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## e-Rulemaking: a New Avenue for Public Engagement

Robert Carlitz\*

Rosemary Gunn†

\*Information Renaissance, [rdc@info-ren.org](mailto:rdc@info-ren.org)

†Information Renaissance, [rgunn@info-ren.org](mailto:rgunn@info-ren.org)

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# e-Rulemaking: a New Avenue for Public Engagement \*

Robert Carlitz and Rosemary Gunn

## **Abstract**

A new online system is being created to support rulemaking, the process agencies use to implement federal legislation. The new system will allow members of the public to participate in rulemaking far more easily than ever before, realizing the potential of legislation that has been in place since 1946. Online rulemaking may lead to a process that is more inclusive in scope and more open to public discussion.

**KEYWORDS:** participation, rulemaking, public engagement, public involvement, e-rulemaking, online dialogue

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## I. Rulemaking

**What is it?** A glance at the front page of a national newspaper in the United States will often turn up a reference to the development of a “rule” by some federal agency. Most of us, however, don’t recognize this as part of the essential and pervasive governmental function known as rulemaking—the process by which these agencies translate laws into specific rules and regulations. For example, the Clean Water Act passed by Congress spoke in terms of making the nation’s streams and rivers fishable and swimmable, but specific limitations on the parts per million of allowable discharges were defined subsequently in rules developed by the Environmental Protection Agency.

Most new laws are implemented through a rulemaking process. It is a ubiquitous part of government; hundreds of new rulemakings are undertaken each year. But although rulemaking affects everyone in our democracy, this process has for the most part been so obscure and inaccessible that few people have even been aware of its existence, much less of the very direct role they might play in it. While significant new rules appear with great regularity and anyone is allowed to submit comments during their development, the rulemaking process is little mentioned in civics textbooks; it is rarely the focus of information campaigns; and its mechanics are not explored on the nightly news. As a result, few ordinary citizens take part.

**What’s new?** The Internet has begun to transform the rulemaking process. In a quest for economy and efficiency, federal agencies began shifting paper dockets—the records of the process, including background research, economic analyses and public comments—to an electronic format, and placing these dockets online. The Office of Management and Budget accelerated this process in 2001, designating online rulemaking as one of 24 e-government initiatives. The E-Government Act of 2002<sup>1</sup> provided a further impetus for this effort and encouraged agency participation. An inter-agency Internet portal to federal rulemaking (<<http://www.regulations.gov>>) opened in January 2003, and a more fully-developed electronic system is scheduled to go online in the summer of 2005.

This article will explore some of the back story regarding the development of the e-rulemaking system, the potential of this system with respect to public engagement, and some questions for the future.

## II. Development of the e-Rulemaking System

The idea of an electronic docketing system has been around for a number of years. Information Renaissance constructed a rough prototype in connection with the E-rate proceeding<sup>2</sup> of the Federal Communications Commission (FCC) in September 1996.<sup>3</sup> The Department of

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<sup>1</sup> E-Government Act of 2002 (Public Law 107-347), December 17, 2002. Online at <<http://www.estrategy.gov/documents/hr2458word.doc>>.

<sup>2</sup> Major subsidies were proposed to connect schools and libraries to the Internet. However, only two of the nation’s 16,000 school districts responded to an FCC request for written comments, presumably because the Commission’s announcement in the Federal Register did not reach these stakeholders.

<sup>3</sup> Information Renaissance, “Comments, Reply Comments and Ex Parte Presentations,” FCC Docket No. 96-45, In the Matter of Universal Service, August 1996. This docket is online at <<http://www.info-ren.org/projects/universal-service/repository-index.html>>. The online public forum (Information Renaissance, Universal Service/Network Democracy On-line Seminar, August 1996) is at <<http://www.info-ren.org/projects/universal-service/>>.

Transportation (DOT) put the first department-wide electronic docket online in 1998, providing access to documents and allowing electronic comments. The Environmental Protection Agency (EPA) began moving its dockets to an electronic system in 2001, though comments could not be read online until 2002. By that time several agencies had some form of an electronic docket and, at the request of members of Congress, the General Accounting Office had published a report entitled “Federal Rulemaking: Agencies’ Use of Information Technology to Facilitate Public Participation.”<sup>4</sup>

When the Bush Administration took office in 2001, e-rulemaking was an obvious option, particularly since the DOT system had demonstrated major cost savings (in large part because its electronic records were defined as the official archive, allowing savings from the elimination of paper dockets). Mark Forman provided the driving force at the Office of Management and Budget (OMB) for 24 e-government initiatives, one of which was the construction of a unified system for federal rulemaking. Forman believed that a single system could meet the needs of all agencies while achieving significant economies through the elimination of duplicative and overlapping software systems.

