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Annual Survey of Virginia Law: Administrative Procedure

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Editorial Comments

With this issue, the *Law Review* is inaugurating a new addition—the *Annual Survey of Virginia Law*. The *Survey* will appear each year in our Summer issue. It will discuss significant decisions of Virginia's courts and of federal courts sitting in the commonwealth and will analyze developments in the General Assembly during the preceding year.

The Editorial Board offers special thanks to three members of the *Law Review* who assisted in this endeavor: Victoria A. Bucur, Thomas C. Dawson, Jr., and Pamela G. Smith. We also express appreciation to those Law School professors who contributed to this year's *Survey*. The articles and their authors are as follows:

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ADMINISTRATIVE PROCEDURE

*John Paul Jones**

Both the General Assembly and the Supreme Court of Virginia have been active recently¹ in administrative law. For the past three years, a broadly-based movement for bureaucratic reform has influenced the legislative and executive branches of state government. The instrument for formal expression of this reform has been the Governor's Regulatory Reform Advisory Board.² In 1985, the General Assembly and the Governor responded obligingly to a second round of suggestions from the Board for amendment of the commonwealth's general administrative process act.³ These legislative changes involved the definition of regulation, i.e., the output of a statutorily controlled administrative rulemaking process,⁴ and

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1. This article addresses legislative developments from the 1985 legislative session and from supreme court cases decided in 1984.

2. The Governor's Regulatory Reform Advisory Board [hereinafter "the Board"] was created by Exec. Order No. 20 (1982), with the general mission of improving the regulatory climate in Virginia. Its specific responsibilities include:

— reviewing any Executive Department proposals which result from studies of existing or proposed regulations, and making recommendations on those proposals;

— advising the Governor on new proposals for reducing, eliminating or clarifying state regulations;

— holding public hearings to identify citizen and private sector concerns related to existing regulations as well as regulatory reform; and

— advising the Governor on progress made in reducing, eliminating, simplifying, or clarifying state regulations.

Exec. Order No. 20 (1982), reprinted in 1983 GOVERNOR'S REGULATORY REFORM ADVISORY BOARD REP. 63 [hereinafter cited as 1983 REPORT]. The twenty-two members of the Board represent the General Assembly, business, organized labor, the bar and various citizen groups. The chairman is Delegate Ralph Axelle, Jr. See 1983 REPORT, *supra*, at unnumbered page following title page.

What the current administration began as a matter of executive discretion, future administrations will continue by statutory command. Under new article 8 of the Virginia Administrative Process Act, VA. CODE ANN. §§ 9-6.14:1 to :25 (Repl. Vol. 1978, Cum. Supp. 1984 & Interim Supp. 1985), each governor is directed to establish procedures for executive review of both the form and content of regulations. VA. CODE ANN. § 9-6.14:25 (Cum. Supp. 1984).

3. The Virginia Administrative Process Act [hereinafter VAPA], VA. CODE ANN. §§ 9-6.14:1 to :25 (Repl. Vol. 1978, Cum. Supp. 1984 & Interim Supp. 1985).

4. The term "rulemaking" does not appear in VAPA. In this paper it is used in its generic sense to denote the process by which agencies compose and promulgate rules of general

the consolidation of exemptions to and exclusions from the general procedural scheme.⁵ Returning to an issue of interpretation first addressed in 1982,⁶ the supreme court twice considered the time bars, concocted from statute and court rule, which limit judicial review of agency action.⁷

The General Assembly's actions have produced mixed blessings: the general procedural scheme has been laudably simplified, but more agencies have been excused from compliance. The supreme court's analysis of time bars to court review has failed to adequately account for the public's interest in the finality of governmental actions. These developments are examined in detail below.

I. LEGISLATIVE CHANGES TO THE VIRGINIA ADMINISTRATIVE PROCESS ACT

A. *Regulation Redefined*

The definition of regulation in the Virginia Administrative Process Act (VAPA) has been changed. The old definition contained a laundry list which defied easy construction.⁸ A court could curtail the scope of VAPA's procedural guarantees by treating the enumeration as exclusive. Imaginative agencies could find new vehicles for decisionmaking not specified in the statute, hence beyond its

application which have force of law. The terms "rule" and "regulation" are synonymous in the commonwealth's administrative lawmaking scheme. VA. CODE ANN. § 9-6.14:4(F) (Interim Supp. 1985). Chapter 2 of VAPA governs their creation by those Virginia agencies subject to the statute. Compare "rulemaking" in federal administrative law. See Federal Administrative Procedure Act, 5 U.S.C. §§ 556, 557 (1982); see also K. DAVIS, 1 ADMINISTRATIVE LAW TREATISE ch. 6 (2d ed. 1978); B. SCHWARTZ, ADMINISTRATIVE LAW ch. 4 (2d ed. 1984).

5. When compared in sweep with the amendments to VAPA passed by the 1984 General Assembly, those passed this session almost classify 1985 as an inferior VAPA vintage. In 1984, among other administrative law reforms, the General Assembly established the Virginia Register of Regulations, created an agency obligation to seek out public input to the drafting of regulations, and substituted less stringent political branch checks on rulemaking for the beclouded legislative veto. See Jones, *Legislative Changes to Virginia Administrative Rulemaking*, 19 U. RICH. L. REV. 107 (1984).

6. *Commonwealth v. County Util.*, 223 Va. 534, 290 S.E.2d 867 (1982).

7. *Forbes v. Kenley*, 227 Va. 55, 314 S.E.2d 49 (1984); *Kenley v. Newport News Hosp. Ass'n*, 227 Va. 39, 314 S.E.2d 52 (1984).

8. Compare the old definition in 1975 Va. Acts 1000:

"Regulation" means any statement of law, policy, right, requirement, or prohibition formulated and promulgated by an agency as a rule, standard, or guide for public or private observance or for the decision of cases thereafter by the agency or by any other agency, authority, or court. But such statements do not include traffic signs, markers, or control devices.

reach. The new definition is succinct and straightforward: "any statement of general application, having the force of law, affecting the rights or conduct of any person, promulgated by an agency in accordance with the authority conferred on it by applicable basic laws."⁹ The General Assembly's elimination of the old definition's laundry list should be seen as intending more liberal construction. Neither the maxim *inclusio unius est exclusio alterius*, nor the presumption the maxim makes about the legislative intent behind omission of one in an apparent set, should be available as a theoretical basis for denying that an agency action resulting in legal injury must conform to the procedural requirements of VAPA.¹⁰

The new definition is short and sweet. It would be sweeter, if shorter. The clause "in accordance with the authority conferred on it [the agency] by applicable basic laws"¹¹ could prove more troublesome than elucidating. The right under VAPA to judicial review of agency action depends upon a claim that a regulation or case decision is unlawful.¹² By the new definition, a regulation is an agency promulgation which is within the scope of the agency's statutory authority. Treating the above-quoted language as limiting would mean agency promulgations beyond the promulgator's statutory authority would also be beyond the scope of judicial review as authorized in VAPA. It would be ironic, to say the least, if judicial review under VAPA were denied for want of a reviewable regulation because the utterance at issue was *ultra vires*. While judicial review could ultimately occur were the agency to attempt enforcement of such a promulgation,¹³ there is no reason to believe the

9. VA. CODE ANN. § 9-6.14:4(F) (Interim Supp. 1985). The same change in the definition of regulation was made in the Virginia Register Act, VA. CODE ANN. § 9-6.16 (Interim Supp. 1985).

