The story of rules and the rules of stories: public comment in environmental rule making

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"All we want are the facts, ma'am"

~Sgt. Joe Friday, Dragnet (1951)

"Facts are simple and facts are straight
Facts are lazy and facts are late
Facts all come with points of view
Facts don't do what I want them to…."

~Brian Eno, Talking Heads, Crosseyed and Painless (1981)

Introduction/summary

In North Carolina and many other states, the opportunities and methods for public comment on rules that govern environmental regulations expanded dramatically in the late 20th century. In the early 21st century, those public input methods remained in place, but agencies, commenters and critics increasingly wondered how rule making could be done more efficiently and effectively without losing legitimacy and fairness. The concerns about rule making shifted from expansion of public input opportunities to methods of analysis and oversight of the rule making process, including the occasionally voluminous official public comment record. The march of innovative and disruptive digital technologies into every realm, including government, also began to raise questions

around possibly better ways to understand public sentiment about proposed rules, perhaps ways augmented by technology.

In this paper, we examine some important background for these newer concerns. First, we review the framework and evolution of the law of public input on rule making. Second, we consider some possible explanations for this evolution in terms of the values served by public comment on rules. Finally, we take a look at research regarding narratives typically found in public comments. We do not explore the strategic uses of public input processes to support litigation or other channels for shaping agency policy, as it is beyond the limits of this paper. We hope this paper can serve as foundational material for advisors to agencies undertaking rule making, for stakeholders interested in advancing their interests in rule making, and for designers of public input processes in the future.

The evolution of public input in North Carolina rule making

The problems of "how" and "why" for public participation in rule making are fairly new problems in public law and administration. Much as one might suppose that the ancient authorities worked it all out in fifth-century B.C. Athens, the issues are closely tied to the rise of representative democracy and, further, to the rise of the administrative state.

Like other original colonies turned states, North Carolina started with legal models from Britain. The English system for control of administrative action developed through the courts and the various "writs" used to bring public officials before judicial tribunals; hence, lawyers and the court system have been the primary players in English

administrative control.[1] European models for administrative control have typically relied on specialized tribunals within the administrative bureaucracy itself.[2] Yet even these executive institutions essentially share the legalistic goal expressed by the Belgian Conseil d'Etat: to "offer to all natural and legal persons the possibility of an effective appeal against irregular administrative acts that might have damaged their interests, as far as no other judicial body is competent."[3] The words "natural and legal persons," "appeal," "irregular," "damaged," and "judicial" all bespeak judicial ancestry. Because they are mostly retrospective in operation, even the European executive institutions do not appear to have been as concerned with pre-decisional input as their counterpart American institutions have become.[4]

In the USA, the use of stakeholder processes, negotiated rule makings, visioning efforts and many other forms of pre-decisional public participation became commonplace in environmental policymaking in the 1990s. These methods were not unique to environmental rule making, but the significant and direct costs that environmental rules could impose on commerce, and the significant population-wide benefits (or avoidance of costs) that environmental rules often sought, put environmental rule making in the forefront of debates over rule making processes. North Carolina provides a case study in the evolution of these processes for public participation. It is not that the state is unique.

In the first hundred years of state administrative law in the United States, North Carolina was usually among the leading states in adopting new approaches to administrative procedure, including rule making. In 1939, North Carolina passed a Uniform Licensing Act,[5] placing the state in the group of eight states that passed administrative procedure laws during the first period of United States administrative law

reform.[6] This first period began with the reaction, led by the American Bar Association, to the rise of federal agencies created to deal with the problems of the Great Depression.[7]

The end of World War II brought renewed attention to administrative law, and the nation passed the Administrative Procedures Act in 1946. In the same year, the National Conference of Commissioners on Uniform State Laws formally approved its first model state administrative procedures act and recommended its adoption to the states.[8] North Carolina was one of twelve states to pass legislation based in part on the model act.[9]

Former Article 18 of G.S. 143 (G.S. 143-195 and -196) required that administrative rules (the term was undefined) previously adopted were effective until June 1, 1943, but thereafter were effective only after filing with the Secretary of State.

> On or before the first day of June of 1943, each agency on the State of North Carolina created by statute and authorized to exercise regulatory, administrative or semi-judicial functions, shall file with the Secretary of State a complete copy of all general administrative rules and regulations or rules of practices and procedure, formulated or adopted by the agency for the performance of its functions or for the exercise of its authority and shall thereafter, immediately upon the adoption of any new general administrative rule or regulation or rule of practice and procedure, or the formulation or adoption of any amendment to any general administrative rule or regulation or rule of practice and procedure, file a copy of the same

> with the Secretary of State: Provided that nothing contained in this article shall require any State agency to file in the office of the Secretary of State any rate, service or tariff schedule or order or any administrative rule or regulation referring to any such rate, service or tariff schedule.[10]

The General Assembly in 1953 passed an act entitled "Judicial Review of Decisions of Certain Administrative Agencies."[11] The Judicial Review Act provided that "Any person who is aggrieved by a final administrative decision, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this article, unless adequate procedure for judicial review is provided by some other statute." [12]

