


Commonwealth of Virginia		
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Administrative Law Advisory Committee		

Meeting Summary

Regulatory Work Group 5th Floor West Conference Room, General Assembly Building September 14, 2011, 2:30 P.M.

Members present: Tom Lisk, Elizabeth Andrews, Alex Skirpan, Cindy Berndt, Karen Perrine, Phyllis Errico, Mike Quinan, Angela Bowser, and Melanie West, Division Director at Virginia Department of Planning and Budget, and Jane Chaffin, Registrar of Regulations for the Code Commission, were guest attendees.

Staff present: Elizabeth Palen and Beth Jamerson

I. Welcome and Call to Order

- Tom Lisk, *Chair*
 - The meeting was called to order at 2:33 p.m.

II. Model State Administrative Procedure Act

- Discussion of Article 3
 - Section 307; Time Limit on Adoption of Rule
 - **Tom Lisk** noted that many times a delay in the regulatory process does not always occur at an agency level, but rather in the review stages, with the Governor's office or Secretary's office. If a time requirement is put on the review by the administration or the overall review period of the regulation, that review process will be constrained in some fashion. It is not simply the agency that contributes to a delay in the promulgation of a regulation.
 - **Melanie West** pointed out that the average time period for adopting a regulation is two years, which is the time limit the MSAPA recommends.
 - **Tom Lisk** mentioned that limiting the process to two years could place an additional burden on agencies if the average time period is already two years.
 - **Cindy Berndt** also pointed out that although agencies could extend the two-year period, this would initiate a second public

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participation period and a second executive review period, which could cause even more delays than the process experiences currently.

- **Elizabeth Andrews** noted that if the regulatory process is lengthy because agencies are working through issues with the regulation, then this is simply the process at work.
- *There was a consensus among the work group members not to recommend adopting a time limit on the adoption of a rule.*

◦ **Section 311; Guidance Documents**

- **Cindy Berndt** mentioned that although there is nothing comparable to § 311(b) in the APA, her experience is that during an administrative hearing, an applicant or permittee would be allowed to challenge the validity and legality of a guidance document. Although the APA does not provide for the formal process the MSAPA does, the process still occurs.
- **Tom Lisk** agreed that he is not aware of any agency that cannot already follow the process § 311(b) provides. He asked the group for thoughts on § 311(h), and whether there should be formal process by which the public can challenge the validity of a guidance document; if a guidance document is an incorrect statement of the law, then perhaps reliance on it to the actor's detriment could be prevented with a procedure to challenge its validity.
- **Mike Quinan** pointed out that one problem with creating a formal process to challenge a guidance document is that if someone tries to challenge its validity during a hearing, without having gone through the formal process first, the administrative law judge is unlikely to be swayed by because the petitioner had a chance to challenge the document and did not.
- *The work group agreed that incorporating any provisions of § 311 into the APA is unnecessary.*

◦ **Section 312; Required Information for Rule**

- *The work group agreed that the APA imposes the same requirements as § 312, and no recommendation is necessary.*

◦ **Section 313; Concise Explanatory Statement**

- **Karen Perrine** noted that aside from explaining why the agency did not accept an argument, all the provisions of § 313 are found in the APA.
- *The group did not feel that a recommendation regarding § 313 was necessary.*

◦ **Section 314; Incorporation by Reference**

- **Tom Lisk** noted that the intent behind this section appears to be to ensure that the public has the ability and the means to find out what rule or code section is being referenced.

- **Karen Perrine** mentioned that § 2.2-4103 essentially imposes the same requirements as § 314, but § 314 allows agencies to incorporate by reference all future amendments.
- **Jane Chaffin** noted that Code Commission regulations prohibit incorporation by reference prospectively.
- **Mike Quinan** suggested codifying the Code Commission limitation on prospective adoption to alleviate the confusion among agencies as to whether or not prospective adoption is permitted.
- *The work group agreed to recommend to the full Committee codifying the Code Commission's limitation on prospective incorporation by reference.*
- **Section 315; Compliance**
 - *The work group agreed making any recommendation with regard to § 315 is unnecessary.*
- **Section 316; Filing of Rule**
 - *The work group agreed any recommendation regarding § 316 is unnecessary as its requirements are already complied with in Virginia.*
- **Section 317; Effective Date of Rule**
 - *The work group noted that the timeframe for the effective date of a rule in the APA is the same as what is recommended in the MSAPA (30 days). Accordingly, no recommendation regarding § 317 is necessary.*
- **Section 318; Petition for Adoption of Rule**
 - *The Virginia APA provides for a slightly longer time period than that proposed by the MSAPA, but provides for a public comment period. There was a consensus among the work group members not to make a recommendation regarding § 318.*
- **Discussion of Article 1**
 - **General Provisions**
 - **Tom Lisk** asked the work group if there were any questions or comments regarding the Article 1 definitions; there were none.
- **Discussion of Article 7**
 - **Rules Review**
 - **Section 701; Legislative Rules Review Committee**
 - **Tom Lisk** noted that the Joint Commission on Administrative Rules (JCAR) is a standing committee of the legislature with the power to review rules.
 - *The work group agreed that a recommendation regarding § 701 is not necessary.*
 - **Section 702; Review by Rules Review Committee**
 - **Tom Lisk** acknowledged that JCAR does not automatically receive a copy of all adopted rules of agencies as suggested

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by the MSAPA, but doing so might be too onerous a burden on part-time legislators.

- *There was a consensus among the group not to make a recommendation regarding § 702.*
- **Section 703; Rule Review Committee Procedure and Powers**
 - *The work group members agreed that § 703 provisions would not work well in Virginia as the legislature in part-time. Accordingly, no recommendation regarding § 703 will be made.*
- **Discussion of Article 8**
 - **Miscellaneous Provisions**
 - **Section 801; Relation to Electronic Signatures in Global and National Commerce Act**
 - **Tom Lisk** noted that agencies in Virginia are granted discretionary authority to accept electronic signatures, rather than a mandate.
 - *The work group agreed that as there have been no issues or complaints regarding electronic signatures, moreover, it may not be appropriate for the APA to address this issue. Accordingly, no recommendation is necessary with regard to § 801.*

III. Public Comment

- There was no public comment.

IV. Adjourn

- The meeting was adjourned at 4:00 p.m.

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