

ADMINISTRATIVE LAW ADVISORY COMMITTEE

REPORT OF THE SUBCOMMITTEE TO STUDY VIRGINIA RULEMAKING TIME FRAMES

Introduction

On November 16, 2000, the Administrative Law Advisory Committee (ALAC) appointed a subcommittee to examine time frames in Virginia's rulemaking process and determine whether any recommendations could be made to reduce time frames without compromising quality and accountability in the rulemaking process. The following members of ALAC were appointed to serve on the Virginia Rulemaking Time Frames Subcommittee: Bernard L. McNamee, Deputy Attorney General; Robert Baratta, Director of Business for Troutman Sanders LLP; Carol G. Dawson, secretary and member of the Board of Directors, Consumer Alert, Inc.; and Kathy R. Frahm, Director of Legislative Affairs for the Department of Environmental Quality.

The basis for this study is derived from Senate Joint Resolution 285 (1997) which would have created a joint legislative subcommittee to conduct a comprehensive study of the efficacy of the APA, including the number, breadth, and rationale for exemptions from the Administrative Process Act, the efficiency, effectiveness and equity of the regulatory and case decision processes, the hearing-officer system, and executive and legislative oversight. The resolution was referred to the Senate Committee on General Laws for study. Senator William C. Wampler, Chairman of the Senate Committee on General Laws, contacted the Virginia Code Commission to request that the Administrative Law Advisory Committee (ALAC) undertake the study.

This report addresses the time frame of the rulemaking process as a component of the larger study request. As part of its consideration of promulgation time frames, the subcommittee utilized the work of previous ALAC subcommittees, including a database of regulatory actions that were promulgated between 1994 and 1998.

Recent promulgation time frames and overall trends

In 1991, it took an average of 390 days to complete a rulemaking process. By 1998, the overall time frame had increased to an average of 571 days (defined as filing of a NOIRA with the Department of Planning and Budget (DPB) until the

time the rule becomes effective). ALAC has not formally evaluated how the timing of the process has changed since 1998. However, several policy changes were implemented by Executive Order 25 (98) that have the potential to shorten certain steps in the process. Specifically, the executive order set new time frames for agencies and DPB to complete their parts in the process. In addition, the executive order required the creation of the Virginia Regulatory Town Hall web site to enhance the efficiency and accountability with which rules are processed.

What is an appropriate time frame?

Views vary widely on whether the average length of the process is appropriate. Some feel that the process is too lengthy and cumbersome, particularly stakeholders who are eager for proposed changes to become effective. On the other hand, those who participate in rulemaking, or find themselves in potential disagreement with agency rulemaking decisions, tend to support additional opportunities for public input and independent review.

The need to implement legal deadlines (federal or state), comport with budget changes, minimize expenditures on an unnecessarily lengthy process, and improve regulations in a reasonably expeditious time frame all suggest the need for an efficient process. Indeed, in cases where there is a perceived need to expedite the process, the General Assembly has exempted certain regulations from the full rulemaking process. At the same time, critical APA goals such as accountability, public legitimacy, and appropriate policy making require adequate time in the process for agency rule development, use of advisory committees, public comment, and independent review.

Because each regulation is different, average time frames tell only part of the story. In the regulations studied by ALAC, there is wide variation in individual promulgation times, with some regulations completing the process in less than a year and others taking several years to complete. The committee identified three factors that affect the time required to promulgate any particular regulation. Depending on which factors influenced particular time frames, this variance may be entirely appropriate, while in other cases it may suggest the appropriateness of taking steps to reduce time frames.

Factors that determine rulemaking time frames

The primary factors that contribute to rulemaking time frames may be summarized as follows:

- a) Complexity: The complexity of a regulatory proposal includes such factors as the length of the regulation, the degree to which issues in the regulation are contested by the public, the technical complexity of the regulation, and the

scope of the regulation's impact. More complex regulations require longer drafting time, a longer period of time for participants to review and agree upon regulatory language, and longer review periods.

- b) **Implementation:** Implementation factors that effect promulgation time frames include the priority given to processing the regulation, the adequacy of the number of staff assigned, and the adequacy of staff training. A relatively minor regulation could take a long time to promulgate if the agency or reviewing office was unable, or otherwise failed, to devote additional resources to accomplishing the task.

