Understanding the E.U. Regulatory Process
Compacts & Administrative Procedure
Compact Rulemaking: The New Frontier
The Case for a Compact APA

Also:
- Government Website Libel
- Mandating Pollution Prevention
- Keynote Excerpts from the Fall Conference
Under the leadership of our Section Chair Bill Funk, and with the help of many Section members and especially our Section Director, Kimberly Knight, this year's 2003 Administrative Law Conference was a resounding success. The November 6-7 conference, with around 600 attendees, was the most well-attended event ever held by the Section. Thanks are due once again to the following conference sponsors: Cadwalader, Wickersham & Taft LLP; Duane Morris Foley & Lardner; Jenner & Block; Kirkland & Ellis LLP; Piper Rudnick LLP; Porter Wright Morris & Arthur LLP; Ropes & Gray; Wiley Rein & Fielding LLP; and Wilmer, Cutler & Pickering. Without their generous support, it would have been difficult to put together a conference with such an array of outstanding educational programs and delightful social and networking events.

We were fortunate to have with us on the program a large number of prominent government officials. Here's a sampling of some edited speech excerpts. For the complete text of these addresses, which are worth reading in full, and for links to the other CLE programs, go to the Section's website. And don't forget to mark your calendars for next Fall's Conference to be held on October 21–22.

From the opening keynote address by John D. Graham, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget:

In order to accomplish smarter regulation, we have launched three major initiatives. They do not involve any new legislation; no executive orders and no campaigns for regulatory relief. They involve more openness in deliberation, better regulatory analysis, and higher quality technical information for use by regulators.

While openness is good government, it has also been a useful tactic in helping shift the public debate on regulation. The debate is moving away from process toward substance, from "who met with whom"? to "is this option more cost-effective than that option?" I believe that is a good development for public policy. While I am an advocate of more openness at OMB, there are limits to openness. For example, I have no intentions of compromising the ability of my career staff to have candid discussions with professionals from the regulatory agencies.

Second, we have also established more rigorous standards for what we expect from agencies in the way of regulatory analysis...I am talking about basic things such as cost-effectiveness analysis, formal probability analysis, and careful consideration of qualitative and intangible values.

Third, we have sought to expand the "information policy" function at OIRA to include the technical quality of information that agencies disseminate to the public.

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Libel by Website: Federal Agency Liability for False Website Statements

By James T. O’Reilly†

To err is human, and to forgive divine.” “The king can do no wrong.” “Everybody makes mistakes.” Our culture recognizes that errors sometimes occur, yet our legal structure denies a remedy for many federal agency errors. The internet has made some small errors gigantic by broadcasting flawed information which is, in effect, unable to be timely rebutted or retracted. Federal agencies that publish or post on the web statements that libel private persons or entities can cause serious harm, with virtual impunity to consequences.

This article explores the inability to obtain collective or individual punishment against agencies and their employees for libelous statements. The effects of such libels may be devastating upon a person or organization, but a “discretionary function” of the agency to make the pronouncement, or the Federal Torts Claims Act’s exclusion of intentional torts such as libel, leaves the wounded private person with no remedy. Only in a few cases of congressional intervention and Court of Federal Claims involvement has there been compensation for severe harm caused by agency misstatements or unjustified criticisms. From the agency operational viewpoint, the present state of law is just fine; they need fear no liability, and only rarely has Congress given either an incentive to make corrections after errors occur.

No APA Remedy
The Administrative Procedure Act of 1946 does not provide remedies for adverse publicity such as erroneous website postings. The Act provides for review of final agency actions, and the lack of official finality to agency statements such as website postings is the principal barrier to remedial efforts. The APA does not contemplate aggrieved persons obtaining judicial review of an agency’s choice to place its staff’s comments, other agency reports, private sector comments or other statements into the website. So these inclusions in the website, other than statements contained in final rules or adjudicative decisions, cannot be addressed by the typical APA review lawsuit. The inclusion on the website of a misleading criticism or false accusation of a private person is not the official decision of the agency in a matter; it may be the staff’s view but carries no finality and has no estoppel effect against the agency. The false or misleading statement would require a denial of a license or adoption of a rule based on the false or erroneous statement, before the agency will have taken a “final agency action” subject to judicial review. Beyond finality, agencies which create a correction mechanism may also defend on the basis that the offended person must exhaust that internal remedy before litigating.

Data Quality Act
The Data Quality Act correction process adopted in agency rules in October 2002 has not had much of an impact to deter agency errors. A tiny handful of corrective actions have been instituted; but after much discussion of potential impacts, no apparent transformation has occurred in agency attitudes and practices. Agencies that care to create voluntary website correction mechanisms, or to empower ombuds to help correct errors, are to be commended. But their self-corrective initiatives are neither compelled by statute nor essential to defending the agency against a high risk of tort liability.

Past History
The litigated cases that have sought relief against agency errors demonstrate that agencies have won virtually all disputes, even where the agency was inaccurate or lax in its research of the disputed statement. Relief has come only when Congress specifically waives the doctrine of sovereign immunity by statute and refers the case to the Court of Federal Claims for determination of damages. This relative handful of reported cases is a symptom of the frustration with lack of remedies, and is not a product of perfection by federal agency publicists or webmasters. Details of the litigation can be found in a 2003 Administrative Law Review article.2

Why Not a Damages Remedy?
The rationale for not creating a damages litigation cause of action for libelous statements appears compelling. First, the abuse potential for policy correction disputes is great. The dissenting voice aiming at the agency message might complain in order to promote a different policy outcome that would be “corrected” in favor of the party who lost the adjudicated case. Second, the resource commitment of a corrections process is evident; agencies have no additional staff for handling corrections, so the same employees who are operating a program could be distracted to the mission of defending their website’s subjective accuracy. The process of adopting a regulation may be delayed by

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forcing the same staff members to draft the rule and then to defend it against critics of its “errors,” with the criticism against the agency attributable to policy disagreements. Third, some agencies might fear making pronouncements of a controversial nature, or fear listing information about controversial public issues that are likely to draw challenges. Fourth, the historical or technical accuracy of some information is judgmental and ripe for debate, so the measure of what is “incorrect” may be quite subjective.

Post-Internet Mechanisms
The correction of a belatedly acknowledged error that has already been posted to the agency website is especially challenging. The data or the entire report may already have been re-broadcast as news or cited in an op-ed advocacy article somewhere. Speed in responding to challenges is essential. The better agencies have teams of correction specialists who can rapidly take the challenged page off-line, or flag it with a cautionary statement. The Environmental Protection Agency error correction team, for example, has a protocol for the handling of complaints about inaccuracies in the EPA’s huge Envirofacts data base. This technical capability must be augmented by a commitment of program managers to examine the challenge and make the substantive decision to alter or withdraw if the information has been shown to be incorrect.

What Should Agencies Do?
Agency managers are stewards of the credibility of the federal government, and their responsible actions to assure accuracy of their data deserve commendation. Agencies which host large internet data resources should examine the quality of their incoming data sources, screening out by protocol or individual selection that set of data that is likely to be of questionable validity. (The agency’s Freedom of Information Act obligations are separate from this concern for data quality; FOIA release obligations come with no warranty or agency imprimatur, but programs of affirmative disclosure or pronouncements inherently involve such a selectivity.)

The agency website and its publications should carry a notice that requests for corrections can be addressed to the designated office which will process the requests and provide a response. If the agency wishes to avoid litigation, it may frequently negotiate for the correction of the disputed data, even where the Data Quality Act does not mandate such action. By analogy, the 1974 Privacy Act allows statements of disagreement to be placed with the disputed record for a future release, so an alternative resolution of a dispute over accuracy might be to expand the fields of data entry to allow a “flag” to indicate that an additional statement is available which takes issue with the selected agency statement.

Ultimately, Congress may debate the wisdom of expanding the Data Quality Act to form a corrections mechanism for federal agency statements made in print and electronic media. If such a mechanism were in place, aligned with limited judicial review of the decision, the credibility of agencies would certainly benefit from the availability of the new assurances of data accuracy.

PARALYZED VETERANS OF AMERICA
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**Prize**  Separate “Student” and “Professional” categories have been established. Cash prizes and publication assistance are available for winning entries on both sides of the issue in each category.

The BVA is the final appellate decision-maker for the Department of Veterans Affairs and adjudicates approximately 35,000 appeals every year. There are approximately 2,000 appeals annually taken from the BVA to the U.S. Court of Appeals for Veterans Claims and over half of those appeals are typically remanded back to the BVA for correction of errors and further adjudication.

**For details, please visit www.pva.org • Entries are due in February 2004**
E nvironmental regulation as we know it is essentially reactive in nature. By focusing on pollution control and risk management, environmental policy is largely limited to responding to pollutants after they are created. The industrial production process is viewed as a black box, and regulation aims to capture the air emissions, wastewater discharges and other contaminants, and subsequently treat, burn or bury them. Rarely do regulators attempt to intervene in the production process to require businesses to eliminate the pollution before it occurs; that is, to require pollution prevention.

Many within government and industry are troubled by the notion of government-mandated pollution prevention, typically raising two arguments against reaching within the black box. First, it is often argued that current laws and regulations do not provide EPA and other regulators with a clear mandate to regulate the production process. Second, opponents of mandatory pollution prevention also contend that regulators lack the technical and business knowledge, skills and resources needed to exercise it effectively. In other words, when it comes to pollution prevention, industry knows best.

This article contends that experience with the implementation of the Clean Air Act’s air toxics program—particularly in Southern California—proves both arguments to be wide of the mark. In fact, when one looks carefully at the language and intent of that program, it is clear that EPA has both the authority and the obligation to directly regulate the production process, in appropriate cases. And while businesses obviously know a great deal about their production processes, research in management and organizational theory teaches us that business firms often lack the time, information and inclination to alter those processes in beneficial ways absent external stimuli. Recent rulemaking by the South Coast Air Quality Management District demonstrates how government can effectively provide such stimulus. We deal with each of these two points in turn.

EPA’s Authority and Obligation.

EPA has consistently taken the position that pollution prevention is best left to the voluntary efforts of industry, which is occasionally nudged along by various financial incentives offered by the government. Take the case of the Pollution Prevention Act of 1990 (the “PPA”), which, among other things, established a pecking order among alternative regulatory approaches such as treatment, land disposal, recycling and pollution prevention. The PPA directs federal regulators to favor pollution prevention approaches over traditional pollution control strategies, yet EPA has viewed this mandate of the PPA as aspirational rather than binding.

EPA has similarly ignored explicit statutory language in the Clean Air Act (CAA) requiring consideration and inclusion (where appropriate) of pollution prevention in the regulation of hazardous air pollutants (“HAPs”). The Court of Appeals for the District of Columbia took EPA to task for this narrow focus on pollution control in National Lime Ass’n v. Environmental Protection Agency, 233 F.3d 625 (D.C. Cir. 2000), emphasizing that EPA has not only the authority but also the obligation to consider and mandate pollution prevention where technically feasible.

National Lime focused on Section 112 of the Clean Air Act, which creates the federal program for reducing emissions of HAPs. Under Section 112(d) (2), for each regulated industry sector, EPA must establish emission standards for HAPs based on the maximum achievable control technology (or “MACT”), including a prohibition on emissions if achievable. MACT includes traditional pollution control technologies that capture pollutants and either treat or contain them. However, the statute also defines MACT broadly to include the measures which “reduce the volume of, or eliminate emissions of, [HAPs] through process changes, substitution of materials, or other modifications.” CAA Section 112(d) (2) (A).