10. Compare the federal definition of "rule" at 5 U.S.C. § 551 (4) (1980). See Administrative Conference of the United States, *A Guide to Federal Agency Rulemaking 16-20* (1983); K. DAVIS, *supra* note 4, at 39-40.

11. VA. CODE ANN. § 9-6.14:14(F) (Interim Supp. 1985).

12. *Id.* § 9-6.14:16 (Repl. Vol. 1978), as limited by *id.* § 9-6.14:15.

13. The last sentence of VA. CODE ANN. § 9-6.14:16 (Repl. Vol. 1978) reads in pertinent part: "In addition, when any *such* regulation or case decision is the subject of an enforcement action in court, the same shall also be reviewable by the court as a defense to the action. . . ." (emphasis added). When construed with the new definition of regulation, "such" could also be argued as limiting, that is, as removing from the scope of judicially reviewable issues in an enforcement proceeding, the legality of any putative regulation claimed to be *ultra vires*. While linguistic interpretation permits such construction, the influence of legislative intent on judicial construction should not. The General Assembly should not be presumed to have so intended. For the sake of clarity, "such" should be deleted from § 9-6.14:16 as well.

General Assembly had such a delay in mind when it redefined regulation. When legislators intended to free an agency, or a certain agency action, from compliance with VAPA's procedural requirements, they provided clear-cut exceptions.¹⁴ Otherwise, the intent of the 1975 General Assembly which passed VAPA, and of the 1984 and 1985 General Assemblies which amended it, should be seen to provide judicial review whenever the agency action exercises delegated legislative or adjudicative powers. The unfortunate clause in section 9-6.14:4(F) should not be construed as limiting. Better still, it should be stricken. Any agency expression intended to be generally applicable and legally enforceable should be viewed as a regulation, so that VAPA applies.

B. *Substantive Regulations No Longer Distinguished*

The 1985 amendments to VAPA discard the previous distinction between substantive and other regulations.¹⁵ Before, whether an agency had to provide for public participation in regulation and public hearings on its prototype generally depended on whether the regulation was substantive.¹⁶ If it were not substantive, the agency could choose to dispense with public involvement in a regulation's design and promulgation.

According to the drafter's notes, substantive regulations (for which public involvement would be mandatory) were to be distinguished from regulations "merely organizational or procedural in nature."¹⁷ Separating the substantive from the procedural in regu-

14. See *infra* text accompanying notes 19-53.

15. As enacted, House Bill 1142 deleted section 9-6.14:4(H):

"Substantive" or "substantive in nature" means, when used in connection with regulations, those allowing, requiring, or forbidding conduct in which persons are otherwise free or prohibited to engage or which state requirements, other than procedural, for obtaining or retaining a license or other right or benefit.

1975 Va. Acts 1000.

16. 1975 Va. Acts 1001. For regulations not substantive, the public participation process might also be made mandatory by the basic law. *Id.* Basic laws are those authorizing administrative agencies to exercise regulatory powers in the form of case decisions or regulations or stating procedural requirements therefor. VA. CODE ANN. § 9-6.14:4(C) (Interim Supp. 1985); see, e.g., the State Health Care Planning Law, VA. CODE ANN. §§ 32.1-102.1 to -122.4 (Repl. Vol. 1985) (especially § 32.1-102.2); the State Water Control Law, VA. CODE ANN. §§ 62.1-44.2 to -44.34(F) (Repl. Vol. 1982) (especially § 62.1-44.15 (Cum. Supp. 1984)).

17. Reviser's Note F, REPORT OF THE VIRGINIA CODE COMMISSION ON THE ADMINISTRATIVE PROCESS ACT, 2 HOUSE & SENATE DOCUMENTS, H. DOC. NO. 2, at 6 (1975) [hereinafter cited as VAPA REPORT]. Reviser's notes, or drafter's notes, are the explanatory notes which accompanied the proposed administrative procedure act suggested by the Virginia Code Commission in its 1975 Report to the Governor. This proposal was adopted as VAPA. Reviser's

lations calls for a judgment about their design or nature, and not necessarily about their impact. The latter criterion is more appropriate to the question of when public involvement in a rulemaking episode is too important to leave to the agency's judgment. If the regulation affects public rights or conduct, traditional notions of fundamental fairness and open government dictate public involvement, whether the regulation speaks to procedure or to substance.¹⁸ The distinction between substantive and other regulations is false in the context of channeling the exercise of delegated power.

Redefining "regulation" eliminates inappropriate restrictions on VAPA's scope. Deleting "substantive" as a distinguishing characteristic of regulation eliminates an extraneous step in the decision of when public involvement can be left to agency discretion. After the 1985 amendments, if agency action of general application affects public rights or conduct, the General Assembly guarantees the public a voice in the decisionmaking process.

C. Exclusions and Exemptions: Of Consolidation and Transmogrification

Passage of VAPA was intended to provide a structure for bureaucratic decisionmaking which is both public and uniform.¹⁹ From the beginning, however, VAPA's reach has been limited, falling short of all actions by all agencies. The act provides for both exclusions and exemptions. While neither term is expressly defined in the act, their usage in VAPA suggests that exclusions limit the scope of a specific VAPA article (such as that governing rulemaking, contested cases, or court review), while exemptions limit the scope of the entire VAPA chapter (i.e., the whole act).²⁰ Exclusions

Note, VA. CODE ANN. § 9-6.14:1. (Repl. Vol. 1978).

18. See K. DAVIS, *supra* note 4, § 6:31.

19. VAPA Report, *supra* note 17, at 6.

20. Contrast the first sections of Articles 2, 3, and 4 of the act (before 1985 amendment), 1975 Va. Acts 1001, 1002, 1004, with Article 5 (before 1985 amendment), 1975 Va. Acts 1005.

