Don’t Pop the Champagne Yet: Ossification, the NPS, and Rulemaking

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Abstract

The U.S. notice and comment rulemaking process has often been considered ossified or broken, but recent scholarship has questioned this claim, particularly in regards to rulemakings within the Department of Interior (DOI). To address this disagreement, we use McGarity’s (1992) ossification argument as a descriptive framework to structure an examination of interview data from three National Park Service (NPS) case studies: (1) Yellowstone National Park Rule (Yellowstone Winter Use Rule), (2) the Special Regulations; Areas of the National Park System, Grand Canyon National Park Rule (Grand Canyon Boat Use Rule), and (3) the Gateway National Recreation Area, Sandy Hook Unit, Personal Watercraft Use Rule (Gateway Personal Watercraft Use Rule). The findings from this research offer a qualitative lens into what drives the longevity of NPS rulemaking, namely procedural, analytical, and substantive requirements. Although the extensive time period to create a NPS rule should not be overlooked, we do argue that the NPS does provide potential innovative pathways to alleviate ossification in the future.

Key words: ossification, rulemaking, NPS, stakeholders, environmental policy

 A growing body of literature has extensively studied the way in which agencies make policy through rulemaking processes (Golden, 1998, Yackee, 2006, West, 2011, Rinfret, 2011, Kerwin & Furlong, 2011, Cook & Rinfret, 2013). One overarching concern from this scholarship is that the rulemaking process has become inefficient or ossified due to procedural, analytical, or substantive review requirements set forth by the executive, judicial, or legislative branches of government (McGarity, 1992). Yet, some scholars offer empirical data (Yackee and Yackee, 2010; 2012) to suggest that rulemaking ossification is overstated.[[1]](#footnote-1) While these efforts are noteworthy, a qualitative perspective of ossification is necessary before we can make such assertions (Yackee & Yackee, 2012). Put differently, what can we learn from the individuals directly involved in the rulemaking process about the realities of ossification?

As such, this paper analyzes three case studies within the National Park Service (NPS): (1) Yellowstone National Park Rule (Yellowstone Winter Use Rule), (2) the Special Regulations; Areas of the National Park System, Grand Canyon National Park Rule (Grand Canyon Boat Use Rule), and (3) the Gateway National Recreation Area, Sandy Hook Unit, Personal Watercraft Use Rule (Gateway Personal Watercraft Use Rule) to determine what factors have impacted the agency’s ability to produce rules. McGarity’s ossification approach is used as a descriptive framework to examine the original interview data from these cases. Although our findings suggest that ossification is still evident within these NPS cases, the interviewees suggest that the agency has attempted to provide a pathway forward through stakeholder outreach to ensure that the national parks are providing the best rulemaking process with limited resources.

The Stages of Rulemaking

To contextualize this analysis, it is important to begin with a general understanding of the U.S. federal rulemaking process. All federal agencies must follow procedures set by the Administrative Procedure Act of 1946 (APA) to conduct a rulemaking (5 U.S.C. §553). To understand how agencies produce rules in compliance with the APA, Kerwin and Furlong (2011) have distinguished eleven stages in the rulemaking process. For the purposes of this research, the process can be captured in three broad stages: rule development, notice/comment, and the rule finalization stage.

 Rule development, the first stage, is where ex parte (informal) communication occurs between interest groups and agency personnel that serve to inform the language of the proposed rule. Moreover, this is where agency staff develops any technical, scientific, environmental, or regulatory impact assessments required to accompany the publication of a proposed rule. An agency enters the notice/comment stage after publishing a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* (a daily publication of all federal rules). Here, an agency grants the public typically 30 to 90 days to submit their comments for a rule. The agency is required to examine these comments and provide feedback to commenters. After an agency has reviewed the comments, the rulemaking process transitions to the third stage - when an agency publishes the final rule in the *Federal Register*. Once published, if stakeholders choose to do so, they can file lawsuits regarding the content of the final rule. Typically, this entire process takes up to two years to complete (Kerwin & Furlong, 2011).

 The NPS follows these basic processes, but can often have additional requirements for consideration. For example, NPS rulemakings can potentially have negative impacts on the environment; therefore, the agency has to complete an environmental analysis of those actions. This analysis typically takes the form of an Environmental Impact Statement (EIS) that occurs under the statutory guidance of the National Environmental Policy Act of 1969 (NEPA) (42 USC § 4321). More specifically, NEPA requires federal agencies to seek input from interested stakeholders through scoping sessions or meetings to determine the potential environmental impacts of possible agency actions. After these meetings, the NEPA process follows a similar structure to that outlined by the APA. For example, the agency must publish a notice in the *Federal Register* that the agency has developed a draft EIS and allow time for the public to comment on the document. The draft EIS includes a range of policy actions the agency might employ to deal with a problem and the agency then selects one as a preferred alternative. After reviewing and perhaps incorporating public comments into their alternative selection the agency then produces the final EIS that identifies both the alternative the agency selects and its environmental impact in conjunction with the publication of an NPRM.

 Finally, if a given NPS rule addresses only the activities and policy within one park, that park’s superintendent is often the manager of the rulemaking process including any NEPA procedures (Cook, 2014). As a result, the park superintendent is often in charge of setting up scoping sessions, contacting collaborating agencies, and compiling the data required to propose and finalize a rule.

