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THE COMMENTING POWER: AGENCY ACCOUNTABILITY THROUGH PUBLIC PARTICIPATION

Donald J. Kochan[*]

ABSTRACT:

Whether you are a member of the resistance movement or a cheerleader for the new Trump Administration's regulatory reform agenda, this Essay 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. The laws in this area are ones about which anyone interested in regulation should know more. Describing general precedents, including two recent exemplar cases from the D.C. Circuit on April 11, 2017 and July 18, 2017, this Essay provides a critical tutorial for anyone interested in getting involved—for or against regulatory change. It helps one understand why what this Essay dubs the "commenting power" is so critical in our democratic republic.

I. INTRODUCTION

Whether you are a member of the resistance movement to or a cheerleader for the new Trump Administration's regulatory reform agenda, this Essay intends to engage your passion. (Of course, scholars, students, and agency officials should be interested too.) It explains the law that allows ordinary citizens, as much as sophisticated interest groups, opportunities to participate in, and have opinions heard on, the development of regulations.

"One of the greatest inventions of modern government" is the characterization that noted administrative law scholar Kenneth Culp Davis has used to describe the "notice and comment" rulemaking process.[1] It is one of the greatest inventions in no small part because notice and comment rulemaking engages the public in the process in a meaningful way. Ordinary individuals are given a rather extraordinary "commenting power."

When an agency proposes a rule, individuals get a chance to comment, and an agency must respond to significant comments raised during the rulemaking

[*] Associate Dean for Research & Faculty Development and Professor of Law, 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).

before the rule can become final and effective. That commenting power has been institutionalized by the Administrative Procedure Act ("APA")[2] in what might be called the roots feeding the branches of government—the People—and it is one that can make a difference by acting as a check on the coordinate power of the Executive Branch. This Essay provides a general overview of this commenting power. It also focuses on two recent cases—from April 2017 and July 2017—reflecting the enduring potency of the commenting power and the negative consequences for agencies that fail to fulfill their duty to consider and respond to comments.

The commenting power acts as a brilliantly-crafted check and balance on 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 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. Beth Simone Noveck summarized it well when explaining, "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 like most of what we consider checks and balances, the commenting power rests in the people.

Administrative agencies are filled with new work when faced with new leadership. This ranges from 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 this happens, there is a critical role for public participation that sometimes evades the attention of the pundits, talking heads, news anchors, editorial writers, and general public.

Built into the design of the APA (and many state equivalents) are key provisions for 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 and upon which the public is given a window to submit comments—that can say just about anything and can support the proposal, oppose the proposal, 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) their final rule. That makes the ability to comment meaningful and capable of making a difference. It means that comments can be powerful.

Part II of this Essay briefly summarizes the notice and comment rulemaking process. Part III examines rulemaking in a time of transition between

[2] 5 U.S.C. §551 et seq., available at https://www.archives.gov/federal-register/laws/administrative-procedure.

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

administrations, along with some general comments on the reasons to comment. Part IV focuses on some of the mechanics of commenting. Several case precedents on an agency's duty to respond to comments will be analyzed in Part V, and the Essay will close in Part VI by analyzing the lessons on an agency's duty to respond to comments provided in the July 18, 2017 opinion in *Sierra Club and California Communities Against Toxics v. Environmental Protection Agency*[4] and the April 11, 2017 opinion in *Waterkeeper Alliance v. Environmental Protection Agency*,[5] both from the U.S. Court of Appeals for the D.C. Circuit. These cases are excellent examples of the power of commenting and of the judiciary's willingness to scrutinize the sufficiency of an agency' 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, i.e. 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.

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 Essay will define), the agency will be disciplined if such comments are ignored. The purpose of the commenting period and the requirement of consideration and response of comments is to make sure the public 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 act as a quality control mechanism.[6] 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.[7]

It is shocking that so many people who hold the commenting power—that's all of us—never choose to exercise it. This Essay is designed to educate individuals on that power in the hopes of inspiring more of the public to become engaged. This

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[4] No. 15-1246, 2017 WL 3027081 (D.C. Cir. July 18, 2017), slip opinion available at slip opinion available at https://www.cadc.uscourts.gov/internet/opinions.nsf/B6A06849B327ADE885258161004EFD90/$file/15-1246.pdf.

