COMMENT

Pouring New Wine Into Old Wineskins? Promulgating Regulations in the Era of Social Media

by Carol Ann Siciliano

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In their rich, lucid, and engagingly illustrated article entitled *Visual Rulemaking*, Prof. Elizabeth G. Porter and Prof. Kathryn A. Watts challenge agencies to break free of dense text and to explore a new universe of "visual rulemaking." Citing colorful examples from the past few years, the authors urge agencies to make greater use of videos, images, and social media to promote transparency and expand public engagement. The authors also fully acknowledge the legal risks of pouring such new wine into old wineskins. And so they invite legal scholars, courts, and agency attorneys to help move administrative law toward a warmer embrace of these dynamic new practices.

Profs. Porter and Watts create three elegant categories to describe agencies' use of visual rulemaking: outflow, inflow, and overflow. The authors use the term "outflow" to describe agencies' efforts to engage the public in rulemaking processes and to educate and persuade the public about the rule's value. The term "inflow" refers to the public's use of visual media to convey information and feedback to the rulemaking agency. Finally, the authors capture an agency's search for legislative solutions within the term "overflow."

I. Building Better Decisions Through Public Engagement

As an agency attorney with decades of experience in rulemaking, I was captivated by the authors' insights regarding "inflow." In this Comment, I intend to analyze the authors' proposals in relation to agencies' responsibilities under the Administrative Procedure Act (APA).

I'll begin by laying a foundation from the perspective of a rule-counseling attorney. For many of us, rulemaking invariably—if not inevitably—leads to litigation. The greater the precipitating problem, the more likely we will encounter stakeholders disappointed with the agency's solution. Therefore, from the very beginning of any rulemaking effort, counseling entails an analysis and management of legal risk. Simply put, the successful defense of an agency rule rests on a three-legged stool: statutory authority, record support, and procedural propriety. If any leg gives way, the rule collapses, taking with it years of investment by agencies and stakeholders, along with the solution itself. Engaging the public within and outside the formal public comment process can strengthen each leg of the stool. At the threshold of rulemaking, agencies can use stakeholder meetings, social media engagements, and Advanced Notices of Proposed Rulemaking (ANPRMs) to explore the nature and extent of the perceived problem, elicit possible solutions, and evaluate the intensity and character of public support or opposition. Feedback flowing into an agency through all of these channels not only equips the agency to make better rulemaking choices, but also highlights potential legal vulnerabilities. Having spent my career defending challenges to agency actions, I highly value early insights into future litigants' objections. I want to know what the public considers to be dubious legal authority or insufficient factual or analytical bases for regulatory ideas. My goal is to strengthen at least two legs of our rulemaking stool. At the very least, I want to apprise agency decisionmakers fully of the legal risks associated with various options and to build the best legal and factual case in support of their final choices. Early and active engagement between an agency and the public allows agency counsel to minimize surprises and prepare, prepare, prepare. By testing the waters, agency outreach through stakeholder meetings, social media, and ANPRMs can also build better regulatory choices: regulate, deregulate, or do nothing at all.

**The views expressed in this Comment are the author's own and do not necessarily represent the views of the U.S. Environmental Protection Agency.*

But at this stage, agency attorneys start to get a little nervous: how does innovative public engagement affect the third leg of our rulemaking stool? Agency attorneys are the first and, in many ways, the principal guardians of the APA's rulemaking requirements. The list of procedural requirements is long. Here are just a few of the questions I would ask myself when counseling on a rule: does the APA require public comment here? If so, does an exception apply? Does the action at issue qualify for that exception? If the agency solicits public comment, how long should the comment period be? What information should the agency include in its docket, preamble, and supporting analyses to provide an adequate opportunity to comment? How does the agency capture and consider public input during the comment period? Which comments are significant enough to compel a response? Has the agency's thinking changed enough to warrant a new round of comment or even a new proposal? And, for heaven's sake, what constitutes the administrative record?

I appreciate the comment process: there's risk and reward for everyone, agency and stakeholder alike. Agency decisionmakers are rewarded with information and ideas; we lawyers are rewarded with intelligence: who is likely to sue us and why? With few exceptions, courts expect future plaintiffs to raise their legal and factual objections with agencies before they place those objections before a court. This gives the agency a fair opportunity to consider the objections, make appropriate changes, and prepare for litigation. Commenters risk showing their analytical hands, but even if they fail to persuade the agency, they are rewarded with the court's attention. Indeed, dissatisfied commenters can reap, in litigation, the information and objections they have sown into the rulemaking record. That material can severely weaken the legs of the stool. A court could upend a rule as arbitrary and capricious if an agency fails adequately to account for credible comments that contradict the information, assumptions, and analyses upon which an agency relies. Or a court could cry procedural foul if, irrespective of the record, an agency fails to respond to significant comments. To me, the comment process is all about fair play.

And that's why I get nervous about the use of social media and especially videos as a form of rulemaking comment. My jitters are a bit predictable, so I'll start instead with the opportunities.

II. Signposts and Direction Arrows

Like the authors, I love the idea of an agency's use of visuals to explain its rulemaking proposals and spur public reaction. In my view, agencies serve the public best when, with creative, diversified outreach strategies and robust information sharing, we engage the broader public in the problem we seek to solve. Even if the public doesn't agree with our ultimate solution, at least—we hope—we have interested more people in governance, improved the record and rationale for our ultimate choice, and helped the public understand the astonishing complexity of making choices amid many reasonable, competing points of view.