A report prepared by the Institute of Government for the Committee on Administrative Law of the N.C. Bar Association in 1960 reviewed the then-current ways that administrative rules were published in several other states.[13] As noted, at that time, filing of most administrative rules with the Secretary of State was required, and where the rules had the force and effect of criminal law,[14] filing was also required with clerks of superior court. The report noted a major flaw with that filing system, which was that "officials with whom rules and regulations are filed have not maintained them in a usable collection." They simply went into a filing cabinet.[15]

The Model State Administrative Procedures Act was revised in 1961. This 1961 model act was the basis for much of North Carolina's first comprehensive administrative procedures act, passed in 1974.[16] North Carolina thus joined the more than half the states

in the country which have adopted general and comprehensive administrative procedures based in whole or in part on the 1946 or 1961 model state administrative procedures act.[17]

The State Auditor's office conducted a survey and published findings in 1976 on the costs and benefits of the new APA.[18] An appendix to the report contains an interesting collection of letters from agencies, both those excluded and those covered by the new APA, with their agency head's impressions of costs and benefits. The survey instrument went to 18 agencies; 11 reported that their administrative rules were available to the public prior to passage of the APA. Six reported that "some" of their rules were available, and one reported that its rules were not available prior to the APA.[19]

The model state administrative procedures act was again revised in 1981. North Carolina followed in 1985 with major changes to its administrative procedures act, although the changes were driven less by the presence of a revised model act than by general awareness of weaknesses in the first North Carolina administrative procedures act. In 1985, while the legislature considered the changes in the APA that produced the Office of Administrative Hearings, the N.C. Center for Public Policy Research published a report on the APA.[20] The survey has a very good timeline summary of APA history in NC.[21] Like the Auditor's report in 1976, the Center surveyed state agencies (92 persons, with a response from 65). Among other findings, APA coordinators reported that 10 or fewer persons attended about half the rule making hearings.[22] The people commenting on proposed rules were believed by survey respondents to be overwhelmingly business interests and regulated persons. Public interest groups were a distant third, interested citizens fifth.[23] Rules were still not published as of the time of this survey. They were available on microfiche. Thirty three percent of survey respondents said the APA process

was too time consuming; this ranked as the greatest weakness of the APA rule making provisions, according to this survey.[24] This is ironically amusing, given how much longer it takes today.

Like most states in the United States, the State of North Carolina is the ultimate implementor of the major environmental programs.[25] The state does have a history of relative harmony—which some criticize as a form of resistance to social change[26]—in its resolution of policy debates, even the difficult debates that environmental decisions often prompt.[27] But our hypothesis is that North Carolina is representative enough of national norms that a review of its use of various public participation techniques may shed some light on their use elsewhere.[28] In seeking to understand the values served by various forms of public participation, we find it instructive to review the rise of these forms in this particular place.

The public hearing, and some notice of the proposed decision that is the subject of the hearing, is a venerable institution that appears in North Carolina environmental law from the very start of the modern era of environmental law (for our purposes, the 1950s). Prior to this, there were "environmental statutes" that regulated land use, but little formal attention was given to public notice and public input on a proposed environmental decision. Instead, there were typically legislative delegations of power made to a person or persons (some of whom formed companies chartered for particular purposes, such as cutting canals). These delegates rendered decisions based on their interests and expertise. When those decisions affected the property of others, and disputes arose, the parties went to court to resolve their differences.

For example, in one of the first "environmental laws" in North Carolina, the legislature in 1795 created a scheme for draining swamp lands, even over the objections of property owners whose land was to be drained. The procedure was for a property owner who wanted the drainage to apply to the superior court in the property owner's county. The court would then appoint "commissioners"—typically local farmers—who would inspect the land and file a report with the court recommending whether and how the land would be drained, and (eventually) the portion of costs to be born by all affected property owners. There was no provision for public input into the commissioners' work. The courts intervened to assure that a property owner who was to be charged had a day in court to contest the process, but courts rarely if ever second-guessed the report of the commissioners.[29]

Early water pollution control efforts were made in the 1940s and 1950s, and these statutes had very limited forms of public participation.[30] In 1945, the Stream Sanitation Act set up a committee to look into the problems of water pollution. The committee was comprised of the heads of the concerned state agencies; members representing the pulp paper industry; textile industry; three members representing municipalities; one for agriculture; one for industry at large; one for the tanning industry; one for the clay industry; and one for the fertilizer industry. No public input was invited.[31] In 1951, a major rewrite of the Stream Sanitation Act authorized the creation of water quality standards, the issuing of special orders, and made provision for public input. However, the hearings were still treated as highly formal events, with submission of "evidence" and a requirement that participants pre-register in order to speak. Procedural mechanisms in the 1951 act, drafted by special private counsel chosen by industry, ensured that public

involvement in actual decisions over stream classifications and committee actions was minimal. For example, notice of special orders authorized under the statute was to be given "only to each person directly affected."[32]