Before the 1985 amendments, this distinction held for subject exclusions and exemptions, i.e., specific agency actions intended to lie beyond VAPA's reach, but not entity exclusions, i.e., individual state agencies and other government bodies intended to be beyond VAPA's reach in their every action. Compare above sections with the old definition of agency in Article 1, 1975 Va. Acts 1000, which "excludes" certain entities from the definition of "agency" and thus from the act. The 1985 amendment eliminates this grammatical anomaly by employing a form of the word "exempt" whenever the reach of the entire act is at issue. See VA. CODE ANN. §§ 9-6.14:4(A), :4.1 (Interim Supp. 1985).

pertain to subjects; exemptions pertain to either subjects or entities. A subject exclusion removes a certain type of agency action from the reach of a particular VAPA article. For example, a subject exclusion for price fixing insulates such regulation from the article 2 notice and comment procedures which otherwise limit an agency's rulemaking power, but not from court review pursuant to article 3.²¹ A subject exemption removes a certain type of agency action from the reach of any part of VAPA. Public contract awards, denials, and compliance are all beyond VAPA's reach because of a subject exemption.²² An entity exemption, on the other hand, puts anything a particular governmental body might do beyond VAPA's reach. None of VAPA's procedural requirements, for example, limit the delegated legislative and judicial powers²³ of such agencies as the State Corporation Commission, the Commission of Game and Inland Fisheries, or the Virginia Housing Development Authority. Each enjoys an entity exemption.²⁴ By amendment to VAPA, the 1985 General Assembly rearranged the placement of exclusions and exemptions within the act, and created four new entity exemptions.

The legislators rearranged VAPA's exclusions and exemptions at the urging of the Governor's Advisory Board.²⁵ Much of the revision of these sections is simple consolidation. Subject and entity exemptions, previously scattered throughout the act, are now found in a single provision.²⁶ Subject exclusions, previously found at the beginning of the relevant article, are still grouped by article, but are relocated up front, in article 1. These structural changes to

21. VA. CODE ANN. § 9-6.14:4.1 (Interim Supp. 1985).

22. *Id.* § 9-6.14:4.1(B)(2).

23. [A]dministrative agencies typically have both legislative and judicial powers concentrated in them. They have authority to issue rules and regulations that have the force of law (power that is legislative in nature) and authority to decide cases (power judicial in nature). It is through its exercise of rulemaking and adjudicatory authority that the administrative agency is able to determine private rights and obligations. . . . To private individuals and the bar that advises them, rulemaking and adjudication are *the* substantive weapons in the administrative armory.

B. SCHWARTZ, *supra* note 4, at 10 (emphasis in original).

24. VA. CODE ANN. § 9-6.14:4.1(A) (Interim Supp. 1985). While their entity exemptions excuse these agencies from compliance with VAPA's procedural norms, VA. CODE ANN. § 9-6.14:4.1 (Interim Supp. 1985) makes clear their duty to publish proposed and final regulations in accordance with the Virginia Register Act, VA. CODE ANN. §§ 9-6.15 to -24 (Repl. Vol. 1978, Cum. Supp. 1984, & Interim Supp. 1985). See *id.* § 9-6.14:22 (Interim Supp. 1985).

25. See *supra* note 2.

26. VA. CODE ANN. § 9-6.14:4.1 (Interim Supp. 1985).

VAPA produce a more "user-friendly" statute. For one unfamiliar with the broad fabric of Virginia's law of administrative procedure, there is less risk of overlooking an outcome-determinative exemption or exclusion.

At the same time, however, the General Assembly transformed four governmental bodies, then enjoying limited subject exclusions and exemptions, into exempted entities. Granted entity exemption by name were the Marine Resources Commission (MRC),²⁷ the Milk Commission,²⁸ and the Virginia Resources Authority.²⁹ Also granted entity exemption were all members of the as-yet-undefined class of "[e]ducational institutions operated by the Commonwealth."³⁰ Moving all rulemaking and adjudication by these government organizations out of the purview of VAPA's uniform and public decisionmaking schemes is a legislative act of dubious public benefit, unjustifiable by specific requirements for speed or confidentiality which might otherwise necessitate one or more subject exclusions.

The legislative practice of granting administrative agencies³¹ en-

27. See *infra* text accompanying note 32 for a general description of the Marine Resource Commission.

28. The Milk Commission regulates milk production and marketing pursuant to the Milk Control Act, VA. CODE ANN. §§ 3.1-420 to -581 (Repl. Vol. 1983 & Cum. Supp. 1985). It licenses distributors, fixes prices, and delimits marketing areas, exercising both legislative and adjudicative powers. See, e.g., VA. CODE ANN. §§ 3.1-430(g), -439 (Repl. Vol. 1983).

29. The Virginia Resources Authority was the Virginia Water and Sewer Assistance Authority until 1985. 1985 Va. Acts 180. It was created to promote water and sewer project investment and to make loans and grants to local governments for such projects. VA. CODE ANN. §§ 62.1-197 to -223 (Interim Supp. 1985).

30. VA. CODE ANN. § 9-6.14:4.1(A)-(F) (Interim Supp. 1985). Just which educational entities enjoy the new exemption is less than clear. Before the 1985 amendments, the subject exclusion for academic matters in article 5 was enjoyed by "state or local public schools, colleges, and universities." 1975 Va. Acts 1005. The 1985 amendment excludes "[e]ducational institutions operated by the Commonwealth." VA. CODE ANN. § 9-6.14:4.1(A)(2) (Interim Supp. 1985). The author attended a public hearing on the subject before the Governor's Board, at which discussion by proponents and Board members alike was couched in the term "colleges and universities." Local public schools and school districts might otherwise be exempt under § 9-6.14:4.1(A)(6), encompassing "all local, regional or multijurisdictional authorities." *Id.*

31. Readily distinguishable, by the existence of alternative structural restraints on discretionary decisionmaking, are entity exemptions for the General Assembly, political subdivisions like cities and counties, and courts. VA. CODE ANN. §§ 9-6.14:4.1(A)(1), (2), (6). The legislature is politically accountable, as are many of the bodies wielding governmental power in the political subdivisions. Courts are limited by doctrines of judicial self-restraint. Separation of powers limits both the General Assembly and the courts. Agencies are not directly responsive to the political process, nor are they limited by separation of powers. Many enjoy unified legislative, adjudicative, and enforcement powers. Thus, procedural restraints ensuring public and judicial oversight are much more significant for "the fourth branch." But a

tity exemptions runs counter to the purpose for which VAPA was created. When considered in light of VAPA's scheme for limiting delegated legislative or adjudicative power by requiring procedural uniformity and public accessibility, entity exemptions are perforce counterproductive because overbroad. They paint with too broad a brush. The metamorphosis of MRC aptly illustrates the unjustifiableness of the entity exemption.

MRC regulates all commercial fishing and the taking of all marine fish, marine shellfish, and marine organisms seaward of the fall line of all tidal rivers and streams.³² It is charged with the preservation of the commonwealth's marine resources and the promotion of its seafood industry.³³ MRC has other responsibilities besides seafood husbandry. It manages the commonwealth's wetlands preservation program, making regulations for wetlands use and issuing permits to wetlands users.³⁴ It also licenses marine archaeological attempts.³⁵

Until this year, MRC enjoyed a variety of subject and entity exclusions. In common with other state agencies, for example, MRC could dispense with public participation when it fashioned regulations affecting its organization or internal practice.³⁶ In common with other agencies, it could dispense with the procedures otherwise required for contested cases when it rendered employee promotion or discharge decisions.³⁷ A subject exclusion in the former example, a subject exemption in the latter, had been included in VAPA because of its drafters' perceptions of the nature of the agency's action.³⁸

MRC also enjoyed a number of exclusive subject exclusions, permitting it to forego the public participation requirements of article 2 when issuing regulations *inter alia* opening or closing various

more detailed development of these notions must await another day.

