When Must a Person Appealing an Administrative Agency Regulation under the Administrative Process Act File the Notice of Appeal in Order to Appeal Timely?

By Norman H. Lamson

Virginia's Administrative Process Act, Ch. 40, Title 2.2, of the Code of Virginia, includes § 2.2-4026 which states:

> Any person affected by and claiming the unlawfulness of any regulation, … shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia.

Va. Supreme Court Rule 2A:2(a) states:

> Any party appealing from a regulation… shall file with the agency secretary, within 30 days after adoption of the regulation…, a notice of appeal signed by the appealing party or that party's counsel.

In *Russell v. Virginia Bd. of Agriculture*, 59 Va.App. 86, 717 S.E.2d 413 (2011), wherein the author of this article represented Russell, a panel of the Court of Appeals held he filed the notice of appeal to a regulation untimely, that is, filed it late.

It would unduly tax the reader's attention to elaborate on the arguments as to why undersigned filed timely. The purpose of this article is to demonstrate the difficulties that counsel may face in determining when to file as to a regulation in order to file timely, as well as the possible ramification that a timely filing results in counsel's filing before his client is "affected" under § 2.2-4026, before there is "final agency action," before his client has standing, and before there is ripeness, resulting in a dismissal for any of those reasons. Finally, I intend to offer suggestions as to how counsel can file timely, but at the same time attempt to avoid dismissals for those other reasons.

CASE BACKGROUND AND OPINION

In *Russell*, the agency, the Board of Agriculture and Consumer Services ("the Board"), voted in favor of the regulation, a regulation for the Eradication of Scrapie from Sheep and Goats, 2VAC5-206, on March 20, 2008, as a final regulation (scrapie is a disease of sheep and goats). That regulation includes a section regulating intrastate trafficking in sheep and goats, 2VAC5-206-20, requiring the affixing of a government issued tag bearing a unique animal identification number to the animal prior to its transfer (even as applied to small farmers, and, say, a gift of one goat from a father to his son). In an apparent effort to comply with Governor Tim Kaine's Executive Order 36 (2006), *Development and Review of Regulations Proposed by State Agencies*, pp. 6-7, the Board posted the regulation online on April 17, 2008, for review by the Department of Planning and Budget ("DPB") (which did not disapprove the regulation); it then submitted such to the Office of the Attorney General (which certified it as not conflicting with law on May 29, 2008); it then submitted such to the Secretary of Agriculture (who approved

it on June 12, 2008); and it then submitted such to the Governor (who approved it on July 24, 2008).[1] The agency then filed the regulation with the Registrar of Regulations ("the Registrar") on July 30, 2008, for the purpose of publication in the Virginia Register of Regulations ("the Register"), specifying an October 3, 2008, effective date.

The Registrar published the regulation in the Register on August 18, 2008, as a final regulation, Vol. 24, Issue 25, pp. 3526-31, including notice of the effective date of October 3, 2008. Nothing on the face of the publication states a date of "adoption" of the regulation, as no law requires it to state such. Kathryn Russell ("Russell") filed her notice of appeal to the circuit court on October 30, 2008, 27 days after the published effective date.

In that court, the Board moved to dismiss, contending the "adoption of the regulation" under Rule 2A:2(a) occurred with the March 20, 2008, vote, so that the appeal was untimely. While the Board did not elaborate, it is evident their position was simply by analogy to how a natural person "adopts" a position, idea, etc., namely, by verbally saying, "I adopt X," or raising a hand, or otherwise signifying his mental assent to the position, idea, etc.. That is, the Board contended the "adoption" for an artificial person such as the Board occurred when a majority of the Board members as a collective body at a meeting said, "yea," or raised their hands, or pushed an electronic button, or otherwise signified their vote in favor of the regulation.

The author opposed the motion, contending (1) that, to determine the meaning of the word "adoption," one had to look to dictionaries extant when the Virginia Supreme Court first employed the language of the Rule in 1971 (the language has been unchanged from that time); (2) that, looking to the edition of *Black's Law Dictionary* then in effect, namely, the 4th edition of 1968, we see

> **adopt.** To accept, appropriate, choose, or select; to make that one's own (property or act) which was not so originally.
>
> To adopt a route for the transportation of the mail means to take the steps necessary to cause the mail to be transported over that route. Rhodes v. U.S. Dv.Ct. Cl. 47…
>
> To accept, consent to, and put into effective operation; as in the case of a constitution, constitutional amendment, ordinance, or by-law. Real v. People, 42 N.Y. 282; People v. Norton, 59 Barb. (N.Y.) 191. A. Code. City of Albany v. Nix 21 Ala.App. 164, 106 So. 199, 200….

