

# The Role of Legislation, and the Legislature, in the Regulatory Reform Process

By Robert A. Heverly, Esq.

Regulatory reform in the environmental arena seems to draw one's attention to the regulatory side of government. Administrative agency implementation of state policy through regulations, orders and enforcement, is the most active element of the regulatory structure. Without administrative agency implementation, statutes might go unenforced, policy directives unheeded, and potential complications overlooked. Broad brush statutes would need to be replaced by specific and detailed regimens drafted by legislators possibly without specific substantive expertise and busy with other, many other, matters on a wide range of topics. Thus, the focus on the administrative agencies (in this context, the Department of Environmental Conservation) and their rules, regulations, procedures and actions, is entirely appropriate.

Even given that concession, however, it is vital to remember that without authorizing legislation, the individual administrative agencies would not exist, let alone have the power to act or regulate. Thus, legislation plays an essential role in the administrative state, setting priorities, determining policies, and defining structures for administrative regulations to operate. The legislature is important not only to the substantive powers of an agency, but also to how it goes about its work. Through the legislative delineation of the administrative process, including rule making procedures and hearings, the legislature has defined how the administrative agencies must act. By authorizing substantive actions and rules, the legislature sets the tone for the regulatory state.

Furthermore, there are times when administrative agencies, while acting within their legislative mandate and powers, take actions to which the legislature objects. In such a case, assuming proper actions in other respects such as procedure and authority, judicial intervention is not likely. The legislature's most certain remedy is then to change the law to forbid what is objectionable, or to require a procedure or action that makes the unacceptable actions impossible.

"Re-legislating" is not the only option available to the legislature. On numerous occasions individual legislators or groups of legislators have sent letters to agencies expressing concern with this or that aspect of agency operations. Depending upon the perceived severity of the agency's actions and the role of the legislators in question (*ie*, Chairs of relevant committees or members thereof, leadership in either house, etc.), such letters may draw substantial response or little response. This legislative role is simply one way of "calling them [the agencies] on the carpet" to explain their actions. Other methods, also used extensively by the legislature in New York, include legislative hearings and legislative reports. All these methods involve actions other than passing laws, but may very well have huge influences on the administrative process.

This discussion of indirect legislative action should not be read, however, to diminish the more direct role the legislature plays in the regulatory arena. All administrative agencies are created by state statute, and without enabling acts to give them life, would be without power. This role is among the most important aspects of regulatory reform. Agencies are charged with implementing a particular legislative scheme, and are forbidden from delving into public policy development through regulatory enactments.<sup>1</sup>

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## LEGISLATIVE PERSPECTIVE

The legislature's administrative role has been recognized by New York Courts for many years. While the legislature clearly has responsibility for policy debate and decisions, the legislature's ability to set limits and outline an agency's duties and powers is also clearly established in New York. The New York Court of Appeals has described the powers of administrative agencies as follows. "Agencies, as creatures of the Legislature, act pursuant to specific grants of authority

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conferred by their creator. In discharging responsibilities, an agency is 'clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication.'"<sup>2</sup>

This aspect of the administrative/legislative relationship grows in importance given the current de-regulatory climate. As regulatory techniques designed to narrow regulatory reach are implemented, they may run contrary to regulatory structures which were enacted in an era of administrative expansion. Legislative changes will likely be necessary to ensure that the full breadth of reform sought by many within New York can occur.

Within New York's environmental realm, many questions have arisen which may only be addressable by legislation. For example, one statutory element that could work a marked change on the environmental landscape is that of authorizing citizen suits to remedy environmental harms.<sup>3</sup> Even if the Department of Environmental Conservation was so inclined as to allow public suits, it is without authority to issue regulations allowing such actions. Authorization of citizen suits is an issue that sits squarely in the

legislature's court at this time; no matter whether you are for citizen suits or against them, that legislative action is required to allow citizens to directly sue under New York's substantive environmental statutes, is largely beyond debate.

Each house of the State Legislature is currently attempting to acquaint itself with its new role in defining the administrative process. Until 1995, state government was made up of a Democratic Assembly, a Republican Senate, and a Democratic Governor. Now, with the Senate and the Executive Mansion both Republican controlled, with the Assembly remaining Democratic, the dynamics of the legislative process have changed. The Assembly is insisting on having its say in legislation, and Assemblyman Brodsky is not hesitant to voice the notion that

the agenda will not be driven entirely by the Senate Republicans and the Governor.

The result of the change in the legislative process is unclear at this time; whether reforms will be caught up in the political nature of the process, and thus relegate the new administration to changing what can be changed in the administrative process alone, or whether the two houses will reach compromises on important issues in the environmental arena is not known. The events, however, will likely be interesting to watch as they unfold.

### References

1. See *Rent Stabilization Ass'n of N.Y. City v. Higgins*, 630 N.E.2d 626, 631 (N.Y. 1993) ("[A]n administrative agency may not, in the exercise of rule-making authority, engage in broad based public policy determinations.") (citation omitted).
2. *Campagna v. Shaffer*, 536 N.E.2d 368, 370 (N.Y. 1989) (citation omitted); see also *City of N.Y. v. New York Comm'n on Cable Television*, 390 N.E.2d 293, 294 (N.Y. 1979).
3. Editor's note: The next issue of the *Albany Law Environmental Outlook* will address the current debate over citizen suits.