

Policy Making 101

How Federal Agencies Create Policy

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- In general, there are two types of agency policy that impact members of the public:
Regulations and Guidance.
 - Regulations are legally binding.
 - Guidance is non-binding.

- “Regulations” are defined as
 - An agency statement of general applicability and future effect;
 - Which the agency intends to have the force and effect of law;
 - That is designed to implement, interpret, or prescribe law or policy OR to describe the procedure or practice of an agency.
 - *See Administrative Procedures Act at 5 U.S.C. § 551; Bulletin for Agency Good Guidance Practices (“GGP”) at 72 Fed. Reg. at 3439.*

- “Guidance” is defined as:
 - An agency statement of general applicability and future effect;
 - Other than a regulatory action;
 - That sets forth a policy on (or an interpretation of) a statutory, regulatory, or technical issue.

- Guidance documents are titled in a variety of ways, including:
 - Policy Statements,
 - Procedural Guidelines,
 - Manuals,
 - Bulletins, and
 - Advisories.

“A Rose is A Rose”

- The fact that an agency uses terms to describe their policy as guidelines, a manual, a policy statement, an advisory, or a bulletin is not controlling in determining whether it is, in fact, a regulation.
 - *See Western Coal Traffic League v. United States*, 694 F.2d 378 (1982), on rehearing, 719 F.2d 772 (1983), cert. denied, 466 U.S. 953 (1984).

- Recently, the courts, Congress, and other authorities noted concerns regarding the issuance of agency policy.
- Their concern was that federal agencies were not observing federal administrative requirements when they issued policy.
- *See Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).*

- In its 2002 Report to Congress, the Office of Management and Budget (OMB) recognized the enormous value of agency guidance documents in general.
- Well-designed guidance documents serve many important or even critical functions in federal programs.

- Guidance documents, used properly, can channel the discretion of agency employees, increase efficiency, and enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties.

- According to OMB, “Experience has shown, however, that guidance documents may also be poorly designed or improperly implemented.”
- Moreover, because it is procedurally easier to issue guidance documents, there may be an incentive for agencies to issue guidance documents in lieu of regulations.

- The benefits accorded by administrative regulatory review are many including:
 1. Internal agency review by a senior agency official.
 2. Public participation, including notice and comment under the Administrative Procedures Act (APA).
 3. Justification for the rule, including a statement of basis and purpose under the APA, Executive Orders, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act.
 4. Interagency review through OMB.
 5. Congressional Oversight.
 6. Judicial Review.

- Laws governing the issuance of regulations include –
 - The Administrative Procedures Act (APA)
 - 5 U.S.C. §§ 501 *et seq.*
 - The Regulatory Flexibility Act
 - 5 U.S.C. §§ 601 *et seq.*
 - The Paperwork Reduction Act
 - 44 U.S.C. §§ 3501 *et seq.*
- In addition, various Executive Orders may apply.

- The APA requires federal agencies to provide the public with an opportunity for “notice-and-comment” on proposed regulations.
- “Notice-and-comment” is provided by publication in the Federal Register.
- *See* 5 U.S.C. §§ 551 and 553.

- The purpose of the Regulatory Flexibility Act is to establish that agencies must endeavor to fit regulatory and informational requirements to the scale of businesses, organizations, and governmental jurisdictions.

- The purposes of the Paperwork Reduction Act are many. They include –
 - “To minimize the paperwork burden for individuals, small businesses, educational and non-profit institutions, Federal contractors, State, local, and tribal governments and other persons resulting from the collection of information by or for the Federal Government.
 - “To ensure the greatest possible public benefit from . . . information created, collected, used, shared, or disseminated by the Federal Government.

44 U.S.C. § 3501.

- In contrast to the many laws and orders governing the issuance of regulations, the issuance of guidance documents is governed by an Executive Order publishing the *Bulletin on Agency Good Guidance Practices* (“GGP”).
 - Final Bulletin published at 72 Federal Register 3432 (Jan. 25, 2007)

- Agencies are to follow the GGP when providing important policy direction on a broad scale.
- GGP requires federal agencies provide the public with an opportunity for access to, and feedback on, “significant guidance documents.”
- Public notice-and-comment on “Significant Agency Guidance” will require posting the guidance on the agency’s website and clearly advertising on that website a means for the public to submit comments electronically.

- Agencies of the Department of the Interior are advised to consult with the Office of the Solicitor to determine whether proposed policy positions are “regulations” or “guidance.”
- And, if guidance, whether it constitutes “significant agency guidance” for purposes of the GGP.