32. VA. CODE ANN. § 28.1-3 (Repl. Vol. 1985).

33. *Id.* § 28.1-23.

34. *Id.* §§ 62.1-13.1, -13.4, -13.9 (Repl. Vol. 1982).

35. *Id.* § 10-145.10 (Repl. Vol. 1978). For a detailed description of MRC's jurisdiction and duties, see VA. CODE ANN. AD. LAW APP. 113-14 (1984-85).

36. 1975 Va. Acts 1001.

37. 1975 Va. Acts 1005.

38. "All [exceptions to VAPA] make necessary exclusions or differentiations because of the nature of the subject, to avoid interpretative controversy, to preserve the flexibility and integrity of the administrative process, and to achieve a practical as well as educational statement of the law of administrative due process in Virginia." VAPA REPORT, *supra* note 17, at 30.

fishing seasons, limiting catch sizes, or halting shellfish taking from polluted ground.³⁹ While not subject to the notice and comment mandates of article 2, rulemaking covered by these exclusions was nevertheless typically required to comply with certain minimal public participation procedures.⁴⁰

Finally, before becoming an exempted agency, MRC could dispense with article 2 procedures in rulemaking when time was of the essence. In common with other VAPA agencies with rulemaking power, MRC could, when the situation dictated and the Governor agreed, issue an emergency regulation.⁴¹ Even when the unpredictable nature of the agency's action made creation of a specific subject exclusion impossible, VAPA provided an alternative limited to the agency's power to justify an exception ad hoc. When the nature of the subject warranted exception, VAPA provided one—limited to what MRC could justify, categorically or ad hoc.

According to MRC,⁴² the change from a limited number of subject-specific exclusions and exemptions to an all encompassing entity exemption is traceable to a recommendation by the Joint Legislative Audit and Review Commission (JLARC)⁴³ in its 1984

39. Twelve such exemptions were identified, with citation to the relevant code authority, in Table 9 of the Report of the Joint Legislative Audit and Review Commission on the Economic Potential and Management of Virginia's Seafood Industry. JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION ON THE ECONOMIC POTENTIAL AND MANAGEMENT OF VIRGINIA'S SEAFOOD INDUSTRY, REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY, 1 HOUSE & SENATE DOCUMENTS, H. DOC. NO. 2, at 80 (1984) [hereinafter cited as SEAFOOD INDUSTRY REPORT]; see *infra* notes 43 and 44.

40. See, e.g., VA. CODE ANN. § 28.1-82(B) (Repl. Vol. 1985).

In the exercise of its authority [to set alternate dates for the season for taking oysters from public rocks]. . . , the Commission shall cause notice of any such action to be taken to be posted in two or more public places in each locality affected at least five days prior to the Commission meeting at which such action may be considered. . . .

Id.

41. In addition agencies may dispense, in whole or part, with the public procedures prescribed by [article 2] with respect to regulations which

. . . .
apply in any situation in which the agency finds, and by preamble states with the reasons and precise factual basis therefor, that an emergency situation exists, in which case it shall first secure the approval of the Governor and accordingly, limit the duration of its regulation in time.

Id. § 9-6.14:6 (Repl. Vol. 1978).

42. Letter from Commissioner William A. Pruitt to Chairman Ralph L. Axelle, Jr. (June 13, 1981) (responding to an invitation to comment on existing and proposed exclusions and exemptions from VAPA).

43. The Joint Legislative Audit and Review Commission (JLARC) oversees state administrative agencies for the General Assembly. It reviews agency procedures and performance for cost-effectiveness. At the request of the General Assembly, JLARC also performs special

report on Virginia's seafood industry.⁴⁴ JLARC's recommendation in fact was that "[c]onsideration . . . be given to granting VMRC time frames and procedures for promulgating regulations that are consistent with those of the Commission of Game and Inland Fisheries."⁴⁵ JLARC's report contained little support for its recommendation. The report repeated MRC's reasons for not issuing emergency fishery regulations when the delays of article 2 rulemaking were considered too onerous (no emergency, or no data to provide a basis for declaring one), and it noted that the Commission of Game and Inland Fisheries had a "blanket exemption" from VAPA.⁴⁶

It is not clear from the seafood industry report⁴⁷ that JLARC urged an entity exemption for MRC. If it did, its recommendation was unsupported by fact in the context of fishery regulation. Even if the emergency subject exclusion were demonstrably inadequate to meet a legitimate MRC requirement for prompt action, such a showing hardly justifies more than a new subject exemption from article 2. Moreover, recommending an exemption that would apply to MRC action outside the seafood husbandry context went beyond the limits of JLARC's study. If the effects of an entity exemption on wetland management or marine archaeology, for example, were considered by JLARC, they were not discussed in its report.

Relying on its new entity exemption, MRC recently amended two regulations without resort to the public participation requirements of VAPA's article 2.⁴⁸ Neither concerned seafood husbandry.

studies, such as that of the seafood industry herein discussed. See H. Res. 59, 1982 H. Journal 184 (1982). JLARC is comprised of state legislators, drawn largely from the House Appropriations and Senate Finance Committees. The Auditor of Public Accounts sits as a non-voting member. VA. CODE ANN. §§ 30-56 to -63 (Repl. Vol. 1985).

44. SEAFOOD INDUSTRY REPORT, *supra* note 39.

45. *Id.* at 81.

46. *Id.*

47. In the Executive Summary, the recommendation is stated as follows: "Consideration might be given to granting VMRC regulatory guidelines similar to those granted the Commission of Game and Inland Fisheries." SEAFOOD INDUSTRY REPORT, *supra* note 39, at V.

48. MRC published the amended regulations in the Virginia Register with the following note: "Effective July 1, 1984, the Marine Resources Commission was exempted from the Administrative Process Act for the purposes of promulgating regulations. The Regulations printed below are voluntarily published by the Marine Resources Commission for the public's benefit and for informational purposes only." 1:17 Va. Reg. 1422 (1985).

MRC's modest characterization of the VAPA amendment as, in effect, a subject exclusion from article 2 is not supported by the language of the amendment. See VA. CODE ANN. § 9-6.14:4.1(A) (Interim Supp. 1985). MRC's exemption is not total. The agency is still subject

The first regulation governed permit issue for highway construction on state-owned subaqueous land.⁴⁹ The second governed permit issue to riparian property owners for projects to control shoreline erosion.⁵⁰ The amendments became effective five days after they were published, and without invitation for public comment.⁵¹ The published discussion accompanying each amendment does not suggest any need for limiting public involvement or accelerated process.

These regulations illustrate the shortcomings of entity exemption. Public participation in MRC's rulemaking was largely foreclosed, without demonstrable agency need. Nothing in JLARC's seafood industry report suggests JLARC contemplated wetlands regulations like these when it urged changes to VAPA's constraints on MRC's exercise of delegated legislative power. If any basis for an additional MRC exception to VAPA exists, it supports only a subject exclusion from article 2 for certain seafood husbandry regulations. There is no basis broad enough to justify MRC's new exemption. The entity exemption is legislative overkill.

