

Any scientist who has a question about how to participate in government rulemaking can call the Climate Science Legal Defense Fund, where we provide free and confidential counsel to scientists with legal questions related to their work. Call us at **(646) 801-0853** or send an email to lawyer@csldf.org.



The Climate Science Legal Defense Fund (CSLDF) works to protect the scientific endeavor by helping defend climate scientists against politically and ideologically motivated attacks. CSLDF is a non-profit organization under section 501(c)(3) of the Internal Revenue Code.

CSLDF and attorneys from RingCentral produced this guide to help scientists understand how to participate in the notice-and-comment rulemaking process, understand other forms of administrative rulemaking engagement, and how to avoid common pitfalls. This guide concerns only U.S laws, and nothing in it should be construed as legal advice for your individual situation.

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A POCKET GUIDE FOR SCIENTISTS

How Scientists Can Participate in Government Rulemaking



Brought to you by
the Climate Science
Legal Defense Fund

INTRODUCTION

Congress relies on administrative agencies, such as the U.S. Environmental Protection Agency (EPA), Federal Energy Regulatory Commission (FERC), and U.S. Department of Energy (DOE) to implement precise, technical rules to carry out federal legislation. These administrative agencies, in turn, rely on scientists, technical experts, regulated entities, and the general public to assist them in developing workable and beneficial rules.

This Pocket Guide provides a brief overview of the rulemaking process, gives practical tips for submitting comments, and offers best practices for safe and effective participation, particularly for scientists who receive federal or state funding.

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I. OVERVIEW OF THE NOTICE-AND-COMMENT RULEMAKING PROCESS

Article I of the Constitution vests all federal legislative power in Congress. Congress, however, does not possess the technical expertise needed to craft precise rules. Enter the administrative state, a term used to refer to the numerous federal agencies charged with implementing and enforcing regulations that govern particular industries or aspects of American life.

The first administrative agencies were introduced in the late 19th century, but the administrative state as we know it today did not start to emerge until the 1930s. As the administrative state grew, so did concerns that unelected officials were determining significant policy matters. Therefore, in 1946, Congress passed the Administrative Procedure Act (APA) to “balance[e] the competing goals of bureaucratic expertise and legislative accountability.”¹ The APA prevents administrative agencies from adopting rules in a vacuum and without accountability. It requires agencies to publish draft rules, solicit public comments, and incorporate those comments into its final rules. It also requires all rules to be supported by a robust and written record. Courts may overturn any agency rule that is not substantially supported by the official record, which includes the agency’s own documents, and all public comments.

Agency rules can have far-reaching consequences for the public and have often been adopted without fully considering the needs of the most affected communities. The notice-and-comment process is a valuable tool for equalizing the policymaking playing field and amplifying these indispensable voices.

Three agencies that implement laws particularly relevant to climate scientists’ work are the EPA, FERC, and DOE. This Pocket Guide uses these three agencies’ rulemaking processes as reference points.

II. HOW TO FIND PROPOSED RULES AND FILE COMMENTS

The first part of the notice-and-comment process is when the agency publishes a Notice of Proposed Rulemaking (“NPRM”) in the [Federal Register](#). [See <https://www.federalregister.gov/>.] Many agencies—including the EPA, FERC, and DOE—also file the proposed rule and any supporting documents on [Regulations.gov](#). This website will serve as a go-to source for finding, tracking, and commenting on proposed rules.

Scientists can find proposed rules by searching for the agency name or looking for key words on [Regulations.gov](#). Ongoing rulemaking can be found by using the appropriate filters.² Once a scientist has identified a rule they are interested in commenting on, they should “subscribe” to that docket to receive notice of any documents filed that relate to the rulemaking.

The best comments generally do not respond to every part of a proposed rule but pick certain issues on which the commenter can provide specific insights. A commenter may want to support a certain proposal, explain why a proposed rule would not be beneficial, or offer an alternative approach. [The Brookings Institution](#) suggests that commenters should:

- Focus on a rule that has fewer competing commenters vying for the agency’s attention, such as rules that have received less press or have fewer filings on [Regulations.gov](#) to date.
- Target particular provisions of a rule rather than offer a general discussion of the proposal.
- Challenge a fundamental premise underlying particular provisions.
- Identify a potential ambiguity and a corresponding clarification.
- Offer alternative language along with an explanation of why that language is better than the proposed provision.³

After the public comment period has expired, agencies will review the comments.

