

## E-RULEMAKING\*

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For some years, agencies have been shifting toward electronic rulemaking. There has been no single watershed event or year in this transformation. But the past year saw a sort of “knee of the curve,” in which electronic rulemaking became very much the norm.<sup>1</sup> Dozens of federal agencies now accept comments on proposed regulations in electronic format and maintain an electronic docket containing copies of comments and other relevant material; under the E-Government Act all agencies are to have electronic dockets in place by March 2004—at least, “to the extent practicable.” At many agency websites, it is a relatively simple matter to learn the status of pending rulemakings and, in some cases, even to search the titles or even the text of materials that have been docketed.<sup>2</sup> A dozen or more agencies also maintain subject or docket-specific listservs, so that subscribers receive e-mail notices of submissions, deadlines, or agency actions.<sup>3</sup> While there is a ways to go in user-friendliness, the shift to e-rulemaking has

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<sup>1</sup> A valuable collection of information and monographs concerning e-rulemaking is available (online, of course) at <http://www.ksg.harvard.edu/cbg/rpp/erulemaking/home.htm> (last visited Nov. 21, 2003). For an excellent general discussion, see Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Civil Infrastructure*, 54 ADMIN. L. REV. 1421 (2002).

<sup>2</sup> Individual agencies’ e-rulemaking sites can be accessed from links at the website of the Federal Register. See [http://www.archives.gov/federal\\_register/public\\_participation/rulemaking\\_sites.html](http://www.archives.gov/federal_register/public_participation/rulemaking_sites.html) (last visited November 21, 2003).

<sup>3</sup> See [http://www.archives.gov/federal\\_register/public\\_participation/rulemaking\\_email.html](http://www.archives.gov/federal_register/public_participation/rulemaking_email.html) (providing links to agency rulemaking listservs) (last visited Nov. 21, 2003).

undeniably made it far easier to learn about agency rulemakings, obtain relevant materials, and submit comments.

In addition to the growth of e-rulemaking efforts within individual agencies, a coordinated, government-wide undertaking made significant progress during the last year. In July 2001, the Office of Management and Budget (“OMB”) established an “E-Government Task Force,” headed by the newly created Associate Director for Information Technology and E-Government.<sup>4</sup> The E-Government Act thereafter created within OMB an Office of Electronic Government, headed by a presidentially appointed Administrator.<sup>5</sup>

In October, the President’s Management Council approved a set of recommendations from the Task Force, leading finally to the publication in February of 2002 of a document entitled “E-Government Strategy.” The Strategy, a revised version of which was released in April 2003,<sup>6</sup> identified twenty-four projects, of which one is “Online Rulemaking Management.” The Department of Transportation was originally the “managing partner” for the initiative; EPA took over in late 2002. The first, easy, step was to include links to individual agency e-dockets from *www.firstgov.gov*. The much harder second step was to create a single web-site from which individuals could find, review, and submit comments on proposed rules from all federal agencies. That site, *www.regulations.gov*, went on line on January 23, 2003. The regulations.gov portal is built on notices of proposed rules that are submitted to the Office of the Federal Register. Users can search by keyword, topic, or agency. A search produces an entry for each

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<sup>4</sup> See Memorandum from Mitchell E. Daniels, OMB Director, to Heads of Executive Departments and Agencies (July 18, 2001). The initial appointee, Mark Forman, left in August 2003 and was replaced by Karen Evans, who had been Chief Information Officer at the Department of Energy.

<sup>5</sup> 44 U.S.C.A. § 3602(a) (2003). The Administrator of this office and the Associate Director are the same person.

