



NEDC’S QUICK OVERVIEW OF ADMINISTRATIVE LAW AND GUIDE TO PERMIT COMMENTING

Protecting the Environment through Public Participation in Agency Decisionmaking

Much of the work that students perform for NEDC involves some interaction with a government agency, for instance the Oregon Department of Environmental Quality (DEQ), the U.S. Environmental Protection Agency (EPA) or the Bureau of Land Management (BLM). The American system of environmental regulation makes an effort to involve the public as much as possible (in theory, at least), and this gives us the ability to act as agency “watchdogs” to ensure that our environmental laws are being implemented and enforced appropriately.

It is quite possible that the first project you tackle for NEDC will be to research and draft a set of “comments” – essentially a detailed letter to an agency concerning an upcoming agency action (i.e., the issuance of a discharge permit under the Clean Water Act, or the sale of timber from Forest Service land) in which you try to point out ways that the agency is not being protective enough of our natural resources. (You will quickly learn that this is usually the case!). This guide will give you an overview of how the agency decision-making process works, and why public participation is so important.

This guide will hopefully bring you up to speed on this critical function of NEDC. Because your first project or set of comments will probably feel very daunting, some background information may help alleviate your anxiety. Remember, you don’t have to read this whole thing! NEDC is a volunteer organization, and we know you already have many competing obligations in law school. You should never feel obligated to tackle a project for NEDC if you feel you just don’t have the time. That said, it is important to do a good job on your comments or other projects because you will be representing the organization. As always, if you feel you don’t have enough guidance or information, don’t hesitate to ask! Thanks for your participation – you are making a difference to the environment of the Pacific Northwest, and adding important practical knowledge to your legal education.

The NEDC Staff
September, 2006

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II. NOTICE AND COMMENT RULEMAKING

A. *What is "Notice and Comment Rulemaking"?*

"Rulemaking" refers to the process by which administrative agencies establish legal standards of conduct, or "rules," of general applicability. Although administrative rules have been given different names, such as "regulations" in the United States and "executive orders" in some European countries, this paper will refer to them as "rules" throughout for the sake of clarity. Agencies develop rules primarily to refine and implement the goals expressed in statutes. Because the legislature has neither the time nor expertise to consider in detail how a statute will be implemented, it delegates this job to the agency or agencies responsible for the areas of law covered by the statute. The development of rules is a principal means by which agencies carry out the task of implementing statutes.

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"Notice and comment rulemaking" is a particular method of developing rules. It requires the agency to notify the public of a proposed rule, and to consider written comments submitted by the public before adopting the rule. Notice and comment rulemaking has become the most common method of enacting rules in the United States. The following discussion outlines the process of notice and comment rulemaking and identifies additional opportunities for public input into the rulemaking process. Although the main focus will be on rulemaking by environmental agencies, similar procedures apply to most other administrative agencies engaged in rulemaking.

The main sources for this discussion are the United States Administrative Procedure Act ("APA") and the Model State Administrative Procedure Act ("MSAPA" or "Model Act"). The APA, enacted in 1946, represents the first comprehensive codification of administrative procedure in the United States. It governs, among other things, the process of "notice and comment" rulemaking applicable to federal agencies. The MSAPA, first approved in 1946 and most recently revised in 1981, sets forth a model code of administrative procedure for state governments. Currently, more than half of the states have adopted administrative procedure laws that are based in whole or in part on the MSAPA. Relevant portions of the APA and the MSAPA are reprinted at the end of this paper in Appendices A and B respectively.

B. *Participation in the Formative Stages of Rulemaking.*

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3. *Advance Public Notice of Planned Rulemaking.* In addition, an agency may notify the public that it is considering a particular subject matter for rulemaking, and accept comments from interested parties. This method for soliciting public input occurs *before* the agency has drafted a specific rule, and thus precedes the usual "notice and comment" process that follows issuance of a draft rule. If the agency uses this procedure, it should specify as precisely as possible the subject matter under consideration, the reasons why a new rule is called for, the options or approaches the agency is considering, as well as the time, place, and manner of public comments.

