

Unit 4 Regulation: Legislation and the Political Process

Administrative agencies are created by Congress (or the General Assembly at the state level) to carry out its laws. Administrative agencies have three functions: legislative, adjudicatory and administrative. Administrative agencies have no power except that delegated to them by Congress. Statutes passed by Congress set the parameters for regulation but often lack specific details. Agencies fill in the gaps in statutes by developing regulations based upon the authorizing statutes. This process is called rule making. Rule making is the legislative function of agencies. Sometimes individuals have disputes with regulatory agencies. The process by which agencies resolve these disputes is the adjudicatory or judicial function. Agency also manage government property and programs; these are the administrative or executive functions of agencies.

Rule making is governed by the Administrative Procedure Act (APA) (there is a state equivalent). There are five steps in rule making:

1. Review of the proposed rule by the Office of Management and Budget (OMB)
2. Notice of the proposed rule published in the *Federal Register*
3. Receipt of public comments
4. Review of the draft final rule by OMB
5. Publication of the final rule in the *Federal Register*

Once the final rule is published it becomes law. There are three types of rule making; they are different only at the public comment stage. In informal rule making the agency receives only written, unsworn comments. In formal rule making the agency formal public hearings where witnesses are sworn and subject to cross examination. In hybrid rule making unsworn written comments are accepted and informal public hearings are conducted. Witnesses in an informal public hearing are not sworn and are not subject to cross examination. Hybrid rule making is the variety most often used by agencies.

There is also exempt rule making that is not subject to these steps. Military and national security matters where secrecy and speed are of essence are exempt from the requirements of the APA. There is also an exemption for emergencies. An emergency rule may be issued without public comment; however, public comment must be taken after the rule issues and the rule is subject to revision based upon the comments received. There are also exemptions for interpretive rules and general policy statements. These last two categories purport to merely state the manner in which an agency will enforce existing law without adding to or subtracting from that law. Courts take a highly skeptical view of exempt rule making because it provides little or no opportunity for public comment.

Public comments are a key part of the rule making process. It is the expertise that the public provides through their comments that help the agency improve the quality and workability of their rules. No agency can have within it all of the expertise needed to develop a rule so agencies must rely heavily upon public

comment. Early in my career I served as an economist in the Agricultural Stabilization and Conservation Service, now the Farm Service Agency of the U.S. Department of Agriculture, where I was involved in preparing rules (regulations) governing the commodity and conservation programs. Part of the job included reviewing public comments. The work gave me a feel for the type of public comments that have the most impact. The post cards distributed by interest groups to their members contain little information and have little impact. Abusive or threatening comments likewise have little impact. The most useful comment is an individual letter that is well-reasoned and documented. I have seen a single such comment result in significant changes to a final rule.

Rules made by agencies are subject to judicial review. There are four grounds upon which a court might set aside an agency's regulation. First, if the statute authorizing the regulation is unconstitutionally vague. Congress violates the Constitution when it gives blanket authority to an agency. The statute must set out the agency's authority and the limitations on that authority with sufficient specificity to satisfy the Constitution. There is a large body of decided cases that defines the border between that which is sufficiently specific and that which is not. Second, the statute authorizing the regulation may itself violate the Constitution. If the authorizing statute violates the Constitution then the regulation based upon the statute may not be constitutional either. Even if the statute itself is constitutional it is possible for the regulation to violate the Constitution. Third, the regulation may exceed the authority granted in the statute. Fourth, the agency may have failed to follow the correct procedure in issuing the regulation. The Administrative Procedures Act governs the development of regulations. The failure to follow the APA may be fatal to any regulation even if the regulation is otherwise valid.

The second role of any agency is similar to that of the court system. Agencies resolve disputes between agencies and individuals affected by agency actions. Administrative law judges or hearing officers generally hear these cases. Most agencies try to make their administrative law judges independent of the parts of the agency from which the dispute arose. Of course achieving this in practice is difficult and this is often a source of contention. If an individual is dissatisfied with the decision reached within the agency then that individual may ask a court to decide the dispute. However, courts will generally not hear disputes with agencies until all remedies within the agency have been exhausted. As a practical matter environmental law is mostly administrative law. Courts are very reluctant to overturn agency decisions. Most environmental disputes are settled by the parties and most of those that are not are decided within the agency adjudicatory process.

Agencies also have executive or administrative functions. These duties include advising the President and his cabinet and staff, conducting research, issuing permits, managing property, and administering contracts and grants. EPA has an important research facility here in the Research Triangle Park. EPA's weather

model that predicts the transport of air pollutants is based here. Forty percent of the land in the United States is government-owned so managing property is very important and can have major environmental consequences. Congress has required that much of EPA's mission be carried out through grants to governments, universities, and the private sector.

Limitations on the power of agencies include constitutional, statutory and institutional. As discussed above no agency can act absent constitutional and statutory authority. Institutional arrangements further limit the power of agencies.