[5] 853 F.3d 527 (D.C. Cir. 2017), slip opinion available at https://www.cadc.uscourts.gov/internet/opinions.nsf/2E91F70B0AF28BBE852580FF004E33FF/$file/09-1017-1670473.pdf.

[6] Jonathan Weinberg, *The Right to be Taken Seriously*, 67 U. MIAMI L. REV. 149, 153 (2012) (discussing how notice and comment and the duty to respond "increases the accuracy of agency decision-making."), available at http://repository.law.miami.edu/cgi/viewcontent.cgi?article=1077&context=umlr.

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

essay will explain 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.

II. WHAT IS "NOTICE AND COMMENT" (OR, "INFORMAL") RULEMAKING?

There are many ways that federal administrative agencies generate regulatory policy, but "notice and comment" rulemaking (also known as "informal" rulemaking)[8] is the most powerful piston driving the regulatory engine. It involves a set of procedures established by the Administrative Procedure Act ("APA"). This Part provides a brief overview of the steps in notice and comment rulemaking.

"Rule making" 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 it 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, there are things agencies can do that do not require officially receiving and responding to comments, including develop guidance, make interim rules, and make emergency rules, among others. However, these actions are meant to be the exception 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 (1) a proposed rule 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] after which (2)

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[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), available at https://www.archives.gov/federal-register/laws/administrative-procedure/551.html. .

[10] *Id.* § 551(4).

[11] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 302–303 (1979).

[12] 5 U.S.C. § 553(b), available at https://www.archives.gov/federal-register/laws/administrative-procedure/553.html; *see also* Home Box Office, Inc. v. F.C.C., 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.")

members of the public are given a window in which they are allowed to participate in the formation of the final rule—the "comment" period where 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, (3) the agency must consider and respond to the comments,[15] a task usually undertaken as part of (4) 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 in the *Federal Register* of the text of the rule itself as it will later appear in the *Code of Federal Regulations* ("CFR") but also that it be accompanied by a "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," or explanatory writing preceding the technical rule—where the agency will often 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 they must.[18]

Notice and comment rulemaking evokes the spirit of democracy and civic republicanism,[19] acting as a mechanism for adding legitimacy to governmental

[13] 5 U.S.C. § 553(c), available at https://www.archives.gov/federal-register/laws/administrative-procedure/553.html.
[14] *Home Box Office, Inc.*, 567 F.2d at 35-36 ("an 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); Thompson v. Clark, 741 F.2d 401, 408 (D.C. Cir. 1984); see also North Carolina Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755, 769 (4th Cir. 2012) ("during notice and comment proceedings, the agency is obligated to identify and respond to relevant, significant issues raised during those proceedings." (citing S.C. ex rel. Tindal v. Block, 717 F.2d 874, 885–86 (4th Cir.1983)).
[16] 5 U.S.C. § 553(c), available at https://www.archives.gov/federal-register/laws/administrative-procedure/553.html.
[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.").
[19] Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992) (describing the democratic nature of rulemaking and its embrace of civic republican ideas of public participation), available at

regulation because of the transparency of the agency action and the involvement of the public as a check before a rule may be promulgated.[20]

The ability for regular people, along with concentrated interest groups, to influence agency decisionmaking is sometimes under-appreciated. The public as a whole seems less familiar with notice and comment rulemaking than they should be. In fact, law students are surprisingly unfamiliar 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]
- ❖ "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

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http://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1026&context=articles; *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), available at http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1974&context=faculty_scholarship.

[20] Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1348 (2011) (explaining rulemaking's relationship with legitimacy), available at http://www.gwlr.org/wp-content/uploads/2012/08/79-5-Mendelson.pdf.