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5. *Consultation with Affected Parties.* An agency may also consult with interested parties during the formulation and drafting of a rule. Consultation is a less formal procedure than negotiated rulemaking, and is intended to gather input from a number of sources rather than to facilitate an agreement among affected parties concerning the rule's actual text. Consultation may be accomplished by bringing all parties to the same table, or it may be sequential. In sequential consultation, the agency contacts the parties one at a time, informs them of proposed options for a rule, and allows them to respond and to suggest alternatives.

Consultation enables the agency to consider a wide range of viewpoints in a short period of time. Whenever an agency consults with an outside party, however, it should disclose this fact in the public rulemaking record. Because the consultation process offers agencies an efficient means to obtain input from a variety of sources, EPA is planning to use the process extensively in developing new rules required by the Clean Air Act Amendments of 1990.

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D. *Public Notice of a Proposed Rule.*

Once the agency has drafted a proposed rule, the public should be given notice and an opportunity to respond before the rule takes its final form. This is true even if citizens have already participated in the formulation of a draft rule. Notice is even more important if the agency has developed a draft rule without formal public input.

Public notice of a proposed rule should generally accomplish two objectives. First, it should provide complete and comprehensible information about the rule and the process for submitting comments. Notice of any proposed rule should enable non-experts to understand how the rule might affect them, and how they may communicate their views or objections to the agency. Second, notice should be published in a manner that reaches the widest possible audience. Public participation in rulemaking is a meaningless exercise unless citizens are made aware of a proposed rule at a time when they can still affect its outcome.

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2. *Publication of Notice.* Publication of the proposed rule should be designed to reach a wide public audience. Unless potentially interested parties are made aware of a proposed rule, they will be unable to express their views on it, and public participation in the rulemaking will be effectively defeated.

At a minimum, notice of a proposed rule should be published in an official government publication, such as an administrative bulletin. In the United States, proposed rules of federal agencies are published daily in the *Federal Register*, the official government publication for this purpose. To be effective, publications like the *Federal Register* must be reliable, timely, and accessible. At the very least, the publication should be available in public libraries and government offices.

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E. *Freedom of Information Laws.*

Freedom of Information laws can play an important role in enabling citizens to participate effectively in rulemaking. In the United States, the federal Freedom of Information Act ("FOIA") requires that "each agency, upon any request for records which (A) reasonably describes such records and (B) 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." Through FOIA, citizens can obtain agency data, analyze the data, and present new insights to the agency. Disclosure of certain documents, such as those which would clearly invade another person's privacy, is prohibited. While a full discussion of FOIA's disclosure requirements and exemptions is beyond the scope of this paper, the text of FOIA, 5 U.S.C. § 552, is reprinted in Appendix D.

F. *Public Comments and Hearings.*

In addition to providing adequate notice of a proposed rule and allowing access to certain documents, the agency should establish procedures for structuring subsequent public input. The submission of written comments is by far the most common form of public participation in the United States. In some cases, however, the agency may also conduct a public hearing about a rule. Whatever means are used to structure public input, there will be questions concerning the timing, form, and consideration of the information received.

1. *The Timing and Form of Written Comments.* The agency should allow sufficient time to receive and consider public responses before it adopts the final version of a rule. The length of this period will usually depend on the complexity of the rule and the interest it is likely to generate. With some rules, the agency will receive little, if any, public response. With others it may be flooded with comments from a wide range of interested parties. In the United States, comment periods are seldom shorter than 30 days. See MSAPA § 3-103(a). This period may be lengthened where appropriate, and it is very

common to extend the comment period for complex rules. Although comments should be submitted in writing, it is probably unnecessary to require the use of a particular format. In the United States, most comments on proposed rules are written in the form of a letter to the agency.

Professionally staffed non-governmental organizations often play an important role in preparing comments on behalf of citizens. Comments are most effective when they reflect a technical expertise in the subject area and are persuasively written. While affected sectors of industry in the U.S. typically hire legal and scientific experts to prepare comments on proposed rules, ordinary citizens may lack the technical and financial resources to prepare effective comments. This is particularly problematic in environmental regulation, where complex rules are the norm. Where citizen organizations are able to draw upon the technical skills of their members or are able to hire expert consultants, their comments can help ensure that environmental concerns are carefully weighed by rulemaking agencies.

