

Lessons Learned on Pre-Regulatory Early Public Engagement Projects

Background

Throughout government regulatory agencies there is increasing interest in establishing communications with the public and regulated entities early in the rulemaking process, before proposed rules are even drafted. By carrying out this pre-regulatory early public engagement both the rules themselves and the public's esteem for its government regulators can potentially be improved. For instance, a public that is more involved in shaping its own regulations might be less adversarial if they feel their voice was heard. Through their participation, citizens can develop a better appreciation of the need for regulations and the process in which they are created. Also, by using a broader range of communications tools to cast a wider net, rulemakers are more likely to come across useful ideas or information that they might not have uncovered on their own.

The EPA has recognized the value of this concept and built it into its Open Government initiative in the form of a flagship theme titled, "Expanding Public Awareness and Involvement in the Development of Rules and Regulations." Across the Agency, early public engagement efforts are now springing up in conjunction with a wide variety of projects. Given the newness of this field, most of these initiatives are having to proceed without the benefit of significant guidance or institutional knowledge and predictably, the results so far have been mixed.

Purpose

The purpose of this report is to begin a process through which the EPA can begin to consolidate its knowledge and learn from its experiences in carrying out early public, or pre-regulatory, engagement efforts. This document, being drawn from just a handful of causal interviews with EPA employees, is only a modest beginning in that endeavor. Therefore, it is not designed to be a comprehensive record of EPA's forays into pre-regulatory public engagement. Instead, it is intended to begin, and help shape, the development of a body of knowledge on this subject. It is hoped that some basic "lessons learned" identified below can be refined through further research and continued collaboration.

Lesson Learned #1 -- Have Realistic Expectations

Generally, the projects tracked in this report have yielded lower than expected levels of participation as well as lower quality of input than some would have hoped for. Several factors are likely contributing to this.

Inflated Expectations – The popular media can easily lead one to believe that Americans spend their days linked in to social media discussing the causes that are important to them. In reality, virtual communities appeal to only a small subgroup of the population and social or environmental concerns are often sidelined by more day-to-day issues related to work and

family. In other words, the total pool of potential public engagement may not be quite as deep or as “tuned-in” as some might assume.

Competition For Time and Attention – It can not be overstated how much competition there is for the public’s attention. Huge sectors of the economy (think entertainment and marketing) are populated with professionals whose sole mission is to capture as much of that attention as possible. When public engagement is but a side project of an organization with other primary goals, as it is for the EPA, it can be difficult to compete.

Low Salience Issues – Many of the issues that the EPA has tried to engage the public on are technical, legal, or scientific in nature. The public may often find these subjects difficult to understand or get excited about.

We Were Already Doing Our Homework – EPA rule writers may be getting less new information out of public engagement efforts than some might have expected because EPA’s initial research was typically conducted in a comprehensive and thorough manner. Many of the activities involved in “early public engagement” were already being carried out, just perhaps in a slightly less systematic or deliberate manner.

It Takes Time To Build a Sense of Trust and Community – It can take years for a community to unite around a particular issue or discussion forum; in many cases the government is involved for only a few months. Furthermore, the public’s trust is diminished by the fact that government interactions will tend to be impersonal, agenda driven, and over the long-term, hard to predict. In sum, the public is not used to engaging with the Federal Government in a casual, collaborative manner. Earning full public trust is probably impossible; gaining a greater share of it will require patience and a long term strategy.

The Underlying Adversarial Dynamics Remain – The EPA is by definition a regulating agency. Therefore, its mission will inherently put it at odds with a regulated community. This means that in many cases, a those groups or individuals that would have the most to contribute to a conversation about a potential rule (whether they are for or against it), will have too much personal interest at stake to engage in a free and open flow of ideas. Instead, they will face pressure to game the situation to their maximum advantage. In this litigious environment, where one’s every statement could potentially be turned into a liability, it is difficult for groups to communicate effectively even when interests are aligned.