- Approval authority for BIE proposed regulations or significant guidance documents may require coordination among various DOI and interagency offices including:
 - Office of the Assistant Secretary – Indian Affairs (*109 DM 8*);
 - The Solicitor’s Office (*109 DM 3*);
 - The Office of the Executive Secretariat and Regulatory Affairs (*110 DM 17 B.*);
 - The Office of Information and Regulatory Affairs in the President’s Office of Management and Budget (*GGP, 72 Fed. Reg. 3432*).

- Therefore, consultation with the Office of the Solicitor on proposed, general policy will be critical for the BIE in determining:
 - the form the proposed policy should take,
 - the approval path for the policy; and
 - the timeframe for publication of the policy.
- Notwithstanding these federal administrative requirements, proposed BIE policy may also require tribal consultation.

Tribal Consultation

- On November 6, 2000, President Clinton issued Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments.
- The purpose of this Presidential order is to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.

- “Policies that have tribal implications” refers to –
 - Legislative comments or proposed legislation,
 - Regulations, or
 - Other policy statements or actions
- that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

- Tribal consultation is to strengthen the United States government-to-government relationships with Indian tribes.
- In addition, tribal consultation is intended to reduce the imposition of unfunded mandates upon Indian tribes.

- As contemplated by the Executive Order, BIA, together with tribal leaders, undertook a collaborative process to develop a consultation policy to guide the government-to-government relationship.
- The BIA's Government-to-Government Consultation Policy was issued on December 13, 2000.

- The BIA acknowledges that all contacts and consultation with Indian tribal leaders shall be conducted in a professional and respectful manner and in accordance with the consultation policy guidelines.

- “Consultation” is defined as a process of government-to-government dialogue between BIA and Indian tribes regarding proposed federal actions in a manner intended to secure meaningful and timely tribal input.

- BIA is to ensure Indian tribes -
 1. Receive timely notice of the proposed federal action.
 2. Are informed of the potential impact on the tribes of the proposed action.
 3. Are informed of the federal officials who may make the final decision on the proposed federal action.
 4. Have their input and recommendations on the proposed action fully considered by those officials responsible for the final decision.
 5. Are to be advised of the rejection of tribal recommendations on such action and the basis for such rejections from those Federal officials who make the final decision.

- Consultation does not mean merely the right of tribal officials, as members of the general public, to be consulted or to provide comments under the APA or other Federal laws of general applicability.

- Consultation between BIA and Indian tribes takes place through three major steps:
 - A. Pre-Decisional Scoping
 - B. Developing the Bureau Proposal
 - C. Implementation of the Final Federal Action
- These procedures allow flexibility and discretion depending on the matter under consultation.

- *Pre-Decisional Scoping*

- Consultation should begin when the BIA knows enough about a proposed action to present a coherent proposal and a suggested list of initial issues.
- Consultation should take place –
 - Before the BIA begins drafting proposed regulations.
 - Before BIA requests the introduction of proposed legislation.
 - Before BIA implements policies or other actions having implications for tribes.

- **Steps in Pre-Decision Scoping**

1. Start consultation after BIA knows enough about the proposed action to identify most of the affected tribes and to present a coherent proposal and suggested list of issues.
2. BIA should prepare an information packet on the proposed action.
3. BIA should work with impacted tribal leaders to design the scoping process for this proposed action.
4. Identify the participants in the consultation from the BIA, the Indian tribal governments and, if appropriate, other federal agencies that have responsibilities regarding the proposed policy.
5. BIA will notify tribal governments at each stage in the process.
6. Conduct a scoping meeting to identify and review the issues along with identifying areas that need further research. BIA and the tribal governments should determine how consultation should proceed after the meeting.

- *Developing the BIA Proposal*

1. BIA should evaluate the comments received from tribal participants. BIA may develop a post-scoping document to share with tribal leaders the preliminary decisions made on what issues to cover.
2. BIA should allocate the decision preparation work and set a schedule for completion of the work. Tribal governments may be involved in specific research or writing tasks.
3. BIA and the Tribes work to design the process for consultation on the draft proposal.
4. BIA should solicit tribal views on the length of the consultation process and inform the tribes of other federal time frame requirements.

- *Implementation of Final Federal Action*
 - BIA shall address issues raised as priority matters during the consultation process in a meaningful and timely manner.
 - Notice of BIA decisions shall be made to all identified parties in the consultation.
 - BIA shall continue to consult with tribes on the manner in which the decision is implemented, as well as any need for training or technical assistance on a new regulation or policy.