In National Lime, the Sierra Club challenged EPA’s failure to set emission standards for several hazardous air pollutants emitted from cement manufacturing plants. EPA justified its inaction by arguing that emission standards need only be based on the pollution control technology currently in use in the industry. Thus, contended EPA, if no existing sources currently control emissions of a given pollutant, then EPA need not set a “MACT” standard for that pollutant. The court rejected EPA’s argument, holding that the absence of an existing control technology did not relieve the agency of its clear statutory obligation to set emission standards for each hazardous air pollutant emitted from the source. In reaching that conclusion, the court relied in part on a Senate Report that stated:

The technologies, practices or strategies which are to be considered in setting emission standards under this subsection go beyond the traditional end-of-stack...
treatment or abatement system. The Administrator [of EPA] is to give priority to technologies or strategies which reduce the amount of pollution generated through process changes or the substitution of materials less hazardous. Pollution prevention is to be the preferred strategy wherever possible.233 F.3d at 634 (citing S. REP. No. 101-128, at 168 (1989)).

Lack of a mandate? At least with respect to the federal air toxics program, there can be little doubt that EPA has the legal authority to peer through the walls of the black box. Indeed, the agency has the obligation to do so. The harder question is how the agency can exercise its authority so as to ensure the creation and diffusion of pollution prevention technologies without harming the regulated businesses. One answer to that question can be found in the dry cleaning sector.

Regulation and TAO in Southern California

Despite the clear language in the statute and the legislative history, EPA rarely incorporates pollution prevention measures in its regulations under the federal air toxics program. Although the agency provides various explanations in different circumstances, one general theme running through EPA’s preamble discussions focuses on the lack of mature, generally available pollution prevention technologies. In other words, EPA is reluctant to ask business to alter or replace established production processes with unproven alternative “clean” technologies. In California, the South Coast Air Quality Management District (“AQMD”) used a unique approach to surmount this obstacle in the context of the dry cleaning industry: AQMD played an active role in evaluating and ultimately demonstrating the commercial viability of an emerging alternative technology.

First, a bit of background. Most professional drycleaners use perchloroethylene (“PCE”), a toxic chemical, as their primary cleaning solvent. In a comprehensive study of toxic air emissions in the South Coast region, AQMD concluded that PCE emissions from dry cleaning operations are a major source of toxic exposures in the urban environment. Consequently, in its 2001 Air Toxics Control Plan, AQMD announced its intention to amend its regulations concerning PCE dry cleaning so as to achieve a 95% reduction in PCE emissions by 2010. Most industrial and environmental observers, accustomed to EPA’s bias for end-of-pipe regulation, expected AQMD’s rule amendments to simply tighten the existing pollution control requirements applicable to PCE dry cleaners. Much to their surprise, in August 2001, AQMD staff instead proposed to phase out PCE use altogether and force dry cleaners to shift to non-toxic alternative processes. After a contentious rulemaking process and some significant changes, the proposal and its ban on PCE was finalized in December 2002.

Like EPA and other regulators, AQMD is reluctant to intercede in the production processes and business decisions of regulated entities. So why did AQMD’s rulemaking staff propose a phase-out of PCE, and why did the AQMD Governing Board approve it? While we cannot completely answer these questions in this brief article, we can identify one substantial factor that propelled this pollution prevention initiative forward: the unique proactive nature of AQMD’s Science and Technology Advancement Office (“TAO”). TAO was formed by AQMD in 1988 in response to an ominous situation: air quality in the Los Angeles air basin was so bad that new emission reduction technologies were needed to attain applicable standards. The office is charged with assisting in the development and demonstration of new technologies. Initially, TAO focused on spawning and demonstrating new technologies that reduced emissions of smog-forming compounds. More recently, TAO has expanded its efforts to include toxic-reducing technologies.

In the case of the PCE dry cleaning phase-out, TAO played a significant role in supporting studies of the viability and commercialization of the leading non-polluting alternative technology: wet cleaning. Wet cleaning systems use water rather than PCE as a cleaning solvent, relying on specialized detergents, computer controlled washers, and other technological advancements to attain performance comparable to that of PCE dry cleaning. Although wet cleaning was available in the early 1990’s, dry cleaners have been slow to adopt this technology. Beginning in 1995, TAO assisted in the funding of (1) rigorous evaluations of the technical, economic and environmental performance of wet cleaning, (2) a number of professional wet cleaning demonstration facilities in California, and (3) a technical assistance project designed to educate cleaners in the South Coast region about professional wet cleaning. These efforts provided the necessary impetus and technical support for AQMD’s rule development staff to seek a phase out of PCE in this industry.

Moreover, these projects helped to create the “social infrastructure” needed to support the diffusion of new technology: skilled personnel to provide technical training; experienced installers, operators and repair technicians; knowledgeable vendors such as distributors; and cooperative relationships among all of those parties. Also, TAO’s work in this area appears to have assisted the AQMD governing board in overcoming reservations they had regarding the commercial viability of wet cleaning.

By linking TAO with the rule development staff, AQMD coordinated research and demonstration of clean technologies with the planning, development and implementation of prospective rules. The integration of the technology advancement function with rule planning and development provides regulators with a broader and more sophisticated understanding of innovative production and technology options to consider when crafting major rules. Many state and federal agencies sponsor research and demonstrations of clean technologies. For example, the California Air Resources Board’s Innovative Clean Air Technologies office (ICAT) has funded projects to demonstrate the commercial utility of technical innovations that will improve emission prevention and control. Yet that office generally funds technologies relating to existing regulatory requirements; those efforts did not support the development of new rules. In contrast, TAO used its...
As Thomas Friedman has recently written, there is growing divergence of interests between Europe and the United States, a divergence which predates and surpasses differences over Iraq and which jeopardizes the shared values of the Atlantic Alliance. This divergence includes differences over regulatory policy and administrative law, which, though not the predominant source, are nevertheless a significant and growing cause of friction and at the same time an opportunity for constructive reengagement. The ABA’s Administrative Law Section project to compare regulatory and administrative procedures is thus a very timely effort that can contribute to a better understanding between the two continents.

There are several key regulatory differences which need to be better understood. For example:

- **Transparency.** At the very outset there is a lack of comparable transparency between the two systems — especially in view of the fact that even some Europeans do not understand how law gets translated in Europe into regulatory requirements that bind the regulated community.

- **Consistency.** Procedures can vary according to economic sector, making it difficult to understand patterns that might in fact be common to various programs (such as the problem of “agency capture” that is well understood in the literature here) and that would make law practice in Brussels more predictable and transparent.

- **Predominance of Design over Performance standards.** The European preference for what would in the United States be considered outdated “design” standards significantly reduces efficiency and competitiveness, in part because it tends to benefit incumbents at the expense of innovators by raising barriers to entry.

- **Delegation.** The design standard preference stems in part from the practice of delegating the development of suggested standards to the leading incumbent firms, whose product then becomes in many cases the de facto official standard — a process that would not be tolerated in the United States.

- **Rejection of Cost-benefit Analysis.** The European model makes much less use of cost-benefit principles than the United States, which can have the effect of aggravating the competitiveness problems of favoring design standards and reducing economic growth. It also increases the discretion of agency officials and thus again reduces the predictability and transparency of the process.

- **Risk vs. Precaution.** The Europeans are less disciplined about managing risk according to accepted principles, preferring generally to rely more on discretion, again reducing both predictability and transparency.

- **Judicial Review.** Although this is changing, the European model generally avoids judicial review, which presents obvious accountability and transparency problems (and differences between the United States and Europe).

All of these differences contribute, among other things, to reduced economic growth and reduced productivity growth in Europe relative to the United States, which in turn exacerbates the friction. It also jeopardizes the U.S. model, because Europe is having success exporting its model overseas, especially in the developing world — making it more likely that standards developed pursuant to their process become the standards for the world market.

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1 Partner, Wilmer Cutler & Pickering; and Past Section Chair.
Interstate Compacts and Administrative Procedure

Ronald M. Levin

The Section of Administrative Law and Regulatory Practice has recently turned its attention to questions about how principles of administrative law are, and should be, applied by the entities that administer interstate compacts. Among the projected fruits of this endeavor are the publication of a book about these compacts, as well as the development of a model administrative procedure act for interstate commissions. To kick off the project, the Section presented a program on interstate compacts at its Fall 2003 Administrative Law Conference. What follows is a slightly revised version of one set of remarks from that event.

Interstate compacts themselves, of course, are not new. They go back further than the United States Constitution does. Consider, for example, Virginia v. Maryland, a boundary dispute that the Supreme Court has just decided. The issue was whether Fairfax County, Virginia, could build a facility to draw drinking water from the Potomac River without obtaining permission from environmental regulators in Maryland. The case turned in part on interpretation of a compact between the two states that was negotiated in 1785 at George Washington’s home in Mount Vernon. George Mason represented Virginia, and Samuel Chase, the future Supreme Court Justice, represented Maryland. This agreement, which is older than the Republic, is still in force today.

Just as the use of interstate compacts dates back to the founding of the country, the study of them dates back to the earliest days of administrative law. Two of the major figures in the first generation of scholars of our subject, Felix Frankfurter and James Landis, wrote a classic article on interstate compacts in 1925, which is still frequently cited today. In short, our Section may be coming a bit late to the party. Nevertheless, we are now in a good position to carry forward this illustrious heritage and apply it to modern problems.

The genesis of our project was a set of comments that the Section submitted last February to the Interstate Commission for Adult Offender Supervision. The AOS Compact is essentially an interstate agreement that benefits individuals who have committed a criminal offense and been released to the community under the supervision of state officials, such as parole or probation officers. The Compact allows these individuals to relocate to another state and be supervised by officials of the second state. The Compact also contains a mandate for rulemaking by the commission that administers it. In addition, it says that the rules shall be issued through procedures that substantially conform to the federal Administrative Procedure Act and the federal Advisory Committee Act. Our Section submitted a letter, drafted primarily by Professor Michael Asimow, commenting on how to fulfill these mandates, particularly on APA issues.

Our letter said that, if the Commission intended to “substantially conform” to APA rulemaking procedure, it would need to construct a process that would reflect four basic steps derived from the APA. Those steps are familiar to most Section members. In any given rulemaking, the Commission would need to (1) publish the text of proposed rules, for example in the Federal Register; (2) accept and consider comments on the proposal; (3) publish a statement of reasons to accompany the final rules that are adopted; and (4) delay the effective date of the rules by at least thirty days after they are promulgated.

Those are the APA procedures for substantive rules that have the force of law. Our letter went on to recommend procedures for other types of rules, including interpretive rules and policy statements, procedural rules, and emergency rules.

Just days before the Section’s conference, the Commission that administers the AOS Compact adopted a set of rulemaking procedures, which had been drafted by its Rules Committee. The procedures are available on the Commission’s website (www.aoscompact.org). Those procedures concerned only substantive rulemaking; the additional kinds of rules that have just been mentioned have not yet been addressed. But, for substantive rules that have the force of law, the Section’s program in November provided an opportunity to assess the committee’s performance.

The obvious starting point for that assessment is the four steps listed above. The Commission’s compliance with the first two is readily apparent. The Commission does publish proposed rules on its website. That procedure is not precisely what the federal APA prescribes, but it does make proposals accessible to everybody, so it can easily be seen as “substantially conforming” to the APA. Moreover, the Commission does accept comments from interested persons. In the case of the third and fourth steps, however, there is somewhat more room for analysis and rumination. Let us consider them in reverse order.

What the federal APA provides in its “fourth step,” once certain exemptions are taken into account, is that any...
significant, coercive, non-emergency rule should not go into effect until people have had at least thirty days to gear up to comply. To allow this much preparation time is the decent thing to do, and the Commission at least showed its sensitivity to the issue. In its latest round of rulemaking, it went beyond the APA minimum by specifying that the particular rules will go into effect 120 days after their adoption. What the Commission did not do, however, was to state in its rulemaking procedure that future rules should also have a delayed effective date under the circumstances contemplated by the APA. The Commission probably should amend its procedures to make this point explicit, so that drafters of future rules won’t forget in a particular instance.

