.

[99] *See* Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking 18–19.

[100] *See id.*; *see also, e.g.*, Letter from various members of Congress to Dr. Margaret A. Hamburg, Commissioner of Food and Drugs, U.S. Food and Drug Administration (May 6, 2011) *available at* http://schakowsky.house.gov/images/stories/Letter_to_FDA_on_Dangerous_Chemicals_in_Brazilian_Blowout_Hair_Treatments.pdf.