Electronic Frontier Foundation

April 7, 2003

USDA FS Planning Rule
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Re: National Forest Service Land and Resource Management Planning
36 CFR 219.19(d)(1)

STATEMENT OF EFF

The Electronic Frontier Foundation (EFF) is a nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. With over 8,000 members, EFF represents the interests of Internet users both in court cases and in the broader policy debates surrounding the application of law in the digital age. EFF opposes misguided legislation and agency regulation, initiates and defends court cases preserving individuals' rights, launches global public campaigns, introduces leading edge proposals and papers, hosts frequent educational events, engages the press regularly, and publishes a comprehensive archive of digital civil liberties information at one of the most linked-to websites in the world, www.eff.org.

EFF'S INTEREST IN THIS RULEMAKING

EFF believes that free speech is a fundamental human right and that free expression is vital to society. The vast web of electronic media that now connects us has heralded a new age of communications, a new way to convey speech. With this comes new ways for citizens to participate in democratic decisionmaking. While EFF is mindful of the serious issues that may arise when information, ideas and opinions flow free, EFF is dedicated to addressing such matters constructively while ensuring that fundamental rights are protected.

EFF's concern here is limited to proposed rule 219.19(d)(1), specifically the portion of that provision that would burden public participation in NEPA rulemaking processes. The specific provision states:

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> Only original substantive comments that meet objection content requirements set out in paragraph (d)(2) of this section will be accepted. Form letters, check-off lists, pre-printed post cards, or similar duplicative materials will not be accepted as objections.

As an organization committed to free speech online, EFF is specifically concerned that this rule will be interpreted to prevent submissions via online "action centers."[1] These technologies empower individuals and organizations to join their voices on issues that concern them. They are used by groups all across the political spectrum, ranging from the American Association of Retired Persons to the National Rifle Association, the National Right to Life Coalition to the American Civil Liberties Union and thousands of others. EFF has its own center at the Internet address <http://action.eff.org/action/>.[2]

"Action center" is a generic name for websites that allow citizens and organizations and even corporations to make their voices heard to government on issues of the day. The EFF's action center is one example, but it is by no means unique. In the context of a proposed rulemaking, the EFF action center presents information about an issue and provides an electronic form for that allows the reader to give public comment back to the agency. The form scrupulously complies with the requirements placed by the agency in the Notice of Proposed Rulemaking. It also ensures that the form is targeted to the correct individual or committee within the agency and that the proper identifying information about the sender is included. Finally, the action center provides proposed language for the content of the comment, again, based upon a more expert understanding of the issues than most members of the public may otherwise have. The EFF action center website allows the user to compose his or her own message, but in practice the majority of users do not so.

These technologies represent an exciting advance in the potential for public participation in agency rulemaking processes. They allow citizens to have a voice

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[1] We are also concerned about the burden it places on traditional forms of citizen communication with government, so our focus on online forms of public participation should not be construed as support for the rule as it impacts them.

[2] EFF's center, like many, provides model language to assist citizens in composing their missives, but also allows them to send individualized messages.

and, equally important, to pool their voices by sending similar messages to the agency, indicating a broader concern than a single voice could do alone. These systems are consistent with the goal of e-government that has been embraced across the administrative landscape.

Basis for the Rule

EFF has attempted to discover the agency's basis for proposing this rule. Unfortunately, the description of proposed changes promulgated with the proposed rulemaking makes no reference to this provision. Similarly, we have searched for a corresponding provision in the rulemaking procedures for other governmental agencies but have found none. Because of this failure, we have been unable to detect why the agency might feel such a rule is necessary.

Public Participation is a Key Element of Rulemaking

Congress expressly called for public participation in rulemaking for all governmental agencies in the Administrative Procedures Act 5 U.S.C. § 553(e) (APA). As the D.C. Circuit observed over twenty years ago:

> Public participation in agency decisionmaking is increasingly recognized as a desirable objective. *See generally* Stewart, *The Reformation of American Administrative Law*, 88 Harv.L.Rev. 1669 (1975).

