# ANATOMY OF A REGULATORY PROGRAM: COMMENT ON "STRATEGIC REGULATORS AND THE CHOICE OF RULEMAKING PROCEDURES"

JEFFREY S. LUBBERS*

## I
## INTRODUCTION

Besides being a very interesting, cogent, and even a tidy study, "Strategic Regulators"[1] sheds some bright light on agency behavior and on the important issue of whether agency rulemaking may be "ossifying."[2]

The study design employed by Hamilton and Schroeder is attractively simple. They started with all of the Environmental Protection Agency's ("EPA's") hazardous waste regulations under the Resource Conservation and Recovery Act ("RCRA") appearing in the *Code of Federal Regulations* ("CFR"), counting each decimal point CFR number as a separate rule. This yielded 697 rules. They then examined all EPA/RCRA guidance documents issued since the inception of the program (1980-1991) and matched them to the appropriate CFR rule.[3] Some CFR rules had associated guidance documents, and some did not. After characterizing the type and history of the individual CFR rules, the authors then developed hypotheses as to why certain CFR rules were more or less likely to be accompanied by supplemental guidance documents.

A premise underlying this research is that agencies seem to be avoiding notice-and-comment rulemaking in favor of greater reliance on more informal issuances.[4] One problem with examining this premise, of course, is the compared-to-what issue. We know, for example, that federal agency rulemaking

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1. James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, 57 LAW & CONTEMP. PROBS. 111 (Spring 1994).

2. The term "ossifying" derives from Thomas McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992). Professor McGarity credits Professor Donald Elliott, then General Counsel of EPA, for coining the term; *Id.* at 1385-86. *See also* Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185 (Spring 1994) (discussing whether, and if so, why, rulemaking has declined).

3. The authors acknowledge that their task was made possible by the fact that a private consulting firm, McCoy and Associates, had obtained and cross-referenced over 1000 such guidance documents totaling over 20,000 pages.

4. *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992).

(at least as measured by the inadequate surrogate of *Federal Register* rulemaking documents and pages) peaked in 1979, dropped rather sharply in the early 1980s, and then edged back up through the late 1980s.[5]

Looking at the RCRA slide provided by Hamilton and Schroeder, we see a similar, albeit bumpier, curve in the EPA's notice-and-comment rulemaking, while the EPA's more informal issuances rose sharply in the mid-1980s, only to drop off again in the late 1980s.[6] Before making any government-wide generalizations, however, we still need better data, and better ways to measure data, on the rise and fall (and perhaps rise again) of agency rulemaking. Even when the data is available for a single program at a single agency, one wishes to know more about the institutional staffing, budgets, priorities, and, perhaps, the shadow of proposed rules waiting in the wings at the agency or at the Office of Mnagement and Budget ("OMB"). Nevertheless, the beauty of the Hamilton/Schroeder idea and database is that it allows us to document a relationship between agency rules and "non-rule" rules.[7] It is quite illuminating to discover that certain types of rules—based either on their "target" or their "rule history"—are much more likely to be accompanied by at least one[8] guidance document.

## II
## ANALYZING THE STUDY

The study's most provocative finding is that rules issued pursuant to legislative or judicial pressures (statutory deadlines with or without "hammers,"[9] court remands, consent decrees) are *much* more likely to be paired with informal

5. *See generally* Mashaw, *supra* note 2.

6. *See* Hamilton & Schroeder, *supra* note 1, at 152 (Table 4).

7. This somewhat oxymoronic term is shorthand for the various types of ("nonlegislative") interpretations, policy statements, and other guidance documents issued by agencies in place of ("legislative") rules normally issued after notice and comment. Professor Asimow has labeled them "underground" regulations. Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43 (1992). For a fuller "taxonomical guide to agency rulemaking," see Anthony, *supra* note 4, at 1319-27.

8. All CFR "rules" with one or more associated guidance documents were flagged. In addition, the type of guidance document was noted (that is "Office of Solid Waste and Emergency Response ("OSWER") directive," "Regulation Development Branch ("RDB") memo," or "hotline response"). However, no attempt was made to gauge the number or significance of such documents associated with each CFR rule.