Forman’s outlook was at once visionary and naïve. His vision was one of profound significance for the public, since rulemaking related to a topic like “water” may occur in any one of several agencies, while people are generally interested in how a rule will impact *them* and their concerns, not in the particular agency that puts the rule together. But the top-down approach to implementation—probably intended to save time and money—was somewhat naïve in that the hundred-plus agencies that make rules for the federal government have evolved with very different cultures and very different stakeholder groups, which has created resistance to system uniformity. OMB’s approach also ignored the need to involve the public in the design of a system that they were expected to use.

The idea of moving all federal rulemaking online received a bipartisan boost from the E-government Act of 2002, co-sponsored by Democratic Senator Joe Lieberman, Republican Senator Conrad Burns and others. The E-government Act set goals for putting individual agency rulemaking online. While the Act did not specify a single system, the purposes of Section 206 of the Act (on regulatory agencies), are clearly stated: “1) improve performance in the development and issuance of agency regulations by using information technology to increase access, accountability, and transparency; and 2) enhance public participation in Government by electronic means.” On the other hand, the level of funding that was envisioned for the E-government Act has never materialized.

For each of its e-government projects, OMB identified a lead agency. Based upon its relatively long experience, the Department of Transportation was initially chosen to lead the federal e-rulemaking effort. But after a study was commissioned to survey existing agency systems, it was decided that the newer Environmental Protection Agency system was the most advanced, and leadership authority was shifted to the EPA.

There were several awkward aspects to this transition. From the viewpoint of public participation and of organizational change, the most regrettable was that the ranking of the various agency systems was based almost entirely on criteria related to system features; other factors that would

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<sup>4</sup> U.S. General Accounting Office, June 30, 2000. “Federal Rulemaking: Agencies’ Use of Information Technology to Facilitate Public Participation,” Report No. GGD-00-135R. Online at <<http://www.gao.gov/archive/2000/gg00135r.pdf>>.

affect implementation of a new system, such as the degree of agency compartmentalization and experience in working across agency departments to embed a new process, were not taken into account.

In the face of stringent OMB deadlines, development of the government-wide system moved along the technical lines most familiar to the EPA. The project has slowly incorporated additional agency partners and a degree of public input. Many agency staff have participated on working committees; a series of hearings have provided a segment of the public with some information on the project; and usability testing is being carried out (March, 2005). However, opportunities for more extensive involvement of the public and agency personnel have been missed, and the atmosphere in which the decisions have been made is one that could make real adoption—even within EPA—more difficult to achieve.

For the public, too, the top-down, expert-driven management style of the EPA team may leave lingering problems. Project specifications were developed behind the scenes, with no opportunities for public comment until long after major contracts had been let and the underlying system had been determined. Further, background information for the public with answers to questions such as “What is rulemaking” and “How do I take part?” has been slow in coming, apparently due to the difficulties of inter-agency coordination.

Fortunately, features that have been adopted should provide a solid foundation for public engagement when the new system is fully deployed, including:

1. Full searchable text of Notices of Proposed Rulemaking and associated background materials for every rule that is open for comment.
2. Ability to receive public comments on any rulemaking via the Internet.
3. Online display of comments shortly after they have been received.
4. Archives of previously published rules, to be developed over time.
5. A safe and secure system for storing rulemaking materials.

### **III. New Models for Public Engagement**

Federal rulemaking—as framed by the Administrative Procedure Act of 1946<sup>5</sup> and elaborated by legislation, court decisions and executive orders<sup>6</sup>—invites broad public input to every rulemaking proceeding. The basic structure is a notice and comment process. An agency publishes a Notice of Proposed Rulemaking (NPRM) in the Federal Register and invites public comment during a specified period. Significantly, in drafting the final rule the agency must consider all “material comment” that has been received. The number of comments received may be of interest to Congress and others, but in agency rulemaking decisions comments are not votes

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<sup>5</sup> Administrative Procedure Act (US Code Title 5, Section 551 and following), June 11, 1946. Online at <<http://www.fda.gov/opacom/laws/adminpro.htm>>. OMB Watch gives a summary at <<http://www.ombwatch.org/article/articleview/176/1/67/>>.

