Chapter III

ADMINISTRATIVE LAW

Administrative law concerns the authority and procedures of administrative agencies. Administrative agencies are governmental bodies other than the courts or the legislatures that carry out the law, and are generally considered part of the executive branch. EPA is charged with carrying out the environmental laws passed by Congress, while the New York State Department of Environmental Conservation ("DEC") carries out New York State environmental laws. Key functions of the administrative agency include rulemaking, enforcement, licensing, and determination of other controversies.

Federal administrative agencies are governed by the Administrative Procedure Act ("APA") 5 U.S.C. §551, *et seq*. New York State also has its own State Administrative Procedure Act ("SAPA"), which is based upon the 1961 Model State Administrative Procedure Act adopted by numerous other states. These acts are designed to ensure that agencies act in accordance with constitutional due process requirements, and provide for adequate public participation in the administrative process.

In carrying out its functions, not only must an agency comply with the applicable administrative procedure act, but it also must not exceed the authority of the particular legislation under which it acts. Further, most agencies have adopted specific rules and regulations to govern their internal proceedings, and many are subject to additional procedures particularly mandated by statutes.

Agencies must also be mindful of environmental statutes that often provide additional procedures for agencies to follow in the administrative process. For example, the National Environmental Policy Act ("NEPA") applies to all federal agencies and provides that whenever

an agency makes a decision involving the quality of the human environment, it must prepare a detailed statement ("EIS") to accompany any proposal through the review process. 42 U.S.C. §4332(c). Courts have interpreted NEPA to be more procedural than substantive, and it requires that agencies to do a case-by-case balancing judgment where economic and technical benefits are weighed against environmental costs. NEPA is discussed in Chapter 17.

Under Freedom of Information laws under both federal law (Freedom of Information Act or "FOIA"), 5 U.S.C. §552, and state law (Freedom of Information Law, or "FOIL"), Public Officers Law Article 6, administrative agencies must make their records available for public review and copying. These laws were enacted as a result of scandals in the 1960s, and a growing public notion that agencies should be held more accountable. Requests may be made by any person, and requesters need not justify reasons for their requests. There are generally no restraints on what a person may do with the information obtained. However, specific exceptions may apply to documents related to such things as national security, personnel matters, and criminal prosecutions, or items subject to a privilege, such as communications between an attorney and his client. Normally, a person requesting copies must pay reasonable copying costs.

A. RULEMAKING

Under the APA, rulemaking is the "agency process for formulating, amending or repealing a rule." 5 U.S.C. §551(5). A "rule" is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of an agency..." 5 U.S.C. §551(4). "Rules" includes most agency "regulations," which nearly always have prospective effect. During rulemaking, an agency acts in a "quasi-legislative" capacity.

While the procedures under APA will be discussed, similar procedures govern state administrative procedure under SAPA Article 2. Under APA, 5 U.S.C. §553, rulemaking (except rules involving "military or foreign affairs," "agency management or personnel," or "public property, loans, grants, benefits or contracts") is generally accomplished through the "notice and comment" procedure, otherwise known as "informal rulemaking." This involves three steps - (1) notice, (2) comment, and (3) publication.

The Negotiated Rulemaking Act of 1990 (101 P.L. 648; 104 Stat. 4969), provides procedures for agencies to follow when negotiation between a limited number of interested parties will be helpful in the rulemaking process. The purpose of the Act is to reduce judicial challenges to regulations by encouraging interested parties to negotiate differences in advance of formal notice and comment rulemaking. The interested parties may suggest proposed rules for notice and comment, but the final decisionmaking authority remains with the agency.

After an agency does sufficient study, it can propose a rule by a notice in the *Federal Register*, which states the "time, place and nature" of the proceeding, the "legal authority under which the rule is proposed," and "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b). However, unless specifically otherwise required by statute, such notice is not required with respect "to interpretative rules, general statements of policy, or rules of agency organization, procedure or practice," or when notice is "impracticable, unnecessary, or contrary to the public interest." *Id*.

