


<b>Commonwealth of Virginia</b>		
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Elizabeth Palen, Executive Director		
<b>Administrative Law Advisory Committee</b>		

**Summary**  
**House Room C, General Assembly Building**  
**October 31, 2011, 12:00 P.M.**

Members present: Chris Nolen, Elizabeth Andrews, Cindy Berndt, Angela Bowser, Roger Chaffe, Thomas Lisk, Eric Page, Karen Perrine, Michael Quinan

Staff present: Elizabeth Palen and Beth Jamerson

**I. Welcome and Call to Order**

- **Chris Nolen, Chair**
  - The meeting was called to order at 12:09 p.m.
  - The Committee will first hear from the chairs of the two work groups tasked with comparing the Model State Administrative Procedure Act (MSAPA) with the Virginia Administrative Process Act (APA). After hearing issues discussed by each work group, the Committee will determine whether to make any recommendations incorporating aspects of the MSAPA into the APA to the Virginia Code Commission.

**II. Overview of Progress From Work Groups**

- **Regulatory Work Group**
  - **Tom Lisk**, chair of the Regulatory Work Group, explained the many issues that the group felt warranted further discussion with the Committee, and the aspects of the MSAPA the group felt should be incorporated into the APA. The Regulatory Work Group primarily discussed Articles 2, 3, 7, and 8 of the APA.
    - The Regulatory Work Group met three times and discussed the regulatory provisions of the MSAPA by article and section.
    - Although there was a healthy discussion with regard to Article 2, the group did not identify any significant areas where the model act provided improvement over the state act; there were technical suggestions, such as including hyperlinks on the Virginia Register's website to assist the user in obtaining guidance documents.

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- Discussions of Article 3 were extensive, but the group did not identify any areas where there was a compelling need to recommend changes. Much of the discussion focused on whether changes would be modest or significant, and unless the group identified a substantive, substantial need for change, then the consensus was not to recommend change for the sake of change. There was considerable discussion regarding the time it takes to move through the regulatory process (§ 307). The group considered whether it might be beneficial to limit the timeframe to develop regulations, but ultimately it was decided that placing an arbitrary time limit on the regulatory process would necessarily place time restrictions on the Department of Planning and Budget, the Cabinet Secretary, and the Governor’s office.
  - **Chris Nolen** asked if there was any discussion about a situation where emergency regulations expire after the permitted extension period due to inaction by the executive branch; this situation has previously occurred. He asked whether this was addressed in the APA and if not, he suggested perhaps providing for further or longer extensions of emergency regulations or a higher level of scrutiny.
    - **Tom Lisk** responded that he did not recall a similar discussion during the meetings. The concern with compelling a timeframe on the regulatory process is that the administrative agency itself does not always control the timing; at the same time there may be a concern by allowing repeated extensions of emergency regulations. This would undermine any incentive to complete the rulemaking process that affords great opportunity for public input.
    - **Karen Perrine** added the MSAPA was drafted to abandon the regulatory process of a regulation if it wasn’t completed within a prescribed period of time. She agreed that Mr. Nolen’s concern was a valid one, and additionally there may be a situation where there is a conflict in the length of time stipulated in the APA and the executive orders. She suggested a regulatory action to replace emergency regulations with permanent regulations to avoid a gap of time where there is no regulatory scheme in place.
  - **Tom Lisk** noted that the Regulatory Work Group also discussed incorporation by reference (§ 314) of the federal statutes and regulations in the Virginia Code. The group agreed that this is not a path Virginia wants to take and the General Assembly has sought to avoid this in the past. However, the group did agree that the Committee should consider codifying limitations with respect to incorporation by reference.
  - **Tom Lisk** mentioned that the Regulatory Work Group also thoroughly discussed Articles 7 and 8.
    - With regard to rules review under Article 7, the group decided the Joint Commission on Administrative Rules (JCAR) effectively serves the function of providing a legislative review mechanism for administrative agencies and regulatory actions; unlike what is

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proposed in the MSAPA, JCAR does not automatically review all regulatory action, but only what is brought before the Commission. The group agreed that as a part-time legislature, such a mandate would be too burdensome.

- With regard to electronic signatures under Article 8, the group agreed that it is not appropriate to include this provision in the APA.
- **Mike Quinan** noted that as previously discussed in prior meetings, the Code Commission already has regulations in place that prohibit incorporation by reference prospectively. However, these regulations are not being complied with, and it is therefore important that either the regulation is strengthened or the prohibition is codified.
- **Karen Perrine** pointed out that the prohibition on prospective incorporation by reference is not a Code Commission regulation currently, but rather is found in the Virginia Register Form, Style, and Procedure Manual issued by the Code Commission. She suggested recommending that the Code Commission adopt a regulation prohibiting prospective incorporation.
- The committee continued to discuss the merits of recommending the adoption of a regulation.
  - *All were in favor of recommending that the Code Commission adopt a limitation on prospective incorporation by reference as a formal policy.*
- The committee discussed including a link to guidance documents on the Virginia Register website.
  - *All were in favor of recommending that hyperlinks be added to the list of guidance documents on the Virginia Register website directing the user to the full text of each document, or, if the document is only available for purchase, to the site where it may be purchased.*
- **Judicial Work Group**
  - **Chris Nolen** noted that there have been several inquiries of the Committee recently with regard to hearing officers. Due to the number of concerns regarding hearing officers, the Committee will include this issue in its work plan for Spring 2012 rather than attempting to resolve all issues at this meeting.
  - **Eric Page**, chair of the Judicial Work Group, explained the many issues that the group felt warranted further discussion with the Committee, and the aspects of the MSAPA the group felt should be incorporated into the APA. The Judicial Work Group primarily discussed Articles 4 and 5 of the APA. The discussions of the Judicial Work Group uncovered complex areas of administrative law that require further review by the committee as part of its work plan for Spring 2012. Additionally, the way many issues are decided is contingent on whether or not Virginia establishes a central panel of administrative law judges, and this too, he

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suggested, should be incorporated into the work plan for the Committee when it meets again in Spring 2012. .

### **III. Public Comment**

- There was no public comment.

### **IV. Adjourn**

- The meeting was adjourned at 1:02 p.m.

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