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

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

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ABSTRACT: U.S. law, most notably in the Administrative Procedure Act (APA), has devoted considerable attention to disclosure of information to the public and opportunities for public participation. This article surveys the legal terrain, with particular attention to notice-and-comment rulemaking, the Freedom of Information Act, the Sunshine Act, and the Federal Advisory Committee Act (all now part of the APA). Other laws, such as the National Environmental Policy Act (NEPA), also require public disclosure and provide opportunities for public input into decisions where science often plays an important role. Some of these mechanisms have proved more effective than others. One significant restriction on disclosure involves trade secrets, an issue that has recently become controversial in connection with fracking.

Disclosure in itself may be valuable in order to improve accountability. The value of direct participation by the public in the decision process, however, remains controversial. Some evidence indicates that public interest groups can be effective when they can deploy expertise, and that they can in fact improve the decision making process by bringing additional information to bear. It is more challenging to create meaningful mechanisms for citizens to participate on an individual basis. It is easy to provide electronic access for the expression of views. But mere expression of attitudes, even by large numbers of people, seems to have little effect in the administrative setting. Rather, effective participation mechanisms seemingly need to provide more opportunity for access to information and expertise by the public.

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I. Introduction

Even in democratic countries, there may not be a consensus that transparency and public participation is better than a closed process involving only elected officials experts, and trained civil servants. The United States, however, has opted for a more open, permeable decision-making process. This article provides an overview of some of the main mechanisms used to promote disclosure and participation, their legal limitations, and their effectiveness.

The first section of the article will provide a roadmap to some of the major provisions of U.S. law concerning public disclosure of government documents and proceedings. Because a survey of all fifty states is impractical, the emphasis will be on federal law. Space allows discussion of only the most notable legal provisions. We will see that some of these provisions have been quite successful, while others have been ineffective or counterproductive.

The second section of the article focuses on mechanisms for public input, such as the longstanding requirement for notice and public comment in rulemaking proceedings. These mechanisms seem to work reasonably well for civil society groups. Efforts to foster mass participation through electronic means have seemed much less successful, at least in terms of meaningful impact on decisions. Other mechanisms seem to exist for providing input into project-specific decisions, but again their effectiveness seems to turn to a large extent on organization and access to expertise and other resources.

The article ends with some thoughts about the lessons of the U.S. experience. Some disclosure mechanisms seem to have functioned much better than others. In terms of public input, there is significant evidence that public participation can be effective when combined with some source of expertise. In

contrast, finding ways for the mass public to participate usefully has been more challenging.

II. Public Disclosure

The public cannot participate in the administrative process, or in the democratic process itself, without access to information. Thus, information is the necessary foundation for meaningful participation.

In the U.S., the Administrative Procedure Act (APA) provides much of the general framework governing disclosure and participation at the federal level.[2] For instance, the APA requires that agencies publish descriptions of their organizational structure, their methods of operation, and their rules of procedure and sample forms.[3] Agencies are also required to publish regulatory agendas twice a year, which include reports on pending rulemakings with target dates for completion.[4] Commentators (at least American ones) contend that "American administrative law today provides probably the greatest opportunity for public participation and the greatest transparency in the administrative process of any nation."[5]

Public disclosure has important potential benefits:

> [U]nder a traditional economic or utilitarian model of decisionmaking, each new piece of information should be integrated according to its probative impact on events and marginal judgments; the information

[2] For good background material on the relevant APA provisions, see William F. Fox, Understanding Administrative Law (2012), and Jack M. Beermann, Inside Administrative Law: What Matters and Why (2011).

[3] Id. at 376.

[4] Id.

[5] William Funk, *Public Participation and Transparency in Administrative Law – Three Examples as an Object Lesson*, 61 Admin. L. Rev. 171-172 (2009).

should enhance rather than undermine utilitarian decisionmaking. . . . Similarly, under a value-based view of rational dialogue, the greater the number of perspectives, the less likely should be the bias or irrationality of the ultimate judgment. Thus, generally speaking, more information should improve ethical decisionmaking as well.[6]

Yet, as the same author also observes, "[d]iverse literatures from social psychology, philosophy and organization theory, however, indicate that this process can be more complicated than this general description suggests."[7]
As we will see, however, even when disclosure does provide benefits, there can countervailing interests: access to meetings can inhibit thoughtful discussion within an agency, and disclosure can conflict with the interest in keeping private information confidential (as in the case of trade secrets). Still, the prima facie case for disclosure seems strong unless outweighed by specific countervailing interests in a particular situation.

Public disclosure is a necessary prerequisite to public participation in decision-making. Given information, even if no formal channels for participation exist, the public can at least seek to exercise influence through the political process. For that reason, subsections A and B discuss access to documents and to meetings of decision makers.

A. The Public As Reader: Access to Documents

The mainstay of public disclosure law in the United States is the Freedom of Information Act (FOIA), now part of the APA.[8] FOIA is not very well-organized

[6] Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 Mich. L. Rev. 917 (1990).

[7] Id.

