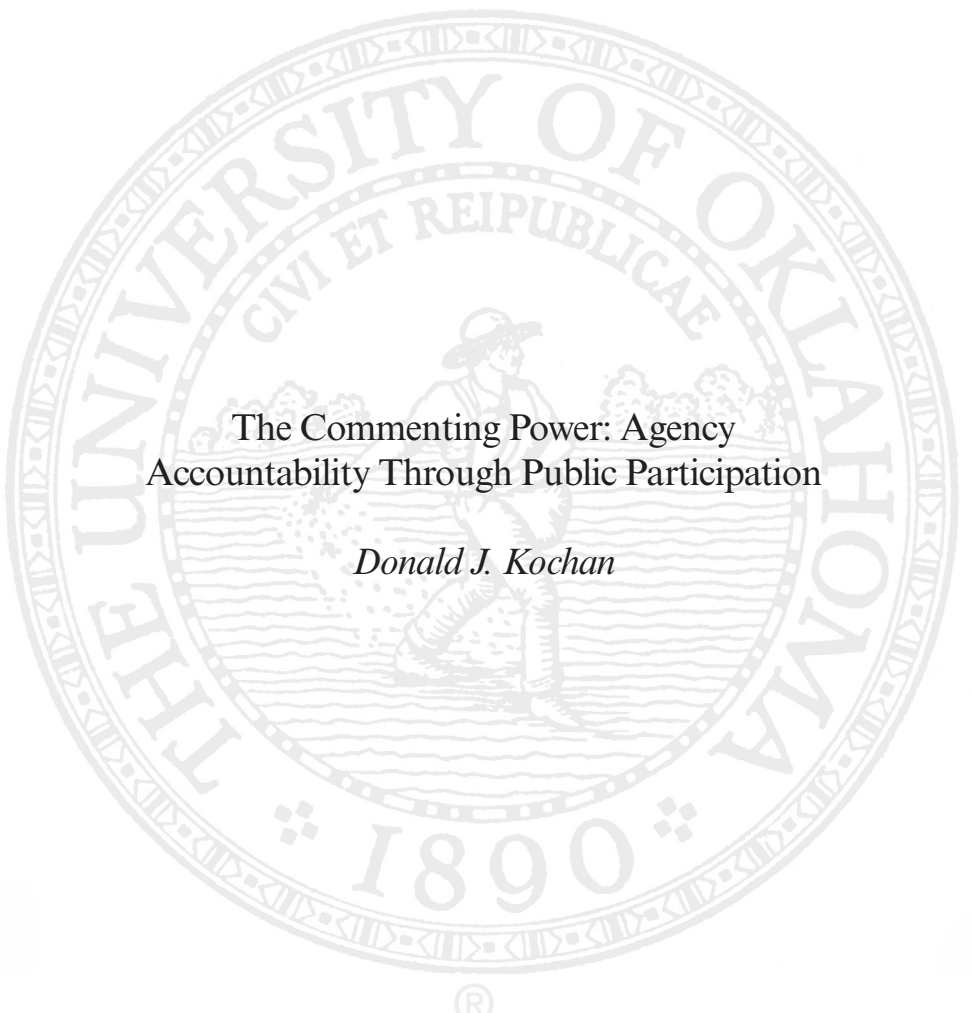
OKLAHOMA LAW REVIEW



The Commenting Power: Agency Accountability Through Public Participation

Donald J. Kochan

VOLUME 70 SPRING 2018 NUMBER 3

THE COMMENTING POWER: AGENCY ACCOUNTABILITY THROUGH PUBLIC PARTICIPATION

DONALD J. KOCHAN*

I. Introduction

Whether you are a member of the resistance movement or a cheerleader for the new Trump administration's regulatory reform agenda, this Article intends to engage your passion. (Of course, scholars, students, and agency officials should be interested too.) The notice and comment rulemaking process governing the creation of most regulations generated by federal agencies includes an obligation that agencies respond to public comments. This public participation requirement, with its "two-way street" obligation to dialogue, is a critical check on agency power. Anyone interested in regulation and governance, including scholars, lawyers, and the public at large, should better understand the contours of this area of law.

This Article provides a critical tutorial for anyone interested in getting involved in regulatory change, whether for or against. Further, it helps one understand why what this Article dubs the "commenting power" is so critical in our democratic republic—it allows ordinary citizens, as much as sophisticated interest groups, opportunities to participate in and have opinions heard on the development of regulations.

Noted administrative law scholar Kenneth Culp Davis has described the "notice and comment" rulemaking process as "one of the greatest inventions of modern government."[1] This status is due in no small part to the ability of notice and comment rulemaking to engage the public in the process in a meaningful way. The commenting power given to ordinary individuals is rather extraordinary.

When an agency proposes a rule, individuals get a chance to comment, and an agency must respond to significant comments raised during the rulemaking before the rule can become final and effective. This commenting power—vested by the Administrative Procedure Act (APA)[2] in the people, who might be called the "roots" feeding the branches of government—acts as a brilliantly crafted check and balance on

* Parker S. Kennedy Professor in Law and Associate Dean for Research & Faculty Development, Chapman University Dale E. Fowler School of Law. Special thanks to Jennifer Spinella for comments and suggestions.

1. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 65 (1969).
2. Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2012).

governmental regulation in the spirit of other checks and balances like bicameralism and presentment, an independent judiciary, and other aspects of the separation of powers. The commenting power ensures that the ballot box is not the only place where citizens get to serve a checking function on government; they have it also in their ability to participate in agency rulemaking. Professor and former United States Deputy Chief Technology Officer Beth Simone Noveck summarized it well when she explained, "Participation in rulemaking is one of the most fundamental, important, and far-reaching of democratic rights."[3] Rather than lying in another branch of government, as do most of what we consider checks and balances, the commenting power rests in the people.

The check provided by the commenting power can be particularly important when administrative agencies are faced with new leadership and, as a result, new work. This work ranges from the usual, expected changes in regulatory policy that follow almost any change in administration to more dramatic changes or even what some consider regulatory upheaval—for good or bad. As these changes occur, there is a critical role for public participation that sometimes evades the attention of pundits, talking heads, news anchors, editorial writers, and the general public.