The Commission’s response to the “third step” raises the most intriguing questions. The Commission did not undertake to publish a statement of reasons along with the final rules. (It did say that the Rules Committee will publish explanations for the proposed rules it puts before the Commission — but, in fact, its descriptions in this particular rulemaking were fairly scanty.) With the benefit of hindsight, it is easy to see why the committee might have been reluctant to take our advice. By the terms of the Compact, each of the forty-two signatory states is entitled to a representative on the Commission. In fact, a state can have more than one commissioner, and there can also be ex officio nonvoting members. Thus, although the exact number of members may vary a bit over time, the Commission is bound to be a fairly large entity.

Accordingly, the protocol that the Rules Committee has adopted to govern the Commission’s deliberations on a rule is basically parliamentary procedure. It reads like Robert’s Rules of Order. The committee introduces a resolution, and there are motions, amendments, debate, and votes. But, not too surprisingly, the protocol does not provide for issuance of a statement of reasons. An administrative agency headed by a single Cabinet Secretary, or even three to five commissioners, can normally formulate an intelligible rationale for its formal actions, but it is not so easy for a parliamentary body to agree on such a statement. In short, the problem for the Compact Commission is that it’s not very “compact”!

The lack of a statement of reasons may cause problems down the road, however. The reason is that the Compact goes on to provide that a rule issued through this procedure is reviewable in federal district court, either in the District of Columbia or in the district in which the Commission’s headquarters is located (Kentucky); and the rule shall be set aside if not supported by “substantial evidence in the rulemaking record.” In this regard, the Commission’s rules are not like the actions of most parliamentary bodies.

Now, one can’t be sure how a district court in Kentucky would proceed in this area. The likely reactions of a district court in the District of Columbia are more predictable, however, because the D.C. Circuit has written a quite illuminating opinion about judicial review of another interstate commission. Old Town Trolley Tours v. Washington Metropolitan Area Transit Commission, 129 F.3d 201 (D.C. Cir. 1997). In that case, the transit commission granted a bus company a license to give guided tours of the capital, and a competing trolley company challenged the license, although unsuccessfully.

One lesson that emerges from a reading of the case is that the AOS Compact judicial review language is awkwardly drafted. The “substantial evidence” test is normally used only where an agency is obliged to make findings on the record of a formal evidentiary hearing. An evidentiary hearing record is very different from a rulemaking record, which can be a very unruly collection of papers, letters, articles, and the like. Fortunately, however, the D.C. Circuit has a lot of experience dealing with badly written scope of review provisions like this, such as the similarly written OSHA provision. Industrial Union Dept’., AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974).

The court understands that what the drafters were trying to say is that they wanted careful, probing review, not perfunctory review — an objective that can be honored within the framework of ordinary APA review. It is only slightly facetious to say that the court would probably read the reference to “substantial evidence” in the AOS Compact to mean “all the familiar APA review standards except substantial evidence”! See Ass’n of Data Processing Serv. Orgs. v. Board of Govs., 745 F.2d 677 (D.C. Cir. 1984) (arbitrariness test and substantial evidence test are equally rigorous); Old Town Trolleys, supra, at 204 (APA review standards can be read in). To use the standard catchphrases, this would entail asking whether a rule is procedurally defective, ultra vires, or arbitrary.

But here is the more practical point: To conduct that sort of review, a court applying APA standards normally expects to have an explanation of the agency’s reasoning. Not only must the bottom-line result be reasonable, but the agency’s action must also be reasoned. For example, in the Trolleys case, the court, in upholding the transit commission, said that the agency had considered the relevant factors “very carefully and at length” and that “the explanation it provided for its action had evidentiary support.”

So, if the AOS Commission can’t furnish an acceptable explanation for a given rule, explaining why it has not accepted various criticisms or proposed changes, it could be headed for serious trouble on judicial review, at least in the D.C. Circuit. And the choice of venue may not be critical, because the Sixth Circuit has also published “hard look” opinions that are quite probing. See, e.g., Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752 (6th Cir. 1995).

The Commission contemplates that, in the event of a court challenge to one of its rules, it will provide the court with a tape or transcript of the meeting at which it adopted the rule. Would that be good enough? Perhaps. After all, the AOS Compact merely calls for “substantial conformity” to the APA. And the courts may well wish to allow a good deal of latitude to the Commission, recognizing that an interstate entity composed of
dozens of members can scarcely be equated with a federal administrative agency.

One suspects, however, that the Commission’s alternative may not prove palatable in all circumstances. The nature of the issues raised by the private party may become important. Where the transcript indicates that the Rules Committee’s analysis met with general approval, or that an amendment was added on the floor of the Commission with a clear explanation by its sponsor and no disagreement from other commissioners, the court might decide that the transcript contains sufficient elucidation of the Commission’s thinking about the points at issue. On the other hand, a court might reach a different conclusion in a case in which a rule was controversial, with various commissioners articulating diverse reasons for supporting the measure and others voicing doubts (not to mention those who perhaps voted for reasons that the transcript does not illuminate at all). One thinks, in this connection, of the familiar problems of trying to construe a statute by relying on floor debates as reported in the Congressional Record.

Suppose, then, that the transcript approach does not work out. How is the AOS Commission supposed to reconcile the imperatives of judicial review with the parliamentary structure through which it operates? Here is one possible solution: The Commission’s Rules Committee (which has a mere ten members) could write relatively full explanations of its proposed rules when it brings them to the Commission, and then update those explanations in light of any amendments the Commission adopts. The updated statement could be circulated to the Commission or its leadership to secure formal approval. There may also be other workable solutions, and these remarks should not be too prescriptive. But this is clearly an area that the Commission may need to revisit sooner or later. Likewise, it is one subject to which our Section should pay attention, as its quite promising project begins to take shape.
In the last week of January 2001, I was reviewing newly submitted Utah legislative measures, looking for proposed regulatory policy and rulemaking provisions that would impact the state's agencies. One morning, I opened up a bill to create a new Interstate Compact for Adult Offender Supervision. It contained language which delegated rulemaking functions but was worded differently than any compacts I had seen before. Where most interstate compacts impliedly authorized adoption of rules to implement substantive functions, this new Adult Offender Compact expressly mandated the adoption of such rules — according to procedures that “substantially conform to principles of the federal Administrative Procedure Act.”

The prescription that some state-to-state rulemaking actions should conform to the federal APA caught my attention. I wondered if states could conduct interstate-agreement functions under the federal APA. Could the federal APA's authority over federal rulemaking actions be applied to state rulemaking actions? And further, since publication of rules is required but no reference was made to any particular media, I wondered if the Adult Offender Compact agency would be required to publish rules in the federal register, or would some other publication be acceptable — such as the internet?

Looking for Answers
The sponsoring agency quickly referred me to Rick Masters, outside counsel for the Council of State Governments and legal counsel for the drafting team. Rick answered some questions and sent some materials. He pointed out that interstate compacts are agreements between states that commit time and resources to manage joint functions or resolve problems shared by states and that if a state adopts a compact, that instrument becomes a binding contract upon future state legislatures.²

I later learned that the rulemaking language for the Adult Offender Compact had been lifted from a compact that had only been adopted by one state and would likely lapse. When I asked Rick Masters why reference was made to the federal APA rather than a state APA, he said that no one state had the “best” APA and that a single state’s APA would not be acceptable to other states. I asked if the drafters had obtained any input about federal APA theory and practice from an administrative-law practitioner or scholar. I then asked if his group had considered using a separate compact as an APA for all compacts. Rick paused, and answered: “Why didn’t I think of that?” That was a defining moment, and I realized for the first-time that I had stumbled onto a difficult policy issue.

Rick then asked me a question: Would I join their next compact drafting team to re-write the Interstate Compact on Juvenile Offenders with about 25 persons from state and federal offices. Upon joining that group, we looked at the federal APA and the 1981 Model State Administrative Procedure Act. We finally agreed on language that has the Juvenile Offender Compact rules conforming with principles of the 1981 MSAPA, “or any other Administrative Procedure Act as selected by the Commission.” As of this date, some states have now adopted the Juvenile Offender Compact, and it is being introduced in others.

Breaking with the Past
In 2002, another group drafted a new Compact on Insurance Product Regulation and took the same rulemaking approach our Juvenile Offender Compact used. So now, there are four interstate compacts, with one having already been adopted, that mandate adoption of rule-making procedures. To my way of thinking, this signals an important change in compact law: A whole new body of administrative rulemaking is emerging, and while these four compacts may lack some of the structure and process typical of most state’s notice and comment methods, this is a new direction for interstate compact rulemaking.

In the past, for the most part, rules and/or policies issued under most interstate compacts normally were not the product of administrative law methodology. I looked at several older compacts and noted three fairly typical rulemaking patterns:

(a) Most early compacts empowered their commissions to administer their substantive functions, but rulemaking and or other similar regulatory processes were not prescribed by those compacts. Examples include the Interstate Compact on Corrections and the Interstate Compact on Civil Defense.

(b) Later compacts, into the late 1950’s, rarely mentioned rules. They only required a compact’s policies to comply with each adopting state’s statutes, rules, or regulations pertinent to their imple-
mentation. The Interstate Compact on Wildlife Violators is an example.

(c) Recent compacts, through the 1980’s, tended to provide for administrative regulations, but without specifying rulemaking procedures. Examples include the Interstate Compact on Vehicle Equipment Safety and the Commission for Higher Education.

When courts upheld rules under these prior interstate compacts, they found implied rulemaking authority to carry out the substantive functions enumerated by each particular compact – essentially the “contract law” approach. The new Adult Offender Compact diverts from that mode and specifically requires that its Commissioners make rules to implement the act.

Why have drafters of four new interstate compacts turned to express rulemaking authority? One major reason stands out: lack of enforcement authority. During our first Juvenile Offender Compact drafting meeting, delegates simply could not express enough of their complete and utter dissatisfaction with how the current Juvenile Offender Compact is failing the states. Basically, it is not being upheld by some states who feel they can choose when NOT to comply.

This enforcement-authority question was the major reason for changing the old Adult Probationer/Parolee Compact. In the mid-1980’s, when the former Interstate Compact for Supervision of Parolees and Probationers was first being considered for revision, having been adopted in 1937, there was much discussion of a problem that had surfaced over the years. When one state refused to cooperate, the Probationer/Parolee Compact offered the “state-having-jurisdiction” little or no relief. Frustrated, the National Institute of Corrections in 1986 funded a Commission to Re-Structure the Probationer/Parolee Compact, and in their study, they identified eight major enforcement gaps, six of which could be addressed through the provision of express rulemaking authority:

1. Outdated client eligibility requirements, which preclude acceptance of certain client groups... (i.e., misdemeanants);
2. Inefficient, inflexible and cumbersome operational procedures, resulting in delays in transfers, arrests, and program delivery;
3. A lack of authority in some states to arrest out-of-state violators;
4. An inefficient interstate parole and probation violation process;
5. A lack of uniformity in administration of preliminary revocation hearings; and
6. Conflicting state policies in the areas of misdemeanant supervision, administration of supervision fees and supervision of certain difficult client groups (for example, clients with diseases like AIDS).

A Question of Force of Law
I suggest that the Adult Offender Compact drafters have turned to federal APA notice and comment rulemaking because of two basic reasons: (a) requiring notice & comment and publication in a document like the federal register will garner more deference by courts; and (b) requiring that the promulgation of rules substantially conform to an Administrative Procedure Act will help impart the force of law.

It is the concept that a compact rule needs to have the force of law that is of interest here. Let me focus on that for a moment. When I informed my office’s legal counsel that the Adult Offender Compact was seeking an increased force of law, he noted that if administrative rulemaking was adopted by states for implementing compacts, then other states might possibly gain enforcement powers against our own state. He wasn’t sure he liked the idea of another state being able to bring stronger enforcement action against our state. But let me suggest that his issue cuts both ways. If a state doesn’t want to enforce certain mutually-agreed-upon solutions to common problems, then I would argue that state should not join a compact in the first place. If one state finds that another state has the authority to take them to court over an issue of non-compliance, and wants to avoid the consequence of that policy, then that state should take steps to withdraw from that compact.