The inappropriateness of an entity exemption varies directly with the scope of an agency's delegated powers. Had MRC no legislative or adjudicative power but to change the opening and closing dates of fishing and harvesting seasons, its entity exemption would, by the agency's modest power, be a modest infringement on the public interest in uniform and accessible agency rulemaking. By this measure, an entity exemption to the Virginia Resources Authority is less troublesome than one to the commonwealth's educational institutions. VRA has its fingers in but one pie; state-run schools have broad powers in many roles. Before, state-run schools enjoyed the common subject exemptions and exclusions discussed above.⁵² They also enjoyed a special subject exclusion for virtually any student-related action.⁵³

to VAPA's judicial review provisions as limited by the Wetlands Act. *Id.* § 9-6.14:4.1(A)(4); see also *id.* § 62.1-13.15 (Repl. Vol. 1982) (standing to obtain court review of MRC wetlands permit decisions limited to applicant, twenty-five or more freeholders, or the county, city, or town).

49. General Permit VGP No. 1, 1:17 Va. Reg. 1422-24 (1985).

50. General Permit VGP No. 2, 1:17 Va. Reg. 1424-27 (1985).

51. See General Permit VGP Nos. 1 & 2, 1:17 Va. Reg. 1422, 1424 (1985).

52. See *supra* text accompanying notes 36 & 37.

53. "[A]ny action taken with respect to the admission, exclusion, discharge, or discipline of students in State or local public schools, colleges, and universities as well as the academic affairs and requirements thereof." 1975 Va. Acts 1005.

It is difficult to say yet which, if any, actions by state schools are now exempt from VAPA's procedural scheme where before the 1985 amendment they would have been covered. The wide variety of their activities makes the change from subject exemption and exclusion to entity exemption for educational institutions more difficult to evaluate than that for MRC. The old school blanket may well have covered as much as the new. What is disturbing, even absent a clear picture of comparative coverage between old and new treatments of educational institutions, is the willingness of the General Assembly to put governmental bodies, and not just actions, beyond the pale of VAPA.

II. SUPREME COURT DECISIONS AFFECTING REVIEW OF AGENCY ACTION

In two cases decided in 1984,⁵⁴ the Supreme Court of Virginia continued exegesis of the second section of VAPA's article 4, which contains the procedures for obtaining court review of actions by administrative agencies subject to VAPA.⁵⁵ The statute, section 9-6.14:16,⁵⁶ prioritizes two alternatives for obtaining court review: by

54. *Forbes v. Kenley*, 227 Va. 55, 314 S.E.2d 49 (1984); *Kenley v. Newport News Hosp. Ass'n*, 227 Va. 39, 314 S.E.2d 52 (1984).

55. Some actions by agencies subject to VAPA may not be brought to a court for review. They include those exempted by § 9-6.14:4.1(B), and those excluded by § 9-6.14:15. Note that the exclusions from article 4 judicial review remain at the head of article 4, while the exclusions to article 2 rulemaking and article 3 case decision have been moved from the head of each article to article 1. See *supra* text accompanying note 26. Compare VA. CODE ANN. § 9-6.14:1.1(C), (D) (Interim Supp. 1985) with *id.* § 9-6.14:15 (Repl. Vol. 1978).

56. VA. CODE ANN. § 9-6.14:16 (Repl. Vol. 1978).

Right, forms, venue.—Any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision, as the same are defined in § 9-6.14:4 of this chapter and whether or not excluded from the procedural requirements of article 2 (§ 9-6.14:6 et seq.) or 3 (§ 9-6.14:10 et seq.) hereof, shall have a right to the direct review thereof either (i) by proceeding pursuant to express provisions therefor in the basic law under which the agency acted or (ii), in the absence, inapplicability, or inadequacy of such special statutory form of court review proceeding, by an appropriate and timely court action against the agency as such or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia. Such proceedings include those for declaratory judgments, mandamus, or equitable relief by way of prohibitory or mandatory injunctions; but relief pursuant thereto shall await final judgments or decrees in such actions save as provided in § 9-6.14:18. Such actions may be instituted in any court of competent jurisdiction as provided in § 9-6.14:5, and the judgments of such courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. In addition, when any such regulation or case decision is the subject of an enforcement action in court, the same shall also be reviewable by the court as a defense to the action; and the judgment or decree therein shall

reference to procedures set forth in the basic law⁵⁷ under which the agency acted, or, if and only when the procedures in the basic law are inadequate, by reference to procedures created by the supreme court. The procedures promulgated by the supreme court in response to this VAPA requirement appear in Virginia Supreme Court Rules Part Two A. They contain two thirty-day deadlines: one for notifying the agency that court review would be sought,⁵⁸ the other for filing a petition for appeal.⁵⁹ In both 1984 cases, as well as the seminal 1982 case, the procedural issue before the supreme court has been the applicability of one or the other of these deadlines.⁶⁰

The uncertainty created by the prioritization of two procedural alternatives depending on the adequacy of one confronted the supreme court first in 1982. In *Commonwealth v. County Utilities*,⁶¹ the court held that because the State Water Control Law⁶² contained a detailed procedural scheme for judicial review of State Water Control Board decisions withdrawing sewage discharge per-

be appealable in other cases.

Id.

57. *Id.* Basic law is defined *supra* note 16.

58. The first deadline appears in VA. SUP. CT. R. 2A:2.

Any party appealing from a regulation or case decision shall file, within 30 days after adoption of the regulation or entry of the final order in the case decision, with the agency secretary a notice of appeal signed by him or his counsel. The notice of appeal shall identify the regulation or case decision appealed from, shall state the names and addresses of the appellant and of all other parties and their counsel, if any, shall specify the circuit court to which the appeal is taken, and shall conclude with a certificate that a copy of the notice of appeal has been mailed to each of the parties. The omission of a party whose name and address cannot, after due diligence, be ascertained shall not be cause for dismissal of the appeal.

59. The second deadline appears in VA. SUP. CT. R. 2A:4.

(a) Within 30 days after the filing of the notice of appeal, the appellant shall file his petition for appeal with the clerk of the circuit court named in the first notice of appeal to be filed and shall cause a copy of the petition for appeal to be served (as in the case of a bill of complaint in equity) on the agency secretary and on every other party.

(b) The petition for appeal shall designate the regulation or case decision appealed from, specify the errors assigned, state the reasons why the regulation or case decision is deemed to be unlawful and conclude with a specific statement of the relief requested.

60. *Forbes v. Kenley*, 227 Va. 55, 314 S.E.2d 49 (1984); *Kenley v. Newport News Hosp. Ass'n*, 227 Va. 39, 314 S.E.2d 52 (1984); *Commonwealth v. County Util.*, 223 Va. 534, 290 S.E.2d 867 (1982). While all three cases have arisen from agency action by way of case decision, the statute and the court rules make it clear that the supreme court's views would apply equally to review of agency rulemaking.

