

## BOOK REVIEWS

NEPA: LAW AND LITIGATION by Daniel R. Mandelker. Callaghan & Co., Illinois, 1984. 677 pages.

Reviewed by *Robert F. Riley\**

The one volume treatise entitled *NEPA: Law and Litigation* provides an extensive review of the case law that has become a "common law" interpreting the National Environmental Policy Act of 1969 (NEPA).<sup>1</sup> Professor Daniel R. Mandelker's<sup>2</sup> treatise is successful and useful in providing a comprehensive framework for the various court decisions that have become so dominant in NEPA's implementation.

The treatise purports only to supply a descriptive review of major environmental case law; however, Professor Mandelker occasionally provides editorial comment when the case law appears unsettled "or when the issues raised are more than usually controversial." The case citations are extensive, and include references to cases published by unofficial services such as Bureau of National Affairs' *Environmental Reporter*, and the Environmental Law Institute's *Environmental Law Reporter*.

The treatise was originally published in 1984, with regular supplements updating textual treatment of the case law, provided on a yearly basis. The work is divided into twelve chapters, which are in turn sub-divided into upwards of fifty-five subsections.<sup>3</sup> Each subsection is frequently cross-referenced to provide an integrated analysis of the particular chapter's concentration.

The scope of the treatise is broad, in that it reviews not only federal case law interpreting NEPA but also state decisions interpreting state environmental policy legislation. The initial chapters provide an introductory analysis concerning the Act's provisions, its administration and the problems of judicial re-

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1. 42 U.S.C. §§ 4321-4361 (1982).

2. Daniel R. Mandelker is Stamper Professor of Law at Washington University School of Law in St. Louis, Missouri. He has co-authored the case book entitled *Environmental Protection: Law and Policy*, and has written numerous books and articles concerning environmental law.

3. The titles of the twelve chapters are: Chapter 1 — An Overview; Chapter 2 — An Outline of NEPA and its Administration; Chapter 3 — Judicial Review Under NEPA; Chapter 4 — NEPA Litigation (Part I — Access to the Courts; Part II — Litigation Practice Judicial Remedies); Chapter 5 — When NEPA Applies; Chapter 6 — Environmental Decisions — Making Responsibility; Chapter 7 — The Environmental Review Process; Chapter 8 — The Threshold Question: Must an Environmental Impact Statement Be Prepared?; Chapter 9 — Scope of the Environmental Impact Statement; Chapter 10 — Adequacy and Substantive Effect of the Impact Statement; Chapter 11 — Evaluation: The Effect of NEPA on Federal Agencies; Chapter 12 — State Environmental Policy Acts.

view. Mandelker also presents a concise review of the Act's legislative history and discusses the role of the Environmental Protection Agency and the Counsel on Environmental Quality in the Act's implementation. Relationships between NEPA and other federal legislation are also presented.

Chapter 4 is divided into two parts and deals with the problems of NEPA litigation. Part I of this chapter considers problems in obtaining access to the courts. For example, judicial deference to an agency's decision-making process, and doctrines limiting the federal courts' review to "justiciable controversies," affect NEPA litigation. Further, the delays inherent in an agency's decision-making process create timing problems, and thus the treatise examines doctrines of "mootness," "exhaustion of remedies," "ripeness," and "laches." Procedure, practice, and judicial remedy dilemmas occurring in NEPA litigation are reviewed in Part II of this important chapter. Professor Mandelker begins this part with a discussion of when supplementary evidence may be submitted to the reviewing court. The chapter also discusses the use of expert witnesses and the awarding of attorneys' fees, and confronts judicial remedies with special emphasis placed upon preliminary injunctions, permanent injunctions, declaratory judgments, and the extraordinary writ of mandamus.

Later chapters review NEPA's retroactive application, exemptions from NEPA and the Act's international applications. Further discussions focus upon the environmental review process that is required by the Counsel on Environmental Quality. The longest section in the book is devoted to analyzing whether and when an environmental impact statement must be prepared. Detailed review of case law interpreting the statutory provisions requiring an impact statement for all "major federal actions significantly affecting the quality of the human environment" is presented. The treatise further considers the required scope and adequacy of an impact statement.

Professor Mandelker does not frequently editorialize or value NEPA's place in federal environmental legislation, although he does include a chapter on the effect that NEPA has had on federal agencies decision-making process. The author also includes a review of what he considers to be "some of the more important evaluations and studies" dealing with the effect of NEPA on federal agencies' decision-making processes. Professor Mandelker concludes his work with a brief review of state environmental policy legislation (little NEPA's).