(3) that the situation thus is one of the word "adoption" having both an ordinary meaning (sometimes referred to as the "popular" meaning or the "layman's" meaning), which appears in the first paragraph, "To accept, appropriate, choose, or select; to make that one's own (property or act) which was not so originally," as well as a strict judicial meaning, which appears in the last paragraph, "To accept, consent to, and put into effective operation; as in the case of a constitution, constitutional amendment, ordinance, or by-law," making it "a word of definite legal signification," also known as a "legal term of art" or a "term of art" or a "technical term"; (4) that in such a situation the rule is well-settled, such rule spanning all written instruments

[1] The pertinent language of EO 36 (2006) is substantially identical to the analogous provisions of Governor McDonnell's Executive Order 14 (2010), *Development and Review of Regulations Proposed by State Agencies.*

including wills, trusts, deeds, contracts and statutes, that the meaning is the strict judicial meaning unless the context indicates an intent to employ the ordinary meaning or some other meaning; (5) that the context here does not indicate an intent to employ the ordinary meaning or some other meaning; (6) that the meaning is hence the strict judicial meaning; (7) that the regulation was "accepted, consented to and put into effective operation" on the effective date of October 3, 2008; (8) that the regulation was thus "adopted" in the strict judicial sense of the term on October 3, 2008; and hence (9) that the October 30, 2008, filing, being 27 days after October 3, 2008, was within 30 days after adoption of the regulation, and hence timely.[2] The trial court granted the motion to dismiss.

Russell appealed to the Court of Appeals which affirmed the trial court, but not adopting the position of either litigant, instead carving out its own view of "adoption." The Court looked to Va. Code § 2.2-4013, which states in pertinent part,

> A. … Not less than fifteen days following the completion of the public comment period provided for in § 2.2-4007.03, the agency may (i) **adopt** the proposed regulation if the Governor has no objection to the regulation; (ii) **modify and adopt** the proposed regulation after considering and incorporating the Governor's objections or suggestions, if any; or (iii) **adopt** the regulation without changes despite the Governor's recommendations for change.
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> B. Upon **final adoption of the regulation**, the agency shall forward a copy of the regulation to the Registrar of Regulations for publication as soon as practicable in the Register. All changes to the proposed regulation shall be highlighted in the final regulation, and substantial changes to the proposed regulation shall be explained in the final regulation.
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> D. A **thirty-day final adoption period** for regulations shall commence upon the publication of the final regulation in the Register. The Governor may review the final

[2] In *Kole v. City of Chesapeake*, 247 Va. 51, 439 S.E.2d 405 (1994), the Court held that a municipality's "decision to adopt" an ordinance within the meaning of a statute occurred on the date which was 30 days after the vote, such being its effective date. Also, the following authorities hold that the word "adoption" is a legal term of art, such that the "adoption" does not occur until the ordinance, regulation, etc., is put into effective operation: *American Federation of State, County and Municipal Employees v. Philadelphia*, 83 Pa. D. & C. 537, 552 (Ct. of Common Pleas, 1952) ("'The primary and natural signification of the word adoption ... includes both take effect and in force'; People v. Norton, 59 Barb. 169[,]" quoting from Bouvier's Law Dictionary; *City of Columbus v. Rudd*, 193 S.E.2d 11, 13 (Ga. 1972) ("Accordingly, the proper construction of the word 'adoption' here requires that it be construed as "effective date" of the charter…"); *Langevin v. Begin*, 683 A.2d 357, 358 (R.I. 1996) ("The word 'adopt' is defined as 'to accept, consent to, and put into effective operation.' Black's Law Dictionary 49 (6th ed. 1990).").