61. 223 Va. 534, 290 S.E.2d 867 (1982).

62. VA. CODE ANN. §§ 62.1-44.2 to -44.34:F (Repl. Vol. 1982 & Cum Supp. 1985).

mits, section 9-6.14:16 did not permit application of the alternative court rule procedure with its thirty-day petition deadline. The basic law procedure contained a notice deadline,⁶³ but not a petition deadline. The court seemed to be saying that a special statutory form of court review proceeding was not so inadequate as to justify resort to the court rule alternative because it lacked the petition deadline of the latter. And there things stood until 1984, when the supreme court decided both *Forbes v. Kenley* and *Kenley v. Newport News Hospital Association* on the same day.

A. *Forbes v. Kenley and Procedural Adequacy*

In *Forbes v. Kenley*,⁶⁴ petitioner appealed from the circuit court's order dismissing his appeal from a case decision by the State Health Commissioner denying him three septic tank installation permits. The circuit court sustained the Commissioner's demurrer on the ground that petitioner's appeal was time barred by his failure to note his appeal to the Commissioner within thirty days, as required by Virginia Supreme Court Rule 2A:2.⁶⁵ On appeal to the supreme court, petitioner continued to maintain that, because the state's Environmental Health Services Law⁶⁶ provided him an adequate special statutory form of court review proceeding⁶⁷ within the meaning of section 9-6.14:16, petitioner was not bound by the court rule alternative. The septic tank permit denial procedure in the basic law did not require the applicant to notify

63. *Id.* § 62.1-44.29 (Repl. Vol. 1982).

64. 227 Va. 55, 314 S.E.2d 49 (1984).

65. *Id.* at 56, 314 S.E.2d at 50.

66. See VA. CODE ANN. §§ 32.1-163 to -248 (Repl. Vol. 1985).

67. The basic law specifically provided for appeals from septic tank permit denials as follows:

After exhausting his administrative remedies, a person subject to an adverse ruling by the Board shall have the right to appeal to the circuit court in the jurisdiction where all or part of the site or proposed site of the septic system is located for a hearing before the judge of said court.

The court shall consider all relevant evidence. If the court, after hearing, reverses the decision of the Board, it may do so upon such terms and conditions, including a probationary period, as may be fair and just under all of the circumstances. The decision may be recorded in the land records of the clerk's office of such court so as to be binding, notice to the public including subsequent purchases of the land in question.

1979 Va. Acts 734.

A new septic tank permit denial review procedure became effective in 1985. VA. CODE ANN. §§ 32.1-163 to -166.10 (Repl. Vol. 1985). It provides for final administrative review by a newly created State Sewage Handling and Disposal Appeals Review Board before circuit court review. Like the old, the new procedure is silent as to notice and filing deadlines.

the agency of his intention to seek court review. Virginia Supreme Court Rule 2A:2, however, imposes a thirty-day notice deadline for such notice.⁶⁸ The Commissioner claimed that, because it failed to set a notice deadline, the procedure set forth in the basic law was inadequate. Section 9-6.14:16, he argued, required the court to supply the missing deadline by applying Rule 2A:2.

The supreme court held for the petitioner. The procedure for court review in the Environmental Health Services Law was adequate, so resort to court rules was impermissible under section 9-6.14:16, even to supply an element as desirable in theory as a time bar. As far as the court was concerned, a special statutory form could be "adequate" under section 9-6.14:16 even when incomplete for want of a deadline.

Nevertheless, the statute is not inadequate on its face. It provides for jurisdiction, venue, decision by judge, and optional relief at the judge's discretion. Moreover, by its express terms, the statute is limited to a single class of cases—appeals from denials of applications for septic tanks. We hold that the statute was adequate and that it was available to *Forbes*.⁶⁹

The negative rule of law in *Forbes* is clear: a special statutory court review procedure is not so inadequate that the Supreme Court Rules Part Two A governs direct review of an agency action just because the basic law lacks a deadline for notifying the agency or filing pleadings. Equally clear is the reluctance of the supreme court to subdivide procedural adequacy with respect to the alternatives presented by section 9-6.14:16: a special statutory court review procedure, taken as a whole, is either adequate or it is not. It cannot be adequate as to some procedural specifics of direct review but inadequate as to others so that Part Two A can apply in part. A special statutory court procedure can be deficient without being inadequate within the meaning of section 9-6.14:16. Such defi-

68. For the text of Rule 2A:2, see *supra* note 58. Nor did the septic tank permit denial review procedure set a deadline for petitioning the court as does Rule 2A:4, the text of which appears *supra* at note 59. Because petitioner had not conformed to Rule 2A:2, however, Rule 2A:4 (which depends on Rule 2A:2 notice) was not at issue. In passing, the court pointed to the absence of a filing deadline in the permit denial review procedure as a second drawback, but, like the absence of a notice deadline, not so grievous as to render the basic law review procedure so inadequate as to trigger resort to Part Two A. *Forbes*, 227 Va. at 60, 314 S.E.2d at 52.

69. 227 Va. at 60, 314 S.E.2d at 52.

ciency will not be judicially repaired by piecemeal application of Part Two A procedures.

Just what is a procedurally adequate review scheme after *Forbes* is yet unclear. That provided in the Environmental Health Services Law is now unquestionably adequate, but the supreme court's list of its procedural provisions, "jurisdiction, venue, decision by judge, and optional relief at the judge's discretion"⁷⁰ should not be taken as correspondent with minimal adequacy. Surely a procedure for court review appearing in a basic law would not be inadequate for want of an express venue provision in light of section 8.01-261, which designates proper venue for "actions for review of, appeal from, or enforcement of state administrative regulations, decisions or other orders."⁷¹

Forbes was wrongly decided. Its unfortunate consequence is that where the court review procedure created in the basic law lacks a deadline for seeking judicial review,⁷² a deadline otherwise apparently reasonable to the supreme court cannot be applied. *Forbes* permits the dissatisfied regulatee to sit on his right to

70. *Id.*

71. VA. CODE ANN. § 8.01-261 (Cum. Supp. 1985).

Category A or preferred venue.—In the actions listed in this section, the forums enumerated shall be deemed preferred places of venue such venue being sometimes referred to as "Category A" in this title, and venue laid in any other forum shall be subject to objection, provided that, if more than one preferred place of venue applies, any such place shall be a proper forum. The following forums are designated as places of preferred venue for the action specified:

1. In actions for review of, appeal from, or enforcement of state administrative regulations, decisions, or other orders:

a. If moving or aggrieved party is other than the Commonwealth or an agency thereof, then the county or city wherein such party:

(1) Resides; or

(2) Regularly or systematically conducts affairs or business activity; or

(3) Wherein such party's property affected by the administrative action is located.

b. If the moving or aggrieved party is the Commonwealth or an agency thereof, then the county or city wherein the respondent or a party defendant:

(1) Resides; or

(2) Regularly or systematically conducts affairs or business activity; or

(3) Has any property affected by the administrative action.

c. If subitems a and b do not apply, then the county or city wherein the alleged violation of the administrative regulation, decision or other order occurred.

