



December 2, 2022

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K. Sabeel Rahman
Associate Administrator
White House Office of Information and Regulatory Affairs
Washington, DC 20500

Dear Associate Administrator Rahman,

I'm a Senior Policy Analyst at the Center for Progressive Reform. The Center is a nonprofit research and advocacy organization that conducts independent scholarly research and policy analysis, and advocates for effective, collective solutions to our most pressing societal challenges. Guided by a national network of scholars and professional staff with expertise in governance and regulation, we convene policymakers and advocates to shape legislative and agency policy at the state and federal levels and advance the broad interests of today's social movements for the environment, democracy, and racial justice and equity.

I have been studying the federal regulatory system for over 14 years, with a particular focus on making the process of rulemaking and implementation more inclusive of and responsive to the public. Accordingly, I applaud the White House Office of Information and Regulatory Affairs (OIRA) for taking on the crucial issue of "opening the federal regulatory process to more voices." My colleagues and I at the Center have long called on OIRA to leverage its unique expertise and institutional position within the executive branch to explore this issue.

I was pleased to participate in the Open Engagement Session that OIRA conducted November 17, 2022. With this letter, I would now like to take the opportunity to provide additional written comments on this subject.

To begin with, I would like to outline why public participation in the regulatory system matters. As you know, the regulatory system offers one of the most important forums for public engagement in

our constitutional democracy. But the full democratic potential of the regulatory system has not yet been realized. There are numerous options for engaging the public in various aspects of the regulatory system that remain to be explored. In addition, it is important to recognize that the regulatory system provides a unique opportunity to empower the public. Indeed, one of the ways that corporate elites have managed to concentrate greater economic and political power in their hands has been through capture of the regulatory process. They've done this by dominating public participation opportunities in the rulemaking process, which in turn drowns out the voices of ordinary citizens who stand to benefit from new regulatory protections. The obvious conclusion to draw from this is that a similar dynamic can be achieved for the public by ensuring that are given a meaningful opportunity to influence regulatory decision-making relative to corporate interests.

Next, it is important to recognize and understand the various barriers that prevent the public from participating effectively in the regulatory system. First, the regulatory system is often characterized by an excessive focus on technocracy and "politically neutral" standards (e.g., economic efficiency or maximized economic growth) as the primary guides for regulatory decision-making. These characteristics of regulatory decision-making serve to exclude ordinary Americans – especially those from structurally marginalized communities – from the conversation. They also leave little, if any, role for important factors like shared values, lived experiences, collective interests, and place based.

A second general barrier is the prevailing organizational culture at many regulatory agencies. At best, many agencies believe their role in interfacing with the public should be limited to serving as a passive recipient of public input. At worst, many agencies aggressively dismiss non-expert viewpoints as worthless.

A third general barrier arises from the material constraints that many members of the public experience and the related general failure of agencies to "meet where the public where it's at" by accounting for these constraints when obtaining public input for their regulatory activities. For example, agencies might schedule public hearings during standard work hours when most members of the public are unavailable to participate. More broadly, participation is time-consuming and expensive for most members of the public.

A fourth general barrier arises from corporate dominance of available public participation opportunities. As a result, when members of the public are able to overcome barriers to participation, their voices are drowned out to such an extent that they are not able to balance out the influence of better-resourced corporate stakeholders.

With a better understanding of the general barriers to public participation in mind, it is possible to design a more effective reform agenda. Such an agenda should be guided by a few general principles. First, public engagement reforms should look beyond “notice-and-comment,” and give special attention to earlier steps in the rulemaking process (e.g., agenda-setting) and later steps (e.g., compliance monitoring and enforcement). Second, the public should play an active and meaningful role in reforming public participation in the regulatory system. Third, reforms should be tailored to specific agency circumstances as much as possible. Overly prescriptive, “one-size-fits-all” reforms are unlikely to work. Instead, policymakers should seek to achieve reforms by setting up a process in which agencies take the lead in designing their own strategy for improving public engagement.

As agencies work to develop a tailored reform strategy, they might wish to pursue a process that includes many of the following steps. First, they might want to perform a stakeholder mapping exercise to understand who their “public” is. Second, they may want to catalog the barriers that members of the public face when attempting to engage with them – particularly individuals from structurally marginalized communities. Third, agencies will then be able to devise concrete reforms or eliminating those barriers. The reforms should be developed in a such a way that they include realistic implementation timelines, an opportunity for public input, transparent implementation, and effective accountability measures.

To be effective, agency reforms to their public participation mechanisms will likely need to include several of the following specific elements:

- Strategies for affirmative outreach to members of the public, especially at the earliest stages of the rule development process, including agenda setting.
- Strategies for engaging the public in compliance and enforcement, consistent with statutory authority.
- Strategies for engaging the public in scientific research (“citizen science”).
- A plan to develop and promote an agency culture that values affirmative outreach to and engagement with the public. This might require changes to staff recruiting, sustained commitment from agency career and political leadership, and carefully calibrated performance incentives.
- Consider whether mass comment campaigns can help members of the public participate when they otherwise would not, and if so, how agencies can encourage such campaigns.

While effective reforms should be agency-centered in design, policymakers can and should consider broader, cross-cutting reforms that would help buttress agency efforts. These might include a centralized clearing house for sharing agency best practices. In addition, policymakers might consider establishing effective accountability mechanisms that would empower the public to ensure that agencies carry out the reform process outlined above and meaningfully integrate those reforms into their routine work practices. Finally, policymakers might consider creating a central forum for public engagement, such as the Office of Public Advocate that would be created by the Stop Corporate Capture Act.

To institute these reforms, policymakers have several options for vehicles. The administration could accomplish much of these reforms (albeit without legal enforceability) administratively through executive order. Alternatively, the administration could work with interested members of Congress to adopt these reforms through legislation. Again, the Stop Corporate Capture Act offers a promising starting point.

Regardless of reform vehicle, building broad public support for these actions will be key, to ensure their adoption and, in the case of administrative reforms, to promote their longevity. Historically, policymakers have been reluctant to defend the regulatory system to the public. The promotion of public participation reforms offers an opportunity to change that. In working to educate the public about these reforms and to build support, the administration will be well positioned to define a positive vision of the regulatory system. A key part of that vision will be an emphasis on the regulatory system's essential role in our constitutional system of governance.

I appreciate your attention to these comments. I look forward to working with you in the months ahead on this effort to promote greater public participation in the regulatory system. Attached, you will find several supporting documents that flesh in greater detail the ideas sketched out in this comment.

Sincerely,

James Goodwin
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Center for Progressive Reform

Enclosures

April 2022

**THE FEDERAL ENERGY REGULATORY
COMMISSION'S NEW OFFICE OF
PUBLIC PARTICIPATION:**

A Promising Experiment in 'Energy Democracy'

*Alexandra Klass and Shelley Welton
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The Federal Energy Regulatory Commission's New Office of Public Participation: A Promising Experiment in 'Energy Democracy'

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EXECUTIVE SUMMARY

Our nation's decisions about how to produce, transport, and use energy were once seen as the province of a narrow band of specialists and the interest of a small but committed group of consumer advocates. In recent years, however, energy policy has moved squarely into the public's zone of concern. People are increasingly aware of energy's profound implications for public health and safety, national security, and climate change. They're realizing that energy policy is not only about heating and cooling homes more efficiently, transitioning away from fossil fuels, and achieving "energy independence." It's also about equity and justice, regardless of wealth or background. It's about shaping the decisions that profoundly affect our lives and our future. It is about democracy.

Yet, as members of the public tune into debates over energy policy, they face considerable barriers that prevent them from engaging with those who make energy-related decisions on our behalf. Like many government agencies, the Federal Energy Regulatory Commission (FERC) does not meaningfully engage the public in its various administrative proceedings. This is important because FERC oversees much of the nation's energy infrastructure and sets energy market rules, rates, and reliability standards. As a result of limited measures for public participation within this influential agency, only the most sophisticated and privileged among us (often those paid to advocate for corporate interests and the wealthy few) have real power to influence important policymaking processes within FERC.

Structurally marginalized groups face the highest barriers to participation and pay the highest price for lack of access. Long subject to environmental racism, low-income communities of color are more likely to experience higher rates of illness — and shorter lifespans as a result — due to energy-related harms. Low-income communities, as well as the elderly and disabled, also experience disproportionate energy burdens, meaning that they must allocate a higher percentage of their income to energy. Decision-making about energy rates and new infrastructure substantially affects these people's lives, yet these groups often lack the resources or physical proximity to decision-making processes to fully or effectively participate in them. And even amid a digital revolution that has democratized access to information, a pandemic that has normalized and increased remote work and learning, and massive social movements demanding racial justice, federal agency rulemaking has become *more* technocratic and *still* fails to take environmental justice into full account.

It is past time for federal regulatory agencies to better engage the public and incorporate their unique on-the-ground perspectives to inform their work and make better, fairer decisions. To its credit, FERC is taking steps to do so and has created a new leadership role focused on environmental justice and equity. A major structural change is also underway: after decades of delay, FERC is now creating a new Office of Public Participation (OPP) to empower the public through more inclusive and responsive policymaking processes.

This report provides core constituencies — agency policymakers, advocates for energy justice, and members of the public who are concerned about our energy future — with the information they need to ensure the OPP achieves its goal of promoting greater energy democracy at FERC. It begins by describing FERC’s role in energy policy and how its actions impact Americans; it then reviews FERC’s progress thus far in constituting the OPP. Finally, it offers recommendations to ensure the OPP achieves its goals and lessons to enhance regulatory democracy and equity across all federal regulatory agencies.

To meaningfully engage new and broader constituencies, this report urges the OPP to:

- **Audit FERC’s existing procedural requirements for participating in the agency’s natural gas proceedings and identify opportunities for streamlining and simplification.**
- **Serve as the main point of contact with communities affected by natural gas pipeline development.**
- **Develop new tools and practices for “translating out” technocratic FERC proceedings to make their impacts understandable, relevant, and actionable to the public.** Specifically, OPP staff should:
 - Identify proceedings where structurally marginalized groups have the most interest.
 - Provide trainings, layperson-oriented informational materials, and designated point people to respond to inquiries from community members.
 - Improve participation and transparency in regional governance processes.
 - Ensure that adequate resources are dedicated to carrying out these tasks in a timely and effective manner.
- **Explore available options for making Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) — nonprofit entities that carry out important grid management work on FERC’s behalf — more inclusive of and responsive to members of the public.** The OPP should develop a comprehensive set of recommendations for achieving this goal and share them with relevant policymakers.
- **Follow these principles when designing FERC’s “intervenor funding” program:**
 - Broadly construe “costs” eligible for compensation and reject cost caps.
 - Prioritize funding for structurally marginalized communities.
 - Minimize uncertainty as much as possible for groups seeking intervenor funding.
 - Promote program integrity by integrating institutional independence into the intervenor funding implementation process.
- **Take necessary steps to bring about a change in FERC’s internal culture so that it genuinely values and embraces public engagement.**

Finally, this report draws from FERC’s experience of developing the OPP to identify best practices that other federal agencies can adopt and adapt to help promote greater public engagement with their own administrative proceedings. These include:

- Surveying different groups of the public affected by their actions, including seeking to better understand what members of these groups see as the most important impacts of the agency’s actions and why they are seen as important by these individuals;
- Identifying and cataloging the various barriers facing members of the public during regulatory proceedings;
- Formulating strategies to overcome any barriers to participation the agency has identified; and
- Developing a genuine culture of inclusivity and responsiveness to ensure that new public participation strategies are fully integrated into the agency’s DNA.