Seeking Uniformity
In wrestling with these questions, I noted that while APA-type rulemaking may be an option for newly enacted compacts, there are another 190 plus interstate compacts currently in force that do not mandate administrative rulemaking methods. How can an APA rulemaking option be provided to agencies operating under those compacts? At some point in my discussion with Rick Masters, I concluded that a new APA could be drafted using the best features of the federal APA, the 1981-MSAPA and existing state APAs. It could also take advantage of much of the rulemaking scholarship from over the past 25 years.

If such a new APA were prepared for interstate compacts, I see two options:

Option-1 - It could be adopted by the states as a separate interstate compact on administrative procedure covering all compacts that any one state has entered into. Such a compact APA would be a controlling act, would delegate rulemaking authority, would define time-frames and filing calendars, and provide notice and comment procedures similar to APAs already adopted by the 50 states. But the downside is clear. A state would need to adopt this new APA compact through legislation. What happens if one or more states fail to adopt? Would Congress have to consent to such an APA compact?

Option-2 - The new draft APA language could become a “rule on rules.” This approach would allow each of the existing 190+ compact commissions to adopt the language as a rule or by-law. But there is a downside here as well. At least in some states, a legal “cloud” might exist. Courts might hold that because an APA rulemaking method was not included in the wording of these older compacts, and didn’t even exist as an option at all prior to 1946, many compact agencies may not have the option of adopting APA-type procedures without passing an amendment to the compacts themselves.

Conclusion
It is not clear to this author that wholesale adoption of the federal APA is well suited to serving the needs of an interstate compact agency. Likewise, exclusive application of the 1981 State Model APA may be equally unsuitable. Drafting some other APA holds promise but is not risk... continued on page 18
The Case for an Interstate Compact APA

By William S. Morrow, Jr.1

Interstate compacts are an effective tool for structuring interstate relationships, regulating private activity that transcends state lines and furnishing government services on a regional basis. They offer an alternative to federal programs and regulation and are particularly apt for matters traditionally addressed by states, such as law enforcement and public health, safety and welfare. Some 190 interstate agreements are currently in place.

Interstate compacts may be divided into two categories, those that have been approved by Congress pursuant to Article I, section 10, clause 3 of the U.S. Constitution, often referred to as the Compact Clause, and those that have not. Those that are approved by Congress become federal law. Gayler v. Adams, 449 U.S. 433, 101 S. Ct. 703, 707–08 (1981). Those that are not are nevertheless contracts binding on the signatories, such that no single State may unilaterally alter the bargain. West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951).

When interstate compact agencies prescribe regulations, adjudicate disputes, respond to requests for information or hold meetings, whose Administrative Procedure Act (APA) applies? Many compacts are approved by Congress. Does that mean those agencies are governed by the federal APA? Having been created by agreements between states, does that mean state APAs apply? If so, which one or ones? Do both federal and state APAs apply? If so, what happens if there is a conflict? Do normal preemption rules apply? Or could it be that neither the federal nor the state APAs apply?

This article takes a brief look at the intersection of APA and interstate compact precedent and concludes that in many, probably most, cases neither the federal nor the state APAs apply. The solution proposed is the creation of an Interstate Compact APA.

I. Which, if any, APA Applies?

Are compact agencies approved by Congress federal agencies within the meaning of the federal APA? Are compact agencies covered by the signatories’ APAs? The answer to each question begins, but does not end, with a look at how APAs define the term “agency.”

A. State APA

State APAs typically define the term “agency” broadly enough to encompass an interstate compact agency. For example, Virginia’s Administrative Process Act defines agency to mean: “any authority, instrumentality, officer, board or other unit of the state government empowered by the basic laws to make regulations or decide cases.” Va. Code Ann. § 2.2–4001 (2003). The definition of agency in South Dakota’s Administrative Procedures Act includes “agent[s] of the state vested with the authority to exercise any portion of the state’s sovereignty.” S.D. Codified Laws § 1–26–1(1) (2003) (emphasis added). It is not uncommon for a compact or court to characterize an interstate agency as an agency or instrumentality of the signatory States.

Some compacts require that the agency follow the APA of the State with the most restrictive provisions. For example, article III(d) of the Tahoe Regional Planning Compact, Pub. L. No. 96–551, 94 Stat. 3233, 3237 (1980), provides that “all meetings shall be open to the public to the same extent required by the law of the State of California or the State of Nevada, whichever imposes the greater requirements, applicable to local governments at the time such meeting is held.”

Some State APAs, however, expressly exclude interstate compact agencies from their purview. Delaware’s APA provides that the term agency “does not include … joint state-federal, interstate or intermunicipal authorities and their agencies.” Del. Code Ann. Tit. 29 § 10102(1) (2003). New York’s APA provides that the term agency “shall not include … agencies created by interstate compact.” N.Y.A.P.A. Law § 102.1. (Consol. 2003). The District of Columbia’s APA has been held not to apply to interstate agencies. Kiska Construction Corporation v. U.S.A. v. Washington Metro Area Transit Authority, 167 F.3d 608 (D.C. Cir. 1999) (citing Latimer v. Joint Committee on Landmarks of the National Capital, 345 A.2d 484, 487 (D.C. 1975)).

And compact precedent barring the application of a single signatory’s laws in a manner that conflicts with or is inconsistent with the terms of the States’ agreement tends to render all State APAs inoperative with respect to interstate compact agencies. Illustrative of this line of cases is the District Court decision in C.T. Hellmuth & Assocs., Inc. v. Washington Metro Area Transit Authority, 414 F. Supp. 408 (D. Md. 1976), holding that the Washington Metropolitan Area Transit Authority (WMATA) is not subject to the Maryland Public Information Act, Art. 76A Md. Ann. Code (1975 Repl. Vol.), because the signatories’ freedom of information laws “differ in not insignificant respects,” and no single signatory is free to “impose its preferences … in derogation of the compact,” no matter how minimal the imposition may be. 414 F. Supp. at 409–10. It should come as no surprise that there is great variation among the various State APAs, such that no two are exactly alike. Compact precedent thus leaves little room, and in most instances no room, for finding compact agencies subject to these statutes.

1 General Counsel, Washington Metropolitan Area Transit Commission; Vice Chair, State Administrative Law Committee.
B. Federal APA

The federal APA defines agency in pertinent part as:

> each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—
> (A) the Congress;
> (B) the courts of the United States;
> (C) the governments of the territories or possessions of the United States;
> (D) the government of the District of Columbia.


When consenting to an interstate compact tending to “encroach upon or interfere with the just supremacy of the United States,” no doubt Congress could qualify its consent by declaring the resulting administrative body to be an “authority of the Government of the United States.” But what would be the point? If creating a federal agency is the appropriate solution, it would be simpler and more direct to have Congress simply pass a federal statute containing the terms of what would have been the States’ agreement and avoid unnecessary negotiations and complications. The value in interstate compacts derives from the basic fact best preserves State sovereignty.

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Congress understood this when it consented to the creation of the Pacific Northwest Electric Power and Conservation Planning Council, declaring that the Council “shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law.” 16 U.S.C. § 839b(a)(2)(A). Similarly, when Congress has ventured beyond merely granting consent to becoming a full compact participant, it has taken pains to disavow the resulting entity as an agency of the federal government. When the United States became a signatory to the Delaware River Basin Compact, section 15.1 (m) was added to provide that the Delaware River Basin Commission “shall not be considered a Federal agency” for purposes of the federal APA. The United States’ participation as a signatory to the Susquehanna River Basin Compact, was conditioned on the same understanding. Pub. L. No. 91–575, § 2(1), § 8(1), 84 Stat. 1509(Dec. 24, 1970).

The courts, however, have been quite willing to inquire as to whether a particular compact agency is so endowed with a federal interest that it should be considered a “quasi-federal agency.” See e.g., Elkon Enterprises, Inc. v. Washington Metro Area Transit Authority, 977 F.2d 1472 (D.C. Cir. 1992) (noting intra-circuit split and assuming without deciding that WMATA is a quasi-federal agency). On the other hand, although Congressional approval of an interstate compact can be a factor in determining quasi-federal agency status, it should not be regarded as dispositive. The courts generally have held that there must be some other federal-interest factors present such as a federal role in appointing agency members, federal funding or furtherance of federal objective; otherwise, federal status will be denied. And sometimes even the presence of one of these federal-nexus factors is not enough.

Finding that a compact agency approved by Congress is not a federal agency can create an administrative law gap in need of filling. Some courts fill that gap with the federal APA notwithstanding a finding that the agency is not strictly speaking an authority of the United States government. In Old Town Trolley Tours v. Washington Metropolitan Area Transit Commission, 129 F.3d 201, 204 (D.C. Cir. 1997), the DC Circuit did just that when faced with deciding the appropriate standard for reviewing licensing decisions of the Washington Metropolitan Area Transit Commission under the recently amended Washington Metropolitan Area Transit Regulation Compact, which provided for judicial review of Commission orders in the DC Circuit but was silent on the scope of review. The court adopted by reference the standards in 5 U.S.C. § 706(2)(A)–(D) because the court had followed those standards under the pre-amended Compact and because such standards are commonplace and merely restated the law as to the scope of judicial review when enacted in 1946. But some courts simply find the federal APA does not apply. Asking the courts to fill in the gaps introduces risk and uncertainty in compact administration.

II. Proposed Solution

The Section of Administrative Law & Regulatory Practice of the American Bar Association (ABA) has embarked on a project to draft an APA for application to or adoption by agencies created by interstate compacts. The immediate goal is to have the project’s work product adopted by the House of Delegates as ABA policy. Ultimately, existing compact agencies and future compact signatories could adopt some or all of the resulting guidelines.

Some might question why the model State APA could not be adopted by compact agencies and their signatories instead. This might be problematic for existing compact agencies. States typically do not adopt model legislation without deleting some provisions and modifying and adding others. A court may be reluctant to uphold an agency’s adoption of a specific model provision rejected by one of the signatories. Further, the model act was promulgated in 1981. The state of administrative law has changed greatly since then, and while a proposal has been submitted to the National Conference of Commissioners on Uniform State Laws to conduct a study of subsequent developments with an eye toward revision, action is not guaranteed any time soon.

Finally, the model State APA does not accommodate the structure of compacts or reflect the unique status and experience of compact agencies and pertinent compact precedent. The Interstate Compact APA Project will take these factors into consideration.

Adopting the federal APA presents its own problems, even though some compacts take this approach with respect to rulemaking. First, adopting the federal APA may be politically unattractive given that one of the reasons compacts are selected as the vehicle for resolving disputes between states and implementing state policies and programs on an interstate level is to avoid or at least minimize federal involvement. Second, if the agency is expressly not a federal agency and/or is held not to be a quasi-federal-

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Public service is a noble calling and in my experience has drawn some of the best and brightest to government. Many who have pursued opportunities in the public sector share a simple desire to do right by the American people. Collectively, public servants possess a wealth of knowledge and expertise that forms the backbone of the administrative state.

Our administrative agencies merge this apolitical expertise with presidentially-appointed leadership. My job as a commissioner is to implement the law set forth in the Communications Act, but, inevitably, public officials are called upon to exercise discretion and to fall back on a guiding regulatory philosophy. A president accordingly tends to fill agency posts with officials who share his or her core ideological preferences. This helps ensure that agencies will make decisions not only based on their embedded knowledge base, but also in a manner that reflects the public’s choice of executive leadership. Another benefit of combining career public servants and political appointees is that it provides an opportunity to infuse an agency with fresh ideas and perspectives.

