

# Suggestions on Challenging Agency Rules and Regulations

by Robert N. Saylor and Bruce D. Sokler

The editors of the *Federal Register* have been called the busiest bureaucrats in Washington because they publish the ever-widening flow of rules and regulations from scores of agencies. Many of these regulations are the result of "informal rulemaking." Under broad delegations of legislative power, agencies decide everything from the amount of lead permitted in gasoline to the procedures for surface-mining of coal. The new administration has promised to stem the regulatory flow. But even if deregulation erodes some of this power, lawyers undoubtedly will have new opportunities to challenge the bureaucracy's attempts to issue, reissue, alter, or withdraw federal regulations.

The Court of Appeals for the District of Columbia Circuit will be called upon to rule on many of these challenges to regulations. In a recent speech, one of that court's most celebrated members, Judge Carl McGowan, suggested that it was in this area that the courts "were running into trouble these days." In an attempt to bring some order to the conflicting strands of judicial decisions, the judge distinguished three different challenges to agency decisions and suggested that judges would view each with a different level of welcome.

First, many appeals challenge procedural errors in adopting regulations. Judge McGowan said the courts will scrutinize procedure carefully because courts are experts on fair procedure. Second, the judge suggested that courts use a middle level of intensity to review agency errors in interpreting statutes. The challengers recite a long line of cases establishing that courts must interpret statutes without regard to the agency's claims of special competence, but the agencies in turn invoke an equally venerable doctrine that courts should defer to the reading of a statute by the agency that enforces the statute. Third, many appeals claim that regulations are invalid under the substantive review standards of the Administrative Procedure Act (the APA)—there is no "substan-

tial evidence" to support the regulations, they are arbitrary and capricious, or the bureaucracy abused its discretion by enacting them. Here, Judge McGowan said, the courts are most restrained, especially in the scientific and technical areas so heavily litigated in recent years.

These grounds provide a useful framework if the morning *Federal Register* alarms you. Yet as even Judge McGowan recognizes, the guidelines are somewhat misleading. The obvious lesson from this framework is to focus primarily on clear procedural errors, then on statutory arguments, and only as a last resort to challenge the substantive flaws in agency decisions. Not so long ago this was the conventional wisdom; an empirical case could have been made for it. But it is less valid today. The Supreme Court unanimously rebuked the Court of Appeals for the District of Columbia Circuit, not for venturing too far into technical or scientific second guessing—but for a *procedural* foray. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

## Binding Regulation

Many statutes require special procedures, and many agency regulations require procedures beyond the statute's basic requirements. These regulations are binding on the agency. The *Vermont Yankee* decision, however, aborted a line of cases where courts had imposed additional procedures. The Supreme Court there chastised the court of appeals' "Monday morning quarterbacking" and warned courts not to "stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." 435 U.S. at 549. Even that court of appeals has recently bypassed or rejected sound procedural arguments opting instead to invalidate regulations for lack of substantial evidence or misreading the statute. E.g., *In re Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980).

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Hence, in today's environment, be guided more by your feel for the most convincing argument than any theory that some types of errors move judges more than other types. The clearer the error—no matter what its type—the better the chance of success.

When you do challenge the procedures used to enact rules or regulations, there are important developments in the traditional areas of attack. Consider the following:

**Inadequate Notice:** The APA requires that interested parties be given notice of proposed administrative action and the opportunity to participate in the decision. The notice must refer to the legal authority on which the agency rests its action. The notice need not particularize each precise proposal which the agency may adopt, but it must describe the subject and issues involved. *Trans-Pacific Freight Conference of Japan/Korea v. FMC*, No. 78-2172 (D.C. Cir. Sept. 11, 1980). Courts apply a harmless error rule in reviewing the adequacy of notice. Only if the challengers would likely have offered new and different criticisms that might have convinced the agency will courts require fresh notice. *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637 (1st Cir. 1979).

The APA does permit an agency to dispense with this requirement when it finds notice and public procedures are impractical or contrary to the public interest. Courts indicate frequently that the exceptions "will be narrowly construed and only reluctantly countenanced," *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980), but usually in the end apply a reasonableness test. *E.g. Council of the Southern Mountains, Inc. v. Donovan*, No. 80-2536 (D.C. Cir. Apr. 16, 1981) (per curiam). In *American Fed'n of Gov't Employees v. Block*, the court conceded that an emergency justifying suspension of notice and comment existed, but then reclassified the regulations as "interim" and directed formal rulemaking. No. 79-2128 (D.C. Cir. Mar. 18, 1981).