I also agree with the authors that agencies can more consistently use social media and visuals during the rulemaking process to encourage the public to comment formally in Regulations.gov. Regulations.gov provides an easy way for the public to send feedback to agencies and—this is very important—for agencies to consider that feedback in a meaningful way. Staff at large rulemaking agencies are well-equipped to recognize and harvest comments conveyed through Regulations.gov. And that means staff are similarly well equipped to help decisionmakers to consider those comments. As the authors point out, by using social media to sweep more people into the Regulations.gov environment, agencies can reach a broader audience.

I also agree with the authors that agencies should place clear signposts when using visuals and other forms of social media in rulemaking. We begin with a confusion of terms: a rulemaking agency will not necessarily recognize a "comment" on social media as a "comment" for APA purposes. And yet, as the authors note, to the broader public that distinction is silly. For reasons explained below, I continue to value the distinction. And because of that, I believe agencies need to explain clearly to the public how each universe functions. For example, as part of a video explaining a proposed rule, I imagine an agency voiceover inviting viewers to learn about the problem by watching the video, experience the views of other members of the public by reading their comments, and participate in the dialogue themselves by providing their own thoughts. And then that voice could invite viewers to talk to the agency itself by going to Regulations.gov to file a comment. The signposts should be clear: use social media to share your views with the public; use Regulations.gov to share your views with us.

Social media can be used in other ways to facilitate public dialogue within and among stakeholder communities. For example, I've been intrigued by the possibility of using wiki pages to develop regulatory text. I imagine an agency creating three or four different wiki "sandboxes" during the comment period, each starting with the agency's proposed regulatory text but each designated for a particular cluster of stakeholders (regulated entities, public interest groups, state governments, etc.). The agency might invite each stakeholder cluster to engage collectively to build regulatory text that reflects that cluster's policy preferences. The agency would then treat as a single comment whatever each cluster's regulatory text looks like at the close of the comment period. Members of the public would, as always, be free to submit their own proposed regulatory text through the customary comment process. But a wiki like this might yield thoughtful results from collective thinking on all

sides of the question, especially if different clusters could experiment by collaborating on a single version. No one would need to claim the product, but the result could certainly be interesting for the agency to see. If an agency were to experiment with a wiki like this, I would also expect the agency to address the comment and record issues, e.g., by stating plainly that none of the wiki material entered or deleted before the precise close of the comment period constitutes a comment for APA purposes; nor will the agency include any of that material in its rulemaking docket or administrative record. Only the final product "counts," the agency would say.

III. The Jitters

This brings me to my jitters. As the authors recognize, squeezing public videos and other visuals into the rulemaking process can create logistical complications. With those complications come legal risk—and jitters. Harvesting factual information and comments from videos and audio can be difficult and resource-intensive for agency personnel, litigants, and the courts. In addition, the authors fairly worry about "link rot" and other practical problems that could impair the permanence of the administrative record. Similar logistical issues hover around text-based feedback generated on social media platforms. Even though these public remarks could more easily be preserved for record purposes, they pose significant problems for the agency as it begins to consider and respond to rulemaking comments. As I noted above, Regulations.gov provides a transparent and tidy platform for both stakeholders and agency staff to comprehend the universe of public comment. But comment strings on social media may be neither. First, there's the matter of transparency. Although certainly public, the comment strings may originate from literally dozens of different platforms, some sponsored by the agency and others not. People reacting to an agency proposal might respond to an agency message, or they might (by choice or accident) express their views as part of a stakeholder-sponsored message. In contrast to Regulations.gov, which clearly describes the agency as the primary audience for comments logged there, the public might reasonably become confused about the destination of its comments. And because of the diversity of platforms, the public might never see the full spectrum of public views on the topic.

My second concern is tidiness. Even if an agency is able to disentangle all the social media strings and tug only on its own, what bits are actually the speaker's final comment? Ordinarily, individuals or entities submitting views to the agency bundle all their information, analyses and opinions into a single document that they label as a comment and submit to Regulations.gov. That document typically reflects their thoughtful deliberations on the issues relevant to them. And—to maximize the amount of time available to collect information, deliberate, and write—commenters typically submit their comments at the very end of the comment period. Contrast this to the give and take of feedback on an agency-sponsored social media site. On these platforms, speakers may post views in short bursts and soon begin to dialogue with each other, not the agency. Even assuming those conversations stay within the scope of the proposed rule, they typically reflect a sequence of thought by the speaker, not a final judgment. What then, is the speaker's "comment" for APA purposes: the last remark or the entire possibly self-contradicting or evolving chain? Where in the sequence did the speaker express a last thought on an issue before moving on to another? How can the agency or another member of the public find it? And what is the agency's APA obligation to respond to those comments? Can an agency's rule fall on procedural grounds for failing to account for each post? And if an agency chooses not to monitor the social media conversation—having merely launched it for educational purposes and to promote dialogue among stakeholders—has it even "considered" those comments for record purposes?

Notwithstanding my jitters, I support the idea of agencies and the public using visuals in rulemaking to expand the audience and enrich the conversation. In their article, Profs. Porter and Watts not only contribute new ideas and analysis to scholarly debate, but they also make sensible recommendations to agency attorneys like me. And, like the authors, I highly value Regulations.gov, which provides a transparent and tidy way for agencies and the public to communicate with each other during the rulemaking process. Profs. Porter and Watts envision a future that avidly embraces both Regulations.gov and visual rulemaking. I do too. We just need signposts to help the public distinguish between the two.