*The Role of Ossification*

 Within the stages of rulemaking, many scholars have focused their research on the impact stakeholders have on influencing the language of agency rules (Golden, 1998; Kerwin & Furlong, 2011; Kamieniecki, 2006; Yackee & Yackee, 2006; Rinfret & Furlong, 2012; Cook & Rinfret, 2013; Rinfret & Cook, 2014). These studies range from assessing ex parte communication between an agency and stakeholders during rule development (Rinfret & Furlong, 2012) to evaluations of public comments and their effect on a final rule (Golden, 1998; Kamieniecki, 2006). This research is far-reaching and commendable, but McGarity (1992) has documented why a focus on the efficiency of the process is also essential. Put simply, McGarity (1992) argues that agencies have taken much longer to write rules since the 1970s because the president, Congress, and the courts have required additional procedures, analytical requirements, and external substantive review mechanisms that have significantly slowed the rulemaking process to the point where many “important rulemaking initiatives grind along at such a deliberate pace that they are often consigned to regulatory purgatory, never to be resurrected again” (pg. 1386-8). Thus, he concludes that the rulemaking process has become inefficient or ossified. We discuss each of McGarity’s ossification elements, procedural, analytical, and substantive review, in turn.

Procedural requirements refer to the analytical rulemaking process add-ons that each branch of government has mandated. For example, the judicial branch has required agencies to provide a more robust explanation “for doing what they do,” (McGarity, 1992, 1400) such as the requirement that agencies “rationally respond to outside comments passing a threshold of materiality” (McGarity, 1992, 1400). Congress has also added its own procedural requirements for rulemakings such as EISs (described above), or in certain cases Regulatory Flexibility Analyses (RFAs), where an agency must describe the impact of a proposed and final rule on small businesses. And, since the 1980s, presidents have required agencies to conduct a Regulatory Impact Analysis (RIA), or an evaluation of the costs and benefits of a rulemaking if the rule’s costs exceed $100 million (McGarity, 1992).

Analytical requirements in the rulemaking process have also contributed to additional rulemaking delay. McGarity argues that the growing complexity, and technical nature of rulemakings has caused agencies to become more focused on establishing the scientific basis for a given rulemaking. To this end, agencies have relied upon scientific advisory committees or independent scientific review processes to determine courses of action for rulemakings. While these scientific review processes can certainly be warranted, McGartiy asserts it, “Has both slowed down the rulemaking process and divested agencies of a certain degree of discretion to press the process forward” (p. 1398).

Substantive review mechanisms are utilized most frequently by the president and the courts, which have aided in lengthening the time to complete a rule. For example, presidents have relied upon appointed administrators to review agency rules to assure they aligned with presidential priorities (Kerwin & Furlong, 2011). Since President Reagan signed Executive Order 12,291, agencies have been subject to an additional political review process from the Office of Management and Budget (OMB). McGarity argues that “the OMB review process [has become] the primary vehicle for presidential micromanagement of the rulemaking process” (pg. 1429) and imposes “a significant drag on the rulemaking process in the executive agencies” (pg. 1436). For those rules that fit with a president’s priorities, agencies must still deal with the substantive review of the courts. McGarity argues that agencies have responded to heightened judicial scrutiny by developing rules that are “bulletproof” in that they are designed to withstand “the worst-case scenario on judicial review. This can be extremely resource-intensive and time-consuming” (pg. 1419). Nonetheless, McGarity suggests that “the net result of all of the aforementioned procedural, analytical, and substantive requirements is a rulemaking process that creeps along, even when under the pressure of statutory deadlines” (pg. 1436).

*A Contemporary Lens*

McGarity’s ossification argument has engendered additional research from scholars to evaluate its cogency. For instance, Kerwin and Furlong (1992) analyzed 150 Environmental Protection Agency (EPA) rulemakings and argued that the activities of the courts, the president, and Congress were significant factors in delaying the development of EPA rules. In addition, these scholars argued in subsequent research that this delay is occurring across the bureaucracy and may be getting worse (Furlong, 1997; Furlong & Kerwin, 2002). As a result, scholars have argued for the adoption of new approaches such as regulatory negotiations or shuttle diplomacy to help streamline or improve the efficiency of the rulemaking process (Fiorino, 1995; Freeman, 1997; Harter, 2000; Kerwin and Langbein, 2000; Fiorino, 2006; Rinfret & Cook, 2014).

Despite efforts to create new approaches to lessen or address ossification, some scholars have questioned its legitimacy (Coglianese, 2002; Shapiro, 2002). For instance, Yackee and Yackee’s (2010) empirical assessment suggests that McGarity’s (1992) procedural, analytical, and substantive review requirements did not lead to a significant increase in delay of rules across the bureaucracy from 1983-2006.[[2]](#footnote-2) And, most recently, Yackee and Yackee (2012) found that rulemakings created by agencies within the Department of Interior (DOI) from 1950 through 1990 did not produce rules at a slower rate as governmental institutions added more procedural requirements. Based upon these findings, one presumption is that McGarity’s ossification findings - that agencies are producing rules at slower rates than previously does not appear to be accurate at least in the context of the DOI.