Although I am an advocate for less government intervention and more private sector self-regulation, I do not wish to leave you with the impression that I believe there is no role for government, and especially for the FTC. Quite to the contrary. First of all, my experience at the FTC only reinforces my belief that too often the heavy hand of government involvement is a direct reaction to the misdeeds and excesses of those in the private sector. Profit is a great motive and driving force in our economic system, but greed tarnishes us all. In recent years, we have certainly seen sufficient examples of greed that begs for some higher authority to act forcefully. Our experiences at the FTC remind us daily that there are firms and individuals attempting to fix prices, lessen competition, and otherwise illegally manipulate the marketplace and to engage in unfair, deceptive, and fraudulent practices – all of which cause (or can cause) considerable harm to consumer welfare.
The FTC is a very busy agency with a lot of complex consumer protection and competition matters on its plate. Despite our workload, however, we manage to deal thoroughly with each case that comes before us. Although a lot of what we deal with involves technical questions of law and economics, I believe that we in government have a duty to apply a generous dose of common sense to our law enforcement and regulatory activities. In my view, an approach that blends analytical rigor with a common-sense, realistic appraisal of what role government should play is the best path toward our goal at the FTC: to protect the welfare of consumers.

From the remarks of Justice Sandra Day O’Connor at the “Understanding the European Union Regulatory Process” program unveiling the Section’s new EU project:

I don’t pretend to have expertise in the area of EU Administrative law, but I have been extremely interested in the development of the European Union. I think that in the century just ended one of the most important, if not the most important, events that occurred in that century was the formation of the European Union and the notion that after generation after generation of wars among nations in the area now covered by the EU, that a union would have been formed and that we would have had peace for over fifty years in that region, and cooperation on a level never before seen is truly incredibly. The European Union...today has more people living within it than we have in our country and it is a formidable area of the world in terms of its influence and its economic strength and power.

Now at present I think there is virtually no transparency in the setting of European Union policies and regulations. And legislation is basically developed by the Commission. The Commission consists of unelected members and there is no representativeness or responsiveness in the sense that we are accustomed to in this country by members of the commission who are setting policy. They are not elected in public participatory elections and there is no body to whom they must report. So it’s very different from the kinds of policymaking and regulatory setting that we are accustomed to in this country.

I will be very interested to see your black letter description of this process. I think it’s needed because businesses here have an urgent need to know how to conduct business there and vice versa, and I think the more that we can acquaint people on this side of the Atlantic and people in the EU with the differences, and in some cases similarities, of the administrative law process in these two regions it will be very helpful. So I think you are engaged in something “a” very difficult, and “b” very useful.

The National Administrative Law Judge Foundation, the public interest arm of the National Association of Administrative Law Judges, is requesting applications for the 2004 Fellowship. The topic for the 2004 Fellowship is “The Relationship of the Administrative Law Adjudicator to the Agency Head.”

The Fellow will prepare an original article for publication in the Journal of the National Association of Administrative Law Judges, and will deliver a fifty-minute oral presentation at the annual meeting in the fall of 2004. The Fellow will receive a $1,000 cash stipend and travel expenses. The final draft of the paper will be due December 31, 2004.

Applicants should submit two copies of a detailed outline, abstract or introduction to the paper, with a writing sample, curriculum vitae, and list of publications, by February 1, 2004. The Fellowship Committee will review the submissions and select a Fellow by March 30, 2004. Applications and inquiries should be addressed to the Chair of the Fellowship Committee:

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Friday, February 6, 2004

10:00 a.m. – Noon

Protection of Industry from Terrorism versus Openness of Regulatory and Safety Information: The Homeland Security Dilemma

Cost: $25.00 Members; $35.00 Non-Members; FREE for Students

“Critical Infrastructure Information” is shielded from Freedom of Information Act disclosure in order to protect industry and local government facilities from attack. The new secrecy clashes with decades of increasing openness and public accountability. This panel will explore the security related issues and suggest ways clients and agencies can deal with the new decisions that must be made.

Panelists:
- Jamie Conrad, American Chemistry Council;
- Daniel J. Metcalfe, Director, Office of Information & Privacy, US Department of Justice;
- James T. O’Reilly, Professor, University of Cincinnati College of Law and
- Wendy Wagner, Professor, University of Texas at Austin School of Law.

Moderator: Lynne K. Zusman, Lynne K. Zusman and Associates, P.C.

1:00 p.m. – 3:00 p.m.
The Energy Bill and FERC – Past, Present and Future

Cost: $25.00 Members; $35.00 Non-Members; FREE for Students

The year 2003 saw tremendous activity in the energy industry, including the nation’s largest power blackout in August. With the passage of the Energy Bill stalled in the Senate at the end of the year, there are many questions regarding energy policy developments. Secretary Abraham is confident that Congress
will pass a comprehensive Energy Bill in January. What form will the Energy Bill take? How will it affect industry? In what ways will FERC’s regulatory role change? Join this panel for an inside look at the past, present and future of the Energy Bill and FERC’s regulatory responsibilities, from both an industry viewpoint and the regulator’s perspective.

**Panelists:**
- **Shelton Cannon,** Deputy Director of the Office of Market Tariffs and Rates, Federal Energy Regulatory Commission;
- **Bruce Edelston,** Director, Policy and Planning, Southern Company;
- **Diana M. Liebmann,** Associate, Haynes and Boone, LLP; and
- **Michael J. Zimmer,** Partner, Baker & McKenzie.

**Moderator:** **Kenneth G. Hurwitz,** Partner, Haynes and Boone, LLP, Washington, DC.

3:30 p.m. – 5:30 p.m.

**“Lessons from Do-not-Call”**

Cost: $25.00 Members; $35.00 Non-Members; Free for Students

This program will address some of the most contentious issues raised by the FTC and FCC’s recent “Do-not-Call” privacy initiative. Issues raised concern the protection of commercial speech, differing treatment of not-for-profit and for-profit telemarketers, and what lessons could be learned for anti-spam initiatives. The panel will include a variety of viewpoints from both the public and private sectors.

**Panelists:**
- **Jodie Bernstein,** Former Director, Bureau of Consumer Protection, Federal Trade Commission and Partner, Bryan Cave, LLP;
- **Eileen Harrington,** Associate Director, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission; and
- **Brad Schuelke,** Texas Assistant Attorney General for Consumer Protection.

**Moderator:** **Steve Vieux,** Federal Trade Commission

6:00 p.m. – 8:00 p.m.

**Section Reception – Casa Rio**

430 East Commerce Street, San Antonio
Cost: $35.00 Members; $45.00 Non-Members; $35.00 Guest(s)

Join us for the Administrative Law and Regulatory Practice Section Reception at Casa Rio. Enjoy authentic Mexican and Southwestern cuisine along with an open bar. Founded in 1946, Casa Rio sits on land first granted title in 1777 by the King of Spain. The Spanish Colonial period hacienda became the core of the new business. The cedar door and window lintels, the fireplace, and thick rock walls, are still evident inside the building. Casa Rio was the first San Antonio business to open its doors to the River and take advantage of the River’s setting. Canoes, gondolas, and paddle boats, evolving into tour and dinner boats, began here and helped create the Riverwalk of today.

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**Saturday, February 7, 2004**

1:30 p.m. – 3:30 p.m.

**The Lawyer–Lobbyist “on the Frontier”: What Legal and Ethical Rules Apply?**

Cost: $25.00 Members; $35.00 Non-Members; Free for Students

When a lawyer engages in lobbying activity, he or she may find that the legal and ethical rules (and protections) that normally apply to his rendition of professional services drop away, only to be replaced by an entirely different scheme of regulation. While the Pennsylvania judiciary has recently claimed the exclusive right to regulate at least some services provided by lawyers that count as lobbying, other courts are finding that, when a lawyer engages in lobbying activities, privileges that exist in other contexts are no longer available to resist discovery and trial testimony. In December 2001, the lawyers that sought the last minute pardon by President Clinton for fugitive American businessman Marc Rich discovered this to their dismay. Then in July 2002, the FDIC was able to obtain a subpoena related to the lobbying activities of one of Washington’s most prominent law firms on behalf of an individual client.

This program will focus on some of the distinctive issues, both legal and ethical, that confront the lawyer who is performing what might be considered “lobbying activities” for his or her client. For example, to what extent do the ABA’s Model Rules of Professional Conduct regulate such conduct? Does the attorney–client or work product privilege disappear when the lawyer used lobbying activities as part of the strategy to advance the interests of his or her client? What do existing legal and ethical rules say about contingency fee lobbying? And, when it comes to the attorney for the public interest client, what distinctive challenges and issues are presented by the dual roles of lawyer and lobbyist?

**Panelists:**
- **Thomas D. Morgan,** Oppenheim Professor of Anti–Trust and Trade Regulation Law, George Washington University Law School;
- **Thomas M. Susman,** Partner, Ropes & Gray LLP; and
- **David C. Vladeck,** Director of Public Citizen Litigation Group and Adjunct Professor of Law, Georgetown University Law Center.

**Moderator:** **William V. Luneburg,** University of Pittsburgh School of Law.

6:30 p.m. – 9:30 p.m.

**Section Dinner – Boudro’s on the Riverwalk in “The Vault”**

Located at the corners of Commerce and Presa Streets, San Antonio
Cost: $65.00 Members; $75.00 Non-Members: $65.00 Guest(s)

Join us for the Administrative Law and Regulatory Practice Section reception and dinner at Boudro’s on the Riverwalk in one their special private rooms — *The Vault* — the actual lobby of the historic Alamo National Bank. The evening begins with cocktails and appetizers followed by a three-course dinner.
Mandating Pollution Prevention

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dry cleaning work not only to assist and educate the industry, but also to support and educate the AQMD’s rule development staff and governing board.

Undoubtedly, integration of the technical advancement and rule development functions at EPA and other agencies would entail significant changes to their existing organizational structures. In particular, such a model would require provision of increased financial, personnel and organizational resources to the technology advancement function, and the creation of more formal, routine channels of communication between the technology office and other offices within the relevant agency.

Nonetheless, if policymakers want regulated entities to blend together business and environmental concerns, they must be willing to do the same within their own organizations.

Interstate Compacts: The Next Frontier for Administrative Rulemaking

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free. To give meaningful consideration to these options – and to address other deficiencies in compact administrative law in the areas of adjudication, judicial review, openness and management – the Section of Administrative Law and Regulatory Practice has embarked on a project to research and draft a model APA for interstate compacts. Approximately forty volunteers in the legal profession – from academia, government and private practice – have joined together in an effort to survey case law on interstate compact procedure, review the provisions of existing APAs at the federal and state levels, and examine current rules and regulatory policies of compact agencies. The project is co-chaired by myself and Bill Morrow, general counsel of the Washington Metropolitan Area Transit Commission, and is expected to take two to three years. Anyone interested in joining should contact Bill Morrow at wmatc@erols.com, or the author at kbishop@utah.gov.

The Case for an Interstate Compact APA

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agency, applying the federal APA really does not make sense. Third, like the model State APA, the federal APA was not enacted with compact agencies in mind. The project output will be.

III. Conclusion

State APAs only apply to interstate compact agencies whose governing compacts expressly authorize such treatment, and few compacts so provide. Congressional consent transforms a compact into federal law but does not in and of itself transform a compact agency into an authority of the government of the United States within the meaning of the federal APA. The result is that courts are often left looking for administrative law to apply. That search would be aided by, and one would hope ultimately circumvented by, the development of guidelines that not only embody the modern administrative law principles common to most APAs but reflect compact precedent and the experience of compact signatories and agencies, as well – an interstate compact APA.

NEED SOME CLE HOURS?