<sup>6</sup> EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, IMPLEMENTING THE PRESIDENT’S MANAGEMENT AGENDA FOR E-GOVERNMENT: E-GOVERNMENT STRATEGY (2003), available at <http://www.whitehouse.gov/omb/inforeg/egovstrategy.pdf> (last visited Nov. 21, 2003) [hereinafter *E-GOVERNMENT STRATEGY*].

pending proposal that fits the search criteria; the entry identifies the agency, subject matter, affected section of the *Code of Federal Regulations* (“CFR”), date of proposal, date by which comments are due, a link to the text of the *Federal Register* notice (in both pdf and html format), and a link for the submission of comments. The site also links to the up-to-date text of the CFR. The site was one of 20 winners of a 2003 “E-Government Pioneer Award” from the FCW Media Group, host of “e-gov.com.”<sup>7</sup>

*Regulations.gov* has been a mixed success.<sup>8</sup> On the one hand, a lot of people are looking at it: in the first three months or so of operation, it had millions of hits.<sup>9</sup> On the other hand, most electronic commenters rely on the agencies’ own websites. For example, during the first three months of operation EPA received only eight comments through regulations.gov and the Department of Transportation only 21 (while receiving 16,000 electronic comments at its own website).<sup>10</sup> This is not a surprise, since the agency sites tend to have more information and will be known to most, and familiar to many, of those interested enough to submit a comment. According to the GAO, not all proposed regulations have in fact been available on *regulations.gov*; at the same time, some proposals have been available only there and not on the relevant agencies’ own sites.

The administration’s e-government strategy envisions an integrated, government-wide docket system that goes beyond regulations.gov. At present, that site allows the user to access

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<sup>7</sup> See Press Release, E-Gov 2003 Awards Innovations in E-Government, available at [http://www.e-gov.com/events/2003/egov/for\\_press/press\\_room.asp](http://www.e-gov.com/events/2003/egov/for_press/press_room.asp) (last visited Nov. 21, 2003). Oddly, EPA’s own E-Docket site was also given an award, but as a “trailblazer” rather than a “pioneer.” The nuanced distinction between a trailblazer and a pioneer (not to mention the third category, “explorer”) is beyond the scope of this chapter.

<sup>8</sup> A useful, somewhat critical, assessment, based on the first three months of the site’s operation, is U.S. General Accounting Office, *Electronic Rulemaking: Efforts to Facilitate Public Participation Can Be Improved* (Sept. 2003) (GAO-03-901), available at [http://www.senate.gov/~govt-aff/\\_files/d03901gao.pdf](http://www.senate.gov/~govt-aff/_files/d03901gao.pdf) (last visited November 15, 2003).

<sup>9</sup> Just how many is unclear. OMB states that in its first three months the site had 2.6 million unique visitors. *E-GOVERNMENT STRATEGY*, *supra* note 67, at 4, 12.

the *Federal Register* notice for a proposed rule, but not the full docket, which can only be accessed via the agency's own website. The plan ultimately is to eliminate the agency-specific dockets, migrating all into the single, government-wide website. This is supposed to be done as a trial run for five agencies by September 2004.<sup>11</sup>

The future of this initiative, and of e-rulemaking generally, is hard to predict. It is easy to oversell the transformations to be worked by e-rulemaking.<sup>12</sup> Thus far, e-rulemaking represents a new and improved format for what is still recognizably the section 553 notice-and-comment process. The transformation that e-rulemaking promises, and so far has not accomplished, would be to make notice and comment a truly dialogic or deliberative process. A simple step in this direction that e-rulemaking facilitates would be to include a rebuttal period as a matter of course, allowing all participants to respond to all other participants after the close of the primary comment period.<sup>13</sup> More ambitiously, some have envisioned electronic rulemaking as a bona fide "dialogue" that becomes truly deliberative, shaping the participants views in the process and leading to real consensus.<sup>14</sup> That happy day remains in the distant future, however.

The move to e-rulemaking has produced, or seems likely to produce, several noteworthy shifts. First, it has saved some money, if only in reduced storage needs and personnel to handle all the paper. If the government-wide docket is ever put in place, there will be some additional,

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<sup>10</sup> General Accounting Office, *supra* note 69, at 23-24.

<sup>11</sup> *E-GOVERNMENT STRATEGY*, *supra* note 67, at 26.