A comment should provide as much detail and scientific support as possible. When submitting a comment, the commenter should ensure that the comment falls properly within their area of scientific expertise and includes sufficient scientific data and evidence. Commenters should explain their credentials and qualifications—both academic and professional—while making clear whether they are commenting as a private citizen or as a representative of their institution (see also Section 5, on page 4). If commenters relied on scientific studies that were subject to the rigorous peer-review process, they should identify those studies in the comment, and include links to those final, published papers (or copies of the papers if not publicly available online) for agency officials to access.

Comments must be included in the official record that accompanies final rules. Consequently, the notice-and-comment process is the best opportunity to add scientific research and expertise to that record. If agencies agree with a comment, they will rely on it to support their rule. If they disagree, they will need to explain why they disagree and why their version of the rule is better.

Finally, the agency will publish its final rule. However, in some instances, the agency may publish a proposed supplemental rule or may decide to abandon the rulemaking. If the agency proceeds with the final rule, it will be published in the [Federal Register](#) [See <https://www.federalregister.gov/>.] where the agency will include its “basis and purpose” of the rule and its legal authority for issuing the rule.⁴

A court may later overturn a rule that is not sufficiently justified by the record, including instances where a court finds that the agency did not properly consider the points raised in submitted comments.

III. SCIENCE ADVISORY BOARDS

Some agencies, including the EPA, rely on scientific advisory boards to help inform agency action and rules. For example, members of the public are encouraged to participate in the EPA Science Advisory Board (SAB) and the Clean Air Scientific Advisory Committee (CASAC), and the Advisory Council on Clean Air Compliance Analysis (Council) meetings and submit comments

directly to the board. Scientists can find more information on how to participate in the EPA advisory committee activities in [this brochure](#).⁵

Meetings of [the SAB](#), [the CASAC](#), and [the Council](#) are generally open to the public. The EPA publishes the agenda, meeting minutes, reports, and underlying documents relevant to upcoming and past meetings.

IV. STATE REGULATORY PROCEEDINGS

Most states also have a state administrative procedure act and encourage public participation in administrative rulemakings. State websites generally post open rulemakings, and the proposed rule should include information on how to comment. The same best practices for drafting any comments at the federal level also apply at the state level. Scientists may be especially interested in work being done by state departments of energy, public service, public utilities, and environmental protection.

V. RECOMMENDATIONS FOR SCIENTISTS ENGAGING IN THE NOTICE-AND-COMMENT RULEMAKING PROCESS AS PRIVATE CITIZENS

- Use personal devices when drafting comments.
- Use personal email account to submit comments.
- Use a disclaimer when engaging publicly, including on social media, about a regulatory issue.
- Engage in the notice-and-comment process outside of regular work hours.

As important as it is for scientists to engage in the notice-and-comment process, it is equally important for them to be aware of the best practices to follow for avoiding common pitfalls or even the appearance of impropriety. In recent years, CSLDF has witnessed an uptick in scientists and researchers who have

been targeted by special interests due to their scientific advocacy—particularly in areas seen as politically controversial, such as climate change. In light of this, there are ways scientists can mitigate these risks when participating in the notice-and-comment process.

The goal is to prevent accusations that a scientist took on institutional authority inappropriately or misused institutional resources. Simultaneously, these measures may also protect public employee scientists from being subject to invasive open records requests and preserve First Amendment protections.⁶

Scientists who are commenting as private citizens should make that clear. As a first step, the comment itself should note that the commenter is participating in their personal capacity, and not as a representative of their institution.

More generally, it is best practice for scientists and other technical experts who are engaging in the notice-and-comment process as private citizens to clearly separate their personal and professional activities. Therefore, when sending emails or other digital messages, scientists should do so via their personal email or personal digital messaging platform accounts (for example, Skype or Slack) rather than an employer-provided account, even when already using a personal computer.

