

C O M M E N T

Comments on *A Truly “Top Task”*: Rulemaking and Its Accessibility on Agency Websites

by Andrea Bear Field

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Prof. Cary Coglianese’s article—*A Truly “Top Task”: Rulemaking and Its Accessibility on Agency Websites*—explains the importance of the agency rulemaking process and describes obstacles encountered by members of the public who wish to participate in that process. In particular, the article focuses on the role of government websites in making relevant information more accessible to the public and on the ways in which agency websites can make it easier—or more difficult—for the public to get timely access to information in individual agency proceedings.

During the almost 40 years, I have been practicing administrative law, I have participated in hundreds of agency proceedings, including scores of formal agency rulemakings conducted by the U.S. Environmental Protection Agency (EPA) and other federal agencies.¹ As part of the process of preparing rulemaking comments in those proceedings, I have often needed to find and review documents prepared by the agency conducting the rulemaking, by other affected federal and state agencies, and by other interested parties. Over the years, agencies have improved the procedures for obtaining such information, but there is still room for improvement. Let me here provide a brief historical perspective and then—relying on experience gained in participating in CAA proceedings—let me address some of the challenges still encountered by members of the public trying to participate meaningfully in agency proceedings.

I. In Olden Days

Professor Coglianese’s article praises EPA for making the rulemaking process more accessible. One key reason for EPA’s success is that Congress set out a blueprint for accessibility to rulemaking information when it amended the

Clean Air Act in 1977. At that time, it added §307(d), which contains a panoply of procedures for EPA to follow when conducting notice and comment rulemaking.² Among the key provisions of §307(d) are those requiring EPA to (a) establish a rulemaking docket for each rulemaking it undertakes (CAA §307(d)(2)); (b) publish in the *Federal Register* notice of the rulemaking, specify the period available for public comment on the proposed rule, provide a docket number for the rulemaking and indicate when and where the docket will be available for public review, and provide a statement of basis and purpose containing the factual data on which the proposed rule is based and major legal interpretations and policy considerations underlying the proposal (CAA §307(d)(3)); and (c) allow for the submission of written comments and presentation of oral testimony on rulemaking proposals and ensure that all written comments, transcripts of hearings, and documentary information are promptly included in the docket and that all such docket information is open for public inspection and copying (CAA §307(d)(4) and (5)).

Following enactment of the 1977 Clean Air Act Amendments, EPA did indeed establish dockets for Clean Air Act rulemakings, the Agency included in those dockets the information spelled out in CAA §307(d), and the public had access to that information. During the “low tech” two decades following passage of the 1977 Amendments, though, “access” meant that anyone learning about an EPA rulemaking had to go to EPA’s docket center; sign in; request and review a copy of the index to that rulemaking docket; and then ask to see—and be able to copy—specific index-listed documents. This paper-based system worked well enough for those who happened to live in or near the places where EPA maintained its rulemaking dockets, but it certainly was not an ideal system for those geographi-

1. Although I have no precise data on the overall number of rulemakings EPA has conducted in the past four decades, the attached table—which lists the number of pages in the *Federal Register* devoted to EPA rules promulgated between 1972 and 2012—amply demonstrates that EPA has indeed produced many, many rules over that time period.

2. Those writing §307(d) relied in large part on the comprehensive approach laid out in a law review article by William Pedersen, then an EPA lawyer familiar with the complexities and occasional haphazardness of the rulemaking process. See William Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975).

cally remote from where the dockets were stored,³ and it had other flaws.

For example, the system of the mid-1970s to 1990s relied heavily on human beings to take many time-consuming steps—rather than typing relatively few keystrokes—to get documents from a commenter's hands into the relevant rulemaking docket. During that time, it could take a week or longer after mailing for comments and attachments to appear in rulemaking dockets.

Also, practitioners from decades ago recall instances in which not all submitted documents would be put in the agency-established rulemaking dockets. In particular, they recall instances in which they filed legal comments and attached thereto a variety of technical support documents but subsequently discovered that EPA—the arbiter of what did or did not get included in rulemaking dockets—tended to put in their dockets only legal comments and declined to include supplemental attached documents.