9. "Hammers" are legislative "or else" provisions which take effect when the agency misses the statutory deadline for rulemaking. In effect, RCRA § 3001 (a), (b) contained a hammer requiring the EPA to list hazardous wastes subject to regulation within 18 months of passage. 42 U.S.C. §§ 6921(a), (b) (1988). *See* Alden F. Abbott, *Case Studies on the Costs of Federal Statutory and Judicial Deadlines*, 39 ADMIN. L. REV. 467, 475-76 (1987). An even more notorious hammer was contained in the Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353, which required the Secretary of Health and Human Services ("HHS") to issue proposed food labeling regulations within 12 months of enactment and final regulations within 24 months. The Act specified that if the final regulations did not meet the deadline, the proposed regulations "shall be considered the final regulations." *Id.* § 3(b)(2). HHS did not meet the deadline for final regulations, leading to a period of regulatory uncertainty. The final regulations were published at 58 Fed. Reg. 2302 (1993) (to be codified at 21 C.F.R. pts. 5 & 101).

issuances.[10] This might seem somewhat surprising, because one would think that an agency operating under a legislative or judicial spotlight would demonstrate responsiveness by relying on the more formal route of notice-and-comment rulemaking. On the other hand, when the informal directives are viewed as *supplementary* guidance, it becomes less surprising that an agency under pressure to issue rules might reserve some of the elaborative aspects of the issue for guidance documents.

For this reason, I would caution the authors not to overly compartmentalize the EPA's behavior in this regard. Even using the authors' rough terminology of "formal" (CFR) versus "informal" (guidance document) rules,[11] they go too far in equating "rules with directives" with "informal" rules.[12] Surely just because a formal rule has one or more informal issuances associated with it does not make the formal rule any less formal. Such a rule may perhaps be deemed less *complete,* although that is simply another way of saying that the rule needs amplification. There is a slightly normative tinge to their discussion—that somehow a rule accompanied by the informal issuance is of a lesser quality rule than a rule standing alone. This may indeed be true, if the former is incomplete or is confusing. On the other hand, the accompanied rule might be more in need of amplification for a different reason—because of its importance and because it resulted in great attention and interest from the regulated community. In some sense, such a rule is more formal.

In probing this perhaps overly semantic debate, it is also important to remember the authors' own caution that they did not observe the timing of the respective issuances. It might be quite important to know which came first—the rule or the directive(s). Did one engender or result from the other? A rule issued for the purpose of codifying a series of informal issuances hardly seems less formal. Nevertheless, from the standpoint of Congress or a court that is especially desirous of an agency rulemaking, this study shows that it behooves the overseer to pay close attention to the full range of agency rulemaking behaviors when the agency responds.

Hamilton and Schroeder present several other hypotheses about what factors lead the EPA to issue formal versus informal rules:

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10. OSWER directives were much more likely to be associated with rules issued pursuant to hammers ("HAMT"), court deadlines ("CRTIMPT"), or court remand ("CRTRTEMT"). This was only slightly less true with respect to RDB memos and hotline responses. *See* Hamilton & Schroeder, *supra* note 1, at 150 (Table 2). The corollary hypothesis is discussed *id.* at 139-46.

11. While this terminology seems apt in that the guidance documents are normally issued in a less formal manner than notice-and-comment rulemaking, the use of "informal" in this context could lead to confusion because notice-and-comment rulemaking (under § 553 of the Administrative Procedure Act) has long been called "informal rulemaking" in contradistinction to the quasi-adjudicative (and now little used) "formal rulemaking" under §§ 553(c), 556, and 557 of the APA. One of the theses of scholars such as McGarity and Mashaw, *supra* note 2, is that "informal rulemaking" has become overly formal.

12. For example, at various points, the authors use the word "informal" to describe a situation where the agency's CFR rule has a directive associated with it. But because neither the comparative significance nor the timing of the two issuances is examined, it is difficult to assume any such motivation on the part of the agency in the abstract. On the other hand, the authors' analysis of the type of rules more or less likely to be supplemented does provide interesting clues to the agency's motivation.

1. As the transaction costs of securing an agreement go up, the agency will be more likely to go informal.[13]
2. As the political costs of adopting a given rule increase, the agency will be more likely to go informal.[14]
3. The higher the costs imposed on regulated parties, the more likely they will resist and, hence, the more likely the agency will go informal.[15]
4. As concern for uniformity, enforceability, the value of precedent, and the advantages of avoiding individual adjudication go up, the agency will be less likely to go informal.[16]

In my view, hypotheses 1-3 overlap. They really boil down to the precept that an agency is more likely "to go informal" (although not necessarily "versus" going formal) where the level of controversy is high. This hypothesis should not be surprising; in fact, it mirrors the advice given by the Administrative Conference on the subject of "negotiated rulemaking."[17] The structured process of "reg-neg" depends on achieving *actual* consensus through negotiation. Thus, the Conference cautioned that the issues involved in a potential reg-neg "should not be such as to require participants in negotiations to compromise their fundamental tenets, since it is unlikely that agreement will be reached in such circumstances."[18] Hamilton and Schroeder have extended this idea to the less-structured notice-and-comment rulemaking process, which, after all, does not require actual consensus (although that always helps), but only an apparent rationality and reasonableness on the part of the agency. It is thus interesting that the EPA's behavior in RCRA rulemaking does bear out the hypothesis. The EPA's enforcement rules are significantly more likely to be the subject of informal guidance than nonenforcement rules. Similarly, the EPA's rules targeting landfills (associated with numerous or controversial groundwater contamination issues) are significantly more likely to be the subject of informal issuances than rules targeting tanks and containers.