<sup>12</sup> For example, the *E-Government Strategy* asserts that "with the implementation of the E-Rulemaking initiative, businesses will no longer need the assistance of a lawyer or lobbyist to participate in the regulatory process." *Id.* at 9. This may be literally true, but *meaningful* participation, effective and sophisticated commenting, and private meetings will still require professional assistance.

<sup>13</sup> See Brandon & Carlitz, *supra* note 62, at 1429-30 & nn.32-33.

<sup>14</sup> See, e.g., THOMAS C. BEIERLE, DISCUSSING THE RULES: ELECTRONIC RULEMAKING AND DEMOCRATIC DELIBERATION (2003) (Resources for the Future Discussion Paper 03-22).

modest, economies of scale.<sup>15</sup> E-rulemaking has probably also marginally increased public participation and transparency as well. However, no one has convincingly demonstrated this to be the case.

A second consequence has been to help entrench the idea of an informal rulemaking “docket.” The APA does not provide for such a thing, and historically it was an incoherent concept since notice-and-comment was not an on-the-record proceeding. Over the last generation—largely as a result of the reconception of notice and comment as involving a “paper hearing,” both by courts and in some specific statutes such as the Clean Air Act—it has become more common to think of informal rulemaking as involving a docket and a record. That language and that conception run through and through the world of e-rulemaking. Thus, the E-Rulemaking Act requires agencies to “make publicly available online . . . materials that by agency rule or practice are included in the rulemaking docket under section 553(c)”<sup>16</sup> (even though there is no such thing as a “rulemaking docket under section 553(c)”). EPA’s e-rulemaking system is known as “E-Docket”; the Department of Transportation has the “Docket Management System,” etc.

The third shift concerns the nature of public comment and is more subtle. In an e-rulemaking world, because so many people are aware of pending rulemakings and commenting is so easy, agencies can be quickly swamped with thousands, or hundreds of thousands of comments. This is the flip side of “transparency” and “increased participation.” What can realistically be expected of an agency dealing with a million comments, thousands of which duplicate one another? The old model of careful individual consideration is inapplicable.

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<sup>15</sup> OMB anticipates an \$8 million cost savings, plus \$3 million in cost avoidance, from decommissioning five agency-specific e-docket systems. *E-GOVERNMENT STRATEGY*, *supra* note 67, at 26.

<sup>16</sup> E-Rulemaking Act § 206(d)(2)(B).

Unavoidably, the agency will start to do what, for example, Members of Congress do: avoid the subtleties and keep a running tally with the grossest sort of division—basically “for” or “against.” Many people have had the experience of laboring over a well-thought out, carefully researched, elegantly written, heartfelt letter to a member of Congress, one which, in the writer’s view, must surely sway any reasonable reader—only to receive a form letter response that suggested that the letter was unread and misunderstood.

Three sorts of consequences can be expected. The first is purely doctrinal. Much of what reviewing courts have said about the need to consider and respond to comments will have to be modified. An agency cannot respond to a million comments other than generally and generically.<sup>17</sup>

Second, the expected savings of time, money, and resources are likely to prove elusive. There may be other gains, of course, but the new systems are likely to lead to “information overload” that could disable agencies or at least slow their decisionmaking.<sup>18</sup>

The third point is goes to the nature of the process. Letter-writing to Congress is seen as a sort of proxy for elections. Voters indicate their preferences; the fact that someone wrote a letter is not important so much for its content but for the signal it gives about the salience of the issue to the letter-writer. Historically, notice-and-comment rulemaking has reflected a different model, in which what mattered was the substance of the comments.<sup>19</sup> However, as the comments

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<sup>17</sup> There is one important caveat, however. To the extent that the comments are duplicative, the burden of responding is not increased.

<sup>18</sup> Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 329 (1998); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW L. REV. 173, 224-28 (1997).

