

contain editorial comments by the Office of the Federal Register including a guide to the legislative history, the date of consideration in each house and where the law will be codified in the United States Code (a codification of the laws of the United States arranged according to subject matter).

The legislative process in most states will be quite similar to the above, but will usually not include such a well-documented record of why the legislature took the action it did. At the local level, cities and counties are not likely to have two houses, are not likely to provide as much public notice and opportunity for input and are therefore able to act more quickly. It is not unusual, for example, for a local ordinance to be introduced and passed at the same council meeting.

As can be seen from the above, the legislative process at the federal level is rarely completed quickly. Prior to submission of a bill and during consideration, a great deal of behind-the-scenes work is done by congressional staffs. However, during the process, virtually all proceedings are open to the public so that interested parties have ample opportunity to follow the actions and make their opinions known.

AGENCY REGULATIONS

Often a piece of environmental legislation will merely set forth a policy or an objective and EPA will be given the task of drafting regulations to implement that policy or to meet that objective. Thus, regulations that are drafted and adopted by

government agencies often have a greater impact on the regulated community than legislation.

The theory behind the extensive use of regulations as opposed to legislation is the need for specialization. Each agency is presumed to have (or be capable of acquiring) greater expertise in a particular subject, making it wise to have the agency set standards and make policy decisions. Both EPA and OSHA possess a great deal of technical expertise and courts often give deference to their technical decisions.

All regulations must be adopted in accordance with some legislative grant of power. Some legislation, such as the Toxic Substances Control Act, contains an extensive list of the types of regulations EPA "may" issue. 15 U.S.C. §2605. Other laws require EPA to publish specific regulations within a set time after passage of the law. The more Congress believes that EPA may not share its view on an issue, the greater the likelihood that Congress will require certain regulations within a fixed time.

The following is an overview of how regulations come into being in the federal scheme. Most states follow similar procedures, but state versions of administrative procedure vary, and may provide fewer procedural safeguards for the regulated community.

The Administrative Procedure Act ("APA"), codified in Title 5 of the United States Code, contains procedures which all agencies must follow in issuing regulations. "Agency" is broadly

defined in the APA to include all authorities of the government, with certain exceptions such as Congress, the judiciary and the military. The APA outlines the procedures to be followed by an agency regarding rulemaking, licensing and adjudication.

A "rule" is broadly defined as "an agency statement of general or particular applicability and future effect, designed to implement, interpret or prescribe law or policy or describing the organization, procedure or practice requirements of an agency" While there are times that agency rulemaking and agency adjudication are difficult to distinguish, if the regulated community as a whole or a specific portion of it are involved, it is likely to be rulemaking. If one party or event is at issue, it is likely to be an adjudication.

Not less than 30 days before the effective date of a rule, general notice of proposed rulemaking must be published in the federal register. The notice must contain the terms or substance of the proposed rule, the legal authority under which the rule is proposed and the time, place and nature of any public rulemaking proceeding. There are exceptions to that rule, the most important of which are "interpretive rules" and the agency's power to make a rule effective immediately if it finds "that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest." "Interpretive rules" are rules in which the agency states its goal to merely interpret the statute and not to make any new law. These do not require public input because they are not binding on the courts.

It is rare that the public interest requires or permits dispensation with the full rulemaking procedures. Such "emergencies" do, however, occur from time to time. Otherwise, rules cannot become effective or enforceable unless the agency follows the appropriate procedures.

After the required notice, agencies must give interested persons an opportunity to participate in the rulemaking process. Participation may be in the form of written statements or oral presentations. It is not unusual for an agency to permit both written comments and oral comments at a public hearing. After considering the public statements, agencies must publish the final rule with a statement of the basis and purpose of the rule.

In practice, it is not uncommon for EPA and OSHA to solicit input from interested parties prior to making a proposal. The proposed rule will then contain a preamble which contains extensive discussion of the justification for the proposal. Additional comments are then received either at a public hearing or during the public comment period. The preamble to the final rule will usually respond to many of the comments received.

Negotiated Rulemaking

EPA has, on several occasions, employed a procedure called negotiated rulemaking. In this procedure, the agency invites interested parties and representatives of the regulated community to participate in the drafting of regulations. The primary goal of negotiated rulemaking is to permit the agency to

promulgate controversial sets of rules and avoid the protracted legal battles that often follow the issuance of such rules. The rules that result from this process are those upon which the working group can reach a consensus. This process does make rulemaking more efficient and save government time and money, but critics contend that the result of this process is often a watered down version of the rules the agency would otherwise have issued.

While the above rules appear to be fairly simple and straightforward, a great deal of litigation has analyzed such issues as what actions constitute rulemaking and whether a particular notice was sufficient. A primary means of attacking a body of regulations is to focus on whether the agency did everything right in promulgating them. Most law schools now provide courses in administrative law and administrative law is a specialty in many law firms.

Federal agencies now produce a large volume of regulatory material on a daily basis. Indeed, the daily index to the federal register, the list of actions taken by federal agencies on any day, is usually about 10 pages long.

Hearings

Agencies hold two types of hearings: (1) legislative hearings, where the agency is gathering information and views about a proposal and (2) adjudicatory hearings where a particular issue regarding a particular person is at stake. At a legislative hearing, members of the public voice their opinion

about a proposal. An adjudicatory hearing is "trial-like" and adversary. The procedures and rules of evidence, however, are less strict than in most courts. These two general types of hearings permit agencies to make law both legislatively and judicially. The body of agency decisions interpreting the law or regulations can be as important to understanding the law as review of the regulations.