[8] 5 U.S.C. § 552.

and can be difficult to navigate.[9] The core of FOIA is section 552(a)(3)(A), which mandates (with certain exceptions) that "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." Subsection (a)(3)(B) requires the agency to "make reasonable efforts to search for the records in electronic form or format." Note that any person can request information, without any showing of a specific need for the information.[10] Because of the breadth of the statute and because fees are often waived, the costs to agencies have been substantial.[11]

Section 552(b) contains several important exceptions to FOIA's disclosure mandate. The following are particularly relevant to environmental and energy issues:

> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> (5) inter-agency or intra-agency memorandums or letters . . .
>
> (9) geological and geophysical information and data, including maps, concerning wells.

For purposes of FOIA, a trade secret is "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of

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[9] Fox, supra note 2, at 377.

[10] Id. at 379.

[11] Id. at 381.

either innovation or substantial effort."[12] Disclosure is not allowed if it would compromise the government's ability to obtain similar information in the future or if it would cause substantial competitive harm to the person supplying the information.[13] When information is *voluntarily* given to the government, the exemption is broader and includes any information that would not ordinarily be exposed to the public.[14] A party supplying confidential information to the government has a "reverse-FOIA" action to prevent disclosure.[15]

The Obama Administration's expressed position has been supportive of FOIA disclosure:

> Among the first steps taken by President Obama on taking office was to issue two memorandums: one on Open Government and one on FOIA. Both included a focus on increasing the amount of information made public by the government. In particular, the FOIA memo directed agencies to adopt a presumption in favor of disclosure in all FOIA decisions, take affirmative steps to make information public, and use modern technology to inform citizens. This echoed the Congress's finding, . . . that the Freedom of Information Act establishes a "strong presumption in favor of disclosure."[16]

According to one commentator:

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[12] Public Citizen Health Research Group v. HEW, 504 F.2d 238 (D.C. Cir. 1974).

[13] See Worthington Compressors, Inc. v. Costle, 662 F.2d 45 (D.C. Cir. 1981).

[14] Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992)(en banc).

[15] See Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

[16] Testimony of Valerie C. Melvin, Director of Information Management and Human Capital Issues in the Government Accountability Office, Before the Subcommittee on Information Policy, Census, and National Archives, Committee on Oversight and Government Reform, House of Representatives, *Freedom Of Information Act: Requirements and Implementation Continue to Evolve* (March 18, 2010), available at http://www.gao.gov/assets/130/124285.html.

Both the Court and Congress seem to be generally happy with the way the Act is working. At present there seem to be no major problems with FOIA of great concern to either the Court or Congress.[17]

Public access via FOIA can be used by ordinary citizens, public interest groups, and journalists. But note that the exception for inter-agency memos means that FOIA does not give the public access to the decision process itself. Efforts to provide such access are discussed in the next subsection.

B. The Public As Audience: Access to Meetings

When decisions are made behind closed doors, the public will receive only a sanitized version of the decision process, if it receives any information at all. Section 552b of the Administrative Procedure Act[18] attempts to combat this problem by establishing requirements for open meetings. Also known as the "Government in the Sunshine Act," this section was an outgrowth of the Wategate scandal, when "Congress became concerned that too much government decision-making was taking place in secret."[19]

Section 552b applies to any agency "composed by two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency." (§ 552b(a)(1)). A "meeting" is defined as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of agency business." (§

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[17] Fox, supra note , at 391.

[18] 5 U.S.C. § 552.

[19] Fox, supra note 2, at 391.

552b(a)(2)).[20] With exceptions similar to those in FOIA (see § 555b(c)), "[m]embers shall not jointly conduct of agency business other than in accordance with this section" and "every portion of every meeting of an agency shall be open to public participation."

Application of this statute is not always easy. According to the Supreme Court:

> This statutory language contemplates discussion that "effectively predetermine official actions." Such discussions must be "sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency."[21]

This is a somewhat vague and subjective test. Some agencies may attempt to exploit the ambiguity to avoid disclosure of important meetings; others may avoid holding meetings at all, even when a court would not say those meetings were covered by the disclosure requirement.

The open-meeting requirement has met with a "very mixed reception,"[22] and "the number and extent of the exemption in the Sunshine Act essentially overpower the statute's basic presumption in favor of open meetings."[23] The exemptions are largely similar to those in FOIA, but with an additional broad exemption when an open meeting would "be likely to significantly frustrate

[20] Note that for a three-member agency, this provision may make it legally risky for any member of the agency to discuss any pending issue with any other member.

[21] FCC v. ITT World Communications, Inc., 466 U.S. 463, 471 (1984)

[22] Fox, supra note 2, at 391.