While the aforementioned research is notable, we argue it is not definitive. The question becomes whether the aforesaid results might differ through a qualitative lens especially since some of the agencies within Yackee and Yackee’s (2012) DOI study, such as the NPS did see a decline in rulemaking effectiveness from 1950 – 1990.[[3]](#footnote-3) Therefore, the goal of this study is to offer a qualitative lens of the ossification debate. Put differently, we use McGarity’s ossification argument as a descriptive framework to examine three NPS cases with long standing histories – Yellowstone Winter Use Rule, Grand Canyon Boat Use Rule), and (3) the Gateway Personal Watercraft Use Rule.

A Qualitative Approach

In order to unpack the prevalence of ossification within the NPS, we offer a qualitative, case study approach. This approach is important, or as Yackee and Yackee (2012) argue, it can “provide high quality (and indeed, "scientific") evidence confirming or disconfirming a particular ossification-related hypothesis” (pg. 1481). Therefore, in order to better understand the role of ossification in NPS rulemaking; this research uses a multiple case study design. Yin (2009) argues that this approach is helpful for answering how and why an event or series of events occurred. Moreover, he suggests that a multiple-case study design is useful for providing generalizable results.

This research conducted twenty four semi-structured phone interviews with agency personnel and stakeholders across three cases. For each rule, three to five agency personnel were interviewed. The agency interviewees were identified through a review of the *Federal Register*, *Unified Agenda*[[4]](#footnote-4), and NPS employee directory. Only those agency personnel that were involved in the development of the rule were interviewed within each case.[[5]](#footnote-5) These interviews were conducted from Fall 2013-14. The goal of each interview was to provide background information about NPS rulemaking processes and what factors may cause delay in each of the cases.

The stakeholder interviews for this research ranged from four to eight per case.[[6]](#footnote-6) The agency interviewees and a review of public comments in the *Federal Register* helped to locate these participants in the process. The stakeholder groups interviewed for this study included industry groups, environmental organizations, public access groups, governmental organizations, and other nongovernmental organizations. Collectively, these interviews provided a primary account of how the rulemaking process unfolded.[[7]](#footnote-7)

*Case Selection*

Case selection is often a concern in qualitative research, or as Yackee and Yackee suggest, this approach can lead to a “tendency to make generalized claims about ossification on the basis of relatively limited anecdotal examples” (Yackee and Yackee, 2012, 1481). As a result, we reviewed the *Unified Agenda,* and found that from 2005-2012 the NPS has not published rules at a rapid rate. More specifically, the percentage of rules proposed and those finalized[[8]](#footnote-8) across George W. Bush’s second term and Barack Obama’s first term fell below 30%. Put differently, the NPS finalized under 30% of the rules it initially proposed, and this is 50 points below the historical average NPS finalization rate of 80% documented by Yackee and Yackee (2012).[[9]](#footnote-9)

Moreover, from 2005 to 2012 the average length of time for the NPS to complete[[10]](#footnote-10) any individual rule was approximately 3 years. If one reorganizes the data to reflect rules that have been re-proposed after being initially withdrawn, the time it takes to complete a rulemaking increases to over 3.6 years.[[11]](#footnote-11) As noted, a typical rulemaking is expected to take on average two years (Kerwin & Furlong, 2011).

Therefore, we selected three rules that deal with unique policy areas and have undergone significant delay for this study: the Yellowstone Winter Use Rule, the Grand Canyon Boat Use Rule, and the Gateway Personal Watercraft Use Rule. The Yellowstone Winter Use Rule was proposed in 1997 and finalized in 2013. The Grand Canyon Boat Use Rule also began rule development in 1997 and is expected to be finalized in early 2015. The Gateway Personal Watercraft Use Rule was proposed in 2003 and was withdrawn in 2011.

The goal here is to apply McGarity’s ossification elements (procedural, analytical, and substantive review) as a descriptive framework to examine the interview data from each of the cases to provide a contemporary analysis of NPS rulemaking processes. This should illustrate whether similar ossification elements are at play in these rules, and if this helps us understand why these, and potentially other rules at the NPS, have not been finalized more quickly.

The National Parks and Ossification

We begin our analysis with a brief history of each rulemaking in order to contextualize our findings beginning with an overview of the Yellowstone Winter Use Rule.

*Snowmobiles, Snowcoaches, and Supplemental EISs*

Perhaps the most widely known and controversial rulemaking across the NPS is the Yellowstone Winter Use Rule (a.k.a. Special Regulations; Areas of the National Park System, Yellowstone National Park Rule). Often promoted as the crown jewel of the park system, issues at Yellowstone National Park garner significant national and local interest (Layzer, 2012). In the case of the Yellowstone Winter Use Rule, the NPS was attempting to determine what level of snowmobile and snowcoach[[12]](#footnote-12) use was acceptable while protecting the environmental integrity of the park. The development of this rule spans the better part of two decades culminating in its most recent final publication in 2013, this section discusses that process.

