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CRE's Proposed Interactive Public Dockets—Tilting the Regulatory Process Further in Industry's Favor

by James Goodwin

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Back in the 1970s, when many of the great environmental, health, and safety statutes were adopted, public interest groups shared an overwhelming optimism that greater public participation held the key to maintaining—and even expanding upon—their successes. All they needed was a seat at the table where decisions are made, and their ideas would ultimately prevail. At first, they were right—public interest groups were able to advance their cause through participation in the regulatory process. But before long, regulated industry discovered that they could beat public interest groups at their own game by using their superior resources. The number of "public input" tables grew, and each increasingly became filled with more and more industry groups, while the seats for public interest groups often go empty. If the public interest groups are able to be present, they are often drowned out.

Once a dream, public participation in the regulatory process has too often become a nightmare for public interest groups. A number of different studies of the regulatory system confirm the extent to which regulated industry

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is dominating participation in the regulatory process, including for rules aimed at environmental, health, and safety issues. A 2006 study of 40 rules promulgated by four agencies (the Occupational Safety and Health Administration, the Employment Standards Administration, the Federal Railroad Administration, and the Federal Highway Administration) issued between 1994 and 2001 found that of the total number of comments, business interest filed 57 percent, governmental interests filed 19 percent, and non-business, nongovernmental interests submitted 22 percent. Public interest group comments constituted only six percent of the total comments submitted by non-business, nongovernmental interests. Another study, by Marissa Martino Golden, examined comments filed on eleven proposed regulations at three agencies (the Environmental Protection Agency, the National Highway Traffic Safety Administration, and the Department of Housing and Urban Development) and found that corporations, public utilities, and trade associations filed between 66.7 and 100 percent of the comments concerning these rules, and neither the EPA nor the NHTSA received any comments from public interest groups concerning five of the eight rules.

The Center for Regulatory Effectiveness (CRE) —an advocacy group with close ties to industry —recently launched a pilot project demonstrating interactive public dockets (IPDs), a proposed change to the regulatory process that would only exacerbate the problems caused by industry's dominance of the regulatory process.

IPDs are ostensibly intended to enhance the public's ability to participate in the regulatory process via the Internet at regulations.gov. In essence, an IPD would transform the traditional online public docket into something more like an online discussion board. As in a traditional electronic docket, all of the public comments would be listed in chronological order. The difference is that IPDs would present the individual comments more like posts on a blog, allowing participants to "comment" on previously submitted materials,

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much like someone could "comment" on an individual blog post. The author of the submitted materials could then respond. This would in theory allow for more immediate and seamless interaction among participants in the regulatory process. Moreover, this give-and-take would in theory be of some informational value to the agency undertaking the regulatory action.

The other big innovation of IPDs is that the participant interaction would continue after the official comment period for a given regulatory action has closed. The agency undertaking the regulatory action would be able take these post-deadline comments and responses into account as it goes about revising the regulatory action in response to the formal comments it received during the official comment period.

IPDs would in theory improve public participation in the regulatory process, but in reality its benefits would be limited to those members of the public with enough resources to take advantage of this opportunity (*i.e.*, industry), tilting the regulatory process further in their favor at the expense of public interest groups and individuals. Given that public interest groups and individuals face enough challenges in completing comments for regulatory actions, it seems unlikely that they would also have the capacity to read through dozens of other submitted materials, comment on them effectively, or respond effectively to comments made on their own submitted materials. In short, the extra participatory values offered by IPDs would be of limited benefit to public interest groups or the public. Regulated industry, however, could easily take advantage of the additional opportunities offered by IPDs, enabling them to increase their dominance over the regulatory process.

IPDs would also undermine the effectiveness of the regulatory system in a subtler way, by overloading agencies, which are already stretched thin, with information that would not substantially improve the rule under development, further ossifying the rulemaking

process. Some numbers might help put this problem in perspective. OSHA has only 68 people on its staff to write rules. Yet the task of writing rules has become enormous. For example, the docket for EPA's rule regulating coal ash already has 432 public comments (as of my last count), and the comment period isn't set to close until November 20. CPR Member Scholar Wendy Wagner has recently published an article on this phenomenon—which she refers to as "information capture"—in the *Duke Law Journal*. Wagner argues that this information overload is what has paralyzed the regulatory state:

> In the regulatory context, information capture refers to the excessive use of information and related information costs as a means of gaining control over regulatory decisionmaking in informal rulemakings. A continuous barrage of letters, telephone calls, meetings, follow-up memoranda, formal comments, post-rule comments, petitions for reconsideration, and notices of appeal from knowledgeable interest groups over the life cycle of a rulemaking can have a "machine-gun" effect on overstretched agency staff. The law does not permit the agency to shield itself from this flood of information and focus on developing its own expert conception of the project. Instead, the agency is required by law to "consider" all of the input received.

IPDs would undoubtedly make the problem of "information capture" even worse. The agencies would now have to consider and respond to all of the trifling little comments that regulated industries might make during and after the official comment period. It's not hard to imagine these IPD-based comments numbering in the thousands for more complex or controversial rules.

In short, the CRE's IPD proposal would be a recipe for greater regulatory delay and

increased industry influence over the regulatory process. The recent BP disaster illustrates the negative consequences when industry exerts too much influence over the agencies that are supposed to be regulating them. We should be wary of any changes to the regulatory system that would help to institutionalize these kinds of regulatory principles. Instead, we should be looking for changes to the regulatory system that will eliminate unnecessary delay and excessive industry influence. The CRE's IPD proposal ought to remain just a pilot project on the organization's website.

***James Goodwin**, Policy Analyst, Center for Progressive Reform. Bio.*

Read Comments *(1)* + Add a Comment

1 An interesting debate. CRE's proposal, CPR's response, and the comments appear to be based on inferences from experience and logic. They are not based on evidence, as far as I can see. I suggest testing CRE's proposal, perhaps under the auspices of the recently resurrected Administrative Conference of the United States. Let us see if the anticipated benefits (broader public input, transparency) and the anticipated problems (agency information overload, agency capture) actually happen. Maybe we can get a grant. Throwing my (limited) wisdom into the fray, my (limited) experience suggests that well-heeled commenters will always have an advantage in any rulemaking system. In a public comment system, they will have or be able to hire good, trusted technical experts and communicators. It's a major source of income, I suspect, for lobbyists. To the extent that less flush people wish to make their voices heard, they will need to aggregate their resources and exploit nonmonetary motivations to encourage their own trusted experts and communicators to speak up. As for the CRE proposal and CPR's objections, I suspect that quality will win out over quantity. Information from sources trusted by the decisionmakers will have the greatest impact. Regulation is not a democratic process, although it improves its authority and gains acceptance when it allows everyone to speak

her or his mind and appears to be a fair process. The public trust in regulators is positively related to regulators demonstrated expertise, demonstrated judgment, and demonstrated responsiveness to the concerns of those affected by their decisions. Information overload is simply a fact of life in the 21st Century. Regulators, like the rest of us, must learn to deal with it. See How To Drink From a Firehose Without Drowning, Or Online Current Awareness Made Less Difficult. I suspect that as for agency capture, there is little difference between CRE's proposal and the current system. As long as aggregate interests offer better preparation for regulatory positions and better standards of living for people leaving regulatory positions, there will be some degree of capture, even if only on a less than conscious level. Regulators are human. Where you stand depends on where you sit, or sat, or will sit. That most regulators try to be honest and objective, that they think they are being honest and objective, is an amazing tribute to American culture. Edward M. "Ted" McClure, Editor Administrative Law Prof Blog
-- *Ted McClure*