The environmental legislative outburst of the late 1960s and early 1970s retained the baseline reliance on quasi-judicial public hearings,[33] but added legislatively-expressed concern for public input,[34] some prohibitions on conflicts in making environmental policies,[35] and the delegation of hearing authority from formal Boards to their staffs.[36] This last issue, the delegation of hearing authority, was a step away from formal hearings in that it permitted "hearings" in informal, smaller settings removed from more daunting meetings of the final decision makers. This era also saw the broadening of lists of stakeholders who were to advise or make environmental decisions to include parties other than those with a direct economic interest in the potential regulations.[37] The developments in the 1960s and 1970s clearly evidence an increasing concern for public involvement in environmental decisions, but the formal procedures used still revolved around the traditional, judicially-based hearing.

In 1974 North Carolina passed an Administrative Procedures Act that, for the first time, provided minimum procedures for all environmental rule making. Prior to this act, each environmental statute included its own embedded administrative processes for public input. After the advent of the N.C. APA, the particular statutes still could (and did) add their own variants in the way of pre-decisional process, but the APA provided a guarantee of minimum procedural requirements such as notice of rules, publication of proposed rules and a required public hearing.[38] Still, the APA requirements were highly

legalistic; there was no expressed goal to reach "consensus" nor any route offered for non-adversarial approaches to policymaking.

In the 1980s, federal legislation for cleanup of contaminated properties changed and dominated much of the debate about environmental law.[39] The legislation ("Superfund") required a degree of public participation in cleanups, including "an opportunity for a public meeting at or near the facility at issue."[40] In 1987, North Carolina, like many other states, passed its own "baby superfund" statute, modeled loosely on the federal superfund legislation. The North Carolina Inactive Sites Act of 1987 imported the concept of a public meeting—something different than a hearing, presumably where discussion was less formal and perhaps more slanted to open-ended discussion of issues at an early stage in the decision process, rather than a quasi-judicial presentation of evidence in response to a particular proposal.[41] In 1989, the public meeting concept was added as an option in deliberations over special orders on consent in the wastewater area.[42] In the 1990s, this extension of the idea of public meetings was broadened to local Solid Waste Management Plans,[43] as well as to contractual agreements for partial cleanup of properties known as Brownfields Agreements.[44]

The most interesting development in the 1990s, however, was the rise of full bore stakeholder processes, which were mandated or otherwise heavily encouraged by the legislature as a way of shaping most of the major environmental policy decisions. A pattern emerged in which representatives of regulated industries, local government, the environmental regulatory agencies, as well as public interest environmental groups would convene in meetings—open to all but rarely attended by others—to attempt to negotiate the details of proposed bills and rules. These groups were sometimes facilitated by

legislative staff, at other times by agency staff, and in some instances by paid, outside facilitators. The goal of each session was consensus on some proposed changes that one or another group had brought to the table. Agency staff themselves were encouraged and began to hold public outreach and consensus-seeking sessions on almost all potentially controversial decisions. Almost every major environmental development in the legislative and administrative arenas, other than adjudications, received some degree of stakeholder process, including the creation of buffer requirements for one of the state's major nutrient sensitive river basins, the Neuse; the development of animal waste regulations for intensive livestock operations; the creation of minimum flow regimes for dams; the brownfields legislation; revision of coastal area local land use planning; changes in permit processing; the development of capacity use regulations for groundwater withdrawals in the central coastal plain; the development of federal stormwater permits for "Phase II" (smaller) communities; and so forth.

Why did the state of North Carolina move from a position of entrusting water pollution control to a handful of interested industry and municipal representatives (1945) to a position of inviting all stakeholders, including public interest group representatives and the general public, to negotiate the details of almost all possible future policy changes (mid 1990s)? What, if anything, was lost and gained in this transition? In the light of this evolution, how do we evaluate public participation processes in environmental decisions today? We turn now to these questions.

Values served by the evolving forms of public input

One explanation of the changes in forms of public input comes from a widely accepted account of the evolution of administrative law and process generally in the twentieth century. It may be that in evolving more inclusive forms of public input, North Carolina is simply reflecting this larger transformation in American administrative law. This transformation has been described as a move from an original concern for efficient application of trained expertise working towards some abstract standard, such as "the public interest," to a process for resolving the competing claims of interest groups. These changes in the basic conception of what agencies do make the input process more important. [45]

On this view, the legitimacy of agency action is less tied to the neutrality and expertise of the agency staff than it is to the openness of the agency to the viewpoints and oversight of all interested persons, making interest group input pivotal. The evolution of public meetings and stakeholder processes was arguably necessary in order to facilitate the discussion of the positions that interest groups have on a given proposal. Once it is conceded that environmental policy decisions cannot really be made on the basis of the neutral application of scientific or other objective information, the public participation process becomes a primary vehicle for soliciting and structuring these interested viewpoints. The decisions themselves become inevitably and inherently a vector of the power exercised by interest group forces, and the test of the public participation process is how accurately and comprehensively the agency gauges the views and forces of the interest groups.