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

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 served 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 its website, 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, and 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]

[22] Response by Student #2, on file with author.
[23] Response by Student #3, on file with author.
[24] https://www.archives.gov/federal-register/the-federal-register/email-signup.html
[25] www.federalregister.gov
[26] www.regulations.gov

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 if 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 after a notice and comment process. As O'Connell explains, "A proposed but unfinished rule usually can be withdrawn for any reason, without an opportunity for comment on the withdrawal;" however, "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 it, 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, are not coupled with substantial substantive constraints on new administrations changing rules (at least not beyond the political constraints). As long as a new administration's regulatory position is allowable by underlying statutes, on many regulatory issues where discretion is available, new administration has considerable latitude within which to adopt new policies. Recent U.S. Supreme Court precedent has made it clear that "Agencies 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, "In such cases it is not that further justification is

[27] Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 959-960 (2008).
[28] National Wildlife Federation v. Watt, 571 F. Supp. 1145 (D.D.C. 1983) (citing Service v. Dulles, 354 U.S. 363 (1957)); *see also, e.g.*, Natural Res. Def. Council, Inc. v. Abraham, 355 F.3d 179, 204-06 (2d Cir. 2004) (agency cannot suspend effective date of final rule without completing notice and comment to alter it); Public Citizen v. Steed, 733 F.2d 93, 99-105 (D.C. Cir. 1984) (indefinite suspension of final rule did not comply with APA requirements for altering regulation already in effect).
[29] Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117, 2125 (2016) (citing, for example, National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U.S. 967, 981–982 (2005)).
[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)).

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, for example. The "reasoned explanation" standard does not give judges an opportunity to 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. Just some explanation is necessary for the change; but, as explained above, to change a rule promulgated through notice and comment rulemaking, an administration must go through a new notice and comment rulemaking. 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 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 a way to expose the flaws in any change of agency position and to question the rationale for changing positions, 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 __, failure of an agency to respond to comments, even when it is otherwise given wide berth to alter a rule, can lead to an invalidation of the new rule—not because it is new but instead just 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 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 is also a way that those supportive of an administration's change in position can provide additional expertise and cover to help bolster the agency's case, both for administrative law's "on-the-record review" and judicial review purposes as well as to help the agency with its public relations. An agency's action is far less likely to be deemed arbitrary and capricious if the

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

record supporting its rulemaking is robust. Supportive comments help in that regard. Like the suggestion box in your local store is more likely to include complaints than compliments, 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 and can use the assistance.

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. Supporters of a proposed rule too can demand that an agency explain itself should an agency decide to move away from the proposed course. Therefore, while supporters could find their comments having utility in helping shield an agency's decision from assault in the courts, they 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 narrative in the larger public debates and electoral considerations.

IV. SEE SOMETHING, SAY SOMETHING: THE COMMENTING POWER

Despite its potential for potency in affecting agency thinking, many rules see almost no public participation.[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 that 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 commenting—just as you can't 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 may take many forms, from legal brief-like documents, 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

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[32] Mendelson, *supra* note 20, at 1345 (explaining that some rulemaking can receive astonishingly high numbers 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 MULLIN, THE ART OF COMMENTING: HOW TO INFLUENCE ENVIRONMENTAL DECISIONMAKING WITH EFFECTIVE COMMENTS, 2D: HOW TO INFLUENCE ENVIRONMENTAL DECISIONMAKING WITH EFFECTIVE COMMENTS (2d ed. 2013); RICHARD STOLL, EFFECTIVE APA

commenting strategies, including for writing comments in a manner that will increase their likelihood of being deemed "significant" enough to demand a response from the agency.

As the previous Part III outlined, comments can be in opposition to or supportive 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, the agency is likely to go forth undeterred.

Less intuitive might be why one would spend the time and effort writing comments supportive. Some of those reasons were described in Part III. Comments can give agencies additional record material upon which to rely when proceeding with a particular regulatory action and thereby helping to 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 position as well as a commenter might. Commenters can sometimes be very welcome allies in the avoidance of an agency being tarred with might otherwise be an insufficient record. The opportunity to rely on supporter's comments can often be a critical aid for agencies.

Comments themselves can also have multi-purpose 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, thereby 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] In fact, 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 rulemakings that could not withstand the scrutiny and exposure generated by the commenting process. Comments submitted

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ADVOCACY (2013); Environmental Law Institute, *Making Your Voice Heard: Step-by-Step Tips for Writing Effective Comments*, May 2012, available at https://www.epa.gov/sites/production/files/2014-04/documents/making-your-voice-heard.pdf (adapted from *The Art of Commenting* by Elizabeth Mullin); Richard G. Stoll, *Effective Written Comments in Informal Rulemaking*, ADMIN. L. & REG. NEWS, Summer 2007, at 15, available at https://www.americanbar.org/content/dam/aba/migrated/adminlaw/news/adlaw_summer2007.authcheckdam.pdf.