**Inadequate Statement of Basis:** The APA requires that a "concise statement of basis and purpose" accompany final regulations. The courts have read this requirement broadly. The cases say the agency must explain "how and why the regulations were actually adopted," *Amoco Oil Co. v. EPA*, 501 F.2d 722, 739 (D.C. Cir. 1974). The written statement must "explain how the

agency resolved any significant problems . . . and . . . show how that resolution led the agency to the ultimate rule." The agency must also "respond in a reasoned manner to the comments received." *Rodway v. Department of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975). The courts invite litigation over the agency's logic.

A statement of purpose must show the extent to which the agency "considered conflicting views or alternative approaches." *National Wildlife Fed'n v. Costle*, 629 F.2d 118, 135 (D.C. Cir. 1980). It must explain "policies and standards" underlying regulations. *Environmental Defense Fund, Inc. v. EPA*, 465 F.2d 528, 539 (D.C. Cir. 1972). It must provide "a thorough and comprehensible statement of the reasons for its decision." *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 701 (2d Cir. 1975). And it must summarize the factual basis for the regulations. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978).

Even with these sweeping requirements, challenges to statements of purpose do not always succeed. Agencies need not "discuss every item of fact or opinion included in the submissions." *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 337-38 (D.C. Cir. 1968). Nor must they supply "specific and detailed findings and conclusions of the kind customarily associated with formal proceedings." *National Nutritional Foods, supra*, 572 F.2d at 701. Defects usually lead to a remand for repairs.

All the same, there is some tactical value to careful reading of the statement of purpose. The agency may not offer justifications in court, whether factual or interpretive, not found in the statement. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, *supra*; *SEC v. Chenery*, 318 U.S. 80 (1943); *American Public Transit Ass'n v. Lewis*, No. 80-1497 (D.C. Cir. May 26, 1981); *National Nutritional Foods Ass'n v. Mathews*, 557 F.2d 325 (2d Cir. 1977).

### Meaningful Comment

**Inadequate Factual Basis:** The agency must make the factual basis for its action available for review. Some courts have held "meaningful comment" stifled when the agency does not release the technical and scientific basis for proposed regulations. *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973). Like other broad challenges, this argument may prove too much because the error, if accepted, may serve to invalidate an entire set of regulations—which the court may be reluctant to do. Other arguments can attack discrete and particularly offensive features of regulations.

For example, *In re Surface Mining Regulation Litigation, supra*, was fought in part over what documents supported technical regulations. When the rules were proposed, there was one document. When the rules became final, there were four supporting documents. In judicial review, 240 documents appeared. A massive set of regulations was vulnerable on this ground, but the court saved them, finding no "special prejudice" from failure to obtain the supporting documents when the regulations were proposed.

This is an odd and unprecedented result. The reason for the requirement in the first place is to give challengers an opportunity to convince regulators that the alleged technical support does not justify the regulations. There the challengers *never* got that opportunity. This is the precise "special prejudice" the requirement was designed to avoid.

**Inadequate Opportunity for Comment:** If the final rule departs radically from the proposed rule, a court may set aside the rule because interested parties were denied opportunity for comment. *See, e.g., Wagner Electric Corp. v. Volpe*, 466 F.2d 1013 (3d Cir. 1972). Most such challenges are rejected. *See, e.g., Sierra Club v. Costle*, No. 79-1565 (D.C. Cir. Apr. 29, 1981); *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir.) (*en banc*), *cert. denied*, 426 U.S. 941 (1976). The Court of Appeals for the District of Columbia Circuit says that final regulations will be invalidated on this ground only if they are "far from the 'logical outgrowth' of the preceding notice and comment process." *Weyerhaeuser Co. v. Costle*, *supra*, 590 F.2d at 1031. *See also Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977). In other words, the final rule must be a new departure.

**Inadequate Analysis of Economic Impact:** The Carter administration issued Executive Order No. 12,044, which required agencies to undertake economic analyses, consider meaningful and least restrictive alternatives, and reduce the paperwork needed to comply with regulations. The executive order was not intended to "provide new grounds for judicial review." But when an agency issued regulations to follow the requirements of the order, those regulations would provide grounds for judicial review. *See, e.g., Surface Mining Litigation, supra*. In fact, most agencies did incorporate the order's requirements in their regulations.