To facilitate the commenting power, key provisions of the APA (and many state equivalents) foster meaningful public participation in the formation and adjustment of regulatory rules. As will be described here, agencies usually must post a proposal for public review, upon which the public is given a window to submit comments. These comments can say just about anything and can support, oppose, or simply suggest ways to improve the proposal. And here's the kicker: the agency is required to review and consider those comments submitted to it, regardless of who from and regardless of form. Furthermore, the agency needs to "respond" to significant comments by addressing concerns raised in comments when announcing (and then "promulgating" and making effective) its final rule. That makes the ability to comment meaningful and capable of making a difference. It means that comments can be powerful.

An agency does not need to agree with a commenter and is not required to make the changes requested, but, for substantial comments (which this Article will define), the agency will be disciplined if such comments are ignored. The purpose of the commenting period and the requirement of consideration of and response to comments is to make sure the public

3. Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 517 (2004).

participation is meaningful and to require the agency to think through its proposed actions. By forcing agencies to think things through, the commenting process serves to discipline the agency and to act as a quality control mechanism.[4] When an agency does not take comments seriously, it is acting in an arbitrary and capricious manner, and the rules it produces in such a process can be invalidated because they do not reflect reasoned deliberation.[5]

It is shocking that so many people who hold the commenting power—that's all of us—never choose to exercise it. This Article is designed to educate individuals on that power in the hopes of inspiring more of the public to become engaged by explaining the process of commenting generally, the development of the law regarding an agency's legal responsibilities to respond to comments, and the power of comments as an accountability mechanism. To that end, Part II of this Article briefly summarizes the notice and comment rulemaking process. Part III examines rulemaking in a time of transition between administrations, along with some general comments on the reasons to comment. Part IV focuses on some of the mechanics of commenting. Several cases on an agency's duty to respond to comments will be analyzed in Part V, and the Article will close in Part VI by analyzing the lessons on an agency's duty to respond to comments provided in *Sierra Club v. EPA*[6] and *Waterkeeper Alliance v. EPA*,[7] both decided by the United States Court of Appeals for the District of Columbia Circuit. These cases are excellent examples of the power of commenting and of the judiciary's willingness to scrutinize the sufficiency of an agency's consideration of comments. The *Waterkeeper Alliance* case, in particular, illustrates two realities: (1) it will serve as an example where an agency changed its position in a final rule after receiving comments on its proposal, that is, where commenting worked; and (2) it will serve as evidence of courts holding agencies accountable when an agency fails to respond to comments it receives, ultimately invalidating the agency action because it did not take a commenter seriously enough.

---

4. Jonathan Weinberg, *The Right to Be Taken Seriously*, 67 U. MIAMI L. REV. 149, 158 (2012) (discussing how notice and comment rulemaking—along with the concomitant duty to respond—"increases the accuracy of agency decision-making").

5. *Id.* at 155-56 (explaining why the "response" obligation for agencies is a necessary requirement to effectuate judicial review for arbitrary and capricious behavior).

6. 863 F.3d 834 (D.C. Cir. 2017).

7. 853 F.3d 527 (D.C. Cir. 2017).

II. What Is Notice and Comment (or "Informal") Rulemaking?

Federal administrative agencies generate regulatory policy in many ways, but "notice and comment" rulemaking (also known as "informal" rulemaking)[8] is the most powerful piston driving the regulatory engine. Notice and comment rulemaking is governed by a set of procedures established by the Administrative Procedure Act; this Part provides a brief overview of those procedures.

"Rulemaking" is defined in the APA as the process of "formulating, amending, or repealing a rule."[9] A "rule" is defined broadly to include "statement[s] of general or particular applicability and future effect" that are designed to "implement, interpret, or prescribe law or policy."[10] Even though rulemaking is a regulatory action, the rules generated after notice and comment rulemaking are typically described as "legislative rules," given that they become binding with the "force and effect of law." [11] That label also functions as a means of distinguishing them from other rules with less force that may emerge through other regulatory processes. Note that there are things agencies can do that do not require officially receiving and responding to comments, including developing guidance, making interim rules, and making emergency rules, among others. These actions, however, are either exceptions, rather than the rule, or are given less binding legal effect than legislative rules generated through notice and comment processes.

The notice and comment rulemaking process starts with a proposed rule being made available to the public—the "general notice of proposed rulemaking"—to alert members of the general public of an expected regulatory action and to invite their input, usually by publication in the *Federal Register*.[12] Subsequently, members of the public are given a window in which they are allowed to participate in the formation of the

---

8. "Notice and comment rulemaking" is also known as "informal rulemaking," which is a misnomer because it involves a fair amount of formal procedures (including publishing and noticing the existence of proposed rules, providing a comment period, etc.). The "informal" moniker is actually an unfortunate one resulting from historical legislative drafting issues involved in the passage of the Administrative Procedure Act.

9. 5 U.S.C. § 551(5) (2012).

10. *Id.* § 551(4).

11. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 302–03 (1979).

12. 5 U.S.C. § 553(b) (2012); *see also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1977) ("Consequently, the notice required by the APA, or information subsequently supplied to the public, must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based.").

final rule—the "comment period." During this period, anyone may make suggestions to the agency regarding the proposal pursuant to the APA requirement that when "notice [is] required" the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[13] Notice is designed to facilitate useful comments and to invite suggestions for alternative approaches.[14]

At the conclusion of the comment period, the agency must consider and respond to the comments,[15] a task usually undertaken as part of an agency decision on a final course of regulatory action or inaction—with a "final rule" published if the agency decides its proposed rule or some logical outgrowth of it should be promulgated and made effective and enforceable.[16] The APA requires that the promulgation of a final rule not only include publication of the text of the rule in the *Federal Register* as it will later appear in the *Code of Federal Regulations* (CFR) but also that it be accompanied by "a concise general statement of [its] basis and purpose."[17] It is within that statement of basis and purpose—often included in what is commonly referred to the "preamble," an explanatory writing preceding the technical rule—where the agency will generally satisfy its duty to respond to comments by explaining the manner in which those comments were considered in reaching the final regulatory result. Courts will review final rules and their preamble to evaluate whether the public's comments were taken seriously, as required by law.[18]

---

13. 5 U.S.C. § 553(c).