Yellowstone National Park has been managing snowmobile use since the 1960s. The amount of snowmobiles entering the park was not a significant environmental issue until the 1990s, when the NPS began reporting that portions of Yellowstone had some of the worst air quality in the nation (Layzer, 2012). Therefore, in 1997 the Clinton administration urged the NPS to address this issue through EIS scoping sessions. During these sessions, the arguments of snowmobile opponents focused on the air pollution, noise, and wildlife impacts of the vehicles, while snowmobile proponents focused on the economic impacts of limiting or banning snowmobile use on local economies (Layzer, 2012). Upon the conclusion of these sessions, the NPS proposed a rule that included a phased in ban of snowmobiles in favor of limited snowcoach access to the park (Layzer, 2012). The NPS then codified the phased in ban in the final rule in 2000 (NPS, 1999). Snowmobile manufacturers sued the agency, arguing that the agency’s review of snowmobile air pollution was based on outdated information. When the George W. Bush administration entered office, the administration settled the suit and agreed to conduct a supplemental EIS addressing this concern (Layzer, 2012).

Equipped with a new EIS, the NPS argued that snowmobile use did not have a significant adverse impact on the park, and so the agency then finalized a rule in 2003 that allowed up to 950 snowmobiles per day (NPS, 2007; Layzer, 2012). In turn, the environmental coalition sued the agency. This measure was vacated by the U.S. District Court of the District of Columbia, along with two subsequent rules that cut the 950 number to 720 in 2004 and finally 540 snowmobiles per day in 2008. Each of these measures was overturned by the DC Circuit on the grounds that the NPS either did not sufficiently consider all the relevant environmental impacts of snowmobiles, such as trail grooming, or the decision making process was arbitrary (Layzer, 2012; Cook, 2014).

By the third lawsuit, President Obama was in office and a new rulemaking process began in 2009. In what has now become a familiar process, the agency began another supplemental EIS in 2010. The concerns of stakeholders had somewhat changed, as snowmobile manufacturers questioned whether the NPS had adequately assessed whether snowcoaches, which had returned as the preferred option for individuals to access the park, were actually more beneficial from an environmental standpoint than snowmobiles. In comparison, environmental groups had new concerns regarding the stress snowmobiles put on wildlife and how trail grooming impacted wildlife travel within the park (Cook, 2014).

After several more iterations of the draft EIS, the NPS published a final rule in 2013, which allows up to 110 transportation events per day including up to 50[[13]](#footnote-13) from snowmobiles, and 60 from snowcoaches (NPS, 2013).[[14]](#footnote-14) This rule also set emission limitations along with noise restrictions for each type of transportation. Thus, after 20 years of activity, the agency had finalized a rule that answered the question, how many snowmobiles are allowed in Yellowstone National Park.

*Battle of the Boats*

The Grand Canyon Boat Use Rule (a.k.a. Special Regulations; Areas of the National Park System) has a similarly long history and often described as complex due to the variety of actors involved ranging from local tribes, national environmental organizations, states, park staff, to boaters. The issue of concern is how best to manage a 277-mile section of the Colorado River that travels through Grand Canyon National Park. The planning process for this rulemaking contained several important steps, which are briefly explained here (NPS, 2006).

For many, the origins of this rulemaking date back to the late 1930s when the first professionally run river trips began on the Colorado River. And, by the 1970s concerns grew over the increased use of motorized boats on the Colorado River. The NPS devised their first Colorado River Management Plan (CRMP) in the 1980s on how best to use the resource, with the goal that the agency will periodically revise to meet changing demands of the park. The CRMP has undergone several iterations, with the most recent efforts dating back to 1997 where the story of this rulemaking begins (NPS, 2006).

In 1997, the NPS put forth an extensive effort to reach out to the public or affected stakeholders to initiate revisions to the CRMP. The agency held several scoping sessions and stakeholder workshops which led to feedback from a variety of vested interested. One of the topics for consideration was whether or not motorized boats could be used in designated areas of wilderness of the Colorado River. Defining “designated wilderness” led to confusion and an eventual NPS suspension of the CRMP process due to the lack of congressional direction. In 2000, private boaters and wilderness groups sued the NPS for suspending its planning processes. An agreement was eventually reached between groups by 2002 and the NPS recommenced its CRMP processes. These efforts lead to the release of a draft EIS in 2004, which was finalized in November 2005 (NPS, 2006).

In October 2006, the NPS issued its revised CRMP. The plan focused on river allocation use between commercial and non-commercial users on the Colorado River within the park.[[15]](#footnote-15) The concern was access or use of the river - self-guided, non-commercial boaters became seemingly frustrated that they were placed on a waitlist under previous CRMP’s, which could take years, if not decades to access the river. In turn, commercial outfitters were often permitted to provide trips on the Colorado River within the Park at will. The resolution was for the 2006 CRMP to allow commercial river outfitters under contract with the NPS to conduct a variety of trips, while permits for non-commercial river trips would now be placed on a weighted lottery system (NPS, 2006).

Due to the efforts of the 2006 CRMP, the NPS proposed the Grand Canyon Boat Use Rule for public comment on how best to update its regulations of boat use based upon the findings from the 2006 CRMP. This proposed rule required all boaters to get permits from park staff, and it allowed the Park superintendent to limit the total amount of permits (NPS, 2009). Though the public comment period ended in September of 2009, the agency does not expect to finalize the rule until Spring 2015.