The importance of NEPA is found in its role as an "environmental overlay" to the statutory responsibilities of other federal agencies. The continuing vitality of NEPA and its environmental mandate requires that all practitioners within the energy field have a solid understanding of its ramifications. Professor Mandelker's treatise provides such insight and serves as a valuable resource for environmental research.

CASES AND MATERIALS ON THE LAW OF OIL AND GAS by Howard R. Williams, Richard C. Maxwell, Charles J. Meyers, and Stephen F. Williams. The Foundation Press, Inc., 5th ed. 1987. 1017 pages.

Reviewed by *David E. Pierce\**

During the past thirty years law professors have been using an edition of *The Law of Oil and Gas* to guide their students through the intricacies of oil and gas jurisprudence. Publication of a fifth edition ensures this tradition will continue.

The fifth edition retains the organization and approach of the fourth edition. Only about a dozen primary cases have been substituted for prior cases. Notes following primary cases have been revised and expanded to reflect the barrage of litigation arising out of the energy crisis and post-energy crisis eras. Much of the material is reflective of the times. For example, new note material at page 346 n.7, discusses the effect of various provisions of the Bankruptcy Code on the oil and gas lease delay rental clause. At pages 929-30 the editors discuss gas balancing, split-stream sales, and ratable take problems.

The editors maintain a logical balance in their case selection. Jurisdictions represented by the primary and note cases generally parallel the quantity of production and litigation in each state. Therefore, the largest number of cases used are from Texas, followed by Oklahoma, Louisiana, Kansas, California, Mississippi, and Arkansas. The balance is made up of an evenly distributed mix of cases from producing states in the remainder of the Midcontinent area and from the Eastern and Western United States.

The Louisiana Mineral Code receives appropriate treatment throughout the materials. Discussions of the Mineral Code illuminate many of the common law concepts and often serves as a prototype for legislative or judicial solutions to oil and gas problems in common law states. For example, the basic goal of dormant mineral and mineral lapse acts can be traced to the civil law concept of liberative prescription.

The major revision of *The Law of Oil and Gas* reflects the expertise of its newest editor — Stephen F. Williams. Judge Williams' work is most evident in Chapter 2, Energy Policy. This chapter has something for everyone. It will satisfy even the most avid law and economics scholars. Oil and gas regulation offers examples of applied, misapplied, abused, and ignored economic theory. For example, the excerpt from Stephen Breyer's *Regulation and Its Reform* demonstrates how faulty analysis of the interstate natural gas shortage problem led to regulatory solutions which aggravated the situation. Chapter 2 should also remind one that economic analysis has been applied to energy regulation for almost a half century — long before such an approach was fashionable in the legal community.

For those more interested in history than economics, Chapter 2 chronicles what appears destined to become a cyclical event — the American response to

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energy shortages and resulting price increases. Nineteen eighty-seven is a fun time to study energy policy since there has been at least one full revolution of the cycle, and to include various innovative, but short-lived regulatory responses.

Before one deletes Chapter 2 from his coverage — to get on with the hard core property and contract aspects of oil and gas law — he should consider the need for an energy policy framework in which to view traditional oil and gas concepts. There is a real danger of developing a fixation for rules when studying, or practicing, oil and gas law. This unique body of law, largely developed by the courts, takes an enormous effort to master. Once one learns all the rules and how they operate, he runs the risk of focusing his efforts at discovering the rule, with its variations and exceptions, instead of analyzing the situation and suggesting solutions which meet a defined social goal. Chapter 2 offers an opportunity to introduce the student or practitioner to the bigger energy picture.

At a minimum, Section 3.A. of Chapter 2 should be examined. This section is appropriately titled: "Energy Policy In Operation." In a 45-page segment the editors do an excellent job of summarizing federal regulation of natural gas production, sales, and transportation. This is one area where traditional concepts are being directly affected by federal regulatory developments. For example, to advise a lessee concerning the implied covenant to market, one may have to inquire about the lessee's efforts to avail themselves of "open access" transportation under FERC Order No. 436. Section 3.A. helps to plug one of the big holes in the oil and gas education of most students — natural gas regulation.

A major deletion in the fifth edition is the 93-page chapter on oil and gas taxation. The editors confess their inability to keep up with changes in the tax area through periodic revision of an oil and gas law text. However, if you want to study the basic concepts of oil and gas taxation, a good summary of depletion and intangible drilling costs can be found at pages 191-196 of the fifth edition. The Windfall Profits Tax is summarized at pages 172-178.