If done right, the OPP could be the federal government’s first meaningful step toward true energy democracy. As such, it could be a model for regulatory democracy writ large, one that is embraced and emulated by agencies across the federal government. The stakes — for equity and justice, for democracy and independence, and for our planet — are high.





INTRODUCTION

In 2017, the Federal Energy Regulatory Commission (FERC) published a final environmental analysis of the Atlantic Coast Pipeline that included a startling conclusion: The pipeline, slated to transport natural gas from West Virginia to Virginia and North Carolina, would *not* unduly harm any majority-Black communities and thus did *not* raise any significant **environmental justice** concerns.

That conclusion must have surprised the residents of Union Hill, Virginia, a small rural community in the center of the state that emerged as a flashpoint in the broader fight over the controversial pipeline's future. Settled by freed slaves in the aftermath of the Civil War and predominantly Black today, Union Hill was not only caught in the path of the pipeline; it had also been selected as the site for a component of the pipeline called a compressor station. These facilities emit air pollutants linked to such human health harms as asthma and heart disease, and they also pose an explosion risk, which can endanger nearby communities.

It turns out that FERC's analysis, which the agency used to justify the permits it issued allowing construction of the pipeline, rested on faulty data that misrepresented the population characteristics of Union Hill and other communities along the project's planned route. Nevertheless, FERC's permit approval process did not provide the residents of Union Hill with a meaningful opportunity to counter the environmental analysis with their own, more accurate demographic data or to voice other concerns about the pipeline's potential harmful impacts.¹ The community ultimately persuaded a federal court to block a key air permit for the compressor station, and later the pipeline's developers abandoned the project altogether, citing cost concerns.

If energy policy was once seen as the province of a narrow band of experts and technocrats, Union Hill's successful fight against the Atlantic Coast Pipeline makes clear that this is no longer the case, nor should it be. How we produce, transport, and use energy is attracting more public attention than ever, precisely because such questions implicate important, widely shared values like justice and fairness and because their ultimate resolution touches our lives in profound ways. In the past, public attention to regulators' development of energy policy was often confined to consumer advocacy concerns, such as those relating to cost and reliability. In recent years, however, a growing awareness of the potentially harmful consequences of our energy choices — including those related to national security, the environment, public health, and, above all, climate change — has moved energy policy more squarely into the public's zone of concern.

Environmental justice refers to the equitable distribution of environmental hazards (e.g., pollution) and environmental benefits (e.g., parks) for all people, regardless of their race, color, ethnicity, or any other aspect of their economic or social status. Further, it requires that all people have a meaningful opportunity to participate in any decision-making process for policies addressing such environmental hazards or benefits.

The story of Union Hill also touches on a closely related issue that is attracting increased public attention — namely, how systemic power disparities contribute to our greatest policy challenges. Many Americans have come to recognize that unless we address underlying disparities, we will not be able to make meaningful progress on climate change, racially motivated police violence, economic inequity, and other pressing social challenges. Consistent with this recognition, leading social movements — including those behind the Green New Deal, Black Lives Matter, and the Fight for \$15 — focus on the need to make our government more people-driven. A greater commitment to democratic governance would, among other things, promote new opportunities and new fora for sustained and meaningful public participation in existing policymaking processes. That the harmful effects of climate change, growing economic inequality, and other social problems are only going to get worse for structurally marginalized communities makes addressing this challenge all the more urgent.

In this report, we refer to the concept of making energy policy more responsive to and inclusive of the public, particularly members of structurally marginalized communities, as “energy democracy.”² As documented below, FERC has historically been inhospitable to energy democracy. Instead, agency processes have frequently excluded most members of the public, and particularly members of structurally marginalized communities. What’s worse, the agency has failed to take environmental justice into full and fair account, leaving low-income people of color and other populations disproportionately impacted by energy decisions with little say in decisions about policies that shape their lives and determine their outcomes.

To their credit, current FERC leaders recognize the agency’s poor track record on integrating environmental justice concerns into its decision-making processes. In the past year, the commission even began taken steps to better account for environmental justice considerations in major areas of its work and has created a new leadership role focused on environmental justice and equity.³ Unfortunately, these efforts immediately stirred up a considerable political backlash from the fossil fuel industry and conservative lawmakers. In response, FERC leadership have paused the effort, and it remains uncertain whether these new policies will ever be formally implemented.

Even more significantly still, a major structural change is underway at FERC: a new Office of Public Participation (OPP), charged with empowering the public through more inclusive and responsive policymaking processes. This report explores in greater detail the development of the OPP and its potential for advancing energy democracy at FERC. It begins by describing FERC’s role in energy policy and how its actions impact the daily lives of Americans. Next, it reviews FERC’s progress thus far in constituting the OPP and then offers recommendations that the agency should adopt to ensure that the OPP is able to function as effectively as possible in promoting greater energy democracy. Finally, it closes by drawing out general lessons from the OPP that could support greater regulatory democracy and equity in other policy contexts.

FEDERAL ENERGY REGULATORY COMMISSION

THE NEED TO IMPROVE ENERGY DEMOCRACY AT FERC

OVERVIEW OF FERC'S ROLE IN ENERGY POLICY

One of several federal agencies that contribute to the implementation of energy policy in the United States, FERC focuses on electricity transmission and sales and the interstate transportation of natural gas. (Natural gas is now the single largest source of U.S. electricity generation. In contrast, oil plays a very small role in U.S. electricity generation, and FERC has limited authority over issues related to oil transportation.) Accordingly, its main responsibilities are:

- **Overseeing the development and operation of the nation's energy infrastructure.** FERC determines whether companies may build interstate natural gas pipelines and where they will be located. This function includes granting natural gas pipeline companies the power of eminent domain, which involves taking private property, even against a landowner's wishes, for use by the pipeline and paying the landowner the "fair market value" for the property taken.
- **Establishing energy market rules.** FERC's design of these rules can determine whether and to what extent **fossil fuel or renewable energy resources** are able to "clear" the markets. An energy resource "clears the market" when all of it is sold at a particular established price. (In general, the cheapest energy sources on offer sell first, followed by the next cheapest, until existing demand has been met. Thus, the more expensive a particular energy resource is, the less likely it will clear the market.)

For the purposes of FERC's role in electricity policy, **fossil fuel resources** generally include natural gas and to a lesser extent coal, which is rapidly declining as a fuel source for electricity generation. The role of oil is even more limited. **Renewable energy resources** generally include solar, wind, geothermal energy, and hydropower (which are often coupled with such measures as consumer efficiency, demand response programs, and battery storage).

- **Setting transport rates.** These rates dictate the cost of transmitting natural gas and electricity among producers and utilities prior to final retail sale to consumers (including households and businesses) and affect the ultimate price that consumers pay for electricity and gas.
- **Ensuring the “lights stay on” through “reliability standards.”** The North American Electric Reliability Corporation (NERC), an international nonprofit entity, proposes reliability standards, which FERC approves or rejects. These standards apply to most aspects of the “bulk power system” — generation and transmission — that provides electricity within the continental United States and parts of Canada and Mexico. Their goal is to ensure that electricity is provided no matter *how much* is demanded and is available *whenever* it is demanded, even on very hot or cold days, or mornings or early

HOW FERC SHARES JURISDICTION OVER ENERGY POLICY WITH THE STATES

Understanding FERC’s role in energy policy requires a basic understanding of how energy law divides oversight responsibilities for different parts of the energy system among different levels of our government. The Federal Power Act and Natural Gas Act charge FERC with regulating:

- Wholesale sales of electricity and natural gas in interstate commerce — that is, sales from producers to or among utilities;
- The operation of and price charged for the infrastructure (*e.g.*, pipelines and transmission lines) used to transport electricity and natural gas; and
- The construction and siting of interstate natural gas pipelines.⁴

Energy law generally defers most other regulatory activities to states, including authority over:

- Retail sales of electricity and natural gas — that is, sales from utilities to individual residential, commercial, and industrial consumers;
- Distribution of electricity and gas (the construction of distribution lines and the rates charged for their use);
- Siting and permitting of inter- and intrastate electric transmission lines except for the portion of lines that cross federal public lands and lines built by federal power marketing administrations (*e.g.*, the Bonneville Power Administration (BPA)); and
- Many aspects of the production of oil and gas and the construction of electric power plants (except for nuclear plants).⁵

The following table summarizes these jurisdictional roles. Note, though, that legal authority over a particular issue of energy policy is often subject to important caveats, which the chart denotes by ascribing “jurisdictional leadership” to either the state or federal level as appropriate. For example, FERC has full authority over the construction and siting of interstate natural gas pipelines. But states may still block natural gas pipelines — and have done so — using non-energy laws. For projects approved by the federal government that may affect water quality, the Clean Water Act gives states the right to certify that they comply with state water quality standards or to deny certification. To take another example, the Federal Power Act assigns to states exclusive authority over retail electricity sales. Yet, many practices viewed largely as related to retail sales activities, and thus within the purview of states, can also affect wholesale rates, thereby potentially (and sometimes actually) implicating FERC’s regulatory authority as well.

TABLE 1. FEDERAL AND STATE JURISDICTION OVER ENERGY

Major Energy Policy Issue	State Jurisdiction	Federal Jurisdiction
Construction and siting of natural gas pipelines	Intrastate pipelines	Interstate pipelines (certificate of public convenience and necessity)
Construction and siting of electric transmission lines	Inter- and intrastate transmission lines, with exceptions	Energy Policy Act of 2005 Sections 1221 and 1222 ⁶ ; Infrastructure Investment and Jobs Act ⁷
Construction and siting of oil pipelines	Jurisdictional leadership	
Rates charged for use of natural gas pipelines	Intrastate pipelines	Interstate pipelines
Rates charged for use of electric transmission lines	Intrastate transmission lines	Interstate transmission lines
Wholesale electricity rates		Jurisdictional leadership
Wholesale natural gas rates		Jurisdictional leadership
Retail electricity rates	Jurisdictional leadership	
Wholesale electricity rates		Jurisdictional leadership
Distribution of natural gas	Jurisdictional leadership	
Distribution of electricity	Jurisdictional leadership	
Reliability of the bulk power system		Jurisdictional leadership

HOW FERC'S ROLE IN ENERGY POLICY IMPACTS ISSUES OF PUBLIC CONCERN

HOT FERC SUMMER



Rep. Casten: “As climate activist Fergie would certainly say, the FERC-alicious definition is to make our planet cooler. . . . Having a well air-conditioned home when it’s ‘hot, hot,’ that’s FERC-alicious, getting your electricity from the lowest cost reliable source — FERC-alicious — an electric transmission system that keeps everything from electric vehicles to steel mills running with zero-carbon electricity, FERC-alicious.”

In 2021, FERC achieved something approximating minor pop culture status thanks to Rep. Sean Casten’s (D-Ill.) “Hot FERC Summer” campaign, which helped educate the public about the important role the agency plays in facilitating an effective transition to clean, renewable energy in the United States.⁸ Even before then, the agency’s visibility among the public was increasing because its work intersects with so many areas of expanding public concern and interest such as climate change and environmental justice.⁹ This section explores FERC’s role in decisions surrounding pipelines and low-carbon energy resources and the types of stakeholders who participate in these decision-making processes.

NATURAL GAS PIPELINES

FERC is the sole entity that approves the construction of interstate natural gas pipelines, although FERC works with many agencies in reviewing the environmental impact of pipelines under the National Environmental Policy Act. Before a pipeline company can construct an interstate natural gas pipeline, it must obtain from FERC a “certificate of public convenience and necessity” under the Natural Gas Act, which the agency issues only upon determination that the public benefits of a project outweigh its adverse impacts.