The Reagan administration has now promulgated Executive Order No. 12,291, which directs a "regulatory impact analysis" containing a cost-benefit analysis and a description of rejected alternative approaches. Any implementing regulations adopted by an agency again may provide a basis for attacking new substantive regulations.

**Inadequate Flexibility:** You may challenge regulations if they operate inflexibly and do not allow for waivers, exemptions, or alternative means of compliance. *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972); *Southwest Pennsylvania Cable TV, Inc. v. FCC*, 514 F.2d 1343 (D.C. Cir. 1975). The issue becomes one of legislative intent. Courts sometimes do conclude that exemptions would not fit the purpose of the legislation. *See DuPont v. Train*, 430 U.S. 112 (1977); *Surface Mining Litigation, supra*.

Last fall Congress passed the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12, which requires that agencies consider regulatory alternatives for rules "likely to have a significant economic impact on a substantial number of small entities 5 U.S.C. § 605." Even under the extremely restrictive judicial review provisions in the Act, failure to consider adequately alternatives can support a challenge that the regulations are arbitrary and capricious.

Several procedural attacks are coldly received. The first is to claim that the decisionmaker was biased. The

second is to characterize the agency's staff as an adverse party that improperly influenced the decision. The third is to suggest that an agency relied improperly on outside consultants. *United Steelworkers v. Marshall*, 647 F.2d 1187 (D.C. Cir. 1980); *Lead Industries Ass'n, Inc. v. EPA*, 647 F.2d 1189, (D.C. Cir.) (*per curiam*), *cert. denied*, 449 U.S. 1042 (1980). *Cf. Hercules Inc. v. EPA*, 598 F.2d 91 (D.C. Cir. 1978) (unsuccessful claim of impermissible reliance on staff). With one wary eye on *Vermont Yankee*, the Court of Appeals for the District of Columbia Circuit recently rejected a procedural challenge based on the agency's receipt of written comments after the deadline and post-comment meetings with industry, congressmen and executive branch officials. The court relied particularly on the fact that the *ex parte* contacts had been disclosed. *Sierra Club v. Costle, supra*.

Despite these seemingly hard-and-fast rules, courts "are loathe to require [agencies] to repeat every step in the administrative process merely because its initial action may have been partially flawed." *Recreation Vehicle Industry Ass'n v. EPA*, No. 76-1875 (D.C. Cir. Apr. 16, 1981). Hence, you may be right, but you may not win. In *Recreation Vehicle*, the appellate court had to solicit the agency's disclosure of what parts of the record it had relied on and observed that the EPA considered the relevant factors only after the regulations were promulgated. The court, however, upheld the regulation because "a remand merely for the sake of formality would serve no useful purpose."

## Statutory Interpretation

After procedural irregularities, the next major basis for challenging agency regulations is that they exceed or misinterpret statutory authority. Not only are courts comfortable and familiar with such claims, but an agency's claim of special competence vanishes if Congress clearly intended a different result. Statutory challenges can often be presented simply and cheaply and do not require poring over massive administrative records. Perhaps most important, the attack can be directed at especially troubling aspects of regulations so that it will not force the court to undo other provisions. These challenges are often successful if the statute uses common-sense terms thoroughly explained in the legislative history, *Weyerhaeuser Co. v. Costle, supra*, or if the agency's interpretation does not comport with the conclusion directed by established principles of statutory construction. *Id.*; *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978).

However, there are several significant obstacles to this line of attack. Courts often will follow the hoary doctrine that a court defers to an agency's interpretation of its statutes. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Statutes and legislative history are often unclear. Moreover, a tie game goes to the agency, so you must make out a clear statutory conflict to prevail.

The final major grounds on which to attack regulations is to argue that the substantive basis for them is insufficient. Regulations adopted by informal rulemaking are normally tested by whether they are "arbitrary and  
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questions under the act. The FTCA has attempted to reconcile the need to protect the United States, the ultimate "deep pocket," against unwarranted liability with the need to have a remedy for the torts committed by government personnel that damage citizens. The act as a whole is an example—perhaps a rare one—of a statute that generally achieves its intended purpose.