2. *The Timing and Format of Public Hearings.* In most cases, the submission of written comments serves the interests of both the public and the agency. Written comments are a convenient means for interested parties to communicate information and arguments to the agency, and written communication allows the agency to review and digest submissions in an efficient manner. But because some individuals may find it difficult to express their views persuasively in writing, acceptance of written submissions may be supplemented by opportunities for oral communication with the agency, such as public meetings with agency personnel.

If the level of interest is sufficiently high, or for any other reason, the agency may choose to hold one or more public hearings about a proposed rule. The hearings will allow interested members of the public to deliver oral testimony about the rule, and to hear the testimony of others. Although public hearings are not required by the APA, many federal agencies, including the EPA, often decide to conduct them.

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3. *Consideration of Comments.* Public participation in rulemaking will have no effect unless the agency actually reads and considers the comments it receives. To ensure that agencies give careful consideration to comments, the government should utilize both legal and institutional safeguards. For example, agencies may be required by law to consider fully all submissions about proposed rules, and to document that consideration in writing. They may also be prohibited from adopting a final rule until the time for receiving comments has expired. See MSAPA § 3-106. Institutionally, agencies may implement procedures to ensure that the appropriate personnel review the comments, and that these personnel consider the content of the submissions. To make the review process more efficient, staff members can organize similar categories of comments, or summarize comments where appropriate.

G. *Adoption of Final Rule.*

After the agency has considered comments by interested parties and has decided on the final version of a rule, it should publish the final rule prior to the rule's effective date. If the final rule has changed substantially from the proposed version, a second round of notice and comment may be helpful. In that situation, the rule would be treated as a new proposal requiring a new period of public consideration and comment. The Model Act accomplishes this by prohibiting the agency from adopting a final rule that is "substantially different" from the proposed rule. MSAPA § 3-107(a). Whether the final rule is "substantially different" from the proposed version depends on the extent to which affected parties would have understood that the proposed rule would affect their interests, and the extent to which both the subject matter and the effects of the two versions differ. *Id.* § 3-107(b).

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III. ENVIRONMENTAL PERMITTING

The process of issuing environmental permits, like the process of developing administrative rules, can benefit from procedures designed to encourage and protect public participation. This section of the paper briefly reviews the purposes and uses of environmental permits, and then discusses in greater detail opportunities for citizen involvement in the permitting process. Unlike the previous section, which described rulemaking procedures applicable to any administrative agency, this section is concerned with environmental regulation only. Although some the recommendations may be applied, by analogy, to non-environmental permits, they are intended to be used primarily in the context of environmental permitting.

A. *What is an Environmental Permit?*

An environmental permit is a legal document that specifies the conditions under which a regulated firm may operate, the types and amounts of pollutants it may discharge, and requirements as to reporting, recordkeeping, operation, maintenance, and all aspects of monitoring and inspection, including frequency, methodology, and sampling locations.

A permit is not simply a license to pollute. In addition to providing specific limits on the pollution a firm may discharge, it can specify a range of other requirements concerning the firm's operation, including the disclosure of important technical (and even financial) information about the firm and its discharges or emissions.

The permit is perhaps the most powerful and effective enforcement tool available to environmental regulators in the United States. Using a permitting system, the agency can determine not only how the source may operate, but whether it may operate at all. The possibility of losing its permit gives a company a powerful incentive to comply with its environmental obligations. Moreover, permits provide an opportunity for the agency to anticipate enforcement problems and solve them creatively in advance. The agency can

write a variety of requirements into a permit, such as requirements for notifying employees of pollution discharges at the plant site, requirements for spill prevention and response plans, requirements for extra inventory or supplies, and requirements for notifying the government or for ceasing operations if certain events take place.

In light of the many advantages of permits, environmental agencies in the United States, including the U.S. EPA, use permits to regulate a number of environmental problems, including air emissions, *see* Clean Air Act Amendments of 1990, Title V, §§ 501-507; the discharge of water pollution, *see* Federal Water Pollution Control Act, Subchapter IV, 33 U.S.C. §§ 1341-1345; the operation of mines, *see* Surface Mining Control and Reclamation Act, Subchapter V, 30 U.S.C. §§ 1251-1279; and the treatment, storage, and disposal of hazardous wastes, *see* Resource Recovery and Conservation Act, 42 U.S.C. § 6925. EPA has issued a set of rules for the issuance, modification, and revocation of permits under some of these programs. These rules, which include procedures for public participation in the permitting process, are reprinted in Appendix E.