In making that assessment, FERC long relied on a “Certificate Policy Statement” issued in 1999¹⁰, which set forth the process for determining when a pipeline is “needed” and weighing that need against its adverse impacts on existing pipeline customers, other pipelines and their customers, and landowners in the path of the pipeline. In recent years, however, FERC has come under fire from environmental groups, landowners, and the federal courts for failing to (1) more fully consider changing market conditions for natural gas and alternative energy sources in determining project need and (2) minimizing the adverse effects of pipelines, including climate impacts and environmental justice concerns.

FERC appeared ready to finally address these concerns when, in February 2022, it issued an “Updated Certificate Policy Statement” indicating its intent to expand the types of evidence it would consider regarding both project need and adverse impacts.¹¹ Regarding adverse impacts specifically, under the updated policy, FERC declared it would more fully consider greenhouse gas emissions associated with proposed pipelines, other environmental impacts, a fuller range of landowner concerns, and environmental justice impacts in determining whether proposed pipelines are in the public interest.

Following a large outcry from the fossil fuel industry and conservative lawmakers, FERC later announced that it would not follow through with the updated policy and instead would continue following the old Certificate Policy Statement while it studied the underlying issues further. In a recently released five-year strategic plan for the agency, FERC leadership indicated that the key issues in its abandoned updated policy, including climate change and environmental justice, remained priorities. Nevertheless, the future status of efforts to update the Certificate Policy Statement to better account for these factors remains uncertain.

Regardless of what happens, other major considerations that are important to the public still receive relatively short shrift in the pipeline approval process, including, for example, potential safety issues.¹² For example, in Pennsylvania, the state attorney general has charged the developer of Mariner East 2, an interstate natural gas pipeline, with multiple criminal counts for repeatedly spilling dangerous drilling fluid and other harmful pollutants, including into nearby wetlands, during construction.¹³ In 2018, another pipeline being built by the same developer exploded during construction, destroying a home and forcing the evacuation of several other families in the area.¹⁴

As FERC approves more interstate pipelines, community-based and other grassroots groups are increasingly participating in FERC processes and voicing concerns about pipelines. For instance, in 2016 several groups in New Jersey filed a motion with FERC challenging the development of the PennEast Pipeline, which was planned to run through their communities. An attorney representing the groups explained that their motion was necessary because “FERC must have substantial evidence of significant public benefit to approve PennEast’s application, but the company’s existing record fails to meet that test.”¹⁵

Members of the public and states have also found other ways to block or slow the construction of new pipelines, including raising concerns about environmental violations that occur during the pipeline construction process and the impact of pipelines on water quality and public health and safety. Local groups in West Virginia opposed to the construction of the controversial Mountain Valley Pipeline pursued this course by challenging the state’s certification that the project would not violate the state’s water quality standards. (West Virginia’s environmental agency was able to defeat the lawsuit, however, by taking the surprising step of waiving its authority to review the pipeline’s compliance with these standards.) Yet, similar community opposition efforts have delayed construction on the project for years.¹⁶

TRANSMISSION LINES AND ZERO-CARBON ENERGY

Growing public concern over the impacts of climate change on individuals and communities has also given even greater significance to FERC's authority in the electricity space over generators' (including renewable generators') access to the electric grid. First, FERC approves the tariffs of electric utilities and other companies that operate electric transmission lines. A "tariff" is a document that details the rate transmission line owners may charge for the use of their lines (taking into consideration the costs of constructing them) and the terms of service that the transmission line operator must offer to generators and power providers that need the lines to transmit or receive electricity. The rate determination is key because the rates charged by transmission line operators help cover the costs of constructing new lines.

Numerous disputes have arisen around how rates should apply to different types of transmission line users.¹⁷ Most recently, under its Order No. 1000, FERC specified that rates must be based on the "beneficiary pays" principle, meaning the many entities that benefit from new transmission lines in a region should share a portion of their construction and maintenance costs. Prior to Order No. 1000, FERC approved this type of rate structure in the Midwest, where newly built transmission lines supported numerous new wind energy projects and carried cheaper electricity to customers throughout the region.¹⁸ Spreading out rates in this way can incentivize the construction of new lines, although it has also led to strenuous objections from some utilities and states that argued they did not benefit from the lines as much as other utilities and states.

FERC also approves the procedures that transmission line operators must follow when reviewing and approving requests of new generators to interconnect with lines. There are currently very long interconnection "queues" with generators waiting to have access to lines. Most of the generators in these queues are renewable energy generators and battery storage operators that provide critical backup power to renewable energy generators. FERC has approved some innovative measures to speed up the interconnection approval process, such as "open seasons" in which generators with real commitments to connecting to the grid can demonstrate their commitment and pay a fee to jump ahead of others in line. But interconnection procedures remain cumbersome and impede the transition to low-carbon energy.

FERC's regulation of electricity markets also substantially affects the pace of low-carbon energy development in the United States. FERC is on a mission to open wholesale markets to low-carbon resources, thus expanding these resources' access to potential customers and thereby increasing their revenues. For example, FERC requires that entities offering "demand response" — or energy non-use in lieu of generation — be able to bid into wholesale markets and receive compensation comparable to generators. FERC also requires grid operators to allow distributed energy resources, such as rooftop solar and energy storage, to participate in wholesale markets.¹⁹

FERC outsources some of the most important grid management work to private nonprofit entities called **regional transmission organizations (RTOs) and independent system operators (ISOs)**, which FERC oversees and regulates. Significantly, RTOs and ISOs are membership organizations, comprising primarily industry insiders, along with others with a sufficient stake in industry outcomes to register as members and pay annual membership dues. By and large, this structure prevents the public from becoming members.

In some cases, however, FERC has impeded the participation of low-carbon resources in electricity markets. For example, it approved controversial "minimum offer price rules" for the markets covering the mid-Atlantic (which is coordinated by a **regional transmission organization (RTO)**²⁰ known as PJM) and New England (which is coordinated by an RTO known as ISO-NE). These rules require state-subsidized renewable energy resources to bid into capacity markets above a minimum set rate. Capacity markets then determine which resources will be compensated in exchange for a promise to make them available in the future to meet potential electricity demand.

The upshot of this rule is that it artificially raised the price of affected resources, including nuclear and renewable energy resources, thus making it less likely that they would clear these markets. Indeed, when the rule was in effect, three nuclear units failed to clear PJM's auction (meaning that their bids were not accepted) even though they would continue running regardless of whether they were selected in the capacity auction or not.²¹ This meant that customers paid for additional, potentially unneeded capacity that did clear the market. PJM has since implemented a narrower rule that largely avoids these types of impacts; ISO-NE, however, has proposed at least a two-year extension of a version of its rule.²²

Another important aspect of FERC's jurisdiction that has arguably enhanced clean energy resources is FERC's decision not to regulate "net metering." Through net metering, the owner of rooftop solar panels connected to the electric grid can send excess electricity generated by the panels — electricity not used by the building — back to the grid. The utility that serves the rooftop solar customer then credits the customer for this electricity. FERC has determined that net metering is not a "wholesale" sale of energy, even though it involves electricity flowing to a utility, which then resells the electricity. Rather, because customers are simply credited for the electricity that they send back to the grid, FERC does not treat this as a sale. This provides space for states to offer relatively generous net metering policies that encourage rooftop solar, although it also allows states to deny net metering altogether, as some have done.

Finally, Winter Storm Uri in February 2021, which left millions of Texans and others without power, highlighted in tragic terms FERC’s important role in regulating grid reliability. Hundreds of people died, and many more were in the dark, without heat, for up to four days. For low-income families and people of color caught in the storm, who were more likely to live in homes without adequate insulation, lack transportation and alternative housing options that would allow them to flee the storm, or have insufficient food supplies available, the resulting hardships were particularly severe. These groups were also most likely to see the slowest post-storm recovery, with power and water being restored to their homes more slowly than in more affluent communities.²³

The outages spread quickly as freezing temperatures sparked equipment failures that knocked entire power plants offline. The cold weather also disrupted fuel supplies to natural gas plants by incapacitating gas wells and transmission infrastructure. These catastrophes might have been prevented had FERC and NERC issued effective mandatory winterization standards, an effort that they are only now undertaking, or considered alternative or additional reliability measures such as **microgrids**. Many entities are to blame for this catastrophe, including the Texas Railroad Commission’s failure to require winterization of natural gas wells and pipeline equipment — thus affecting fuel supply to power plants — and the state Public Utility Commission’s failure to require power plant winterization, though NERC and FERC deserve their share, too.

Microgrids are relatively small-scale generation resources that connect to a cluster of buildings, such as a university campus or critical infrastructure within a neighborhood, and can disconnect from the broader grid during a blackout, providing continuous power even when the grid is down. Microgrids can run on clean energy, such as fuel cells powered by hydrogen produced with renewable energy, or solar panels and batteries.

STAKEHOLDERS WITHIN FERC’S DECISION-MAKING PROCESS

When FERC approves construction of a new natural gas pipeline, reliability standards for the bulk electric grid (including generators), rules for transmission line operation and rates, and orders that affect zero-carbon generation, several classes of stakeholders participate to varying degrees. Individuals and communities impacted by proposed pipelines or other infrastructure, Native American tribes, public interest organizations and environmental groups, and neighbors are playing an increasingly important and vocal role addressing concerns about impacts. Some groups — particularly national environmental groups that have consistently demanded more detailed environmental review of the impacts of FERC-approved infrastructure — are repeat players in these processes. Industry actors and groups that support FERC-approved infrastructure are also repeat players with a deep understanding of how to navigate FERC approval processes and court challenges to FERC decisions.

Beyond private individuals, associations, and corporations, state energy agencies often endeavor to influence FERC’s decisions. For example, the Illinois Commerce Commission, which regulates Illinois’s electric utilities, has consistently opposed FERC ratemaking for transmission lines that allows rates for these lines to be distributed evenly among beneficiaries of the line. The commission has alleged that Illinois ratepayers pay higher rates for electricity (as a result of higher transmission costs) and will not benefit commensurate with those costs.²⁴ NERC and RTOs that operate the grid also sometimes comment on FERC actions, with RTOs often directly challenging FERC decisions through requests for rehearing of orders with which they disagree.

The last general class of stakeholders includes those individuals and groups that are not repeat players in FERC processes and challenges to FERC actions in court. As described in detail below, these individuals and groups face formidable barriers to participation that place them at a concerted disadvantage relative to more sophisticated stakeholders. One of OPP’s critical functions, then, is to help level the playing field for nonrepeat players and to otherwise offset as much as possible the systemic resource and expertise advantages that repeat players enjoy.





BACKGROUND ON THE OFFICE OF PUBLIC PARTICIPATION

Congress first authorized the OPP through the 1978 Public Utility Regulatory Policies Act (PURPA), one of the major federal laws that FERC is charged with implementing and enforcing. But that authorization essentially lay dormant for over 40 years — until a 2020 appropriations law directed FERC to get the OPP up and running, a process the agency formally launched in February 2021. The law specifically directed FERC to devise an organizational structure and initial budget for the OPP and to update Congress on its progress by June 2021.

As part of its response to these directives, FERC launched a four-month stakeholder outreach process that included solicitation of written public feedback as well as a series of public listening sessions. Significantly, FERC focused several public listening sessions on particular stakeholder classes, such as landowners, consumer advocates, and **environmental justice communities**. FERC also hosted a daylong workshop that included five panel-led discussions featuring members of the public that focused on issues related to the development of the OPP, such as its general structure, functions, and specific techniques for promoting equity in procedure and public engagement.

