
MEMORANDUM

TO: National Organic Standards Board
FR: Joseph Mendelson, III and Andrew Kimbrell
RE: *Ex Parte* Communications
DA: 29 September 1998

Issue Presented

Will United States Department of Agriculture ("USDA") communications with members of the National Organic Standards Board ("NOSB") concerning the substance of the new rulemaking reproposal for the National Organic Program regulations violate prohibitions on *ex parte* communications?

Brief Answer

No. Prevailing case law suggests that the USDA could engage in communications with the NOSB concerning the substance of the organic rule proposal prior to publication in the Federal Register. In particular, the NOSB's statutory relationship with the USDA suggests that the agency would not run the risk of invalidating its reproposal by engaging in such discussions.

Statement of the Facts

Subsequent to the close of the public comment period for the USDA's Proposed National Organic Program, 62 Federal Register 65850 (December 16, 1997), the Secretary of Agriculture has stated that the agency will be publishing a repropoed rule for public comment by the end of 1998. Given the numerous substantive discrepancies between the first proposed rule and the NOSB's recommendations found in the original proposal, members of the NOSB have repeatedly pressed the USDA for a role in reviewing the substance of the reproposal prior to its finalization and publication. While the USDA has engaged in a continuing dialogue with the NOSB and the public concerning generalities of the reproposal, the agency has been extremely reluctant to allow the NOSB any role in reviewing the substance of the reproposal as it is developed by USDA. The agency has justified its refusal by claiming such communications would violate the agency's policies

on *ex parte* communications and that engaging in such communications may ultimately invalidate any reproposal.

Applicable Statutes

Administrative Procedure Act, 5 U.S.C. § 551, et seq. (1994)
Organic Foods Production Act, 7 U.S.C. §§ 6501 -6522 (1994)

Discussion

Under the Administrative Procedure Act ("APA") *ex parte* communication is defined as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by" by the APA. 5 U.S.C. §551(14). Thus, *ex parte* communications encompass a broad range of off-the -record, private communications between a agency decisionmaker and another person concerning the substantive nature of a proposed rule .

The APA, however, does not place restrictions on *ex parte* communications in informal rulemaking (i.e. notice and comment rulemaking). However, concerns that *ex parte* communications allow private pressures to be brought to bear on the substance of a rulemaking proceeding outside of the public's view have led courts to place restrictions on such communications. Early court rulings found that a ban on *ex parte* communications in notice and comment rulemaking was absolute and agency staffs were forbidden from any *ex parte* communications. Home Box Office, Inc. v FCC, 567 F.2d 9 (D.C. Cir. 1977) (setting aside an FCC rule revision because of heavy *ex parte* lobbying during the deliberative stage of a rulemaking proceeding). However, this broad prohibition was later relaxed in Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (challenging a final Clean Air Act standards because of an industries intense *ex parte* lobbying after the close of a comment period).

In Sierra Club, the court reject the broad prohibition in Home Box Office and stated:

[W]here the agency action involves informal rulemaking of a policymaking sort, the concept of *ex parte* contacts is of more questionable utility . . . Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part on the openness, accessibility, and amendability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall.

. . . Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public

cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs. *Id.* at 400-01.

As a result, courts have since held that *ex parte* communications are not broadly banned during the deliberative periods of notice and comment rulemaking. Of course, this also does not mean any and all *ex parte* communications are allowed and clear cases of *ex parte* coercion or legal prejudice to particular parties could invalidate the results of a final rulemaking.

Each federal agency has a different approach to *ex parte* communications. Some agency's have formal policies governing *ex parte* communications.[1] Throughout the NOSB process, the USDA and the Agricultural Marketing Service have either denied the existence, or refused to release, any written *ex parte* policy governing informal rulemaking. The USDA does require all timely written submissions made after publication of a notice of proposed rulemaking (therefore classified as *ex parte*) to be made available for public inspection, unless a submitter has requested confidentiality and a determination is made that the records can be withheld. 7 C.F.R. § 1.27. The submitter is then given an opportunity to withdraw the submission. *Id.* The Agricultural Marketing Service ("AMS") also has specific regulations governing *ex parte* communications during the formulation of marketing agreements. 9 C.F.R. § 900.16 (1998) (See Appendix). The agency's policy concerning other communications has been characterized as, in general, avoiding *ex parte* communications during the rulemaking process, but requiring agency officials to draft a memorandum detailing the communication for inclusion in the rulemaking record if such communications take place. See Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 3rd ed. (1998) at 232.