The public can play a significant role in the environmental permitting process. In some ways, the public's involvement in permitting can bear similarities to its involvement in notice and comment rulemaking. For example, there typically are procedures for notifying the public of a permit application, and for allowing opportunities for public comment and opposition. However, the differences between permitting and rulemaking sometimes dictate different procedures for guaranteeing public participation. These procedures are discussed below.

B. *Participation During the Early Stages of Permitting.*

When an environmental permitting program is first introduced, all facilities within the ambit of the program will be required to obtain permits. In the early stages of a new *permitting program*, the public can perform a valuable role in helping to identify companies that continue to emit pollution without permits. In some states, for example, members of the public have volunteered to walk along rivers and streams looking for discharges of water pollution. By later checking their notes against the agency's list of permitted facilities, these "stream walkers" can help ensure that every discharger has acquired a permit.

After all existing facilities have obtained permits, only new facilities need to apply for new permits, while existing facilities must renew their permits at regular intervals established in the permitting law (often every five years). Between these intervals, the agency may reopen permits for cause, such as alterations in the facility's operations, violations of the permit requirements, or the application of more stringent requirements by law or regulation. *See* 40 C.F.R. § 122.62.

Generally, public interest will be greatest when a new facility seeks a permit. If, however, a community has experienced problems with a permitted facility, or new pollution control standards have become applicable, the facility's application for renewal may also generate a great deal of public attention. In either case, there should be opportunities for

the public to submit comments or participate in public hearings prior to the decision to grant or deny a company's application.

When a government agency receives an application for a permit, it should first confirm that all necessary information has been provided. Generally, the applicant should indicate, among other things, the name, location, and mailing address of the facility; the names, addresses, and telephone numbers of the operator and owner; the nature of the facility's business; the principal products and services to be provided; the manufacturing processes to be used; the location, amount, variability, and chemical composition of discharges or releases from the facility; whether discharges are intermittent or continuous; the technology planned or in place to reduce pollution; all spill prevention and response plans; a list of environmental permits applied for or received; whether the operator or owner operates any other facilities subject to environmental permits and whether these permits have been violated. Verifying the completeness of an application is a task that can usually be done by the staff of the agency without public involvement. Use of pre-printed application forms by the agency is recommended to specify the information necessary.

C. *Public Notice of Permit Application.*

Once the agency has received a completed application for a permit, it may decide either tentatively to deny the application or to begin preparing a draft permit. 40 C.F.R. § 124.6. In either case, the agency should notify the public of its action as soon as possible, and provide an opportunity for public comment. 40 C.F.R. § 124.10. It may be advantageous to provide notice and opportunity for comment before the agency actually begins to draft the permit. This will ensure that the permit writers review public comments before drafting the permit language. On the other hand, notice may be delayed until after a draft permit has been prepared. This will allow the public to focus their comments on actual provisions of the proposed permit.

1. *Contents of Notice.* Regardless of whether a draft permit has been prepared and included in the notice, the notice should provide sufficient information to apprise the public of the facts necessary to the permit decision. It should indicate the name and address of the facility, and describe the business and industrial processes that will be carried out there. It should also describe the nature, quantity, and frequency of the discharges from the facility, and any anticipated environmental effects from these discharges.

Depending on the facility and pollutant involved, the notice may provide additional information to assist the public in evaluating the likely impact of the proposed activity. For example, if a plant is planning to release pollutants into surface waters, the notice could identify the location of all discharge points at the plant, the name of the receiving waters, any water quality standards applicable to the waters, and whether the waters currently meet those standards. As another example, the notice could indicate the type, amount, and location of any hazardous raw materials or wastes on site. The notice should also state whether an environmental impact assessment has been prepared.