- c) **Structural requirements:** The structural requirements or minimal time frames required in the promulgation process are set by the APA, the Virginia Register Act, and executive orders. These requirements establish the minimum amount of time it takes to complete parts of the process. In some instances, they also establish maximum allowable times. To the extent that the regulatory change is not complex or controversial, and there is no processing delay, the basic structural requirements would largely determine the promulgation time frame. The minimum and maximum legal requirements of the process are outlined in the following table:

Stage of Process	Minimum Days Required	Maximum Days Allowed	Basis
(a) DPB Pre-NOIRA review	-	14	EO
(b) Governor's Office Pre-NOIRA Review	-	-	EO
(c) Register submission to publication date	19	33	Registrar
(d) NOIRA public comment period	30	-	APA
(e) Agency proposed development time	-	180	EO
(f) DPB proposed review and EIA	-	45	APA
(g) Governor's Office proposed review	-	-	EO
(h) Register submission to publication date	19	33	Registrar
(i) Proposed public comment period	60	-	APA
(j) Development of final regulation / Period for Governor to Comment / Distribution of Public Comment Summary 5 days prior to adoption	15	120	APA, EO
(k) Register submission to publication date	19	33	Registrar
(l) 30-Day Final Adoption Period	30	-	APA

Apart from these basic legal structural requirements, complexity and implementation play a significant role in determining the overall time frame. This conclusion is supported by the great variability in time frames for different regulations in the ALAC dataset, since each of these regulations was promulgated under the same basic structural requirements. In addition, the dataset considered by ALAC provides evidence that implementation factors can play a major role in determining the promulgation time frame independent of the regulation's complexity level. For example, the dataset contains instances of relatively complex regulations that were able to complete the process in about a year. At the same time, there are examples of relatively trivial regulatory changes that took well over two years to complete.¹

Recommendations

Virginia could eliminate or shorten certain structural requirements of the process. While this type of change would be relatively easy to implement, eliminating critical steps could involve negative consequences, including reduced public participation and confidence, reduced independent review, and poorly designed or inefficient regulations. In its 1993 study, JLARC uncovered critical deficiencies in the regulatory process, such as routine failure to consider public comments and failure to disclose potential regulatory impacts. Subsequently, these deficiencies have been remedied through independent review and other changes in the process (e.g., a mandatory Notice of Intended Regulatory Action) that, while requiring more time, have also led to increased quality and accountability.

Second, Virginia might seek to improve the implementation of the process, such as by devoting more staff to rulemaking at critical agencies or review entity offices, setting strict deadlines for completion of tasks, and providing accountability through management tools such as the Town Hall web site. While these types of changes are likely to be more costly and difficult to implement than modifying the structure of the process, they would be less likely to compromise public participation and the quality of the final rule.

Taking into account these considerations, an approach addressing both legal structure and implementation factors is recommended for consideration. The first two recommendations target the structural process and have been selected with the aim of minimizing any negative impact on public participation and the overall quality of final regulations. The remaining recommendations are primarily intended to improve the way the rulemaking process is implemented.

¹ A relatively simple "Waterworks Fee Cap" regulation required 1,716 days to complete, while a complex welfare reform regulation was completed in 368 days.

- Create a fast-track rulemaking process. ALAC recommends eliminating the NOIRA and Final stages for certain non-controversial regulatory changes. This process would apply to regulations that are not expected to be controversial. Rather than define a “non-controversial rule,” the APA would require a process that would allow the Governor, a member of the General Assembly, or members of the public to reverse the fast-track designation. The fast-track rulemaking process would proceed as follows: The agency publishes the text of the fast-track rule with concurrence from the Governor. If an objection to that designation is received within the 60-day public comment period from at least 10 persons or any member of the applicable standing committee of either house of the General Assembly, the agency shall (i) file notice of the objection with the Registrar of Regulations, and (ii) proceed with the normal promulgation process set out in this article with the initial publication of the proposed regulation serving as the Notice of Intended Regulatory Action. Otherwise, the regulation would become effective 15 days after the close of the 60-day comment period, unless a later date is specified. This process would allow a minor rule to become effective within 74 days of its initial publication. A draft legislative amendment to accomplish this recommendation is attached.
- Create an electronic version of the Register. The paper version of the *Virginia Register of Regulations* should be phased out and replaced over the next two years with an electronic *Register* that is updated on a daily basis. The first step in accomplishing this goal could be a decision by the Code Commission to designate the electronic *Register of Regulations* as the official version of the document. In addition to saving the cost of printing the *Register*, this change would allow for more frequent updates and greater accessibility by the public. Assuming the Registrar's office requires editorial time of 7 days for proposed and final regulations, and 3 days for NOIRAs, this change would reduce the promulgation time frame by an average of 61 days.
- Manage the rulemaking process more intensively. The Regulatory Town Hall should be employed to provide enhanced management tools to meet appropriate time frames in the rulemaking process. First, the site should include time-line management tools for planning rulemaking actions and should automatically notify appropriate parties when time frame targets are not being met. Second, the Town Hall should incorporate and track the formal review of proposed and emergency regulations conducted by the Office of the Attorney General. Third, the Town Hall should include a new regulations “docket” to assist agencies and others in tracking the implementation of legislative mandates requiring regulatory action.

