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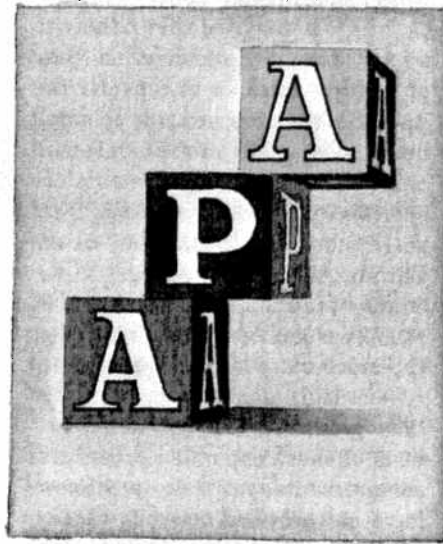
To Touch on a Touchy Subject Limiting Agency Discretion in Rulemaking Under the Federal and Florida Administrative Procedure Acts

by Dan R. Stengle

Since their respective adoptions, both the federal Administrative Procedure Act and Florida's Administrative Procedure Act have become increasingly complex in their respective rulemaking requirements. The evolving and expanding processes of both the federal APA and the Florida APA appear to speak to a rather low level of trust and confidence in the rulemaking in which agencies engage, and constrain the discretion of agencies in adopting rules. Because of the myriad complexities imposed on the rulemaking process on the federal level, one rightly may question how practical rulemaking itself has become. In Florida, the noisy debate continues legislatively and judicially over the direct authority that the legislature has delegated to agencies to adopt rules, while the additions to the processes by which rules are required to be made also has limited the discretion of agencies in adopting rules.

The Federal Act

When the federal APA was developed and became law in 1946, it set "a pattern designed to achieve relative uniformity in the administrative machinery of the Federal Government."¹ Its rulemaking requirements for notice and comment allowed agencies to adopt and amend rules rapidly as circumstances warranted.²



In the evolution of the federal APA, the courts, Congress, and the President have imposed significant and extensive limitations and demands upon agency actions through rulemaking.³ The process of federal rule adoption has become not only increasingly important, but also increasingly burdensome as agencies are required to demonstrate a need and rationality for the adoption of rules. In addition to the basic structure of the federal APA requiring notice and opportunities for public participation in the rulemaking process,⁴ Congress has added a number of provisions that are also found, in some form, in the Florida APA, such as processes for negotiated rulemaking and defined alternative dispute resolution procedures encouraging mediation.⁵

Apart from direct requirements and constraints of the federal APA, agencies also must meet other Congressionally imposed rulemaking provisions. For instance, an environmental impact statement is required by the terms of the National Environmental Policy Act.⁶ Other legal requirements mandate that agencies engage in a cost-benefit assessment for "economically significant rules," and agencies must consult with designated governmental officials before promulgating "significant" rules.⁷ As well, the Regulatory Flexibility Act of 1980 stipulates that federal agencies must publish a description of any

rules they expect to propose which are likely to have an economic impact on small entities.⁸ The Unfunded Mandates Reform Act requires executive agencies to consider regulations that impose mandates on specified governmental entities, and requires preparation of specified regulatory analyses.⁹ The Small Business Regulatory Enforcement Fairness Act of 1996 requires federal agencies to afford opportunities to small businesses and governments to allow them to comment effectively on proposed rules.¹⁰

These are but a few of the myriad rulemaking requirements imposed upon agencies of the federal government.¹¹ Indeed, federal mandates have become so extensive that commentators worry the analysis required for federal rulemaking has the potential to lead to regulatory paralysis.¹² A number of commentators have decried the "ossification" of federal rulemaking, making reference to the inefficient and even paralyzing requirements to which agencies must adhere in their regulatory programs.¹³

The ongoing debate concerns the balance to be struck between overly encumbering the federal administrative processes—which frustrates the ability of agencies to make rulemaking decisions—and unbridled discretion in rulemaking by largely unelected bureaucrats.