Because permit applications and draft permits are technical in nature, they may be difficult for non-experts to understand. Thus the permitting agency should be required to prepare a less technical summary of the proposed permit requirements. Under United States permitting laws, these non-technical documents are called "fact sheets." See 40 C.F.R. § 124.8. They describe succinctly the discharges from the facility, the proposed limitations on those discharges, and requirements for compliance and monitoring. They also include an explanation of the rationale used in developing the proposed discharge limitations. Fact sheets are required to be made available to the public, and are mailed to anyone who requests a copy. They provide, in less technical form, much of the information upon which interested citizens base their comments.

Notice of a proposed permit typically instructs members of the public about how they can participate in subsequent stages of the permitting process. The notice would include a description of the procedures for submitting comments on the permit, and the procedures for requesting a public hearing. The names and addresses of agency personnel who are responsible for the permit would also be provided, along with directions about how interested parties may obtain copies of the permit application, the fact sheet, and other relevant documents.

2. *Publication of Notice.* As with rulemaking, public notice of a proposed permit should be designed to reach the people who will be affected by the action. But whereas rules generally apply to entire industries and other categories of polluters, most permits apply only to a particular company or facility. Thus permits often affect fewer citizens than do rules (although water and air pollution from an individual facility can sometimes travel great distances), but these people will have a great deal at stake in the final decision. The community living in the vicinity of a plant will be very concerned about the quality of its immediate environment. Thus it is important to ensure that the people who may be most affected by a permitting decision receive the most complete notification possible.

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Permitting laws in the United States require agencies to maintain lists of all interested persons and organizations in a region, and to mail to these people notices of the proposed permit. See 40 C.F.R. § 124.10(c)(1)(ix). These interested parties might include local civic associations, local chapters of environmental organizations, trade union representatives, recreational associations, and other groups likely to be affected by the proposed activity. Mailings of this nature, combined with official government bulletins and notices in local newspapers and radio broadcasts, are used to alert interested members of the public of a pending permit application.

D. *Opportunities for Public Input.*

1. *Comments.* Interested members of the public should be given a sufficient time period in which to submit comments on a proposed permit. United States laws commonly provide a 30-day comment period, with 45 days required in some cases. See 40 C.F.R. § 124.10(b). These periods are usually taken as minimums, however, and the comment period can be lengthened if necessary to allow all interested parties to express their views.

Although draft permits contain technical information that may be difficult for non-experts to understand, even with the aid of a fact sheet, informed citizens' groups can perform a useful function in reviewing the actual draft of the permit. The public should therefore have access to the permit application filed by the source as well as to any environmental impact assessments that have been performed. By comparing the information in these documents with the limitations set forth in the draft permit, citizens' groups can point out possible omissions, inaccuracies, or inadequacies in the permit. These groups can also verify that the draft permit provides both daily and monthly limitations for the discharge of named pollutants, and can ensure that the limitations reflect the application of the best available technology. While these tasks will be performed by the government agency, citizens' groups can provide a useful check on the agency's work.

As with public comments in the rulemaking context, comments on permit applications can be greatly assisted by non-governmental organizations having special knowledge and expertise in environmental matters. Although individual citizens can assess many features of permit applications, groups of concerned citizens are in a better position to deal with the more technical issues of the permit. Indeed, comments submitted by well-informed non-governmental organizations may prove to be extremely influential in the agency's ultimate decision to issue or deny a permit. For these reasons, encouraging the growth of professionally staffed non-governmental organizations the CSFR, Hungary and Poland can be an important step toward developing more responsive environmental protection regimes in these countries.

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E. *Issuance of Final Permit.*

After the period for public comments and hearings has ended, the agency will either grant or deny the application for a permit. The permit does not go into effect until after a waiting period (e.g., 30 days) has elapsed from the date of its publication in final form. See 40 C.F.R. § 124.15(b). This allows time for minor corrections, and for aggrieved parties to initiate administrative appeals within the agency. In the notice of the final permit, the agency is generally required to summarize the comments received, review testimony presented at any public hearings, and explain why it did or did not alter the permit as a result of these comments and testimony.