A major addition is the expansion of the public lands chapter, now found at Chapter 9. In a mere 46 pages, the editors provide a very effective overview of oil and gas development on federal lands. Current issues regarding the leasing of federal lands are explored followed by copious note discussions about the regulatory gauntlet which awaits persons intent on developing their federal lease.

The fifth edition of *The Law of Oil and Gas* represents an improvement of an already excellent teaching tool. However, this work can also be a useful resource for the practitioner. The cases selected by the editors, and the accompanying notes and commentary, offer astute analyses of the principles being discussed. This provides valuable insight which the practitioner can apply to his problem. For example, suppose a client plans to convey an undivided one-half interest in oil and gas retaining the exclusive right to lease and receive any bonus. The lawyer wants to draft a workable mineral deed — one that avoids many of the problems associated with segregated executive rights. Or perhaps he is representing a nonexecutive mineral interest owner who discovers the executive rights owner leased the land for a 1/8th royalty, a \$1,000/acre bonus, and a \$50,000 production payment. To address either problem, he needs to

know, among other things, what the relative rights and obligations are between the owners of the executive and nonexecutive interests.

Turning to the index of *The Law of Oil and Gas*, The lawyer would look under the heading "Executive Right" and find the entry "Duty in exercise, 659-681." Beginning with *Whitehall Oil Co. v. Eckart*, the editors trace the early development of Louisiana law concerning the duty the executive rights owner owes to the nonexecutive. The current state of the law is noted in Article 109 of the Louisiana Mineral Code, which is reproduced with its official comment. The notes and cases following the Louisiana material focus on the development of Texas law. The editors demonstrate how the courts have progressed from a mechanical analysis of merely defining the terms "bonus" and "royalty," to defining the basis obligations created by the executive/nonexecutive relationship. This relational analysis is applied to numerous situations providing the reader with a general guide to problems inherent to the relationship. Citations to recent cases and references to secondary resources round out the information required by the practitioner. Questions posed by the editors suggest related problems. For example, at the end of footnote 34 at page 680, the editors ask: "Need an interest be equipped with the executive interest to be a mineral interest?" Practitioners should find such a resource well worth the \$33.95 purchase price.

The success of *The Law of Oil and Gas* as a teaching tool is demonstrated by its thirty year tenure and, until recently, by the lack of competing casebooks. Oil and gas law has not met with the proliferation of casebooks experienced by other disciplines, apparently because instructors were satisfied with what was available. Today, instructors have a choice between two excellent casebooks: The fifth edition of *The Law of Oil and Gas* and *Oil and Gas Law Cases and Materials (Oil and Gas Law)*, by Eugene O. Kuntz, John S. Lowe, Owen L. Anderson, and Ernest E. Smith (West Publishing Co., 1986). *Oil and Gas Law* is reviewed by William A. Mogel in 6 ENERGY L. J. 387 (1986).

Since comparisons between these two works are inevitable, I will make a few of my own. First, except for Chapter 2, *The Law of Oil and Gas* relies more on cases to present legal principles. Case selection, probably from thirty years of evolution, is extremely well suited to the topics being presented. *Oil and Gas Law* relies more on notes and commentary: most of which are informative instead of inquisitive. A major advantage for the instructor using *Oil and Gas Law* is the Teacher's Manual the editors have prepared. Instructors, especially those new to oil and gas law, will find the *Oil and Gas Law* Teacher's Manual to be an invaluable resource. It is, without a doubt, the best Teacher's Manual this author has seen for any casebook and includes all sorts of helpful information — not just suggested answers to notes and questions in the text. The editors of *The Law of Oil and Gas* have not prepared a teacher's manual. The publisher indicates no teacher's manual was available for prior editions and none is under preparation for this edition.

A major strength in *The Law of Oil and Gas* is the regulatory material in Chapter 2, particularly the natural gas material at Section 3.A. of Chapter 2. *Oil and Gas Law* fails to address natural gas regulation. *The Law of Oil and Gas* also has, by comparison to *Oil and Gas Law*, an extensive treatment of oil and gas development on federal lands. However, a major strength in *Oil and*

*Gas Law* is Chapter 6 concerning oil and gas contracts. Chapter 6, in addition to discussing assignments, also examines various types of development agreements and their basic tax implications. Although *The Law of Oil and Gas* treats assignments extensively in Chapter 7, development agreements do not receive special treatment.

Both books do an excellent job of presenting the basics of oil and gas law. Therefore, instructors will probably select the book which coincides with their special interests, whether they be, for example, energy policy, law and economics, or oil and gas contracts. In any event, law professors (and their students) are fortunate to have a new edition to *The Law of Oil and Gas* and the opportunity to choose between two fine works. The oil and gas practitioner is fortunate to have an updated version of a superb research tool.

