CHAPTER 3

Rules Without Rulemaking --

A Wrong-Headed Approach

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§ 3.01. Introduction.

Administrative law, while it may not sound so, is among the most vital and vibrant areas of legal practice. For example, a particular facet of administrative law -- rulemaking -- is where the rubber hits the road in translating the statutory pronouncements of Congress or other legislative bodies to their real-life impacts on people. It is an area that has undergone dramatic changes in the past twenty-five years, with important implications for the democratic principles on which our government was founded. To quote Professor Kenneth Culp Davis:

[T]he changes in rulemaking procedure are so broad and so deep that they are properly called revolutionary, [and] the changes are continuing. The problems [with which rulemaking deals] are difficult and complex, and at the same time their solution is vital to the success of modern government. Legislators, judges, and administrators are all groping in an unusual degree. . . . Seldom in the history of the Anglo-American judiciary have the courts been so creative, and perhaps never before has so much interaction occurred between new thinking of judges and new thinking of legislators.(1)

Whether or not you agree with his conclusions, Professor Davis' description of the dynamics involved are right on target -- with two additional points. Judges and legislators are not the only forces engaged in Davis' "new thinking." The rulemaking communications network can be viewed more accurately as a communications quadrangle, with agency administrators constituting the third point, and the public interest (of which we are all a part, regardless of whom we represent), as the fourth.

Professor Davis' description rings true even more clearly if we consider the following dynamics of the rulemaking process: first, the mistrust between Congress and the White House for much of the past 25 years (especially when control of these branches lies in the hands of different political parties); second, the tensions between the President, his 3,500 or so political appointees, and the hundreds of thousands of entrenched bureaucrats (or career civil servants, depending on your point of view); and third, the almost schizophrenic attitude of the public, exemplified by support for government enhancement of the environment and public safety and health on the one hand and opposition to "big government" on the other. Nowhere else do all of these buffeting cross-currents swirl and clash against one another in a more dynamic, complicated fashion than in the businesses we mineral lawyers represent.

The minerals industries are pervasively regulated by an alphabet soup of federal agencies (MSHA, EPA, OSM, OSHA, to name just a few) charged with implementing comprehensive, complex, and highly technical statutes (*e.g.*, MSHAct, CWA, CAA and CAAA, RCRA, SMCRA, OSHA). All of these laws, either through the Administrative Procedure Act (APA) or through statute-specific provisions, establish strict, detailed procedures for rulemaking, key to which are the requirements for notice and comment from the public.

This system of notice and comment, albeit cumbersome and time consuming, has worked well. Keeping in mind that administrative agencies are comprised of unelected government officials, the unrepresentative character of these agencies is tolerated, in large part, because of the opportunity for public participation in the rulemaking process. These procedures reflect a balance envisioned by Congress between democratic principles and governmental efficiency. This Chapter discusses the tensions between these two poles in the context of rulemaking. The tensions are truly remarkable because, for a variety of reasons (some internal and some resulting from external pressures), agencies have devised methods to avoid the rigors and protections of the APA. Agencies issue policy statements, memoranda, manuals, and other creatively named documents that, on examination, often turn out to be rules -- without rulemaking.

Emphasizing MSHA activities, this Chapter examines the legal issues associated with what is becoming an increasing threat to the democratic principles underlying the APA. It looks at some of the underlying reasons for this trend and offers some options for redressing the concerns of all involved.

§ 3.02. The Administrative Procedure Act.

[1]--Introduction.

The APA(2) defines agency "rules" broadly. A rule includes "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or