

I am writing to express my concerns about the draft recommendation and report on this topic, which will come before the Assembly next month. As someone who engages in these sorts of contacts for a living, I have a particular interest in the topic. My experience (of more than three decades) with the rulemaking process also informs these concerns, however. My concerns are two-fold but related; one involves tone and other, more important, involves substance.

Tone

I was pleased to see the draft recommendation, on page 1, “emphasiz[e] that [ex parte] communications 'are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness.’” Of course, that quote comes from Home Box Office, which then proceeded to restrict such communications. I was surprised, though, to then read more discussion of that case and none of *Sierra Club v. Costle*, the far more important decision that effectively overruled it. It seems to me that a fairer characterization of the DC Circuit’s current view of the issue is captured by this rather powerful statement from the latter decision, by Judge Wald:

"Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs of the public from which their ultimate authority derives, and upon whom their commands must fall. . . . Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts can . . . spur the provision of information which the agency needs."

657 F.2d 298, 400-01 (D.C. Cir. 1981). I think this quote belongs in the recommendation, not just the report. I also think its omission helps explain how the draft recommendation came to include recommendation #9, discussed next.

Substance

The recommendation envisions that it could be a "best practice" (p.2, line 26) for agencies to prohibit their staff from having any advertent communications with outsiders after the comment period closes for a rulemaking:

9. Agencies should determine whether, and under what circumstances, ex parte communications made after the close of the comment period should be permitted and, if so, how they should be considered.

P.8, lines 143-45.

I think the Assembly should strongly resist this notion:

- As a matter of legal philosophy, at least, it’s hard to square a flat prohibition on post-NPRM contacts with Judge Wald’s ringing statement.

- The need for the kind of openness she describes does not go away once a comment period closes. Such periods often last a year or more, and a lot can change — or become better understood — during that time. Indeed, it's common that agencies and stakeholders, after working through the comments and living with the proposal, come to see problems — and solutions — that they had not previously anticipated. These solutions might avoid lawsuits over the final rule. For the agency to go into “dark” mode can only impair this post-comment period possibility and increase the likelihood of rules that are suboptimal or require correction.

- Such a prohibition is also highly impractical, particularly in complicated rulemakings that go on for any length of time.

- Flat prohibitions can be attractive to agency staff, as it gives them an excuse to avoid having to respond to questions or otherwise have substantive conversations with outsiders about a pending proposal. In my experience, agency lawyers especially like the idea, as it makes their role of minding their clients simpler and easier. But this at best a unilateral benefit and, as I've argued above, often not even in the agency's best interest.

- I think there is little risk that interested participants will hold back arguments or data from the comment period and then seek to slip them in afterward via contacts with the agency. First, no sensible entity would knowingly run the risk of having their issue or point be excluded from consideration during the rulemaking (or on judicial review) for having missed the comment period. Second, where it appears that an entity is trying to do that, agencies can be clear that the entity could well have made that argument earlier, or if the information is genuinely new, that it will be added to the docket and could potentially give rise to a NODA. Of course, publishing a NODA may well be the right thing to do in any event to reach the optimal outcome.

- Finally, I understand that some agencies currently do not allow post-NPRM contacts and would like to continue to do so. I realize that ACUS is to some extent an inter-agency consensus process, and that the draft recommendation accommodates those agencies' desires. I believe their practice is bad public policy, however, and believe that another part of ACUS's job is to say that when it's true.

For all these reasons, I strongly urge you to eliminate words in #9 that would expressly or implicitly authorize a “no contacts” rule post-NPRM.

In a perfect world, these documents would have resisted calling the contacts in question “ex parte,” but I can see the ineluctable attraction of the word. So I'm picking my battles. But I really do urge the Assembly to (re)consider the issues discussed above, particularly the latter.

Sincerely,

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