14. *Home Box Office, Inc.*, 567 F.2d at 35-36 ("[A]n agency proposing informal rulemaking has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible.").

15. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1997); Thompson v. Clark, 741 F.2d 401, 408-09 (D.C. Cir. 1984); *see also* N.C. Growers' Ass'n v. United Farm Workers, 702 F.3d 755, 769 (4th Cir. 2012) ("[D]uring notice and comment proceedings, the agency is obligated to identify and respond to relevant, significant issues raised during those proceedings." (citing South Carolina *ex rel.* Tindal v. Block, 717 F.2d 874, 885-86 (4th Cir. 1983)).

16. 5 U.S.C. § 553(c).

17. *Id.*

18. William L. Andreen, *An Introduction to Federal Administrative Law Part 1: The Exercise of Administrative Power and Judicial Review*, 50 ALA. LAW. 322, 324 (1989) (explaining the agency's responsibility to respond to comments in the preamble of a final rule as designed so that "the courts can determine whether an agency is truly considering the comments made by the public").

Notice and comment rulemaking evokes the spirit of democracy and civic republicanism,[19] acting as a mechanism for adding legitimacy to governmental regulation due to the transparency of the agency action and the involvement of the public as a check before a rule may be promulgated.[20] This ability for regular people, along with concentrated interest groups, to influence agency decision making is sometimes underappreciated. The public as a whole seems less familiar with notice and comment rulemaking than they should be. In fact, law students are surprisingly uninformed too, at least until they take a course on regulations, like administrative law. For example, I asked my students in my Spring 2017 administrative law class to respond to two questions halfway through the semester:

1. Most Interesting? What has been the most interesting thing you have learned about administrative law that you did not know before taking this class (or at least that you hadn't appreciated to the same extent prior to this class)? What is it that makes that thing interesting?
2. Most Unique? What doctrine, theory, or system that you've learned is unique to administrative law as compared to things you have learned in other subject matter courses? If it is the same as your answer to #1 above, then please focus just on why you believe this thing is "unique" to administrative law.

Almost all of the students spent a substantial amount of time admiring the commenting process. Here is a representative sampling that shows just how special notice and comment seemed to my students:

- "It's really unique that any person can comment on a proposed rule. In some ways it seems very American to let anyone—regardless of station, power, or influence—to be able to have an opinion and share it with the agency."[21]

---

19. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1514-15 (1992) (describing the democratic nature of rulemaking and its embrace of civic republican ideas of public participation); *see also* Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 945 (2006) (discussing the history of commenting in rulemaking as a means of engaging citizens in regulatory development).

20. Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1348 (2011) (explaining rulemaking's relationship with legitimacy).

21. Response by Student #1, on file with author.

- "What is unique about Administrative Law, as compared to other subjects? I think it offers the most opportunity for public involvement, with nearly complete freedom and little to no cost to the public, via the notice and comment process. First, I think it is fantastic that the public is free to comment without being forced to hire an attorney or spend any money. Second, I appreciate the fact that the public is being invited to comment on rules and regulations, which strike me as the forms of law that most directly affect us. Third, with the internet making it possible for nearly everyone to post a comment for the world to see, and no indication of filtering of those comments on the part of the agencies, it's an incredible opportunity to exercise our freedom of speech and attempt to influence the outcome of the rules and regulations that will directly affect us. . . . Finally, and maybe most amazingly, the agencies must consider any comments they receive . . . ."[22]
- "I'm incredibly thankful we have these policies and procedures for rulemaking because during the comment period interested parties can comment positively or negatively upon the proposed rule. Of course, I would hope revoking the Clean Air Act would receive a fair amount of negative comments, thereby deterring its revocation. Overall, I found this subject matter to be the most interesting because even though President Trump is holding the most powerful office in the world, there are checks and balances as to what he can do."[23]

It was really quite remarkable how drawn the students were to the democratic quality of the commenting process. The survey serves as a reminder to those of us in the administrative law world that this very important method of agency accountability should not be taken for granted.

Those wishing to keep current on rulemakings can sign up to receive a "daily contents" email with the contents of the *Federal Register*, which will include, hot off the presses, all proposed rules, final rules, and notices from agencies published each day.[24] This information and past issues of the *Federal Register* are also available on the *Federal Register's* website,

22. Response by Student #2, on file with author.

23. Response by Student #3, on file with author.

24. *Receive Federal Register Contents by E-Mail*, NAT'L ARCHIVES (Aug. 17, 2016), https://www.archives.gov/federal-register/the-federal-register/email-signup.html.

searchable by date and by agency.[25] To submit comments on proposed rules, to view comments submitted on pending proposed rules or on final rules, or to otherwise explore the administrative record for many rules that are or have been the subject of a notice and comment process, one can also visit Regulations.gov, where such information is searchable by date, agency, and docket number.[26]

III. It Takes a Rule to Change a Rule: Commenting in a Time of Administrative Transition

Rules generated by notice and comment—a relatively rigorous process—get the benefit of a certain amount of durability, enduring even after agency leadership or presidents change unless undone by the same rigorous process. Just as it takes a law to repeal a law in Congress, it takes a notice and comment rule to rescind or alter a rule that has already been made final and effective through the notice and comment process. "A proposed but unfinished rule usually can be withdrawn for any reason, without an opportunity for comment on the withdrawal;" however, a "completed legislative rule typically can be rescinded only after notice and comment."[27] That means that rules promulgated under a previous administration remain binding with the force and effect of law until changed in the appropriate way as outlined by the APA. As one court summarized, an agency "is obligated to apply [its] own regulation, unless and until it is rescinded after [the agency] affords notice and an opportunity to comment."[28]

The existence of these procedural constraints, however, is not coupled with significant substantive constraints on new administrations changing rules (at least not beyond those constraints imposed by political considerations). As long as a new administration's regulatory position is allowable by underlying statutes, on many regulatory issues where discretion is available, the new administration has considerable latitude within which to adopt new policies. Recent Supreme Court precedent has

---

25. FEDERAL REGISTER, http://www.federalregister.gov (last visited Nov. 2, 2017).

26. REGULATIONS.GOV, http://www.regulations.gov (last visited Nov. 2, 2017).

27. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 959-60 (2008).