*Safe and Clean or Dirty and Dangerous?*

The Gateway Personal Watercraft Use Rule (a.k.a. Gateway National Recreation Area, Sandy Hook Unit, Personal Watercraft Use Rule) deals with another aspect of water use across the parks and specifically whether personal motorized watercraft (PWC) or jet skis can be safely allowed in the park and if so where. Situated within the heart of the New York City metropolitan area, Gateway is inherently different from Yellowstone and Grand Canyon. In fact, Gateway is made up of three distinct units including the Jamaica Bay, Staten Island, and Sandy Hook units. The rule under review here deals with the Sandy Hook Unit or 1,665 land acres and 7.5 miles of ocean beaches and coves on the northern New Jersey coast (NPS, 2006). Not surprisingly, as PWC use increased across the park system, Gateway was a popular location (NPS, 2006).

Gateway was required to address the impacts of the increased use of jet skis in the park, after the promulgation of the NPS-wide rulemaking regarding PWC use titled: PWC use within the NPS System Rule in 2000 (NPS, 2000). This rule required each individual park that allowed PWC access, to evaluate the impacts of that access on the environmental quality of the park. Based upon that assessment, the park was required to set appropriate limits on PWC use. If each park did not conduct such a rulemaking, PWC would be banned entirely (NPS, 2000).

Because Gateway allowed PWC in the park, staff started working on an environmental assessment (EA)[[16]](#footnote-16) of PWC use shortly after the national rule was published (NPS, 2006). Agency staff concluded that 35% of all water users in the park used PWCs. In the EA agency personnel evaluated the pollution associated with these jet skis, whether PWCs represented a safety issue, and the impacts jet skis have on fragile wetland ecosystems. The controversy here focused on how the park should balance recreation and access to the park, while also protecting the park’s shallow water ecosystems. Gateway published an EA in 2003 at which time the two year deadline for finalizing a rule had passed so the national mandated ban of PWC took effect (NPS, 2006).

Regardless, the agency continued work on this rulemaking, completed the EA, and published a proposed rule in 2006. This rule would have banned PWC use within much of the Sandy Hook Unit, but allowed access through the Shrewsbury River channel that grants passage to reach other waterways (NPS, 2006). This proposed rule was withdrawn Fall 2011, and was not reintroduced. Though the agency did not publicly explain this action, one interviewee commented that the rule was withdrawn, because “the superintendent [at the time] said we didn’t need to produce the EA if we selected the no action alternative…that was new to me…[but] the decision was made by the superintendent that basically ended the process.” As a result, the initial ban imposed in 2002 became permanent.

The NPS and Ossification

As each case indicates, these rulemaking processes were indeed time-intensive. We now turn to the three driving elements of McGarity’s ossification framework - procedural, analytical (science), and substantive review to evaluate if ossification, as described by McGarity was the culprit.

*Congress, NEPA, and Wilderness*

 Recall, the procedural element within McGarity’s approach encompasses the additional analyses mandated by the president, Congress, or the courts. When comparing the three cases, interviewees identified procedural requirements by Congress, namely the NEPA process, as the most significant impediment.

 For example, interviewees commented that the congressionally mandated NEPA process aided in the longevity of the Yellowstone Rule, and this was made worse because the agency mishandled the process. First, one interviewee with an industrial perspective argued “we had six or seven EISs for this rule.” Thus, the NEPA process certainly resulted in delay, and a recreationist argued that the NPS had to do so many EISs because “they do internal studies and open only a few areas for consideration in these processes.” The agency is then generally disinterested with the input of stakeholders as this interviewee went on to assert the NPS uses the scoping sessions “to check a procedural box and move on, and that’s it.”

Stakeholders laid some of the blame for the delay resulting from the NEPA process, on Yellowstone’s superintendents. One interviewee noted that Yellowstone had three superintendents over the course of this rulemaking, and each superintendent’s perspective on the snowmobile question colored the process. For example, an industry representative argued “The first was arrogant and basically said that snowmobiles are finished in the park. The second was easy going and in the middle but no overt effort to bring stakeholders into the process. The third has been very engaged constantly with groups across the process.” Thus, the NEPA process inherently caused delay in this rulemaking, and this was exacerbated by agency personnel activities at the park.

Agency personnel generally defended their activities in this rulemaking arguing that “we have to follow NEPA requirements, it is the law, and sometimes it does take a long time.” However, one agency employee mentioned that the agency does make determinations based on “what should be covered under an EIS, that is a judgment call on whether you have the right information, and sometimes we are wrong on that.” Thus, the agency response to concerns regarding the NEPA process was to suggest that their management of the process was not at fault, it was factors outside of their control.

In turn, the procedural requirements cited as causing delay by interviewees for the Grand Canyon Boat Use rule differed slightly. The focus was two-pronged – NEPA and wilderness designation. For example, one interviewee noted, “You have to remember that this rule really started before NEPA was created or on the books.” Thus, as another interviewee notes, “When you are trying to determine access of the Colorado River pre and post-NEPA it becomes complex.” And as one member of a boating association noted, “In the late 1970s this was a big fight - we had engine concerns, the commercial boaters tried to keep their motors on the river, but in the end, this is going to be a losing battle because Congress passed NEPA. You can’t [muck] up the water with your dirty engine.”

Despite these sentiments, many interviewees focused on other issues that prolonged the process such as defining wilderness designation in the Colorado Management Plan, which led to evaluating who had the most access to use the river.[[17]](#footnote-17) One individual representing an environmental organization noted, “This rule is so complicated and was really driven by what designated wilderness is. If we can’t even define this, how can we come up with a plan to manage the river?” Interestingly, some representatives from the non-commercial boating sector also wanted to make sure the river was indeed preserved for future generations to use. Or as one person noted, “We really wanted to help to protect this concept of wilderness for the river.” In contrast, commercial boaters believed that they were also able “to preserve the wildness of the river.”