Likewise, when engaging publicly, such as in op-eds, speeches at rallies or protests, or on social media about a regulatory issue or on an agency rule—unless they are doing so on behalf of their employer—it is best practice to separate the personal from the professional. For example, use a personal social media account and not one associated with an employer—this goes for any social media platform in which an agency’s proposed rule or public comments on that rule are discussed. Even when the platform is a personal one and not an employer’s, scientists should consider using disclaimers in their biographical information such as, “title and affiliation offered for identification purposes only” or “views are mine only and do not reflect those of my institution or employer.”

It is also important not to use any devices provided by an employer or otherwise associated with a job for conducting research in preparation for the comment, for drafting or submitting the comment, or for collaborating with other individuals or organizations about participating in the notice-and-

comment process. Similarly, scientists should not engage in this work during their regular work hours, but rather in their own free time. This will help ensure that the commenter is seen as acting in their personal capacity versus in an official position or on behalf of an employer.

This separation is especially important for government employed or government funded scientists, including those who work at public universities. Public employees are typically not constitutionally protected when speaking in their official capacity or as part of their official job duties. However, public employees are generally protected under the First Amendment to the U.S. Constitution if they speak as private citizens about a matter of public concern, and the speech does not interfere with their official responsibilities. With this in mind, scientists who work for the government, public universities, or who receive even a small amount of public funding should be particularly mindful of keeping clear the boundaries between personal and professional.

Finally, as the Union of Concerned Scientists noted in its guide, [“How to Participate in Federal Rulemaking.”](https://www.ucsusa.org/sites/default/files/2021-06/How-to-Participate-in-Federal-Rulemaking-6-30-21.pdf) [See <https://www.ucsusa.org/sites/default/files/2021-06/How-to-Participate-in-Federal-Rulemaking-6-30-21.pdf>.] it is important to be civil when submitting comments to agencies. The way scientists “present [themselves] and phrase [their] comments matters. Impolite or condescending behavior can distract attention from the merits of the comments made.” [See Union of Concerned Scientists’ [“How to Participate in Federal Rulemaking”](#) which offers suggestions on how to make participation in the rulemaking process as effective as possible.]

For scientists who do not want to limit their participation on an issue to the notice-and-comment rulemaking process, see CSLDF’s pocket guide, [“Advocating for Science in a Politicized Environment”](https://www.csldf.org/wp-content/uploads/2020/04/CSLDF-Pocket-Guide-to-Advocating-for-Science-in-a-Politicized-Environment.pdf) [See <https://www.csldf.org/wp-content/uploads/2020/04/CSLDF-Pocket-Guide-to-Advocating-for-Science-in-a-Politicized-Environment.pdf>.] and CSLDF’s Know Your Rights guide, “Scientific Activism and Protests.” [See <https://www.csldf.org/wp-content/uploads/2020/04/CSLDF-science-advocacy-protests-brochure.pdf>.]

CONCLUSION

Scientific voices are vital in this arena and should be encouraged and supported. Agencies view the expertise of scientists, researchers, and other technical experts as integral to the rulemaking process. However, it is important for commenters to follow the best practices and recommendations outlined in this guide, and to otherwise use sound judgment when engaging in the notice- and-comment process, particularly for scientists who work at public universities or other public institutions, or who work for the federal government or receive any government funding.

ADDITIONAL RESOURCES

Union of Concerned Scientists,
[“How to Participate in Federal Rulemaking”](#)⁷

Administrative Conference of the United States,
[“Notice-and-Comment Rulemaking: Bulletin No. 014”](#)⁸

Administrative Conference of the United States,
[“Federal Register Publication Requirements: Bulletin No. 001”](#)⁹

U.S. Department of Health and Human Services,
[“How to Participate in the Rulemaking Process”](#)¹⁰

Climate Science Legal Defense Fund,
[“A Pocket Guide for Scientists: Advocating for Science in a Politicized Environment”](#)¹¹

Climate Science Legal Defense Fund,
[“A Pocket Guide for Scientists: the First Amendment”](#)¹²