<sup>19</sup> As Judge Posner wrote in *Alto Dairy*, discussed *supra* at notes 6-8, “[t]he purpose of a rulemaking proceeding is not merely to vote up or down the specific proposals advanced before the proceeding begins, but to refine, modify, and supplement the proposals in the light of evidence and arguments presented in the course of the proceeding. *Alto Dairy v. Veneman*, 336 F.3d 560, 569 (7th Cir. 2003).

received on proposed rules increase by orders of magnitude, and as they increasingly take the form of hundreds of thousands of identical emails organized by trade associations or non-profits, one would expect both participants and observers to tend toward a more “political” understanding of the process.<sup>20</sup>

As many have pointed out, there are two dominant models of the administrative process. Under the “expertise” model, the agency is a neutral, apolitical, technocratic expert. Problems of public policy have right and wrong answers, and the chances of identifying and implementing the right one are increased if the agency is kept out of the political process. Under the “politics” model, what legitimates agency decisions is not their objective correctness according to experts, but their consistency with popular preferences. Policy decisions are more about values than facts, and agencies *ought* to be subject to political influences. Neither model has ever triumphed, though the overall trend has been away from the expertise model and toward the politics model.<sup>21</sup>

E-rulemaking can only accelerate this trend. Consider just one recent example. After a relatively rapid rulemaking and Environmental Impact Statement (“EIS”)-writing process, the U.S. Forest Service issued the so-called “roadless rule” in the waning days of the Clinton administration. The rule restricts road construction in almost 60 million acres of Forest Service land. The rule has generated a number of legal challenges, with several district judges finding defects in the process,<sup>22</sup> and the Bush administration is considering diluting its protections in

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<sup>20</sup> See Beierle, *supra* note 75, at 11 (lamenting that e-rulemaking produces, “[a]t worst, a cacophony of unreflective comments [that] tempts rule writers to lapse into preference aggregation, counting up support and disagreement in an inappropriate application of a voting model”); Randolph J. May, *Under Pressure: Campaign-style tactics are the wrong way to influence agency decisions*, LEGAL TIMES, July 7, 2003, at 44 (noting, and lamenting, shift from an expertise model to a politics model, of which efforts to bombard rulemaking agencies with duplicative comments are an aspect); Rossi, *supra* note 79, at 238-41.

<sup>21</sup> For one useful general description, see Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745 (1996).

<sup>22</sup> See, e.g., *Wyoming v. U.S. Dep’t of Agric.*, 277 F. Supp. 2d 1197 (D. Wy. 2003); *Kootenai Tribe v. Veneman*, 142 F. Supp. 2d 1231 (D. Idaho 2001), *rev’d*, 313 F.3d 1094 (9th Cir. 2002).

Alaska. Comments on the proposed rule and/or the Draft EIS, and on the current Alaska proposals, numbered in the millions and have been overwhelmingly in favor of stringent protections. Press coverage has overwhelmingly treated the comment process as a sort of vote.<sup>23</sup> This conception can also be seen in an amicus brief submitted to the 9th Circuit in *Kootenai Tribe* by the Montana Attorney General. The brief’s basic point had nothing to do with legality, but came down to this: “hey, Montanans overwhelmingly support this rule, as shown by tabulating our comments during the process.” Emphasizing that 67 percent of commenters in Montana (and 96 percent nationwide) favored stronger protections than were anticipated in the Draft EIS, and that the Forest Service responded by strengthening protections, the brief concludes that the rule is “the product of public rulemaking at its most effective.”<sup>24</sup> What’s more, the Ninth Circuit placed some weight on this argument.<sup>25</sup>

In short, the new technology is forcing agencies toward a particular model of the process and function of rulemaking, as opposed to enabling agencies better to function under the model chosen independent of that technology.

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<sup>23</sup> For example, an item in the Sierra Club’s newsletter was subtitled “What part of 1 million comments didn’t they understand?” Kim Todd, *Roadless Rule Redux*, THE PLANET NEWSLETTER, Sept. 2001, at 1.

<sup>24</sup> Brief of Amicus Curiae, Montana Attorney General at 5, 6, *Kootenai Tribe v. Veneman*, 313 F.3d 1094 (9th Cir. 2002) (Nos. 01-3547-2, 01-35539, 01-3547-6).

<sup>25</sup> *Kootenai Tribe*, 313 F.3d at 1116 n.19.