Stating that the appeal clock starts ticking on the date of adoption, but construing such as adoption in the strict legal sense, amounts to the same thing as saying the clock starts ticking on the effective date because the regulation can't be consented to so as to be put into effective operation prior to the effective date. The framers of the Model State Administrative Procedure Act selected the "effective date" as the date when the clock starts to tick with respect to complaints of agency procedural violations, but chose no limitations period for complaints based on other grounds: "Judicial review of a rule on the ground of noncompliance with the procedural requirements of this [act] must be commenced not later than [two] years after the effective date of the rule. Judicial review of a rule or guidance document on other grounds may be sought at any time." Sec. 503(a), *Revised Model State Administrative Procedure Act* (2010).

> regulation during this thirty-day final adoption period and if he objects to any portion or all of a regulation, the Governor may file a formal objection to the regulation, suspend the effective date of the regulation in accordance with subsection B of § 2.2-4014, or both.
>
> If the Governor files a formal objection to the regulation, he shall forward his objections to the Registrar and agency prior to the conclusion of the thirty-day final adoption period. The Governor shall be deemed to have acquiesced to a promulgated regulation if he fails to object to it or if he fails to suspend the effective date of the regulation in accordance with subsection B of § 2.2-4014 during the thirty-day final adoption period. The Governor's objection, or the suspension of the regulation, or both if applicable, shall be published in the Register.
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> A regulation shall become effective as provided in § 2.2-4015.

Commenting on this statute, the Court said,

> The problem with determining the date of adoption for the purpose of Rule 2A:2 is that the APA uses the term "adoption" at several different points and in different contexts. For example, Code § 2.2–4013 is the statute which is relevant to this analysis, and it references "adoption" in three different ways. Under subsection A, "adoption" first occurs when the agency decides to adopt a regulation following public comment.

Id. at 91, 415. The Court then noted that subsection B references a "final adoption" that "relates back to the initial adoption." Id. The Court then noted that subsection D's statement of a "final adoption period" "arguably implies that the 'final adoption' referred to" in subsection B "is not actually 'final' at all until the conclusion of the 30-day adoption period." Id. at 92, 415-16.

The Court stated,

> This "final adoption" [subsection D "final adoption"] occurs thirty days after the publication of the final regulation in the Register, whereas the "final adoption" in subsection B is the agency action that triggers the publication of the final regulation in the Register in the first place. Thus, logic dictates that the "final adoption" referred to in subsection D must be separate and distinct from the "final adoption" in subsection B.

The Court then continued,

> So the question then arises, at which point of "adoption" does Rule 2A:2 contemplate that the 30–day period commence within which to note an appeal? Put another way, does "final adoption" of a regulation occur when the agency votes to implement it and forwards the regulation to the Registrar of Regulations for publication or after the expiration of the 30–day public comment period during which the Governor can suspend or suggest changes to the regulation? Procedural due process considerations and the principle that appellate courts may generally only consider issues on appeal which involve lower court judgments, or as in this case, agency decisions which are final, weigh in favor of using the later date as the point at which the period for noting an appeal

commences. However, an application of either definition of "adoption" to the record before us results in a conclusion that Russell's appeal was not timely filed.

Id. at 93, 416. The consequence was that the Court refused to say whether "adoption" under Rule 2A:2 meant § 2.2-4013(B) "final adoption" or § 2.2-4013(D) "final adoption." The Virginia Supreme Court denied a petition for appeal.

PROBLEMS CREATED BY THE OPINION

At first blush, it would appear that the panel has merely left lawyers in Virginia in doubt over whether the appeal clock starts ticking on either of but two dates: (1) on the date of filing with the Registrar (here, July 30, 2008) or (2) the date which is 30 days after the date of publication in the Register (here 30 days after the August 18 date of publication is September 17, 2008). The fact that there appears to be only two possible dates comes from the language pertaining to § 2.2-4013(B) "when the agency votes to implement it [the Regulation] and forwards the Regulation to the Registrar of Regulations for publication" because when the agency here "voted to implement it" occurred on March 20, 2008, but the date they "forwarded" it for publication occurred on July 30, 2008, and thus the date in the singular on which they did both acts is July 30, 2008. Also, "the agency action that triggers the publication of the final regulation in the Register" is both the vote on March 20 and the filing on July 30, and hence the "agency action that triggers" must have occurred on July 30. In the panel's discussion of subsection D, the panel explicitly states September 17 as the date on which the clock starts to tick if Rule 2A:2 "adoption" is subsection D "final adoption." Hence, again, it appears at first blush there is but one possible date of subsection B "final adoption," July 30, and a second possible date of subsection D "final adoption," September 17 We are apparently supposed to wait until the legal system chews up it next victim who guesses at the wrong date in order for the courts to reveal to us what is the real date of Rule 2A:2 "adoption."[3]