This theory does not explain how and why the interest groups that tended to dominate the decisionmaking process in the early days—before much attention was paid to public participation—would permit the expansion of input to include views other than their own. Recall that in the 1940s, the first stream sanitation law in North Carolina called for a committee that included only representatives of discharging industries and municipalities. How did other interest groups land a seat at the table? Turning back to the larger scene in American administrative law, agencies in the 1970s faced criticism for being captive to regulated interests. The reforms in public participation of the 1960s and 1970s might be explained as a legislative response to those criticisms—an opening up of "sunshine" on a government viewed as controlled by regulated interests.

In the late 1980s and 1990s, on the other hand, the environmental agencies in North Carolina, as elsewhere, faced great criticism for being overly burdensome and inefficient in their zeal to protect the public. They also faced, at the state level, the first full blast of litigation challenging environmental rules and adjudicatory efforts. Agency motivation to ease criticisms and defuse lawsuits served agency interests of effectiveness and public support. Expanded public input held the promise of softening the criticisms and lessening the litigation. Arguably the evolution of "public meetings," which allow a more open presentation and discussion of what an agency was proposing to do than does the trial-type procedure of the "public hearing," gave the agencies a tool both to better explain the rationale for proposed decisions and to present them at an earlier stage, when fewer details were fixed and routes might be found to avoid litigation.

The stakeholder processes of the 1990s could be seen simply as a refinement of these agency strategies to relieve pressures and reduce litigation exposure. However, they

also may reflect genuine learning by agencies and legislators on more effective ways to gather input than the traditional, legally-based "public hearing." The 1990s saw a great rise generally in research and reporting on methods of building consensus. Perhaps the rise of complex, consensus-based forms of input in the 1990s represented a recognition that policy decisions themselves are improved with more open discussion and debate outside the agency. In the 2000s and beyond, however, numerous "regulatory reform" bills evidenced very little legislative or powerful stakeholder interest in more open discussion and debate.

An alternative explanation for the increase in attention to public input processes is that the dominant interest groups came to understand that public input was not usually pivotal in shaping the final decision. If they could continue keeping policies within bounds acceptable to them, while also presenting a policymaking process that appeared open to all points of view, so much the better hegemony.[46] While a plausible explanation, it is hard to square this view with the actual, highly decentralized structure of environmental decision making in North Carolina. Power to make executive branch decisions is split among the Governor, his appointees to the Department of Environmental Quality and the Department of Health and Human Services (among other agencies), elected heads of agencies not in the Governor's cabinet (such as the Departments of Labor and Agriculture), the career officials who staff these agencies, and a variety of boards and commissions appointed by various elected officials, including the Governor, the President Pro Tem of the Senate, and the Speaker of the House, all overseen by the legislature. In this setting of shared power, policy outcomes really do seem to be a vector-like result of numerous forces pushing and pulling in different

directions. Thus, the more the process is open to additional viewpoints, the less likely a given participant is in control of the outcome.

A final, contrasting explanation is that increased public input and discussion, culminating in the consensus-seeking stakeholder efforts of the 1990, was the only way to get decisions made on potentially controversial environmental policy questions. In other words, the public input may, in some cases at least, give a means to unclog the logjam that otherwise can be created when any one or more of the groups that have power decide they do not like a proposed change. This ability to "veto" changes is another feature of the environmental policymaking arena that, one might plausibly suggest, has increased through the years as more and more groups have learned how important a given environmental policy decision may be and how to mobilize support for their interests. In the 1980s and 1990s, it was rare for any one interest group to be able to push through new legislation or new regulations without support from at least several other groups that did not necessarily share their interests exactly.

Whatever the causes of the particular changes in input process at each statutory step, it is apparent in review of the fifty year period that the administrative system changed to respond more directly to public and interest-group representation and to be more "transparent." These changes appear in retrospect as the piling of a new layer of informal input and discussion processes on top of the prior formalistic public notice, hearing and comment processes.

Judicial review of rules in North Carolina generally takes place only when a rule is applied to a particular person,[47] except for challenges to vetoes by the Rules Review Commission[48] and challenges to temporary and emergency rules.[49] The fact of limited

judicial review of rule making alone creates major differences in the way rule making is done and perceived in North Carolina, as compared to the federal government. Many, if not most, controversial rules in the federal system are challenged when they are promulgated, even before they are applied, and the federal courts have shown some willingness to inquire into the process and merits of the new rules themselves. In contrast, "Entry of a rule in the North Carolina Administrative Code after review by the [Rules Review] Commission creates a rebuttable presumption that the rule was adopted in accordance with [the APA rule making provisions.]"[50] This means that once codified, a North Carolina rule is difficult to challenge other than in a challenge to the circumstances or fairness of its application to a particular person. There are at least two procedural mechanisms for getting a court to review a rule directly (rather than reviewing its application in a particular case): a declaratory judgment action in superior court and a rule making petition. But rule making is a quasi-legislative activity, so the merits of the agency's policy choices in any given rule are unlikely to be disturbed by a court (absent some constitutional problem). Given this shift to respond to public and interest-group input, we focus on understanding public sentiment towards proposed rules.