National Resources Defense Counsel v. Security and Exchange Commission, 606 F. 2d 1031, 1046, fnte 18 (D.C. Cir. 1979)("NRDC").

Judicial decisions reviewing agency decisions regularly consider not only the substance of comments, but the *number* of comments indicating the same or similar positions. *See e.g. Ashley County Medical Center v. Thompson*, (2002) 205 F.Supp.2d 1026, 1049 (only two of 240 comments supported the proposed rule while 238 opposed it) *NRDC* at 1038 (noting that 353 written comments were received, with hundreds of comments on each side of the issue).

More importantly, agencies routinely consider information about the entities and individuals who oppose or support an agency decision. *See e.g. Ashley* at 1050-1053 (noting the differing impacts of the proposed rule on California, Montana, Mississippi and Kentucky among others); *NRDC* at 1038 (noting the

differences between the comments submitted by shareholders and those submitted by corporations).

Agencies, and thereafter courts reviewing agency actions, take into account whether those who object (or support) a proposal are located near an affected area. They also consider whether a commentator is affiliated in some way with an affected industry, whether as a worker, customer or a businesses. All of this information is lost if the comment is rejected because its content is not unique.

In considering whether an agency acted in an arbitrary and capricious manner, the courts have looked to whether an agency has responded to those that raise "significant problems" *Ashley* at 1056, *citing Reytblatt v. United States NRC,* 105 F.3d 715, 722 (D.C. Cir. 1997) ("An agency need not address every comment, but it must respond in a reasoned manner to those that raise significant problems"). Here, by allowing citizens to present shared concerns in a uniform manner, action centers allow citizens to pool their concerns and thus ensure that the problems they identify reach the threshold of "significant" for purposes of ensuring a substantive agency response.

The action centers also simplify the process for both the agency and the person seeking to comment, one of the goals of e-government. For the agency, they provide location and identifying information for objector in a uniform format, allowing the agency to evaluate those factors easily. For the public, they help ensure that the comments are within the agency rulemaking guidelines and are directed to the appropriate person or department within an agency. Most importantly however, they allow persons of modest means and full-time jobs that are not focused on agency lobbying to participate in the public comment process.

Moreover, the rule is unlikely to reduce the workload of the agency. While agencies have an obligation to make a reasoned response to all comments, agencies currently have no obligation to respond to comments individually. Indeed, it is common for agencies in a final rulemaking to say something like, "25 commentators stated that the rule would be a mistake" for a given reason which summarizes the concerns, and then go on to address that concern. Given this common practice, the proposed rule will not save the agency any time, since the amount of effort it takes to decide a comment is duplicative and therefore need not be considered is the same as it takes to decide it is duplicative and therefore can be addressed as part of a global reply to a type of comment.

Indeed, the rule is likely to make the agency worse off, since a decision to reject a comment is the sort of agency action that triggers a duty to inform the author of that comment that his has been rejected. If the commentator believes the decision to ignore is erroneous, the decision to ignore may even trigger a right of action under the APA, which creates a risk of introducing further delay into the rulemaking process.

Agencies Have Broad Discretion in Weighing Submissions, but Not in Deciding to Reject Submissions Entirely Based upon their Content

Agencies rightfully have broad discretion in weighing submissions and determining whether they raise significant concerns. Moreover, agency rulemaking is not a popularity contest such that the sheer number of comments alone in opposition to or support of an issue should outweigh a careful, substantive analysis of the question at hand. But this proposed rule represents something different – it allows the agency the discretion to refuse to accept a submission in the first place. The "Provisions and Intent of the Proposed Rule" admits as much, stating that, in contrast, "the 2000 rule does not limit who can file an objection." 67 Fed.Reg. 235 at 72791.