In response to some of the issues raised by interviewees, one NPS representative suggested, “The management of the river has changed over the life of the park since President Roosevelt. And, we have done our best to really work with all the parties involved. Because of the changing requirements enacted by Congress, an interviewee from the NPS noted, “The process becomes slow and cumbersome because it takes time to make adjustments. You can’t just change something overnight; you have to work with the various stakeholders that will be impacted. This is our responsibility.”

 Like Yellowstone, the Gateway interviewees highlighted the impact that the NEPA process had on the PWC rulemaking. Recall, the agency was required to assess the environmental impacts of PWC on the park and devise a policy that mitigated those impacts. One environmentalist highlighted the length of time associated with the NEPA process, and questioned its transparency asserting the “park seemed very negligent in their process…I commented in 2003 followed up with them about five years ago and they said we haven’t made a decision we will publish that information when we make a decision…you [the interviewer] were the first one to tell me the status of that rule.”

Agency personnel agreed that the NEPA process caused delay in this rulemaking, largely because the park was not well equipped to carry out the assessment. For example, one interviewee commented “we were really weak on compliances procedures at the time we have gotten better since then, in hiring the right staff to carry out these procedures biologists and cultural resources folks before it was just me.” In this case the lack of expertise and available resources to conduct the NEPA process resulted in delay.

 By way of summary, while the intent of Congress in creating NEPA or wilderness designation is to protect the environment, the implementation of these policies by agencies such as the NPS can lengthen the time by which an agency creates a rule. This was clearly indicated by the interviewees and some with visible frustration because as one interviewee noted, “Why can’t the NPS move a little faster, it takes eons for them to finalize a rule.” As a result, McGarity’s procedural requirements did aid in explaining delay across these three rulemakings.

*The Politics of Science*

 Recall, the second element of McGarity’s explanation of rulemaking ossification is analytical requirements, namely the use of science in rulemaking, which can extend the process. Though the role of science in delaying these rulemakings was highlighted by interviewees in both the Yellowstone and Gateway cases, it was not a dominant theme noted by interviewees as an issue in the Grand Canyon Rule.[[18]](#footnote-18) This was in part because in both the Yellowstone and Gateway case the driving concerns were the impacts associated with snowmobiles and PWCs on park ecosystems, thus science was employed to inform these rules. In comparison, science was not a predominant theme documented by the Grand Canyon rule, due to concerns with who was able to raft the river, how many boats, and what groups can obtain a permit.

The driving scientific controversy in the Yellowstone case was the impact of snowmobiles and snowcoaches on the Yellowstone ecosystem in terms of their physical impact along with their air emissions. These are conceivably science related concerns, and as such one stakeholder argued “science is important because it provides the factual information needed to propose a rule.” However, stakeholders were critical of the efforts of the agency as one environmentalist argued “the agency discredits evidence that is not to their liking” and an industry interviewee suggested “this is very much a politically driven process . . . not based on sound science.” For example, an industry representative argued that their organization asked the NPS to analyze snowcoach emissions and the agency did not respond until “the EPA came in and basically demanded that the NPS look back over their emissions data. No one had tested them, and EPA forced the NPS to test them.” As a result, the agency had to delay the rulemaking in order to re-evaluate these emissions.

Gateway dealt with inherently similar concerns related to the role of science in that rulemaking, but the controversy here dealt with the physical impact and water pollution associated with PWCs. Environmental interests were concerned about the agency’s scientific data on PWC impacts as one interest argued that the agency “needed more evidence for noise impacts and air quality concerns.” In comparison, one manufacturing interviewee argued that the agency should revisit its “original purpose and justification of excluding PWC from gateway and [determine whether] those are valid based on modern technology.”

NPS personnel across these two cases voiced a similar response in regards to the role of science in these rulemakings. For example, one agency staffer from the Yellowstone case asserted “rules should be based on science, fidelity to the law, and the best interests of the public.” Yet, one agency interviewee from the Gateway case noted basing rules off of sound science is inherently problematic because “you can find science to support any particular claim, that doesn’t mean it is good science, so the idea is these groups then use their science which supports their position and stand by that.” Thus, this interviewee went on to assert that it is the agency’s job to sift through the information to find the science that should inform their decision. However, an interviewee from the Yellowstone case suggested “that these are not pure processes and external factors influence the outcome” including the superintendent’s and political appointee perspectives on what science should be employed and then “outside groups challenge the science in order to influence the outcome.” Thus, how the agency attempts to deal with these factors can have impacts on the longevity of the rule.

In sum, the role of science in these particular cases caused delay, but not in the way McGarity suggests. Here the concern from interviewees was that the agency was arbitrarily selective of scientific information. As a result, stakeholders claimed these processes were both incomplete and potentially impacted by the views of agency staff. This somewhat contrasts McGarity’s assertion that external scientific review processes are the culprit. Nevertheless, the overall suggestion by McGarity that science, which is inherently inconclusive, can result in delay in rulemakings is accurate both when external scientific review and internal review processes are employed.