Florida Rulemaking Requirements

Florida has undergone a similar but less onerous expansion of its rulemaking requirements from its inception. As is the case with the federal APA, however, there can be little doubt that rulemaking under Florida's APA likewise has become more complex as it has developed from its origins in 1974.

In the APA of 1974, an agency was, as now, required to publish notice of its intended rulemaking action, setting forth a "short and plain" explanation of the purpose and effect of the proposed rule, a summary of the proposed rule, and the specific legal authority under which its adoption

was authorized.¹⁴ Any affected person so requesting was required to be given an opportunity to present evidence and argument on all issues under consideration.¹⁵ Each adopted rule was required to be accompanied by a reference to the specific rulemaking authority and the section of law being implemented, interpreted, or made specific.¹⁶ The agency was authorized in rulemaking proceedings to recognize any material which could be judicially noticed, and it was authorized to incorporate the materials into the record of the proceeding.¹⁷ Prior to completing the rulemaking record, the parties to the rulemaking proceeding were to be provided a list of materials, and given an opportunity to examine them and offer written comments or rebuttal.¹⁸

In the world of the 1974 APA, there was no requirement that the agency prepare a statement of estimated regulatory costs, hold rulemaking workshops, provide notice of modifications to a proposed rule, adhere to a fairly extensive and detailed spate of uniform rules, or to consider the impact of the proposed rule on small businesses, small counties, and small cities. All of these requirements are specified in the current APA.¹⁹ Yet these more recent additions to the Florida APA, while tending to encumber the adoption of agency rules, seem reasonable when compared to the much more burdensome federal rulemaking standards. Agencies have groused about the added burdens of these expanded procedural requirements, yet these provisions have not provided the only tension in the field of administrative law, either federally or in Florida.

Of Courts and Deference

In reviewing the history of both the federal and Florida administrative constructs, one must consider the importance of judicial review of agency rulemaking. Arguably, the most important judicial overlay in the development of federal administrative law culminated in the 1984 decision of the U. S. Supreme Court in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

In *Chevron*, the Court established a two-step test to be applied in the analysis of agency actions in implementing statutes through rulemaking:

When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.²⁰

In considering the tension between the delegation of authority by Congress to administrative agencies, when contrasted with the judicial review of agency decisions, the *Chevron* court acknowledged the necessary "formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."²¹ The Court in *Chevron* further acknowledged that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . ."²² In the most recent developments in Florida administrative law, it is that type of deference to administrative agencies that the Florida Legislature has struggled to curtail.

In Florida, direct substantive limitations placed on agency rulemaking have framed a component of the debate beyond simply the more complicated, the more extensive, and the more time-consuming rulemaking processes that have been imposed on agency rulemaking activities.

For the first time, in 1996, the Florida APA provided that rules may not be based only on a general grant of rulemaking authority. Instead, the APA requires that they must also implement a specific law. The 1996 legislative revisions to the APA provided that an agency's rules are required to "implement, inter-

pret, or make specific the particular powers and duties granted by the enabling statute."²³ In 1999, the legislature amended the 1996 standard to limit further an agency's authority to adopt rules only to "implement or interpret the specific powers and duties granted by the enabling statute."²⁴ Additionally, an agency does not have the authority to adopt a rule only because it is reasonably related to the authority of the enabling statute and is not arbitrary or capricious, or because it is within the agency's class of powers and duties. Statutory language granting rulemaking authority or describing generally an agency's powers and function are directed to be construed to extend no further than implementing or interpreting specific powers and duties conferred by the same statute. As well, an agency does not have the authority to implement statutory provisions setting forth general legislative intent or policy.²⁵

Before the 1996 revisions, a number of appellate court decisions upheld rules that were "reasonably related" to the purpose of the enabling statute as long as the rules were not arbitrary or capricious.²⁶ This "reasonably related" standard effectively was overruled by the 1996 revisions to the APA.