* * *

G. *Public Involvement in Monitoring Permitted and Unpermitted Facilities.*

Monitoring discharges from permitted facilities can be very important, especially in the early months of a facility's operations. The permit can require the facility to monitor and report its own discharges, and these reports are typically made available to the public. Water pollution laws in the United States require companies to submit "discharge monitoring reports" (DMRs) at regular intervals, usually every month. See 33 U.S.C. § 1318; 40 C.F.R. § 122.48. Similar reports are required for acid rain emissions under section 412 of the Clean Air Act Amendments of 1990. Industry self-monitoring is considered more fully in a separate Environmental Law Institute working paper on Industry Self-Monitoring and Community Right-to-Know Laws.

Self-monitoring by industry does not *eliminate* government enforcement, but supplements it. The authorized government agency bears continued responsibility for inspecting facilities to ensure the accuracy of self-monitoring systems and to guard against falsification of data. The public can also play an important role. By reviewing DMRs, citizens can determine whether the plant has exceeded any of the discharge limitations of its permit. If violations are discovered, citizens can inform the agency or report chronic violators to the local media. The threat of adverse publicity is often a significant motivator for companies concerned with their public image and with the marketability of their products. Finally, citizens can help to identify unpermitted sources of pollution, and can report apparent permit violations based on observations of steaming water, bad odors, or dead fish.

IV. CONCLUSION

Rulemaking and permitting are two of the most important areas for public participation in environmental regulation. Notice and comment rulemaking provides an effective and relatively inexpensive way to ensure the public's ongoing participation in the administrative process. According to a leading professor of administrative law, notice and comment rulemaking is "one of the greatest inventions of modern government." K. Davis, *Administrative Law* 241 (1977).

The following is a selection from *Tips for Effective Public Commenting*, a publication of NOAA Fisheries (the full document is available at <http://www.fakr.noaa.gov/prules/effectivecomments.pdf>)

Although written specifically to advise the public on how to comment on actions taken by NOAA Fisheries, most of the pointers here are equally valid when writing to other government agencies as well.

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Preparation and Organization

- Begin your work well before the comment deadline.
- Read the proposed rule.
- Make sure you understand the applicable laws and regulations and exactly what they cover. Contact the agency expert if you need additional information.
- Ensure that you fully understand each issue being discussed so that your comments are fully relevant.
- Underline or highlight the issues that you wish to respond to.
- Outline your thoughts on a piece of paper before beginning to write your comment.

Format

- Comments should be typed, legible, and easy to read.
- Comments should be submitted on 8 1/2 by 11-inch paper unless submitted electronically.
- Mailed comments should be sent to the appropriate address, e-mail, or fax number indicated in the ADDRESSES section of the proposed rule.
- Comments may also be submitted by web form at the Federal Rulemaking Portal: www.regulations.gov. Follow the instructions at that site for submitting comments.
- Submissions should include the comment submitter's name, address, and phone number. Anonymous submissions will not be considered.
- Comments must be delivered, postmarked, or dated, by the deadline indicated in the DATES section of the proposed rule.
- Refer to the docket number, program title, or use the document identifier in the ADDRESSES section for electronic comments listed in the Federal Register notice in a subject line or in the first sentence of the comment.

Content and Style

- Clearly identify the issues in the notice you are commenting on.
- Confine comments to the Federal Register notice you are referencing.
 - Keep comments targeted to the issues within the scope of the proposed rule.
 - Avoid addressing different rules or policies in your comment.
- If you are commenting on a particular word, phrase, or sentence please provide the page number, column, and paragraph citation of the particular issue as indicated in the Federal Register notice
- Clearly indicate if you are for or against the proposed rule or some part of it, and why.
- Agency reviewers look for good science and reasoning in the comments they evaluate.
 - Where available, use data to support your position.
- If you disagree with a proposed action, suggest an alternative and how the alternative might meet the same objective.
- If a proposed rule raises many issues, do not feel obligated to comment on every one.
 - Select those issues that you are most concerned about, that affect you the most, and that you understand the best.