*Substantive Review*

The final element of McGarity’s framework – substantive requirements – captures the political and judicial review processes on agency rulemaking. One interviewee aptly summarized the role of the three branches of government in regards to NPS rulemakings suggesting “the courts evaluate the process the agency used; the legislature can try to stop funding the process of rulemaking… [and] the president’s people [appointed officials] can direct the outcome of agency activities.” Across the cases, the impact of presidential political appointees and/or the role of the courts was most apparent.

For instance, interviewees from the Yellowstone case were convinced that presidential political appointees and the courts were significant contributors to the uncertainty and delay of this rule. Several interviewees noted that the role of political influences from appointees was a strong delay factor in the Yellowstone case, or as one interviewee said “it is a little disconcerting to come to an agreement with NPS staff and then watch that person’s superiors change the outcome of the process.” Agency personnel concurred on this point as one staffer suggested “Interior has a biased opinion, and political appointees have agendas, they want to have a legacy and they likely have a bent towards the agenda of the president.” Moreover, one agency interviewee suggested it is these officials that can determine “whether we move ahead with a new review in two days or two months.” As a result, political appointees can cause delay in the process.

The courts have also been very active in perpetuating the longevity of the Yellowstone rule, and this has been influenced in part by this political appointee meddling. As one agency staffer asserted we always strive to “put out something that is defensible in terms of our mission and legally,” but political appointees have often influenced this process causing the courts to intercede (Layzer, 2012). One interviewee elaborated on this suggesting that “the 2000 final decision is a good example of this where the final EIS came up with an entirely different alternative from what was in the draft and this was thrown out by the courts that was a political change to add the alternative.”

Interviewees argued that the presence and activities of stakeholders has also increased the role of the courts in this and other rulemakings. For example, one recreation interest asserted that the NPS decision making calculus has forever changed, because “the environmental groups are no longer the only ones that sue, ever since we built up our legal department the agency has been more interested in hearing our concerns. Recreationists will no longer just roll over and accept what the agency does.” As a result, the courts were a source of delay in the Yellowstone rule due to both political appointee and stakeholder actions.

Likewise, in the Grand Canyon Boat Use Rule, the interviewee sentiments were that the rulemaking takes a lot of time because as one interviewee noted, “We are Grand Canyon National Park, we have worldwide attention on all of our actions and with this brings a lot of politics.” there are always directives on what to do from Washington, this creates a lot of pressure and can lengthen the time to move forward.” Thus, in this case, there are often cross pressures from various entities and in the agency’s opinion.

Moreover, this “political environment drives groups to sue the Grand Canyon National Park.” Environmental organizations and boating associations interviewed were frustrated with the prolonged NPS rulemaking process. According to one boating representative, “We had to sue the NPS; otherwise we would have never had a Colorado River Management Plan or even a rule for that matter.” Similarly, an interviewee from an environmental stated, “You often have to use the courts to get the NPS to move forward.”

Gateway was also driven by a litigious decisionmaking environment. As one NPS employee mentioned “the regional office didn’t want to make any mistakes on this, they wanted to avoid litigation. Very tedious process…we would go over every sentence, then there were the comments, and this was on top of all the other compliance issues we were juggling and before you know it six or seven years go by.” Most recently, after the agency withdrew the rule, one staffer suggested “there wasn’t any pushback, because it hadn’t been an active rulemaking for a long time, really the highest involvement was after the initial national rule went into place.” As a result, the agency’s initial concern regarding litigation caused significant delay in the process, and by the time the agency made a decision to withdraw the rule, most interested parties had already stopped paying attention.

Thus, in terms of substantive review, each case encountered political obstacles or rather substantive review requirements that lengthened the rulemaking process. These substantive review elements (i.e. involvement of political appointees, litigation) resulted in additional delay of all three of these rules.

Implications and Conclusion

McGarity’s ossification elements were driving factors in explaining the longevity of the rules across these three unique cases. Yet, this begs the question, what, if anything, can the NPS do to reduce this ossification for future rulemakings? The interviewees in all three cases provided some recent changes in NPS rulemaking processes that may provide some answers to this question.

First, some stakeholders suggested that the commitment of recent Yellowstone staff to incorporate more meaningful stakeholder engagement throughout the rulemaking process was a useful innovation. For example, one interviewee commented the “Park service has reached out to stakeholders more forcefully then they have in the past. I think that is one of the strengths and they are doing it throughout the process.” One agency employee from the Yellowstone case, voiced this commitment suggesting that “stakeholder input can be critical to any process by providing information to [augment the agency’s] conclusions.”

However, the amount of stakeholder engagement that a park does for a rulemaking is contingent on the values of the park’s superintendent as one former NPS employee argued “superintendents have a lot of control regarding how much stakeholder input the agency does and who participates.” Unfortunately, this interviewee argued “a lot of superintendents think they exist at the left hand of god, and have a [my way or the highway] mentality, and that is still there to some extent.” Thus, superintendents that choose to employ a more stakeholder focused rulemaking process may have better results than the more conventional approach, particularly during NEPA related processes.