We Are Still Developing Our Skill Set – As stated above, the EPA is relatively new to the process of engaging the public on environmental issues at the pre-regulatory stage. Skills and best practices that will be refined over time are still being tested and development.

Agency leaders need to understand that public engagement is a time consuming job that requires a great deal of personal engagement from those involved in carrying it out. If these efforts fail to yield significant results, the situation can easily become very demoralizing. For this reason, plans to carry out pre-regulatory public participation campaigns should not be taken lightly and perhaps even be set aside until adequate resources, know-how, and leadership commitment have been committed the project.

That does not mean that these projects should be avoided. Early experiences have proven that, while it is difficult, pre-regulatory public engagement is in fact useful and important. With several of the aforementioned considerations, the take away message is not that the job is impossible. Instead, they inform us that the Agency needs to get into this field now, to “get its hands dirty” and begin the processes of building trust and learning from doing. Public engagement initiatives undertaken by the EPA have already produced input that has helped to constructively shape regulations on several occasions. On several instances, it seems that this kind of public outreach can be especially useful in correctly defining the scope of a future statute. For instance, Gilbert Mears of OEI’s Toxic Release Inventory (TRI) Program Division notes, “the outreach ... consistently generate[d] internal questions to be answered as to the appropriate scope of the rule and policy calls within that scope.” That sentiment was echoed, and followed by mention of new substantive ideas being generated, when Louise Camalier, another OEI rulewriter described a subsequent pre-regulatory outreach effort:

We provided consultation for Tribal representatives through two scheduled conference calls, among other methods of outreach. In the conference calls, EPA went through each option that was up for consideration for the upcoming proposed rule, anticipating feedback in the form of either agreement or disagreement. While we received such comments, we also benefited from participants proposing alternatives and/or extensions of options that we had not previously entertained. We took these comments back to our office management and OGC contacts, who helped weigh the feasibility of such options, as well as how to craft the language in the proposal.

There is every reason to believe that with good planning, patience, and proper support, the benefits of pre-regulatory outreach should continue to increase over time.

Lesson Learned #2 – Strategize Early and Often About How to Surmount Limitations Associated the Paperwork Reduction Act

The most common concerns from those interviewed dealt with the constraints imposed on them because of legal limitations related to the Paperwork Reduction Act. This act stipulates that every federal agency must obtain approval from the Office of Management and Budget before collecting the same or similar information from 10 or more members of the public. To obtain this approval, agencies must submit an Information Collection Request (a process that is usually prohibitively costly and time consuming). These requirements make it very difficult for

the EPA to ask the public questions that will yield useful answers. The most frequent work-arounds to this problem involve strategies to circumvent the Act's definitions of, "collecting the same or similar information." Typically, this translates into either asking broad questions or asking for "feedback" on declarative statements.

Currently, there seems to be no good solution to this problem except to work closely with the Office of General Counsel early and frequently throughout the public engagement process. It would seem that, as time goes on, and the Agency gains more experience with this kind of public consultation, some initial nervousness – and perhaps excessively cautious attitudes - might be tempered. While there is official guidance developed on this subject, the Agency may wish to revisit the issue with the intent of providing greater consistency in its guidance and brainstorming ways to be maximally effective within the current legal constraints.

Lessons Learned #3 – Closely Consider Branding and Audience Targeting

Those planning to undertake a pre-regulatory public consultation activity should seriously consider the branding of their effort. The public has proven to be sensitive to the ways they are approached about pre-regulatory consultation. It has been noted, for instance, that some potential bloggers may be uncomfortable posting their comments on Regulations.gov because the site also serves as the central portal for government-wide docket information (which is legalistic in nature) and requires one to sign in with a username and password. Even when sections of this site are specifically delineated from surrounding docket information and defined as areas where citizens can make informal non-binding and anonymous comments, some potential commenters may not find the experience as "safe" and "familiar" as a blog on an EPA web page.