The Rules of Stories: Scholarly work on narratives in public comment on proposed rules

Many scholars have focused on narratives used in public comments as a means of understanding how individuals formulate beliefs, communicate and reason[51]. Narratives (i.e. stories) are used to construct the veracity, scope and mutual exclusivity of the way a problem is defined in ways that produce desired outcomes[52] – this is the chief rule of storytelling. The idea is that individuals that have similar beliefs will construct stories in

ways that illustrate the shared values that present the group's problem definition as the most beneficial solution.

But why is it important to understand the conflicting views that is public sentiment? This is important because it helps to further bolster transparency and accountability for the agencies that are charged with incorporating public input in rule making. Researchers focused on understanding influence, analyzed deliberations during public hearings and found that agency officials were more likely to be responsive to narratives that were similar to their own[53] . Groups use this knowledge to their advantage by employing distinct language that resonate with officials to ensure that their values become institutionalized. Therefore, it is important for agencies to utilize methods that increase accountability by acknowledging values across differing perspectives.

These values can be understood through the identification of literary devices – characters, setting, moral, plot and metaphors [54]. Characters are defined based on what entity is being described as the protagonist or antagonist – a hero (the entity presenting the best solution) or a victim (the entity being harmed by the proposed solution). The setting describes the legal and constitutional parameters, demographics, geography, and facts. The moral is the policy solution being promoted. The plot functions to situate the different characters within the context of the story. Lastly, metaphors and symbols are used to amplify the narratives being told. Through the analysis of these literary devices it is possible to differentiate between the group identity which is based on the beliefs and the values that are at the core of the issue.

The group identity is important to the way that the problem is being defined, so groups use a problem definition that reinforces the group identity. This approach is often

reinforced in controversial decisions because individuals receive no benefit from focusing on the facts but instead benefit from highlighting the group's narrative through the use of stories that emphasize metaphors and symbols. Many scholars have found that stories associated with group identity have the ability to influence an individual's position on an issue far more than the scientific facts being presented because the problem definition is based on the core values of the group[55]. The propositions put forth by cultural theory can be used to understand the core values associated with the group identity.

Scholars have sought to understand public comments based on how groups use narratives to formulate beliefs, communicate and reason. Cultural theory has been identified as a useful tool for evaluating belief systems across different policy contexts. Cultural theory states that individuals are naturally predisposed to define problems based on cultural perspectives that function to explain the rules for communication and rational thinking [56]. These perspectives are based on the cultural theory typology initially developed to explain differing perceptions of nature as a collective representation of group beliefs [57]. The typology was later expanded to describe belief systems based on a group's perceptions of interaction with the world and the degree to which these groups limit beliefs and behavior. The typology includes four cultural archetypes that discuss how certain groups perceive[58] and frame stories[59] concerning risk, they include: hierarchs, egalitarians, individualists, and fatalists. Hierarchs believe that rules should be followed and that the system of rules are sufficient to address new technologies. Egalitarians believe that the government's role is to protect those of lesser power and promote fairness. They also believe that societal well-being is most important for individual prosperity. Individualists believe that society should value individual success

and that regulation should not stymie innovation. Fatalists believe that the system is not fair and that there is very little that the government can do to prevent harm. Researchers have been successful at analyzing narratives for inclinations toward these four cultural worldviews -- hierarchical, egalitarian, individualist, and fatalist – by using natural language processing software to understand public sentiment.

Natural language processing techniques can help agency officials with gaining a deeper understanding of public sentiment, as well as, increase efficiency in the review process [60] [61]. The incorporation of technology into the rule making process has led to an increase in public participation which also means a larger number of public comments. Although more public participation is a good thing, it has created somewhat of an administrative burden. Natural language processing technologies can help to reduce the time and cost associated with analyzing comments[62]. It would also allow agency officials to efficiently monitor platforms that allow for deliberation between stakeholders. Deliberation between stakeholders provides an opportunity for stakeholders to learn from each other, while also providing more information about public input. More importantly, agency officials can use this technology to recognize the core values that are associated with the group identity.

Scholars have used natural language processing technologies, informed by cultural theory, to gain a better understanding of the perspectives being discussed in public hearings [63]. Review of comments surrounding the approval of genetically engineered salmon revealed that groups shared key concerns despite using extremely polarizing stories. For example, comments coded as individualist were mainly concerned that rules set in place for regulation be structured in a way that would not stifle

innovation; comments coded as hierarchical mainly discussed the need to develop rules that promoted safety while also allowing for feasible regulatory standards; comments coded as egalitarian mainly discussed their concern in relation to rules that protected the public by increasing transparency (i.e. labels) and the environment (i.e. production only at land locked locations). The concerns presented in these stories all have somewhat of a correlative element despite the fact that the stories were all based on extremely polarizing formulations of the problem.

