Center for Science and Democracy at the Union of Concerned Scientists

FACT SHEET

ROADMAP FOR SCIENCE IN DECISIONMAKING

Public Participation in Rulemaking at Federal Agencies

Recommendations for 2021 and Beyond

HIGHLIGHTS

Public participation is a cornerstone of good government; it ensures that communities can share their concerns and priorities with decisionmakers, increases civic participation, and improves the outcomes of rulemaking. The Union of Concerned Scientists has compiled actions that federal agencies should take to promote public participation in decisionmaking, including:

- ***Involving communities in decisionmaking earlier and more effectively, especially marginalized communities and those most likely to be affected by new or revised rules.***
- ***Promoting efforts to increase transparency in rulemaking.***
- ***Ensuring that all proposed rules, as well as background information and instructions on commenting, are easily accessible from agency websites and presented in clear, plain language.***

At its core, democracy is a system of government empowered by and beholden to its people. This vision of self-governance, championed by the nation's founders, requires accountability, equity, and public participation. Whether by individuals or by public interest groups representing common needs, public participation can cultivate community understanding of and support for policy decisions, as well as help ensure that research and decisionmaking neither alienate communities nor ignore public priorities (Woolf et al. 2016).

Public participation can take many forms. Agencies can inform and learn from the public online or via virtual or in-person meetings, hearings, and town halls. At the same time, they must uphold a variety of legal mandates to promote participation. For example, federal law requires government agencies to publicize proposed rules, allow time for public comment, and respond to the substance of those comments (US Congress 1946).

Yet there are ongoing threats to public participation in government, particularly rulemaking. Problematically, agencies tend to solidify the content of rules before comment periods—before proposed rules are "publicly observable" (Potter 2017). Most of the work, then, occurs in the "black box" of setting rulemaking agendas and developing rules (Sant'Ambrogio and Staszewski 2018). This is troubling: because agencies have discretion over who they listen to, interest groups often wield great influence over rulemaking before the public is even aware rules

Christos Bachanakis/Creative Commons (Flickr)

A two-way dialogue between the government and its constituents not only helps decisionmakers understand the needs and priorities of the communities they serve, but also ensures that policies and programs are designed to best address those needs. The federal government should provide many opportunities for public input on the policies that will affect them.

are under consideration (Steinzor, Patoka, and Goodwin 2011). For example:

- In his first two months as Acting Environmental Protection Agency (EPA) Administrator, Andrew Wheeler, a former lobbyist for the fossil fuel industry, held almost 20 times as many meetings with industry representatives as with conservationists (Valdmanis 2019).
- In his first five months in office, Deputy Secretary of the Interior David Bernhardt, formerly an oil and gas lobbyist, met with an executive from an oil and gas trade association affiliated with a client he was recused from dealing with (Beitsch 2019). Between February 2017 and October 2018, top Department of the Interior political appointees met with more than 70 lobbyists representing companies from which Bernhardt was recused (Coleman 2019).

The Trump administration, like its predecessors, rarely takes advantage of opportunities to make public input more accessible. For example, an agency can issue an Advance Notice of Proposed Rulemaking (ANPRM), which can give the rulemaking process more time for public input and invite earlier, pre-rulemaking public input. However, agencies issue ANPRMs for less than 5 percent of rules (Balla 2019).

The Office of Information and Regulatory Affairs (OIRA), which reviews agency regulations at various stages in the rulemaking process, ostensibly provides another opportunity for public input. OIRA meets with anyone who seeks to discuss a rule under review. Yet inequitable practice has accompanied this equitable-sounding policy. Agencies rarely publicize meeting opportunities and timelines widely, and industry takes advantage of the policy by an overwhelming margin, meeting with OIRA five times as often as do public interest groups (Steinzor, Patoka, and Goodwin 2011). These meetings, which profoundly affect policy, are closed to the public and often occur before the release of proposals for comment (Potter 2017; Steinzor, Patoka, and Goodwin 2011).

Not all relevant or affected parties can, or do, submit comments on proposed rules. Opportunities for comment are rarely publicized to affected communities, and they are usually written in technical language, intended for highly specialized audiences. This helps explain why industry commenters shape final rules to a greater extent than do other commenters. Unlike most of the public, industry interests often employ in-house technical experts, attorneys, and lobbyists to help make their case in public comments (Yackee and Yackee 2006). This further alienates the public, whose expertise, instead of being technical, often come from lived experiences—experiences that may not readily translate into the technocratic language of the regulatory process (Goodwin 2019a).

