

Administrative Decisions and Other Actions

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Every attorney knows that Congress passes laws and that executive agencies promulgate regulations to implement and enforce those laws. Then, of course, the courts rule on issues brought to them. So, the most important legal sources are laws, regulations and court decisions, right? Not always. When it comes to how the government affects the day-to-day life of a person, often the most relevant legal documents are sources such as administrative guidelines, manuals or decisions. Guidelines and manuals may be written for internal agency use, but in practice they can be just as important as regulations. Administrative decisions, like court decisions, often relate to specific situations or parties but provide guidance or legal precedent for others.

Because federal administrative agencies have been created over the course of more than a century, they vary in form and function. The histories of administrative agencies provide insight into the diversity of regulatory and decision-making processes and publications.¹

In 1887, because of a Supreme Court decision invalidating individual states' rights to

regulate railroads,² Congress passed the Interstate Commerce Act. It established the first independent regulatory commission. The Interstate Commerce Commission was to set rates that would be "reasonable and just," featuring aspects of each of the three branches of the federal government. It sets rates and other rules for railroads, enforces these rules and then adjudicates disputes via a panel of administrative law judges. The commissioners' expertise in railroads allowed them to regulate more effectively and to respond to changes more quickly than could Congress and the courts.

The early 20th century saw the adoption of other legislation to regulate specific economic activities. Upton Sinclair's muck-raking novel, *The Jungle*, spurred the adoption of federal pure food and drug laws in 1906. These laws were administered by an Agriculture Department office—later known as the Food and Drug Administration. Other laws regulated financial activities and monopolies, establishing the Federal Reserve System and the Federal Trade Commission.

During the Depression, the federal government sought to stabilize the economy

and aid farmers, the jobless and others through a series of regulatory and legislative efforts. The Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the Federal Communications Commission and the National Labor Relations Board were established.

Many of these early regulatory bodies dealt with economic matters. After World War II, and especially during the 1960s and 1970s, Congress began to examine consumer protection, the environment, occupational safety and racial discrimination. More regulatory bodies followed—including the Consumer Product Safety Commission, the Environmental Protection Agency and the Occupational Safety and Health Administration.

Each of these agencies governs a specialized area through regulations and other legal documents. They promulgate regulations through a complex process—standardized from agency to agency. Proposed rules are published in the *Federal Register*; comments from the public and interested parties are considered; and final regulations are published first in the *Federal Register* and later in the annual *Code of Federal Regulations*. A researcher familiar with regulations in one area of law can easily locate regulations in another area.

The same cannot be said of administrative decisions and adjudications. Decision making processes vary greatly from agency to agency, as does the precedential value of the documents. Add to this complexity the fact that there is no standard method or place for publication of these documents. There is no *Federal Register* for administrative decisions, advisory opinions, agency directives, enforcement bulletins, policy letters and memoranda, orders, guidance documents or administrative law judges' opinions.

Terminology can be problematic. The FCC calls its regulations “orders,” but not all FCC orders are regulations printed in the *Federal Register*. The Treasury Department calls its regulations “decisions,” as in the series, *Treasury Decisions*. However, these are regulations—not adjudicated decisions. Guidelines are published in the

Federal Register as proposed, or as final regulations; or they may appear in the *Notices* section. In either case, the agency may intend its guidelines to be binding. For many agencies, guidelines never appear in the *Federal Register*.

Administrative documents such as policy letters, manuals, guidances and memoranda, that are not published in the *Federal Register*, should interpret previously published statutes or formal regulations, or they should be general statements of policy.³ Though interpretative documents or policy statements carry less weight in court than formal regulations—

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The Department of Agriculture uses manuals and bulletins to run many of its programs, such as the meat inspection and the gypsy moth programs. Appendix A to the Food Safety and Inspection Service's regulations on *Performance Standards for the Production of Certain Meat and Poultry Products* is entitled *Guidelines for Cooked Beef, Roast Beef, and Cooked Corned Beef*. Appendix A is not contained in the *CFR*. The introduction says “establishments may choose to employ these guidelines as their process schedules,” but one suspects that FSIS staff and regulated processors treat these specifications as requirements rather than guidelines.

The spotted owl controversy in the Northwest began with a set of guidelines written by the regional office of the Fish and Wildlife Service. After challenges from

the timber industry these guidelines were rescinded, only to be followed by formal regulations.

The EPA often uses memoranda and manuals in its job of regulating polluting industries. Its disclaimer for RCRA On-line (<http://yosemite.epa.gov/osw/rcra.nsf/>) states:

Users of the index should also note that the Q&As, letters and memoranda referenced herein are not, by any means, a complete representation of the guidance available from EPA on RCRA issues. Database documents are not intended to replace or super-

sede the regulations. Users should always consult other sources of information such as the *Code of Federal Regulations*, the *Federal Register* and appropriate guidance documents to ensure complete research.