[23] Id. at 392.

implementation of a proposed agency action."[24] Worse, even when the law does lead to open meetings, the result may simply be that "true deliberations generally take place elsewhere – in hallway conversations or exchanges of memoranda."[25] The fundamental problem is that there are legitimate reasons for private deliberation such as concern that a statement may be used against the agency in later litigation or the possibility that initial discussions might provide misleading signals about the agency's ultimate position.[26]

A related statute, the Federal Advisory Committee Act (FACA) applies to advisory committees used by an agency as a source of advice, when such committees contain at least one private individual. Initially, these groups were largely composed of business interests.[27] Congress was "concerned that these advisory groups enabled big business to exert undue influence on agency decisionmakers and also provided a fertile opportunity for industry collaboration that might run afoul of antitrust laws."[28] Today, these committees are essentially subject to the same open-meeting requirements as agencies themselves. This provision also seems to have been unsuccessful, partly because of the availability of loopholes.[29] As a result, agencies have developed strategies for avoiding the requirement, so that the effect of the Sunshine Act "is not to enhance transparency in the decisional process but to impede the very collegial

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[24] Beerman,supra note 2, at 355-356. This provision is contained in 5 U.S.C. § 552b(c)(9)(b).

[25] Beerman, supra note 2, at 392.

[26] Funk, supra note 2, at 190.

[27] Id. at 183.

[28] Id. at 184.

[29] Id.at 187.

decisionmaking that the establishment of multimember agencies was supposed to capitalize upon."[30]

FACA can nevertheless be a barrier to participation by non-governmental experts. For instance, the D.C. Circuit once held FACA applicable to the National Academy of Sciences,[31] which the Academy insisted would have impeded its ability to offer disinterested scientific advice.[32] Congress apparently agreed and promptly reversed the decision.[33] Nevertheless, agencies continue to complain that FACA impedes the use of scientific advisory boards and favors the use of individual peer reviewers instead, losing the opportunity for fruitful interchange between the reviewers.[34]

Public disclosure requirements can involve other forms of information, not just access to government deliberations. There are specific disclosure requirements for environmental data in many environmental and energy statutes. One of the most important is the Emergency Planning and Community Right-to-Know Act, better known as EPCRA.[35] The key provision is section 313, which requires release of information about toxic chemical releases.[36] Subsection (a) requires disclosures for any facility where a toxic chemical[37] was "manufactured, process or otherwise used in quantities exceeding the toxic

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[30] Id. at 191.

[31] Animal Legal Def. Fund, Inc. v. Shalala, 104 F.3d 424 (D.C. Cir. 1997).

[32] Gregory Morrison, *Science in the Modern Administrative State: Examining Peer Review Panels and the Federal Advisory Committee Act*, 82 Geo. Wash. L. Rev. 1654, 1661-1662 (2014).

[33] Id. at 1662.

[34] Id. at 1664.

[35] 42 U.S.C. § 11001 et seq. For an overview of EPCRA, see Salzman and Thompson, Environmental Law and Policy 193-194 (3rd ed. 2010).

[36] 42 U.S.C. § 11023.

[37] There has been controversy about which chemicals are covered by this requirement. See Nimish R. Desai, *American Chemistry Council v. Johnson: Community Right to Know, But About What? D.C. Circuit Takes Restrictive View of EPCRA*, 33 Ecology L.Q. 583 (2006) [student note].

chemical threshold quantity." Under subsection (f), the thresholds are based on the amount of chemicals at the facility, not the amount of the release: five tons for chemicals used at a facility, and 12.5 tons for chemicals manufactured or processed at the facility. Subsection (h) mandates disclosure of the forms:

> The release forms required under this section are intended to provide information to the Federal, State, and local governments and the public, including citizens of communities surrounding covered sites. The release form shall be available . . . to inform persons about releases of toxic chemicals to the environment . . .

Subsection (j) requires to EPA to "establish in a computer data base a national toxic chemical inventory" which is to be accessible via the Internet.[38]

However, section 3222 contains a major exception to EPCRA disclosure for trade secrets.[39] This exception covers only the specific identity of the substances,[40] but under subsection (h), EPA must still disclosure the adverse health effects of the substance without identifying it.

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[38] EPCRA § 324, 41 U.S.D. § 11044(a), also contains a catchall disclosure mandate for EPCRA documents.

[39] 42 U.S.C. § 11042.

[40] EPA has also been inhibited in disclosing other information it has received about toxic chemicals:

> EPA has limited ability to publicly share the information it receives from chemical companies. . . Specifically, as we reported in 2005, EPA has not routinely challenged companies' assertions that the chemical data they disclose to EPA . . are confidential business information. . . . When information is claimed as confidential business information, it limits EPA's ability to expand public access to this information – such as sharing it with state environmental agencies and foreign governments.

Statement of Alfredo Gomez, Director Natural Resources and Environment, Chemical Regulation: Observations on the Toxic Substances Control Act and EPA Implementation 9 (2013)(GAO-13-696T).

EPA has a website providing information about toxic releases.[41] The website has a search feature providing information based on postal code, city, or county. It's also possible to search by chemical, industry, or date.[42] For example, a quick search revealed that two thirds of hazardous chemicals that were disposed of in Oakland, California came from AB&I Foundry, located at 7825 San Leandro Street, which sent about sixty tons of manganese compounds for disposal.