- If you are commenting in your capacity as a professional (scientist, attorney, fisherman, businessman, etc.), say so. To the extent appropriate and possible, briefly identify your credentials and experience that may distinguish your comments from others.
- Clearly indicate if you are commenting as an official representative or spokesperson for an organization. Provide a brief overview of your organization, its size, and its interest in the matter.
- To the extent possible, personalize your comments. Give real-life examples of how the proposed rule would impact you negatively or positively. If appropriate, indicate how failures to comply with the proposed regulation may adversely affect you.
- Research opposing views from your own, and take note of any specific opinions or facts that you disagree with. In your own comments, provide detailed information to counter information you perceive to be incorrect from these other sources.
- Include copies of articles or provide a list of references that support the comments. Only relevant material should be submitted.
- [Federal agencies] encourage comment submitters to be courteous, professional, and respectful.
- Although [federal agencies] appreciate and willingly receive any comments, constructive comments, whether negative or positive, are best.
- Refrain from using politically-charged rhetoric.
- A rant may make you feel better, but it will not help the agency resolve any problems.

Review

- Read through what you've written before submitting your comments. Sometimes it helps to wait a day or two before reviewing your comments.
- Ask someone you know who can quickly give you objective feedback to review your comments before you submit them.

Form Letters

Organizations often encourage their members to submit form letters designed to address issues common to their membership. Organizations including industry associations, labor unions, and conservation groups have used form letters to voice their opposition or support of a proposed rule. Many in the public mistakenly believe that their submitted form letter constitutes a "vote" regarding the issues concerning them. While public support or opposition may help guide important public policies, [federal agencies] make determinations for a proposed action based on sound reasoning and scientific evidence, not a majority of votes. A single, well-reasoned comment may carry more weight than a thousand irrational and poorly researched form letters.

Moreover, large volumes of form letters impose significant administrative costs on the agency and provide little value to the administrative process. When [federal agencies] receive large volumes of form letters, each letter must be carefully reviewed to ensure that any additional comments added to the form letter are considered, which requires substantial time and staff resources. Additionally, large volumes of form letters can impair processing equipment by jamming fax machines, overloading email accounts, and preventing other comments from being received. This can create a substantial drain on the agency's resources without providing any real benefit to the submitting organization or to the general public. However, [federal agencies] recognize an organization's desire to express public support or opposition to a proposed action. Therefore, [federal agencies] recommend that if an organization wishes to indicate widespread support or opposition by their membership or the public, they submit a single copy of the comments contained in their form letter along with an attached list of signatures from their membership or other interested parties. Those organizations should continue to encourage their members to submit their own additional comments if they wish to do so.

What happens to comments after they are submitted?

All proposed and final rules issued by [federal agencies] are published in the *Federal Register*, issued Monday through Friday. Pending matters open to public comment often are reported by the news media and also can be found on [federal agencies' websites], and the Federal e-rulemaking portal, www.regulations.gov. When [federal agencies] receive a comment letter, it is logged, numbered, and placed in a file for that docket. Regulatory specialists then summarize each independent comment within the comment letter and develop responses to those comments. After careful consideration of the comments and concerns on a proposed rule, [federal agencies] will usually summarize all comments received, respond to them in a final rule if approved, and publish a final rule including those comments and responses, unless a decision is made that the proposal should not be finalized.

Additional Questions

What is a proposed rule notice?

A proposed rule is a regulation published by an executive-branch department or administrative agency in the *Federal Register* for review and public comment prior to its adoption. A proposed rule describes a change to the regulations the agency feels would benefit the resource and the public and invites public comment on the proposed change. Proposed rules are not law.

What is a Notice of Availability?

An NOA is a notice published in the *Federal Register* that announces the availability of an analysis document for public comment. The NOA notifies the public of the availability of environmental documents required under the National Environmental Policy Act (NEPA) so as to inform those persons and agencies who may be interested or affected. The NOA is distinct from a proposed rule notice and may be commented on separately.

Why should I comment on a proposed rule or NOA?

Public comments give the agency valuable insight for determining if a potential effect from a proposed rule or NOA will be positive or negative from a public perspective. Public comments may also help the agency identify issues it might not have initially considered. Public comments often help direct the agency's prospective policy on a given issue.

Do my comments have any affect on the Federal rulemaking process?

Absolutely! Public input is imperative to helping the agencies make prudent, well-reasoned decisions. More importantly, public input is imperative to maintaining democratic principles in determining the wise use of publicly-owned resources.

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[NOTE: The section above was written by NOAA Fisheries, not NEDC.]