The term **environmental justice communities** is often used to describe discrete geographic areas that are inhabited by members of structurally marginalized populations (e.g., low-income/low-wealth individuals, people of color, ethnic minorities, or immigrants with uncertain legal status) who face disproportionately greater exposure to environmental or public health hazards or who are otherwise disproportionately more vulnerable to such hazards due to factors related to their socioeconomic status.

FERC published its report on efforts to establish the OPP on June 24, 2021. This report summarizes public feedback it received through stakeholder outreach. It also outlines a timeline of future milestones for the OPP’s development, including the hiring of a director and deputy director and a rulemaking on the specific issue of **intervenor funding**.

Already, though, there are worrying signs about OPP’s future efficacy. For instance, FERC missed the first milestone in its report to Congress when it failed to hire a director and deputy director by the end of fiscal year (FY) 2021. The director was hired a few weeks after FY2021 ended, and a deputy director was not hired until several months after that, in February 2022. It is not clear what effect these delays will have on later milestones set out in the report. Separately, the bipartisan infrastructure bill signed into law in November 2021 included an amendment eliminating the four-year term limit PURPA originally established for the OPP director. This amendment makes it easier for a future FERC chairperson to fire the director and undermine a key guardrail against improper political interference in OPP activities.

Intervenor funding is the policy of reimbursing stakeholders (“intervenor”) for some or all of the costs they incur when participating in agency administrative actions. Intervenor funding programs are typically intended to address the financial barriers that can prevent participation by underrepresented stakeholders. The section of PURPA that created the OPP explicitly authorizes the office to establish such a program to “provide compensation for reasonable [attorneys’] fees, expert witness fees, and other costs of intervening or participating in any proceeding before” FERC, subject to certain specified limits and conditions.





BARRIERS TO PUBLIC PARTICIPATION AT FERC

Even as members of the public increasingly recognize the importance and relevance of FERC’s work to their lives, their health and safety, and the issues they care about, they nevertheless face considerable barriers that prevent them from engaging with the agency, much less having those their concerns actually heeded in the agency’s final decisions. These barriers are by no means unique to FERC and in recent years have been the subject of increased attention from academic experts, policymakers, and public interest advocates.²⁵

The first and most basic barrier to participation at agencies such as FERC are those that arise from a simple failure to “meet the public where it’s at” through what seems to be either indifference or a basic misunderstanding among agency staff on how to engage with non-experts. Some common failures along these lines include:

- **Scheduling public hearings during standard work hours, which are inconvenient for many people, and especially members of marginalized communities.** Such scheduling practices tend to result in a systematic over-inclusion of professional advocates – including corporate lobbyists or public interest organization staff – while largely excluding members of the public who wish to voluntarily participate.
- **Hosting hearings at sites that are inaccessible to mass transit.** This is a particular hardship for lower-income people who lack reliable access to cars.
- **Failing to provide translation services for people who don’t speak English as a first language.** On similar lines, agencies do not always provide effective notification of participation opportunities to affected communities in their native languages.

What makes these material barriers to public participation so pernicious is that they tend to reflect and exacerbate the centuries of systemic oppression faced by structurally marginalized members of U.S. society. The tragic consequences of such oppression — most notably, economic privation and impairments in crucial forms of cultural and social capital — leave members of these communities incapable of effectively participating in any form of governance, even under the best of circumstances. The practical effect of this class of barriers is that “the best of circumstances” rarely, if ever, prevail for the participatory opportunities offered by regulatory agencies.

Public feedback confirms this problem at the agency. In its June 2021 report, FERC notes that many commenters called on the agency to better inform potentially affected members of the public about specific actions it was undertaking. They suggested FERC publish relevant information on its website and inform the public about upcoming actions via direct mail to residences and businesses, email messages, advertisements in newspapers and radio programs, and posts on social media platforms. Commenters also encouraged FERC to distribute information to municipal government offices and local elected officials, community- and faith-based organizations, educational institutions, and other trusted organizations in affected communities. Others called for translation services during FERC’s public meetings.²⁶

A second major barrier is that meaningful participation in the regulatory system is increasingly resource-intensive. Paradoxically, this problem arises in part from the sheer volume of opportunities for public engagement that are available throughout a standard regulatory proceeding. To engage in each opportunity requires considerable time and money — resources generally available only to the most sophisticated participants. Yet, failing to seize these opportunities, due to resource constraints or other factors, severely minimizes the influence participants bring to the process. For instance, during a typical rulemaking, participants might engage with an agency multiple times before the issuance of a regulatory proposal through various *ex parte* contacts; submit detailed comments after the proposal is issued; avail themselves of other participatory opportunities afforded by such laws as the Unfunded Mandates Reform Act or the Regulatory Flexibility Act; and hold meetings with the White House Office of Information and Regulatory Affairs during the centralized review process.

In its June 2021 report, FERC acknowledged this barrier, observing that its “processes for different proceedings can contain multiple deadlines that may prove difficult for participants to fully understand and navigate.”²⁷ Further complicating these actions is the extensive grid management role that RTOs and ISOs play, under FERC supervision. As noted above, these entities wield enormous influence over the development of transmission policy and energy market participation rules. But only formal members of RTOs or ISOs, a class that is generally composed of corporate entities, can participate in the work that these entities carry out on behalf of FERC. On this issue, the June 2021 report discusses many commenters’ suggestions that “OPP help stakeholders and the public better understand, and participate in, the processes and proceedings of the [FERC]-regulated RTOs and ISOs.”²⁸

A third barrier — and one that is particularly acute at FERC — is the inherently technocratic nature of the policy issues under development, which effectively excludes most members of the public, particularly those from structurally marginalized communities. Indeed, a strong tension lies at the heart of the modern regulatory system. On the one hand, it reflects a strong commitment to expertise-driven policymaking, with congressional mandates calling for technology-based solutions to our pressing social problems carried out by a diverse array of agency professionals. Yet, on the other hand, the rulemaking process depends on sustained public participation, both to improve substantive decision-making and to grant it democratic legitimacy. In recent decades, the increasingly technocratic nature of regulation has effectively limited meaningful participation to only the most sophisticated and best-resourced stakeholders, which generally includes those from regulated industry.

In preparing its June 2021 report, FERC heard from several commenters about this challenge, with one noting that the agency’s “proceedings often involve highly complex technical engineering, economic, and scientific information that is difficult for a lay-person to understand.”²⁹ Others explained that “they often need to hire experts or are disenfranchised from the process given the technical complexity of the issues that are presented to” FERC.³⁰

The final barrier, which builds on the first three, is corporate dominance of the regulatory system. Even when members of the public are able to overcome other barriers — the material inconveniences, the resource constraints, and the technocratic presentation of information — and secure their spot at the decision-making table, their voice is often drowned out by those of the powerful corporate interests sitting next to them. Corporate entities don’t merely outnumber other participants at virtually every step of a regulatory proceeding; they are also much more aggressive and often overwhelm agencies with document submissions.³¹ The upshot: Agencies get a skewed perspective on the issues they intend to address through regulation, which then undermines the quality and legitimacy of those regulations. Worse still, the voices that are systematically excluded often speak for structurally marginalized communities, which reinforces broader problems of societal and racial injustice.

FERC’s June 2021 report recognizes the deleterious effects that corporate dominance often has on its activities. There, the agency refers to commenters who emphasized that the OPP should strive to “place affected communities on equal footing with well-resourced industry stakeholders.” The report goes on to note the “large number of commenters expressing concern that [FERC] historically has favored industry preferences at the expense of communities and consumers.”³²





RECOMMENDATIONS FOR A MORE INCLUSIVE AND RESPONSIVE OPP

The OPP is, in many ways, an unusual experiment. The typical model of advancing constituent interests in energy policy has been that of the “consumer advocate” — a professional office charged to act as an expert proxy for the interests of consumers during energy proceedings.³³ The OPP rests on substantially different conceptual underpinnings, given that its organic statute instructs the agency to assist “the public” in speaking for themselves.³⁴ Implicit in this command is a charge for FERC to engage new and broader constituencies in more meaningful ways.

Strategies for successful engagement will likely vary across the components of FERC’s work. Natural gas pipeline approval, for example, demands different strategies than electricity sector oversight. The following details key recommendations for each sector and explores themes and challenges that might unite FERC’s efforts across issue areas.

NATURAL GAS PIPELINES

When it comes to natural gas pipelines, potentially impacted landowners and other nearby residents are an obvious core constituency. Yet, as the fight in Union Hill over the Atlantic Coast Pipeline illustrates, many residents of affected communities find participation in pipeline certificate and siting decisions procedurally and substantively challenging. These challenges have multiple causes, from an unnecessarily complex filing system to difficulties in organizing affected parties. **Accordingly, the OPP should audit FERC’s existing procedural requirements for participating in the agency’s natural gas proceedings and identify opportunities for streamlining and simplification.**

One other feature of the current system is especially problematic: FERC charges pipeline companies themselves with acting as the key points of contact with affected communities. **The OPP should instead manage interactions between interested members of the public and pipeline developers.** Having the OPP take over this role — or at least provide substantially more oversight and resources to affected landowners and communities — would enable the office to experiment with ways to make these processes more accessible, legible, and fair to landowners and other nearby residents. The OPP’s functions in this respect would mirror much of the work that the U.S. Environmental Protection Agency (EPA) does regarding contaminated properties — and many of its best practices likely transfer to FERC.³⁵

TRANSMISSION LINES AND ZERO-CARBON ENERGY

Perhaps more conceptually challenging is the question of how the OPP might facilitate engagement in FERC's work in the electricity sector. Agency decisions made with respect to grid management and electricity market rules affect not only electricity prices but also the economics and viability of the transition to clean energy. The agency's rules also dictate whether smaller-scale resources, such as community-based renewable energy, energy storage, and rooftop solar, can participate in electricity markets.

The wide-ranging effects of these actions touch on many problems that community-based organizations across the country are working to solve, including energy insecurity and the need for locally based energy initiatives, as well as efforts to shut down high-polluting "peaker" plants (older, inefficient facilities that run during periods of high demand). These organizations have valuable opinions and expertise to offer FERC regarding rules' impacts and reasonability. In most cases, however, the links between particular wholesale electricity market tariff designs or grid planning processes and localized impacts are difficult to deduce and articulate, even for technical experts.

Here, then, the OPP's role is not simply to involve an under-engaged but easily identified segment of the public in decision-making, but rather to actively seek out and engage new community consultants and experts. **To do so, the OPP should develop new tools and practices for "translating out" technocratic FERC proceedings to make their impacts understandable, relevant, and actionable to the public. It should also ensure that adequate resources are dedicated to carrying out this task in a timely and effective manner.**

Effectively carrying out this recommendation will generally involve two steps. First, the OPP will need to identify electricity proceedings where community groups — particularly disadvantaged or structurally marginalized groups that don't have a track record of FERC participation — might most have an interest. Second, it will need to provide trainings, layperson-oriented informational materials, and designated point people that community members can contact during significant proceedings. Drawing on recommendations issued in 2018 by the Administrative Conference of the United States,³⁶ the OPP should consider hiring field staff trained in grassroots engagement who can build relationships with constituencies who have historically been underrepresented in FERC's proceedings.