Its 1998 *RCRA Orientation Manual* states:

In addition, the manual is not intended to modify or affect in any way existing statutory or regulatory requirements or Agency policies; it is simply intended to briefly summarize those requirements and policies. If there is any unintended variation between any statements in this manual and existing requirements of policy statements, the requirements or policy statements are controlling.

These disclaimers aside, for the attorney working in the area of environmental law, it is vital to be aware of EPA's manuals, memoranda and RCRA letters.

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For some agencies, notably the National Labor Relations Board, case-by-case adjudication is the primary means of establishing policy. The NLRB has few regulations in the *CFR*, but it has produced more than 330 volumes of decisions. NLRB decisions are reviewable by the U.S. Courts of Appeals and have considerable precedential value.

Administrative decisions are not like court decisions: They cannot be relied on as precedent. The Internal Revenue Service's private letter rulings and the Securities and Exchange Commission's no-action letters are examples of documents prepared in reply to individual inquiries. Private letter rulings were made available to the public after the Tax Reform Act of 1976. They "may not be used or cited as precedent."⁴ The SEC states on its "staff interpretations" Web page (<http://www.sec.gov/interp.shtml>) that "[t]hese staff interpretations provide guidance to those who must comply with the federal securities laws. However, because they represent the views of the staff, they are not legally binding."

Many of these types of documents have been in existence since the New Deal, and access has been a problem for more than 60 years. As an influential 1941 commission report noted:

Rules and regulations are not the only materials of administrative law. There are, in addition, . . . the decisions of each agency, only some of which are accompanied by reasoned opinions, and only some of which are published; the agencies' reports to Congress, which contain a variety of useful information but which are not always readily available to the public at large; the interpretative rulings made by the agencies or their general counsel, which frequently are not published; press releases, notices, speeches and other statements of policy that are easily lost and obviously

cannot be distributed to or kept by all who might some day have use for them; and the decisions of the courts upon review, enforcement, or restraint of administrative action, which are few and deal for the most part either with purely formal matters or with the details of a particular case. All these types of information should be made available, in orderly and readily accessible form, to the public.⁵

Lexis and Westlaw began providing greater access to this type of agency information in the early 1980s. Currently, Lexis lists 102 titles in its *Federal Agency Decisions, Combined* file. Westlaw's *Fadmin-All* contains 86 agency titles. The contents note for this database describes its contents as "an order, opinion, decision, policy statement, announcement, adjudication, release, administrative action, letter ruling, or no action letter prepared by the agency." Of course, Lexis and Westlaw provide increased access to this information for those who can afford these services.

such as final opinions, orders, statements of policy and interpretations, administrative staff manuals and instructions to staff "available for inspection" in a Washington office. E-FOIA mandated, and the Web has enabled, the government to provide citizens with access to many types of documents that were once virtually inaccessible. But how effectively are the agencies making this material available?

OMB Watch, a private organization formed to promote government accountability, examined this issue in an E-FOIA compliance report released in 1999. In this report examining 64 agencies, OMB Watch found that 11 percent had no useful E-FOIA presence and that 89 percent comply with varying degrees. In November 1999, no agency had completely complied with E-FOIA requirements. The report noted that "agencies are moving at a great speed to provide information online. Unfortunately, this information, in particular information about agency records and decision-making, still is often unorganized, unrelated, and difficult to find."⁷

This is a key point. Adding documents online does not make them accessible. There must be a user interface, thorough indexing and effective search capability.

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Better access to administrative documents came with the Electronic Freedom of Information Act Amendments of 1996.⁶ E-FOIA required agencies to make administrative materials created after November 1, 1996, available electronically. It was no longer adequate to simply make materials

Some agencies, like the Department of Justice and the Mine Safety and Health Administration, seem to put everything into their E-FOIA Reading Rooms, though they might also have the same documents in other places on their Web sites. Other agencies, such as the FCC, have E-FOIA

pages that are guides through their Web pages, with substantive materials in other places on their Web sites. Some agencies' E-FOIA pages simply list contacts and give an overview of the E-FOIA, without useful links. The OMB Watch report found that more than a third of agency Web sites did not have E-FOIA links directly from their home pages.

The federal government has done an admirable job in publishing administrative agency regulations in print and on the Web. New *Code of Federal Regulations* volumes are published annually and kept up to date by daily *Federal Register* issues. GPO Access (<http://www.access.gpo.gov>) provides convenient access to this information. Agency decisions, however, present a very different picture. More agencies are putting these resources on their Web sites. However, there is no central repository such as the *CFR* or GPO Access, and the government does not link to all agency sites.

Librarians have worked to make this diverse mass of information more accessible. One of the most respected and widely cited set of links to agency Web sites, LSU Libraries Federal Agencies Directory (<http://www.lib.lsu.edu/gov/fedgov.html>), is used by GPO Access as its list of federal agency Internet sites. The University of Virginia Law Library provides an even more focused resource. Its Federal Administrative Decisions & Other Actions page (<http://www.law.virginia.edu/admindec>) is the nation's most comprehensive set of links to agency decisions on the Internet. Its goal is to link to all federal government Web sites which contain legally binding or authoritative administrative decisions or similar information. Begun in 1999 with approximately 25 agencies, it now provides links to decisions, E-FOIA reading rooms, and similar pages from more than 125 departments, agencies and offices.