In telegraphing a message that is largely antithetical to components of the federal *Chevron* doctrine, the message to administrative law judges of the Division of Administrative Hearings and to appellate courts was that the Florida Legislature disapproved of the deferential standards that had been used to determine whether rules constituted an invalid exercise of delegated legislative authority. To agencies, the message was also clear: Stop relying on general grants of rulemaking authority and expressions of general legislative intent in adopting rules.

Among the most significant appellate court opinions construing the new rulemaking standard was a 1998 case, *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So. 2d

Fla. 1st DCA 1998), *rev. den.*, 727 So. 2d 904 (Fla. 1999). The opinion in *Consolidated-Tomoka* established a broad new standard by which agency rules would be evaluated, according to whether an agency rule

falls within the *range of powers* the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction. A rule is a valid exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented.²⁷

The class of powers and duties delegated to an agency could be de-

The court concluded that, if statutes were required by the APA to refer to such specific subjects as runoff, recharge, and floodplain requirements, "enabling statutes would have to be as detailed as the rules themselves, and the point of rulemaking would be defeated entirely."²⁸

The court in *Consolidated-Tomoka* focused on the sentence of the rulemaking standard adopted in the APA in 1996, "An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the

***Before the 1996* revisions, a number of appellate court decisions upheld rules that were "reasonably related" to the purpose of the enabling statute as long as the rules were not arbitrary or capricious**

fining broadly or specifically, depending upon the legislature's objective.

The court used the newly established test to find that the rules challenged in *Consolidated-Tomoka* were valid exercises of delegated legislative authority. The proposed rules defined two areas within the St. Johns River Water Management District as hydrologic basins, and established more restrictive permitting and development requirements within these basins. The petitioners challenged the rules, asserting that they violated the rulemaking standard adopted by the legislature in the 1996 revisions to the APA. An administrative law judge invalidated the proposed rules, reasoning that they were based on statutes that provide only general, nonspecific descriptions of the agency's duties. The district court of appeal held, however, that the water management district had the authority to adopt all of the challenged rules.

enabling statute."²⁹ The court found the sentence to be ambiguous, and stated that the courts are bound to interpret ambiguous statutes in the most logical and sensible way. In evaluating the purpose of the language, the court stated, "We consider it unlikely that the Legislature intended to establish a rulemaking standard based on the level of detail in the enabling statute, because such a standard would be unworkable."³⁰

Thus, the court declined to evaluate agency rules based on the sufficiency of detail in the language of the enabling statute, and held, "An argument could be made in nearly any case that the enabling statute is not specific enough to support the precise subject of a rule, no matter how detailed the Legislature tried to be in describing the power delegated to the agency."³¹ Therefore, the court found the new standard to be

a functional test based on the nature of the power or duty at issue and not the

level of detail in the language of the applicable statute. The question is whether the rule falls within the range of powers the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction.³²

As a result of the broad "range of powers" test adopted by the court in *Consolidated-Tomoka*, concerns arose that the legislature's 1996 amendments to the rulemaking standard had been invalidated.

Thereafter, the Florida Legislature modified the 1996 rulemaking standard to further limit agency rulemaking authority, and expressly addressed the "range of powers" test by providing that "No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious" be expanded to include the language, "or is within the agency's class of powers and duties . . .".³³ Thus, the Florida Legislature effectively overruled the "range of powers" test established in *Consolidated-Tomoka*.

The Continuing Tension

It should not have been unexpected that the 1946 federal APA or the 1974 Florida APA would evolve from their plainer roots to the more complicated procedural schemes that they are today. It is logical that procedural statutes governing the highly important endeavor of agency rulemaking would grow and evolve over the years to address exigent circumstances and contingencies confronted through the growth of regulatory programs, addressing more complex problems and concerns.

It should also not be unexpected that the constitutionally created tension between the legislative, executive, and judicial branches of government would be especially concentrated in a procedural act regulating the activities of regulatory agencies. Rather than merely concentrating on the rulemaking requirements per se, the battleground may continue to revolve around more direct restrictions on agency authority to adopt rules.

