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Agricultural Outlook Forum
U.S. Department of Agriculture

February 21-22, 2008

Legal and Analytical Constraints on the Regulators

Jeffrey S. Lubbers



Agricultural Outlook Forum **Presentation**

Jeffrey S. Lubbers

February 22, 2008



***Procedural Impediments to
Regulation—The
Ossification of the
Rulemaking Process***




First Congress: Act of September 29,
1789:

Pensions should be paid “to the
invalids who were wounded and
disabled during the late war . . . under
such regulations as the President of the
United States may direct.”




“The extent to which the administrative law of the national government is to be found in executive regulations is not ordinarily appreciated.”

Frank J. Goodnow, The Principles of Administrative Law in the United States
87 (1905).



**“[The] procedure of
administrative rule making
is one of the greatest
inventions of modern
government.”**

Kenneth Culp Davis,
Administrative Law Treatise § 6.15, at
283 (Supp. 1970).



“Over the past few decades, Congress, the courts, and the executive branch have layered so many significant procedural requirements on notice and comment rulemaking that most academics and policymakers agree that the process has become ossified and inefficient.”

Stephen M. Johnson, *58 Admin. L. Rev.* 37
(2006)

Notice-and-Comment Rulemaking Comes to China

By Jeffrey S. Lubbers*

A recent newspaper article contained the following quote that everyone in the ABA Administrative Law Section could readily agree with:

The work of law-making must be professional and precise. But to invite public suggestions into the law-making process shows an open, scientific and democratic attitude. Thus the process to solicit public opinion is a process of education, a process to foster and improve democratic awareness, as well as a process to promote democratic and legal construction.

This was not an American or EU commentary; it was an excerpt from the Chinese *Worker's Daily*. The quote was carried in the April 18, 2006 edition of the English-language *China Daily*² in an article that

workshop on U.S.-style rulemaking in 2003 and now had the opportunity to see just how far things had come.

The focal point of our trip was the City of Guangzhou (population around 10 million), which had just completed its first venture into notice-and-comment rulemaking, with the advice and counsel of the Yale advisers. The Director of the Guangzhou Office of Legislative Affairs (OLA), Chen Licheng, pronounced it a big success—so much so that the city had immediately thereafter enacted an ordinance (the “Measures on Public Participation in Formulating Rules”) mandating that, starting in 2007, all future municipal rules must be issued according to a sophisticated and open system of public participation.

summary of all of the inputs with an OLA response to the comments was posted on the OLA website on February 9, 2006.⁴

To give one example, a customer of a meat and vegetable market, Mr. Huang, commented that in such markets the public scales are often not open on holidays and weekends and sellers change their scales and hurt consumers. He suggested that management of scales be standardized and that such manipulations be punishable by fines. The OLA’s response indicated that this kind of situation will be dealt with in the new regulation.⁵

OLA then formulated a discussion draft text and announced a second round of notice and comment, this time on the full draft text, with a 35-day comment



Federal Register Pages 1985-2006

[Source: Competitive Enterprise Institute, “Ten Thousand Commandments” 27 (2006)]

<u>Year:</u>	<u>Federal Register Pages</u>		
■ <u>1985</u>	<u>53,480</u>		
■ <u>1986</u>	<u>47,418</u>		
■ <u>1987</u>	<u>49,654</u>		
■ <u>1988</u>	<u>53,376</u>		
■ <u>1989</u>	<u>53,842</u>		
■ <u>1990</u>	<u>53,620</u>		
■ <u>1991</u>	<u>67,716</u>		
■ <u>1992</u>	<u>62,928</u>		
■ <u>1993</u>	<u>69,688</u>		
■ <u>1994</u>	<u>68,108</u>		
■ <u>1995</u>	<u>67,518</u>		
■ <u>1996</u>	<u>69,368</u>		
		■ <u>1997</u>	<u>68,530</u>
		■ <u>1998</u>	<u>72,356</u>
		■ <u>1999</u>	<u>73,880</u>
		■ <u>2000</u>	<u>83,294</u>
		■ <u>2001</u>	<u>67,702</u>
		■ <u>2002</u>	<u>80,332</u>
		■ <u>2003</u>	<u>75,798</u>
		■ <u>2004</u>	<u>78,852</u>
		■ <u>2005</u>	<u>77,777</u>
		■ <u>2006</u>	<u>78,724</u>