[35] Weinberg, *supra* note 6, at 153 ("Its obligation to solicit and receive comments is "inextricably intertwined" with its statutory obligation to issue an explanatory statement with each rule.")

have the potential to also 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 documents the precedents enforcing the duty to respond to comments—for rules subject to notice and comment requirements, an agency will be deemed to be acting in an arbitrary and capricious manner if it fails to respond to significant comments.[36]

Commenting is critical to the exchange of views Congress envisioned as a check on agency power and a means to create better-informed agency decisions. In *Home Box Office, Inc. v. F.C.C.*, the U.S. Court of Appeals for 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 rulemaking legitimate.[37] That court continued 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] Such a requirement to consider and respond to comments is designed to ensure that the public participation is protected as meaningful, to ensure that the agency is thinking through its substantive choices, and to facilitate assessment of an agency's decisionmaking 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

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

[37] *Home Box Office, Inc.*, 567 F.2d at 35.

[38] *Id.* at 35-36 (D.C. Cir. 1977) ((citing Portland Cement Ass'n v. Ruckelshaus, 486 F.2d at 393-394). 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 6, 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 6, at 153 ("The 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 401 U.S. at 416)).

[41] American Min. Congress v. U.S. E.P.A., 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

"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 to respond discipline agencies to be sure that they do not miss analyzing important issues or concerns.[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 is and what is 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 a serious one that an agency must take seriously, and the agency certainly cannot start out from a position of dismissiveness.[46]

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record to ascertain that the agency has made a reasoned decision based on 'reasonable extrapolations from some reliable evidence,'" (citing Natural Resources Defense Council v. EPA, 902 F.2d 962, 968, (D.C.Cir.1990)).

[42] Pub. Citizen, Inc. v. F.A.A., 988 F.2d 186, 197 (D.C.Cir.1993) (omission in original) (quoting Automotive 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 (D.C. Cir. 1977).

[43] The Loan Syndications v. Securities and Exchange Commission, No. 16-652 (RBW), 2016 WL 7408834 (D.D.C. Dec. 12, 2016), at * 15 ("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) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

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

[45] *Home Box Office, Inc.*, 567 F.2d at 35 n. 58 (citing Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393-394 (1973)); *see also American Min. Congress*, 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*, 741 F.2d at 408).

[46] North Carolina Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755 (4th Cir. 2012).

An agency's response must also be coherent, serious, and substantive—a conclusory brush off to a comment will not be enough to satisfy the duty to 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 rulemaking's authority, wisdom, or support, their silence is arbitrary and capricious and thereby fatal to the rule.[49] For example, the U.S. Court of Appeals for the Fourth Circuit once analyzed a short agency comment period and express statement in advance that the agency would not consider some comments that were clearly relevant, let alone respond. It determined that such an attitude made the agency non-compliant with notice and comment requirements.[50]

In a 2016 case decided by the U.S. Court of Appeals for the D.C. Circuit, the Department of Treasury's Financial Crimes Enforcement Network ("FinCEN") did not respond to comments by interested stakeholders, as it was required to do. Some non-responsiveness led to invalidation of some rules,[51] because the ignored comments were "meaningful, i.e. significant enough"—in other words, they "'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, commenters "concerns . . . that FinCEN did not explicitly address are sufficiently insignificant that FinCEN was not required to address them in more detail" because "there is no indication that" the matters addressed in the comments "played a

[47] *American Min. Congress*, 907 F.2d at 1189 (finding agency's in-the-record responses to serious challenges to data used were insufficient because the court found "there 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 ("the 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 Natural Resources Defense Council v. EPA, 859 F.2d 156, 188 (D.C.Cir.1988)).

[50] *North Carolina Growers' Ass'n, Inc.*, 702 F.3d at 769.

[51] FBME Bank Ltd. V. Lew, 209 F.Supp.3d 299, 334-35 (D.D.C. 2016) ("the 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.'")