Next, the public comment period follows, pursuant to which the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. §553(c).

The purpose of the comment period is to provide parties who may be affected by the proposed regulations with information the agency will use to base its ultimate decision upon, so they may have an opportunity to respond or rebut that information, which enables agencies to make better informed decisions. Generally, EPA allows at least 30 to 60 days for public comment.

APA does not specifically require a public hearing to be held. Nonetheless, the particular statute which authorizes an agency to act may specifically require a "legislative hearing" on the record, where oral testimony is taken as part of the rulemaking process. In such an instance, the specific procedures under 5 U.S.C. §556 and 557, which also apply to adjudicatory hearings, govern the conduct of the hearing. This process is known as "formal rulemaking."

Finally, after considering the public comments, the agency can either abandon its plans, or publish a final rule in the *Federal Register*. This notice must be published at least 30 days prior to the effective date of the rule, unless it involves "(1) a substantive rule which grants or recognizes an exception or relieves a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. §553(d). Further, the agency must "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. §553(c).

A final rule may, in response to public comment, be somewhat different from the original proposal. However, agencies must consider "all relevant factors," which include public comments, when making their determination, or else their decision will be considered arbitrary and capricious. *See, e.g., U.S. v. Nova Scotia Food Products, Corp.* 568 F.2d 240 (2d Cir. 1977). Furthermore, if the revisions are so substantial that it is really a new proposal, the rulemaking procedure must be started anew. For example, in *Chocolate Manufacturers Ass'n v. Block*, 755

F.2d 1098 (4th Cir. 1985), a proposed rule was replaced by a final rule which reached the opposite conclusion, based upon comments received from only one side of the controversy. The court held that notice was inadequate because an interested party was not alerted to the possible substantial changes eventually adopted in the final rule, and therefore, the final rule was not a "logical outgrowth" of the proposed rule and comments.

Rules are generally adopted on the initiative of the agency, often in response to a legislative mandate. APA also requires that interested persons be given "the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. §553(e).

The draft and final notices in the *Federal Register* are very useful sources of background information which can be of great help in the interpretation of a regulation. These notices, particularly the draft notice, may also contain a discussion of and citations to scientific or technical data which provided the basis for the regulation. Each agency also periodically publishes its "regulatory agenda" in the *Federal Register*, which gives a preview of upcoming regulatory action. Similarly, notices regarding a proposed regulation in New York State are published in the *New York Register*.

B. OTHER AGENCY FUNCTIONS

Agencies also enforce statutes and regulations. For example, DEC has environmental police who investigate allegations of illegal pollution. The result of an administrative enforcement proceeding could be either referral to a prosecuting agency such as the United States Department of Justice or the New York State Attorney General's Office for criminal or civil action, or else an administrative enforcement action.

Another important function of an agency is to process and rule upon requests for permits. If a permit application is sufficiently important or controversial, it may warrant a hearing. Under federal and state law, if timely application is made for renewal of a permit, it continues in force until the application is finally determined. 5 U.S.C. §558(c); SAPA §401(2). Under APA, if a permit is denied, the agency must give "prompt notice," and must generally support its action "by a brief statement of the grounds for denial." 5 U.S.C. §555(e).

Furthermore, statutes may specifically empower agencies to decide controversies. This could include the resolution of a dispute between private parties, or under APA, the issuance by a federal agency of a "declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. §554(e). DEC is also specifically authorized to issue declaratory rulings on the applicability of regulations. *See* 6 N.Y.C.R.R. Part 619.

C. ADJUDICATORY HEARINGS

A statute may require a formal hearing in front of either an administrative law judge ("ALJ") or the "agency" itself. This is known as an "adjudicatory hearing." Adjudicatory hearings may be required for enforcement, licensing and other proceedings. In some instances, it may also be deemed a constitutional "due process" requirement, particularly when the forfeiture of money, a license or other property is involved. While the procedure under APA will be discussed, a similar process applies under SAPA Article 3. Both EPA and DEC have their own ALJs.