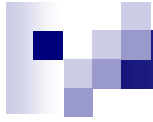


Rules and Final Rules—1976-2004

[Source: Competitive Enterprise Institute, “Ten Thousand Commandments” 28 (2006)]

■ Year Proposed Rules Final Rules

■ 1976	3,875	7,401		
■ 1977	4,188	7,031		
■ 1978	4,550	7,001		
■ <u>1979</u>	<u>5,824</u>	<u>7,611</u>		
■ 1980	5,347	7,745		
■ 1981	3,862	6,481		
■ 1982	3,729	6,288		
■ 1983	3,907	6,049		
■ 1984	3,350	5,154		
■ 1985	3,381	4,843		
■ 1986	3,185	4,589		
■ 1987	3,423	4,581		
■ 1988	3,240	4,697		
■ 1989	3,194	4,714		
■ 1990	3,041	4,334		
			■ 1991	3,099 4,416
			■ 1992	3,170 4,155
			■ 1993	3,207 4,369
			■ 1994	3,372 4,867
			■ 1995	3,339 4,713
			■ 1996	3,208 4,937
			■ 1997	2,881 4,584
			■ 1998	3,042 4,899
			■ 1999	3,281 4,684
			■ 2000	2,636 4,313
			■ 2001	2,512 4,132
			■ 2002	2,635 4,167
			■ 2003	2,538 4,148
			■ 2004	2,430 4,101
			■ <u>2005</u>	<u>2,257</u> <u>3,943</u>



Statutory Requirements



Formal Rulemaking

Where statute requires rulemaking to be done after an opportunity for a hearing on the record.

Rare, and generally undesirable—Still required in some FDA rulemaking.



Hybrid Rulemaking

Congress requires
additional statutory
requirements in specific
statutes, e.g., OSHA,
Clean Air Act, FTC Act.



Environmental Impact Statements

National Environmental Policy Act (1970)

NEPA requires preparation of “Environmental Impact Statements” for actions affecting the human environment.



Government–Wide Laws Affecting Rulemaking



Paperwork Reduction Act (1980)

Requires all agencies to:

- Analyze information collection burdens not only in forms, questionnaires, etc., but also in rules with reporting requirements.
- Provide additional opportunity for notice and comment
- Obtain OMB approval



Regulatory Flexibility Act (1980)

Requires all agencies to:

- Consider impacts on small entities (businesses and communities)
- If rule has a significant economic impact on a substantial number, agency must prepare a special analysis at proposed and final rule stage.
- Judicial review added in 1996 amendment.



Unfunded Mandates Reform Act (1995)

Requires agencies to assess economic impact of rules on state, local and tribal governments—and on private sector.



Congressional Review Act **(1996)**

- **Requires submission of final rules to Congress—major rules’ effectiveness delayed 60 days**
- **Provides for expedited legislative process**
- **Congress can only disapprove; it cannot change**
- **Requires Presidential agreement (or veto override)**
- **Because of cumbersome process, only one rule has been disapproved—in 2001)**



Information Quality Act (2000)

- **The IQA requires every agency, to issue guidelines, with OMB oversight, to:**
 - **ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by the agency;**
 - **establish administrative mechanisms allowing affected persons to seek and obtain correction of such information;**
 - **post such requests and their responses on the agency websites.**

- **OMB has taken the position that the IQA applies to information that an agency cites in its notice of proposed rulemaking because the agency is thereby endorsing the reliability of that information.**



Presidential Requirements Affecting Rulemaking



Exec. Order 12866—Regulatory Planning and Review (1993)

- **Issued by President Clinton, continued by President Bush. It requires**
 - **OMB review of significant regulations**
 - **Cost-benefit assessments of “economically significant” regulations**
 - **Submission and publication of agencies’ annual regulatory plan and semi-annual Agenda**
 - **Periodic Review of existing regulations**



E.O 12,866 Amendments—Jan. 2007

- Modified by E.O. 13,422 (Jan. 23, 2007):**
 - OIRA review of “significant” guidance**
 - Agencies must now identify specific market failure**
 - Reg. Policy Officer must be Pres. Appointee—no longer reports to agency head**
 - Reg. Policy Officer must approve Reg. Plan**
 - No rulemaking may commence w/o being on the Plan**
 - Aggregate costs and benefits for all rules must be included in the Reg. Plan**
 - “Formal” (on the record”) rulemaking to be considered for “complex determinations”**