Audience targeting is a closely related issue. Evidence seems to indicate that targeting specific groups for pre-regulatory feedback helps to produce better results. This allows EPA employees to focus their limited resources on the sectors of the public that will be most likely to provide them with valuable feedback. Those targeted members of the public are also more likely to provide useful comments if they sense that they have been provided a forum where their voices will be noted and their opinions will be understood and taken seriously. That is critically important if sophisticated commenters are going to be expected to expend the effort necessary to produce substantive comments.

It is also important to be aware of instances when a particular interest group or individual may "hijack" an open discussion forum and overtake constructive dialogue. In this type of instance, a well thought out moderation strategy can help prevent the situation from getting out of hand. It is advisable that such a moderation strategy is developed and publicly noted in advance. Doing so might act as a deterrent for this type of behavior.

Targeting, and building inroads with a target audience can require significant time and resources. This process can be accelerated when EPA finds a way to provide that audience with valuable information or useful service (such as webinars, alerts, useful forms and templates, training, etc.). When this is done properly, it gets a target group into the habit of coming to the EPA for information. This will then relieve the Agency of some of the pressure to actively push that information out to users in the field. Also, by giving back, and not just taking from the public, the Agency can show it is willing to be an equal partner in the relationship.

If a target community is geographically based, initial introduction through a local organization or Regional Offices is advised. These local affiliates will often have better pre-existing relationships throughout the community. They will also seem less intimidating to those unaccustomed to dealing with representatives of the Federal Government.

When targeted sectors are asked for feedback or information they should always be reminded of why they have an interest in participating. Invoking specific examples of how similar cooperation has paid dividends in other instances would be useful at that point. Once a targeted group has been cultivated, a listserv can be a useful to keep-up communications.

Lesson Learned #4 -- You Will Probably Need To Actively Drive the Public To Participate.

Typically, individuals do not seek out opportunities to engage in pre-regulatory consultation on their own. This means that it is not enough to simply place a blog on a website, mail-off an invitation to a town hall meeting, or e-mail a link to a webinar. More often, people will need to be enticed, reminded, and cajoled to take part. At that stage, there is no replacement for as much individual personal interaction as possible.

Once the consultation has been initiated, it might take some continued effort to keep a good conversation rolling. For instance, it could be useful to “prime the pump” by making arrangements to have willing participants kick-off conversations by raising key issues. Those same participants can subsequently play a lead role in helping to keep the conversation headed in the right direction.

Similarly, while moderators typically remain passive, some might want explore the possibility of actively engaging the conversation in a more journalistic style. This can be done by actually answering public questions, providing clarifications on factual matters, prompting participants for further input (such as, “what do you mean by that,” “why do you feel that way,” or “what is your evidence”), and making use of subtle steering mechanisms (like, “but have you considered x,” or “what effect might that have on y”).

[A note of caution here: this kind of active moderation may not be permitted as it could be construed as speaking officially on behalf of the Agency without proper authorization. This is an

instance where EPA could benefit by having employees wishing to maximize the potentials of public engagement come together with the Office of General Council in order to hold broader discussions on this subject. By handling the issue in this way, rather than on an ad-hoc basis, the Agency could most effectively define parameters and optimize practices.]

Lesson Learned #5-- Provide Good Background Information in an Easily Digestible Format

One should not assume that public stakeholders will already have all of the information they need to constructively contribute to a policy conversation. People that feel strongly about an issue may not have all the facts. Conversely, people may also be reluctant to contribute if they feel they will be exposing their ignorance in the process. Here again, it is good to provide background information actively (not passively) in the most targeted and personalized manner possible.