The following helpful checklist on writing comments is modified from the Table of Contents of the book *The Art of Commenting: How to Influence Environmental Decisionmaking with Effective Comments* by Elizabeth D. Mullin, published by the Environmental Law Institute, 2000.
(this book is available in the Boley Law Library)

I) Preparing to Comment

- *Step One: Set the Stage*
 - Identify Your Contact
 - Plan Ahead
 - Coordinate Your Comments With Others
- *Step Two: Identify and Collect Background Material*
 - Statutes
 - Regulations
 - Agency Materials and Guidance
 - Sample Documents for Use as Examples
 - Substantive Materials and Information
- *Step Three: Review the Material*
- *Step Four: Make a Checklist*

II) Reviewing the Document.

- *Step One: Review the Table of Contents and Skim the Document*
- *Step Two: Read the Document*
 - Check the Document Against Your Checklist
 - Check for Substantive Errors or Omissions
 - Spot Check for Internal Accuracy.
 - Check for Consistency With Other Information You Have
- *Step Three: Review Your Notes for Major Problems and Themes*

III) Defining Your Objectives

IV) Writing the Comments

- *Cover Letter*
 - Tip One: Clearly Identify the Document Reviewed
 - Tip Two: Establish Your Authority to Comment
 - Tip Three: Include Any Pertinent Commenting History
 - Tip Four: Identify Attachments, If Any
 - Tip Five: For Lengthy Comments, Briefly
- *Summarize Your Major Concerns*
- *Organization and Format.*
 - Tip One: Use Headings
 - Tip Two: Prepare General Comments
 - Tip Three: Write Page-by-Page Comments.
 - Tip Four: Make Your Comments Easy to Read
- *Style*
 - Tip One: Use Topic Sentences
 - Tip Two: Use Short Sentences (50 words or fewer)
 - Tip Three: Use the Active Voice.
 - Tip Four: Do Not Ask Questions
 - Tip Five: Be Respectful

V) The Art of Commenting

- *Pounding the Law*
- *Pounding the Facts*
- *Pounding the Table*
- *What to Say*
 - Tip One: Make the Strongest Possible Points
 - Tip Two: Suggest Specific Language When Possible and Appropriate
 - Tip Three: Indicate What You Support as Well as What You Disagree With.
 - Tip Four: Give Specific Examples to Illustrate Concerns
 - Tip Five: Provide Supplemental Information, If Needed
 - Tip Six: Offer Helpful Solutions

VI) What Next?

- *Comments on Internal Documents*
- *Public Comment on Agency Documents*
 - Option One: Review Other People's Comments
 - Option Two: Submit Additional Comments
 - Option Three: Speak at Any Public Meeting or Hearing
 - Option Four: Rally Support for Your Position
 - Option Five: Lobby Your Buddy
 - Option Six: Meet With the Decisionmaker
 - Option Seven: Involve a Legislator
 - Option Eight: Go to the Press

ADDITIONAL RESOURCES:

- Take Administrative Law (required for the Environment and Natural Resources certificate)
- The book referenced above (The Art of Commenting) is available in the law library – call number KF3775.Z9 M85 2000. It's great!
- Memorandum, EFFECTIVE PUBLIC PARTICIPATION UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT, Prepared by the US Department of Energy, 1998. Available online at <http://www.eh.doe.gov/nepa/tools/guidance/pubpart2.html>. This lengthy memo is intended to guide DOE regulators as to the legal and policy requirements governing DOE decisions that involve NEPA. Has some useful information, though.
- Wikipedia: *Rulemaking*, available at (<http://en.wikipedia.org/wiki/Rulemaking>). No kidding, its pretty clear and concise. It also has good entries for the Administrative Procedure Act and most federal agencies.
- Information on the EPA's Public Involvement Policy is available online: (<http://www.epa.gov/publicinvolvement/policy2003/index.htm>)
- NEDC keeps all of our comments, letters etc. on our network server. There's a pretty good chance we have one on file that is similar to the one you are drafting (for instance, we have dozens of past comments on Clean Water Act discharge permits, aka NPDES permits). Just ask the law clerk to dig some out for you.

- Ask somebody for help: Project Group Coordinator, Law Clerk, Student Director, Executive Director, a 2L or 3L that has written comments in the past.