A second challenge that OPP confronts in this area relates to efficacy and venue: The electricity sector's unusual governance model makes participation in initial regional proceedings as important as participation at FERC itself. As noted above, the predominant model of grid governance in the United States delegates considerable authority to membership-based RTOs and ISOs to develop energy market rules and tariffs through internal governance processes — all before filing these rules and tariffs for FERC approval.³⁷ Once those entities have filed requests to approve their new rules and tariffs, the commission is limited by deferential review standards in its ability to shape proposals.³⁸ **For this reason, the OPP should explore available options for making RTOs and ISOs more inclusive of and responsive to members of the public. It should develop a comprehensive set of recommendations for achieving this goal and share them with relevant policymakers.**

INTERVENOR FUNDING

One of the most important early actions that the OPP is set to take to improve public participation is the creation of an intervenor funding program. Several states operate such programs to support public engagement with utility regulatory proceedings within their jurisdictions; these provide models for the OPP to consider as it designs a national program. The structure of these programs varies across states, including with regard to mechanisms for awarding funds, applicant eligibility requirements, application deadlines, and the scope and amount of intervenor expenses that can receive compensation.³⁹

Designing an intervenor program will require FERC to resolve a host of potentially thorny problems. In doing so, FERC should strive to adhere to the following principles: **First, the intervenor funding program should seek to construe the concept of “costs” eligible for compensation as broadly as possible and to explicitly reject any caps on those costs.** This is essential to ensuring meaningful participation by stakeholders with the greatest resource limitations. **Second, to the extent possible, the program should prioritize funding for those representing structurally marginalized communities.** This would necessarily exclude for-profit corporations and even many nonprofits with a national presence.

Third, program design and implementation should strive to promote as much certainty as possible for groups seeking intervenor funding. Because these groups work on such thin resource margins, they are not in a position to take significant financial risks in order to participate. Faced with uncertainty over funding, they will likely opt out of most participation opportunities. To help reduce uncertainty, the OPP should consider designing this program so that it provides groups with advanced guarantees of funding, backed by regular communication on deadlines and status. Alternatively, the office should consider opportunities for granting partial or full upfront funding awards to groups. Instituting such practices would require some creativity on the OPP’s part, however, because the authorizing statute directs the office to consider contributions intervenors make to the outcome of a particular proceeding as a condition for awarding funds. In addition, the OPP should develop clear policy statements and guidance and keep them regularly updated, defining key issues regarding implementation of the intervenor funding program.

Fourth, the OPP should strive to build some form of institutional independence into the intervenor funding implementation process to promote program integrity. To a large extent, programmatic integrity would be achieved by measures aimed at promoting certainty and narrowing instances requiring discretion. For those remaining areas requiring some measure of discretion, a mechanism to provide independent third-party review would be useful.

Critics of a robust intervenor funding program claim that it might unnecessarily prolong proceedings. A well-designed program following the principles outlined above — especially with regard to promoting implementation certainty — would likely avoid such problems.⁴⁰ In addition, other mechanisms for strengthening public participation developed and implemented by the OPP — such as improved communication, technical assistance, and earlier outreach — would also promote overall efficiency in FERC’s regulatory proceedings. The realization of these efficiencies will likely more than offset any delays a robust intervenor program might entail.

FERC'S INTERNAL MANAGEMENT

Across issue areas, the OPP also has a role to play in transforming the agency's internal practices and procedures. Much of the discussion around the OPP to date has focused outward — that is, on how the office might more effectively engage the public. But research on public participation in administrative law highlights another challenge that the OPP should begin to address: making the information held by non-expert members of the public more intelligible and useful to agency staff. Research finds that “undervoiced” participants who engage in federal rulemakings often provide what has been termed “situated knowledge” derived from their lived experience. The issues they raise are germane but expressed in terminology and framing that differs from industry interests or other repeat participants in FERC's proceedings.⁴¹

The OPP should take necessary steps to bring about a change in FERC's internal culture so that it genuinely values and embraces public engagement. This organizational culture will not only encourage FERC staff to be more empathetic and responsive in their interactions with the public. It will also help them to better develop the skill of “translating in” the non-expert views and insights those members of the public offer during the agency's proceedings, better ensuring that that views and insights are properly accounted for in FERC's decision-making. Indeed, in its June 2021 report, FERC acknowledges this problem and notes commenters' many recommendations about how to bring about such a cultural change. These recommendations include hiring a more diverse staff that includes “individuals with disadvantaged backgrounds” and those “having community and grassroots organizing and outreach experience.” Commenters also note “the importance of OPP staff having soft skills, such as empathy, cultural sensitivity, and flexibility.”⁴²

On this last point, the historic challenges of participation at FERC leave many members of the public concerned that the OPP will prove to be little more than window dressing. Certainly, the fact that FERC is creating the office more than 40 years late, and only under pressure from Congress, does not bolster public confidence. Yet the mandate to create the OPP comes at an opportune time. FERC's current leaders have placed unprecedented emphasis on elevating considerations of energy and environmental justice. This same emphasis should inform the mission and structure of the OPP. If designed with care, diligence, and adequate resources, the office could become a crucial experiment in advancing the Biden administration's broader aspirations to embed equity considerations in administrative decision-making.⁴³

PROMOTING CIVIC ENGAGEMENT AT OTHER AGENCIES

It is past time for federal regulatory agencies to consider how to better engage the public and capitalize on their unique on-the-ground perspectives to inform agency work and promote better quality decision-making. That is why it is so heartening to see FERC, after decades of delay, finally launch the OPP. To make the most of this opportunity, we must also reflect on the lessons learned so far from FERC's early steps on establishing the OPP and consider how this effort might serve as a model for other federal regulatory agencies.

The first thing federal agencies must do is survey different groups of the public affected by their actions. “Stakeholder mapping,” in which agencies identify *all* relevant stakeholder groups to be consulted and empowered within decision-making processes, is key to enabling adequate outreach. Agencies should give particular attention to those groups representing structurally marginalized communities or that have otherwise been historically under-represented in agency processes, including people of color and low-income families. Ultimately, this is the “target audience” for the agency’s efforts to strengthen meaningful engagement.

As part of this survey, agencies must also endeavor to better understand what members of these groups see as the most important impacts of their actions and why they are seen as important by these individuals. The best way an agency can accomplish this is through a significant stakeholder outreach effort. The steps taken by FERC as part of its early efforts to develop the OPP, including hosting a variety of listening sessions and conducting a public comment period, may provide a model for similar outreach efforts. Agencies should also critically assess the outreach mechanisms they have used in the past and determine whether they would be appropriate for this effort and which adaptations, if any, might be necessary for enhancing their effectiveness.

Next, agencies must honestly identify and catalog the various barriers facing members of the public during regulatory proceedings. For many agencies, this process may not be comfortable since it will require them to confront their own historic role in contributing to systemic oppression of structurally marginalized communities. Nevertheless, grappling with these kinds of issues is essential. In carrying out this assessment, agencies may wish to consider approaches that draw on the insights of human-centered design.⁴⁴ The general goal of these approaches is to get as accurate an understanding as possible of what it is like to stand in the public’s shoes and interface with an agency. Doing so will help reveal the variety of challenges the public faces — such as poorly designed websites or inaccessible public hearing locations — when trying to engage. The agency should supplement this work with more traditional public outreach efforts, such as those employed by FERC in its initial steps for establishing the OPP.

The next step is to formulate strategies to overcome the challenges outlined in the above-noted assessment. As a threshold matter, agencies will likely encounter few legal constraints to employing these strategies, but they should nevertheless be mindful of them. Likewise, agencies will generally find that implementing most of these strategies rarely requires specific statutory authorization. Indeed, the provision in PURPA that authorized the creation of the OPP is a rare exception. Nevertheless, agencies need to consider these and other practical constraints for implementing these strategies, such as available resources and the need for quick implementation of policy priorities. Indeed, improving public participation involves difficult tradeoffs, including the costs of implementing new engagement strategies and potential delays arising from careful implementation. Strategies to reconcile and resolve these tradeoffs should inform agency efforts to improve public engagement.

One important strategy that all agencies should consider is finding effective ways to engage with the public as early as possible. These early stages are when public input is typically most valuable to agency decision-makers. Public perspectives shed important light on the competing values at stake in a given regulatory proceeding and inform how a particular decision might implicate the overarching goals and purposes of the authorizing statute at issue. These perspectives can also provide crucial information to agencies on agenda-setting. For instance, if an action is of particular importance to a structurally marginalized community, then an agency should consider fast-tracking that action, consistent with its legal authority and relevant resource constraints.

As the action moves through the regulatory process, it is likely to become increasingly defined by complex technical and legal questions that are beyond the ken of most members of the lay public. At these later stages, agencies should consider a different suite of strategies to bridge this “expertise gap” in ways that permit the public to remain engaged as much as possible. This problem can in part be addressed through the “translating out” strategies noted above. Just as important, though, agency staff should recognize that non-expert members of the public have valuable insights to offer at these latter stages of the rulemaking process. Accordingly, they will likewise need to deploy new “translating in” strategies for ensuring that such non-expert views are properly assimilated into the expertise-driven framework that typically characterizes many agency proceedings and accurately accounted for in the final policy decision.

Finally, to ensure that new public participation strategies are fully integrated into the agency’s DNA — rather than treated as a peripheral check-the-box exercise — agencies need to develop a genuine culture of inclusivity and responsiveness. The goal should be to recognize the inherent value of public input and to sincerely believe that the quality of the agency’s work will be fundamentally diminished unless and until that input is meaningfully considered and incorporated into decision-making processes.

In short, agencies must move beyond community consultation to genuine community involvement — and ideally empower communities to change substantive aspects of agency-approved projects. To take an example applicable to the energy context, agencies could potentially involve communities in pollinator plantings or maintenance around or under certain energy infrastructure, art projects associated with this infrastructure, or creative design strategies involving fences or vegetation to make energy projects more aesthetically appealing for neighboring communities.

Unfortunately, no one-size-fits-all mechanism exists for achieving such cultural change within agencies. Several ingredients can contribute, though, including promoting diversity through strategic recruitment practices (*e.g.*, hiring staff from diverse socioeconomic backgrounds or with training in community organizing or sociology), carefully designed performance metrics to align incentives for agency staff with the goal of promoting public participation, a strong and sustained commitment from agency leaders, and allocation of adequate budgetary resources. As noted above, the public comments discussed in FERC’s June 2021 report raised many of these issues.

Significant changes in institutional architecture at agencies, such as FERC’s current efforts to establish the OPP, can also cultivate a culture of inclusivity. It remains to be seen, however, whether the agency will take other necessary steps to bring about this cultural change.



CONCLUSION

With higher gas prices and climate-linked natural disasters dominating the news headlines, U.S. energy policy has come to occupy a prominent position in the public consciousness. Attention to the constellation of federal agencies charged with developing and implementing energy policy — including FERC — is expanding beyond the “usual suspects” of industry insiders to include a growing number of members of the public. This upsurge has been particularly pronounced among members of structurally marginalized communities — those primarily comprising people of color and low-wealth families — who for decades have borne a disproportionate share of the negative consequences of our energy policies, and who now see meaningful public participation as an essential precondition to correcting future injustices. And yet, members of the public continue to face barriers in influencing policy decisions — energy and otherwise — that shape their lives and determine their outcomes.

Against this backdrop, it is heartening to see FERC taking long overdue action on establishing the OPP. If done right, the OPP could be the federal government’s first meaningful step toward achieving true energy democracy in the United States — energy policy guided by broadly shared public values and developed and implemented through an ongoing and durable collaborative process between members of the public and agency professionals. More broadly, the OPP could offer a model for regulatory democracy writ large, one that is embraced and emulated by agencies across the federal government working on a variety of policy issues of public concern.

FERC’s experiment with the OPP is one worth following by policymakers, public interest advocates, academic experts, and concerned members of the public, including those from structurally marginalized communities, who are interested in strengthening our democracy and, particularly, our administrative state. The lessons it offers — for good or ill — will guide future efforts at promoting a government that truly is “by the people.”

