Effective Written Comments in Informal Rulemaking

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What Is This Article About?

I moderated a panel called “Rulemaking – An Insider’s Guide to Writing Effective Comments” at a recent Administrative Law Conference in Washington, D.C. sponsored by the ABA Section of Administrative Law and Regulatory Practice. This article began with program notes for that session prepared jointly by Michael E. Herz, Professor of Law at Cardozo School of Law, and myself.

I have adapted and expanded upon those program notes, and have included thoughts expressed by the panelists: Caroline H. Wehling, of the U.S. Environmental Protection Agency, Ann H. Wion, of the U.S. Food and Drug Administration, and Jonathan E. Neuberger, of Wilmer Hale LLP, Washington D.C.

The focus of this article is on preparing effective written comments during informal notice-and-comment APA rulemaking. You should recognize that in rulemaking advocacy, written comments are only one of many vehicles for influencing the agency. The broader issues, however, are beyond the scope of this article.

In the Federal Register preamble style now in vogue, I am phrasing my subject headings in the form of questions and am using the words “you” and “your” a whole lot.

What Are Your Purposes?

Based on your review of an agency’s proposed rule, you may believe that the entire proposal is a disaster and not a word of it should survive. Or you may love every detail. Or, more likely, the proposal might contain elements you support and elements you oppose.

Wherever you are on the love-hate scale, you need to be realistic. These days, the public comment stage of a proposed rule is, for most rules, pretty much the 11th hour. If the agency were to make a dramatic change in direction, it would either have to abandon years of work or, at a minimum, go through another (arduous) round of notice and comment. Therefore, achieving fundamental change at this stage is often an enormous uphill battle.

So what are your purposes in filing written comments? You should consider the three principal roles your comments may play. First, they may be useful in convincing the agency to shape its final rule a certain way. Even if securing truly fundamental changes from the agency may be an uphill battle, sometimes it happens. Moreover, even where fundamental changes may not be in the cards, you may often convince the agency to make improvements in details (where the devil is often ensconced).

Second, your comments may be critical in laying the groundwork for judicial review of the final rule. So even if you can’t get what you want from the agency, you might get it from a reviewing court. Among the most critical issues to the court will be the content of the comments before the agency and the agency’s response to those comments. And remember, one cannot seek judicial review based on an issue that was not raised first before the agency.

Finally, approaching your comments from a defensive point of view can often be critical. If you like the proposal (or certain parts of it) and hope the parts you like survive at the agency and/or in judicial review, it may be important for your comments to play a supportive or even buttressing role to the agency’s position.

What Should Your Strategy Be?

In trying to match your purposes with a strategy for preparing comments, you should consider the following fundamental points.

1. Discretion Over Valor. Unless you find the proposal utterly unacceptable in any form, you should suggest improvements that would be better than nothing. Some advocates (particularly fight-to-the-death litigators) might feel that suggesting improvements — after arguing that an entire proposal should be totally nixed — flashes a sign of weakness and that agency personnel (or a reviewing court) would therefore take your “totally nix” position less seriously.

Considering your heavy burden in convincing an agency to do a 180 and your almost-as-heavy burden to secure a judicial vacatur — as courts will almost always give some form of deference to the agency — the better view is that discretion should prevail over valor.

Agency personnel will appreciate the fact that you are simply being smart and realistic in “plead in the alternative.” They certainly see parties do this all the time. Appellate judges are also sophisticated on these matters and appreciate that such pleading in the alternative is more a sign of wisdom than weakness.

In other words, no matter how much you feel wronged by a proposal, there is a very good chance you won’t be able to convince the agency to drop it. And there is also a good chance you won’t be able to convince a court to vacate it. If you are going to have to live with a final rule after it survives judicial review, you might as well try to make it as palatable as possible.

2. Frame Opposition Comments to Anticipate Judicial Review. If you are seeking substantial changes or a major turnaround in the proposal, make your comments look and sound like a legal brief (more on style and tone later). The more your comments look like you are seriously geared up for a legal challenge, the more seriously agency personnel will take your comments.

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In this regard, carefully consider the caselaw on judicial review of agency rules, and prepare to attack any element of the proposal where there may be weakness. This would include arguments regarding statutory authority and interpretation as well as adherence to all prescribed procedures.