Id.

72. While the issue in *Forbes*, whether Court Rule 2A:2 governed septic tank permit denial appeals to the circuit court, appears to be one of notice to the Commissioner, the crux of the matter is the Court Rule's deadline for going forward. Appellee did not claim insufficient notice; he claimed failure of timely notice. Brief for Appellee at 7-9; see *infra* note 79.

reconsideration. The court's non-definition of "adequate" in section 9-6.14:16, from which stems this regrettable state of affairs, is not based on legislative history. In the silence of the General Assembly, public policy should guide statutory construction. Public policy dictates a different conclusion in *Forbes*.

Society has an interest in the finality of administrative agency actions. Efficiency and economy in the execution of public policy cannot occur when agency resources marshalled to defend a particular rulemaking or adjudication cannot be promptly redeployed to other government business. Planning in both the private and public sectors by others affected by a regulatory action cannot continue while awaiting the final word. These interests are served by promptly shutting the courthouse doors to a disgruntled regulatee.

On the other hand, society's interest in fair treatment by government persuades affording the loser in a bureaucratic dispute an opportunity for judicial review—for obtaining correction by convincing a neutral referee that the regulator made a mistake or did not play by the rules. With the thirty-day notice and filing deadlines in Part Two A the supreme court strikes a balance. After thirty days, society's interest in finality outweighs its interest in governmental fair dealing.

The supreme court's decision in *Forbes* responds only to the public interest in fair play. It suggests that the court paid little or no attention to the public interest in finality when it construed the limiting language in section 9-6.14:16. The balance between these two important policies should be restruck. The rule of law in *Forbes* should be abandoned by the supreme court. Otherwise, the General Assembly should amend VAPA to include a definition of "adequate" which properly motivates a regulatee to promptly exercise his right to judicial review.

The apparent similarity between *Forbes* and *County Utilities*⁷³ does not mean the latter was also wrongly decided. In both cases, the supreme court rejected the notion that the absence of a deadline limiting a regulatee's right to seek court review did not make the procedure afforded by the basic law so inadequate as to trigger Part Two A of the Supreme Court Rules. The special court review procedure at issue in *County Utilities* required the regulatee to notify the agency that court review was anticipated,⁷⁴ but the basic

73. 223 Va. 534, 290 S.E.2d 367 (1982).

74. VA. CODE ANN. § 62.1-44.29 (Repl. Vol. 1982).

law set no subsequent deadline for filing a petition with the reviewing court. In other words, the State Water Control Law review procedure had a notice deadline like Rule 2A:2; it had no petition deadline like Rule 2A:4. But, because notice by the regulatee under the Water Control Law procedure triggered a Water Control Board duty to go forward, a petition deadline for the regulatee was unnecessary. In *County Utilities*, the public interest in finality was otherwise adequately served by the shifting of the burden of going forward from regulatee to state agency. The one deadline was enough. In *Forbes*, on the other hand, the silence of the basic law meant that going forward lay in the unbridled discretion of the regulatee. The public interest in finality was not served by the review procedure in the basic law held adequate in *Forbes*. Neither was it served by the court's opinion in the other administrative procedure case decided on the same day as *Forbes*.

B. *Kenley v. Newport News Hospital Association: Five Pounds of Court Rules in a Ten-Pound Statutory Bag*

In *Kenley v. Newport News Hospital Association*,⁷⁵ the State Health Commissioner appealed from a circuit court declaratory judgment that the Association, as operator of Riverside Hospital, need not obtain a certificate of public need before resuming a program of open heart surgery after a fourteen-month hiatus.⁷⁶ The Commissioner had previously advised the operator that resuming a service after more than a twelve-month interruption was considered a new project requiring certificate application, and the operator had so applied. When the Commissioner denied its application, the operator appealed.

While the appeal was still pending, the operator sought a declaratory judgment from the circuit court that, contrary to the Commissioner's decision, reactivating the hospital's open heart surgery program was not subject to the health planning law's requirement for certificate application. The Commissioner unsuccessfully de-

75. 227 Va. 39, 314 S.E.2d 52 (1984).

76. When this controversy arose, Virginia law required that anyone beginning a new health project in the state apply for a certificate of public need from the State Health Commissioner. 1973 Va. Acts 605. Introduction of a new service was a project requiring such application. 1973 Va. Acts 604. A new health care planning law was passed in 1982, repealing the code sections related to this case, but substituting a new scheme for screening new health projects, which copies the old in respects herein relevant, adding the twelve-month interruption limit for new service. VA. CODE ANN. §§ 32.1-102.1 to -102.11 (Repl. Vol. 1985).

murred on the grounds that the operator had failed to comply with the procedural prerequisites for judicial review of his decision, as set forth in section 9-6.14:16 and Part Two A of the Supreme Court Rules. When the circuit court granted the operator's motion for summary judgment, the Commissioner appealed, renewing his procedural objection and contesting the circuit court's interpretation of the health planning law.⁷⁷

The supreme court reversed and issued final judgment for the Commissioner, agreeing with him that to reestablish an open heart surgery program the operators had to apply for a certificate of public need.⁷⁸ The court did not, however, agree with the Commissioner's view that Part Two A limited the operator's motion for declaratory judgment. The Commissioner had argued that the declaratory judgment procedure for court review of his decision was inadequate within the meaning of section 9-6.14:16 because there were no time limits for initiating court review.⁷⁹ The operators had responded that Part Two A applied only to direct appeals and not to motions for declaratory judgment.⁸⁰ Acknowledging that the result would be an alternative circumventing the time restraints of Rules 2A:2 and 2A:4, the court nevertheless, in dictum, "assume[d], without deciding" that the General Assembly had created a distinction between direct appeals and motions for declaratory judgment in Code section 9-6.14:16(ii).⁸¹ Part Two A applied to the former but not the latter.⁸² Thus, where the basic statute did not

77. The facts are taken from the supreme court's opinion.

78. 227 Va. at 47, 314 S.E.2d at 57.

79. Brief for Appellant at ll -13, *Forbes v. Kenley*, 227 Va. 55, 314 S.E.2d 49 (1984). "Delays will most often prejudice the state agency because of changes in personnel, dimming of memories, and the retirement or destruction of relevant documentation. Thus, an aggrieved party to a case decision could manipulate and improve the chances for success in court by the simple act of delay. . . ." *Id.* at 13.

80. *Kenley*, 227 Va. at 46, 314 S.E.2d at 56.

81. *Id.* at 46-47, 314 S.E.2d at 56.