SOUTH-EAST ASIAN SEAS: OIL UNDER TROUBLED WATERS. HYDROCARBON POTENTIAL, JURISDICTIONAL ISSUES AND INTERNATIONAL RELATIONS by Mark J. Valencia. Oxford University Press, Singapore, 1985.

Reviewed by *Edward R. Leihy\**

*South-East Asian Seas: Oil Under Troubled Waters* is the latest publication in a series devoted exclusively to the availability and production potential of natural resources in South-East Asia. Oxford University Press East Asia publishes the series, under the general editorial supervision of Professor Ooi Him Bee of the National University of Singapore. Previous volumes produced in this series include Raj Kumar's, *The Forest Resources of Malaysia: Their Economics and Development*, and Professor Bee's, *The Petroleum Resources of Indonesia*.

The project is a welcome one. Reliable information about the precise location and extent of natural resources in South-East Asia has been difficult to obtain. With regard to petroleum, for example, reserve figures are at our fingertips for most of the nations of the world. This has never been the case with South-East Asia. Several reasons may account for this situation. First, during the past three decades, when most of the world's reliable reserve and production figures were being compiled, South-East Asia was bathed in both international and internal conflicts. Reserve estimates took a back seat to personal and national survival. Second, as a result of this picture of war and internal strife, the rest of the industrial nations of the world looked elsewhere for needed sources of hydrocarbons. During that time, the world seemed awash with oil, and the prospect of shortage was a distant intangible resident only in the minds of contrariwise futurists. Third, and possibly most importantly, oil and natural gas have historically been difficult to recover from the region in economically marketable quantities because of the unique geological formations found there. Much is recoverable only by offshore and deep-water drilling, yet, as the author points out, the "amount of deep-ocean drilling that has been done in the region is negligible relative to the prospective acreage involved."<sup>1</sup>

During the past decade, much has changed. The concept of hydrocarbon shortages, whether as a result of reservoir exhaustion or cartel decree, is no longer mythical; it happened with mailed-first certainty. The artificial paucity of oil supplies during the 1970's financially crippled major industrial nations. The resulting unprecedented capital transfer from these countries to the Middle East permitted several OPEC members for the first time to become a significant force in the internal economies of Western industrialized nations. Secondly, the return of some measure of stability to South-East Asia—although by no means as much as the author asserts—coupled with new deep-water drilling techniques, have permitted expanded hydrocarbon exploration and development

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1. M. VALENCIA, SOUTH-EAST ASIAN SEAS: OIL UNDER TROUBLED WATERS, at 3 (1985).

there.

Against this background, Valencia's study is timely. His book sets out to describe the location and types of hydrocarbon reserves in South-East Asia, and to provide best estimates of their recoverable quantities. Because many of these deposits are off-shore, however, jurisdictional disputes over proper ownership have arisen. The book analyzes the principal jurisdictional disputes in terms of "geography and geology, exploration and lease history specifics, the status of the dispute, possible boundary placement in relation to hydrocarbon potential, and . . . the relationship of the boundary dispute to the larger field of national interests and international relations."<sup>2</sup>

Some of the jurisdictional disputes Valencia assesses are very significant from both an economic ownership point of view, as well as from the international relations/East-West perspective. With respect to each of these, Valencia carefully sets forth the geography and geology of the area, the basis of the jurisdictional dispute, its present status, and the national and international interests at stake. He handles these surveys well. A volume could readily be devoted to each of these disputes. In the space available, however, Valencia succinctly summarizes the disputes and provides an historical perspective that is especially helpful to the reader who is not steeped in the jurisdictional problems associated with the exploitation of hydrocarbons from this region. Indeed, in this portion of his study, Valencia's degree of detail is perfect, as is his penchant for striking at the heart of the geopolitical factors that ride on the outcome of these disputes.

Valencia closes with a chapter on possible responses of states involved in these jurisdictional disputes. Some responses that have been employed singly or in combination include physically occupying the area, unilaterally licensing exploration or development, stalling negotiations while maneuvering for diplomatic support, negotiating directly or through intermediaries to resolve the dispute, and agreeing jointly to explore and exploit hydrocarbon resources in the disputed areas. Not surprisingly, Valencia urges this last approach as the most appropriate. He recognizes, however, the difficulties this process must surmount. For example, if the disputants have different contractual systems for exploitation—*e.g.*, concessions versus production sharing—they must decide on one or the other:

Questions of management rights, taxation, and the allocation of financing are also difficult . . . . There also must be agreement on the degree of autonomy and authority to be vested in the joint development authority, if one is established. Should it be strong—a full legal entity with powers to license, stipulate terms and exemptions, and enter into agreements with foreign companies—or should it be weak—simply a liaison or consultative body between national oil companies?<sup>3</sup>

Although Valencia does not provide a quick and ready means of resolving these issues in every case, he consistently asks the right questions, resolution of which must be at the center of any joint development agreement.