California has its own law, Proposition 65, which parallels and then goes beyond EPCRA. Prop 65 requires businesses to post a warning if any toxic chemical is present in "significant" amounts, which are defined as less than a 10^{-5} with lifetime exposure.[43]

As we saw earlier, trade secrets can limit disclosure under FACA. Trade secrets have also proved a problem in other contexts. There has been great controversy about disclosure of the ingredients of the mixtures used in fracking. From the industry point of view, "a drilling company puts millions of dollars into the research and development of fracking fluids", which often vary between geological formations.[44] Yet the composition of the fluids is important to determine whether intrusion into aquifers would pose health risks.[45]

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[41] http://www2.epa.gov/toxics-release-inventory-tri-program

[42] http://iaspub.epa.gov/triexplorer/tri_release.chemical

[43] See Salzman and Thompson, supra note 35, at 194-195.

[44] John Craven, *Fracking Secrets: The Limitations of Trade Secret Protection in Hydraulic Fracking*, 16 Vand. J. Env. & Tech. L. 395, 401-402 (2014).

[45] Id. at 402-403. For an interesting discussion of how state regulators have used what was initially a voluntary industry website to facilitate disclosure, see Hannah J. Wiseman, *The Private Role in Public Fracturing Disclosure and Regulation*, 3 Harv. Bus. L. Rev. Online 49 (2013). For discussion of the broader issue of public participation in voluntary industry efforts, see Janice Gorin, *Caught Between Action and Inaction: Public Participation Rights in Voluntary Approaches to Environmental Policy*, 24 Stan. Env. L. Rev. 151 (2005).

In general, disclosure requirements may have three effects on decision makers other than (hopefully) the disclosure of additional information. First, agencies may modify their conduct to avoid generating information that they consider confidential. This may be desirable when the conduct itself is socially harmful, such as release of toxic chemicals. (EPCRA, Prop 65) It is undesirable when the conduct is beneficial, like collective deliberation (FACA, Sunshine Act).

Second, agencies may generate information in forms that are less susceptible to disclosure – for instance, conducting discussions in person or by phone, or using private phones and computer for sensitive matters. This imposes a cost on the agency without any corresponding benefit.

Third, agencies may take shelter in some exemption to disclosure such as trade secrets. The desirability of that conduct depends on whether the exemption itself properly balances the interests at stake. For instance, it is hard to take issue with exemptions for truly sensitive information relating to national security. Yet there is always the risk that exemptions will be abused.

III. Public Input into the Decisionmaking Process

At least in the U.S., the value of disclosure in a broad range of situations does not seem to be controversial. The value of public input in administrative proceedings, however, may present more difficult questions. There is a tension between the expertise model of administrative decision making, which values the judgment of disinterested professionals and civil servants, and the political model, which views administrative decisions as an extension of democratic politics.[46] Under the expertise model, public participation is valuable only to the

[46] See Christopher Edley, Jr., Administrative Law: Rethinking Judicial Control of Bureaucracy 84-86 (1990).

extent that it provides additional information to the decision makers. Under the political model, public participation can also potentially be valuable for other reasons, depending on one's particular vision of politics: as a method for populist influence, a way of communicating or refining public values, or as an avenue for pluralist influence by interest groups. Yet public participation might be ineffective to serve some or all of these purposes, or could be counterproductive.

This section surveys some of the legal mechanisms for public input and provides some tentative evaluation of whether they in fact provide opportunities for useful and meaningful input. The discussion is divided into two parts. The first topic involves rulemaking by the federal government. This topic is largely governed by the Administrative Procedure Act. This topic involves the issuance of regulations that apply nationwide and often have large society impact. The second involves government approval of specific projects. Some projects, like the Keystone XL pipeline, may have national significance and receive widespread public attention. Others are smaller in scale and are likely to involve local communities rather than national organizations or massive public attention. American law has made some effort to increase public input on these project-specific decisions, but with mixed results.

A. Rulemaking

Agencies that issue regulations must comply with section 553 of the APA, which creates both information and input rights. A notice of the proposed rule must be published in the Federal Register, containing key information such as "the terms or substance of the proposed rule or a description of the subjects and issues involved." (APA § 553(b)). The agency must then "give interested persons an opportunity to participate in the rule making through submission of written

data, views, or arguments with or without opportunity for oral presentation." (APA § 553(c)).

Although the statute's language seems to contemplate only minimal information in rulemaking notices, courts have built on this requirement to require much more. Courts requires that the notice address "the issues to be addressed in the rule-making proceeding with sufficient clarity and specificity to allow them to participate in the rulemaking in a meaningful and informed manner."[47] This includes disclosure of the technical basis for the proposed rule and sufficient information to allow informed critique.[48] As a commentator explains, some courts have "required to provide notice of any data or studies upon which the agency relies, reasoning that it is impossible to participate meaningfully in the rulemaking process without sufficient notice of the information the agency is considering."[49] For instance, one agency was reversed for falling to disclose the maps and internal studies that it later relied on.[50] In addition, parties must be allowed to respond to new information provided by other commentators.[51]

The APA requires the agency to "consider" comments, and a cynic might say that this "merely means placing a date-time stamp on the comments as they come in and tossing the comments into an appropriate filing cabinet."[52] Yet it is

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[47] AMA v. United States, 887 F.2d 760 (7th Cir. 1989).