28. Nat'l Wildlife Fed'n v. Watt, 571 F. Supp. 1145, 1147 (D.D.C. 1983); *see also, e.g.,* Nat. Res. Def. Council, Inc. v. Abraham, 355 F.3d 179, 204-06 (2d Cir. 2004) (explaining that an agency cannot suspend effective date of final rule without completing notice and comment to alter it); Pub. Citizen v. Steed, 733 F.2d 93, 99-105 (D.C. Cir. 1984) (stating that indefinite suspension of final rule did not comply with APA requirements for altering a regulation already in effect).

made it clear that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change" and so long as the new policies are consistent with their statutory authority.[29] There is normally not a heightened standard of review in such instances, so long as the agency is aware that it is making a change and provides policy reasons for it (which can include that there is a new administration that simply has different regulatory priorities or assumptions).[30] The Court has counseled that "[i]n such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[31] Yet these explanations can be based on different ways of interpreting data, competing policy preferences, or different philosophical or economic assumptions. The "reasoned explanation" standard does not give judges an opportunity to actually judge which policy choice—the old or the new—is better.

Nonetheless, the commenting power is particularly potent during regulatory alterations brought on by a change in administrations. Only some explanation is necessary for the change; but, as explained above, to change a rule promulgated through notice and comment rulemaking, an administration must undergo a new notice and comment rulemaking process. Thus, even though an agency is empowered to change its position on a regulation, it cannot do so without first responding to significant comments received during the comment period associated with the proposed rule to rescind or change the existing rule.

Commenting in times of transition can often be of heightened importance, no matter if one supports the status quo or a change in rules. Commenting is the means to expose the flaws in any change of agency position and to question the rationale for such change, forcing an agency to respond and explain its decision, including to defend its reasons for change. Even when the agency faces a relatively low threshold for changing discretionary direction, such commenting has the potential to force agencies to issue responses.

Commenting makes these agencies defend their "reasoned explanation" in ways that otherwise might be less robust, less transparent, or less publicly accessible and capable of scrutiny. As seen in Part V, failure of an

29. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016).

30. *Id.* at 2125-26 ("When an agency changes its existing position, it 'need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.'" (citing FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)).

31. *Fox Television*, 556 U.S. at 515-16.

agency to respond to comments, even when the agency is otherwise given latitude to alter a rule, can lead to an invalidation of the new rule—not because it is new, but because of the consistent obligation to respond to comments. Furthermore, even outside the direct challenge to a rule's validity in court, comments that force responses can create an open public record for electoral review. Those responses allow voters to judge the administration's positions and hold the administration accountable or demand that Congress do the same. The duty to respond to comments creates a higher standard of explanation simply because of the level of dialogue that must occur. If there are no comments, the agency naturally need not explain nearly as much as when it must generate responses to criticisms.

Of course, the commenting process also serves as a way for those supportive of an administration's change in position to provide additional expertise as well as cover to help bolster the agency's case—both for administrative law's "on-the-record review" and for judicial review purposes. An agency's action is far less likely to be deemed arbitrary and capricious if the record supporting its rulemaking is robust. Supportive comments help in that regard. Supportive comments can also help the agency with its public relations. Just like the suggestion box in your local store is more likely to include complaints than compliments, however, so too do administrative dockets often see an imbalance where those with objections to a rule are more likely to take time to comment. Supporters of any regulatory effort should take care to remember that agencies need to develop a strong record favoring their preferred position.

Moreover, supporters should be concerned that, without their comments, an agency could be swayed to abandon a proposed rule or adopt a different, less favorable course of action. Supporters of a proposed rule can also demand that an agency explain itself should an agency decide to move away from the proposed course. Therefore, while supporters could find that their comments have utility in helping shield an agency's decision from assault in the courts, their comments might also turn out to be a way to criticize the agency's decision if it changes course. Moreover, like opponents to the proposed rule, the initial supporters can also use the record generated by the agency's responses in the development of the larger narrative in public debates and electoral considerations.

IV. See Something, Say Something: The Commenting Power

Despite its potential for potency in affecting agency thinking, many rules receive almost no public input.[32] Some of the most controversial rules can generate substantial commenting,[33] but even those voices are not as diverse as they could be given that those who comment are often especially interested in the rule's outcome. The commenting power is meaningless if you don't take the time to write a comment. You cannot have influence through commenting without actually commenting—just as you cannot win the lottery if you don't buy a ticket. Those who see something happening in the regulatory space that they care about—whether in opposition or support—should say something.

Comments can take many forms, from legal brief-like documents to long reports, simple letters, short emails, and even postcards. There are strategies, forms, and styles for comments that can increase their effectiveness, and books and other resources exist to provide commenters guidance on drafting and submitting. Individuals should consider consulting these tools[34] to develop effective commenting strategies, including tactics for writing comments in a manner that will increase their likelihood of being deemed significant enough to demand a response from the agency.

As Part III outlined, comments can be in opposition to or in support of rules. The rationale for using comments to oppose is rather intuitive. If an agency proposes taking a course of action and no one explains why it should not take that action, the agency is likely to go forth undeterred.

Less intuitive might be why one would spend the time and effort writing supportive comments. Part III discussed several of those reasons. Comments can give agencies additional record material upon which to rely when proceeding with a particular regulatory action, thereby helping to

---

32. Mendelson, *supra* note 20, at 1345 (explaining that some rulemakings can receive astonishingly high numbers of comments (even in the hundreds of thousands when assisted by electronic means and public campaigns working to generate comments (sometimes in forms)) but acknowledging that "[a]t the same time, . . . many rulemakings garner few, if any, comments").