The Environmental Racism of the Weymouth Compressor Station

In 2020, a natural gas company called Enbridge completed construction on a large compressor station in North Weymouth, Massachusetts, as part of its Atlantic Bridge Project pipeline. North Weymouth, which is just south of Boston, was already home to a high concentration of heavy industrial facilities, and the community has suffered high air pollution and contaminated soil for decades as a result. The community’s residents, many of whom are low-wealth and people of color, suffer greater rates of respiratory and heart disease compared to the state average. Local activists and community-based organizations unsuccessfully fought the project for more than five years and continue to campaign for it to be shut down. Despite community opposition, FERC ultimately signed off on the compressor station’s construction in 2017.

For more, see Miriam Wasser, *The Controversial Natural Gas Compressor in Weymouth, Explained*, WBUR, October 13, 2020, <https://www.wbur.org/news/2020/10/13/weymouth-compressor-explainer-climate-change-enbridge-natural-gas-fracking>.

ENDNOTES

¹ Ben Paviour & Abi Cole, *A Historically Black Town Stood in the Way of a Pipeline – So Developers Claimed It Was Mostly White*, GUARDIAN, Sept. 16, 2021, <https://www.theguardian.com/us-news/2021/sep/16/virginia-atlantic-coast-pipeline-union-hill-historically-black-town> (last visited Mar. 11, 2022).

² See Shelley Welton, *Grasping for Energy Democracy*, 116 MICH. L. REV. 581 (2018).

³ Statement, Richard Glick, Chairperson, Federal Energy Regulatory Commission, Weymouth Compressor Station (Jan. 20, 2022), available at <https://www.ferc.gov/news-events/news/chairman-glick-statement-weymouth-compressor-station>; Notice of Inquiry, Certification of New Interstate Natural Gas Facilities, 86 Fed. Reg. 11268 (Feb. 24, 2021).

⁴ FERC also regulates interstate oil pipeline service and rates (to a limited degree), although it does not regulate the construction or siting of those pipelines.

⁵ Retail sales and distribution of oil are not subject to much regulation, aside from safety and environmental regulations.

⁶ 16 U.S.C. § 824p; 42 U.S.C. § 1642i.

⁷ Infrastructure Investment and Jobs Act, Pub. Law 117-58 (2021). This law grants enhanced backstop siting authority to FERC for transmission lines and an increased role for DOE in determining where such lines should be built in establishing National Interest Electric Transmission Corridors.

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Regulation as Social Justice

**A Crowdsourced Blueprint for
Building a Progressive
Regulatory System**

by James Goodwin

September 2019

About the Center for Progressive Reform

Founded in 2002, the nonprofit Center for Progressive Reform connects a nationwide network of scholars with policymakers and allied public interest advocates. CPR pursues a vision of legal and regulatory policies that put health, safety, and environmental protection before private interests and corporate profit. With rigorous analysis, strategic engagement in public interest campaigns, and a commitment to social welfare, CPR supports thoughtful government action, ready public access to the courts, enhanced public participation, and freer access to information.

Acknowledgments

CPR is grateful to the Public Welfare Foundation, the Bauman Foundation and the Deer Creek Foundation for their generous support of CPR's work.

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Regulation as Social Justice

A Crowdsourced Blueprint for Building a Progressive Regulatory System

Introduction

On June 5, 2019, the Center for Progressive Reform hosted a first-of-its-kind, one-day [convening](#) that brought together a diverse group of more than 60 progressive activists and academics. Our purpose was to begin the process of developing a [progressive vision of the U.S. regulatory system](#) – one that is not only robust and responsive enough to meet the immediate challenge of protecting people and the environment against unacceptable risks, but that also is institutionally designed to promote the broader social goals of justice and equity.

Participants agreed that one of the important but often overlooked factors contributing to the nation’s most challenging social problems – growing economic inequality, racism, and the inability to come to grips with the climate crisis – is that our regulatory system is broken and ineffective. Consequently, to fulfill a progressive vision of society, advocates will need to pay special attention to [rebuilding and modernizing the regulatory system](#).

By protecting us all against a variety of health, safety, environmental, and consumer hazards, such a regulatory system would avert the kinds of harms that can amplify institutionalized injustice. Moreover, a stronger regulatory system that provides greater and more meaningful public participation opportunities would shift more political power to ordinary Americans, breaking up the near-monopoly of political power that corporate special interests now enjoy in the regulatory space.

We built the convening around a series of innovative “Idea Exchanges,” during which participants were invited to explore these ideas by drawing upon and sharing their unique expertise and experiences. These sessions consisted of structured small group discussions involving no more than eight participants, led by a facilitator, and including a dedicated scribe to carefully document the discussions. The first Idea Exchange session launched by asking participants “How do you see your advocacy work contributing to the goals of social justice and equity?” The second Idea Exchange session began with “What legal or other institutional changes would you make so that you are better able to promote social justice and equity as part of your advocacy work?” Following is a synthesis of the ideas prompted by these questions.

The Broken U.S. Regulatory System: The Progressive Community's Assessment

Progressive policy advocates identified four broad contributing factors that help explain the current weakened state of the U.S. regulatory system: weak and outdated laws; unnecessary implementation barriers facing agencies; excessive corporate influence; and obstacles to meaningful public participation.

Weak and Outdated Laws

The last few decades have seen Congress increasingly marked by a pattern of [asymmetrical polarization](#) in which conservative lawmakers have taken more extremist policy positions at the expense of serving the interests of their constituents, particularly the working poor and communities of color. These lawmakers bear the lion's share of the responsibility for Congress's ongoing failure to ensure that the federal government operates effectively and to address new and emerging threats to the public (e.g., [climate change](#))

through legislation. Despite the harms that result from this phenomenon, these members rarely face any political consequences for their inaction. In the absence of new legal tools, agencies instead resort to utilizing their existing authorities as best as they can, which often results in inadequate or incomplete protections.

These partisan dynamics have made the pursuit of compromise on legislation all but impossible. As a result, on the infrequent occasions that protective legislation is actually

passed, it has typically been watered down to the point that it is ineffectual and imposes no greater burden than affected industries are willing to tolerate (e.g., [toxic chemicals](#), [compounding pharmacies](#), etc.).

The working poor and communities of color are disproportionately harmed by weak and outdated laws. The members of these communities bear a disproportionate burden when these threats remain unaddressed through effective legislative action. These individuals also have little political power in Congress, as they are systematically excluded from meaningfully participating in the shaping of Congress's legislative agenda or in the development of the substance of individual bills.

Unnecessary Implementation Barriers

Even when protector agencies like the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), and the Occupational Safety

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and Health Administration (OSHA) do have sufficient legal tools to achieve their mission of protecting people and the environment, they must often overcome [significant obstacles](#) before those tools can be deployed. Frequently, these obstacles were created or are encouraged by corporate interests for the purpose of defeating or delaying regulatory action. Their continued existence, however, [translates](#) into concrete harms for ordinary Americans, especially the working poor and people of color who would otherwise enjoy the greatest benefits from strong regulatory protections.

'Hollowed Out' Agencies. The agencies charged with protecting the public have been consistently [starved](#) of necessary financial resources. Current tax policies coupled with the seemingly bottomless appetite for defense spending generate insufficient revenue to support even basic government functions. Broadly accepted “small government” ideology, when used as a rationale for starving protector agencies, strongly deters even modest efforts to increase agency budgets or the tax revenues to pay for them.

Relatedly, agencies also face a dire shortage of critical human resources. Large numbers of experienced expert staff are reaching retirement age or seeking employment opportunities outside of the federal government in response to deteriorating working conditions. This resulting “brain drain” will be especially [damaging](#) because shrinking budgets and formal hiring freezes have prevented agencies from attracting and cultivating new talent within their ranks to replace outgoing workers. Recent actions by the Trump administration have only reinforced this dynamic, with the institution of policies that have the effect, if not the intent, of making public service increasingly undesirable. These actions include [imposing contracts](#) that remove grievance procedures and telework options, instead of bargaining in good faith.

Systemic Delays. The number of procedural and analytical requirements and “veto gates” that agencies must navigate in order to implement their authorizing statutes has [grown inexorably](#) in recent decades. Similarly, for agencies that want to avoid carrying out their statutory mission, they may use these requirements as cover for slow-walking the implementation of new regulations. Administrative law, however, provides no real accountability measures for [inaction](#) or persistent delays.

Avenues of Interference. The three main inputs in regulatory policy formulation are science, economic impacts, and legal authority. Opponents of regulatory safeguards have devised strategies for manipulating each of these factors to delay new rules or advance their preferred policy outcomes:

The agencies charged with protecting the public have been consistently starved of necessary financial resources. Current tax policies coupled with the seemingly bottomless appetite for defense spending generate insufficient revenue to support even basic government functions.

- **Politicized science.** Opponents of regulations have become adept at challenging agency science by demanding that regulatory decision-making meet [unnecessary and irrelevant standards](#). When this strategy has failed, these opponents have sought to [deny inconvenient scientific findings or censor them outright, including working to sideline career scientists](#). More recently, they have challenged the institution of science itself, baselessly calling into question its [objectivity and reliability](#).
- **Cost-benefit analysis.** Rather than provide an objective tool for understanding the economic impacts of proposed regulations, cost-benefit analysis was always intended as a vehicle for corporate interests to [attack common-sense safeguards](#). Its methodologies serve to distract attention from how regulations are necessary for protecting people and the environment against unacceptable harms by instead placing undue focus on industry profits. In this way, cost-benefit analysis empowers narrow industry interests at the expense of the public interest.
- **Judicial interference.** Bedrock administrative law doctrines such as [Chevron and Auer deference](#) and [nondelegation](#) have long stood as bulwarks to judicial activism by conservative judges looking to attack regulations they oppose on ideological grounds. The recent [takeover of the federal judiciary by conservative judges](#) ideologically hostile to federal regulation has placed these critical doctrines under threat of being reshaped or torn down altogether. Such changes would give these conservative judges nearly unfettered freedom to substitute their policy judgement for that of agency experts and demonstrated public needs and reject common-sense safeguards opposed by regulated industries.

Excessive Corporate Influence

At both the federal and state level, corporate special interests are able to exercise enormous influence over regulatory development and implementation. As a result, regulatory policies often benefit corporations at the expense of public welfare. In the worst cases, these policies produce a regressive wealth transfer that enables corporations to enjoy larger profits at the cost of harms to public harms and safety – costs that are disproportionately paid for by the working poor and communities of color. At the same time, this excessive corporate influence has the effect of drowning out the voices of ordinary Americans, especially those from marginalized communities, systematically precluding their meaningful participation in the regulatory system.

Congress. The U.S. Supreme Court's *Citizens United* decision exploded years of progress on campaign finance reform, establishing a [money-in-politics regime](#) in which corporations and the wealthiest Americans can use mammoth contributions to political candidates and political action committees (PACs) to buy the policies and legislation they want. This

excessive corporate influence helps reinforce the pattern of legislative inaction noted above. Anti-regulatory legislative tools such as [limitation riders](#) in annual appropriations bills and [Congressional Review Act \(CRA\)](#) resolutions of disapproval enable members of Congress to reward their donors by overriding regulations they oppose while largely evading public scrutiny.

Regulatory agencies. Corporate interests are able to use their superior financial resources to [dominate every step of the rulemaking process](#), effectively [drowning out the voices](#) of the people. Despite this dominance, opponents of regulatory safeguards have created institutions, such as the White House [Office of Information and Regulatory Affairs \(OIRA\)](#) and the [Small Business Administration's Office of Advocacy](#), that serve to amplify and reinforce industry's arguments against regulatory safeguards. A chronic lack of resources has contributed to undue corporate influence over agencies by forcing them to become [increasingly dependent on the industries](#) they are supposed to oversee for expertise on complex technical matters and even to outsource many oversight and compliance assurance activities to those industries as a cost-saving measure. The arrival of the Trump administration has seen corporate capture of agencies elevated even further, with former [industry officials](#) and [lobbyists](#) assuming leadership positions throughout agencies to an unprecedented degree.