82. The court's assumption that the General Assembly had created a distinction between alternative procedural forms in § 9-6.14:16(ii) rests in turn upon a tacit assumption that the sentence in § 9-6.14:16 which begins "such procedure" and permits motions for declaratory judgment, mandamus, and injunctive relief by way of prohibitory or mandatory injunctions refers back to *both* the statutorily regulated procedure in § 9-6.14:16(i) *and* the court-regulated procedure in § 9-6.14:16(ii). See VA. CODE ANN. § 9-6.14:16 (Repl. Vol. 1978) (see *supra* text of statute at note 56). If the permissive list of procedural forms does not refer to the court-regulated procedure, then only direct appeal would be available to challenge agency action when, as in *Newport News Hosp. Ass'n*, the basic law did not provide otherwise. Such an interpretation would have led to the conclusion that the circuit court lacked jurisdiction to entertain the hospital operator's motion for summary judgment. As long as the court is willing to construe § 9-6.14:16 so as to afford a disgruntled regulatee a choice as to

provide a procedurally adequate statutory review form, judicial review could be obtained either by direct appeal, for which Part Two A set both a thirty-day notice deadline and a thirty-day petition deadline, or by motion for declaratory judgment, for which Part Two A set no deadlines. Once again, as in *Forbes*, the supreme court had evidenced its aversion to the thirty-day deadlines created in its own rules, this time laying responsibility for an exception to their application at the feet of a General Assembly tarred with the brush of imprecise legislative drafting.

The court's criticism is misplaced. If a time bar should limit access to judicial review of agency decisions, the fault for the absence of a time bar for motions for declaratory judgment lies not with the General Assembly for imprecisely drafting section 9-6.14:16 but with the supreme court for too narrowly drafting Part Two A. Section 9-6.14:16 of the Code of Virginia leaves to the supreme court the creation of procedures for obtaining direct review of agency decisions, except where a specific review procedure is adequately set forth in the basic law.⁸³ Among the proceedings for which the General Assembly expressly contemplated supreme court furnished procedures are those for declaratory judgment.⁸⁴ Part Two A was promulgated pursuant to section 9-6.14:16.⁸⁵ Rule 2A:1(c) says Part Two A shall apply to judicial review "by way of direct appeal from" agency action. Even if Rule 2A:1(c) were not to be construed as limiting the scope of Part Two A, neither Rule 2A:2 nor Rule 2A:4 expressly reaches judicial review by way of motion for declaratory judgment. But nothing in the statute dictates this limit on the rules. If the thirty-day notice and petition deadlines do not reach declaratory judgment motions, it is because the supreme court has stopped short of regulating as far as the General Assembly contemplated. Part Two A needs amendment, not section 9-6.14:16.

Three times the supreme court has been invited to apply a Part Two A deadline when the basic law court review procedures lacked one. Three times the court has declined. Whether or not the court

how to proceed when the basic law is silent, then the dissimilar scope of § 9-6.14:16(ii) and Part Two A remains troublesome from the point of view of those valuing administrative action finality.

83. *Id.*

84. "Such proceedings include those for declaratory judgments, mandamus, or equitable relief by way of prohibitory or mandatory injunctions. . . ." *Id.* § 9-6.14:16.

85. Va. Sup. Ct. R. 2A:1(a) ("These rules are promulgated pursuant to § 9-6.14:16 of the Code of Virginia.").

correctly decided in each instance, the three cases taken together evidence an aversion to the application of the court's own balance of society's interest in the finality of agency action against society's interest in discovering and correcting bureaucratic mistakes. There is no apparent explanation for this aversion on the part of the authors of Part Two A. What is apparent is the need for change if finality is to be adequately served in Virginia administrative law.

Section 9-6.14:16 creates a distinction between administrative action review rights which exist in basic law and those which exist in VAPA; a distinction that is unnecessary and, as is evident above, subject to distortion. Sometimes such procedural distinctions are necessary. With respect to the process employed by an agency in reaching its initial decision, there is much to be said for variation depending on the different interests at stake, the complexity of factual disputes and the amount of public attention. Trial-like procedures best serving the decision in one instance, would be unacceptably slow in another. VAPA's articles 2 and 3, for example, respond to this need for different decisionmaking procedures.⁸⁶

But regardless of the subject matter, regardless of the method chosen by the agency to regulate, all challenges to agency action can be treated alike at the court review stage. By then, there is, or should be, only a decision accompanied by a record. All petitions for agency action review look alike. All that is required of the court is a review of the decision with reference to the record. At this stage, there is no reason to distinguish among agency decisions with respect to deadlines for going forward. The distinction in section 9-6.14:16, directing review by reference to different procedures in some instances, is unnecessary and productive of mischief. It should be discarded in favor of a single procedure which balances finality and opportunity to be heard. The model might well be Part Two A.⁸⁷

Recently, both the General Assembly and the Supreme Court of

86. VAPA REPORT, *supra* note 17, at 4.

87. Appeals from decisions by the State Corporation Commission go directly to the supreme court. VA. CODE ANN. § 12.1-39 (Repl. Vol. 1978). They are limited by a thirty-day notice deadline and four-month petition deadline. VA. SUP. CT. R. 5:21(c),(g). Appeals from decisions by the Industrial Commission go directly to the court of appeals. VA. CODE ANN. § 17-116.05.2 (Cum. Supp. 1985). They are limited by a thirty-day notice deadline. VA. SUP. CT. R. 5A:11(b). The clerk of the Commission must transmit the record to the court of appeals within thirty days thereafter. VA. SUP. CT. R. 5A:11(d).

Virginia addressed the Virginia Administrative Process Act. The General Assembly streamlined VAPA's definition of regulation, and discarded a troublesome distinction between regulations for which VAPA's rulemaking procedure was mandated and those for which it was merely optional. At the same time, however, the General Assembly excused three state agencies and all state schools from compliance with VAPA's procedural schemes. Meanwhile, the supreme court twice passed on opportunities to repair faulty court review options inadequately serving the public's interest in the finality of administrative agency decisions.

Next year promises to be better. The 1986 General Assembly will probably be called upon to enhance the training and independence of agency subordinates and others called upon to preside at administrative hearings.⁸⁸ The Attorney General's office has proposed a legislative response to *Forbes* and *Newport News Hospital Association*.⁸⁹ The inevitable dialectic of procedural standardization and exception continues. The first administrative law decision by the new court of appeals has been decided.⁹⁰ These coming attractions evidence the continuing vitality of administrative law in the commonwealth.

88. Memorandum from Delegate Ralph L. Axselle, Jr., Chairman, Governor's Regulatory Reform Advisory Board, to Heads, Virginia Agencies with Regulatory Responsibilities (May 28, 1985).

89. Memorandum from Roger L. Chaffe, Teresa D. Creef, C. Tabor Cronk, Assistant Attorneys General, *APA Revision-Standardization of Judicial Review* (April 18, 1985).

90. *State Bd. of Health v. Virginia Hosp. Ass'n*, 1 Va. App. —, 2 V.L.R. 30 (1985); see VA. CODE ANN. §§ 17-116.01 to .014 (Cum. Supp. 1985). An aggrieved party has the right to appeal to the court of appeals the final decision of a circuit court on appeal from a decision of an administrative agency. *Id.* § 17-116.05.