33. *Id.*

34. *See, e.g.*, ELIZABETH D. MULLIN, THE ART OF COMMENTING: HOW TO INFLUENCE ENVIRONMENTAL DECISIONMAKING WITH EFFECTIVE COMMENTS (2d ed. 2013); RICHARD STOLL, EFFECTIVE APA ADVOCACY: ADVANCING AND PROTECTING YOUR CLIENT'S INTEREST IN THE DECISION-MAKING PROCESS (2000); Richard G. Stoll, *Effective Written Comments in Informal Rulemaking*, 32 ADMIN. L. & REG. NEWS 15 (2007); *Making Your Voice Heard: Step-by-Step Tips for Writing Effective Comments*, ENVTL. L. INST. (May 2012), https://www.epa.gov/sites/production/files/2014-04/documents/making-your-voice-heard.pdf.

insulate the agency action from invalidation upon judicial review. Sometimes agency officials may lack resources, lack expertise, or simply be so new to the job that they are unable to research or articulate defenses for their positions as well as a commenter might. Commenters can sometimes be welcome allies in assisting an agency seeking to avoid being tarred with what might otherwise be an insufficient record. The opportunity to rely on supporters' comments can often be a critical aid for agencies.

Comments themselves can also have multipurpose utility. While one might write a comment for submission to an agency, that same work product might also be effectively repurposed and used in public relations campaigns associated with the interests advanced by the comments, thus affecting social and political change even beyond affecting agency decision-making. On a variety of levels, there is strategic utility of commenting to affect legal, political, and social change even beyond the agency record.

V. Agency Accountability: Duty to Consider and Respond to Comments

Comments can force agencies to better explain their decisions or abandon courses of action that cannot be justified.[35] As discussed above, the mere existence of the commenting process acts as a check on the pool of acceptable courses of action and deters agencies from embarking on rulemaking that cannot withstand the scrutiny and exposure generated by the commenting process. Comments submitted also have the potential to create a situation where an agency does not, or is unable to, adequately respond to the concerns raised, leaving a rule vulnerable to invalidation. This Part details the precedents enforcing the duty to respond to comments, which, for rules subject to notice and comment requirements, generally hold that an agency will be deemed to be acting in an arbitrary and capricious manner if it fails to respond to significant comments.[36]

Responding to comments is critical to the exchange of views Congress envisioned as a check on agency power and is a means to create better-informed agency decisions. In *Home Box Office, Inc. v. F.C.C.*, the D.C. Circuit stressed that "there must be an exchange of views, information, and criticism between interested persons and the agency" to make agency

35. Weinberg, *supra* note 4, at 157 ("Its obligation to solicit and receive comments is 'inextricably intertwined' with its statutory obligation to issue an explanatory statement with each rule.").

36. *Id.* ("[A]n agency need not respond to insignificant arguments. But if an agency does not respond to significant comments, its decision-making cannot be deemed rational.").

rulemaking legitimate.[37] The court continued, emphasizing that "a dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."[38] Looking at the whole picture is important, and commenters often help agencies complete that task.

Consequently, the courts hold agencies accountable when they fail to take comments seriously by not fulfilling their statutory duty under the APA to consider and respond to comments submitted during rulemaking.[39] This requirement to consider and respond to comments is designed to ensure that public participation is protected as meaningful, to guarantee that the agency is thinking through its substantive choices, and to facilitate assessment of an agency's decision-making process during judicial review, where a court must "assure itself that all relevant factors have been considered by the agency."[40]

When courts review agency rulemaking to determine whether the agency has made a "reasoned decision," analyzing an agency's response to comments is critical part of that exercise.[41] Thus, the D.C. Circuit has explained that an "agency's response to public comments . . . 'enable[s] [a court] to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.'"[42] The commenting process and the duty

---

37. 567 F.2d 9, 35 (D.C. Cir. 1977).

38. *Id.* at 35-36 (footnote omitted) (citing Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973)). Weinberg similarly calls the right to comment and the agencies' obligation to respond as "a two-way dialogic commitment, in which government decision-makers may not simply ignore the arguments raised by citizens." Weinberg, *supra* note 4, at 150 (explaining that the APA requirements to allow comments and require response is one way our law recognizes a citizen's "right to be taken seriously").

39. Weinberg, *supra* note 4, at 153 (stating that "[t]he institution of notice-and-comment does a notable job of simulating a dialogic, discursive relationship in which government must show the citizenry the respect of explaining itself—of hearing public comments and responding to them directly," but arguing it does not create enough of a connection).

40. *Home Box Office, Inc.*, 567 F.2d at 36 ("A response is also mandated by *Overton Park*[.]" (citing Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977)).

41. Am. Mining Con. v. EPA, 907 F.2d 1179, 1187-88 (D.C. Cir. 1990) ("Deference to the agency does not, however, require us to abdicate the judicial duty carefully to 'review the record to ascertain that the agency has made a reasoned decision based on "reasonable extrapolations from some reliable evidence"' . . . ." (quoting Nat. Res. Def. Council v. EPA, 902 F.2d 962, 968 (D.C. Cir. 1990), *vacated in part* 921 F.2d 326 (D.C. Cir. 1991)).

42. Pub. Citizen, Inc. v. FAA, 988 F.2d 186, 197 (D.C. Cir. 1993) (quoting Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 335 (D.C. Cir. 1968)); *see also Home Box Office, Inc.*, 567 F.2d at 36.

to respond impose discipline on agencies, ensuring that they do not miss analyzing important issues.[43]

Commenters should be aware that the duty to respond is only triggered by serious and significant comments. Agencies "need not address every comment, but [they] must respond in a reasoned manner to those that raise significant problems."[44] Again, the guidance from the D.C. Circuit's *Home Box Office* opinion is helpful in determining what comments are and are not "significant":

> In determining what points are significant, the "arbitrary and capricious" standard of review must be kept in mind. Thus only comments which, if true, raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule cast doubt on the reasonableness of a position taken by the agency. Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true.[45]

While the agency can avoid responding to insignificant comments, an agency should be very cautious about deeming comments unworthy of response. The response obligation is one that an agency must take seriously, and the agency certainly cannot start out from a position of dismissiveness.[46]

An agency's response must also be coherent and substantive—a conclusory brush-off to a comment will not be enough to satisfy the duty to

---

43. Loan Syndications v. SEC, 223 F. Supp. 3d 37, 63 (D.D.C. 2016) ("Indeed, failure to address issues raised in comments may require a finding that the agencies acted in violation of the APA by 'fail[ing] "to consider an important aspect of the problem."'" (citing Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1051 (D.C. Cir. 2002)).

