


Commonwealth of Virginia		
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Andrew Kubincanek, Program Coordinator		
Administrative Law Advisory Committee		

Regulation Adoption Date

The Issue:

What constitutes the "adoption" of a regulation for purposes of appealing a regulation "in the manner provided by the rules of the Supreme Court of Virginia"? (Sec. 2.2-4026 of the VAPA.) Rule 2A:2 of the Rules of the Supreme Court requires the filing of a petition within 30 days after "adoption" of a regulation.

Rule 2A:2:

(a) Any party appealing from a regulation or case decision shall file with the agency secretary, **within 30 days after adoption of the regulation** or after service of the final order in the case decision, a notice of appeal signed by the appealing party or that party's counsel. In the event that a case decision is required by § 2.2-4023 or by any other provision of law to be served by mail upon a party, 3 days shall be added to the 30-day period for that party. Service under this Rule shall be sufficient if sent by registered or certified mail to the party's last address known to the agency.

Background:

Attached is a decision by Judge Markow from May 2011 (Karr), in which he said the 30-day appeal period occurs after publication of the regulation in the Virginia Register. That decision differs from a prior decision of his (Sherwin Williams - also attached), in which he said the adoption date of a regulation is when the agency or Board takes collective action to adopt it. Note that Judge Markow's decision in Karr seemed to hinge on the definition of "regulation" in the APA, which is "any statement of general application, **having the force of law**, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws." He noted at the Karr hearing and in his Order that he did not believe that a regulation can have the "force of law" until it has been reviewed by the Governor and Attorney General and filed with the Registrar.

Then, on Nov. 22, 2011, the Court of Appeals issued the following decision:

<http://www.courts.state.va.us/opinions/opncavwp/2443102.pdf>

If you read pages 4-6, you will see that the Court discussed this issue and the confusion that exists, but did not come to a conclusion because, no matter which way the adoption date is

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calculated, the petitioner did not timely file. (In fact, an attorney in my office who was present during the hearing said it sounded like each of the three judges preferred a different answer - one thought it was the time of adoption, one thought it was the time of publication, and one thought it was after the final adoption period.) The Supreme Court declined the appeal and the petition for rehearing (which was untimely filed), and the Court of Appeals has entered an order certifying its judgment as final, so it is completely done and we are left without definitive judicial guidance on this question.

On the ALAC website in the Studies section, there is the Report of the Subcommittee to Study Interruptions of the Regulatory Process:

<http://codecommission.dls.virginia.gov/documents/alac/studies/2001/intereg.pdf>.

In that report on page 3, the response to Question 4 is informative on this topic:

"Question 4: Should an agency be required to republish a suspended regulation after the suspension period if no changes are to be made?

Answer: This seems unnecessary, particularly as to lengthy regulations. However, suspension of a regulation, as well as its reinstatement cannot be done informally. The public must be informed of what has occurred. The agency should therefore be required to furnish to the Registrar for publication a notice describing the prior publication, the prior notice of suspension, the agency's decision not to change the regulation and its action setting a new effective date.

A further question necessarily arises in this context as to when the previously suspended regulation was "adopted" for purposes of appeal under the APA and Part 2A of the Rules of the Supreme Court. *See* Rule 2A:2, which states in part:

Any party appealing from a regulation . . . shall file, within 30 days after **adoption of the regulation** . . . a notice of appeal.

Thus, if an agency first adopts a final regulation on Day 1, suspends it on Day 2 and sets a new effective date on Day 35, a notice of appeal challenging it must arguably still be filed within 30 days of Day 1. Suspension of a regulation means that the regulation is not effective and never will be unless and until the agency sets a new effective date. However, a potential challenger waiting for the latter could find that he is too late to file an appeal. The agency would have through this maneuver escaped judicial review.

To avoid this result, the agency should be required to readopt the regulation when it sets a new effective date, even if no changes are made. Of course, the foregoing is much less likely to be a problem if changes **are** made to a suspended regulation because the agency must take action to readopt and/or amend the regulation."

Note that § 2.2-4015(A) states that "[a] regulation adopted in accordance with this chapter . . . shall become effective at the conclusion of the thirty-day final adoption period provided for in

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subsection D of § 2.2-4013, or any other later date specified by the agency, unless:” either the legislature or the Governor take action to require further comment or request an amendment, or the agency takes action to amend the regulation.

However, “[w]henver the regulatory process has been suspended for any reason, any *action by the agency* that either amends the regulation or does not amend the regulation but specifies a new effective date shall be considered a *readoption of the regulation for the purposes of appeal.*” § 2.2-4015(B) (emphasis added). It is the action by the agency in finally approving and setting the language in the regulation that the General Assembly considers the adoption event “for the purposes of appeal.”

Further, § 2.2-4015(B) goes on to state that “[w]hen a regulation has been suspended, the agency must set the effective date no earlier than fifteen days from publication of the readoption action and any changes made to the regulation.” This must mean that the effective date is different from, and necessarily occurs after, the readoption date for the purposes of appeal - and thus that the adoption date, which must have occurred at some point before any readoption can occur, also differs from and precedes the effective date.