In general, therefore, Valencia has written a very respectable analysis of the status of issues relating to hydrocarbon production in South-East Asia. Of

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2. *Id.* at 39.

3. *Id.* at 118.

course, the volume has a few problems, but fortunately they are more procedural than substantive.

This author does not know whether Mark Valencia is a geologist. The interest he expresses in the geological minutiae of South-East Asia, however, is at times overwhelming. His seemingly endless analysis of "Tertiary sedimentary basins," cretaceous and quaternary marine clastic sedimentary fill, lacustrine Paleogene strata, and downwarped Carboniferous granitic plot forms, coming as it does at the beginning of the book, caused this reader to steal a peek at subsequent chapters to check whether my fortitude might be rewarded with more pertinent material. In taking too much time to set his stage, Valencia nearly loses his audience. The only comparable literary experience that comes to mind is the exposure in ninth grade to Herman Melville's *Moby Dick*. Excited about the prospect of chasing the White Whale along the Line, I was not quite ready for the "ponderous task" of traversing first Melville's mini-treatise on cetology. It mattered not to me that the Sulphur Bottom whale was distinctly different from the Grampus and the Narwhate, or that the Thrasher would never be found running with the Finback whale. I wanted to get on with the hunt.

Secondly, Valencia comes off as too great an apologist for South-East Asian development. Although he refers regularly to the "stable political circumstances" of the area, the very thesis of his study is that there are simmering—in some cases festering—boundary disputes that threaten to become explosive. Indeed, Valencia's claim of political stability can hardly be credited for an area that includes Vietnam, Kampuchea and the Philippines.

Another irritation is that Valencia bootstraps his conclusions on too many occasions. His own writings in this field include *Atlas for Marine Policy in Southeast Asian Seas*, *Marine Policy in Southeast Asian Seas*, and several related articles and commentaries. His excessive reliance on these works as support for positions taken in the present volume becomes nettlesome.

Finally, there are two excellent aspects to this volume that should not be overlooked. The first is "Table 5. Petroleum Legislation in South-East Asia." The table presents for each of the hydrocarbon-producing countries in South-East Asia (1) the types of production agreements permitted (concessions, production sharing, joint ventures, etc.); (2) the duration of these agreements; (3) the obligations of the foreign participants; (4) the role of the national oil company; (5) royalties payable; (6) taxes payable; (7) the cost recovery provisions; (8) the production shares after cost recovery; and (9) other important provisions. Although this table will need to be updated as competition causes nations to propose new types of arrangements, it provides a useful starting point.

Also interesting is the survey<sup>4</sup> of each nation's present oil production and Valencia's projections for the future. He reviews the nation's current oil consumption, traces the source of this oil, and asks whether the source is reliable and whether the need will continue. He also assesses the reasonable export opportunities for these nations. This section provides a thumbnail sketch of each nation's economic and political aspirations and sets a good foundation for the clash of interests presented by the boundary disputes.

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4. *Id.* at 31.

This type of book, written in this particular style, is reminiscent of a pre-publication review written early in this century. In 1909, the New York publisher Mitchell Kennerley was offered the opportunity to publish Van Wyck Brook's first book, *The Wine of the Puritans*. Kennerley gave the manuscript to his cousin and principal editor, Arthur Hooley, to review. Although Brook's work in no way concerned oil production or South-East Asia, Hooley's report to Kennerley could aptly sum up Valencia's study:

The little book has value, though it is neither complete nor incontrovertible. But it would be good enough to publish, if you cared to spend time and money upon a production which could not appeal to a wide circle. For the style, if not the matter, would militate against popularity . . . . But, on the other hand, there is no question of brilliancy. The book is thoughtful and pertinent, but it is above the heads of the ordinary reading public, and not quite big enough to make an important impression on the reflective and discerning. Yet it has interested me, though it presents no new discoveries. The impersonal treatment, the absence of fidgety cleverness, of straining after effect, deserve some recognition.

Valencia has done a rather good job.

STATE ADMINISTRATIVE RULE MAKING by Arthur E. Bonfield. Little, Brown and Company, Boston, 1986. 672 pages.