Visit the Section’s Website at www.abanet.org/adminlaw and click on ONLINE CLE for access to Section programs at WestLegalEdCenter.
As this is written, the Supreme Court has decided only a handful of cases this term, but among them was an administrative law case applying *Chevron, Barnhart v. Thomas*, 124 S.Ct. 376 (2003). *Thomas* involved a former elevator operator whose job had been eliminated. Thereafter she applied for Social Security Disability benefits, which requires that she be unable to perform substantial gainful activity by reason of a medical condition. Specifically, the statute states that the condition be of such severity that she “is not only unable to do [her] previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy. . . .” “Work which exists in the national economy” is further defined as “work which exists in significant numbers” either where the applicant lives or in several regions of the country. After a hearing before an ALJ, she was found to suffer hypertension, cardiac arrhythmia, and cervical and lumbar strain/sprain, but the ALJ found that these ailments did not prevent her from performing her past work as an elevator operator. Consistent with Social Security regulations, he refused to consider whether the job of elevator operator still existed in significant numbers in the national economy. The Third Circuit en banc held that the statute unambiguously provides that the ability to perform one’s prior work is disqualifying only if that work exists in the national economy. This holding conflicted with that reached by four other courts of appeal, so the Court granted certiorari.

The Third Circuit found the statute unambiguous because, “by referring first to ‘previous work’ and then to ‘any other kind of substantial gainful work which exists in the national economy,’ the statute unambiguously indicates that the former is a species of the latter.” The Supreme Court disagreed in a unanimous opinion by Justice Scalia. In his words, the Third Circuit’s interpretation was “precisely contrary to the grammatical ‘rule of the last antecedent,’” and while such a rule is not an absolute and can be overcome by other indicia of meaning, here there was no reason not to give effect to the normal grammatical rule. In response to the argument that it would be absurd to deny a person disability benefits because they can perform a job that does not exist in the national economy, the Court posited that it was plausible that Congress chose the ability to perform one’s past work as “an effective and efficient administrative proxy for the claimant’s ability to do some work that does exist in the national economy.” Such a proxy would often allow the agency to avoid the more difficult investigation as to whether the person was unable to perform any other work in the national economy, thereby saving agency resources. The fact that the proxy might not always be accurate would hardly make such a rule unreasonable. “To generalize is to be imprecise. Virtually every legal (or other) rule has imperfect applications in particular circumstances.” The Court concluded: “The proper Chevron inquiry is not whether the agency construction can give rise to undesirable results in some instances . . ., but rather whether, in light of the alternatives, the agency construction is reasonable.”

There does not appear to be anything special in this opinion, but it does once again remind us how deferential the Supreme Court is at *Chevron’s* step two. The reasonableness of the agency’s interpretation, potentially disqualifying even a person disabled from holding any job existing in the national economy, did not derive from any proof or administrative record material, thereby distinguishing this assessment from the reasonableness inquiry attendant to judicial review of agency action as arbitrary or capricious. Indeed, there is nothing other than the Court’s supposition that using a person’s ability to do his or her past work as a proxy for performing other work in the national economy would indeed save any agency resources, and there is nothing other than the Court’s dismissal of the perfection of rules that assesses the actual consequences of the agency’s rule on individuals.

The Court has recently granted certiorari in a potentially important administrative law case. The issue in *Norton v. Southern Utah Wilderness Alliance* (decided below *sub nom. Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002)) involves judicial review of agency inaction under 5 U.S.C. § 706(1), which provides that a court shall “compel agency action unlawfully withheld or unreasonably delayed.” Although lower courts have struggled to harmonize the APA’s limitation of judicial review to “final agency action” with this provision and a definition of agency action that includes “a failure to act,” the Supreme Court has apparently never specifically addressed this issue.

The case arises in an environmental challenge to the management of Bureau of Lands Management lands in wilderness study areas. The Federal Land Policy and Management Act requires the BLM to manage wilderness study areas “in a manner so as not to impair the suitability of such areas for preservation as wilderness.” The BLM’s regulations implementing this requirement in essence prohibit the use of off-road vehicles in WSAs. Here the environmentalists brought suit alleging that the BLM had failed to carry out this mandatory, nondiscretionary duty and sought an order compelling action unlawfully withheld.

The government denied that this was a case under § 706(1), arguing that there was no “agency action,” including no failure to act within the meaning of § 551(13), and that the case was really a challenge to the ongoing management of the area for which the APA does not provide judicial review in the absence

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When does *Chevron* apply? If it doesn’t, what is the nature of *Skidmore* deference?

The Courts have continued to struggle with the question of whether *Chevron* deference applies to particular agency statutory interpretations. In *U.S. v. Mead*, the Supreme Court explained that *Chevron* deference applies “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” In so doing, the Court said that a requirement for relatively formal procedures such as notice and comment was a good indication that Congress intended the courts to defer to a particular agency interpretation. The fundamental question, however, is not the nature of the process implemented by the agency, but whether the relevant considerations, including agency process, indicate that Congress intended *Chevron*-style deference to apply to the interpretation at issue.

In reviewing an EPA interpretation reached through informal rulemaking, the Fifth Circuit recently truncated the delegation inquiry by characterizing the test as whether “the agency’s decision is a result of a sufficiently formal and deliberative process to warrant deference...” *BCCA Appeal Group v. U.S. EPA*, 348 F.3d 93, 100 (5th Cir. 2003). Noting that EPA had acted through “a formal process,” the court applied *Chevron* deference. In most cases, this shorthand approach will make no difference to the outcome. It is important to understand, however, that the mere use of – or failure to use – formal procedures in reaching a statutory interpretation does not determine whether *Chevron* deference is due. Other indicators of congressional intent may be used to argue for or against *Chevron* deference regardless of the procedures used by the agency.

Two recent decisions involving the IRS demonstrate that agency use of “a formal process” such as informal rulemaking is not necessary to support *Chevron* deference. A third raises the question of the nature of *Skidmore* deference when *Chevron* does not apply. In *Alfaro v. Commissioner*, 2003 WL 22509403 (5th Cir. 2003), the Fifth Circuit granted *Chevron* deference to an interpretation stated in a Treasury Regulation that had been issued without notice and comment. It is not clear, however, why the court applied *Chevron*. The IRS had argued that deference was due under the multifactor test of *Barnhart v. Walton* despite the failure to pursue notice and comment. Without engaging in such an analysis or otherwise explaining itself, the court simply stated that the interpretation had to be sustained if it was reasonable. We cannot tell why the court applied *Chevron* deference in this circumstance. From the opinion, it seems likely that the strength of the agency’s interpretive argument rendered insignificant the fine details of deference analysis.

In *Hospital Corporation of America and Subsidiaries v. Commissioner*, 348 F.3d 136 (6th Cir. 2003), the Sixth Circuit similarly granted *Chevron* deference to a Treasury Regulation that had been issued without notice and comment. In that case, however, the court addressed the distinct issue of whether *Chevron* deference was due where the interpretation had been issued pursuant to “general authority to ‘prescribe all needful rules and regulations for the enforcement’ of the Internal Revenue Code,” rather than under an express statutory provision granting authority to implement particular sections of the Code. Citing the Supreme Court’s decision in *Buckhannon v. United States*, 537 U.S. 437 (2003), the court held that general rulemaking authority was sufficient to constitute an implicit delegation that would support *Chevron* deference.

Finally, the Sixth Circuit in *Aeroquip–Vickers, Inc. v. Commissioner*, 347 F.3d 173 (6th Cir. 2003), grappled with the degree of deference due to an interpretation embodied in a Revenue Ruling. In a 2–1 decision reversing an 11–6 decision by the Tax Court, the majority and dissent agreed that the ruling was not entitled to *Chevron* deference. They seem to have disagreed as to the nature of *Skidmore* deference. Despite holding that *Skidmore* deference applied, the majority characterized the IRS’s interpretation as “entirely reasonable,” seemingly reflecting *Chevron*. The majority then explicitly applied *Skidmore* deference, upholding the interpretation because the agency’s interpretation was persuasive and because this “longstanding interpretation of [the agency’s] own regulations,” deserved “substantial judicial deference.” The dissent argued that the majority had overstated the degree of deference due to a Revenue Ruling. Emphasizing that “the level of respect afforded the agency pronouncement [under *Skidmore*] depends on its ‘power to persuade,’” the dissent found the agency’s analysis to be wanting. While the majority applied something of a multifactor analysis by considering the longstanding nature of the agency interpretation, the dissent seems to be saying that *Skidmore* requires nothing more than a determination of whether the agency’s argument is persuasive.

7th Circuit on *Buckhannon*, the IDEA, and “prevailing party” status for the purpose of attorney fee awards

The Seventh Circuit joined the Second and Third Circuits in holding that the Supreme Court’s decision in *Buckhannon Bd. & Care Home v.WVa. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001) applies to the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA). In so doing, the court articulated a presumption in favor of *Buckhannon*’s applicability to statutory fee shifting provisions that award fees to a “prevailing party.” It also held that a party who achieves success through a private settlement of litigation does not qualify as a “prevailing party” under *Buckhannon*.

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Buckhannon involved litigation that was rendered moot when a state legislature repealed provisions of state law that had been challenged under the Fair Housing Amendments Act (FHAA) and of the Americans with Disabilities Act (ADA). Both statutes awarded attorney fees to the “prevailing party.” The Supreme Court refused to apply the “catalyst theory,” holding that the term “prevailing party” was a term of art under which the litigant must achieve success in the litigation itself, generally taken to mean either by prevailing on the merits or by obtaining a judicially sanctioned consent decree.

In T.D. v. La Grange School District No. 102, 2003 WL 22682466 (7th Cir. 2003), the plaintiff arguably achieved success in the litigation itself by reaching a settlement agreement that provided a substantial financial recovery and the sort of school placement originally sought by the plaintiff. The District Court held that Buckhannon did not apply to this case because the IDEA included various limitations on recovery that rendered it distinct from other “prevailing party” fee shifting statutes. The Seventh Circuit reversed on this point, but it refused to adopt a blanket rule that Buckhannon would apply to all “prevailing party” statutes. Recognizing that the “text, structure, or legislative history” of a particular fee-shifting statute might indicate that the term “prevailing party” in that statute is not meant to have its usual meaning, the court held that “there is a strong presumption that Buckhannon applies to each fee-shifting statute that awards fees to ‘prevailing parties.’” Thus, the court left open a rather narrow door for arguments that the catalyst theory is available under some fee-shifting statutes that use the term “prevailing party.”

Having held Buckhannon applicable to the IDEA, the court then denied attorney fee recovery for the District Court case because the litigation had been resolved through a private settlement agreement, without the imprimatur of the court through a consent decree or otherwise. The fact that the court had been heavily involved in the settlement negotiations was not a sufficient “judicial imprimatur” to render the plaintiff a “prevailing party” under the IDEA. Rather, “[t]here must be some official judicial approval of the settlement and some level of continuing judicial oversight.”

Two additional points are worth noting with respect to this opinion. First, although the plaintiff did not recover fees for the District Court litigation, it did qualify as a “prevailing party” with respect to the administrative due process hearing before the agency. Because the plaintiff had achieved success “on certain significant issues and achieved at least some of the benefit he sought,” he was entitled to recover attorney fees related to the administrative hearing. Second, the court rejected a request to recover expert witness fees under statutory language allowing recovery of “attorney fees as part of costs.” Despite legislative history clearly supporting expert witness fee recovery, such statutory language did not qualify as the explicit authority that Supreme Court precedent requires to support recovery of expert witness fees.

Safety regulation of oil tankers as a taking of property – Federal Circuit accepts the possibility but holds no taking on the particular facts

The Oil Pollution Act of 1990 requires that all newly constructed marine vessels capable of carrying petroleum products be built with double hulls. It also requires that all existing single-hull oil tank vessels be retired from service or retrofitted with double hulls according to a retirement schedule that began in 1995. Maritrans, Inc., the owner of several such vessels, argued that these restrictions constituted a taking of its property interest in its many single-hulled vessels. In Maritrans, Inc. v. U.S., 342 F3d 1344 (Fed. Cir. 2003), the Federal Circuit denied the particular claim, but it left the door open for similar claims with respect to the effect of regulations upon highly regulated personal property.