Congressional Research Service,
[“An Overview of Federal Regulations and the Rulemaking Process”](#)¹³

Endnotes

- ¹ Susan E. Dudley, “Milestones in the Evolution of the Administrative State,” MIT Press Direct, July 1, 2021, <https://direct.mit.edu/daed/article/150/3/33/102568/Milestones-in-the-Evolution-of-the-Administrative>.
- ² Note that there are filters for EO 13711 Designation and Priority. Both are Executive Branch administrative classifications that affect whether the rule is subject to further inter-agency review or other internal policies. See “FAQ,” Office of Information and Regulatory Affairs, Office of Management and Budget, <https://www.reginfo.gov/public/jsp/Utilities/faq.myjsp>, for more information.
- ³ Martin Totaro and Connor Raso, “A Fresh Look at the Public’s Role in Shaping Agency Rules,” The Brookings Institution, June 15, 2021, <https://www.brookings.edu/blog/up-front/2021/06/15/a-fresh-look-at-the-publics-role-in-shaping-agency-rules>.
- ⁴ Note that there are some exceptions to public consideration in agency rulemaking. For example, an agency would not need to engage in the typical process if its proposed rule change could be characterized as a commonsense interpretation, or if the agency could legitimately rely on a good cause exception, such as if the agency found that public procedure was impracticable, unnecessary, or contrary to the public interest, and then incorporated its reasoning into the rule. But, for the most part, this process is required.
- ⁵ U.S. Environmental Protection Agency, “Advisory Committee Meetings and Report Development: Process for Public Involvement, A Report of the Science Advisory Board Staff Office,” https://sab.epa.gov/ords/sab/sab_apex/r/files/static/v403/sabso_04_001.pdf.
- ⁶ See Climate Science Legal Defense Fund, *Research Protections in State Open Records Laws: An Analysis and Ranking*, 3d Ed., Nov. 2021, <https://www.csldf.org/wp-content/uploads/2020/05/CSLDF-Report-2021.pdf>; Climate Science Legal Defense Fund, *A Pocket Guide for Scientists: The First Amendment*, April 2021, <https://www.csldf.org/wp-content/uploads/2021/03/CSLDF-Guide-to-the-First-Amendment.pdf>.
- ⁷ Union of Concerned Scientists, “How to Participate in Federal Rulemaking,” July 2021, <https://www.ucsusa.org/sites/default/files/2021-06/How-to-Participate-in-Federal-Rulemaking-6-30-21.pdf>.
- ⁸ Administrative Conference of the United States, “Notice-and-Comment Rulemaking: Bulletin No. 014,” May 2021, <https://www.acus.gov/sites/default/files/documents/IIB014-Rulemaking.pdf>.
- ⁹ Administrative Conference of the United States, “Federal Register Publication Requirements: Bulletin No. 001,” Dec. 2019, <https://www.acus.gov/sites/default/files/documents/IIB-001%20Federal%20Register%20Publication%20Requirements.pdf>.
- ¹⁰ U.S. Department of Health and Human Services, “How to Participate in the Rulemaking Process,” <https://www.hhs.gov/sites/default/files/regulations/rulemaking-tool-kit.pdf>.
- ¹¹ Climate Science Legal Defense Fund, *A Pocket Guide for Scientists: Advocating for Science in a Politicized Environment*, Feb. 2019, <https://www.csldf.org/wp-content/uploads/2020/04/CSLDF-Pocket-Guide-to-Advocating-for-Science-in-a-Politicized-Environment.pdf>.

¹² Climate Science Legal Defense Fund, *A Pocket Guide for Scientists: The First Amendment*, April 2021, <https://www.csldf.org/wp-content/uploads/2021/03/CSLDF-Guide-to-the-First-Amendment.pdf>.

¹³ Climate Science Legal Defense Fund, *A Pocket Guide for Scientists: Advocating for Science in a Politicized Environment*, Feb. 2019, <https://www.csldf.org/wp-content/uploads/2020/04/CSLDF-Pocket-Guide-to-Advocating-for-Science-in-a-Politicized-Environment.pdf>.