More importantly, the proposed rule allows the agency to base its decision on whether to accept an objection on the content of the message – that is, whether the content is the same as another message that the agency has received. While agencies have generous discretion to set the terms for the *form* of messages they receive, the proposed rule allows the agency to exclude comments based upon whether the *content* of the objection is the same or similar to other objections. This is a troubling change that is inconsistent with the duty of an agency under the APA to consider public comment as part of its decision making. As a practical matter, the rule will disadvantage members of the public in favor of lobbyists, large organizations and businesses that can afford to hire professionals to prepare unique, separate comments. This sort of favoritism is inconsistent with the policy goals of the APA.

Agency Refusal to Consider Public Input Raises First Amendment Concerns

The proposed rule is not only inconsistent with the Administrative Procedures Act, it raises serious First Amendment concerns. As the Supreme Court long ago observed, "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Meyer v. Grant*, 486 U.S. 414, 421(1988), *citing*

Roth v. United States, 354 U.S. 476, 484 (1957)(law forbidding the payment of those who circulate petitions declared unconstitutional). This principle applies equally to "the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Meyer* at 428, *citing Buckley v. Valeo*, 424 U.S. 1, 48 (1976). There is no question that the comments that would be excluded from consideration under this rule, whether pre-printed post cards, form letters or submissions generated by online activism forms, are protected speech under the First Amendment.

Under the proposed rule, the agency will have to read a proposed comment to decide whether it qualifies as an "original, substantive comment." Thus, the agency's decision about whether to consider input from members of the public is based the content of the comment. Governmental rules that discriminate based upon message content trigger the strictest constitutional scrutiny. *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (government cannot discriminate against speech "because of its message, its ideas, its subject matter, or its content."); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U. S. 530, 537 (1980). In order to survive strict scrutiny, the agency would have to demonstrate that the rule served a compelling state interest and was narrowly tailored to meet that interest. While the agency has not articulated the exact basis for this proposed rule, it seems clear that this proposed rule would not survive strict scrutiny analysis under the First Amendment.

Even if the rule could be construed as content neutral, it still would not pass First Amendment scrutiny. Under this scrutiny, called intermediate scrutiny, a rule must not burden substantially more speech than is necessary to further the government's legitimate interests. *Turner Broadcasting Sys. et. al. v. FCC*, 512 U.S. 622, 662 (1994) (*citation omitted*). In such an analysis, the practical effect of the rule as disadvantaging average citizens and the poor from participating in the public comment period for agency rulemaking would certainly weigh heavily against the agency. In considering a rule that prevented another cheap and convenient form of speech, the U.S. Supreme Court articulated a reason that rings equally true for online activism websites:

> Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.

City of Ladue v. Gilleo, 512 U.S. 43, 53 (1994). Residential signs often do not contain "original substantive comment," yet the Supreme Court recognized their

importance to public debate. While in this case citizens are communicating with their government, rather than each other, the First Amendment's view of the situation is unchanged. Governmental attempts to place cost and convenience barriers on the ability of the public to give input into governmental processes are, rightfully, viewed with extreme skepticism by the courts. It is difficult to imagine any important governmental interest that would outweigh this loss of public voice, or that agency concerns about its workload, or whatever goal it articulates in support of this rule, could not be addressed in a less discriminatory manner.

CONCLUSION

EFF urges the Forest Service not to adopt proposed regulation 219.19(d)(1). Public participation in agency rulemaking is a vital part of the administrative legal process. It is secured by the Administrative Procedures Act and the U.S. Constitution, as well as simple common sense. The proposed rule would reduce public input into agency decisionmaking in a way that favors monied interests and lobbyists over average citizens. It would also disfavor new technologies that make the public participation process more convenient for both citizens and the agency, a step that is inconsistent with the goals of e-government. The proposed rule would require the agency to turn a blind eye to members of the public who choose to join their voices together in an effort to ensure that the agency does not overlook a significant issue affected by a proposed rule. Finally, it will reduce the amount of comments overall.

Should the Content Analysis Team wish to discuss this matter further, EFF would be happy to do so. We can be reached as follows:

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