Maritrans claimed that the OPA restrictions constituted a categorical “total taking” of the value of the vessels following their forced retirement dates. The United States argued that categorical takings analysis does not apply to personal property, that there can be no property interest in operating on the navigable waters, and that the transport of oil is a nuisance that can be closely regulated without triggering takings analysis. The Federal Circuit rejected all of these claims.

As to the government’s arguments, the court held that Maritrans had a property interest in the barges themselves, not in their operation on the navigable waters. Thus, federal regulation of the barges could constitute a taking of property.

As to the takings claim, the court held that it could not separately consider the time after retirement of the vessels as a categorical total loss of value. Instead, it must consider all of the remaining use of the vessels, both before and after retirement. Since the vessels retained some use value prior to retirement and some market value and insurance recovery value, the facts did not present a categorical taking.

Once Maritrans had been relegated to Penn Central takings analysis, it had little chance of success. With only a 13% drop in value overall, and a public need favoring the regulation, Maritrans could not show a sufficient diminution in value or other imposition to establish a taking. This was particularly true where Maritrans had not been a specific target of government action, but the loss had been spread through the entire oil vessel industry.

9th Circuit – NEPA challenge to state water management program is ripe despite absence of site-specific decisions – discussion of standing under NEPA – other ripeness and standing decisions

Various state and federal agencies are cooperating to create and implement the CALFED program, which they describe as “the largest, most complex water management program in the

continued on next page
world,” engaged in “the most complex and extensive ecosystem restoration project ever proposed.” As part of that effort, CALFED prepared a programatic environmental impact statement, which identified a preferred alternative under which there would be significant changes to the allocation of water resources in the area. Plaintiffs, farmers who alleged they would be adversely affected by the plan, challenged the EIS on various grounds.

The District Court rejected the challenge as unripe under the principles of Ohio Forestry Ass’n v. Sierra Club, 523 U.S.726 (1998), essentially because any specific site-specific actions would require further analysis and decision. The Ninth Circuit reversed in Laub v. US Department of the Interior, 342 F3d 1080 (9th Cir. 2003).

Emphasizing the difference between the substantive challenge at issue in Ohio Forestry Association and a procedural challenge under NEPA, the court held that a challenge to a programatic impact statement is ripe at the time the statement is issued. The reason is twofold. First, the court cited Ohio Forestry Ass’n itself for the proposition that NEPA, unlike a substantive statute, “simply guarantees a particular procedure, not a particular result.... Hence a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get ripen.” Second, the court emphasized that the practice of tiering environmental impact statements means that some issues are resolved at the more general, programmatic, stage. These issues guide further decisionmaking and will not be reopened when site-specific analyses are performed. Thus, a NEPA challenge may be ripe at a relatively early, general stage of analysis, while a substantive forest plan will not be ripe for challenge until a decision is made with respect to a particular site-specific activity.

The Laub opinion also includes a useful discussion of standing under NEPA. The important point is that the plaintiffs must identify a substantive environmental harm to support standing, not merely the procedural harm of failure to prepare an adequate EIS. Where a plaintiff alleges such a substantive harm, the traceability and redressability requirements are somewhat relaxed due to the inherently indirect effect of NEPA analysis on substantive decisions. Also, in this case the government did not raise standing issues until the appellate stage of the litigation. While a jurisdictional question such as constitutional standing may be raised at any stage, the court refused to hear the government’s argument that the plaintiffs were not within the zone of interests of the statute. Having failed to raise this prudential point earlier, the government had waived it.

Two other ripeness decisions are worthy of note. The first, Maritrans, Inc. v. U.S., 342 F3d 1344 (Fed. Cir. 2003), discussed above with respect to the takings claim, originally involved some 37 vessels. The Court of Federal Claims held that the claim was not ripe with respect to 29 vessels that had not yet been sold, refitted, or scrapped in reliance upon the provisions of the Oil Pollution Act of 1990. Maritrans pressed its ripeness claim with respect to seven vessels whose retirement dates had been definitively established by the OPA. Since the OPA effectively reduced the value of those vessels prior to their actual retirement date, there was a present injury. No further government action was necessary to make the claim ripe for review. The second decision is The University of Medicine and Dentistry of New Jersey v. Corrigan, 347 F3d 57 (3d Cir. 2003), in which a medical school sought to challenge the initiation of an audit by the Inspector General of the Department of Health and Human Services. By its nature, the initiation of an audit is not a “definitive position” of an agency, nor does it represent the culmination of the decision making process. It is merely the initiation of agency process. However unwise, it is not ripe for judicial review. Interestingly, the concurring opinion would have dismissed the action on the ground that an Inspector General’s decision to initiate an audit is a matter “committed to agency discretion by law,” and thus unreviewable under Section 701(a) (2) of the APA.

As to standing, see also Ranger Cellular v. FCC, 2003 WL 22681318 (D.C. Cir. 2003) (no redressability where challenger sought a new auction of cellular telephone licenses, but conceded that its chances of prevailing in an auction were “virtually nil”); and Consumer Federation of America v. FCC, 2003 WL 22461433 (D.C. Cir. 2003) (standing found where FCC order could provide redress).

Various decisions on access to judicial review
Several decisions addressed timing and other barriers to judicial review of agency decisions. In Roberts v. US Railroad Retirement Board, 346 F3d 139 (5th Cir. 2003), for example, the Fifth Circuit took sides in a circuit split on the reviewability of a refusal to reopen an earlier claim denial. Roberts had first filed and lost a disability claim before the agency. He did not challenge that decision. He later filed and won a disability claim. At that point, he asked the agency to reopen its earlier denial. When the agency refused, he sought judicial review. The Fifth Circuit denied review on the ground Roberts had not sought review by the statutory deadline for review of the original decision. To allow review of a later refusal to reopen would eviscerate the statutory time limit. This decision, joining the Fourth, Sixth, Seventh, and T enth Circuits, contrasts with the position of the Second and Eight Circuits. The latter would allow review of the reopening denial to determine whether there had been an abuse of discretion.

Two decisions addressed fine points of filing dates. Consumer Electronics Association v. FCC, 347 F3d 291 (D.C. Cir. 2003), involved a challenge to a rule issued by the FCC. Eager to get to court, the CEA filed its action on the very day the rule was issued. Relying on its own rule providing that “first day to be counted when a period of time begins with an action taken by
Can Legally Significant Government Action Avoid APA Rulemaking Requirements? Well...Maybe

By Michael Asimow

The rulemaking provisions of California’s APA are overbroad. They apply to virtually every form of agency quasi-legislative action, including interpretive rules and policy statements. Yet California’s rulemaking procedure is costly and cumbersome (involving multiple notices, statements, hearings, findings, and review of the rule by the Office of Administrative Law). When compliance with APA rulemaking requirements would have disruptive effects on government, the courts sometimes invent ways around the law, as occurred in California v. Pacific Gas & Electric Co. (PG&E) vs. State Dep’t of Water Resources (DWR), 5 Cal.Rptr.3d 283 (Ct.App. 2003).

The background of the PG&E case was California’s energy crisis of 2001. Since the sudden spike in energy costs had forced California’s private utilities into (or close to) bankruptcy, the legislature required DWR to purchase power and resell it to the utilities. DWR had to submit a “revenue requirement” to the Public Utilities Commission; before doing so it had to conduct a “review” to determine whether the costs included in its revenue requirement were “just and reasonable.” This determination established the prices for energy to be sold in the future that would allow DWR to recoup its outlays. The question is whether DWR’s “review” was a “regulation” that could only be adopted after compliance with the APA.

The just and reasonable review seemed to meet the statute’s broad definition of a “regulation” (which boils down to any agency statement of general application that implements or interprets law). Yet California’s byzantine rulemaking statute imposes bureaucractic costs on government agencies that sometimes exceed the public benefits of that procedure. The reality is that the “review” in the PG&E case just doesn’t look or feel like a “regulation” as we understand the term. The decision is a welcome recognition that not every legally significant step a government agency takes should be subjected to rulemaking procedure.

Automatic Drug Testing of Drivers Involved in Accidents? Not So Fast

By Lois Oakley

Georgia’s highest court has determined that a provision of the state’s implied consent statute violates constitutional protection against unreasonable search and seizure. The case examined a head-on collision in which one driver sustained serious injuries. These injuries caused the police to seek to collect blood samples from both drivers pursuant to Georgia’s implied consent law. This statute provides:

The State of Georgia considers that any person who operates a motor vehicle . . . throughout this state shall be deemed to have given consent . . . to a chemical test . . . of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug . . . if such person is involved in any traffic accident resulting in serious injuries or fatalities. OCGA 40-5-55(a).

The reviewing court concluded that the implied consent law was unconstitutional since it authorized a search and seizure without probable cause. Although the state’s interest in safeguarding its highways from impaired drivers was indisputable, the court reasoned that this interest was not the primary purpose of the implied consent law. Rather, it determined that the primary purpose was “to gather evidence for criminal prosecution.” It wrote:

“No matter how important that purpose [gathering evidence] may be, it does not create a special need to depart from the Fourth Amendment’s requirement of probable cause; otherwise it could be argued that the State’s interest in securing evidence in any situation of potentially serious criminal conduct would justify dispensing with any finding of probable cause.”


Pennsylvania Supreme Court Adopts Capricious Disregard Standard of Review of Agency Adjudication

By John Gedid

In Wintermyer v. Workers Compensation Appeal Board, 571 Pa. 189, 812 A.2d 478 (2002), the Pennsylvania Supreme Court adopted the capricious disregard standard of review for agency adjudication. This standard may be raised in all appeals, even though the language of the Pennsylvania Administrative Agency Law does not mention that standard.

In Wintermyer, a workers compensation ALJ disbelieved claimant’s physician witness on causation of claimant’s carpal tunnel syndrome. The reason for disbelieving the witness was the testimony of a supervisor that the claimant had very limited computer keyboarding duties. Both the Workers Compensation

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Peer Review

The peer review panel was convened to discuss the Office of Management and Budget’s proposed draft Bulletin on “Peer Review and Information Quality.” 68 Fed. Reg. 54023 (2003). Panelists included program co-chairs Kansas Law School Professor Sidney Shapiro and Cadwalader, Wickersham & Taft partner Fred Anderson, along with Science Magazine Deputy Editor Brooks Hanson, U.S. Chamber of Commerce VP Bill Kovacs, and OIRA counselor Paul Noe.

Later, the Section Council debated the contents of a proposed draft letter commenting on the agency’s proposal. Although the proposed comments were not, strictly speaking, the product of the panelists’ comments, no doubt the program helped inform the debate that ensued before the Council.

One area of concern to council members was which rules would be subject to the new peer review requirement. The general consensus was that the benefit of subjecting major rules to peer review, those with an impact of a $100 million or more, would likely equal or exceed the burden on agencies in terms of added resource consumption and delay. At the same time, the $100 million trigger would offer an objective standard for determining when peer review should apply.

An amended version of the draft comment letter was later circulated to and approved by Council members. The comments express the Section’s support for OMB’s efforts to ensure the quality of the information disseminated by the federal government. The comments also note that official ABA policy urges that the “nature, significance, and complexity of the risk assessment should dictate when peer review is used and the nature and scope of peer review.” ABA Resolution on Risk Assessment (October 1999) (available at http://www.abanet.org/adminlaw/risk02.pdf). Accordingly, the comments suggest allowing agencies to forgo peer review when the information that would be reviewed “is neither controversial nor seriously disputed.” The comments argue that “quantitative measures, such as the $100,000,000 threshold, are considerably more reliable and manageable as triggers for required peer reviews than qualitative standards whose language, however framed, is likely to invite uncertainty and argument.”

The comments also offer improvements for the peer review and correction process and call for “review of the process that [OMB] implements after the expiration of an appropriate period of time, such as five years.” At the time of this article’s writing, the Section was seeking permission to submit its comments under the ABA’s blanket authority rules.