- On November 5, 2009, President Obama issued a memorandum to the heads of executive departments and agencies on tribal consultation requirements.
 - He directed each agency to submit to OMB a detailed plan of actions the agency will take to implement the policies and directives of E.O. 13175.
 - He further directed each agency to submit to OMB on an annual basis, a progress report on the status of each action included in its tribal consultation plan together with proposed updates.

- On February 22, 2010, Secretary Salazar announced the Interior Department's plan to develop a department-wide policy on tribal consultation and coordination.

- The proposed Department-wide policy will:
 - Recognize the special legal status of tribal governments;
 - Respect tribal sovereignty and support self-determination and self-governance;
 - Honor the trust relationship between the United States and tribal governments;
 - Demonstrate Interior's commitment to improving communications while maximizing tribal input and coordination;
 - Ensure that Interior consults on a government-to-government basis with appropriate tribal representatives;
 - Ensure Interior's bureaus and offices conduct consistent consultation; and
 - Be clear, understandable and workable.

- Interior's consultation plan will also establish a Tribal Consultation Team comprised of senior Department representatives and tribal leaders.
- Interior will identify an official to be responsible for overseeing Department-wide implementation of the consultation plan.
- After consultation on the plan, the Department will publish it in the Federal Register.

- In summary, in the development or implementation of BIE policy impacting Indian tribes, we recommend the agency seek legal guidance from the Office of the Solicitor to ensure compliance with the federal administrative process and tribal consultation legal requirements.

DOI's Office of the Solicitor ("SOL")

- The Solicitor is the principal legal advisor to the Secretary and the Chief Law Officer of the Department.
- She is responsible for all legal work of the Department except for the work of the Office of Hearings and Appeals, and the work of the Legislative Counsel.

- The Solicitor's Office is organized in two ways:
 1. Subject matter "Divisions" located in our Washington, DC office and
 2. Regional and Field Offices located nationwide.

- Generally, the Divisions cover the following programs:
 - Indian Affairs (BIA, BIE, Offices of the ASIA)
 - Minerals (MMS, OSM, Bureau of Mines)
 - Land and Water (BLM, BOR, USGS)
 - Parks and Wildlife (NPS, FWS)
 - General Law (procurement, personnel law, administrative law issues)

- Regional and Field Offices are located throughout the country including –

- Albuquerque, NM
- Anchorage, AK
- Atlanta, GA
- Billings, MT
- Boise ID
- Boston, MA
- Denver, CO
- Knoxville, TN
- Phoenix, AZ

- Pittsburgh, PA
- Portland, OR
- Sacramento, CA
- Salt Lake City, UT
- San Francisco, CA
- Santa Fe, NM
- Tulsa, OK
- Twin Cities, MN

These offices typically provide legal services to the agency decision makers in their region.

- On February 19, 2002, the Solicitor issued a memorandum regarding the provision of legal services to the Office of Indian Education (now BIE).
- In essence, the memorandum served to remind SOL offices that education legal work that had national or multi-office implications was to be coordinated with the SOL Division of Indian Affairs.
- Local education issues were to be handled by SOL regional and field offices unless they raised important national or policy issues.

- Questions?
- Thank you for your time and attention! As you may have guessed, I enjoy the variety and scope of legal issues presented in implementing the BIE's various programs.
- My contact information is as follows:
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- **Bibliography**

- Policy Making

- Administrative Procedures Act, 5 U.S.C. § 501 *et seq.*;
 - Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*; and
 - Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*
 - Numerous Executive Orders and Notices including:
 - *Regulatory Planning and Review Process*, E.O. 12866 of Sept. 30, 1993, 58 Fed. Reg. 51735; as amended by E.O. 13258, 67 Fed. Reg. 9385; and E.O. 13422, 72 Fed. Reg. 2763.
 - *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432 (Jan. 25, 2007).

- Tribal Consultation

- *Consultation and Coordination with Indian Tribal Governments*, E.O. 13175 of Nov. 6, 2000, 65 Fed. Reg. 67249.
 - *BIA Government-to-Government Consultation Policy*, Dec. 13, 2000.
 - President Obama's Memorandum of November 6, 2009, for the Heads of Executive Departments and Agencies, *Tribal Consultation*.
 - DOI News Release of Feb. 22, 2010, *Salazar Announces Plan of Actions to Develop a Department-wide Policy on Tribal Consultation Per President's November 5, 2009 Director*.

- Office of the Solicitor

- 109 DM 3, Office of the Solicitor
 - DOI Solicitor's Manual (Rev. Jan. 2009)
 - Memorandum to Associate Solicitor, Division of Indian Affairs, Regional and Field Solicitors, *Matters Regarding the Office of Indian Education* (Feb. 19, 2002).