- Develop an annual rulemaking report. ALAC should work with the Department of Planning and Budget and other parties as appropriate to produce an annual or semi-annual report of rulemaking activity and time frames.
- Enhance executive branch training. Executive branch agencies should provide enhanced training to regulatory staff to increase efficiency in the rulemaking process. Rulemaking time frames appear to be affected by the level of training and staff resources devoted to rulemaking and by the frequency with which an agency is involved in the rulemaking process. Staff may not be familiar with the requirement of the Registrar's Office or of the executive orders, or with proper procedures for developing and drafting regulatory documents, causing delays in the development and approval of regulatory packages, as well as a decline in the overall quality of regulatory actions. Rulemaking agencies should conduct a brief management review of their operations, and along with DPB, develop a systematic training program to ensure that appropriate resources are available to develop quality rules in a timely manner.

Conclusion

The subcommittee respectfully submits this report and recommends its adoption, along with the proposed amendments to the APA. If approved, ALAC should forward the report and recommendation to the Code Commission for its consideration.

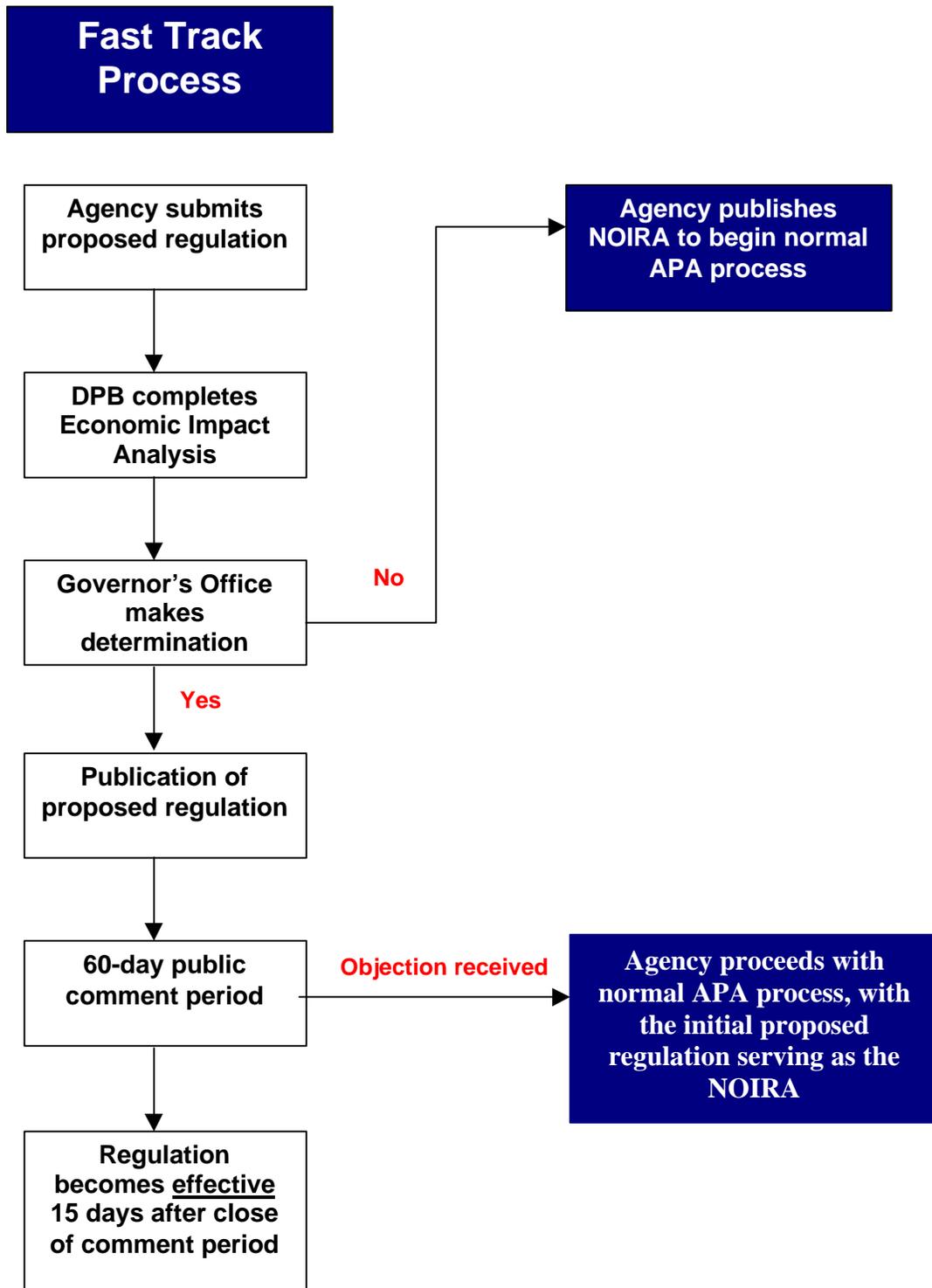
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**Appendix 1:
Draft Legislative Language for a Fast-Track
Rulemaking Process**