Corporate interests are able to use their superior financial resources to dominate every step of the rulemaking process, effectively drowning out the voices of the people.

States. One way states seek to attract new businesses is by weakening regulatory standards, creating a ["race to the bottom"](#) dynamic that leaves their residents inadequately protected against unacceptable risks. Many [state economies are dominated by a few powerful industries](#), providing those businesses significant leverage to dictate regulatory standards.

Barriers to Meaningful Public Participation

At the same time that corporate influence over the regulatory system has increased, ordinary Americans are finding that the traditional avenues to participation are being systematically shut off or marginalized. The increasing costs to meaningful participation mean that the working poor and communities of color will be the first to be excluded from this process, all but ensuring that the results will not be sufficiently attentive to their concerns and perspectives.

Congress. The dominating influence of money in politics means that average constituents have no realistic chance of having their views heeded by their representatives in Congress when they conflict with the views of large contributors or key industries. Individuals can still exercise their

democratic power in the voting booth, but [gerrymandered](#) congressional districts and [systematic disenfranchisement](#), especially among the working poor and communities of color, have significantly diluted the voting power of those who desire real change.

Regulatory agencies. Meaningful participation in the rulemaking process can be [resource-intensive](#), forcing even the largest public interest advocacy organizations to forgo available participation opportunities and locking out individuals altogether. The substance of regulatory decision-making has become [increasingly technocratic](#), limiting meaningful participation to those with advanced training in law, economics, or science. And this disparity isn't equally distributed: The working poor and people of color tend to be more frequently excluded from the regulatory process than other Americans. It does not require a law degree to be poisoned by pollution, for example, but regulatory agencies are not geared to solicit, accept, or act on testimony about the *lived experience* of pollution's victims.

Courts. The Administrative Procedure Act, as well as a few environmental, consumer protection, and various other health and safety statutes, empower people to bring ["citizen suits"](#) to hold agencies accountable for fulfilling statutory mandates or to bring enforcement actions when regulated industries violate protective rules or standards. [Narrow standing](#)

[requirements](#) created by conservative federal judges have limited the ability of citizens to sustain such suits, blunting the power of these provisions. Litigation costs might also present a barrier to bringing certain kinds of citizen suits. While laws like the Equal Access to Justice Act can help defray these costs in certain cases, significant gaps in access to litigation costs remain. And helpful laws that do exist are [under attack by conservative lawmakers](#).

State and federal tort law, as administered by civil courts, offers a crucial backstop to weak or ineffective regulations or half-hearted enforcement. Acting at the behest of corporate interests, conservative judges, along with likeminded state and federal lawmakers, have successfully limited citizen access to the civil courts.

State and federal [tort law](#), as administered by civil courts, offers a crucial backstop to weak or ineffective regulations or half-hearted enforcement. Acting at the behest of corporate interests, conservative judges, along with likeminded state and federal lawmakers, have successfully limited citizen access to the civil courts, including through the expansion of [forced arbitration](#). To further discourage civil lawsuits, they have resorted to such tactics as placing [arbitrary caps on available damages](#), thus reducing judgments to a small cost of doing business for scofflaw industries.

A Blueprint for Rebuilding a Progressive Regulatory System

Congress

Under our constitutional framework, the U.S. system of regulatory safeguards is a [product of congressional legislation](#). That means protector agencies cannot do their jobs well unless and [until Congress does its job well first](#). The U.S. Constitution also endows Congress with the responsibility of overseeing agency implementation of authorized public interest programs to ensure they are promoting the public welfare as effectively as possible. The influence of corporate money, however, has contaminated this aspect of Congress's work such that its [oversight function has devolved into politicized interference](#) aimed at preventing agencies from implementing broadly popular public safeguards. Achieving a progressive vision of the regulatory system will thus require fundamental reforms to Congress, as well.

Campaign finance reform. Congress is unlikely to pass legislation addressing new and emerging threats as long as money plays such an influential role in politics. In the absence of campaign finance reform, oversight will continue to be misused by members of Congress as a vehicle for rewarding corporate donors by attacking regulations they oppose, rather than as a legitimate tool for ensuring that the public interest is being served.

Policy development.

- Reversing the pattern of asymmetrical polarization that has come to define Congress will not be easy, thanks to the many structural forces that encourage and reinforce it. One important first step will be for all members of Congress – but especially conservatives – to cultivate and observe a new legislative culture in which bills are considered on the merits, rather than engaging in zero-sum-game politics that values short-term “wins” of blocking the opposing party’s legislative agenda ahead of working together to advance the common good. Several institutional changes would help ensure the viability of a more productive legislative culture, including campaign finance reform and measures to enhance Congress’s technical and policy capacity (such as [reviving the Office of Technology Assessment](#)).
- Authorizing committees should explore mechanisms for ensuring that environmental, consumer protection, and other health and safety statutes are designed to better account for their impacts on marginalized members of society, including the working poor and communities of color. These include ensuring that such legislation has an appropriate [place-based focus](#) and properly accounts for *cumulative impacts* on marginalized members of our society.

- Environmental, consumer protection, and other health and safety statutes must be designed to preserve state and local governments' authority to provide their citizens with protections that go beyond the "floor" established by federal regulations.

Budget process. The process by which Congress allocates tax dollars is fundamentally broken and must be overhauled so that we are better able to make necessary investments for improving our country, including by increasing resources for regulatory agencies.

Anti-regulatory gimmicks. Opponents of regulatory safeguards frequently employ anti-regulatory gimmicks like CRA resolutions of disapproval and limitations riders on appropriations bills to attack popular public safeguards as a means of rewarding their corporate donors. Such gimmicks also reinforce the hyperpartisanship that contributes to congressional dysfunction and undermine public esteem for Congress. While these devices

in theory could be used to advance social justice, they are politically asymmetric, offering far more utility to opponents of regulatory safeguards. Because, on balance, progressive goals would be better served if these gimmicks no longer existed, Congress should take necessary steps to abolish them.

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Regulatory Agencies

The heart of the regulatory system is the agencies themselves. A progressive regulatory system will require energetic and well-resourced agencies. It will also require the creation of a policymaking process that is institutionally designed to insulate agencies from undue corporate influence and that orients decision-making toward the promotion of social justice and equity as a guide star in agencies' pursuit of their respective statutory missions.

Capacity. Increased budgets will ensure that agencies have the financial resources they need to carry out their statutory missions in an effective and timely manner and for resisting *corporate capture* (i.e., so that they are not dependent on regulated industry for expertise and do not have to rely on outsourcing compliance and oversight activities to regulated industry). The president and Congress should explore needed personnel reforms that would enable agencies to attract and retain highly qualified legal, technical, and scientific experts to inform their work. These reforms should also give special attention to addressing the "brain drain" trend that many federal agencies are currently experiencing. The presence of strong labor unions and employee protections would also help safeguard grievance procedures and limit opportunities by political leadership to make changes that worsen federal civil service working conditions.

Policy development.

- Congress should enact new legislation to correct the asymmetry in administrative law that makes it easier to hold agencies accountable for action than for *inaction* – an asymmetry that systematically disadvantages regulatory beneficiaries. This legislation should seek to grant citizens enhanced and expanded rights to spur agency action on new regulations. Similarly, this legislation should grant citizens enhanced rights to hold agencies legally accountable for unnecessary delays in advancing rules that are already under development. Alternatively, federal courts should adopt a [less deferential approach](#) when evaluating agencies' rejections of citizen petitions for rulemakings.
- The president and Congress should take appropriate steps to [eliminate unnecessary procedural and analytical obstacles](#) that delay rulemakings and waste scarce agency resources without improving the quality of agency decision-making. These obstacles also enable corporate capture of agency decision-making. In particular, the president and Congress should consider eliminating or reforming the various requirements related to cost-benefit analysis and regulatory impact analysis, centralized review conducted by OIRA, and the many procedural and analytical requirements mandated by the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, the Unfunded Mandates Reform Act, and the Paperwork Reduction Act.
- The president, Congress, or agencies themselves should establish [new procedural mechanisms and institutions](#) for obtaining the perspectives of ordinary Americans, especially the working poor and communities of color, to inform their agenda-setting and regulatory decision-making. Rather than sitting back and waiting for responses that likely will never come, agencies should be under an affirmative duty to reach out to affected populations. New institutions should be created for the purpose of amplifying the voice of ordinary Americans in the rulemaking process. These institutions might include new kinds of task forces charged with explaining scientific and other policy-relevant data to the public in order to obtain better informed feedback or teams of local engagement staff who would work with community leaders to obtain a comprehensive understanding of a regulation's potential community-level impacts.
- The president, Congress, or agencies themselves should establish new procedural mechanisms and institutions for affirmatively learning about the harms faced by different communities – particularly those that are disproportionately populated by the working poor and people of color.

The president, Congress, or agencies themselves should establish new procedural mechanisms and institutions for obtaining the perspectives of ordinary Americans, especially the working poor and communities of color.

These efforts might include better use of targeted environmental monitoring, [supporting epidemiological research](#) and [citizen science](#) initiatives, and [tools for better accounting for the cumulative effects](#) of the different kinds of harms that those communities experience.

- The president, Congress, or agencies themselves should institute strong new [scientific integrity policies](#) that safeguard agency scientists against improper influence in their work, better insulate agency scientific research from politically driven policy development, and empower agency experts to communicate to the public directly about their work.
- The president, Congress, or agencies themselves should institute new [ethics reforms for agency leadership positions](#) to protect against conflicts of interest and abuses of authority by individuals who previously served as corporate officers or lobbyists in the industries they would be charged with overseeing. The president, Congress, or agencies themselves should likewise institute new [ethics reforms aimed at the other side of the “revolving door.”](#) These reforms would target abuses of authority or conflicts of interest among current agency officials who may become employed in the industry that the agency is charged with overseeing, or among former agency officials who have become so employed.

Enforcement.

- Increased budgets for agencies should include special attention to providing significantly [greater resources for enforcement activities](#). At the same time, there should be a [decreased reliance](#) on outsourcing enforcement and compliance oversight to third-party auditors and less use of industry “self-policing,” which serve to weaken accountability. To better leverage those additional resources, agencies should explore opportunities for greater coordination internally, as well as [externally with other agencies](#), using such methods as joint inspections, for example.
- Agencies should make greater use of their existing legal authorities to deploy [criminal enforcement](#) for regulatory violations, particularly against culpable individuals, including [responsible corporate officers](#). Congress should enact legislation granting agencies enhanced authority to employ criminal enforcement tools.
- Agencies should make greater use of their existing legal authorities to employ more non-traditional but effective enforcement tools such as [shaming and enhanced disclosures](#) by corporations of the harms their activities cause. Congress should enact legislation as necessary granting agencies enhanced authority to employ these and other kinds of non-traditional enforcement tools.

- Where applicable, federal agencies should conduct [more rigorous oversight of state enforcement activities](#). Consistent with their legal authorities, agencies should be more aggressive in withdrawing state enforcement powers or taking other corrective measures when state enforcement performance is demonstrably inadequate. Congress should enact legislation as necessary granting federal agencies enhanced authority to hold states accountable for their delegated enforcement activities.
- Congress should enact legislation that grants [expanded citizen suit opportunities](#) for holding corporations and individuals accountable for regulatory violations. Such legislation should also seek, to the extent legally feasible, to remove standing barriers, particularly those created by the courts, that block people affected by violations to bring suits requiring that the law be enforced.
- Congress should enact legislation that expands and enhances [protections for whistleblowers](#) who play a vital role in exposing regulatory violations.