[52] *Id.* at 333 (after determining it was "clear that FinCEN did not meaningfully respond to FBME's comments regarding the agency's analysis of SARs data," 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, Oregon v. E.P.A., 507 F.3d 706, 714–15 (D.C.Cir.2007); Reytblatt v. Nuclear Regulatory Comm'n, 105 F.3d 715, 722 (D.C.Cir.1997); *Home Box Office, Inc.*, 567 F.2d at 35 n. 58).

meaningful role in the rulemaking such that [the commenters'] critique, if true, would have changed the outcome of the Second Final Rule."[53]

Consider also the 2015 D.C. Circuit opinion in *Delaware Department of Natural Resources & Environmental Control v. E.P.A.*.[54] There, the court noted that, "During 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."[55] The court agreed with petitioners that "EPA should have, but did not, respond properly to their well-founded concerns."[56] The court characterized the agency as offering only "wan responses" to the comments.[57] 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."[58] 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."[59] The court concluded that the "EPA cannot get away so easily from its obligations under the APA to respond to 'relevant and significant' comments."[60] Further, when commenters suggested that EPA consult with another agency, the Federal Energy Regulatory Commission ("FERC"), the EPA improperly passed the buck when it stated those "are comments more appropriately directed towards the FERC." [61] Ultimately the court held that "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, "EPA's response [or lack thereof] to comments

[53] *Id.* at 336-37; *see also Loan Syndications*, 2016 WL 7408834, at * 16 (demonstrating failure to respond to a comment is not a strict liability offense; holding agency action valid "Even 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.'").
[54] 785 F.3d 1, 13-24 (D.C. Cir. 2015).
[55] *Id.* at 13-14.
[56] *Id.* at 14.
[57] *Id.*
[58] *Id.* at 15 ("EPA . . . refused to engage with the commenters' dynamic markets argument. At points, its later statements contradicted earlier responses") (citing Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486, 1520 (D.C.Cir.1984) ("Such self-contradictory, wandering logic does not constitute an adequate explanation" of agency action)).
[59] *Id.* at 15.
[60] *Id.*
[61] *Id.* at 18.

suggests that its 100–hour rule, to the extent that it impacts system reliability, is not "'the product of agency expertise.'"[62] 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.[63] The court in *Delaware Dept. of Natural Resources & Envtl. Control* 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.[64] Because it had failed to do so, EPA's "rulemaking was arbitrary and capricious" in that case.[65]

Longstanding precedent supports to agency duty to respond as critical to making the commenting power meaningful. Part VI provides some recent examples that shows the endurance of these critical standards today.

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. Each is instructive and examined in this final Part VI.

In a July 18, 2017 opinion in the case of *Sierra Club and California Communities Against Toxics v. Environmental Protection Agency*, the U.S. Court of Appeals for 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").[66] It held that "EPA did not adequately respond to petitioners' comments," thereby remanding to EPA for further proceedings.[67] In attempting to meet statutory demands for listing certain HAPs and emissions targets, EPA relied on "surrogates"—i.e. "rather than issuing new specific standards, the agency relied on

[62] *Id.* at 18.
[63] 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), available at http://www.cardozolawreview.com/content/37-1/KOCHAN.37.1.pdf.
[64] *Delaware Dept. of Natural Resources & Envtl. Control*, 785 F.3d at 16.
[65] *Id.*
[66] No. 15-1246, 2017 WL 3027081 (D.C. Cir. July 18, 2017), slip opinion available at https://www.cadc.uscourts.gov/internet/opinions.nsf/B6A06849B327ADE885258161004EFD90/$file/15-1246.pdf.
[67] *Id.* at *1.

previously set emission limits for another hazardous air pollutant or compound, 'which serves as a surrogate for the targeted section [7412](c)(6) [pollutant].'"[68]