Reviewed by *Anthony C. Duenner\**

*State Administrative Rule Making* is a highly useful guide for any lawyer whose practice offers exposure to the oftentimes confusing area of agency rule making at the state level. As one of the two reporter-draftsmen of the 1981 Model State Administrative Procedure Act,<sup>1</sup> which has been adopted by or relied upon in the formulation of administrative procedure acts by at least thirty-three states and the District of Columbia,<sup>2</sup> Mr. Bonfield is a recognized expert in the area of state administrative rule making. The text closely tracks the 1981 MSAPA, and offers unparalleled insight into the state rule making process.

Although most state administrative practitioners could benefit from reviewing *State Administrative Rule Making*, one caveat regarding the focus of the text is in order. As stated by the author, "this book proposes, analyzes, and seeks to justify an ideal or model system for the formulation, adoption, and review of rules made by administrative agencies, with particular attention to the performance of those functions by agencies of state government."<sup>3</sup> Thus, at times the text reads like the legislative history of a state administrative procedure act. Indeed, it occasionally seems as if the book is directed at state legislators contemplating a change in their state's administrative rule making procedure.<sup>4</sup> These minor distractions aside, practitioners who are involved in the state administrative rule making process would be well advised to maintain *State Administrative Rule Making* as a reference.

Mr. Bonfield's text is divided into three major sections:

- I. General Considerations;
- II. The Agency Rule-Making Process; and
- III. External Review of Administrative Rules.

Section I provides an explanation of the need for a model state administrative procedure act. In Chapter I, the introduction to the book, the author traces the origin and growth of administrative procedure acts. Mr. Bonfield points out that the focus of the MSAPA, and thus of the book, is toward administrative

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1. 14 U.L.A. 67 (Supp. 1986) [hereinafter 1981 MSAPA]. The 1981 MSAPA was preceded by the *Model State Admin. Procedure Act* (1946), 9c U.L.A. 179 (1957), and by the *Revised Model State Admin. Procedure Act* (1961), 14 U.L.A. 357 (1980). Unless greater specificity is required, hereinafter these acts will be referred to collectively as "the MSAPA."

2. Those states are: Arkansas, Arizona, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin and Wyoming. See 1961 MSAPA, 14 U.L.A. 158 (1980 and Supp. 1986 at 67); 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (1978), 1982 Supp. at 4 [hereinafter *Davis*]; A. BONFIELD, *STATE ADMINISTRATIVE RULE MAKING* 13 (1986) [hereinafter *STATE ADMINISTRATIVE RULE MAKING*].

3. *STATE ADMINISTRATIVE RULE MAKING* 12.

4. See, e.g., *STATE ADMINISTRATIVE RULE MAKING* 592.

*procedures*, as opposed to substantive agency law. The text traces the development of the federal Administrative Procedure Act (federal APA)<sup>5</sup> and the MSAPA.

Chapter 2, "Applicability of Model Legislation," begins by outlining the differences between administrative rule making on the state level and administrative rule making on the federal level. It then offers a comprehensive discussion defining the agencies that are subject to the rule making procedural rules of the 1981 MSAPA. At issue is the meaning of the word "agency;" while some state administrative procedure acts (state APAs) are limited in application, Mr. Bonfield urges the adoption of a broader definition. The author also lists certain entities that in his view should be exempt from the provisions of state APAs.

"Administrative Rules and Orders" is the title of the third chapter, which explains the necessity for a rule/order dichotomy. Although often it is difficult to differentiate between agency rule making and agency adjudication, the distinction is an important one. Different procedures apply to rule making and adjudicative proceedings, and in many instances the practical effect of characterizing a matter as one or the other can be significant. According to the author, most state APAs base their definition of "rule" on the 1961 MSAPA, which is ambiguous in a number of respects. The 1981 MSAPA, which clarifies without altering the 1961 provision, provides that rules may be of general applicability even if they originally were directed only at one person.<sup>6</sup> This approach appears to be in accord with federal case law on the subject.<sup>7</sup> Arguing that the provisions of the federal APA are excessively limiting, the author sets forth a helpful four-part test for determining whether an agency statement of law is a "rule" or an "order."<sup>8</sup>

Chapter 4 of the text, entitled "Preference for Law Making by Rule," recognizes that administrative agencies generally are vested with discretion in making law: 1) by rule; 2) by order, on a case-by-case basis; or 3) by a combination of rule and order. Although state courts generally uphold the discretion of state administrative agencies, Mr. Bonfield points out that state legislatures may alter this scheme with respect to a portion or all of the law making by some or all of their state's agencies. Like the federal APA, the 1981 MSAPA provides one set of procedural rules for rule making and another for adjudication; however, unlike the federal APA or the 1961 MSAPA, the 1981 MSAPA requires that initial agency law making be by rule.<sup>9</sup>

As it is not possible in all cases to make law by rule, the author recognizes that some case-by-case adjudication will perservere. In order to prevent "ad-hoc" rule making, the 1981 MSAPA requires the subsequent codification of

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5. The federal APA is codified at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362, 7562 (1982).