That all changed in the early 2000s, when the federal government set up Regulations.gov and a new electronic Federal Docket Management System to house rulemaking information in one central online location. As a result of these improvements, individuals no longer have to make physical trips to docket rooms, and commenters may have more confidence that everything they properly submit will be included in rulemaking dockets. These improvements, however, did not (and do not) eliminate all problems of public access to rulemaking materials.

For example, in the early days of Regulations.gov, commenters could encounter significant delays between the time when they sent materials to Regulations.gov and the time when those comments showed up in the designated rulemaking dockets for others to review. Over time, this issue has been substantially addressed.

Also, in the early days of Regulations.gov, it was difficult to determine if and when new documents were added to dockets because documents did not always appear in the order in which they were submitted for posting. That problem, too, was subsequently addressed. An improvement to the search function of Regulations.gov means that those now roaming through dockets on Regulations.gov can find materials recently added to dockets by searching for everything posted after a specific designated date.

Some of my colleagues who must more frequently roam through Regulations.gov have suggested an additional way in which to make that site's search function more robust. Specifically, they note that it is now possible to look for any comments filed in a rulemaking docket by a specific entity, say Sierra Club. And it is possible to search a docket for any documents posted after a specific date, say January 1, 2014. But it is not yet possible to combine these two searches and look for all information posted by Sierra Club after January 1, 2014.

Another way to improve the ease with which one navigates Regulations.gov would be to establish a separate category to house comments sent in response to advocacy groups' now-standard practice of sending blast emails to their constituencies, urging followers to submit rulemaking comments and often including form response cards that can be filed directly in rulemakings. It is certainly appropriate to encourage such public participation in rulemakings so that agencies will know the extent of the public's interest in the rulemakings. But note-card comments—particularly when they arrive in the thousands or tens of thousands—can take up many screens on the docket sheet. One screen defaults to showing 25 entries. Going through hundreds of screens can take a significant amount of time. This makes it difficult for interested parties to find, analyze, and respond to substantive comments in the docket. Again, such comments should be included in rulemaking dockets, but putting them in a separate category of comments would make it easier for all parties to search for—and find—the more detailed comments filed by both those supporting and opposing particular actions.