<sup>6</sup> Examples of legislation: the Paperwork Reduction Act, the Small Business Regulatory Enforcement Fairness Act and the Unfunded Mandates Reform Act; court decisions: *Weyerhauser v. Costle*, 590 F.2d 1011, 1030-31 (1978, DC Circuit). *Portland Cement v. Ruckelshaus*, 486 F.2d 375, 3939-94 (1973, DC Circuit), cert. denied 417 US 921 (1974); executive orders: 12,291 and 12,886.

on the rule; rather the notice and comment process is an opportunity for stakeholders and interested members of the public to offer substantive analysis and criticism of the proposed implementation of the law.

Few other venues offer such a direct, compelling and effective means for public involvement during a process in which federal policies are developed. Yet aside from efforts of some interest groups to lobby for particular outcomes on particular rules, this has not been a mechanism used by many members of the public. This is understandable, since broad public participation in rulemaking was impractical before the widespread availability of the Internet.

With paper-based systems, the physical location of agency rulemaking dockets tended to limit participation. Anyone wishing to follow the detailed course of submissions had to be in Washington or to have a representative who could consult the docket on a daily basis. Internet-accessible dockets change the situation dramatically. As agencies move their dockets to electronic form, the possibility for direct public participation becomes very real and practical.<sup>7</sup> Some day, individuals will be able to track the progress of a particular rule as easily as they currently track the expected arrival of a package from a commercial delivery service.

We expect e-rulemaking to transform the nature of public involvement in the rulemaking process. More people will come to understand the process, and many will become aware how rulemaking can affect their daily lives. Those who browse the Internet looking for information on items affecting their health, workplace or environment—to pick a few possible examples—should find newly proposed rules from the Department of Health and Human Services, the Occupational Safety and Health Administration or the EPA, and be led directly to pages that display these new rules and invite them to offer their comments.

Initially, it is likely that increased participation will simply be in the form of “electronic postcards.” Today it is easy for the Web site of a public interest group to invite visitors to push one button to write a letter to their Congressman and push another button to send a comment on a rule to the relevant agency. The same technologies that make this sort of electronic avalanche easy to provoke will also make it easy for the agency to digest. Remember that the agency must respond to each substantive comment, not to the intensity with which each such comment is registered. Thus one thoughtful comment should carry as much weight as one thousand repeats of the same submission. Inevitably agencies will learn to tally multiple submissions of the same

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<sup>7</sup> Several authors have discussed aspects of this development. For example: Brandon, B.H. and Carlitz, R.D., “Online Rulemaking and other Tools for Strengthening Our Civic Infrastructure.” *Administrative Law Review* 54:4, 1421 (Fall 2002). Online at <[http://www.info-ren.org/publications/alr\\_2002/alr\\_2002.pdf](http://www.info-ren.org/publications/alr_2002/alr_2002.pdf)>; includes a consideration of legal aspects of online rulemaking and the potential to enhance public involvement. Thomas C. Beierle, “Discussing the Rules: Electronic Rulemaking and Democratic Deliberation.” Resources for the Future Discussion Paper 03-22, (April 2003). Online at <<http://www.rff.org/Documents/RFF-RPT-demonline.pdf>>; includes definition and discussion of online deliberation. Cary Coglianese, “E-Rulemaking: Information Technology and Regulatory Policy.” Harvard University, John F. Kennedy School of Government, Regulatory Policy Program Report No. RPP-05 (2004). Online at <[http://www.ksg.harvard.edu/cbg/rpp/erulemaking/papers\\_reports/E\\_Rulemaking\\_Report2004.pdf](http://www.ksg.harvard.edu/cbg/rpp/erulemaking/papers_reports/E_Rulemaking_Report2004.pdf)>; see in particular p. 25f. on “Institutional Challenges and Constraints.” Noveck, Beth Simone, “The Electronic Revolution in Rulemaking.” *Emory Law Journal* 53, no. 2 (Spring 2004). Online at <<http://ssrn.com/abstract=506662>>; offers a vision of what e-rulemaking could become, but cautions that the current approach to software design may stand in the way of participation. Shulman, Stuart W., “The Internet Still Might (but Probably Won't) Change Everything: Stakeholder Views on the Future of Electronic Rulemaking.” University of Pittsburgh (October 14, 2004). Online at <[erulemaking.ucsur.pitt.edu/doc/reports/e-rulemaking\\_final.pdf](http://erulemaking.ucsur.pitt.edu/doc/reports/e-rulemaking_final.pdf)>; reports on discussions of the development of e-rulemaking by focus groups that involved non-governmental organizations as well as government agency rule-writers and managers.

comment electronically and record them as a single thought, thus blunting the effect of the electronic avalanche.