But in undersigned's view it really isn't clear from the opinion whether the choices are July 30 versus September 17, or instead March 20 versus July 30 versus September 17, thus actually leaving lawyers in doubt as to which of 3 dates is the date when the appeal clock starts ticking. First, although the Court quotes from undersigned's assignment of error which stated the filing with the Registrar occurred on July 30, the Court itself nowhere explicitly states the filing occurred July 30. Thus, the court never explicitly tells us that if Rule 2A:2 "adoption" means § 2.2-4013(B) "final adoption," then the appeal time expired on August 29, 2008. Since they explicitly say that under subsection D "final adoption" the clock started ticking on September 17, 2008, and that the appeal period under such view expired on October 17, 2008, why didn't they explicitly say when it started ticking and when the time expired for subsection B "final adoption"?

Second, the court states, "An amended final proposed regulation was adopted by the Board at a March 20, 2008, meeting." Plainly, the panel reads the APA as *in pari materia* ("on

[3] The panel hints that, when called upon to decide, it will rule in favor of subsection D "final adoption" because that date is a date which avoids due process problems which may confront subsection B "final adoption." ("Procedural due process considerations… weigh in favor of using the later date…")

the same subject matter") as the Rules of Court, looking to APA § 2.2-4013 to determine the meaning of the rules, and Rule 2A:2 of course speaks of "adoption" of a regulation, not "final adoption" of a regulation. Yet the court never explains why the "adoption" did not occur on March 20, 2008, as contended by the Board, or why it rejected the Board's position. Nor did the Court even attempt to explain the obvious, that it was redrafting Rule 2A:2 from "adoption" to "final adoption," when the Court of Appeals lacks power to redraft a rule of court.

Third, subsection B states, "Upon final adoption the agency shall forward…," and it is evident from this plain language that "final adoption" must precede the forwarding, that is, there is in time first the "final adoption," and then after the final adoption "the agency shall forward." And we cannot conceive what that action is before forwarding other than the vote, here on March 20. So if Rule 2A:2 "adoption" is subsection B "final adoption," then Rule 2A:2 "adoption" must be the vote because subsection B "final adoption" is the vote. Yet, as noted, the court speaks of subsection B final adoption as occurring at the moment where there is both the vote and the forwarding ("**this action** [in the singular] by the agency [is] the 'final adoption'"), that is, "final adoption" occurs with the forwarding. The court never explains how a "final adoption" under subsection B, which textually occurs before forwarding, can occur on forwarding.

Fourth, the opinion, assuming Rule 2A:2 "adoption" is subsection D "final adoption," states, "[O]n September 17, 2008, the regulation was 'adopted' and became effective." Id. at 93, 416. Yet the opinion also states, "The regulation had an effective date of October 3, 2008[,]" Id. at 90, 415, and nowhere explains how a regulation can become "effective" on a date earlier than its "effective date." Such failure to explain is especially problematic in light of Va. Code § 2.2-4015, a Code section which the panel never quotes from and which states,

> A. A regulation adopted in accordance with this chapter and the Virginia Register Act (§ 2.2-4100 et seq.) **shall become effective** at the conclusion of the thirty-day final adoption period provided for in subsection D of § 2.2-4013, **or any other later date specified by the agency**, unless: [there is legislative or gubernatorial objection, or agency suspension].

Since the October 3, 2008, date is a "later date specified by the agency," then that is the date it became effective, not September 17, 2008.

In sum, if a client comes to counsel within 30 days after the vote, it is difficult to see how one can safely tell him, "Under authority of *Russell*, let us wait until the date of forwarding to the Registrar, and then file within 30 days thereafter," or "Let us wait until the date that is 30 days after the date of publication and then file within 30 days after that date regardless of whether the agency has specified a later effective date." And of course the precedent itself may get overruled. Given that the panel rejected undersigned's position that Rule 2A:2 "adoption" is the dictionary strict judicial meaning, then, until the matter is straightened out, the date of the vote urged by the Attorney General still appears as much a possibility as the other two possible dates.