These limitations have their sources in all three branches of government. The President appoints agency heads, and can also fire the heads of executive agencies at will. The OMB makes budget recommendations for each fiscal year. And the OMB reviews proposed and final rules prior to their publication in the *Federal Register*. The President also has the power to issue executive orders that limit agency authority. Judicial review has already been discussed; all agency actions are subject to judicial review. Congress exercises its authority over agencies in several ways. There are oversight committees for each agency. These committees can compel agency officials to explain their actions to them. If Congress is particularly upset with an agency's action it may repeal the agency's enabling statute. At that point the agency ceases to exist and its employees must look for other work. A less drastic remedy that congress employs is to modify the enabling statute to force the agency to comply with the wishes of Congress. Can also control agencies through the budget process. Congress may provide no funding for activities that it does not like or it may require that certain monies be spent on projects that it does like. Nominations of all political appointees to agency offices are subject to the advise and consent of the Senate.

There are three basic types of federal agencies. Executive agencies report to the President and their officials serve at the pleasure of the President (which means that the President can fire them without prior notice and without reason or for any legal reason). Independent agencies are independent of the executive branch. Their heads are appointed by the President but they serve for fixed terms and may not be fired by the President. Congressional agencies are creatures of Congress whose officials serve at the pleasure of Congress. The General Accounting Office (GAO) is an example of a congressional agency. The GAO often audits executive agencies responsible for protecting the environment. The EPA is unique among independent agencies in that its head serves at the pleasure of the President. This is the result of the process by which EPA was created. It was created by an executive order signed by President Nixon.

Resolution of Environmental Disputes Negotiating with Regulatory Agencies Mediation, Arbitration & Litigation

Regulatory agencies may sanction violations of environmental laws through civil or criminal actions or both. Federal criminal prosecutions are conducted by the

Justice Department in cooperation with the subject matter agency. In criminal prosecutions the government must prove its case beyond a reasonable doubt. Defendants in criminal cases have a seventh amendment right to a jury trial.

Regulatory actions begin with investigation by the regulatory agency. Investigations are initiated by two alternative routes, citizen complaints or a neutral inspection scheme. A neutral inspection scheme is one under which no member of an industry is more likely to be subjected to inspection than any other member of the group with similar characteristics. There need be no suspicion of wrongdoing in order to conduct an inspection under a neutral inspection scheme. Numerically, the largest number of investigations are initiated as the result of citizen complaints to the regulatory agency. Inspections, however initiated, require a warrant in order to satisfy the fourth amendment, unless the subject of the investigation consents to the inspection. The probable cause needed for a warrant is low; courts almost never deny agency requests for warrants. Whether a subject should voluntarily consent to inspection or should require a warrant is a subject often discussed. In general, the inspection can be expected to be less adversarial if consent is given; however, the subject should involve their attorneys in the discussion with the agency so that the scope and objectives of the inspection are clearly defined.

After conducting the inspection, the agency has several options. It may conclude that there are no violations and that no further action is warranted. If action is warranted, the agency may issue an administrative order that defines the action to be taken by the subject to bring itself into compliance. For more serious violations the agency may assess a civil fine in addition to requiring remedial action. For violations that appear to involve criminal misconduct, the agency may refer the matter to the Justice Department for review. Attorneys in the Justice Department will determine whether the subject should be indicted.

Should the subject disagree with the terms of an administrative order or fine, it may use the agency's internal appeal process. Different agencies have different appeal processes; some are much more formal than others. Generally the appeal is heard by an administrative law judge. An administrative law judge is an agency employee who is independent of the agency employees involved in issuing the order or fine. If the subject is dissatisfied with the results of the agency's internal appeals process, it may then appeal to an appropriate court for relief. In the alternative the subject may ignore the agency's order and/or fine and force the agency to take it to court. Under some circumstances an interested party may challenge an agency's regulation without waiting for an enforcement action. The course that a regulated party takes in a dispute with the agency will depend on its circumstances, the statute involved, and the risks associated with each alternative course of action. The standard of review that is applied is an important consideration. For challenges to many regulations the standard of review is abuse of discretion, a difficult standard to overcome. For a court to find that an agency has abused its discretion, the court must find that there is no rational basis for the

agency's action.

In addition to those actions brought by federal and state agencies, environmental disputes may arise between private parties. Many environmental statutes have citizen suit provisions that permit private parties to enforce environmental laws through civil lawsuits. There are also other common law and statutory actions that may involve environmental issues.

There are alternatives to the courts for resolving environmental disputes. These alternatives are often cheaper than litigation and can reduce the level of acrimony associated with disputes. This can be particularly important where the parties must continue to deal with each other after the dispute is resolved. The two basic types of alternate dispute resolution are arbitration and mediation. In arbitration a neutral third party hears the disputes and makes a decision resolving it. The result may be either binding or nonbinding. If binding the parties are obliged to abide by the decision; if nonbinding the parties may either agree to follow it or ignore it and proceed to litigation. Mediation involves a neutral third party mediator who helps the parties reach a resolution of their decision but does not decide the issues as an arbitrator would. There are various variations of these techniques; some involve court supervision while others do not.