Basically, this section uses adoption to specify at least three different points in the regulatory process (adoption, readoption, final adoption period), and all three are different from the effective date.

Options to address this issue:

- 1) Amend § 2.2-4015 and/or other sections of the VAPA
- 2) Amend Rule 2A:2
- 3) Amend both

For discussion - Roger Chaffe has suggested the following amendment to Rule 2A:2:

(a) Any party appealing from a regulation or case decision shall file with the agency secretary, within 30 days after **the date on which, subject only to any readoption required pursuant to § 2.2-4015 (B), the agency takes final action to adopt** ~~adoption~~ of the regulation or after service of the final order in the case decision, a notice of appeal signed by the appealing party or that party's counsel. In the event that a case decision is required by § 2.2-4023 or by any other provision of law to be served by mail upon a party, 3 days shall be added to the 30-day period for that party. Service under this Rule shall be sufficient if sent by registered or certified mail to the party's last address known to the agency.

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Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

SUE KARR, HAROLD H. MCCALL
JAMES R. WEBB, and CAROL ANN WHITE

Petitioners

v.

CL11-321

THE VIRGINIA DEPARTMENT OF
ENVIRONMENTAL QUALITY, AND
DAVID PAYLOR, DIRECTOR, VIRGINIA
DEPARTMENT OF ENVIRONMENTAL
QUALITY

Respondents

ORDER

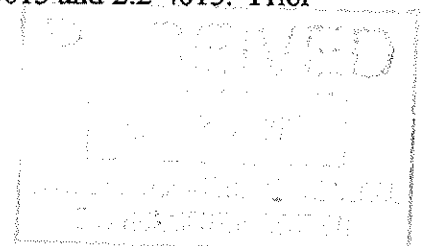
The parties appeared on May 19, 2011 for argument on the appellees' Plea In Bar.

The court finds that the petition was filed within 30 days of publication of regulation complained of by the plaintiffs.

The Commonwealth argues that the complaint should be barred as its filing was more than 30 days after the adoption of the regulation.

A petition must be filed within 30 days "after the adoption of the regulation." Supreme Court Rule 2A:2. A "regulation" is defined as "any statement of general application, having the force of law, affecting the rights or conduct of any person..." Va. Code Ann §2.2-4001.

The regulation complained of was adopted by the respondent Director on October 22, 2010. That is only the first step in preparing a regulation which has the force and effect of law. The Director's adoption could not have the force of law and affect anyone until it had been reviewed by the Governor and the Attorney General and filed with the Registrar of Regulations. See Va. Code Ann §§2.2-4012B, 2.2-4013 and 2.2-4015. Prior



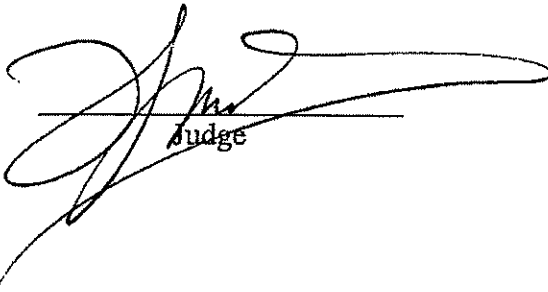
to this it cannot be a "regulation." Further, prior to a regulation becoming effective, there could be no person with standing to file a petition as his interests could not be affected by the regulation. Under that circumstance the court would be called on for an advisory opinion.

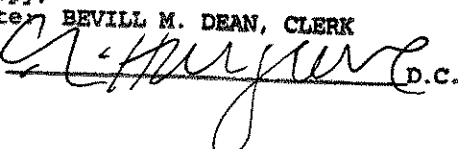
It is, therefore, ORDERED that the Plea In Bar is overruled.

The objections of the Commonwealth are noted.

Copies of this order are mailed to counsel of record.

ENTER: 57-231/1


Judge

A Copy,
Teste: BEVILL M. DEAN, CLERK
BY:  D.C.

Circuit Court
OF THE
City of Richmond
John Marshall Courts Building

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Office of the Attorney General
Environmental Unit

400 NORTH NINTH STREET
RICHMOND, VIRGINIA 23219-1999

T. J. MARKOW
JUDGE

October 5, 2004

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Re: Case No. CH04-722-3
The Sherwin-Williams Company
v.
Commonwealth of Virginia,
Air Pollution Control Board

Dear Counsel:

This case is before the court on a Plea in Bar of Jurisdiction. Appellant seeks judicial review under the Administrative Process Act, VA Code §2.2-4000 *et seq.*, of a regulation, referred to as Rule 4-49, which applies to Architectural and Industrial Maintenance Coatings, and was adopted by the Commonwealth of Virginia, Air Pollution Control Board.

Virginia Code § 2.2-4026 of the Administrative Process Act provides for judicial review "in the manner provided by the Rules of the Supreme Court of Virginia." Supreme Court Rule 2A:2 requires that "[a]ny party appealing from a regulation ... shall file, within 30 days after adoption of the regulation ... with the agency secretary a notice of appeal signed by him or his counsel" (emphasis added). In order for Appellant's Notice of Appeal to be timely, it

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Page 2
October 5, 2004

must have been filed within 30 days of the "adoption" of the regulation. Appellant filed its Notice of Appeal on March 22, 2004.