Recent study of EPA Appointees Concerning White House Review of EPA Rules **Interviewed 30 former EPA Appointees from Bush I and Clinton Administrations**

- **Question:** The White House sought changes that would make a regulation more protective of human health and the environment”

■ Never true:	17.9%
■ Rarely true:	53.6%
■ Sometimes true:	21.4%
■ Often true:	3.6%
■ Always true:	0.0%
■ Other	3.6%

- **Question:** “The White House sought changes that would make a regulation less burdensome for regulated entities”

■ Never true:	0.0%
■ Rarely true:	0.0%
■ Sometimes true:	35.7%
■ Often true:	60.7%
■ Always true:	3.6%
■ Other	0.0%

- **Question:** As between the White House and EPA, which was more likely to be captured by an interest group?

■ (1) White House:	60.7%
■ (2) EPA:	17.9%
■ (3) Other:	21.4%



Impact Statements Required by Other Executive Orders

- ❑ **Federalism:** Requires agencies to consult with state and local governments and consider impacts of rulemakings on them.
- ❑ **Indian Tribal Governments:** Requires agencies to consult with Indian Tribes and consider impacts of rulemakings on them.
- ❑ **Civil Justice Reform--**Requires agencies to comply with requirements to improve rulemaking drafting to reduce needless litigation.
- ❑ **Governmental Actions Interfering with Property Rights—**
Avoid improper “takings” of private property
- ❑ **Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations**
- ❑ **Protection of Children from Env't'l Health & Safety Risks**
- ❑ **Implementation of the North American Free Trade Agreement:** Requires agencies to provide a 75-day comment period for any proposed technical regulation.
- ❑ **Regs. affecting Energy Supply, Distribution or Use**



Other Presidential Requirements

- **Presidential Memorandum on Plain Language (1998)**
- **OMB Peer Review Bulletin (2004):** Requires all agencies to conduct a peer review of “scientific information disseminations that contain findings or conclusions that represent the official position of one or more agencies of the federal government.” Applies to rulemaking—peer review reports normally must be made available to potential commenters in the rulemaking.



Principles for Risk Assessment (updated 9/2007)

- 1. Agencies should employ the best reasonably obtainable scientific information to assess risks to health, safety, and the environment.
- 2. Characterizations of risks and of changes in the nature or magnitude of risks should be both qualitative and quantitative, consistent with available data. The characterizations should be broad enough to inform the range of policies to reduce risks.
- 3. Judgments used in developing a risk assessment, such as assumptions, defaults, and uncertainties, should be stated explicitly. The rationale for these judgments and their influence on the risk assessment should be articulated.
- 4. Risk assessments should encompass all appropriate hazards (e.g., acute and chronic risks, including cancer and non-cancer risks, to human health and the environment). In addition to considering the full population at risk, attention should be directed to subpopulations that may be particularly susceptible to such risks and/or may be more highly exposed.
- 5. Peer review of risk assessments can ensure that the highest professional standards are maintained. Therefore, agencies should develop policies to maximize its use.
- 6. Agencies should strive to adopt consistent approaches to evaluating the risks posed by hazardous agents or events.



**One way out for agencies:
Issue more “guidance”—exempt
from notice-and-comment
requirements?**



“Guidance”


- Guidance is desirable, but can be abused.
 - Can fit within “policy statement” exemption from N&C; but to do so, must be non-binding.
 - New OMB Bulletin on “Good Guidance” (2007) recognizes that some agencies abuse exemption by treating guidance as binding.
 - Provides for standardized drafting elements, public access, and N&C for “significant” guidance.
 - Provides for OMB review of “significant” guidance.



“When spiderwebs unite,
they can tie up a lion.”

Ethiopian proverb





**Another way out? Use of the
Internet to Enhance Public
Participation and
Transparency?**



*"The Electronic
Revolution in Rulemaking"*

Beth Simone Noveck, 53
Emory L.J. 433 (2004)



**“The Internet Still Might
(but Probably Won’t)
Change Everything: Stakeholder
Views on the Future of Electronic
Rulemaking”**

Stuart W. Shulman (2004)

Early Adopter of E-Rulemaking

USDA-Organic Foods Rulemaking (1999-2000)



But...Emerging Problem: Information Overload?