Finally, reducing the impact of substantive review processes will be much more difficult because of the NPS’s inherently contradictory mission which requires the agency to balance environmental protection of parks with public access (Cook, 2014). How the agency strikes this balance, will undoubtedly remain controversial particularly for rules that deal with high profile parks like Yellowstone and the Grand Canyon. To reiterate this point, one agency interviewee elaborated “Yellowstone is different from most parks; there is no such thing as something that won’t be controversial at this park.” Moreover, another agency interviewee suggested, “Grand Canyon is a crown jewel and with this comes controversy. People will fight for it until their death.” Thus, it is unlikely that rules at Yellowstone or the Grand Canyon will see reduced involvement from political appointees or the courts. Despite these concerns, one NPS interviewee proclaimed, “What the NPS really needs to do is to have the courage in our convictions. We should publish a rule when we believe it is ready instead of being afraid that someone is going to sue us.”

In short, this research should not be viewed as the last word on whether ossification exists across the NPS, but rather, a baseline for future research. The rules we analyzed here are salient cases within the NPS and scholars should assess whether the elements identified here are also prevalent in less salient cases. Furthermore, subsequent research should evaluate whether these ossification elements result in the delay in rulemaking efforts across other public land agencies such as the Bureau of Land Management (BLM), which has received unprecedented public attention due to rulemaking efforts to address oil and gas development on public lands. An analysis of how other agencies that produce highly controversial rulemakings such as United States Fish and Wildlife Service (USFWS) endangered species listings or United States Forest Service (USFS) wilderness designations could also be of value to determine if the antidotes to ossification documented in this study are applicable.

Nevertheless, the value of this research is that it provides a much needed qualitative perspective for the ossification debate and the role it can play in explaining delay in NPS rulemaking processes. Other federal agencies could benefit from learning from the mistakes of the NPS and seek to offer solutions to produce more efficient, and likely effective rules.

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1. Yackee and Yackee (2010: 2012) empirically assess rulemakings across the federal bureaucracy from 1983-2006 and then focus on rulemakings within the Department of Interior from 1950-1990 to suggest that ossification is overstated. [↑](#footnote-ref-1)
2. However, these scholars noted that this did not encompass the time period before the mid 1970’s when, according to McGarity, the rulemaking process was not ossified. [↑](#footnote-ref-2)
3. The scholars do discuss the rulemaking process with 11 current DOI agency personnel; however these interviews appear to focus on what changes the agency personnel would recommend to improve the existing process, as opposed to analyzing what factors impact the process most directly (Yackee & Yackee, 2012). [↑](#footnote-ref-3)
4. The *Unified Agenda* is a biannual publication that catalogues all U.S. federal agency actions since 1995 and is accessible at: <http://www.reginfo.gov/public/do/eAgendaMain>. [↑](#footnote-ref-4)
5. Only a few agency personnel are assigned to write a rule due to budgetary constraints (Kerwin & Furlong, 2011). [↑](#footnote-ref-5)
6. Identifying and locating stakeholder participants in these rulemakings was problematic due to the duration of the processes and in particular the amount of time from the publication of a proposed rule until today. [↑](#footnote-ref-6)
7. The snowball method was also used to obtain interviewees for this research. After each interview, the interviewees were asked to name additional individuals involved in the rulemaking process (Patton, 1990). [↑](#footnote-ref-7)
8. Finalized rules refer to any rule that resulted in a published final rule. This also includes final actions and interim final rules. This and subsequent percentages were determined by reviewing the unified agenda for proposed actions and completed actions each year from 2005 to 2012. [↑](#footnote-ref-8)
9. If one adds withdrawn rules as a successful finalized action these percentages increase to 67% for Bush and 70% for Obama. Typically withdrawing a rule results in a significant waste of time and resources, so we argue they should not be considered positive or successful developments. [↑](#footnote-ref-9)
10. Completed rules in this case refer to any finalized action or when a rule is withdrawn. [↑](#footnote-ref-10)
11. Often the NPS will withdraw a rule and propose a new rule that either selects a different alternative to deal with a problem associated with a previously proposed rule, or to limit the scope of a previous rulemaking. This average was determined by identifying when a rule was initially added to the unified agenda and when it was listed as a completed action in that publication. [↑](#footnote-ref-11)
12. Snowcoaches are enclosed multi person over snow vehicles (NPS, 2013), these can be best described as small over snow tour buses. [↑](#footnote-ref-12)
13. An event would be equal to a seasonal average of 7-8 snowmobiles traveling together, while a seasonal average of 1.5 snowcoaches corresponds to 1 event. [↑](#footnote-ref-13)
14. http://www.nps.gov/yell/parkmgmt/upload/Final\_Rule\_Yellowstone\_National\_Park\_Winter\_Use\_-10-23-2013.pdf. [↑](#footnote-ref-14)
15. A commercial trip is an outfitter guided trip and a non-commercial trip is self-guided travel on motorized or non-motorized rafts. [↑](#footnote-ref-15)
16. NEPA requires the development of EAs in those cases where an action’s environmental impacts are not known, while EIS’s are required when an action has known environmental impacts. [↑](#footnote-ref-16)
17. This rule or the issues surrounding wilderness originate from the Wilderness Act of 1964. The agency had to figure out how much access was allowed while maintaining its wilderness qualities. Stakeholders interviewed here stressed that this caused delay in the process. [↑](#footnote-ref-17)
18. The Grand Canyon Boat Use Rule did undergo an EIS and interviewees did mention this process, but the focus of each interview noted other prevalent issues that drove the process. [↑](#footnote-ref-18)