More interesting than the increased volume of comments may be the ability of commenters to read and reflect on what others have written. As the speed with which comments are posted online—and the ability of the public to view the entire docket online and in real time—increases, the ability of the public to follow the evolution of specific arguments in the docket will also increase. At present, not all agencies post comments; even for those that do, comments that are not received electronically must be scanned in and may not be posted until after the docket is closed. As agencies join the new system, the intent is that all their comments will be posted promptly.

When the ability to read others' comments is combined with the possibility of a reply, as currently allowed by some agencies, commenters are further empowered: they may offer arguments that counterpoise or rebut others' arguments. As agencies and the public become more aware of reply comments, more agencies may allow this feature.

We see a structure resembling an online dialogue developing in this manner. In the prototype that Information Renaissance created for the Federal Communications Commission rulemaking, we included docket materials such as the Notice of Proposed Rulemaking, background materials, and all previously submitted comments; these became background information for a moderated online dialogue. While such dialogues are not part of the current notice and comment process, they could evolve as a natural adjunct.<sup>8</sup>

The vision of electronic rulemaking that we see evolving from the new federal system is one of (a) broad recognition that rulemakings are taking place and that they often affect people, institutions and resources across the country, (b) understanding that taking part in a rulemaking can give anyone a voice that will reach agency decision makers, (c) opportunity for interested members of the public to be notified automatically when rules of interest to them are up for discussion, (d) understandable background materials that make the system and the process accessible to the public, (e) in-depth, informed discussions of the rule by those who participate in the notice and comment process, and as this develops, (f) increased mutual appreciation of the public and agency staff, interacting as individuals.

Rulemaking is not an activity that individuals will typically participate in at every opportunity. Rather, when a proposed rule affects someone directly, or when it deals with an issue they regard as particularly important, they will have the opportunity to speak out. If the electronic rulemaking system comes to resemble the vision outlined above, it may give the public an informed and effective voice—a voice that is, we believe, an essential feature of democracy.

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<sup>8</sup> An early example is the facilitated online discussion on fire safety regulations held by the Nuclear Regulatory Commission in 1996 (outlined briefly at <<http://www.nrc.gov/reading-rm/doc-collections/commission/secys/1996/secy1996-134/1996-134scy.html>>). This process has received mixed reviews, perhaps as a result of its very ambitious goals, but was an interesting attempt to involve stakeholders prior to the notice and comment process, when public engagement could be particularly meaningful.

## IV. Questions for the Future

The vision we have just described is one that can be realized, in part, by the Federal Docket Management System (FDMS) currently scheduled to go online with six initial agencies in summer, 2005. Goals of the eRulemaking initiative<sup>9</sup> to “[e]xpand public understanding of the rulemaking process” and “[i]ncrease the amount, breadth, and ease of citizen and intergovernmental access and participation in rulemaking” would seem to support this vision.

The extent to which the public actually makes use of the system will, however, depend on a number of elements that are not yet in place. The FDMS could do a great deal to increase the likelihood of effective public engagement by including an accessible introduction to the rulemaking process<sup>10</sup> and information on how to use the electronic system. It will also be important to encourage feedback from public users of the system and to use this information for iterative improvements.

Effective public engagement will also require new efforts by agencies, interest groups and individuals. Publicity that targets citizen groups could help to increase participation; but, given the new potential for the expanded involvement of individuals in rulemaking, these groups may need to re-think their own roles. Also, the need to encourage *informed* public participation should stimulate work by the agencies to make the issues involved in their rulemakings more understandable to the general public.

Looking ahead, several features might be added to the system, and other aspects might be enhanced to further the goal of public engagement in rulemaking.