[48] AMA v. Reno, 57 F.3d 1129, 1132-1133 (D.C. Cir. 1995).

[49] Beerman, supra note 2, at 208.

[50] National Black Media Coalition v. FCC, 791 F.2d 1016, 1023 (2d Cir. 1986).

[51] Beerman, supra note 2, at 208.

[52] Fox, supra note 2,at 168.

also true that courts are "exceptionally suspicious" when the agency completely disregard the comments.[53]

The government is engaged in a concerted effort to make rulemaking accessible on agency websites. At present, however, agency websites often have limited functionality. A 2011 survey found that less than half of the home pages on agency websites were contained regulation oriented material and Regulsations.gov appeared infrequently; about a third provided some explanation of the rulemaking process but only a fifth mentioned even one specific proposed rule.[54] Notably, agencies are also branching out into the use of social media like twitter to provide information to the public.[55]

There is now some concern that agencies are evading the notice and comment requirements. If agencies want their regulations to have the "force of law," under the APA, they must provide prior notice and comment unless they determine and explain that such process would be "impracticable, unnecessary, or contrary to the public interest."[56] The good-cause exception was intended to be narrow. In recent decades, however, agencies have increasingly relied on two broader forms of binding rulemaking that forego prior notice and comment: direct final rulemaking and interim final rulemaking, neither of which is covered directly by the APA.[57] Direct final rules, which are supposed to speed up non-

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[53] Id.

[54] Cary Coglianese, *A Truly "Top Task": Rulemaking and Its Accessibility on Agency Websites*, 44 Env. L. Rep. 10660, 10663 (2014).

[55] GAO, Social Media: Federal Agencies Need Policies and Procedures for Managing and Protecting Information They Access and Disseminate 3-6, 10-14 (2011) (GAO-11-605)

[56] 5 U.S.C. § 553(b)(3)(B).

[57] *See* Administrative Conference of the United States, Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking, 60 Fed. Reg. 43,108, 43,110-13 (Aug. 18, 1995); Lars Noah, *Doubts About Final Rulemaking*, 51 ADMIN L. REV. 401, 401-02 (1999).

controversial regulation, become effective a certain time after publication in the *Federal Register* unless "adverse" comments are submitted. Interim final rules take effect immediately upon publication or soon thereafter and allow for commenting ex post. Agencies can then issue final rules, but rarely do so, keeping the interim final rules on the books.[58] One empirical study showed that the use of these new forms of rulemaking increased between 1983 and 2002. The Government Accountability Office (GAO) determined that agencies did not publish a NPRM allowing the public to comment in about 44 percent of traditional rulemakings between 2003 and 2010.[59] Less than ten percent of those rulemakings were interim final rules that permit ex post commenting.[60] Clearly, there is considerable room for improvement.

Agencies are forgoing prior notice and comment in particularly important rulemakings as well. The GAO also found that agencies skipped such process in approximately 35 percent of major rulemakings (i.e., having an annual effect of at least $100 million or otherwise significant) between 2003 and 2010; almost half of these major rules were, however, interim final rules with commenting after the fact.[61] To be fair, agencies typically claim that the good cause exception in the APA or some other exemption allows them not to follow traditional procedures. Yet, agencies often do not respond to these later comments in the most significant rulemakings.[62]

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[58] *See* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 903 (2008).

[59] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 8 (Dec. 2012).

[60] *Id.* at 13.

[61] *Id.* at 8, 13.

[62] *Id.* at 28.

A further stage of the administrative process, beyond what is required by the APA, has been established in a series of presidential orders that require review of regulations by the Office of Information and Regulatory Analysis (OIRA) in the White House. Concerns about the transparency of the process led to executive orders mandating additional disclosures in order to make reveal communications between agencies OIRA and written communications from outside the government. In addition, logs of meetings with outsiders are supposed to be publicly available.[63] But these procedures are not judicially enforceable and are not always followed.

During the review process, OIRA engages directly with agencies like EPA, sometimes intensively.[64] OIRA can also meet with interested parties, within in and outside government. As a former OIRA head explained, "it accepts all comers."[65] This provides a valuable opportunity for input, but it also may leave the pubic in the dark about influences on the final decision. OIRA now must invite the agency (or agencies) that drafted the regulation to each meeting and disclose all the participants in those meetings. The directives also require OIRA to "make available to the public all documents exchanged between OIRA and the agency during the review by OIRA," including written materials given to OIRA by a private or public entity, but only after the final rule has been published or the agency has publicly announced its decision not to issue the rule.[66] Oral

[63] See Funk, supra note 5, at 176-177 for further information about the procedures.

[64] *See See* Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 Pace Envtl. L. Rev. 325 (2014).

[65] Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1860 (2013).

