

Public Participation in Science-Based Policy Under U.S. Law

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PUBLIC PARTICIPATION IN U.S. POLICYMAKING

INTRODUCTION

PURPOSES OF TALK

- Provide an overview of U.S. Law, as a basis for comparison with other legal systems.
- Examine limitations on disclosure and participation rights.
- Analyze the functions of disclosure and participation.

Outline of Talk

- **Key disclosure requirements:** when is government information on environmental matters available to the public?
- **Important participation rights** in creating regulations and decisions about other projects.
 - *Note: I will not include litigation as a form of public participation – a very important mechanism in the U.S., but too big a topic to include.*
- **Conclusions**

What are the People entitled to know about
their government and their environment?

PUBLIC DISCLOSURE

Freedom of Information Act

- “each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any) and procedures to be followed, shall make the records promptly available to any person.”
- Main exceptions: interagency deliberations, trade secrets

Other Mechanisms

- Notice and comment rulemaking. Disclosure in regulation.
- Open meeting law (a dubious success)
- Environmental Impact Statements – disclosure of environmental information.
- Toxic Release Inventory – public disclosure about hazardous chemicals.
- Federal advisory committees – another idea that hasn't worked well.

WHEN CAN THE PUBLIC BE HEARD IN A
PROCEEDING?

ACTIVE PUBLIC PARTICIPATION

Major participation rights

- The “comment” part of notice and comment rulemaking. Note agency’s obligation to respond to comments, subject to judicial review.
- Public hearing requirements for projects that might have environmental impacts under NEPA regulations.
- Numerous public hearing rights in federal, state, and local proceedings.

Downsides of Disclosure

- Can inhibit thoughtful discussion within an agency.
- Can inhibit information sharing with the government.
- Can conflict with the interest in keeping private information confidential (as in the case of trade secrets).
- May simply confuse the public in some cases.

Downsides of Participation Rights

- Can be gamed by “false flag” groups – the “Citizens for a Cleaner City” which was actually organized by a polluter to stop regulation.
- Public hearings may be meaningless formalities.
- Can mislead officials by providing an unrepresentative sample of the public.

ARE THERE GENERAL LESSONS
FROM THE U.S. EXPERIENCE?

CONCLUSION

Disclosure

- Broad disclosure requirements can inhibit effective government if it's not well designed.
- But a great deal of disclosure *can* be allowed without undermining government effectiveness.
- Privacy and trade secret restrictions are important but have to be carefully defined.

Participation Rights

- Public participation can have substantial benefits:
 - Contribute expertise,
 - Provide a gauge of public views,
 - Give the public a sense of being heard.
 - Enhance legitimacy.
- Direct participation by public at large is usually ineffective (unless it's massive). (Net Neutrality and the Daily Show example)
- However, participation can be very effective when mediated by civil society groups.

For Information on U.S. Environmental Law

- www.legal-planet.org

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Thank You!



“Sunlight is the best disinfectant.”

Justice Louis D. Brandeis