EU Project

Boyden Gray’s paper from the program on “Understanding the E.U. Regulatory Process” appears elsewhere in this issue of the News and succinctly demonstrates the need for a probing and exhaustive examination of the regulatory process under the European Union. Excerpts of Justice Sandra Day O’Connor’s keynote remarks, also included in this issue, amplify Gray’s concerns about a lack of transparency in process and highlight the enormous stakes for the U.S. and its international trading partners.

The program was the first of several conferences planned for the Section’s project on European Union administrative law. In addition to Gray, program panelists included Program chair George A. Bermann, Walter Gellhorn Professor of Law and Jean Monnet Professor of European Union Law, Columbia University School of Law School; Theodore “Ted” Kassinger, General Counsel, U.S. Department of Commerce; and Peter Berz, First Secretary, Trade Section, Delegation of the European Commission.

Bermann later addressed the Council on the design phase of the project. Reminiscent of the Section’s APA project, EU project output would include a black letter statement of European Union administrative law, which would be reviewed and discussed at transatlantic conferences or symposia before finalization. A prescriptive phase is also contemplated, resulting in perhaps a comparison between US and EU regulatory processes for the purposes of transatlantic regulatory cooperation and/or trade disputes avoidance and resolution.
Interstate Compact Project

The Section’s Interstate Compact APA project got under- way with a program on “Administrative Procedure and Interstate Compacts.” The program was organized by project co-chairs and program panelists Utah legal policy consultant Kent Bishop and News editor Bill Morrow. Other panelists included project members Ron Levin, Henry Hitchcock Professor of Law, Washington University in St. Louis, and 2000–01 Section Chair; and Rick Masters, General Counsel, Interstate Commission for Adult Offender Supervision. Papers from three of the panelists are reproduced in this issue of the News, albeit as revised by the authors after the program ended.

Interstate compacts are an effective tool for structuring interstate relationships, regulating private activity that transcends state lines and furnishing government services on a regional basis. They offer an alternative to federal involvement and are particularly apt for matters traditionally addressed by states, such as law enforcement and public health, safety and welfare. Some 190 interstate agreements are currently in place.

Interstate compact agencies generally are not considered federal agencies within the scope of the federal APA, are not generally subject to state APAs, and in some states are expressly excluded from the scope of the state’s APA. Some recent compacts have incorporated APA-like provisions, but the practice is hardly uniform.

Approximately forty volunteers have signed on to research case law and literature, survey compacts and compact agencies, and compare and contrast the federal APA with the Model State APA. The goal of the project is to produce a set of administrative procedure guidelines that could be adopted as ABA policy and applied to or adopted by compact agencies. The project is expected to take two to three years.

Bill Morrow, Kent Bishop, Ron Levin & Rick Masters

SECTION OF DISPUTE RESOLUTION IN NEW YORK

The American Bar Association Section of Dispute Resolution Sixth Annual Spring Conference, entitled Resolution and Resilience, will occur in New York City at the Sheraton Hotel April 15–17 and feature the presentation of the D’Alemberte/Raven Award to Amb. Richard Holbrooke.

Amb. Stuart Eizenstat former U.S. Secretary of the Treasury will speak about his efforts to achieve justice for Holocaust victims and families.

Stay tuned to our web site for full conference details: www.abanet.org/dispute/conference/6th/home.html.

Supreme Court News

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of a discrete agency action, citing Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). The Tenth Circuit disagreed. It held that there was an allegation that the BLM had failed to take a mandatory, required action, and this was, therefore, a claim of agency inaction, which is all that is required to bring a claim under § 706(1). To the extent that the agency claimed it was managing the area, the court said this would go to the merits of the claim, not the jurisdiction of the court to consider it.

The immediate impact of this case will be with regard to environmental suits involving agency management of public lands, where a claim that the agency has failed to fulfill a mandatory duty has been one of the few ways to challenge management activities. See also Montana Wilderness Ass’n v. United States Forest Serv., 314 F.3d 1146 (9th Cir. 2003) (upholding a § 706(1) claim). But see Sierra Club v. Peterson, 228 F.3d 559 (5th Cir. 2000) (en banc) (holding that alleged agency failure to comply with the National Forest Management Act did not amount to a failure to act justifying review under § 706(1)).

More generally, however, the Court’s initial foray into this area may well have ramifications beyond this set of cases.
By Yvette M. Barksdale


In this article, the author critiques the efficacy of legal standards that reduce or eliminate enterprise liability for organizations who have “internal compliance structures” such as corporate ethics codes of conduct and accompanying internal compliance procedures. The author discusses the history of such internal compliance structures, beginning with their use within the United States Sentencing Commission’s “Organizational Sentence Guidelines” and their subsequent proliferation into a variety of areas, including employment discrimination law. The author also surveys and critiques extant empirical research into the efficacy of such internal compliance structures. The author argues that little evidence exists for the assumption that such codes of conduct and other internal compliance structures, in fact reduce the incidence of prohibited conduct within the organization. Rather, the author concludes, a growing body of evidence indicates that such compliance structures largely serve as “window dressing” which provides market legitimacy and reduced liability for the firms. Moreover, such structures have adverse consequences, including under-deterrence of corporate misconduct and a proliferation of costly, but arguably ineffective, internal compliance structures.

The author attributes the popularity of such internal compliance structures, to a trend toward “negotiated” or “cooperative governance” models, which involve the regulated group and other interested parties in the governance process. The author, adopting an “Incomplete Contracts Governance Theory,” concludes that although such negotiated governance models provide descriptive insights into legal regulatory processes, the models underdetermine the ability of regulated parties and their lawyers to subvert the negotiated policies by renegotiating “outs” to the policies in the subsequent implementation and enforcement phases of the policies. The author argues such successful subversion is predicted by the Incomplete Contract Governance Theory.

Mary K. Olson, Pharmaceutical Policy Change and the Safety of New Drugs, 45 J. L. & ECON. 615 (2002).

This article describes an empirical study of whether statutorily mandated acceleration in the speed of Food and Drug Administration’s (FDA) new drug approvals have adversely affected new drug safety. Olson’s study, which analyzed adverse drug reaction (ADR) data from 141 FDA “new chemical entity” approvals between 1990 and 1995, concludes that “reductions in new-drug review times are associated with increases in both adverse drug reactions (ADRs) requiring hospitalization and ADRs resulting in death.” Olson argues that adverse drug reaction data is a better measure of drug safety than the number of withdrawn drugs, analyzed by others. Olson’s results indicated that a one month reduction in a drug’s review time is associated with a one percent increase in expected reports of ADR, hospitalizations and a two percent increase in expected reports of ADR deaths. The mean 12 month reduction in a drug’s FDA review time is associated with an increase of 10.92 ADR hospitalizations and 7.68 deaths.

Olson argues for new techniques to reduce the adverse safety effects of speedier new drug processes. Olson notes, however, that despite the increase in adverse drug reactions, consumers may still have net benefits, on the whole, because of the increased health benefits of earlier access to life saving new drugs. The author concludes that more empirical research is necessary to determine this.


In this article, Professor Wasserman discusses the issue of presidential, legislative and executive branch succession in the event of catastrophic terrorist or other attack. Professor Wasserman critiques the shadow government currently in place post 9/11 as a good idea in concept, but one which is impracticable in practice because it does not provide for a clear line of succession for the political branches consistent with Constitutional requirements (as apparently structured based upon the limited public information available). Professor Wasserman recommends constitutional and statutory revisions to provide a quick reconstitution of the political branches of the government in a manner which adheres to separation of powers, federalism and democratic principles.


In this article, Professor Meltzer contrasts the Supreme Court’s relative judicial activism in the statutory preemption area with the Court’s corresponding “judicial passivity” in statutory interpretation. Meltzer argues that the Court, through textualist interpretation, “refuse[s] to take the responsibility for shaping a workable legal system” for resolving everyday disputes. Meltzer analyzes four statutory interpretation cases in which he argues, the Supreme Court’s construed conception of the judicial role in statutory interpretation as avoiding “judicial lawmaking,” impairs the Court’s ability to sensibly decide real-life disputes. These cases include Great-West Life and Annuity Insurance Company v.
Knudson, 122 S. Ct. 708 (2002), in which the Court interpreted ERISA to essentially render a wide range of subrogation clauses unenforceable. Meltzer argues the resulting uncertain enforceability of subrogation rights will likely discourage ERISA benefit plans from paying beneficiaries, a result that the Supreme Court could have avoided with a more purposive interpretation.


In contrast, Meltzer argues, the Court’s preemption cases go far beyond textual directives when interpreting federal statutes to preempt state and local law, sometimes preempting even when Congress has enacted narrower express preemption clauses. These preemption decisions also conflict with the Court’s protection of states’ rights in other areas, such as state governmental immunities. Meltzer argues the Court should take a more active judicial role in statutory interpretation because Congress lacks institutional competence to foresee all possible contingencies and to muster the necessary time, attention and political will to correct deficient statutes. In contrast, the Supreme Court may have institutional advantages for resolving interpretive problems arising from its case by case approach, which is moored to the context of individual disputes. To support this view of the proper judicial role, Meltzer discusses problems of supplemental jurisdiction under 28 U. S. C. §1367 (2003), and the retroactivity of the 1996 amendments to habeas corpus jurisdiction in the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

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Appeals Board and the intermediate appellate court, Commonwealth Court, reversed, holding that the ALJ capriciously disregarded competent evidence of a physician. The Supreme Court reversed Commonwealth Court on the basis that the capricious disregard standard is available, but that the lower courts had misapplied the standard.

In a severely divided set of concurring opinions, the Pennsylvania Supreme Court held that the capricious disregard standard could be raised in all cases, even those in which both sides present evidence. A majority of the court reasoned that the “in accordance with law” language of Pennsylvania’s Administrative Agency Law § 704 furnishes authority for this standard of judicial review. The court explained that an agency’s conclusions of law must be supported by sufficient, competent findings of fact. The capricious disregard standard assures that objective by examining the adequacy and competence of factual support for agency conclusions. The court was badly divided over the exact definition of capricious disregard and how it should be applied in particular cases. However, the justices were unanimous in concluding that this standard: 1) will result in reversal only in the most exceptional circumstances; 2) will generally apply only to negative agency findings and conclusions; and 3) will require, in employing it, particular care not to interfere with the substantial evidence standard of review or the power of the ALJ to make credibility determinations.

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the Commission is the day after the day on which public notice of that action is given,” the FCC argued that the CEA’s challenge had to be dismissed because it had been filed too early. While the FCC lawyers might get credit for creativity, the court rejected the FCC’s position as contrary to common sense. The court held that the rule does not establish the period within which review may be sought. Rather, it provides a means of court held that that the rule does not establish the period within which review may be sought. Rather, it provides a means of


At the other end of the filing period, Public Citizen had “59 days after the order is issued” to challenge a rule issued by the National Highway Traffic Safety Administration. Public Citizen filed its action within 59 days of the date the rule was filed with the Federal Register and available for public inspection. NHTSA argued, however, that the filing was late because it was more than 59 days after the agency had issued the rule, apparently meaning the date when the agency had signed and thereby promulgated the rule. In Public Citizen v. Mineta, 343 F.3d 1159 (9th Cir. 2003), the Ninth Circuit found the challenge to be timely. In so doing, it found the agency’s interpretation of its own regulation to be unreasonable. The court held that the period for review must run from the point at which the agency action is publicly available, not some earlier point when it is still hidden from view.

Ruud v. US DOL, 347 F.3d 10086 (9th Cir. 2003), involved a whistleblower claim under two distinct statutes, the Clean Air Act (CAA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Since the CAA provided for immediate review in the Court of Appeals, while CERCLA provided for review in the District Court, the issue was whether the Ninth Circuit could consider the entire claim. Emphasizing considerations of judicial economy and efficiency, the court joined several other circuits in holding that the appellate court could hear both claims in a single proceeding.
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