44. *Id.* at 64 (quoting Covad Commc'ns Co. v. FCC, 450 F.3d 528, 550 (D.C. Cir. 2006)).

45. 567 F.2d at 35 n. 58 (citing Portland Cement Ass'n v. Ruckelshaus, 586 F.2d 375, 393-94 (1973)); *see also Am. Mining Cong.*, 907 F.2d at 1187-88 (applying the *Home Box Office* standard and reiterating that "in assessing the reasoned quality of the agency's decisions, we are mindful that the notice-and-comment provision of the APA . . . 'has never been interpreted to require [an] agency to respond to every comment, or to analyse [sic] every issue or alternative raised by comments, no matter how insubstantial.'" (quoting Thompson v. Clark, 741 F.2d 401, 408 (D.C. Cir. 1984) (brackets and "sic" in original)).

46. *See generally* N.C. Growers' Ass'n v. United Farm Workers, 702 F.3d 755 (4th Cir. 2012).

respond.[47] In other words, the agency needs to "respond with sufficient clarity or specificity to . . . significant challenges."[48] When an agency fails to respond to specific challenges to the proposed rule's authority, wisdom, or support, its silence is arbitrary and capricious, and thus fatal to the rule.[49] For example, the Fourth Circuit once analyzed an agency's short comment period and express statement in advance that the agency would not consider (let alone respond to) some comments that were clearly relevant. The court determined that such an attitude made the agency noncompliant with notice and comment requirements.[50]

In a 2016 case decided by the D.C. Circuit, the US Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) did not respond to comments by interested stakeholders, as it was required to do. Nonresponsiveness led to the invalidation of some rules[51] because the ignored comments were meaningful, that is, "significant enough." In other words, the comments "raise[d] points relevant to the agency's decision and . . . if adopted, would require a change in an agency's proposed rule."[52] Regarding other sections in the same rulemaking, the court determined that the failure to respond to comments was not significant because, "even accepting" the comments as an accurate critique, "there is no indication that" the matters addressed in the comments "played a meaningful role in

47. *Am. Mining Cong.*, 907 F.2d at 1189 (finding agency's in-the-record responses to serious challenges to data used were insufficient because the court found "only conclusory statements that do not respond to the petitioner's challenges in any coherent manner").

48. *Id.* at 1190-91 ("We are constrained to remand to the agency for a fuller explanation . . . . Neither the summary comments nor the 1980 reports respond with sufficient clarity or specificity to the petitioners' admittedly significant challenges.").

49. *Id.* at 1191 ("[T]he agency's failure to respond to petitioners' specific challenges in the record is fatal here, since 'the points raised in the comments were sufficiently central that agency silence . . . demonstrate[s] the rulemaking to be arbitrary and capricious.'" (quoting Nat. Res. Def. Council v. EPA, 859 F. 2d 156, 188 (D.C. Cir. 1988)).

50. *N.C. Growers' Ass'n*, 702 F.3d at 769-70.

51. FBME Bank Ltd. v. Lew, 209 F. Supp.3d 299, 334-35 (D.D.C. 2016) ("[T]he Court concludes that FBME's comments regarding FinCEN's analysis of SARs data were 'significant,' since resolving them in the Bank's favor would likely have 'require[d] a change in [FinCEN's] proposed rule.'" (alteration in original) (quoting City of Portland v. EPA, 507 F.3d 706, 715 (D.C. Cir. 2007))

52. *Id.* at 333 (determining it was "clear that FinCEN did not meaningfully respond to FBME's comments regarding the agency's analysis of SARs data," then explaining the test by which the court "must evaluate whether those comments were sufficiently "significant" to warrant a response." (citing and quoting *City of Portland*, 507 F.3d at 714-16 (D.C. Cir. 2007); Reytblatt v. Nuclear Regulatory Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1977); *Home Box Office, Inc.,* 567 F.2d at 35 n.58)).

the rulemaking such that [the commenters'] critique, if true, would have changed the outcome of the Second Final Rule."[53] Thus, commenters' "concerns . . . that FinCEN did not explicitly address are sufficiently insignificant that FinCEN was not required to address them in more detail."[54]

Consider also the 2015 D.C. Circuit opinion in *Delaware Department of Natural Resources & Environmental Control v. EPA*.[55] The court noted that "[d]uring the notice and comment period, petitioners presented their concerns about the 2013 [emissions standards for air pollutants] Rule's impact on the efficiency and reliability of the energy grid."[56] The court agreed with petitioners that the "EPA should have, but did not, respond properly to their well-founded concerns."[57] The court characterized the agency as offering only "wan responses" to the comments.[58] The cursory treatment failed to demonstrate that the agency had thought through what the commenters were actually suggesting. When commenters explained big ideas, the EPA seemed not to understand them and "missed the forest for the trees" when "the overriding concern of these comments was the perverse effect the 100–hour exemption would have on the reliability and efficiency of the capacity and energy markets, not the specific clean energy alternatives that could supply the grid instead of backup generators."[59] Finding that the EPA utterly missed the big-picture effects described in the comments, the court determined that the EPA did not comply with its duty to respond under the APA when it "essentially said that it was not its job to worry about those concerns."[60] The court concluded that the "EPA cannot

53. *Id.* at 336-37; *see also* Loan Syndications v. SEC, 223 F. Supp. 3d 37, 64 (D.D.C. 2016) (demonstrating that failure to respond to a comment is not a strict liability offense; holding agency action valid "[e]ven though the agencies did not necessarily address each and every concern raised by these comments," because such failure did not demonstrate that agency's decision "'was not based on a consideration of the relevant factors.'" (quoting Covad Commc'ns Co. v. FCC, 450 F.3d 528, 550 (D.C. Cir. 2006)).

54. *FBME Bank*, 209 F. Supp. at 336.

55. 785 F.3d 1, 13-24 (D.C. Cir. 2015).

56. *Id.* at 13-14.

57. *Id.* at 14.