6. See 1981 MSAPA § 1-102. See also A. BONFIELD, STATE ADMINISTRATIVE RULE MAKING 78-80 (1986).

7. See, e.g., *Anaconda Company v. Ruckelshaus*, 362 F. Supp. 697 (D. Colo. 1972), *rev'd*, 482 F.2d 1301 (10th Cir. 1973).

8. STATE ADMINISTRATIVE RULE MAKING 85.

9. See 1981 MSAPA § 2-104(3). See also STATE ADMINISTRATIVE RULE MAKING 118-27.

rules of law derived from adjudication.<sup>10</sup> While this latter provision has been described by one authority on the subject as “[a]n outstanding feature, well ahead of federal law,”<sup>11</sup> Mr. Bonfield recognizes that subsequent codification is not proper in all cases. Throughout Chapter 4 the author merely expresses his view that in *most* cases rule making is preferred to adjudication.

Section II of *State Administrative Rule Making* is the heart of the book, dealing with procedures to be followed during the rule making process. Chapter 5, “Purpose of Agency Rule-Making Procedures,” is a general discussion of the need for fairness in agency rule making. Chapter 5 serves as an introduction to and a build up for Chapter 6, “Agency Procedures for Adoption, Effectiveness, and Review of Rules.”

Chapter 6 will be most useful to practitioners. In 284 pages, the author walks the reader through the maze of state administrative rule making procedures provided by the 1981 MSAPA.<sup>12</sup> Those familiar with the earlier MSAPAs and the federal APA should be forewarned that the 1981 MSAPA contains rule making procedural provisions that differ from or are not found in either the earlier MSAPAs or the federal APA. Generally, the 1981 MSAPA provisions guarantee procedural safeguards in excess of those found in earlier MSAPAs and the federal APA. In some instances, this is a result of codification of relevant case law on the subject; in other instances, the 1981 MSAPA admittedly provides more procedure than may be necessary, depending on the circumstances.

Chapter 7 provides an “Overall Evaluation of Agency Procedures.” Responding to criticism that the procedure provided by the 1981 MSAPA is in some instances uneconomical, Mr. Bonfield provides a brief cost/benefit analy-

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10. See 1981 MSAPA § 2-104(4). See also ADMINISTRATIVE RULE MAKING 131-36.

11. *Davis, supra* note 2, 1982 Supp. at 4. The provision has not received high praise from all commentators, however. See Scalia, *Back to Basics: Making Law Without Making Rules*, Reg., July-Aug. 1981, 25, 28.

12. Specifically, the author provides a detailed examination of: 1) Section 3-101 of the 1981 MSAPA, authorizing agencies to give notice and to seek advice on *possible* rules; 2) Section 3-102, requiring agencies to maintain a current rule making docket available for public inspection; 3) Section 3-103, providing *detailed* requirements concerning notice of proposed rule making; 4) Section 3-104, outlining the right of persons to participate in the rule making procedure—but not requiring “standing” to participate; 5) Section 3-105, providing for a cost/benefit analysis of proposed rules, if analysis is requested; 6) Section 3-106, *inter alia* requiring agencies to consider all comments before promulgating rules; 7) Section 3-107, prohibiting agencies from adopting rules “substantially different” from their NOPR counterparts; 8) Section 3-108, providing that any or all of the procedures guaranteed by Section 3-103 through 3-107 may be waived by an agency if “unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule;” 9) Section 3-109, allowing an exemption from Section 3-103 through 3-108 in the adoption of agency *interpretive* rules; 10) Section 3-110, requiring agencies to provide reasons for their adoption of new rules; 11) Section 3-111, prescribing specific minimal standards for the content, style and form of agency rules; 12) Section 3-112, mandating specific items to be included in the record of each agency’s rule making proceedings; 13) Section 3-113, providing sanctions for any agency’s failure to comply with prescribed rule making procedure; 14) Section 3-114, requiring the filing of the original copy of the rules of all agencies in one central public depository; 15) Section 3-115, providing the effective date of new rules; 16) Section 2-101, mandating specific requirements for the publication, compilation, indexing and public inspection of agency rules; 17) Section 3-116, exempting certain classes of rules from the requirements of Section 3-102 through 3-115; 18) Section 3-117, forcing administrators to at least consider, on their merits, public petitions for the adoption of rules; and 19) Section 3-201, requiring agencies periodically to review the effectiveness of all of their rules to determine whether any new rules should be adopted.

