

To: Rulemaking Committee  
From: Michael Herz  
RE: Comments on Preamble to the draft recommendation on public engagement  
Date: October 8, 2018

Here are some editorial suggestions on the current version of the preamble to the Public Engage recommendation. The numbers indicate line numbers in the draft.

1 – The important thing is less the opportunity than the actuality. So perhaps: “Robust public engagement is vital to the rulemaking process. It permits agencies . . .” the problem with that is that you have defined “public engagement” to be something *the agency* does, not something the public does. Given that, “robust public engagement” is wrong, but so is what the draft now has (which says that the opportunity for agencies to do outreach is vital, which is not right). So, what about: “Full and effective public participation is vital to the rulemaking process. It permits agencies to obtain more comprehensive information, enhances the legitimacy of their decisions, and ~~enhances~~ increases public support for their rules.”

10 – “primarily, if not solely,” in place of “considerably”

11 – delete “rulemaking”

11-12 – “Although this generates important information” for “Although agencies receive important information from the public during the notice-and-comment process”

13 – “public engagement” seems to be being used in a different sense here as well. Replace “engagement” with “participation”

14 – “NPRM” for “notice of proposed rulemaking”

14-15 – Move “particularly before issuing an NPRM” to the end of the sentence

22 – I admit it took me a while to grasp the specialized meaning of “public engagement,” even though you do define it here. Perhaps out of an abundance of caution, and for clarity, this could say something like: “For purposes of this Recommendation, ‘public engagement’ refers to activities *by the agency*, not activities by the public. It includes all efforts to . . .”

25 – delete “efforts”

26 – this sentence says “through the rulemaking process”, but at line 21 it says “before issuing NPRMs”. One or the other should go. I’d delete “before issuing NPRMs” but I defer

32 – delete “efforts”

33 – “hold” for “garner”

35 – delete hyphen between “wide” and “range”; delete “affected”

38 – perhaps “useful” for “informed”

40 – “pursue” for “undergo”

41 – delete “efforts”

43 – I’d say: “Each method will have both distinct benefits and distinct drawbacks.”

FN6 – “Some” for “other” [“other” doesn’t work because the text doesn’t identify any agency or agencies in the first place]

50 – insert “these two mechanisms are” in between “While” and “similar”

50-52 – “to solicit information” seems unnecessary. Also, the difference between choosing “an approach to take” (RFI) and choosing between “several alternative proposals” (ANPR) is pretty vague. Maybe: “RFIs are generally used when an agency is determining whether to proceed at all and, if so, what general approach to take. ANPRMs are generally used when the agency has formulated one or more regulatory proposals, but only tentatively.”

55 – I don’t know what “formal” means here, or exactly what the point of the introductory clause is. Perhaps just delete that clause and say “RFIs and ANPRMs provide agencies ....”

61 – In addition to FACA is the PRA potentially relevant enough to mention?

67 – As per the discussion at the October 5 committee meeting, this is a place it would be good to add a little more about the value of these sorts of meetings. Maybe something along these lines: “When all goes well, these more dialogic sessions can produce new ideas and creative solutions that would be missed when stakeholders simply assert their existing positions. They also can lead to some change in stakeholders’ positions in light of a greater understanding of others’ concerns.”

71 – delete “efforts”

72 – “appropriate” for “qualified”

73 – not sure what “presumably” means. “presumptively”? “ordinarily”?

73 – “separate webpage” is unclear. Separate from what?

72-74 – At line 72 it’s “agencies”; at line 74 it’s “an agency”; need to clean that up

74 – “contemplated” is awkward and inaccurate; only *some* contemplated rules are relevant. I think we could just say “these” in place of “contemplated”