[66] *Id*. at § 6(b)(4)(D). In addition, the agency is supposed to disclose any technical information on which it bases its regulatory decisions, including from these meetings. *See* Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

communications and documents exchanged before the official review process, however, are not included.[67]

Even if the meeting and document exchange disclosure mechanisms are followed, much of the interaction between OIRA and regulators remains shielded from public scrutiny. In addition, the White House contends that these interactions are protected by executive privilege from congressional oversight and by the deliberative process exemption from required disclosure under the Freedom of Information Act.[68]

The APA provides at least the opportunity for public input in rulemakings. Yet, as we have seen, there are disturbing indications that this opportunity is being eroded (or at least rendered less meaningful) by changes in administrative practice. Oddly, as we will see in the next section, these efforts to restrict input have occurred at a time when efforts are being made to broaden access electronically. It is also a time during which evidence has emerged of the value of input from public interest groups.

2. Assessing Public Participation in Rulemaking

Recent empirical evidence that suggests that at least participation in rulemaking by public interest groups can influence agency outcomes and can contribute useful expertise beyond what is available to agencies themselves.[69]

One study investigated the influence of national environmental groups on EPA regulations of toxic air emissions.[70] Public interests groups comment on

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[67] Heinzerling, supra note 64, at 361-364.

[68] *See* Memorandum from Michael B. Mukasy to the President, Office of Legal Counsel, Assertion of Executive Privilege over Communications Regarding EPA's Ozone Air Quality Standards and California's Gas Waiver Request (June 19, 2008), 2008 WL 5506397.

[69] In the United States, organized environmental groups with considerable expertise play a substantial role in the regulatory process. Richard Lazarus, The Making of Environmental Law 49, 81-85 (2004).

such proceedings haphazardly, making it possible to compare outcomes when they did and did not participate. The study found that comments by industry in the rulemaking process were correlated with changes that weakened a rule, but that comments by public interest groups often resulted in changes that strengthened the rule.[71] Given that agency apparently found the comments to be well-founded in those cases, it appears that their participation improved the outcome of the process. Participation by public interest groups also seemed to lead to additional attention to the rulemaking from the media, fostering public knowledge of the proceedings.[72]

A second study also suggests that environmental groups do in fact contribute useful expertise. This study involved citizen petitions to list a species as endangered, an issue that involves considerable technical input from biologists.[73] Briefly, the findings were as follows:

> [W]e compare species that are identified for listing through the petition process with species that are identified for listing by the agency on its own. We use that comparison to explore a series of questions: Are species listed as a result of petitions at a higher risk of extinction than other listed species? Do they cost more to restore to healthy population levels? Are they more likely to conflict with development projects being pursued by other federal agencies, such as dams or roads? . . .

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[70] Wendy Wagner, Katherine Barnes, and Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emissions Standards*, 63 Ad. L. Rev. 99 (2011).

[71] Id. at 132

[72] Id. at 140.

[73] Eric Biber and Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law,* 58 UCLA L. Rev. 321 (2010)

> Contrary to the criticisms in the literature, we find no statistically significant differences on any of these factors between species listed as a result of petitions and species listed on the agency's own initiative. If anything, petitions seem to better identify at-risk species that cost relatively little to restore to health. We find similar results for species that were the subject of litigation under the ESA's citizen suit provision.[74]

Apparently the agency was overlooking species that were just as much in need of protection as the species that the agency itself chose to protect. Thus, the study suggests that, even from the narrow expertise perspective, public participation by such established groups can be helpful to the decisional process.

The advent of electronic rulemaking has focused attention on less structured participation by the public at large. Email has also provided a method for public input,[75] sometimes resulting in thousands of email comments on proposed rules.[76] For instance, over sixty thousand people commented on a proposal to list polar bears as an endangered species.[77] Yet agency responses to such mass commenting has been perfunctory, and "agencies often seem to be impatient with and unresponsive to value-focused commenting" (meaning comments that communicate public attitudes but no new factual information).[78] But there are exceptions, such as a rulemaking over whether to allow installation

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[74] Id. at 324-325.

[75] For a discussion of the benefits that agencies perceive in use of electronic media in rulemaking, see Cary Coglianese, *Enhancing Access to Online Rulemaking Information*, 2 Michigan J. Env. & Admin. L. 1, 36-37(2012).

[76] See Nina Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 Geo. Wash. L. Rev. 1343, 1344-1345 (2011).

[77] Id. at 1345.

[78] Id. at 1367.

of on-off switches for airbags.[79] As a result of public comments emphasizing the issue of personal choice, the agency set up focus groups to determine whether providing public education would reduce misconceptions about air bags.[80] The final rule allowed deactivation only under very limited circumstances but also established a public information campaign.[81]

It remains controversial, however, whether agencies should take such comments seriously as a gauge of public opinion, or whether instead they should strive to provide forms of public participation that involve more informed responses, particularly from groups whose views may not be otherwise represented in the rulemaking.[82]

B. Public Input and Project-Specific Decisions

Projects, as opposed to regulations, involve different forms of input. At the federal level, the National Environmental Policy Act of 1969 (NEPA)[83] provides opportunity for input for a broad range of projects that require preparation of an environmental assessment (EA) or of a more elaborate environmental impact statement (EIS). Section 1501.5 of the implementing regulations[84] requires that, with limited exception, the agency "involve environmental agencies, applicants, and the public" in the process of determining whether an EIS is required. This process results in preparation of an EA, which is a less elaborate evaluation of

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[79] Id. at 1366.