Understanding how people naturally process information can also improve how agencies communicate with stakeholders [64]. People have predictable cultural biases that are grounded in their view of the world. Researchers used this knowledge to develop tests to understand how people would respond to scientific communication in the form of stories based on the four cultural precepts: hierarchical, egalitarian, individualist, and fatalist[65] . The results indicated that respondents were more likely to respond positively to narratives that fit a cultural precept that was similar to their own. Given this knowledge, agencies could structure communication to the public such that it addresses stakeholder concerns as it relates to the four cultural precepts.

In closing, the discussions throughout this paper illustrate some of the prevalent concerns faced by agencies tasked with incorporating public input into the rule making process. In North Carolina, the laws on public input into rule making have evolved dramatically over the past few decades. These transitions were initiated in the 1990s when the state moved from a position of entrusting environmental concerns to a handful of interested parties to one that incorporated input from all stakeholders when negotiating policy changes. At the time this was reflective of the larger scale transformation

occurring in American administrative law. Ultimately these transitions can be summarized as learning lessons that led to the refinement of the agency strategies to relieve pressures, reduce litigation exposure, increase stakeholder engagement, and an increase in legitimacy and accountability. Given national trends to focus on improving the quality of incorporating public input, we are likely at the precipice of change.

Increased responsiveness to the public and interest-group input have led to agencies across the nation incorporating new technologies. The incorporation of new technologies signals the horizon of another evolution in the public input process into rule making. New approaches to utilizing existing technologies such as natural language processing through the lens of cultural theory provide the promise of increased efficiency and improved methods of understanding public sentiment. Gaining a better understanding of the stories, problems, and solutions being promoted within public comments can lead to a more meaningful public input process that can shape how agencies communicate with the public [66]. Therefore, it is imperative that advisors to agencies undertaking rule making and designers of the public input process consider these options in the future.

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[1]See generally L. Jaffe, Judicial Control of Administrative Action ch. 7 (1965).

[2] For example, the Conseil d'Etat of France (http://www.conseil-etat.fr/) and Belgium (http://raadvst-consetat.fgov.be/home_en.htm) and the Italian Consiglio di Stato (http://www.giustizia-amministrativa.it/).

[3]Supreme Administrative Court of Belgium, "What do we Do?", http://raadvst-consetat.fgov.be/whatwedo_en.htm (Oct. 1, 2000).

[4] This is not to say that the European experience offers nothing of value for researchers in environmental public participation; to the contrary, efforts such as the Dutch and New Zealand initiatives at stakeholder formulation of environmental policy suggest there is much to be learned by Americans from European and Commonwealth administrative models. See, e.g. http://www.rri.org/envatlas/europe/netherlands/nl-index.html and http://www.rri.org/envatlas/europe/netherlands/nl-index.html .

[5] S.L. 1939-218, An Act to Provide a Uniform Procedure for the Suspension or Revocation by Certain North Carolina Boards and Commissions of Licenses to Engage in Trades and Lawful Callings. This act was codified at G.S. 150-1 et seq (now repealed). Its vestiges live on as the separate Article 3A procedure for contested case hearings of certain boards, notably occupational licensing agencies.

[6] Others include Massachusetts, South Carolina, Kansas, Oregon, North Dakota, South Dakota, and Wisconsin.

[7] See generally 1 K. Davis, Administrative Law Treatise §1:7, at 24 (2d ed. 1978); see also A. Bonfield, State Administrative Rule Making § 1.2.1, at 16-22 (1986).

[8] Bonfield 1986, at 18.

[9] K. Davis, Administrative Law Treatise §§1.04-1.05, at 14 (1970 Supp.), reporting the twelve states to be California, Illinois, Indiana, Massachusetts, Michigan, Missouri, North Carolina, North Dakota, Ohio, Pennsylvania, Virginia and Wisconsin.

[10] G.S. 143-195 (repealed in 1973 with the passage of N.C.'s APA).

[11] S.L. 1953, Ch. 1094 (codified as G.S., Ch. 143, art. 33; G.S. s 143-306 to G.S. s 143-316).

[12] G.S. 143-307 (repealed), explained in In re Halifax Paper Co., 259 N.C. 589 (1963).

[13] Robert G. Byrd, *A Report to the Committee on Administrative Law of the North Carolina Bar Association on Publication of Administrative Rules and Regulations* (Chapel Hill: Institute of Government 1960).

[14] Former G.S. 143-198.1 (in addition to filing with the Secretary of State, agencies created by statute and authorized to exercise regulatory, administrative or quasi-judicial functions had to file with the clerk of superior court of each county a certified indexed copy of all rules, the violation of which would constitute a crime.)

[15] Byrd at 3.