Let us now demonstrate the additional problems that arise whether the Courts ultimately rule the date on which the appeal clock starts to tick is (1) the date of the vote, (2) the date of forwarding, or (3) the date which is 30 days after the day which is 30 days after publication (hereinafter "the 3 possible dates").

THE PANEL'S CHOICE OF POSSIBLE DATES FOR WHEN THE APPEAL CLOCK STARTS TO TICK MAY LEAVE COUNSEL HAVING TO FILE WHEN HIS CLIENT IS NOT "AFFECTED" UNDER VA. CODE § 2.2-4026 AND HENCE WHEN THE SOVEREIGN HAS NOT CONSENTED TO BE SUED.

Preliminarily, if the Court of Appeals ultimately decides that the date of adoption is subsection D "final adoption," then the hereinafter problems only face counsel representing a client for whom the agency has designated an effective date later than the default effective date of 30 days post publication. The reason is because where no later effective date is specified, the effective date is 30 days post publication, and an appeal filed within 30 days after such date will necessarily be filed while the regulation is effective. However, if the court ultimately determines that the date of adoption is the date of subsection B "final adoption," and that such date is the date of the vote, or that it is the date of subsection B "final adoption" and such is the date of forwarding, then the hereinafter described problems necessarily confront him.

APA suits are suits against the sovereign, and it is axiomatic that such suits may be conducted only with the consent of the sovereign. Furthermore, such consent can only be manifested by a statute of the legislature, and, where the statute fixes terms and conditions of the suit, those terms and conditions must be complied with, or else a defense of sovereign immunity will be sustained. Va. Code § 2.2-4026 grants a right to sue only to "a person affected," and thus the issue of whether the person suing is a person affected under § 2.2-4026 is interwoven with the sovereign immunity issue. As we intend now to demonstrate, had Russell filed commencing on any of the 3 possible dates, she would have filed when she was not a "person affected" and hence without authority under § 2.2-4026 and without the consent of the sovereign.

The Scrapie Regulation simply did not affect Russell in any way prior to the effective date of October 3, 2008. Prior to that date, she could sell a goat or sheep, or lease one, or buy one or otherwise transact without having to affix an ear tag or other identifying number. It was only after the effective date that if she made such a transfer without affixing the tag that she could be criminally prosecuted.

Ironically, at a hearing before the Joint Commission on Administrative Rules on January 8, 2008, in opposing the efforts of Russell and other small farmers acting under the Virginia Independent and Consumer Farmers' Association ("VICFA"), the State Veterinarian, Dr. Richard Wilkes, stated in response to questioning by Delegate Hull, "However, no one is required to have identification until the sheep enter commerce." (http://dls.state.va.us/GROUPS/jcar/meetings/010808/sm010808.pdf) If a person simply owned sheep or goats, and never formulated an intent to sell or otherwise transfer the animals, the regulation would never affect him at all. In our case, Russell had an intent to transact, but it was as of the effective date, and so she came to be affected as of that date, not affected prior to it.

One can envision a legislative schema and regulation under which a person could be "affected" prior to the effective date. For example, if the Board had no power to withdraw or amend its regulation prior to the effective date, so that upon the vote there is nothing to prevent the regulation from becoming effective save the mere passage of time, and the Board had voted to require all sheep and goat owners to have a building which, under the state of the art then existing, required 7 months to build, then, immediately upon the March 20 vote, Russell would

for all practical purposes have been affected. The reason is that the March 20 vote would have forced her immediately to commence construction of a building so as to be compliant on the effective date. But, as we intend to demonstrate and discuss below, in Virginia agencies do have a power to withdraw their regulations at any time prior to the effective date, and the requirement of tagging an animal prior to a sale required no action prior to the effective date.

Note that the requirement there be consent to sue the sovereign by a statute of the legislature, and, if the legislature grants consent on terms and conditions, that those terms and conditions must be met, pertains to the subject matter jurisdiction of the court. *Afzall ex rel. Afzall v. Com.*, 273 Va. 226, 639 S.E.2d 279 (2007). If the requirements are not met, then the courts lack subject matter jurisdiction, Id., with the consequence that the mere failure of the Attorney General timely to defend on grounds that the plaintiff is not affected cannot prevent him from later raising that defense. Id.; See also *Com. v. Luzik*, 259 Va. 198, 206, 524 S.E.2d 871, 877 (2000). Indeed, in the total absence of the Attorney General raising the defense, the court may raise the issue *ex mero motu* (of its own accord), and, indeed, has a duty to raise the issue *ex mero motu. Afzall ex rel. Afzall v. Com.*, at 230, 282 ("[T]he want of such jurisdiction of the trial court [subject matter jurisdiction] will be noticed by this court *ex mero motu.*")

PANEL OPINION MAY REQUIRE A FILING PRIOR TO "FINAL AGENCY ACTION."