Under APA, 5 U.S.C. §554, formal notice of an adjudicatory hearing must be given to all parties, and all interested parties must be given an opportunity for "the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the

nature of the proceeding, and the public interest permit," as well as a hearing and decision on notice, in accordance with 5 U.S.C. §556. In adjudicatory proceedings, *ex parte* communications with the presiding ALJ or agency are prohibited. 5 U.S.C. §554(d).

At the hearing, unless otherwise provided by statute, the burden of proof is on the proponent of the rule, order or permit. 5 U.S.C. §556(d). Further, each party "is entitled to present his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. §556(d). Parties may be represented by an attorney, 5 U.S.C. §555(b), and subpoenas may be issued as "authorized by law." 5 U.S.C. §555(d).

Before a decision is made, the parties to such a proceeding are allowed an opportunity to submit proposed findings and conclusions, exceptions to the agency recommendations, and supporting reasons. 5 U.S.C. §557(c). All of these materials, along with the other submissions and the transcript, constitute the agency's record for decision. 5 U.S.C. §556(e).

The ALJ then makes a decision, which must include a statement of:

> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. §557(c). The decision must rest upon "consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence." 5 U.S.C. §556(d). When a decision is rendered by an ALJ rather than the agency itself, the decision is deemed the decision of the agency unless there is an appeals

procedure, in which case the agency hears the appeal, and has "all the powers which it would have in making the initial decision." 5 U.S.C. §557(b).

D. JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS

Actions of an administrative agency are subject to judicial review by the courts, which can rescind an agency's decision if it has: (1) acted in a manner inconsistent with statute or the Constitution, (2) acted in an arbitrary or capricious manner, or abused its discretion, or (3) reached conclusions not supported by substantial evidence. Generally, the third type of challenge -- which comes after an administrative hearing -- is made directly to the intermediate appellate court (federal Circuit Court of Appeals or New York State Appellate Division of the Supreme Court).

Judicial review is generally limited to the agency's record, which consists of a statement of reasons with sufficient facts to justify the agency action, and new testimony is usually not taken. 5 U.S.C. §557(c). Further, courts cannot substitute their own judgment for that of the agency's and usually avoid inquiry into the mental processes of decisionmakers (*i.e.* they normally do not question the reasoning of the agency at the time the decision was made). Courts are more deferential to agency decisions when reviewing questions of fact and policy (especially where highly technical issues are involved), and are far less deferential when reviewing questions of law (*e.g.* where statutory interpretation is at issue). If courts do set aside the agency action, the matter is usually remitted to the agency for a new determination, rather than the court making a new decision itself.

No action can be brought until all avenues of review <u>within</u> the agency are exhausted, and a final administrative decision is reached. This may include any allowable administrative

appeals. Thus, if a particular substantive point was not raised before the agency, it cannot be before the court for the first time, since the objector did not exhaust his administrative remedies.

Many EPA permit decisions are made by EPA Regional Administrators or offices. Permit decisions, enforcement decisions by EPA ALJs, and certain other EPA decisions may be appealed to the Environmental Appeals Board.

In New York State, there is an abbreviated procedure for bringing a lawsuit to challenge the action of a state agency (including a municipality) under CPLR Article 78, which allows the New York State Supreme Court to reach a swift determination. However, a very short statute of limitations (generally four months, sometimes as short as 20 days) applies to Article 78 proceedings.

A growing number of statutes, including the Clean Air Act (42 U.S.C. §§7401, 7604) and the Clean Water Act (33 U.S.C. §§1251, 1365), contain citizen suit provisions by which any aggrieved person may bring an action to challenge non-discretionary duties of administrators, *e.g.*, where administrators neglect to enforce laws against violators. Even where a statute does not expressly provide a citizen suit provision, a private right of action against an agency may be implied if the statute at issue clearly intends to protect a certain class of people. However, even with citizen suit provisions, plaintiffs must surpass a large hurdle to even get into court. Plaintiffs must establish that they have standing, the court has jurisdiction to hear the particular case, the issue is ripe for review, all administrative remedies have been exhausted, and that the court will be able to redress the wrong that is claimed.