Both federally and in Florida, the question will continue to be whether the appropriate balance is being struck somewhere between unbridled discretion and requirements so rigid that they hamstring administrative agencies. □

¹ Introduction to Attorney General's Manual on the Administrative Procedure Act, U.S. Dep't of Justice (1947), www.oalj.dol.gov/public/apa/refrnc/agintro.htm.

² Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533 (2000).

³ *Id.* at 533-34.

⁴ Administrative Procedure Act, 5 U.S.C. §553 (a)-(d).

⁵ 5 U.S.C. §§561-68, §§571-83.

⁶ National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4347.

⁷ Exec. Order No. 12,866, 3 C.F.R. 638 (1993) (requiring agencies to consult with the Office of Management and Budget's Office of Information and Regulatory Affairs when particular types of rules are in their planning stages).

⁸ Regulatory Flexibility Act, 5 U.S.C. §602(a).

⁹ Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§1501-1538, 1571.

¹⁰ Small Business Regulatory Enforcement Act of 1996, 5 U.S.C. §601 note.

¹¹ For an extensive listing and table of requirements for federal rulemaking, see Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533.

¹² See Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533, 534, and citations at notes 5-7 therein. See also Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429 (1999) and citations at notes 3-5 therein.

¹³ See, e.g., Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997); compare, Thomas O. McGarity, *Response, The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997).

¹⁴ FLA. STAT. §120.54(1).

¹⁵ FLA. STAT. §120.54(2).

¹⁶ FLA. STAT. §120.54(6).

¹⁷ FLA. STAT. §120.54(5).

¹⁸ *Id.*

¹⁹ See FLA. STAT. §120.54. The specifications relating to the statement of estimated regulatory costs, and the cir-

cumstances under which the statement is required to be prepared, are provided in FLA. STAT. §120.541.

²⁰ *Chevron*, 467 U.S. at 842-843.

²¹ *Id.* at 843.

²² *Id.* at 844.

²³ 1996 Fla. Laws ch. 159, §§3, 9 (emphasis added).

²⁴ FLA. STAT. §§120.52(8), 120.536(1); 1999 Fla. Laws ch. 379, §§2 and 3 (emphasis added).

²⁵ *Id.*

²⁶ See, e.g., *State, Dept. of Insurance v. Great Northern Insured Annuity Corp.*, 667 So. 2d 796 (Fla. 1st D.C.A. 1995); *Fairfield Communities v. Florida Land & Water Adjudicatory Commission*, 522 So. 2d 1012 (Fla. 1st D.C.A. 1988); *Florida Waterworks Association v. Florida Public Service Commission*, 473 So. 2d 237 (Fla. 1st D.C.A. 1985), *rev. den.*, 486 So. 2d 596; *Florida Beverage Corp. v. Wynne*, 306 So. 2d 200 (Fla. 1st D.C.A. 1975).

²⁷ *Consolidated-Tomoka*, 717 So. 2d at 80 (emphasis added).

²⁸ *Id.* at 81.

²⁹ FLA. STAT. §§120.52(8), 120.536(1).

³⁰ *Consolidated-Tomoka*, 717 So. 2d at 79.

³¹ *Id.* at 80. Compare this conclusion with the analysis of *Chevron* by Professors Davis and Pierce, "It is impossible to draft a statute with sufficient precision and foresight to resolve each of the hundreds of issues that are likely to arise during the life of the statute. The degree of precision in statutory language varies widely from statute to statute and even from issue to issue within the same statute. Sometimes Congress is content to use extremely broad language, e.g., regulate in the "public interest," or ensure prices that are "just and reasonable." KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE*, Vol. I, §3.1, at 107 (3d ed. 1994).

³² *Consolidated-Tomoka*, 717 So. 2d at 79.

³³ 1999 Fla. Laws ch. 379, §§2, 3, codified at FLA. STAT. §§120.52(8), 120.536(1) (emphasis added).

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