Administrative decisions are sometimes difficult to find—even for librarians. Many agencies, like the Customs Service, revamp the information they publish in print before publishing to the Web. The Web counterparts of agency administrative

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decisions may be organized differently from the print versions. Other materials, such as advisory letters from the Office of Government Ethics, might have been virtually impossible to find in print. Many other agencies formerly published their decisions, or at least a portion of them, but now rely on electronic dissemination.

Sites such as UVA's provide access to a myriad of administrative decision sites, but determining the force and effect of these decisions may still require e-mailing or contacting an agency—perhaps being transferred among departments and waiting days or weeks for a response. The Internet has not changed everything.

What about Virginia?

States have generally trailed the federal government in publishing administrative agency materials and in providing substantive information on the Web, and Virginia is no exception. Virginia regulations are now published in the *Virginia Administrative Code*, available in print, through Westlaw or Lexis, and on the Web (<http://legis.state.va.us/StatutesAndRegulations/AdminCode.htm>). However, agency decisions lag.

This is beginning to change as state agencies migrate from antiquated dial-in systems to the Internet. The State Corporation Commission Clerk's Information System, with information on corporate registrations in Virginia, is available on the Web (<http://www.state.va.us/scc/division/clk/diracc.htm>). A researcher will be well rewarded for spending some time on this site. Many of the orders available in the Lexis or Westlaw SCC files are free through the Clerk's Information System.

The Virginia Workers' Compensation Commission has come a very long way in making its decisions and other information available electronically. Formerly, the commission distributed its decisions electronically on diskette. In 2000, the commission mounted its opinions as a searchable database on its Web site, going back to 1995, with selected additional decisions available as far back as 1990 (<http://www.wvc.state.va.us/>). The commission links to "Rules and Regulations" (<http://www.wvc.state.va.us/rules.htm>). The link to its regulations goes to the commission's section of the *Virginia Administrative Code*, but without the searching capability. However, other useful links include tables of benefits amounts, hearing loss tables and a program for calculating COLA. The commission also makes its forms available from the Web site for printing but not for submitting electronically.

Many Virginia agencies, like the Board of Accountancy, post forms, applicable regulations and laws and other pertinent information on their Web sites. The Department of Employment Dispute Resolution posts its grievance procedure manuals, mediation program guidelines, forms, rulings and hearing decisions on its Web site (<http://www.edr.state.va.us/>). The Division of Purchases and Supply of the Department of General Services has posted some directors' memoranda, in addition to manuals, on its Web site (<http://159.169.222.200/dps/>).

The Commonwealth's My Virginia page (<http://www.myvirginia.org>) provides a starting list of agency Web sites, but more extensive information is available in the annual *Report of the Secretary of the Commonwealth*. Similar to the *United*

States Government Manual, the report provides general information on agencies including members of boards, statutory authorization, basic duties and responsibilities, and governor's executive orders. The report is now published both in print and on the Web (<http://www.soc-apps.state.va.us/Bluebook/>). The Web version is updated weekly and available for a \$25 subscription fee. Virginia state depository libraries⁸ have free access to this Web site.

How will digital information be archived? Decisions may be available on Westlaw and Lexis, but there is no guarantee that these companies will maintain archival collections of government information. This is the government's job. Similarly, as agencies migrate to Web-only access for some types of information, it is very important that they have a plan for archiving this information. Just as attorneys may now need to know how a Labor Department regulation was worded in 1976, it might be necessary in the future to see how a Virginia Board of Accountancy 2001 form looked. If agencies only publish these materials electronically without maintaining access to older versions, it

might be impossible to see the 2001 version of that form. How ironic it would be if in this age of more information, we actually end with less. ♪

Endnotes

- 1 Much of this overview comes from Marc Eisner, Jeff Worsham & Evan Ringquist, *Contemporary Regulatory Policy* (2000).
- 2 *Wabash, St. L. & P. R.R. v. Illinois*, 118 U.S. 557 (1886).
- 3 See Robert A. Anthony. "Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?," 41 Duke L.J. 1311 (1992).
- 4 26 U.S.C. § 6110(k)(3) (2000).
- 5 Attorney Generals. Commission on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 77-8, at 26 (1941).
- 6 Pub. L. 104-231, 110 Stat. 3048.
- 7 "A People Armed?": Agency E-FOIA Implementation <<http://www.ombwatch.org/article/articleview/940/1/71/>> (published on July 15, 2002). Report originally issued in late 1999.
- 8 Virginia state depository libraries are: Chesapeake Public Library, University of Virginia's College at Wise, College of William and Mary, George Mason University, James Madison University, The Library of Virginia, Longwood College Library, Mary Washington College, Old Dominion University, Radford University, University of Virginia, Virginia Commonwealth University, Virginia Tech.

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