Notice +

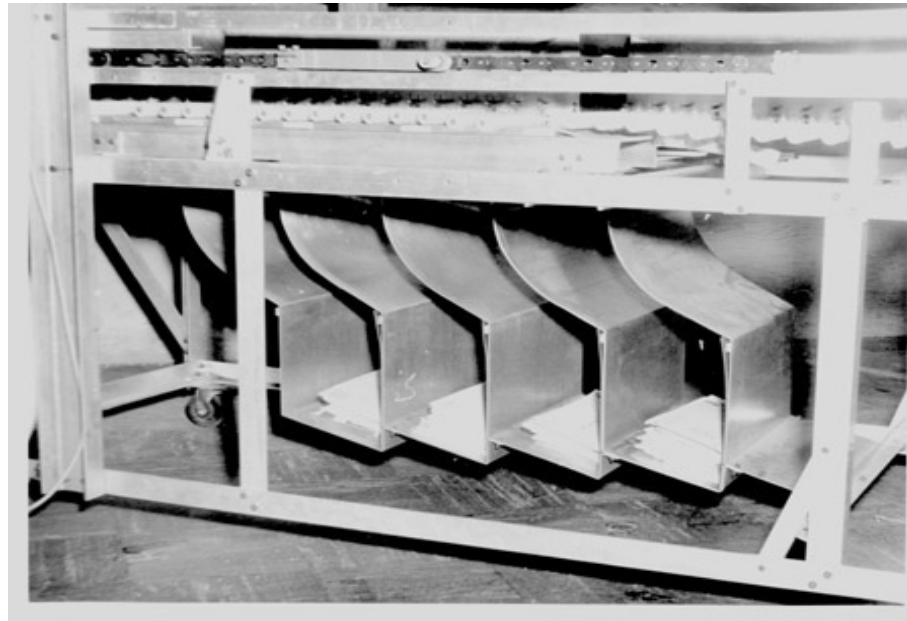




Object Lesson: Volume of E-mails to Congress is Skyrocketing

- According to *Washington Post*:
 - 2004—Congress received 200 million e-mails and postal letters
 - 2006—Congress received 318 million e-mails
- Response: Erect barriers

Can agencies develop good sorting techniques?






E-Rulemaking--Emerging Issues

**Access to Information Issues —
Ideally, what information should be
available electronically?**






Text of the proposed and final rules, public comments, preambles, ex parte communications, videotaped or audio taped public hearings, OMB review documents, relevant impact statements, related studies, relevant court proceedings, etc., etc.

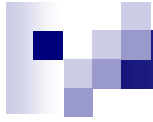
“Drilling Down”—Studies and analyses that are in the docket, or public comments, and links to secondary studies and analyses referenced in the primary studies.



E-Rulemaking--Emerging Issues (2)

- Special issues concerning electronic public comments:
 - Need to scan & docket written (paper) comments
 - How should exhibits, forms, photographs, etc. be dealt with?

 - Legal Issues---
 - Archiving issues. Do (redundant) paper copies need to be kept? [ditto ditto ditto ditto ditto]
 - Obscene or indecent speech issues [?&%^*^%\$]
 - Copyright concerns ©
 - Digital signatures [10101010101]
 - Security issues 
 - Privacy issues
 - Mandating e-comments



**Will E-Rulemaking lead
to:**

- **Greater Politicization?**
- **Greater White House
influence?**



Another suggestion: Negotiated Rulemaking



APHIS Negotiated Rulemakings

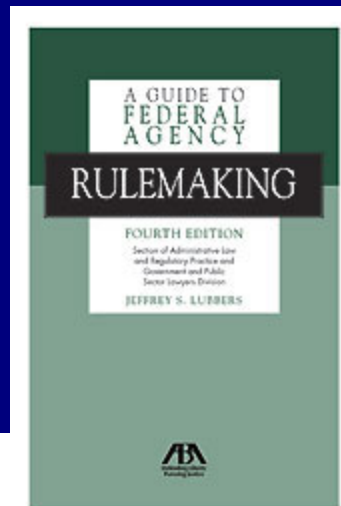
- Varroa Mite (1988)
- Scrapie (1990)

Mixed success—negotiated rule proposed and issued, but was the problem solved?

**Can E-Rulemaking allow
interactive “chatrooms”—or
interactive negotiated
rulemakings? Can they work?**



For a lot more.....



<http://www.abanet.org/adminlaw>



Thank you for your attention!



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