Perhaps more importantly, attempt to hold the agency’s feet to the fire on “reasoned decisionmaking” requirements. For each and every logical underpinning of the agency’s reasoning, consider questions and criticisms that will force the agency to “connect the dots” logically. For every key assumption based on fact, data, studies, consultants’ reports, etc. (technical, legal, economic, etc.), consider filing comments pointing out flaws, inconsistencies, and “unconnected dots.” Equally important, supply your own authenticated facts, data, etc. that buttress your arguments. And where there are gaps in the agency’s logic and backup support, be sure to point that out.

3. Consider Framing Supporting Comments to Anticipate Opponents’ Judicial Review. If you are happy with all or most of the proposal, do not sit back and relax! The only possible exception might be where you are supremely (and rationally) confident that there are no parties on the other side who will be opposing the proposal before the agency or a reviewing court. The main point here is that the proposal you like may have logical holes or data gaps, and/or may need beefing up in terms of legal analysis or reasoning. In this situation, you may through your comments supply ammunition for the agency to react to, explain, and incorporate in its final rule, possibly shoring up its defenses against your opponents on judicial review.

What Are Your Key Considerations for Content?

After you have considered your purposes and adopted a strategy to complement your purposes, you might consider the following points about content.

1. Specificity is golden. Instead of just saying a proposed rule provision would cause pain or suffering or be impractical, provide real life examples with back-up data and verification for the record. The more actual, verifiable, factual material you can provide, the better. If the agency estimates that a proposal will cost $x per facility and you say it will cost $2x per facility, explain why with as much backup data as possible how you reached your $2x estimate.

An agency’s decision to go your way on a point will be much more defensible if it is based on solid, specific facts in the record. Conversely, an agency will have to go to more trouble in maintaining a position you don’t like the more you can provide solid, specific facts that undercut that position. If all you have are vague, unsubstantiated complaints, an agency will have little trouble giving them short shrift.

Equally important: be specific on what you want the agency to do. After you have spent 30 pages explaining how a proposed standard of 0.0873 ppm is wrongheaded for 86 reasons, you will gain credibility with the agency if you then explain what standard would be correct and why.

A panelist made another good point about specificity in comments. An agency proposal these days might rely on background documents that might contain hundreds or even thousands of pages. Whenever you refer to and/or criticize something in these documents, be as precise as possible with your references. It does little good for you to say simply that the calculations in the economic background document are flawed when the economic background document has 400 pages of calculations. Exactly which ones on which pages are flawed—and why?

2. Authenticity is also golden; both for your sources and yourself. For all the great new and specific data and information you are going to provide, be sure to identify the source of your information, and include the best documentation that attests to the authenticity of the source and the information. In other words, don’t just submit an unlabeled spread sheet with a bunch of numbers on it with your comments. And where you are relying on the opinions of individual experts or corporate consultants, be sure to include whatever backup information is necessary to qualify the sources as reputable and credible.

Equally important: authenticate yourself. Make clear who you are, what your interest in the proposal is, how exactly you would be affected by the proposal, and how and why the agency should respect your opinions. For instance, if a proposal relates to a prescribed way of securing a chemical facility’s perimeter from terrorists, if you explain (and document) how your company has provided security for chemical facilities for 25 years in 38 states, your comments will probably move up several notches in credibility and tend to be taken seriously. If you represent the local garden club, while you might have some very good and relevant points to make, it would be wise to explain at the outset how and why you have the interest and expertise to comment.

This self-authentication can also become critically important in judicial review, as “standing” to sue is an ever-present bugaboo for would-be suitors in federal courts, and some federal courts have been extraordinarily picky on this issue lately. (Another article, perhaps.)

3. Error on the side of inclusion. If you raise nine separate arguments before a court on judicial review, you do not have to win on five to get the rule vacated; often winning on one issue is all you need. So for a proposal you do not like, raise as many relevant issues as you can, with as much factual, legal, policy backup as you can, to show problems with the proposal. The agency will either have to agree with you when it cannot come forward with straight-face defenses, or will be put to a lot more trouble to explain its basis and purpose in the record in order to survive judicial review. The more relevant and bona fide arguments against a proposal that you can raise in comments, the more points the agency will have to deal with in its final statement of basis and purpose, and the greater you increase the chance of finding a hook to convince a reviewing court to vacate the final rule.

4. Respond to your opponents. With e-docketing, it is becoming increasingly easy to read, and, thus, to comment on, others’ submissions. Some agencies are considering or have experimented with “reply periods” after the due-date for comments. Even if there is no official reply period and the deadline for comments has passed, there is no harm in sending in a response to someone else’s comments. Particularly if you could not have submitted the response earlier, because the comment to which you are responding was only
What Are Your Key Considerations for Style, Organization, and Presentation?