sis of the 1981 MSAPA. The author counts as benefits: 1) lawful rules; 2) technically sound rules; 3) rules that are acceptable to the public; 4) adequate assurances of notice; and 5) the maintenance of only those rules that are in the public interest. The author admits that the added procedure means an increase in time and energy (and therefore money) expended in the rule making process, but concludes that:

[T]he immediately more expensive Model Act procedural requirements are likely to reduce societal costs in the long run . . . . Viewed as a whole . . . the provisions of the 1981 Act relating to agency rule making, rule effectiveness, and rule review, are defensible and desirable, as applied to all rules of all agencies, and are an advance over all earlier legislation on this subject.<sup>13</sup>

Section III of the text describes *external* review of administrative rules. In Chapter 8, "Review of Rules by Governor and Legislature," Mr. Bonfield maintains that judicial review is an inadequate check on the power of agencies, as the judiciary checks only the *legality* of rules, not their desirability. The author insists that state governors and legislators should be allowed override power, since ultimately they take the blame for unpopular agency rules. Section 3-202 of the 1981 MSAPA, a provision that "may be one of the Act's most important and controversial innovations,"<sup>14</sup> allows the governor rescission power over agency rules. Section 3-202 authorizes the governor to rescind or suspend all or a severable portion of any rule of any jurisdictional state agency at any time and for any reason. The 1981 MSAPA limits the governor's rescission authority to granting that authority only where the agency itself would have the authority to rescind the rule in question. Therefore, the governor must follow MSAPA rule making procedure when rescinding or suspending a rule. Professor Davis has lauded this provision, asking, "If a Chief Executive should have power to veto lawmaking by legislative body, why should he not have power to veto lawmaking by an agency? (And then the next step: Or lawmaking by a court?)"<sup>15</sup>

Another innovation of the 1981 MSAPA is the creation of joint legislative committees, charged with selective review of possible, proposed and adopted agency rules. Section 3-204 outlines the powers of joint committees, which are vested with the power to recommend statutory supersession of rules. The author contrasts this scheme with "undesirable" APAs that allow one-house or two-house legislative *veto* of rules. To "veto" a rule under the 1981 MSAPA, the legislature must in effect promulgate a new rule superseding the old rule. Thus, under the 1981 MSAPA, neither the governor nor the joint administrative rules committee has true veto power. The 1981 MSAPA guarantees the same procedural safeguards regardless of whether a rule is being initiated or superseded.

In Chapter 9, "Judicial Review of Rules," Mr. Bonfield describes the 1981 MSAPA provisions relevant to judicial review of state agency rules. The 1981 MSAPA provisions relating to standing, exhaustion of administrative remedies, timing of judicial review and burden of persuasion largely codify rel-

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13. STATE ADMINISTRATIVE RULE MAKING 448, 452.

14. STATE ADMINISTRATIVE RULE MAKING 550.

15. Davis, *supra* note 2, 1982 Supp. at 5.

evant case law as developed under other APAs. Regarding standards for review, Section 5-116(c)(7) of the MSAPA requires agencies to submit "substantial evidence" to support the facts upon which their rules expressly or impliedly rest. Section 5-116(c)(8)(iv) provides an additional optional "arbitrary and capricious" standard that allows courts to overturn agency action "only if the agency took such action wholly on the basis of whim or illogical thinking."<sup>16</sup>

The author reads section 5-116 as authorizing *de novo* review by the courts as to most issues. However, he also reads section 5-116 as mandating judicial deference to agencies acting on matters within their primary jurisdiction, noting that the application of law to fact generally falls within an agency's discretionary powers. In his conclusion to Chapter 9 (the final substantive chapter of his book) Mr. Bonfield recognizes that while the 1981 MSAPA is an improvement over many existing APAs, it is incapable of determining in every case whether a court may substitute its judgment for that of an agency or whether the court should defer to the judgment of the agency as acting within the scope of its primary jurisdiction.

*State Administrative Rule Making* is a book that has something for almost everyone interested in administrative rule making. It is a comprehensive reference for practitioners involved in state administrative rule making processes, and is also of value to those interested in the administrative rule making from a more academic standpoint. State legislators would benefit greatly from reading the text, as it presents an APA that is the result of careful study, years of practical experience, and codification of case law developed through litigation of other APA's provisions. Finally, as the 1981 MSAPA in many instances represents an improvement over the existing federal APA, it would behoove those who oversee the federal administrative rule making process likewise to review *State Administrative Rule Making*.