[80] Id.

[81] Id.

[82] The argument for the more nuanced approach is made in Cynthia Farina, Mary Newhart, and Josiah Heidt, *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 44 Env. L. Rep. 10670 (2014).

[83] 42 U.S.C. § 4321 et. Seq.

[84] The regulations by the Council on Environmental Quality can be found in Chapter V of the Code of Federal Regulations (CFR).

environmental issues than a full-blown EIS. When the agency makes a finding that a proposed action will not have a significant environmental impact, it must make the finding available for public review before finalizing it if the action is similar to one that normally requires an impact statement or is unprecedented. (§ 1501.4(e)(2)) In any event, it must make the ultimate finding available to the public (§ 1501.4(e)(1)), which provides the opportunity for political mobilization and perhaps litigation before the project is underway.

When the agency decides that there are significant environmental impact statements, it moves into an elaborate set of procedures for preparing an EIS. For instance, once it has prepared a draft impact statement, the agency must request "comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected." (§ 1503.1) More generally, the regulations provide that "[a]gencies shall (a) [m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures," including specific requirements for public notice (such as publication in local newspapers in appropriate cases). Public hearings are called for when an action is controversial or another agency has requested a hearing. (§ 1506l.5(e)(2))

There have been interesting experiments with the use of Geographic Information Systems (GIS) to assist in public disclosure and participation. The Bureau of Reclamation made good use of GIS in performing an assessment of the operations of the Glen Canyon Dam. Public interest was very high, with more

than thirty thousand people commenting on the draft EIS.[85] As CEQ has explained,

> GIS provides the analyst with management of large data sets, data overlay and analysis of development and natural resource patterns, trends analysis, mathematical impact modeling with locational data, habitat analysis, aesthetic analysis, and improved public consultation. Using GIS has the potential to facilitate the efficient completion of projects while building confidence in the NEPA process.[86]

Besides the Glen Canyon project, GIS has also been used for the Pacific Northwest Forest Plan and for the Upper Columbia River Basin Study.[87]

GIS has received enthusiastic reviews because of its ability to catalyze public input:

> According to the Western Governors' Association, GIS is a vital component of successful NEPA processes that address land management decisions because the decisions are spatial and stakeholders relate to location; therefore, location is often the focus of stakeholder comments and concerns. The U.S. Air Force commented that a Website developed by Eglin Air Force Base to accomplish interdisciplinary reviews of environmental impact analyses uses GIS to illustrate proposals. Their GIS also provides simultaneous access to operational and environmental information, thereby increasing awareness of environmental issues.[88]

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[85] The NEPA Task Force, Report to the Council on Environmental Quality: Modernizing NEPA Implementation 26 (2003), available at https://ceq.doe.gov/ntf/report/finalreport.pdf.

[86] Id. at 28.

[87] Id. at 28.

[88] Id. at 13. For an early discussion of the potential of GIS, see William Eady, *The Use of GIS in Environmental Assessment*, 13 Impact Assessment 199, 202 (1995). For a brief discussion of

California has been a leader in the use of GIS. One project mapped almost 1500 natural resource projects.[89] Another mapped natural resource values and conservation opportunities for 6500 square miles in the Sacramento area.[90] Much of this work is now publicly available. For instance, one site provides complete information relating to range, habitat, spawning, management plans, and land uses for key species of fish.[91] California is actively engaged in upgrading its GIS resources. Illustrating the constructive role of civil society, the California Geographic Information Association (CGIA) is a non-profit, state-wide organization formed in 1994, devoted to improved sharing and use of geographic information.[92]

Besides NEPA, many other environmental statutes contain specific provisions for input by the public. For instance, before a water pollution permit is issued, the Clean Water Act requires that "the public . . . receive notice of each application for a permit and . . . an opportunity for public hearing before a ruling on such application."[93] Courts have intervened at the programmatic level when states fail to provide sufficient opportunity for public participation, and they have also overturned individual permits for lack of public participation.[94]

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possible uses of GIS under NEPA, including linkages with remotely sensed data, see Kenneth Markowitz, *Using 21st Century Technologies to Implement NEPA* (SGO026 ALI-ABA 155)(Dec. 2001).

[89] Chad D. Shook et al., *Applied Geographic Information Systems in Cooperative Natural Resources Projects: A California Example* (Feb. 1, 1999), http://repositories.cdlib.org;/jmie/ice/icepubs/Shook1999a

[90] Michael C. McCoy, James F. Quinn, and Naomi B. Kalman, *Identifying Environmental and Agricultural Values and Opportunities for Regional Planning: A GIS Approach* (Oct. 1, 2002), http://repositories.cdlib.org/jmie/ice/icepubs/McCoy2002a.

[91] http://www.calfish.org/DesktopDefault.aspx?tabId=64#any_URL

[92] See http://www.cgia.org/

[93] CWA § 402(b)(3), 33 U.S.C. § 1342(b)(3).