Hypothesis 4, however, seems to partially contradict the controversiality hypothesis. That is, the fourth hypothesis predicts that the higher the number of regulated parties affected by the rule, the more likely the agency will wish to bind them through a rule issued through notice-and-comment procedure so as to avoid numerous individual adjudications. Thus, because there were nearly 1800 facilities storing waste in tanks and containers and only 18 landfill facilities, it is more likely that tank and container rules would be formal/unsupplemented. This hypothesis was confirmed by the authors' findings. Nevertheless, it seems to me that the number of regulated entities potentially affected by a rule should

13. Hamilton & Schroeder, *supra* note 1, at 130.
14. *Id.*
15. *Id.*
16. *Id.* at 131.
17. Administrative Conference of the United States ("ACUS") Recommendations 82-4, 85-5, "Procedures For Negotiating Proposed Regulations," 1 C.F.R. § 305.82-4 (1992).
18. 1 C.F.R. § 305.32-4, 85-5 ¶ 4(b).

correlate to some degree with the controversiality of the rule—the more the "adversarier." This may, of course, depend on external variables such as the degree of organization within the industry as well. Perhaps the tank and container industry was "asleep at the switch" when the EPA proposed its rule. Or, perhaps, it found the rule to its liking. Credit is due to Hamilton and Schroeder for even allowing us to plumb these questions.

Other avenues of inquiry are opened up by this stimulating article. It would, for example, be interesting to delve more deeply into the differences between the three types of issuances (OSWER directives, RDB memos, and hotline responses) used by the EPA in this program. Why did the agency change its approach from directives to even more informal hotline responses?[19] Moreover, why did the total amount of informal issuances drop off so much in the late 1980s? Had most of the regulatory interstices been filled?

Researchers also need to devise ways to evaluate the article's premise (reflected in hypothesis 4, for example) that formal (legislative) rules are more enforceable than nonlegislative rules. Especially where the agency has the leverage of a permit program (as in RCRA), there may be little practical difference.[20]

## III
## CONLUSION

This thought brings me to the terminus of this comment—which as in many administrative law articles is in the "*Chevron* station."[21] A week before this symposium I attended an oral argument in the D.C. Circuit in which the Solicitor of Labor was defending a program directive issued by the Mine Safety and Health Administration concerning testing and reporting procedures for pneumoconiosis in coal mines.[22] The American Mining Congress had challenged the directive on the ground that it should have been issued as a final rule, using notice-and-comment procedures. The Solicitor argued that the directive was an interpretive rule and thus exempt from notice-and-comment under the APA.

In the course of the argument, the issue arose as to whether, if the court agreed with the Department that the rule was interpretive, the rule would still

19. Hamilton & Schroeder, *supra* note 1, at 152 (Table 4). The use of OSWER Directives predominated from 1980-85; use of RDB memos (issued by a branch of OSWER) and hotline responses began to emerge in 1985. Presumably, the latter two issuances require lower-level sign-offs than the OSWER Directives (or, of course, agency rules published in the Federal Register).

20. *See* Peter Huber, *Exorcists vs. Gatekeepers in Risk Regulation*, REGULATION, Nov.-Dec. 1983, at 23-32; Peter Huber, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025 (1983).

21. *Cf.* Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984.

22. Oral argument, American Mining Congress v. Mine Safety and Health Admin., 995 F.2d 1106 (D.C. Cir. 1993).

be entitled to *Chevron* deference.[23] The Solicitor quite forthrightly said "no." He stated that the Department had had a choice: it could have gone through legislative (what Hamilton and Schroeder call "formal") rulemaking and thereby achieved a rule possessing the force of law and entitled to *Chevron* deference, or it could have, for efficiency reasons, used an informal directive not entitled to such deference. In this case, the Department used an informal directive in the hope that a reviewing court would uphold the reasonableness of the agency's interpretation without the added *Chevron* deference.

This choice—by the "strategic regulator"—is the very choice that Hamilton and Schroeder have placed under the microscope so ably. I would hope that they and other researchers will emulate and refine their technique with similar databases in the future. All of us, whether students of regulation, legislators, judicial reviewers, or presidential coordinators, need to understand better (and predict) the behavior of strategic regulators.

23. "*Chevron* deference" refers to Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-45 (1984), in which the Supreme Court instructed reviewing courts to give greater deference to agencies' interpretations of their own statutes.