

SUBJECT: POLICIES FOR PUBLIC CONTACTS IN RULE MAKING

1. PURPOSE. This order sets forth basic policies for contacts with members of the public taking place during the course of rule making as to rules other than those FAA rules involving airspace assignment and use.
2. GENERAL POLICIES. It is the policy of this Department to encourage full public participation in rule making actions taken by any operating element of the Department and to provide for the open development of rules. To assure adequate public participation, apart from the opportunity to respond in writing to a notice of proposed rule making and to appear and be heard at a hearing called in connection with rule making, the following should be adhered to:
 - a. Persons directly responsible for a rule making action should undertake such contact with the public as will be helpful in the resolution of questions of substance and justification, and should be receptive to proper contacts from those affected by or interested in the proposed action.
 - b. To discharge the Department's obligation to conduct its rulemaking activities in a public manner, interested members of the public should be afforded adequate knowledge of such contacts. This is necessary to assure the equal opportunity to which all interested members of the public are entitled in making their views known to the Department. Knowledge of the substance of contacts with individual members of the public may be as important for consideration by other interested members of the public as knowledge of individual written comments. Further, if such knowledge is not made available, the Department may be deprived of informed and valuable comment.
 - c. Public contact of the nature discussed in this order should be held to a minimum once the closing date for comments on a particular rule-making action has passed. Contacts made at

DISTRIBUTION: All Secretarial Offices
All Operating Administrations
National Transportation Safety Board
(Info)

OPI: Office of Regulation

this stage of a rule-making proceeding, even if reported and docketed, tend to be hidden since many persons feel that they have no need to check further the public docket after the closing date for comments. Contacts of this type may also subject the rule-making action concerned to attack in court. If it is necessary to have public contact at this stage of a rule-making proceeding, the meeting should, if possible, be announced publicly or all persons who have expressed an interest in the rule-making action should be invited to participate. In no event should any group or individual be given any information regarding the rule making that is not available to all groups or individuals.

3. POLICY FOR REPORTING CONTACTS WITH THE PUBLIC.

- a. Reports of the substance of contacts, including meetings with interested members of the public, should be made as hereinafter provided when the contact is one:
 - (1) Involving headquarters personnel of the Office of the Secretary or of any operating administration whose duties include direct participation in the development of rules or who are in a position responsible for influencing such development; and
 - (2) In which members of the public furnish information or express views bearing on the substance of a rule proposal.
- b. When the contact takes place after the issuance of a notice of proposed rule making in the subject matter, the report should be made and included in the public docket promptly following the contact. When the contact takes place before the issuance of a notice of proposed rule making and when the substance of the contact forms one of the bases for issuance of the notice, the substance of the contact should be discussed in the preamble to the notice. If in any case there is a legitimate reason for not discussing the prior contact in the preamble to the notice, then a report of the contact should be made and placed in the public docket when the notice is issued.

4. FORM OF REPORT. The report to be included in the public docket need not be a verbatim transcript of the meeting. On the other hand, a mere recitation that on X day a meeting was held with listed persons to discuss a named general subject is inadequate. The report should, at a minimum, contain -
 - a. A list of the participants;
 - b. A summary of the discussion; and
 - c. A specific statement of any commitments made by any Departmental personnel.

John A. Volpe
Secretary of Transportation

Relevant contacts can take place before a proceeding is opened (i.e., before the issuance of a regulatory document such as a notice of proposed rulemaking or an advance notice), while the docket is open (usually after the first notice seeking public comment is issued), or after the docket is closed but before a final decision is made (i.e., after the comment period on the notice is closed but before another document is issued taking action on the notice). Each of these is treated somewhat differently, but the goals are the same: communications that could influence a decisionmaker must be reflected in the rulemaking record so that (1) it can be as complete as possible to permit full judicial review; and (2) all members of the public have an equal access to the information available to the decisionmaker and, therefore, an equal opportunity to present their views in the proceeding. In brief, the "rules" are as follows:

- (a) Significant contacts before a rulemaking document is issued that influence a rulemaking should be noted in the preamble to the proposed regulation or in a memorandum placed in the rulemaking docket once it is opened;
- (b) Contacts while the docket is open should be noted in the docket;¹ and
- (c) Contacts after the docket is closed that could influence a decision maker must also be noted in the docket and, if the comment is significant, the docket may be required to be reopened for reply.

In all cases, of course, those with whom we are talking should not be given any information about the proceeding that is not available to the public. Contacts by another government agency² acting as a conduit for a private party must also be disclosed.³

-
- 1 Such contacts, and especially post-closing contacts, should be discouraged--commenters should be encouraged to make their comments through regular procedures.
 - 2 Refer to OMB memorandum dated June 11, 1981, on "Certain Communications Pursuant to Executive Order 12291, 'Federal Regulation'" for details on how OMB will handle communications it has with the public involving another agency's rulemaking.
 - 3 In a somewhat analogous situation, after initially closing the comment period on its proposed Surface Coal Mining Regulation, the Department of Interior (DOI) decided to consult with the President's Council of Economic Advisors (CEA). Based on advice from the Department of Justice, DOI found it necessary to reopen the public docket to receive comments on the nature and substance of the contacts between CEA and the public (44 FR 1355, January 4, 1979).

C-50
2/22/84