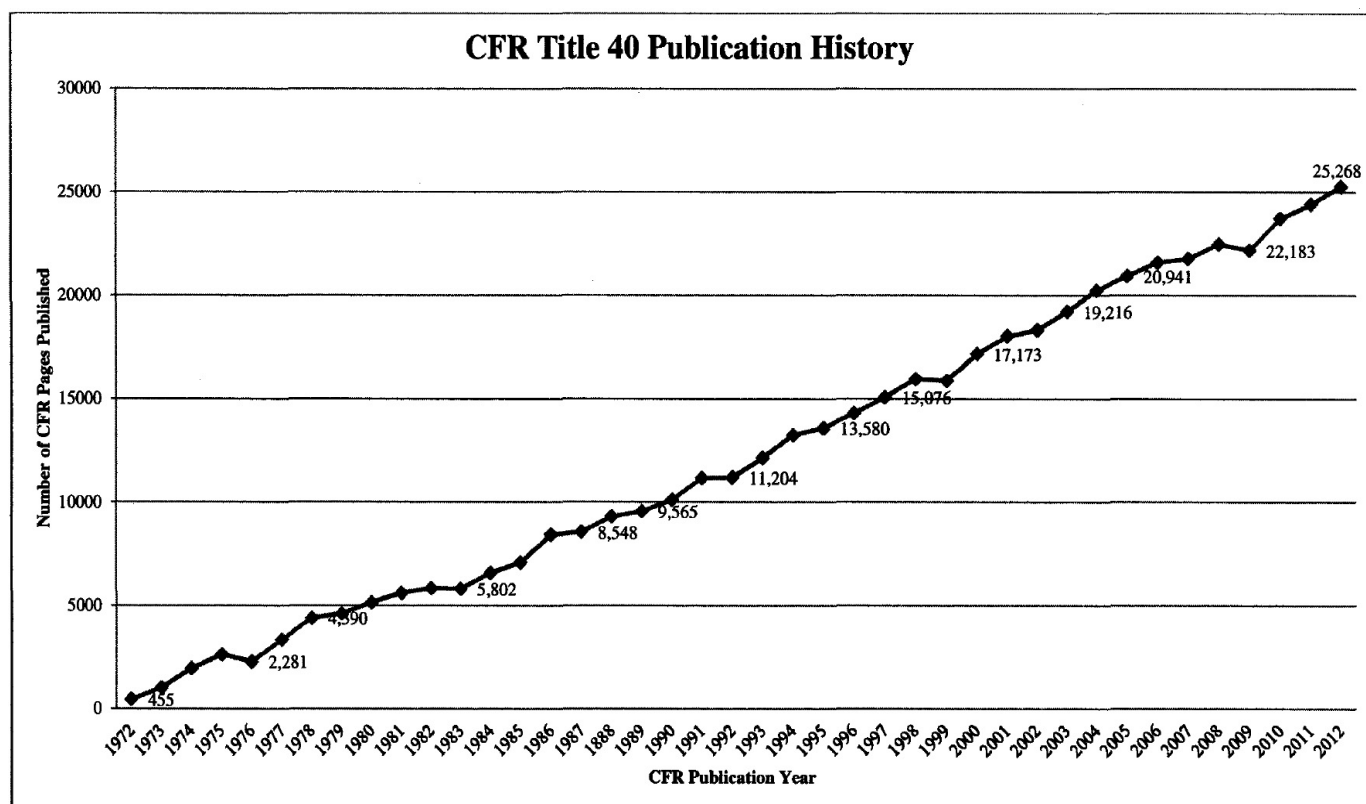
II. Larger Problems That Still Remain

Even if Regulations.gov can be made to work perfectly, however, the public will still not have the desired access to agency decisionmaking processes unless decisionmaking entities widely use Regulations.gov. As noted in Professor Coglianese's article, some agencies still have not established robust systems for using Regulations.gov when they conduct rulemakings. Just as large a problem, though, is that even those agencies that use Regulations.gov in formal notice-and-comment rulemakings can avoid the transparency of that process when they avoid the notice-and-comment rulemaking process altogether and opt instead to set policy through other mechanisms.

For example, when EPA—the agency with which I am most familiar—chooses to set policy through the issuance of guidance documents, rather than through formal rulemaking, there is no set process ensuring that the public will have access to or be able to comment on what goes into EPA's policy. The following are just a few difficulties I have encountered in trying to track EPA's decisionmaking process when EPA avoids the notice-and-comment rulemaking process.

- The agency website's search engine fails me. When I first hear that EPA is thinking about developing a policy on a particular topic (Topic X), I want to get background information about that topic and about what EPA has previously done on related topics. Years ago, I would start my investigations by going to EPA's website and searching for Topic X. Over the years, I have often found that to be a dead end because the website's search engine is not a particularly robust one. For me, a better way of finding information about Topic X on EPA's website is to do a Google search of Topic X. That approach has frequently turned up

3. Interested parties could also request copies of the docket index and specific docket materials by mail if they paid "the expenses, including the personnel costs to do the copying." CAA §307(d)(4)(A).



helpful links to key information, including links to places on EPA's website that I was unable to find using the search engine on EPA's website.

- The agency may not create a docket where all relevant information is placed. Or it may establish multiple dockets, each of which houses some—but not all—of the information it is considering in its development of a guidance or policy memorandum. Or a docket—if one exists—may be housed within a regional office of EPA. Obviously, any or all of these things can make it hard to find key documents and comment on them.
- The agency may make major or minor changes to its website—an event that seems to happen at the beginning of each new administration and sometimes more often than that. Or the agency may post a document and then decide at a later time to remove

that posting. Due to things like this, that a gem of a document—found and carefully bookmarked one day—seems to vanish the next day. (At one point, I thought I was the only one to whom this happened. Chatting with colleagues has convinced me that this is a more widespread problem.) Because of things like this, the agency's website does not serve as a complete history of regulatory decisionmaking.

In summary, much has happened in the past forty years to make it easier for both experienced and not-so-experienced members of the public to participate meaningfully in agency rulemakings. However, more could be done to improve both the tools used to provide information in individual rulemakings and the mindsets of agencies that now often prefer to avoid the lengthy, often-contentious rulemaking process.