If information is provided on a website, the requirement of comprehensiveness must be balanced against the need to keep the interface easy to comprehend and easy to navigate. To the extent possible, it is a good idea to tier the information supplied, thereby allowing users to get the basics immediately and follow a path to more information at own their discretion. This can be accomplished using either hyperlinks to other web pages or fold down “accordion” sections on the website. It would also be advisable to explore the possibility of using multimedia features to convey basic background information to users. The formatting and content of this background material should be consciously designed to lead the viewer to the question/comment field.

Public engagement that occur in real-time (both virtual and live) might be more effective if they are broken-up into a series of sessions. In the first, background information and the broad outlines of a proposed regulation can be explicated. Later, after this has been digested and discussed internally among stakeholder groups, another session can be scheduled to allow for a more conversational exchange.

Lesson Learned #6 – Blogs Can Be Tricky To Do Right

As interest in “social media” and “web 2.0 technologies” continues to grow, blogs are increasingly being seen as the primary medium for pre-regulatory engagement. Blogs, while easy to set-up, can be very difficult to properly maintain. When thinking about blogs, it is useful to keep the following considerations in mind:

Momentum should not be underestimated. In order to keep comment writers interested and engaged it is important that their comments should be posted soon after submission. Accomplishing this usually requires continual supervision, which can quickly become very taxing

for the workforce assigned to that task. This problem becomes greatly magnified in cases where comments must be legally vetted or approved by management before they are posted. To minimize this burden, managers and staff should work in advance of the project to sort-out chains of command and develop a workflow that facilitates rapid response and efficiency. Troubleshooting about possible legal concerns and other content issues should be done ahead of time in order to allow routine decisions to be made on the lowest/most immediate level of project management possible while the blog is running.

Mentioning, and/or providing links to, an EPA blog in another, pre-existing blog can be an effective form of advertising. In this way, an EPA blog may inherit some of the trust and legitimacy that has already been established within a defined user community.

Posts containing hyperlinks have proven to be problematic at EPA blogs. Current policy dictates that these can not be published to the web. While this policy is mentioned in a disclaimer at the blog sites, it can easily be overlooked by the casual user. In most cases, when this happens, the blog moderator is not able or authorized to individually alert the commenter to the fact that their noncompliant remarks will not be posted. Clearly, in instances where the outside hyperlinks are related to spam or commercial sites, they should be forbidden. But in several instances the links have been directed to relevant background information. This would seem to be an area that deserves further discussion and refinement of guidance policy.

EPA blogs have also faced problems with outright spam. This can be minimized by limiting outside references to the blog and requiring log-ins from users. Unfortunately, these tactics run counter to earlier suggestions about the need to lower barriers to participation and actively drive traffic to the blog site.

The burden of maintaining blogs appears to be amplified by the fact that, in most cases, this primarily routine administrative task, is carried out by rulewriters or subject matter experts. This may be an inefficient use of staff resources. EPA might want to consider the possibility of shifting these responsibilities to contractors or other employees that have been specially selected to serve as reviewers of outreach communications. Those individuals could then act as moderators (following guidance specified for the task) and also help to organize the feedback for others to consider.

That transition would be aided, and the entire blog experience improved for the Agency, if the EPA developed a more comprehensive agency-wide guidance policy on blogs. Currently, it appears general rules have been developed, but much of the actual decision making about implementation is still being carried out independently in the Program Offices. Their uncertainty about legal concerns and accountability issues tend to direct managers to adopt a

highly cautious stance that can result in burdensome oversight practices which may not actually be necessary.

Conclusion

Because it could potentially produce many benefits for the Agency, EPA's use of pre-regulatory public engagement is likely to increase in the coming years. In a world where information and lines of communications are so thoroughly democratized, regulatory agencies cannot afford to wait until rules are largely written before they open themselves up for public input. However, there is much that still needs to be learned if the EPA is going to get the most out of this process. This paper is intended to capture some of the current perspectives on the subject and help those considering a pre-rulemaking public engagement think through key aspects of their plan. More importantly, the report can serve as a starting point for future undertakings to assemble and develop best practices on this activity.

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