[94] See Terence J. Centner, *Challenging NPDES Permits Granted Without Public Participation*, 38 Env. Affairs 1, 4-5, 32-37 (2011)

Similarly, government regulations have expanded the right of local communities to participate in the permitting process for hazardous waste facilities.[95] This is not to mention the opportunities for public participation that may be provided by state law.

As in rulemaking, the indications are that public input is effective in project-specific decisions when coupled with some form of expertise. As a very experienced and sophisticated land use and environmental lawyer observed:

> Citizen participation needs agents (usually, but not necessarily, attorneys) and experts to provide the sophisticated content, presentation, and political acuity necessary to have effect. Participation without such expertise will fail to change the process or contribute to the outcome of the subject proceeding, and thus will fail its democratic function. . . [E]nvironmental decision-makers require technical input, which

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[95] See RCRA Expanded Public Participation Rule, http://www.epa.gov/wastes/hazard/tsd/permit/pubpart.htm. Under the rule,

> - Permit applicants must "hold an informal public meeting" to inform community members of proposed hazardous waste management activities before applying for a permit to conduct these activities.
> - The permitting agency must "announce the submission of a permit application" by sending a notice to everyone on the facility mailing list. The announcement will tell community members where they can examine the application while the agency reviews it.
> - The permitting agency may require a facility to "set up an information repository (or library)" at any point during the permitting process. The repository should include relevant documents, such as the permit application, reports, and any other information the permitting agency wishes to make available.
> - The permitting agency must "notify the public prior to a trial (or test) burn" at a combustion facility (i.e., an incinerator or other facility that burns hazardous waste) by sending a notice to everyone on the facility mailing list.

> unassisted lay participants cannot provide. . . . If citizens partner with experts, however, true effects on process and outcome are possible.[96]

In part because of the importance of skilled partners, public participation also can have a dark side. It may be easier to mobilize the public in a particular area affected by a project, leading local interests to have undue influence. This may particularly be a problem in siting energy-related projects.[97] The result can be the well-known NIMBY ("Not In My Back Yard") problem. Even worse, the result may be to shunt projects to areas where the residents are less able to organize and deploy the necessary expertise, raising questions of environmental equity.[98]

Clearly, one of the challenges in designing mechanisms for public participation is to guard against such skewing. Affirmative steps seem necessary to provide an opportunity for meaningful participation to individuals who are not represented by established public interest groups and who lack their own access to resources and expertise. For instance, it may be necessary to consider providing funding in order to equip citizen groups with enough expertise to participate in a meaningful way.[99] Other possibilities involve the use of stakeholder advisory groups, deliberative polling, and ombudsmen.[100]

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[96] Marc Mihaly, *Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership with Experts and Agents*, 27 Pace. Env. L. Rev. 151, 168 (2009).

[97] See David B. Spence, *The Political Economy of Local Vetoes*, 93 Tex. L. Rev. 351 (2014) (discussing this issue in the context of fracking); Shalini P. Vajjhala and Paul S. Fischback, Quantifying Siting Difficulty: A Case Study of U.S. Transmission Line Siting (2006) (Resources for the Future discussion paper); Susan Lorde Martin, *Wind Farms and NIMBYs: Generating Conflict, Reducing Litigation*, 20 Fordham Env. L. Rev. 427 (2010).

[98] See Martin, supra note 97, at 427-428.

[99] For an argument to this effect, see Mihaly, supra note 97, at 223-226. Mihaly explains that sophisticated developers were willing to help pay his fees in order to make constructive negotiations possible. Id.

[100] Id at 220-222.

IV. Conclusion

As we have seen, U.S. law provides extensive public disclosure requirements and opportunities for public participation. Some disclosure requirements seem to be relatively successful, such as FOIA and California's Proposition 65. Other disclosure requirements have turned out to be counterproductive or ineffective, notably open meeting requirements that are either evaded or inhibit collective deliberation.

Public participation in decision-making involves active input from the public, not just transparency. Opportunities can be found in the rulemaking process, in NEPA, and in public hearing requirements in statutes governing pollution and toxic substances. Although empirical evidence seems scanty, the available evidence indicates that public interest groups have been able to influence decisions through this mechanism and have been able to provide valid additional expertise. Unfortunately, the opportunity for such input may have been somewhat undermined by recent modifications in the administration process.

Moreover, efforts to promote more direct forms of public participation, such as e-rulemaking, have been much less effective. Making public participation effective on behalf of the public at large may require affirmative efforts to provide information and expert assistance. Simply allowing the public to register its attitudes seems to have limited effectiveness.

In short, the American experience with public disclosure and participation has been mixed but at least in part encouraging. These mechanisms remain works in progress. The disclosure requirements involve difficult tradeoffs between transparency and countervailing interests in

confidentiality, which may require continual renegotiation. Participation requirements seem most valuable when they open the door to civil society groups rather than individuals as such. It remains a challenge to provide opportunities for meaningful input directly from members of the public who do not have the financial resources or social capital to obtain access to expertise. Hopefully, the U.S. experience may have some instructive value for other legal systems, although every country obviously has its own specific governance arrangements and political culture.