[16] The original North Carolina APA, G.S. Chapter 150A, codified House Bill 1076 (ratified April 12, 1974) and was originally made effective July 1, 1975. The effective date was delayed until February 1, 1976 by S. 85 (ratified March 24, 1975). The original North Carolina APA required in Article 5 that agencies file all rules, regulations, ordinances, standards and amendments with the Attorney General's office before the rule could become effective. This excluded (1) rules, procedures, or regulations relating to internal management of the agency; (2) directives or advisory opinions to any specifically named person or group with no general applicability throughout the State; (3) dispositions of a specific issue or matter by the process of adjudication; and (4) orders establishing or fixing rates or tariffs. G.S. 150A-10 (repealed).

[17] Bonfield, 1986, at 19, reported 28 such states: Arkansas, Connecticut, Georgia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Oklahoma, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, as well as the District of Columbia. Bonfield notes that Prof. Davis also includes Arizona, Florida, Indiana, Massachusetts, New Mexico and Oregon as such states. Bonfield, 1986, at 19 n.9. Bonfield's 1993 Supplement, citing 14 U.L.A., listed 29 states, for some

reason not including North Carolina. A. Bonfield, State Administrative Rule Making §1.2.2, at 3-4 (Boston: Little Brown, Supp. 1993).

[18] N.C. Dept. of State Auditor, Operational Audit: The Administrative Procedures Act (Raleigh: Mach 1976).

[19] Operational Audit at 7.

[20] Bill Finger, Jack Betts, Ran Coble, and Jack Nichols, North Carolina Center for Public Policy Research, Assessing the Administrative Procedure Act (Raleigh: N.C. Center for Public Policy Research, May 1985).

[21] Id. at 15-19.

[22] Id. at 24.

[23] Id at 25.

[24] Id at 28.

[25] North Carolina is fully delegated and/or authorized to run the federal hazardous waste, water and air pollution permitting programs, along with its own contingent of state-created regulatory programs such as erosion and sediment control, coastal area management, and water (capacity) use.

[26] See generally, e.g. William Henry Chafe, Civilities and Civil Rights: Greensboro, North Carolina, and the Black Struggle for Freedom (Oxford: Oxford U. Press, 1981).

[27] V.O. Key's observations still seem pertinent here. Key characterized the state as a "progressive plutocracy" in which the interests of big business are always attended to, but in a "progressive" fashion that avoids some of the strife and scandal that has plagued other southern states. V.O. Key, Southern Politics 205-228 (New York: Random House, 1949).

[28] In the last half of the twentieth century, North Carolina was among the faster growing (second quintile) states in population [and per capita income]. Its Gini index, a measure of income inequality, moved from 39th most equal in 1949 to 29th most equal in 1989. Laura Langer, "Measuring Income

Distribution across Space and Time in the American States," Social Science Quarterly 80:55, 63 (March 1999).

[29] E.g., Adams v. Joyner, 147 N.C. 77 (1908).

[30] The public hearing, still with judicially based procedures, actually made its appearance in North Carolina environmental law at least as early as 1937, with the passage of the Soil Conservation Districts Law. This act created a finely wrought system of public input, but it was based on the model act drafted by Philip M. Glick and others in Washington—the New Deal progressivism expressing itself in proto-environmental legislation. See Philip M. Glick, "The Politics of Conservation," in J. of Soil and Water Conservation 255-258 (Sept-Oct. 1982). North Carolina's adoption of the model act, with its extensive public input, agency decision criteria that expressly included consideration of income status and extent of public involvement, and fairly broad powers for the newly created soil conservation districts, was doubtless attributable at least in part to Hugh Hammond Bennett of Anson County North Carolina, who ran the new Soil Erosion Service for Franklin Delano Roosevelt. See Arthur M. Schlesinger, Jr., The Coming of the New Deal 341-341 (Cambridge: Houghton Mifflin, 1959).

[31] N.C. Sess. Laws 1945-378.

[32] N.C. Sess. Law 1951-606.

[33] See, e.g. N.C. Sess. Laws 1967-892 (air standards and special orders, borrowing procedures from 1951 water law); Sess. Laws 1973-392 (Erosion and Sediment Control hearings, aimed at applicants for permits whose plans were denied or modified).

[34] See, e.g., N.C. Sess. Laws 1967-892 (setting up Air Control and Water Control Advisory Councils, including a doctor and a biologist in addition to the interested parties).

[35] See N.C. Sess. Laws 1973-698 (prohibiting anyone who received a significant potion of income directly or indirectly from a permittee or applicant from serving on the Board of Water Resources).

[36] N.C. Sess. Laws 1973-698 (Board of Water Resources, later the Environmental Management Commission, permitted to let staff members hold hearings).

[37] Id.; see also N.C. Sess. Laws 1973-1284 (Coastal Area Management Act Advisory Council).

[38] N.C. Sess. Laws 1973-1331 sec. 1. See particularly the procedure as codified at 150A-14 (now superceded by G.S. 150B) which required advance notice of public hearings and openness to "any person to present data, views, and arguments. . . If the persons likely to be affected by the proposed rule are unorganized or diffuse in character and location, then the agency shall publish the notice as a display advertisement in at least three newspapers of general circulation in different parts of the State..Upon adoption of a rule, the agency, if requrested to do so by an interested person either prior to adoption or within 30 days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the consideration urged against its adoption."