It is also axiomatic that an appeal from an agency regulation lies only at the conclusion of "final agency action," and that any appeal prior thereto must be dismissed as premature. Mr. Justice Scalia gave the classic formulation of final agency action in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997):

> First, the action must mark the "consummation" of the agency's decisionmaking process -- it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

Regarding the first prong, when the "consummation" of the agency's decision-making process occurs in Virginia, of significance is Va. Code § 2.2-4016, another Code section which the *Russell* panel fails to mention, and which states,

> Nothing in this chapter shall prevent any agency from withdrawing any regulation at any time prior to the effective date of that regulation. A regulation may be repealed after its effective date only in accordance with the provisions of this chapter that govern the adoption of regulations.

It is evident the statute creates a situation where, upon the vote by the agency in favor of any regulation as a "final regulation," it is as if there is appended to the regulation the words, "But we reserve the right to withdraw this regulation at any time prior to the effective date." Since the effective date was October 3, 2008, the Board had a power to withdraw the regulation at any time prior thereto, and the question arises, "When does the 'consummation' of the agency's decisionmaking process occur given the power to withdraw under § 2.2-4016?"

To answer such question, we must look to the opinion of a U.S. Supreme Court Justice, then federal court of appeals judge, Ruth Ginsburg, in *National Treasury Employees Union v. Federal National Labor Authority*, 712 F.2d 669 (D.C. Cir. 1983):

> An agency's order becomes "final" or "effective" for appellate review purposes when the agency arrives at a terminal, complete resolution of the case before it. An order lacks finality in this sense while it remains tentative, provisional, or contingent, **subject to recall, revision, or reconsideration by the issuing agency**.

Id. at 670-71 (emphasis added). Referring to prior cases, she stated, "[A]nd in *Cardin* and *Windom*, there was nonfinal, interlocutory agency action, because a RIF notice, prior to the specified effective date, can be amended or cancelled." Id. at 675. In a footnote, she wrote,

> RIF notices, because they are conditional--they may be withdrawn, altered, or amended--can be compared to class action certifications in civil litigation. See Fed.R.Civ.P. 23(c)(1). Such certifications are interlocutory and may not be appealed as a matter of right.

Id. at 675, n. 14.[4] Since the Board had a power to withdraw the regulation on any of the 3 possible dates, it follows there was then no consummation of the decision-making process, and hence then no final agency action, and hence an appeal at such time would have been premature.

Regarding the second prong, first, as noted above, § 2.2-4026 grants a right of judicial review to a person affected by and claiming the unlawfulness of a "regulation." Va. Code § 2.2-4001 defines "regulation" as follows:

> "Rule" or "regulation" means any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws.

Hence, a right of judicial review does not arise until there is "force of law," and there cannot be force of law until the arrival of the effective date. Since that is the date on which rights or obligations have been determined, then that is the date of final agency action, and that is the date on which a right to seek judicial review arises.

Second, Va. Code § 2.2-4027 authorizes judicial review of "agency action", and Va. Code § 2.2-4001 defines such as follows:

> "Agency action" means either an agency's regulation or case decision or both, any violation, compliance, or noncompliance with which could be a basis for the imposition of injunctive orders, penal or civil sanctions of any kind, or the grant or denial of relief or of a license, right, or benefit by any agency or court.

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[4] Judge Ginsburg's rule, that a regulation which the agency may still withdraw is merely interlocutory and not final, has been adhered to in the following cases: *Bellarno Intern, Ltd. v. Food and Drug Admin.*, 678 F.Supp. 410, 416 (E.D. N.Y. 1988); *City of Park Hills v. Public Svc. Comm. of the State of Mo.*, 26 S.W.3d 401 (Mo. App. W.D. 2000); *Essex County v. Zagata*, 672 N.Y.S.2d 281, 284-85, 695 N.E.2d 232 (Ct. App. N.Y. 1998); *DRG Funding Corp. v. Secretary of Housing and Urban Development*, 76 F.3d 1212, 1214 (D.C. Cir. 1996).