These trends perpetuate existing inequities, especially for people at greater risk of adverse outcomes linked to regulatory decisionmaking. For example, lax regulation of air pollution disproportionately affects communities of color, low-income communities, and Indigenous communities—those who are more likely to live near highways and industrial facilities and who endure higher rates of asthma and certain cancers as a result (Desikan et al. 2019).

Some agencies have also restricted the public comment period. For example, in October 2018, the Bureau of Land Management halved, from 30 days to 15 days, the comment period for a series of oil and gas leases across Utah (Solomon 2018). And despite a 1993 executive order advising agencies to give the public "no less than 60 days" to comment on a proposed rule (and significantly longer for complex rules), the EPA settled on a 30-day comment period for its controversial, far-reaching, deceptively titled proposed rule "Strengthening Transparency in Regulatory Science"—without public hearings, and during a pandemic (Rosenberg and Reed 2020). (After a public outcry, EPA extended the comment period by 30 days.)

Moreover, existing infrastructure for online comment can be difficult for the public to use. For example, the organization of regulations.gov is inconsistent. Document type categories on the website vary between agencies, making it difficult for users to search effectively. Other advanced search filters, such as "By Agency," are often similarly unhelpful (Rubin 2018). Agencies also sometimes create multiple dockets for the same proposed rule, each with different information, which can prevent users from accessing up-to-date information. In other cases, agencies may fail to upload crucial context for a rule, such as background research or underlying data (Coglianese and Rubin 2019). There is little consensus and research on the best ways to evaluate large quantities of diverse public comments, despite the growth of online processes for writing rules—"e-rulemaking"—since the early 2000s (Massaro 2018). And perhaps most prohibitively, not everyone who may be affected by e-rulemaking can access it—for example, low-income households are far less likely to have reliable Internet access (Anderson and Kumar 2019).

Opportunities for comment on proposed rules are rarely publicized to the communities most affected by the rules.

Recommendations

Agencies should involve communities in decisionmaking earlier and more effectively, especially marginalized communities and those most likely to be affected by new or revised rules.

- In July 2020, the Trump administration proposed revisions to the National Environmental Policy Act (NEPA), a bedrock law that requires agencies to inform and engage with the public on federal infrastructure projects. These revisions would disempower communities, obscure decisionmaking from the public, and potentially endanger public health (Earthjustice 2020). These proposed revisions should be rescinded. Agencies should uphold NEPA as it stands—abiding by NEPA's existing project categories, permitting environmental studies to exceed two years if necessary, and considering a project's cumulative impacts, including on the climate.
- Agencies can further uphold NEPA by improving the Environmental Impact Statement (EIS) process. Agencies typically appoint scientific and technical experts to manage the EIS process for EIS-applicable rules. (These experts are called EIS "preparers.") However, the process often marginalizes at-risk populations—such as communities of color, Indigenous people, and low-income groups—even though these are more likely to be affected by the environmental inequities perpetuated by some regulatory decisionmaking (Morrell 2013; Desikan et al. 2019). Agencies should work to improve processes for selecting EIS preparers by doing the following:
  - Agencies should make public each rule's EIS process, including which agency officials or bodies are selecting EIS preparers and the criteria for making those selections.
  - Agencies should ensure that social scientists are represented among academic experts on EIS teams. EIS teams, usually composed of technical experts, often exclude academic social scientists (Morrell 2013).
  - Agencies should ensure that, when feasible and appropriate, EIS teams should include at least one nontechnical expert—such as a community member—with knowledge about a proposed rule, its implications for communities, or public opinions and concerns. Even the addition of one nontechnical expert to a committee can promote equitable, effective decisionmaking (Morrell 2013).
- Agencies should ensure that the public can comment early in the rulemaking process, before proceeding with regulatory proposals, by publishing a Request for Information (RFI) or ANPRM in the *Federal Register* when appropriate. This can promote a deliberative model of public engagement, which encourages two-way dialogue between agencies and the public, rather than one-way, with agencies merely receiving public input that they may or may not use (Morrell 2013).
- To address the dearth of research on effective strategies to engage the public during rulemaking—particularly strategies relevant to specific communities that are most affected by proposed rules but, in many cases, least able to give input—agencies should collaborate with the General Services Administration (GSA), Office of Science and Technology Policy (OSTP), Office of Management and Budget (OMB), and United States Digital Service (USDS), as well as with independent research bodies, to investigate such strategies and deploy those shown to be most effective. This research must include newer technological avenues for public communication, including social media, and it must be sensitive to the preferences and needs of specific communities (Portman 2009). To keep agencies accountable and facilitate collaboration, the OSTP, the GSA, and the USDS should co-lead a working group on targeted community engagement, with representatives from all rulemaking agencies.
- To encourage participation from parties affected by rulemaking proposals but unlikely or unable to comment (due, for example, to language barriers or Internet inaccessibility), agencies should plan and execute proactive, targeted outreach efforts. Agencies should amend existing policies on public participation to require efforts that identify and engage communities and deliberately address barriers to participation, doing this before rules are solidified. These efforts may require the creation of new entities—for example, task forces that engage directly with community leaders to better understand local impacts or trusted intermediaries who represent local needs and can build trust and communication between agencies and communities (Goodwin 2019b). Agencies should work with the GSA to audit and improve existing systems of outreach.
- Agencies should hold informational webinars, public information meetings, and town hall–style sessions outside regular working hours, especially for rules that have the potential to significantly affect communities of concern. They should plan these outreach efforts