Permits

Permits are, in a sense, regulations that apply to a specific plant, process or individual. Because the Clean Water Act's National Pollution Discharge Elimination System ("NPDES") applies to anyone who discharges waste water and thus applies to nearly all manufacturers, the permit procedures under this program have a broader impact than most sets of regulations. Additionally, at the state and local level many activities are regulated through permit systems. The following brief analysis of the Clean Water Act permit system is illustrative of such systems.

Basically, a permit from EPA or the state is required in order to discharge wastewater. States may enforce the Clean Water Act only after they convince EPA that they have the legal authority to implement and enforce its provisions. The NPDES permit will include nationally required effluent limitations and any more stringent water quality limitations based on the water into which the discharge will be made and other compliance

provisions regarding such matters as pollution control technology, timing and monitoring and reporting requirements.

The effluent criteria in a permit are set according to the limits of existing technology. Thus, EPA's view of BAT (best available technology) and BPT (best practicable technology) will play an important role in the process. Since both BAT and BPT require an analysis of costs, the technology based limitations can be the source of a great deal of disagreement between the agency and a regulated party.

Procedurally, the first step is submission of a permit application that explains the process the applicant plans to engage in, the technology it plans to use and what the discharge is likely to consist of. The application also must contain detailed information about the site, the geology of the site and the water system into which discharge is proposed. This application is then reviewed by the EPA staff or the staff of the relevant state agency. Many agencies have a procedure in place for assistance in preparing the application. This procedure can be helpful in expediting the completion of the permit process. The process for obtaining permit modifications is similar to the application process. A modification will be required for changes in the volume of wastewater, changes in limitations, changes in location or even changes in the owner of the permit.

The agency responds to the application by notifying the applicant that the application is complete or by listing the additional information it needs and additional conditions that

must be included in the permit. Among the standard conditions are:

1. The permittee agrees to comply with all conditions of the permit;
2. The permittee agrees to properly operate and maintain its systems of treatment and control;
3. The permittee agrees to take all reasonable steps to minimize or prevent any discharge in violation of the permit;
4. The permittee may not defend an enforcement action on the ground that it would have been required to halt or reduce plant operations to prevent the violation;
5. The permittee will permit the agency to inspect the facility and review documents;
6. The permittee will agree to follow strict monitoring, record keeping and reporting requirements.

When an applicant is dissatisfied with permit conditions imposed by EPA or a state, it will usually attempt to negotiate more favorable conditions. If the applicant is still dissatisfied, it is entitled to appeal permit provisions. The procedure for review is first an administrative agency evidentiary proceeding possibly followed by a court proceeding.

An appeal of permit provisions is rare. Typically, once the permit is in final draft form, the public is given notice of the permit and provided an opportunity to comment. A public hearing is required if there is substantial public opposition to the issuance of the permit. Based on this public participation, the draft permit may be modified. If any party is aggrieved, an evidentiary hearing process begins. This is often

a full-blown trial with both sides submitting expert testimony concerning why their position is most sound. After a final determination is made on the appropriateness of permit conditions, the permit is in effect.

There is something of a trend in the environmental area to increase the number of activities that are regulated by a permit system. Permit systems provide the regulators with greater information about what the regulated community is doing and permit greater flexibility depending on such factors as the activities a regulated party is engaged in and the location.

When Rules Become Effective

Within the federal register notice regarding a rule, the agency will state an effective date or effective dates. Many rules are effective immediately upon publication. Others, however, require major changes in the way certain businesses operate and, therefore, a phase-in period must be provided. Depending on the situation, final rules may not become effective for two years, or portions may become effective at different times. Additionally, it is not unusual for the final promulgation of a set of regulations to be followed quickly by a lawsuit. If the challenge to the agency's action is substantial, a court may issue a stay of the applicability of a portion of the regulations. In that case, one needs to follow the litigation in order to know what is applicable.

The General Accounting Office ("GAO") has the power to delay or prevent the applicability of regulations. Pursuant to

the paperwork reduction act, regulations are screened by GAO, which examines the costs involved. GAO has, at times, prevented the applicability of certain regulations until either the regulations are revised or further study takes place. GAO's action will be reported in the federal register just like any other rulemaking activity.

Finally, Congress in requiring the agency to issue regulations can set a deadline for when those regulations must become effective. Congress has, at times, included an enforcement provision, stating that if regulations are not in effect by a certain date, then a particular guidance document will become law. The purpose is to emphasize the need for the agency to act quickly.

EXECUTIVE ORDERS

Because EPA, OSHA and most of the other federal agencies are within the executive branch of the government, the president can, by executive order have an impact on the regulatory process. For example, EPA was created by President Nixon's reorganization of the executive agencies. President Nixon took environmental responsibilities from a number of agencies and put them into the new EPA.

The impact of official executive orders is primarily limited to such issues as procedure and structure. The president does, however, also have great substantive impact on the regulatory process. The president's "agenda" for what issues

need to be addressed is often translated into both congressional and regulatory action. More importantly, through the political appointment process, the president's priorities often translate into regulatory action or inaction. What rules are being enforced with the most vigor, what regulations are finalized with the most speed and what issues lie dormant are often controlled by the president. Thus, to a large extent, what the regulated community needs to be most concerned with is determined by the president at the federal level and chief executive at other levels of government.

There have been a number of cases in which the scope of the presidential power to regulate has been tested. In the Steel Seizure Case, President Truman's seizure of the steel industry by an executive order was held to be an improper attempt by the president to legislate. In contrast to that, the Supreme Court has held that Congress cannot maintain a "legislative veto" over executive action. That is, Congress' grant of rulemaking power to a federal agency cannot be conditioned on a vote by one house of Congress approving the regulations. The legislative veto would be "legislation" and requires the full legislative process.

TREATIES

The United States Constitution states that treaties entered into by the federal government are the supreme law of the land. Treaties can thus, supersede both state and local laws. There has been a great deal of international activity regarding