Courts

The courts have long been recognized as the [“great equalizer”](#) – a venue where any ordinary American can hold the most powerful people or corporations

accountable for their misdeeds and the harms they cause. A progressive regulatory system will require courts to fulfill this role, complementing the protections that strong regulations provide while serving as a [backstop](#) when agencies are unwilling or unable to fulfill their statutory obligations. To achieve the kind of citizen-centered courts necessary for a progressive regulatory system, policymakers will need to eliminate existing barriers that prevent citizens from having full and meaningful access to bring their claims. This will include addressing non-constitutionally based standing requirements, as well as eliminating arbitrary constraints on achieving civil justice, such as [forced arbitration](#) and [damage caps](#).

At the same time, a progressive regulatory system will require judges who reject judicial activism by respecting the constraints on their role in mediating disputes over regulatory policies. Congress has never deputized federal judges to participate in the execution of legislation by authorizing them to substitute their policy judgment for that of the agencies, and for good reason. Judges by training and practice are generalists and do not wield the substantive expertise that agency decision-makers are able to bring to bear in policymaking. Doing so, moreover, contravenes the explicit instructions of Congress that agencies resolve matters of public policy. Accordingly, in a progressive regulatory system, federal judges must

Congress has never deputized federal judges to participate in the execution of legislation by authorizing them to substitute their policy judgment for that of the agencies.

recognize the constitutional legitimacy of broad delegations of policymaking authority and respect the bedrock deference doctrines established in [Chevron](#) and [Auer](#). Nevertheless, the federal courts will remain one of the greatest near- and medium-term threats to a progressive regulatory system as the George W. Bush and Trump administrations have had [considerable success in seating judges](#) who are not just ideologically hostile to regulations in general but also willing to engage in judicial activism to strike down individual regulations that they oppose on policy or political grounds.

State Governments

In our federalist system of government, states are, at the very least, important partners in promoting the public welfare and, at the very best, [genuine innovators and pioneers](#) in delivering stronger protections and [advancing the goals of social justice](#) for their citizens. In practice, though, states have too often been a barrier to safeguarding people and the environment while serving as a vehicle for excessive corporate influence over the rulemaking process. A progressive regulatory system both promotes and respects the principles of federalism by demanding that states behave in a way more in line with the idealized vision of this division of responsibilities.

State Constitutions. A few state constitutions already contain provisions recognizing their [citizens' right to healthy environment](#). Citizens in other states can avail themselves of constitutional amendment procedures to include this provision in their own state constitutions. Such provisions would strengthen citizen efforts to fight any anti-regulatory policies that the state might attempt to pursue in the future.

Direct Democracy. Citizens should avail themselves of opportunities for statewide and local [ballot initiatives](#) to pursue progressive reforms of the state's regulatory system.

Policy Development. Public interest advocates in progressive states should pursue opportunities to work with state legislatures and governors to institute progressive reforms of the states' regulatory systems. These reforms might include creating [new mechanisms for engaging members of the public](#) – especially the working poor and people of color – in formulating policy agendas and developing new regulatory safeguards. State agencies in progressive states should also experiment with different approaches for incorporating a more *place-based focus* into their regulatory decision-making, including by giving special attention to the cumulative harms experienced by communities of color and low-income communities. These efforts can lead to a “bottom-up” approach in which state-level regulatory reforms in progressive states can help stimulate similar reforms at the federal level.

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Memo to Biden: Regulation Is Infrastructure

James Goodwin | April 27, 2021

Responsive Government



President Joe Biden's April 28 speech to a joint session of Congress — his first major address since his inauguration — offers him a chance to outline and defend his policy priorities. He should use this opportunity to articulate a positive vision of regulation as an institution within our democracy and to champion the crucial role it plays in promoting the public interest.

Biden will likely focus much of his speech on his ambitious infrastructure plan, from which he can easily pivot to regulation. After all, robust regulations are essential to the success of the U.S. economy, no different from traditional "gray" infrastructure like roads, bridges, pipelines, and power lines.

Strong regulatory protections provide a foundation of trust, which is critical for keeping our economy humming. Imagine, for example, if the Biden administration's Occupational Safety and Health Administration (OSHA) issued its [long overdue](#)

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emergency temporary standard to protect workers from being exposed to COVID-19 on the job. Such a standard would give workers and consumers confidence that they can safely get back into the marketplace, providing a much-needed jolt of economic activity.

Like bridges, regulatory protections also link, in durable and meaningful ways, the interests of disparate economic actors to promote their mutual well-being. An [Obama-era regulation](#) that sought to require financial advisors to make decisions based on their customers' economic interests instead of what would yield them the greatest compensation was intended to have this effect. Such measures may come at a short-term cost to the financial services industry — cheating can be lucrative, after all. Over time, though, more people would be likely to avail themselves of the services this industry offers, as they come to recognize financial advisors as worthy of their trust. If this rule hadn't be wrongly struck down in court in 2018, it would have meant financial services customers getting better results, and the financial services sector getting more customers. With interests aligned, it was a win-win.

When strongly enforced, regulations are essential guardrails for our economy. Indeed, if the United States is to do our part in stopping humanity from driving over the edge into climate change-fueled cataclysm, we must pursue an aggressive strategy to wring greenhouse gas emissions out of our economy as quickly as possible. Regulations targeting the emissions of individual industrial sectors will play a crucial role in that strategy — and hopefully prevent our country from careening off the climate cliff.

Civic infrastructure

The value of regulation extends well beyond its contributions to our economic infrastructure. It also forms a critical part of our *civic* infrastructure. Regulation, in short, is democracy in action. Though far from perfect in practice, the regulatory system offers an irreplaceable public sphere in which we all can work together to give life to our common values through policies that promote our common goals.

Through its public participation opportunities, the regulatory system creates a foundation of trust between and among fellow Americans, regardless of where we might stand on a particular policy issue. Brought face-to-face to contest and deliberate, we are ultimately empowered to recognize the innate dignity and

humanity of even those with whom we disagree. In this way, a vibrant regulatory system can help repair the partisan and cultural divisions that have long embroiled this country.

Similarly, the regulatory system can restore a sense of connectedness between ourselves and our government. It offers us opportunities to interact with public officials on an ongoing basis, which can help bridge the divide that has left many of us feeling like our government is some distant "they" instead of an extension of ourselves, as if our government is somehow not part of "we the people."

Better still, when we see the impact that we have on regulatory policymaking, we have a greater sense of authorship over our shared destinies as members of the broader American community.

And, as we increasingly feel a sense of having "reclaimed our government," we will become more invested in developing our civic persona and carrying out our public-minded responsibilities, including not only showing up to the ballot box but also embracing other deeper forms of democratic engagement. In turn, rejuvenated civic empowerment will buffer future incursions of creeping authoritarianism that threaten the American democratic experiment.

If the Obama administration was any guide, conservative lawmakers and their allies in industry will waste no time in attacking the foundational legitimacy of the Biden administration's use of regulation to advance its public-centered policy agenda. The Biden team must not merely rebut these attacks on their own terms, but rather preemptively reframe the debate over regulation by laying out an affirmative vision of its essential role in our economy and democracy. With the eyes of the nation watching, Biden's speech to Congress provides an opportune moment to do just that.



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LAW AND JUSTICE

Regulatory Government Is Democratic Government

Conservatives want to thwart federal rule making, the way they shut down Biden's OSHA mandate for COVID. Here's one way to fight back.

by James Goodwin

February 5, 2022



United States Supreme Court Justice Neil Gorsuch in the Warner legislative chamber at the state Capitol, Monday, May 7, 2018, in Lincoln, Neb. (Kayla Wolf/Lincoln Journal Star via AP)

When the conservative movement [contrived](#) to pack the U.S. Supreme Court with right-wing ideologues, one of the goals was to create a powerful ally in its [campaign](#) to

dismantle the federal regulatory system, which we all [depend](#) on every day to safeguard our families, communities, and environment. With its recent [decision](#) in the emergency vaccine-or-test case, the Court's conservative supermajority gave its clearest signal yet that it will [advance](#) this campaign from the bench.

The unsigned majority opinion and the concurrence authored by Justice Neil Gorsuch, when read together, lay out a comprehensive blueprint for [defeating](#) regulation in the public interest. Significantly, the arguments they raise are firmly grounded in the long-standing conservative myth that the regulatory system lacks sufficient “democratic accountability.” Quoting the late Justice Antonin Scalia, the [concurrence](#) casts the stakes in stark terms, warning of “government by bureaucracy supplanting government by the people.”

If the conservative justices' frontal assault on our regulatory system were to succeed, the resulting harm would be incalculable. The vaccine-or-test standard alone would have [prevented](#) more than 6,500 deaths and 250,000 hospitalizations, according to the U.S. Department of Labor.

Less appreciated, though, the deconstruction of the regulatory system would also inflict serious harm on our system of democratic government. That's because, contrary to Scalia's glib canard, government by bureaucracy *is* [government](#) by the [people](#). Conservatives on and off the high court fundamentally misunderstand—and willfully misrepresent—federal agencies' role in responding to the public will and protecting the public interest.

Indeed, the regulatory system is quite literally [democracy in action](#), as it invites and empowers members of the public to work with their government to implement policies to keep our drinking water free of contaminants, ensure that the food on store shelves is safe to eat, prevent crooked banks from cheating customers, and much, much more. In fact, one of the defining attributes of the federal regulatory system, as the administrative law expert William Funk has [noted](#), is the myriad opportunities it offers for public participation throughout the policy implementation process, from agenda setting to enforcement.

The best known of these opportunities is the [notice-and-comment process](#) under the [Administrative Procedure Act](#), which governs federal rule making. Other legally established avenues of civic engagement include [petitions to initiate rule makings](#), membership on [advisory committees](#), and [“citizen suits”](#) to enforce violations of rules.

Many agencies [go beyond](#) these legally required participatory opportunities in order to obtain public input to inform their actions, using such discretionary tools as [requests for information](#), [focus groups](#), and [public hearings](#).

Our regulatory system's broad variety of participatory opportunities helps each of us find our own way to civic engagement. We can focus our energies on particular policy issues that we might find particularly compelling, such as climate change, student debt justice, or fair housing. And the manner in which we participate can vary according to our own skills, talents, and interests. We can, for instance, participate as a [community organizer](#) or a [citizen scientist](#), or simply by [telling stories](#) about our lived experiences.

The regulatory system, of course, has yet to live up to its democratic potential, and its public participation mechanisms do not adequately ensure that everybody's voice is heard, particularly people in structurally marginalized communities. Corporate special interests overwhelmingly dominate the most [significant avenues](#) for public input, while working families and marginalized communities face [significant barriers](#) to participation.

More fundamentally, though, existing procedures are not designed to meet the public where it is at. By and large, agencies operate as [passive receptacles](#) of public input, a posture that effectively excludes many of those most directly impacted by regulatory actions.

The [Stop Corporate Capture Act](#), sponsored by Washington Representative Pramila Jayapal, the current chair of the Congressional Progressive Caucus, would address some of these problems. If passed, it would provide the public with new legal tools to hold agencies more accountable when they fail to issue new safeguards authorized by law. It would also create an Office of the Public Advocate, which would help people participate in the rule-making process.

The regulatory system provides a crucial platform for Americans to collaborate in our ongoing project of self-government. If conservatives are so concerned with democratizing our regulatory system, then they should support the Stop Corporate Capture Act and take other steps to strengthen our regulatory system, not weaken it.