carefully and tailor them to the circumstances of each community. Agencies should include records of these efforts—including meeting transcripts, scheduled events, and agency deliberations on outreach planning—in the regulatory docket for any proposed rules. If agencies do not provide these records, they should justify in writing why they choose not to do so or why the records do not apply.

- Agencies should investigate strategies for evaluating and responding to public comments to ensure that they hear stakeholder concerns equitably and efficiently.

Agencies should promote efforts to increase transparency in rulemaking.

- Federal agencies should require that, during the notice-and-comment phase of rulemaking, public commenters who include scientific or technical research disclose their funding sources and sponsoring organizations, as the Occupational Safety and Health Administration does (*Federal Register* 2016). The GSA can play a key role by adding to its online portal for submitting public comments an entry area for disclosing financial arrangements, sponsorships, and peer review status. If a commenter does not disclose this information, that omission should be clearly indicated.
- Agencies should preemptively publish records of all research, sources, and correspondences—including meetings and phone calls—used to inform the rule-drafting phase. These records should be publicly available in the rulemaking docket within a reasonable timeframe after the research, correspondences, or other source retrieval occurred, and before publication of the rule proposal.
- Deliberative-process protections, which are discretionary exemptions created by the Freedom of Information Act, allow agencies to withhold information from the public and may be warranted in many cases—for example, to protect confidential research data. However, agencies have abused this exemption to improperly withhold information crucial to ensuring accountability, such as research and communications informing regulatory decisionmaking (Wagner 2013). Hence, agencies should, when feasible and appropriate, adhere to a presumption of disclosure for records used to inform rulemaking.
- Agencies should ensure that redlined versions of rules, which document edits and changes that OIRA makes during the rulemaking process, are accessible to the public when a rule is published on regulations.gov, as required by Executive Order 12866, Section 6(a)(3)(E)(iii). Agencies should include clear, simple explanations of and justifications for every major change proposed by OIRA and its parent body, OMB; these should be easily retrievable (e.g., in memos distinct and separate from redlined documents).

Agencies should enhance digital accessibility in the rulemaking process.

- Agencies should collaborate with independent bodies, such as the Government Accountability Office, to conduct extensive audits of the use and misuse of e-rulemaking and other venues of public outreach regarding e-rulemaking, including social media. This should include deliberately soliciting feedback from users, including individuals from communities of color and individuals whose first language is not English.
- Agencies should ensure that the following are available in clear, plain language: proposed rules in all stages of the rulemaking process; instructions and explanations of the public's various venues of participation; and suggestions for commenters to effectively share experiences, offer value statements, and learn more about an issue (Sant'Ambrogio and Staszewski 2018). To complement efforts to promote plain-language rules, agencies should provide easy-to-access definitions, explanations, and context for complex rules.
- The homepage of each agency website should provide a one-stop point of access for all proposed rules open for comment, including links to other important websites such as the *Federal Register* and regulations.gov (Coglianese 2011).
- The public is not always equipped to track, understand, and respond to rulemaking, which is often highly technical and difficult to access. Public interest groups thus play a crucial intermediary role in informing the public about relevant developments. However, inconsistencies in and difficulty of using the *Federal Register* and regulations.gov impede such efforts. They make it difficult to share opportunities for comment, refer the public to specific dockets, and coordinate related advocacy efforts. To help remedy this:
  - Processes and requirements for utilizing regulations.gov must be standardized across all agencies, while accommodating agencies' varying needs. Agencies should collaborate with the GSA, OSTP, OMB, USDS, and independent research bodies to standardize processes and requirements for utilizing the Federal Docket Management System, including file classification and terms used to identify stages in the rulemaking process.