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## Challenging Regulations

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capricious." This means that courts will "vacate" regulations not "sustainable on the administrative record made." *Vermont Yankee Power Corp. v. Natural Resources Defense Council, supra*. Courts will review the record to see if it contains a "rational basis" for the regulations. *National Ass'n of Food Chains, Inc. v. ICC*, 535 F.2d 1308 (D.C. Cir. 1976). And if the regulations turn on "determinable facts," the official "must, in form as well as substance, find those facts from evidence in the record." *Industrial Union Department v. Hodgson*, 499 F.2d 467, 475-76 (D.C. Cir. 1974).

Agencies may not fill gaps in the record by affidavits or new arguments advanced for the first time in court. *SEC v. Chenery, supra*; *National Nutritional Foods, supra*; *National Welfare Rights Organization v. Matthews*, 533 F.2d 637 (D.C. Cir. 1976); *Rodway v. Department of Agriculture, supra*. But courts describe the standard as "restricted"; complex scientific issues are approached with some diffidence. *Lead Industries Ass'n v. EPA, supra*.

There are serious obstacles to overturning regulations on "arbitrary and capricious" grounds. See, e.g., *Ethyl Corp. v. EPA, supra*. Moreover, mastering the record in the first instance is expensive and time-consuming. In attacking an agency's record, you fight a ghost. You cannot know what the agency will rely upon. If you rebut one study, the agency

often then claims to rely up on another, and another. You might never have known of them until a court suit is brought.

For this reason, it is important in this kind of case to commit the government as early as possible to its theory for supporting the regulations. That way, you need not master and discuss the whole record, and you identify a target to rebut which, if destroyed, will allow the regulation to fall.

If the statement of purpose does not set forth the basis for each provision of the regulations, the government may ease your burden by filing a certified index of the administrative record. When the action challenging a regulation has been filed in district court (as opposed to direct review in the court of appeals), the Justice Department often moves to confine review to the administrative record in an effort to defeat all discovery. In return, the government offers a certified index that will list every entry in the record that relates to a particular provision of the regulation. In some recent cases, the government has provided both a certified index and a separate list indicating those portions of the regulation upon which they will rely.

### More Rigorous

Under certain statutes, such as the Occupational Safety and Health Act, courts review informal rulemaking using the substantial evidence test. That means review more rigorous than under the arbitrary and capricious standard. *Environmental Defense Fund, Inc. v. EPA*, 636 F.2d 1267, 1277 (D.C. Cir. 1980). Nevertheless, since most of the regulations are highly technical, it remains difficult to overturn the regulations. Courts proclaim that their task is merely to "ensure public accountability," *AFL-CIO v. Marshall*, 617 F.2d 636, 651 (D.C. Cir. 1979), and they often express reluctance to second-guess an agency decision that falls within a "zone of reasonableness," especially where a numerical standard is established. See, e.g., *Steelworkers v. Marshall, supra*.

Despite these protests, the Court of Appeals for the District of Columbia Circuit required 226 pages in *Sierra*

*Club v. Costle, supra*, to declare the EPA's rule on sulfur dioxide for coal generators reasonable. It took 245 pages in the *Steelworkers* case to review, under the substantial evidence test, OSHA's lead regulations and (with respect to particular industries) sent the regulations back to the agency. It is not likely that the substantial evidence standard will make a challenger's job much easier where highly scientific and technical matters are involved.

The Reagan administration's list of federal regulations to be reviewed, postponed or cancelled shows that judicial challenges to informal rulemaking will not become an object of historical curiosity. New legislation and executive orders may modify the grounds on which challenges are based but it is likely that the procedural, statutory and substantive review principles charted in the past decade will continue to provide the framework for judicial decisions on agency rules.

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## Foreign Policy

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text, certainly, the judiciary has not hesitated to inform the executive branch that it is the province of the courts to say what the law is, and to apply it.

A good argument can be made that the Constitution itself commits certain matters affecting foreign affairs to the judicial branch. Article III extends the judicial power to all cases "affecting Ambassadors, other public Ministers and Consuls; . . . Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

In terms of federal-state relations, it appears that the founding fathers expected cases touching on foreign affairs to be decided by the federal courts. Hence, Alexander Hamilton observed that "so great a portion of the cases in which foreigners are parties involve national questions, that it is by far most safe and most