58. *Id.*

59. *Id.* at 15 ("[The EPA] refused to engage with the commenters' dynamic markets argument. At points, its later statements contradicted earlier responses.").

60. *Id.* at 15.

get away so easily from its obligations under the APA to respond to 'relevant and significant' comments."[61]

Further, when commenters suggested that the EPA consult with the Federal Energy Regulatory Commission (FERC), the EPA improperly passed the buck when it stated those "are comments more appropriately directed towards the FERC."[62] Ultimately the court held that the "EPA cannot have it both ways" by "simultaneously rely[ing] on reliability concerns and then brush[ing] off comments about those concerns as beyond its purview." Consequently, the "EPA's response [or lack thereof] to comments suggests that its 100–hour rule, to the extent that it impacts system reliability, is not 'the product of agency expertise.'"[63] Furthermore, the rule prohibiting post hoc rationalizations in administrative law means that an agency must consider and respond to comments *before* promulgating its final rule, not in some later-in-time justification.[64] The court thus concluded that, although "[d]uring oral argument, EPA's attorney told the court that EPA 'heard' the commenters' concerns about the 2013 Rule . . . merely hearing is not good enough[.] EPA must respond to serious objections" and must do so in the final rule.[65] Because it had failed to do so, the EPA's "rulemaking was arbitrary and capricious" in that case.[66]

Long-standing precedent supports the agency duty to respond because it is essential to making the commenting power meaningful. Part VI provides some recent examples that show the endurance of these critical standards today.

---

61. *Id.* (quoting Cement Kiln Recycling Coal. v. EPA, 493 F.3d 207, 223 (D.C. Cir. 2007).

62. *Id.* at 18 (quoting 40 C.F.R. § 6685 (2013)).

63. *Id.* at 18 (quoting Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Ass'n, 463 U.S. 29, 43 (1983)).

64. For a discussion of the prohibition on *post hoc* rationalizations and its justification in administrative law, see Donald J. Kochan, *Constituencies and Contemporaneousness in Reason-Giving: Thoughts and Direction After* T-Mobile, 37 CARDOZO L. REV. 1, 22, 27, 36-39 (2015).

65. *Del. Dept. of Nat. Res. & Envtl. Control*, 785 F.3d at 16.

66. *Id.*

VI. Recent Cases Illustrating the Commenting Power and Consequences for Agency Failure to Respond

In addition to longstanding precedent on the duty to respond, two very recent cases are instructive on the potential potency of the commenting power.

In *Sierra Club v. EPA*, the D.C. Circuit denied an EPA motion to dismiss a complaint challenging a final rule regarding "maximum achievable control technology" (MACT) standards for emissions of certain hazardous air pollutants (HAPs).[67] The court held that the "EPA did not adequately respond to petitioners' comments," and remanded to the EPA for further proceedings.[68] In attempting to meet statutory demands for listing certain HAPs and emissions targets, the EPA relied on "surrogates." Specifically, "rather than issuing new specific standards, the agency relied on previously set emission limits for another hazardous air pollutant or compound, 'which serves as a surrogate for the targeted section [7412](c)(6) [pollutant].'"[69]

Commenters, including the petitioners in the case, challenged that practice of using surrogates, contending instead that HAP-specific standards should be set or that, if a surrogate is to be used, then the "EPA must demonstrate the reasonableness of the use of a particular surrogate in a specific context."[70] The EPA provided some explanation for some surrogacy choices, but according to the court, "failed to respond adequately to comments disputing those explanations."[71]

The court identified two primary errors. First, the EPA claimed that the challenges were untimely, so it was not required to respond in the comments.[72] But the court rejected the timeliness argument; consequently, "the substantive comments raised meritorious issues unanswered by EPA" requiring remand.[73] Second, the court held the EPA could not claim that, because the surrogacy standards were old and tested when previously applied to other determinations, the proposed rule raised no new substantive issues regarding those standards.[74] The court explained that the "EPA cannot hide behind the established nature of the standards it uses when it

67. 863 F.3d 834, 835 (D.C. Cir. 2017).
68. *Id.* at 835.
69. *Id.* at 836 (quoting 79 C.F.R. 74,677 (2014)).
70. *Id.* at 838.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id*.

applies new surrogacy relationships."[75] In its conclusion, the court determined that "[p]roviding brand-new clarification of some surrogacy relationships necessarily rendered it substantive and EPA's failure to explain sufficiently these newly 'clarified' relationships and respond to the associated comments dooms the current determination."[76]

Meaningful public participation is protected when the courts review an agency's compliance with its duty to take comments seriously. *Sierra Club* is just one of the latest poignant reminders that agencies cannot take lightly their responsibility to engage with commenters and that there are consequences for failing to fulfill an agency's duty to respond.

The opinion in *Waterkeeper Alliance v. EPA,*[77] also from the D.C. Circuit, is another wonderful example of the power of commenting and an example of the judiciary's willingness to scrutinize the sufficiency of an agency's consideration of comments. The case involved a 2008 final rule by the EPA regarding reporting requirements for air releases from animal waste at farms,[78] and the public's interest in accessing the information that could be gathered from reviewing such reports.

According to the court, "the EPA has broad powers to take remedial actions or order further monitoring or investigation" upon being notified by farms and other entities about the release of certain hazardous materials—like the ammonia or hydrogen sulfide released from animal waste—under reporting requirements in sections of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[79] and the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA).[80] Although both statutes require reporting of the release of hazardous substances above a certain threshold, the EPA's 2008 final rule exempted farms "from CERCLA and EPCRA reporting requirements for air releases from animal waste"[81] above that threshold, contending that such "reports are unnecessary because, in most cases, a federal response is impractical and unlikely."[82] In fact, the EPA claimed that "it had never taken response action based on notifications of air releases from animal

75. *Id.* at 839 (emphasis added).

76. *Id.*

77. 853 F.3d 527 (D.C. Cir. 2017).

78. CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste at Farms, 73 Fed. Reg. 76,948, 76,956/1 (Dec. 18, 2008).

79. 42 U.S.C. §§ 9603-9604 (2012).

80. 42 U.S.C. § 11004 (2012).