Since, as noted above, Russell could not be sanctioned for any conduct occurring on any of the 3 possible dates, there was then no "agency action" under § 2.2-4027, and hence at that time no authority for judicial review.

Also, the requirement there be final agency action before a complainant may appeal has also been characterized as jurisdictional. *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, 313 F.3d 852, 857 (4th Cir. 2002) ("Because we conclude that the Report was not final agency action, and therefore, that the district court lacked subject matter jurisdiction to hear plaintiffs' claims [citation omitted], we do not reach the standing issue."); *Tomer v. Maine Human Rights Comm*., 962 A.2d 335, 338 (Me. 2008) ("The authority granted to courts pursuant to the APA allowing judicial review of 'final agency actions' is a jurisdictional issue."); *DRG Funding Corp. v. Secretary of Housing and Urban Development*, 76 F.3d 1212, 1214 (C.A.D.C., 1996) (" The requirement of a final agency action has been considered jurisdictional.")

THE PANEL'S OPINION MAY CAUSE COUNSEL TO FILE APPEAL BEFORE THE CLIENT HAS STANDING AND THERE IS RIPENESS.

An analysis similar to the above could be made demonstrating that *Russell* may require counsel to note appeal at a time when his client lacks standing because, as noted above, on any of the 3 possible dates Russell was not affected, and hence not injured, and hence did not suffer "particularized injury" as is required to show standing. And *Russsell* may require counsel to note appeal prior to there being ripeness because ripeness requires the plaintiff to plead that he felt the effects of the regulation in a concrete way, and, Russell not feeling the effects at all on any of the 3 possible dates, could not have felt them in a concrete way on any of the 3 possible dates. As with sovereign immunity and final agency action, standing and ripeness are issues that the circuit court and court of appeals are duty-bound to raise *sua sponte.*

SUGGESTIONS TO COUNSEL IN DEALING WITH *RUSSELL*

Because of the language of Rule 2A:2, "within thirty days **after** adoption of the regulation," merely noting appeal **before** the adoption is not ultimately an option for attempting to appeal timely because such an appeal, being filed too early, is as untimely as one filed too late. *Western Union Telegraph v. Federal Communications Commission*, 773 F.2d 375 (D.C. Cir. 1985) (Scalia, Judge). Given the confusion generated by *Russell,* undersigned's suggestion is for counsel to attempt *seriatim* filings of the notice of appeal and petition for appeal, referencing *Russell* in each of the documents. Thus, if the client comes to you within 30 days after the vote, file the notice of appeal within 30 days after the vote, stating therein you are filing because under the precedent it is not clear when you should file. Then, file your petition for appeal within 30 days thereafter, again referencing *Russell* and the uncertainty it creates as to when to file. Be as honest as you can in your petition as to how your client is affected or may come to be affected.

Presumably, the agency will still post the regulation online for DPB, circulate it to the Attorney General, then to the appropriate Secretary of the Department, and then to the Governor, and, upon obtaining the requisite approvals, then forward to the Registrar for publication, which will publish, noting the agency filing (forwarding) date. Then, within 30 days after the forwarding, re-file your notice of appeal and then your petition for appeal, again referencing

Russell in each document.

Then, after publication in the Register, and within 30 days after 30 days post publication, re-file your notice of appeal, again referencing *Russell.* Then file your third petition for appeal, again referencing *Russell*. With respect to whatever date the courts ultimately determine is the date the clock starts to tick, it will regard your notice of appeal and petition for appeal filed with reference to that date, and disregard as nullities the notice of appeal and petition for appeal filed with reference to the other two possible dates.

SUGGESTIONS FOR CHANGE TO RULE 2A:2(a).

The legislature should change § 2.2-4026 to state,

> shall have a right to the direct review thereof by a court action against the agency or its officers or agents. **The person affected shall file notice of appeal within thirty days after first being affected by the regulation.**

Such language preserve the idea of a 30 day limitations period, but will make clear that the time when the appeal clock starts ticking isn't ultimately dependent on actions taken by the agency at all, but on when a person is first affected. Thus it will effectuates the legislature's intention that *any* person affected have judicial recourse even if he is not first affected until years after a regulation's effective date.

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