Appendix 2



Appendix 3 Time Frames Data

The following information is based on data provided by agencies to ALAC, and provides an approximation of promulgation time frames from FY 95 through FY 98.

Average Number of Days by Stage

Stage	All Regulations	Fastest 20% of All Regulations	Fastest 20% at Each Stage	FY 1998 ^a	Basis
Review of pre-NOIRA					
Transmission Time	15	4	1	6	Submission
(a) DPB Review	41	29	7	13	Executive Order
(b) Governor/Secretary Review	28	9	2	12	Executive Order
Time between NOIRA Approval and Submission to Registrar	20	6	0	29	Agency regulatory development
(c) Publication of NOIRA	22	20	18	22	APA
(d) NOIRA Comment Period	34	31	29	34	APA (30 days)
(e) Time between Close of NOIRA Comment to Submission of Proposed Regulations for Review	217	34	21	115	Agency regulatory development
Review of Proposed					
Transmission Time	7	8	0	4	Submission
(f) DPB Review and Completion of Economic Impact Analysis	67	38	14	61	APA (45 day deadline)*
(g) Governor/Secretary Review	43	10	0	93	Executive Order
Time between Proposed Approval and Submission to Registrar	19	2	0	20	Agency regulatory development
(h) Publication of Proposed	22	21	19	22	APA
(i) Proposed Comment Period	61	58	52	60	APA
(j) Time between Close of Proposed Comment and Submission of Final Regulations	97	41	22	91	Agency regulatory development
(k) Publication of Final	25	22	7	23	APA
(l) Time Between Publication of Final Regulations and Effective Date	39	38	28	35	APA (30 day minimum)

* Since July 1998, DPB's economic impact analysis time frame has averaged under 36 days.

Note: The stage letters are intended to correspond to the stages on the chart found on page 4.

Table 3: Benchmark Completion Times by Fiscal Year

	FY 1995-1998	FY 1995	FY 1996	FY 1997	FY 1998
Median Days	627	639	633	590	552
Average Days	664	774	656	597	571
Regulations Begun	276	64	80	94	38
Completed in 0-12 months	8% (23)	9% (6)	13% (10)	5% (5)	5% (2)
Completed in 0-18 months	27% (74)	23% (15)	34% (27)	27% (25)	18% (7)
Regulations Completed^a	198 (72%)	53 (83%)	74 (93%)	56 (60%)	15 (39%)
Completed in 0-12 months	12% (23)	11% (6)	14% (10)	9% (5)	13% (2)
Completed in 0-18 months	37% (74)	28% (15)	36% (27)	45% (25)	47% (7)

^a Completed as of October 1, 1999.

Appendix 4

Time Frames Dataset