The parties disagree as to the date of "adoption." Appellant contends that the regulation was not "adopted" until the procedures outlined in the Administrative Process Act for the "final adoption" process were complete. Appellant argues that February 24, 2004, the date the regulation was published in the Virginia Register, is the appropriate date of adoption, and therefore, its Notice of Appeal was timely. Appellee argues, however, that the regulation was adopted on November 5, 2003, the date the Board voted to adopt the regulation, and therefore, Appellant's Notice of Appeal was untimely and the court is without jurisdiction. The court agrees with Appellee.

When the Administrative Process Act was originally enacted, the vote of the Board was the final act in the adoption of a regulation. Nine years later, the Administrative Process Act was amended to allow for legislative and executive review of the Board's vote to adopt a regulation. The Supreme Court, however, did not change its Rules to account for the amendment. While the court understands Appellant's argument that the subsequent amendment creates an ambiguity, it is quite clear that the original Administrative Process Act intended for the adoption date to be the date the Board voted for the regulation and no authoritative action has effectively changed this adoption date.

An incongruity exists between the Administrative Process Act, which uses the terms "adoption," "final adoption period," and "final adoption," and Supreme Court Rule 2A:2, which only uses the term "adoption."

Additionally, the Administrative Process Act's separate use of the terms "adoption," "final adoption period," and "final adoption" appears to create an inconsistency in the statute. However, the court, after reviewing the statute in detail, has determined that the term "adoption" refers to the date the Board votes for the regulation, the term "final adoption period" generally refers to the legislative and executive review and publication process, and the term "final adoption" refers

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Page 3
October 5, 2004

to the day after the 30 day publication period and is synonymous with the regulation's "effective date."

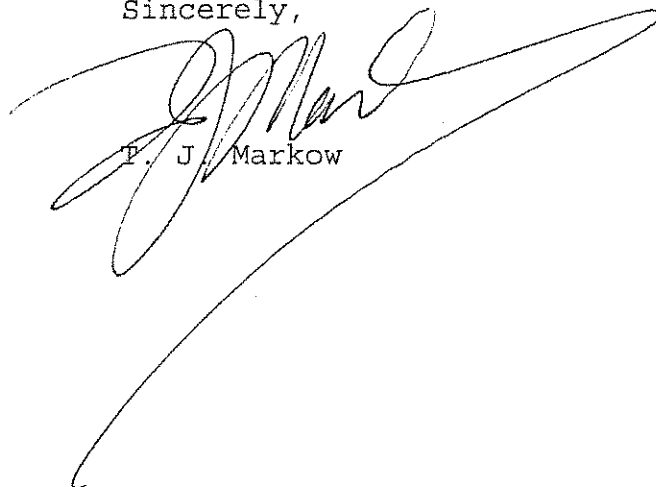
The court believes the term "adoption" contemplates a collective action by the agency. Accordingly, adoption constitutes the Board's act in voting for the regulation. The process subsequent to the Board's action, which is referred to as the "final adoption period," only impacts the regulation upon some objection by the governor or suspension by the legislature within the specified period of time. Without this, the regulation becomes effective as originally adopted by the Board. No further Board action is necessary for the regulation to become effective unless there is an amendment.

If the court was to accept Appellant's argument that adoption does not take place until after the review process, due to the incongruity between the Administrative Process Act and Supreme Court Rule 2A:2 and the inconsistency in the Administrative Process Act, it is unclear what date would constitute adoption.

Appellee argues that the date of adoption was the date the regulation was published in the Virginia Register. However, Appellee also argues that publication commences a 30-day "final adoption" period. These arguments are incongruous. It is unclear on which of these dates "adoption" occurs, the date of publication or 30 days after the date of publication.

The court is of the opinion that the term adoption refers to the date the Board voted to adopt the regulation. Accordingly, Appellant's Notice of Appeal was untimely. The Plea in Bar is SUSTAINED and the appeal DISMISSED.

Sincerely,



P. J. Markow

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Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building
Office of the Attorney General
Environmental Unit

THE SHERWIN-WILLIAMS COMPANY,

Appellant,

v.

Chancery No. 04-722-3

COMMONWEALTH OF VIRGINIA,
AIR POLLUTION CONTROL BOARD,

Appellee.

ORDER

This case is before the court on a Plea in Bar of Jurisdiction. Appellant seeks judicial review under the Administrative Process Act, code §2.2-4000 et seq., of a regulation, referred to as Rule 4-49, which applies to Architectural and Industrial Maintenance Coatings, and was adopted by the Commonwealth of Virginia, Air Pollution Control Board.

For the reasons stated in a letter opinion dated October 1, 2004, which is made a part hereof, it is hereby ORDERED the Plea in Bar is SUSTAINED and the appeal DISMISSED.

Copies of this order are mailed this day to counsel of record.

Enter: 10/7/04


T.J. Markow, Judge