1. *Online dialogue.* We have described the back and forth that might appear in an electronic docket as the beginnings of an online dialogue. Much more effective, at least in terms of public understanding, would be a structured and moderated dialogue that covers the major issues underlying a particular rule or the major sections of an NPRM. Technology is not an issue—several software variants are available—and there are increasing numbers of moderators trained to facilitate this work. Agency process is a much bigger issue, from questions of “Will it be more work?” to legal issues. Pilot projects are needed, and third parties may be needed to organize or facilitate such events.
2. *Active notification.* The FDMS will include some form of e-mail notification that alerts people to new rules of interest. More useful will be the development of headline services (using, for example, the “RSS” technology that has been developed for news sites and Web logs) with filters that permit users to make detailed topic selections and request customized forms of notification.
3. *Machine communication.* The FDMS is being designed with a Web site as the fundamental means of access. While this model provides a reasonable paradigm for people with a casual interest in rulemaking, it breaks down very quickly when an organization would like to participate fully in a given rulemaking (or set of rulemakings). A good Web site leads users to any document in three or four clicks of the mouse. But

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<sup>9</sup> EPA eRulemaking Team memorandum, November 8, 2004. (Unpublished).

<sup>10</sup> Regulations.gov links to a lengthy Federal Register Tutorial provided by the National Archives and Records Administration (<[http://www.archives.gov/federal\\_register/tutorial/tutorial.htm](http://www.archives.gov/federal_register/tutorial/tutorial.htm)>) that includes sections on rulemaking. However, it is not written as a guide for new users who plan to submit comments.

when the goal is to access all of the perhaps one thousand documents in a particular docket, this simple model would require three or four thousand mouse clicks—enough to give anyone carpal tunnel syndrome. The solution to this problem—technical, not medical—is to allow machine access to the FDMS, for example by using a popular architecture known as “Web services.”

4. *Aggregation of comments.* Web services can work in the other direction, too, providing bulk transfers into the FDMS. An interest group could, for example, gather anecdotal information relevant to a proposed rule from its members. The interest group’s experts could develop arguments based on this data and submit a comment including a statistical summary of members’ experiences. At the same time the interest group could submit the individual anecdotes, with cross-links allowing readers to see the individual cases behind the statistics or the way in which particular cases build the larger overall picture.
5. *Open modeling.*<sup>11</sup> Many technical rules elicit comments based upon the output of computer models. If the components of these models are proprietary, it can be next to impossible to decipher what this output really means. With an electronic docket it should be possible to include the model itself in the submitted comment. Without revealing proprietary components, a commenter could place the model online as a “black box.” This would allow others to experiment with the model, understand how it responds to changes in its input parameters and compare its behavior to other successful models, physical laws or accumulated experience.
6. *Modular systems/open architecture.* One of the most exciting aspects of current software development is the ability to construct systems from individual modules and to extend these systems with the addition of new components. FDMS development is expected to adhere to this practice,<sup>12</sup> so the system should be able to accommodate any of the ideas suggested here—and others that may be proposed by users. In practical terms such extensibility of the e-rulemaking system will depend upon two factors: whether the system follows an open architecture with public standards for data interchange, and whether there is any funding to pursue initiatives to extend and enhance the system.
7. *Broader scope.* Over time the FDMS should expand—or should be interoperable with parallel systems—to facilitate public involvement in those parts of rulemaking that precede publication of the NPRM (such as issue-framing within the agency) or follow publication of the final rule (such as permitting and enforcement).

The E-government Act proposed funding for experimentation and inter-agency collaboration. We hope Congress will make this funding available and use it to develop the FDMS in a vibrant and open process of discovery and growth.

*Robert Carlitz is the Executive Director of Information Renaissance, a nonprofit corporation that promotes the use of the Internet to support the public interest. He is a graduate of Duke University and California Institute of Technology, with BS and PhD degrees in physics.*

*Rosemary Gunn is the National Projects Manager for Information Renaissance. She is a graduate of the University of Southern California and has completed course work for a Master’s in management and international relations at Webster University in Leiden, the Netherlands.*

<sup>11</sup> Felleman, J., 1999, “Internet-facilitated Open Modeling: A Critical Policy Framework.” *Policy Studies Review* 16, 193-216. Online at <<http://www.esf.edu/es/felleman/OpenMod/OM-Paper.html>>.

<sup>12</sup> eRulemaking memorandum, *ibid.*