E. NEW YORK DEC UNIFORM PERMIT PROCEDURES

Under New York State Environmental Conservation Law Article 70, the "Uniform Procedures Act" ("UPA") ensures permit applicants that a standard process will be followed when the DEC reviews their application. Regulations delineating these Uniform Procedures are set forth at 6 N.Y.C.R.R. Part 621. UPA applies to most important DEC permit applications, including general, conceptual, and routine permitting, although there are a few program-specific procedures. *See* ECL §70-0107(3). Further, emergency authorizations for up to two 30-day periods may be given if the DEC makes an appropriate finding that an emergency exists. ECL §70-0116.

Generally, the Uniform Procedures require DEC, within 15 days of a permit application, to "mail written notice to the applicant of its determination whether or not the application is complete." ECL §70-0109(1)(a). If this is not done, the application is "deemed complete." ECL §70-0109(1)(b). However, if an application is found to be incomplete, the applicant may resubmit it with the missing information, and a new 15-day period will begin. 6 N.Y.C.R.R. §621.5(g).

Following determination that an application is complete, DEC must publish a notice of the application in the *Environmental Notice Bulletin* and a local newspaper of general circulation, which requests public comment on the application. ECL §70-0109(2). The *Environmental Notice Bulletin* is now on line on the DEC web site at http://www.dec.ny.gov/enb/enb.html. In some cases, particularly "major projects" or those that generate great public interest, a "legislative hearing" may be scheduled to give public comments to an ALJ. 6 N.Y.C.R.R. §621.7(c).

Then, within a time period specified by Article 70, DEC must (provided the fee is paid), make a decision on the application. ECL §70-0109(3). If, after expiration of that time period, the applicant mails a certified mail letter to the DEC Commissioner requesting action and he fails to make a decision within five working days, the application is "deemed approved," subject to standard conditions. ECL §70-0109(b).

An adjudicatory hearing must be held before a decision is made if, after evaluating an application and public comments received, DEC determines that "substantive and significant issues" are presented. 6 N.Y.C.R.R. §621.7(b). N.Y.C.R.R. §624.4(c) defines "substantive" and "significant" issues as follows:

> (2) An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. In determining whether such a demonstration has been made, the ALJ must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ.
>
> (3) An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those in the draft permit.

An "issues conference" is held to delineate the issues. At the issues conference, the proposed intervenor may present oral argument in support of granting party status and finding adjudicable issues. 6 N.Y.C.R.R. §624.5(b)(2). Written briefs may later be allowed. 6 N.Y.C.R.R. §624.5(b)(4). "[T]he purpose of an issues conference is to resolve, as well as narrow issues." *ROBBED v. Jorling*, Index No. 7879/91 (Sup. Ct. Monroe Co. 1991, Boehm, J.), *aff'd on opinion below* 193 A.D.2d 1144, 600 N.Y.S.2d 653 (4th Dep't 1993), *mot. den'd* 82 N.Y.2d

659, 604 N.Y.S.2d 557 (1993); 6 N.Y.C.R.R. §624.5(b)(2). The ALJ then rules on party status, and whether adjudicable issues have been raised. 6 N.Y.C.R.R. §§624.4(b)(5), 624.5(d)(2). If there are no issues, the requested permits should be granted.

DEC regulations provide that environmental groups, neighbors, municipalities and other interested parties may obtain "party status" and participate in adjudicatory hearings as "intervenors," provided they have concrete legitimate legal objections as well as standing to challenge the particular action. 6 N.Y.C.R.R. §624.5. Persons desiring party status must initially file a petition in writing by the date specified in the notice of hearing, which satisfies the requirements of 6 N.Y.C.R.R. §624.5(b).