81. *Waterkeeper All.*, 853 F.3d at 530.

82. *Id.*

waste" and it could not "foresee a situation where [it] would take any future response action as a result of such notification[s]."[83]

In other words, the EPA based its exemption on the justification that it did not see any utility for the agency to receive such reporting information on releases, so there was no need to demand it. The EPA was seemingly invoking the de minimis exception—a judicially created doctrine (and a cousin of the avoiding absurdity doctrine) that excuses strict compliance with a statute's terms and grants an agency "authority to create even certain categorical exceptions to a statute 'when the burdens of regulation yield a gain of trivial or no value,'"[84] because "[a]gencies are not . . . 'helpless slaves to literalism.'"[85] To support its exemption decisions, the EPA pointed only to provisions in the statute that the court held did not "even hint[] at the type of reporting exemption the EPA adopted in the *Final Rule*," yet "the EPA extract[ed] from them a notion that Congress meant to 'avoid[ ] duplication of effort . . . and minimiz[e] the burden on both regulated entities and government response agencies.'"[86] The court held that the EPA's exemptions could not be justified under the de minimis exception because the EPA erred when it "purported to find an absence of regulatory benefit,"[87] and because "[efficiency] concerns don't give the agency carte blanche to ignore the statute whenever it decides the reporting requirements aren't worth the trouble."[88]

Commenters objected to the EPA's exemption rule on many grounds, which brings us to lesson one of the case: it demonstrates a victory for commenters and proof that commenting can sometimes change an agency's position between a proposed rule and a final rule. In light of comments received, the EPA changed its position in the final rule and retained reporting requirements regarding releases from large concentrated animal feeding operations (CAFOs), in part because EPCRA has an express public disclosure requirement in the statute (unlike CERCLA, which does not directly deal with public disclosure for information regarding releases).[89]

---

83. *Id.* at 531-32.

84. *Id.* at 530 (quoting Pub. Citizen v. FTC, 869 F.2d 1541, 1556 (D.C. Cir. 1989)).

85. *Id.* at 535 (quoting Pub. Citizen v. Young, 831 F.2d 1108, 1112 (D.C. Cir. 1987)).

86. *Id.*

87. *Id.*

88. *Id.* at 535 (citing Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2446 (2014) ("[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.")).

89. *Id.* at 532 ("[P]ublic comments seeking information about emissions from the largest farms (so-called CAFOs), led the EPA to carve CAFOs out of its EPCRA

That result in the rulemaking record illustrates that sometimes comments result in real changes in agency policy even after the agency thought it might act in certain way prior to considering the comments.

Lesson two from the case concerns evidence of accountability when agencies fail to respond adequately to comments received. In choosing to retain the other exemptions, the EPA claimed there would be no value to obtaining the information supplied by reporting, as discussed above. The commenters disagreed, asserting both that the EPA had many options available in its tool belt to take responsive action or to order remedial action and that the reporting information had independent value even if the EPA did not see an immediate, direct way that the agency would use the information—other constituencies of the information would find it valuable and could use it for productive purposes. The court agreed that the record showed the EPA had remedial powers that could address reported releases.[90] Thus, as the court explained, the commenters "put before the EPA a good deal of information, not refuted by the EPA, suggesting scenarios where the reports could be quite helpful in fulfilling the statutes' goals."[91] The commenters described in detail ways that the EPA could respond to releases using its existing authority, so the court found EPA deficient in its duty to respond to comments when the agency simply claimed, "it is unclear what response the commenter had in mind."[92] Furthermore, the court agreed that there was an informational benefit to the public and others from release information, including local officials who could use the information to formulate effective and safe responses that "emergency commissions could use . . . when responding to citizen complaints or genuine emergencies."[93] The EPA made some statements why it felt the reports would not be useful to the agency, but failed to see that the reports might have broader utility beyond those limited agency purposes.

---

exemption. . . . The *Final Rule* thus requires CAFOs to continue reporting air emissions under EPCRA, but not under CERCLA; other farms are exempt from both.").

90. *Id.* at 530 ("In light of the record, we find that those reports aren't nearly as useless as the EPA makes them out to be. . . . We therefore grant Waterkeeper's petition and vacate the *Final Rule*.").

91. *Id.* at 537 ("Whatever the EPA's past experience in responding to mandated information may have been, it plainly has broad authority to respond. CERCLA authorizes both removal and remedial actions.").

92. *Id.* at 536.

93. *Id.* at 536-37.

While granting Waterkeeper Alliance's petition and vacating the final rule, the court summarized the disconnect between the comments submitted and the path chosen by the EPA as follows:

> [T]he comments undermine the EPA's primary justification for the *Final Rule*—namely, that notifications of animal-waste-related releases serve no regulatory purpose because it would be "impractical or unlikely" to respond to such a release. It's not at all clear why it would be impractical for the EPA to investigate or issue abatement orders (as suggested by the Clean Air Agencies) in cases where pumping techniques or other actions lead to toxic levels of hazardous substances such as hydrogen sulfide. And the SARA Title III Officials provide at least one way that local or state authorities might use the CERCLA release reports—to narrow an investigation when they get a phone call reporting a suspicious smell or similarly vague news of possibly hazardous leaks. The record therefore suggests the potentiality of some real benefits.[94]

When commenters raise significant concerns, the APA requires the agency to prove it has considered them, in part by respecting the commenters by providing a response. When an agency fails to do so, its actions cannot withstand judicial review. That is the commenting power.

VII. Conclusion

The commenting power allows ordinary citizens and organized interests alike to have a real, influential role in notice and comment rulemaking and the formulation of regulatory policy. Real people are empowered by the commenting process to have a real say in how the administrative state impacts their real lives. Oftentimes comments don't change an agency's course when a proposed rule is opposed or don't prove consequential in convincing the agency to stay the course when a proposed rule is supported. But sometimes, comments do. Furthermore, you can't play a role in possibly influencing an agency position unless you enter the game. Thankfully, for the purposes of accountability and the supply of information into the regulatory process, the Administrative Procedure Act gives everyone that meaningful opportunity to participate.

---

94. *Id.* at 537 (citation omitted).