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 "EPA must demonstrate the reasonableness of the use of a particular surrogate in a specific context."[69] EPA provided some explanation for some surrogacy choices, but according to the court "failed to respond adequately to comments disputing those explanations."[70] Two primary errors were identified by the court. First, EPA claimed that the challenges were untimely, so that it was not required to respond in the comments. However, the court rejected the timeliness argument and, consequently, "the substantive comments raised meritorious issues unanswered by EPA" requiring remand.[71] 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. Indeed, the court explained, "EPA cannot hide behind the established nature of the standards it uses when it *applies* new surrogacy relationships."[72] In its conclusion, the court determined that, "Providing 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."[73]

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

The April 11, 2017 opinion in *Waterkeeper Alliance v. Environmental Protection Agency*[74] from the U.S. Court of Appeals for 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' consideration of comments. The case involved a 2008 final rule by the EPA regarding reporting requirements

[68] *Id.* at *2.
[69] *Id.* at *4.
[70] *Id.*
[71] *Id.* at *3.
[72] *Id.* at *4 (emphasis added).
[73] *Id.*
[74] 853 F.3d 527 (D.C. Cir. 2017), slip opinion available at https://www.cadc.uscourts.gov/internet/opinions.nsf/2E91F70B0AF28BBE852580FF004E33FF/$file/09-1017-1670473.pdf.

for air releases from animal waste at farms,[75] and the public's interest in access to 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 both the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA")[76] and the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA").[77] Although both statutes require reporting for the release of hazardous substances above a certain threshold, EPA's 2008 final rule exempted farms "from CERCLA and EPCRA reporting requirements for air releases from animal waste"[78] above that threshold, contending that such "reports are unnecessary because, in most cases, a federal response is impractical and unlikely."[79] In fact, EPA claimed that "it had never taken response action based on notifications of air releases from animal waste" and it could not "'foresee a situation where [it] would take any future response action as a result of such notification[s]."[80]

In other words, the EPA based its exemption on the fact 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. 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,'"[81] because "'[a]gencies are not . . . 'helpless slaves to literalism.'"[82] 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.'"[83] The court held that EPA's exemptions could not be justified under the de minimis exception because the EPA erred when it "purported to find

[75] 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).
[76] 42 U.S.C. §§9603-9604.
[77] 42 U.S.C. §11004.
[78] *Waterkeeper Alliance*, 853 F.3d at 530.
[79] *Id.*
[80] *Id.* at 531-32.
[81] *Id.* at 530 (citing Public Citizen v. FTC, 869 F.2d 1541, 1556 (D.C. Cir. 1989) (quoting Alabama Power v. Costle, 636 F.2d 323, 360-61 (D.C. Cir. 1979)).
[82] *Id.* at 535 (quoting Public Citizen v. Young, 831 F.2d 1108, 1112 (D.C. Cir. 1987))
[83] *Id.*

an absence of regulatory benefit,"[84] including 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."[85]

Commenters objected to EPA's exemption rule on a number of levels. 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, 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).[86] That result in the rulemaking record illustrates that sometimes comments result in real changes in agency policy even after the agency thought it might go a certain way prior to considering the comments.

Next is lesson two from the case: evidence of accountability when agencies fail to respond adequately to comments received. In choosing to retain the other exemptions, EPA claimed there would be no value to obtaining the information supplied by reporting, as discussed earlier. The commenters disagreed, contending both that EPA had many options available to it in its tool belt to take responsive action or to order remedial action and that the reporting information had independent value even if 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 EPA had remedial powers that could address reported releases.[87] 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."[88] The commenters described in detail ways that 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

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[84] *Id.*

[85] *Id.* at 536 (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.")).

[86] *Id.* at 532 ("public comments seeking information about emissions from the largest farms (so-called CAFOs), led the EPA to carve CAFOs out of its EPCRA exemption. . . . The *Final Rule* thus requires CAFOs to continue reporting air emissions under EPCRA, but not under CERCLA; other farms are exempt from both.").

[87] *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*.").

[88] *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.").

simply claimed, "'it is unclear what response the commenter had in mind.'"[89] Furthermore, the court agreed that there was 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."[90] 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.

When 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.[91]

When commenters raise significant concerns, the APA requires the agency to prove it has considered them, including 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 as well as organized interests 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 that 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 them to stay the course when a proposed rule is supported. But sometimes they do. Furthermore, you can't play

[89] *Id.* at 536.
[90] *Id.* at 536-37.
[91] *Id.* at 537.

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.