If issues are presented, an adjudicatory "trial-type" hearing is then held before an ALJ, which is governed by rules set forth at 6 N.Y.C.R.R. Part 624. The applicant has the burden of proof to demonstrate that its proposal will be in compliance with all applicable laws and regulations administered by the department." 6 N.Y.C.R.R. §624.9(b). However:

> In situations where the department staff has reviewed an application and finds that a component of the applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant.

6 N.Y.C.R.R. §624.4(c)(4). Thus, "'[t]he application together with the Department Staff's draft permit constitute a prima facie showing that the project as conditioned would meet all regulatory criteria.'" *ROBBED v. Jorling*, Index No. 7879/91 (Sup. Ct. Monroe Co. 1991, Boehm, J.), *aff'd on opinion below* 193 A.D.2d 1144, 600 N.Y.S.2d 653 (4th Dep't 1993), *mot. den'd* 82 N.Y.2d 659, 604 N.Y.S.2d 557 (1993). At that point, "[t]he adjudicatory proponents have the burden to show facts warranting adjudication." *Akzo*

Nobel Salt Inc., Interim Decision of the Commissioner (Jan. 31, 1996). "The burden is upon [intervenors] to provide a clear explanation of the issues sought to be adjudicated and not merely make obscure references to matters which should be considered and then, thereafter, seek to set aside the determination on the ground that there was a failure to consider those matters. *Citizens for Clean Air v. NYSDEC*, 135 A.D.2d 256, 262, 524 N.Y.S.2d 585, 588 (3d Dep't 1988), *app. dis'd* 72 N.Y.2d 853, 532 N.Y.S.2d 363 (1988).

After the hearing, the ALJ prepares a report summarizing the parties' arguments and evidence, and sets forth his or her findings of fact and conclusions based on the record. The report is not final until it is approved by the DEC Commissioner. 6 N.Y.C.R.R. §624.7(d).

F. CONSTITUTIONAL LIMITATIONS ON GOVERNMENT ACTION

The police power is the inherent power of the state to enact reasonable measures to preserve and protect the public health, safety and welfare. It is delegated by the states to local authorities. To a large extent, it is the source of the authority for state and municipal governments to enact environmental laws and other regulatory measures. The police power is greater in an emergency situation. *See, e.g., Historic Albany Foundation, Inc. v. Fisher*, 209 A.D.2d 135, 625 N.Y.S.2d 349 (3d Dep't 1995).

It is sometimes said that the power is derived from the Tenth Amendment to the U.S. Constitution, which provides that "[t]he powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." Technically, the source of the police power is not from the Constitution, and in fact each state possessed the power before joining the union as the inherent power of a civilized

government. The Tenth Amendment merely affirms that the states did not give up their police power to the federal government.

Nonetheless, the police power is subject to constitutional limitations, provided both in the U.S. and state Constitutions. Under the Fourteenth Amendment, the state may not deprive a citizen of "life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." A similar provision is contained in Article 2, Sections 6 and 7 of the New York State Constitution, and most other states' constitutions. Further, the Bill of Rights and most state constitutions protect such things as freedom of speech and religion, and the right to bear arms. Accordingly, regulatory measures enacted under the police power cannot discriminate on the basis of race or religion, and must provide fair procedures when citizens' rights are directly impacted.

Under the Commerce Clause of the United States Constitution, Congress may regulate commerce between the states. This is considered the source of authority for many federal statutes and regulations, such as disaster relief and environmental measures. Further, the war power under the Constitution gives the federal government great authority in cases of war or riot. The Commerce Clause generally preempts the rights of states to enact laws that impede interstate commerce. *CWM Chemical Services, LLC v. Roth*, 6 N.Y.3d 410, 813 N.Y.S.2d 18; 2006 (2006) (state tax may not discriminate against waste from out of state).