First, you have an “overarching” point (another word for large agencies love to use these days). Just as “location, location, location” is everything in real estate, to be truly effective your written comments should be “professional, professional, professional.” It may sound silly to remind you, but take extra time to make sure your comments are polished, free of typos, neatly formatted, and clearly written in crisp, grammatically correct style. Additional points:

1. Follow directions. The agency’s proposal will tell you how to label your comments (usually by some docket number), how many copies to send, what format(s) may be options (electronic, fax, hand delivery), exactly where to send your comments depending upon format, and set the deadline. Whatever they say, do it. (As explained before, when it comes to distribution, you should do more than they say; but never do less than they say.)

2. Cool it. Vent and be sarcastic all you want – in your first draft. Then sleep on it and delete all the venting and sarcasm. It may feel good to write nasty when you are feeling like the proposed rule is a travesty of all that is good and fair, but agency personnel will not be moved in your direction one iota by a mean tone and just may be moved the other way. Also, on judicial review, judges and their clerks will probably need to focus on your written comments and they would likely have the same reaction to nastiness as the agency personnel. One panelist’s advice was also well-taken: “avoid profanity and personal threats.”

3. Make it easier for any reader to follow. Bear in mind that your comments may be one submission among thousands. Therefore it is essential to make your comments clear and accessible. Lengthy comments should begin with a quick summary of the main points; different sections should have headings to serve as guideposts; major, essential points should be distinguished from minor, technical ones. It should be as easy as possible for the reader to grasp your essential concerns.

4. Make it easier for each reader to find the parts of interest to him/her. The need for clear headings and separate treatment of distinct points is especially critical in rulemakings on complex subjects, where several different components of an agency might cover discrete issues and personnel in those components will have separate and distinct roles to play in formulating the agency’s response to comments and the final rule. For instance, a Clean Air Act proposed rule will likely involve questions of cost-effectiveness, economic impact, availability of technology, public health effects, and/or environmental impacts, each of which will lie within the jurisdiction of different offices or individuals within EPA.

In such settings, it is especially important to separate your distinct points clearly, and use headings and subheadings liberally. You need to make it easy for the economists in the agency to find your economic arguments, and the health effects people to find your health effects arguments. Assume nobody wants to wade through a bunch of pages they don’t find interesting or relevant looking for parts they might be interested in.

5. If the agency asks for certain questions/issues to be addressed in a certain order or with a specific labeling scheme, do it. Sometimes an agency’s proposal will ask commenters specifically to address some number of questions or issues, and the preamble may contain a lettering or numbering sequence for these questions or issues. If so, be sure to include a section in your comments that provides your comments or answers to any of these questions or issues clearly labeled in the same format that the agency has asked for.

You may think this is silly or unnecessary if, for instance, you believe that there are portions of your beautifully written prose that already answer some or all of these questions. But recognize that in many agencies, contractors are hired to read, summarize, and digest and categorize written public comments issue by issue. If you want your distinct point on a certain issue to end up in the right place in this summary and categorization, it is safer to make the contractor’s job easier by leading him or her to the right place in your comments. If you want the contractor’s digest to include your points on a specific issue (and this digest may be all that key agency personnel ever bother to read), you had better follow the format the agency has specified.

6. Summarization is also golden. Prepare a short summary (or targeted summaries) of your key points. Busy people hate to read long documents and agency personnel are busy. Also, the higher up you go in the agency, the person you may want to influence is even less likely to want to read very much of what you write. Therefore, always have a very sharp and short summary prepared covering your most important points. On complex rules where your comments might deal with legal, policy, economic, health effects, etc. issues, you might consider separate sharp and short summaries of each section.

What Are Some Pointers on Distribution?

1. Send to Key Staff. Rule number 1 on distribution: do not simply send your comments to the address specified in the proposed rule. If so, the only people who may actually read your comments will be the contractors hired to digest all the submissions. Rather, it is critical to send copies of your comments directly to the key people in the agency at the staff level who will be working on the final rule, perhaps with separate cover letters for personnel handling separate issues, in which you can summarize and highlight your main points on those issues for such personnel.

2. Send at Least Summaries to Key Leadership. Also consider sending short, punchy summaries of your main points to higher level agency personnel. (Again, these might be separately tailored for different components.) Key decision makers are rarely going to read a 100-page public comment document; they might read your one or two page punchy summary.

What is the Conclusion?

If commenting is worth your time, it is worth your time to make your comments effective, and we hope this helps.