Despite the apparent absence of formal USDA *ex parte* policies concerning notice and comment rulemakings, several court rulings suggest that *ex parte* USDA communication with the NOSB concerning the substantive contents of any rule reproposal would not run afoul of the APA. In particular, these rulings focus on agencies abilities to engage in *ex parte* communications with outside consultants. In *United Steelworkers of America v. Marshall*, an Occupational Safety and Health Administration ("OSHA") rule was challenged because the agency used consultant reports and analyses that were not placed in the agency's rulemaking record. 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981) (upholding in most respects OSHA's lead standard). In the case, the consultants had testified publically in favor of the rule and analyzed the public record for the agency decision makers. The court ruled that the consultants' activities made them the "functional equivalent" of the agency staff, and therefore, not subject to *ex parte* restraint. *Id.* at 1218-20. The court did indicate that had the consultants introduced new information during their tasks the court would have had greater problem upholding the rule. *Id.* at 1220.

A similar decision was reached in National Small Shipments Traffic Conference, Inc. v. ICC, 725 F.2d 1442 (D.C. Cir. 1984) (refusing to invalidate a rule on the basis that staff had actively been involved in the decision making process). In this case, the court, relying on Steelworkers, stated that private technical consultants may assist the agency in analyzing the record without running afoul of the prohibitions of *ex parte* contacts. Id. at 1449-50. Therefore, in finding a consultancy, or a functional equivalency of staff, courts have allowed individuals to be considered insiders not subject to any prohibitions of *ex parte* contact rules. Id.

These holdings are particularly relevant given the statutory role of the NOSB. The NOSB is an unique federal advisory committee created by the Secretary of Agriculture pursuant to the Organic Foods Production Act ("OFPA")[2] and the Federal Advisory Committee Act ("FACA").[3] The NOSB serves as an advisory board to the Secretary of Agriculture. The Board is generally responsible for advising the Secretary on all aspects of the implementation of the OFPA. Specifically, the Board is responsible for evaluating substances for inclusion on the Proposed National List.[4] The purpose of the Board is to assist in the development of standards for substances to be used in organic production and to advise the Secretary on any other aspects of the implementation of the OFPA.[5] The role of the NOSB is to recommend organic standards and provide public input to help the Secretary shape the policies and regulations that will govern the national organic certification program.[6] Thus, the NOSB has two distinct roles: (1) to provide the Secretary of Agriculture with recommendations regarding the implementation of the OFPA; and (2) to develop the Proposed National List or amendments to the National List for submission to the Secretary.[7]

Given this statutory role, the NOSB could be viewed to fit well within the confines of the type of consultancy relationship in Steelworkers and National Small Shipments that would allow *ex parte* communications. Moreover, the public representative responsibilities of the NOSB would seem to make it difficult for any party to suggest that communications between the agency and the NOSB would result in material prejudice to parties not privy to the communications. The only stricture that would seem to hold is that USDA officials would be best served to draft memorandum detailing the substance of any communications with the NOSB for inclusion in the administrative record of the rulemaking.

Conclusion

The NOSB's statutory authority dictates a close, consultive working relationship with the Secretary of Agriculture in developing national organic standards. The OFPA even delegates authority to the NOSB to create part of the proposed rule (i.e the National List). See 7 U.S.C. §6517 (d). Such a close role relationship with the USDA gives rise to a "consultancy" relationship that falls within prevailing case law allowing for *ex parte* communications on the repropoed rule's substance. Further, in allowing such communications the agency would not be invalidating the ultimate proposed rule.

1. See e.g. Federal Trade Commission (FTC), 15 U.S.C. § 57a(j); Consumer Product Safety Commission (CPSC), 16 C.F.R. Pt. 1012; Department of Transportation (DOT), Department of Transportation Order No. 2100.2 (1970); Environmental Protection Agency (EPA), Administrator's Memorandum of May 31, 1985; and Federal Emergency Management Agency (FEMA), 44 C.F.R. § 1.6 (1987).
2. 7 U.S.C. §§ 6501-6522 (1994).
3. 5 U.S.C. App. 2 (1988 & Supp. 1994)
4. Senate Report 99-145, 99th Cong. 1st Sess. (1985) at 297; See also, 136 Cong. Rec. H11,361 (daily ed. October 22, 1990). The OFPA is premised on the fundamental principal that synthetic chemicals should not be used in the production or handling of organic food products. As a result, the OFPA prohibits the use of synthetic chemicals and natural chemicals that are dangerous to human health or the environment in organic products. The National List is a procedural mechanism for establishing exceptions to this general principal. See *infra*, Memo at "II. The National Organic Standards Board and Creation of the National List."
5. 59 Federal Register 58 (January 3, 1994)
6. NOSB, Final Recommendation, "Standards and Procedures Governing the Accreditation of Organic Certification Organization" (June 4, 1994) at 4, lines 159-164.
7. 7 U.S.C. § 6518(k)(1) and (2) (1988 & Supp. 1994); See *infra*, Memo at "IV. The National Organic Standards Board and Creation of the National List."



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