[39] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601-9675.

[40] See 42 U.S.C. § 9617 (CERCLA § 117).

[41] N.C. Sess. Laws 1987-574 (giving authority to hold both “meetings” and “hearings”).

[42] N.C. Sess. Laws 1989-766.

[43] N.C. Sess. Laws 1995-594.

[44] N.C. Sess. Laws 1997-357.

[45] See R. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669 (1975).

[46] This view is consistent with the observation of Key about North Carolina, that “the effectiveness of the oligarchy’s control has been achieved through the elevation to office of persons fundamentally in harmony with its viewpoint. Its interests, which are often the interests of the state, are served without prompting.” V.O. Key, Southern Politics 211 (New York: Random House, 1949). It is also consistent with critics of stakeholder processes and public input who suggest they are no more than post-Fordist approaches to sap the energy and coopt the mission of environmental advocates. E.g., Mayer Magit, “Post-Fordist City Politics,” in Post-Fordism: A Reader 316. A. Amin, ed. (Oxford: Blackwell 1994)[check cite]

[47] See G.S. 150B-43 ("Any person who is aggrieved *by the final decision in a contested case*…is entitled to judicial review of the decision…") (emphasis added). "No appeal lies from an order or decision of an administrative agency of the State or from judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute." In re State ex rel. Employment Security Com., 234 N.C. 651, 68 S.E.2d 311 (1951). See also In re Stiers, 204 N.C. 48, 167 S.E. 382 (1933) (the State cannot appeal in either civil or criminal cases except upon statutory authority); In re. Halifax Paper Co., 259 N.C. 589, 131 S.E.2d 441 (1963).

[48] For challenges to a Rules Review Commission veto of a permanent rule, see G.S. 150B-21.8(d). This provision and the statutory grant of standing to challenge temporary rules were added in 2003, so at the date of publication of this book, there has been little to no experience with them.

[49] G.S. 150B-21.1 (c) (temporary rules); G.S. 150B-21.1A(c) (emergency rules).

[50] G.S. 150B-21.9(a1). Prior to 2003, this language was "conclusive evidence" rather than "rebuttable presumption." The legislature lowered the standard for judicial review of a permanent rule in response to requests by lobbyists for development interests, who were frustrated in their challenge to state wetland rules by the decision in In re Ruling by Environmental Management Com'n, 155 N.C. App. 408, 573 S.E.2d 732 (2002). It will be interesting to see whether increased litigation over rules results from the change.

[51] McBeth, Mark K., Michael D. Jones, and Elizabeth A. Shanahan. "The narrative policy framework." Theories of the policy process 3 (2014): 225-266.

[52] Stone, Deborah. Policy Paradox: The Art of Political Decision Making. 3rd ed. (revised). New York: W.W. Norton & Co., 2012.

[53] Eckerd, Adam. "Risk management and risk avoidance in agency decision making." Public Administration Review 74, no. 5 (2014): 616-629.

[54] Id at 51, 52.

[55] See e.g., Kahan, Dan M., Hank Jenkins-Smith, and Donald Braman. "Cultural cognition of scientific consensus." Journal of risk research 14, no. 2 (2011): 147-174.

[56] Kahan, Dan M. "Cultural cognition as a conception of the cultural theory of risk." Handbook of risk theory: Epistemology, decision theory, ethics, and social implications of risk (2012): 725-759.

[57] Douglas, Mary. Essays on the Sociology of Perception. Routledge, 2013.

[58] Thompson, Michael, Richard Ellis, and Aaron Wildavsky. Cultural Theory. Boulder, CO, 1990.

[59] Jones, Michael D., and Geoboo Song. "Making sense of climate change: How story frames shape cognition." Political Psychology 35, no. 4 (2014): 447-476.

[60] Raile, E., Henry King, E. Shannahan, Jamie McEvoy, Clemente Izurieta, Nicolas Bergmann, Richard Ready, Ann Marie Reinhold, and G. Poole. "Narrative-based Risk Communication: A Lingua Franca for Natural Hazard Messages." 76th Annual Midwest Political Science Association, Chicago IL (2018).

[61] Crow, Deserai, and Michael Jones. "Narratives as tools for influencing policy change." Policy & Politics 46, no. 2 (2018): 217-234.

[62] Livermore, Michael A., Vladimir Eidelman, and Brian Grom. "Computationally assisted regulatory participation." Notre Dame L. Rev. 93 (2017): 977.

[63] Williams, Teshanee Tamara. "Narrative Policy Framework: Examining Policy Narratives as Tools of Influence in the Regulatory Review Process of Bioengineered Salmon in the United States and Canada." (2019).

[64] McMorris, Claire, Chad Zanocco, and Michael Jones. "Policy Narratives and Policy Outcomes: An NPF Examination of Oregon's Ballot Measure 97." Policy Studies Journal 46, no. 4 (2018): 771-797.

[65] Id at 55.

[66] Id at 61.