- Regulations.gov should not enable CAPTCHA, a type of computer program that protects against bot spam by distinguishing humans from computer or machine input, on their forms until a comment application programming interface (API) is available to approved public interest groups and advocacy vendors. Because regulations.gov lacks such an API to post comments, these groups and vendors struggle to promote public access to the site—a challenge that will worsen if CAPTCHA is enabled without a comment API.

Conclusion

Public participation in and access to government rulemaking have significant, inherent value. Access democratizes the rulemaking process, consolidates knowledge that is dispersed across society (and that regulators do not always have access to), increases civic participation, and improves the outcomes of rulemaking (Sunstein 2014; Moxley 2016). More broadly, transparency is a cornerstone of good government. Transparency can deter abuses, and when it fails to do so, it can empower the public to recognize and root out those abuses (Bharara et al. 2019).

Given the value of public involvement in rulemaking, the importance of transparency around science-based regulatory decisions, and current challenges facing public participation, access must become more equitable and productive. In 2021 and beyond, it is up to federal agencies to make this vision a reality.

Taryn MacKinney *is an investigative researcher in the Center for Science and Democracy at UCS.* ***Genna Reed*** *is a lead science and policy analyst in the Center.* ***Jacob Carter*** *is a scientist in the Center.* ***Gretchen Goldman*** *is the research director of the Center.*

REFERENCES

Anderson, Monica, and Madhumitha Kumar. 2019. "Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption." Pew Research Center, May 7. https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption

Balla, Juliana. 2019. "Early but Not Often: A Look into the Use of ANPRMs in Rulemaking." Regulatory Studies Center at George Washington University, May 3. https://regulatorystudies.columbian.gwu.edu/early-not-often-look-use-anprms-rulemaking

Beitsch, Rebecca. 2019. "GOP Oversight Report Says Interior Head Met with Group Tied to Former Clients." *The Hill*, August 22. https://thehill.com/policy/energy-environment/458474-republican-oversight-report-shows-interior-head-met-with-groups

Bharara, Preet, Christine Todd Whitman, Mike Castle, Christopher Edley Jr., Chuck Hagel, David Iglesias, Amy Comstock Rick, and Donald B. Verrilli Jr. 2019. *Proposals for Reform, Volume II: National Task Force on Rule of Law and Democracy.* New York, NY: Brennan Center for Justice. https://www.brennancenter.org/our-work/policy-solutions/proposals-reform-volume-ii-national-task-force-rule-law-democracy

Coglianese, Cary. 2011. "Federal Agency Use of Electronic Media in Rulemaking Process." Public Law Research Paper No. 11-32. Philadelphia: University of Pennsylvania Law School. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911546

Coglianese, Cary, and Todd Rubin. 2019. "Improving Regulations.gov." *The Regulatory Review*, May 28. https://www.theregreview.org/2019/05/28/coglianese-rubin-improving-regulations-gov

Coleman, Jesse. 2019. "David Bernhardt's Ex-Lobbying Clients Met 70 Times with Interior Department Appointees." Documented, March 27. https://documented.net/2019/03/david-bernhardts-ex-lobbying-clients-met-70-times-with-interior-department-appointees/

Desikan, Anita, Jacob Carter, Shea Kinser, and Gretchen Goldman. 2019. *Abandoned Science, Broken Promises: How the Trump Administration's Neglect of Science Is Leaving Marginalized Communities Further Behind.* Cambridge, MA: Union of Concerned Scientists. https://www.ucsusa.org/sites/default/files/2019-10/abandoned-science-broken-promises-web-final.pdf

Earthjustice. 2020. "Nationwide coalition sues to defend the people's environmental law." Earthjustice Press Room, July 29. https://earthjustice.org/news/press/2020/nationwide-coalition-sues-to-defend-the-peoples-environmental-law

Federal Register. 2016. "Occupational Exposure to Respirable Crystalline Silica, Final Rule." Occupational Safety and Health Administration. 81 (58). March 25. https://www.govinfo.gov/content/pkg/FR-2016-03-25/pdf/2016-04800.pdf

Goodwin, James. 2019a. "Can Hip Hop Save Rulemaking?" *The Regulatory Review,* August 5. https://www.theregreview.org/2019/08/05/goodwin-can-hip-hop-save-rulemaking

———. 2019b. *Regulation as Social Justice: A Crowdsourced Blueprint for Building a Progressive Regulatory System*. Washington, DC: Center for Progressive Reform. September. http://progressivereform.org/our-work/regulatory-policy/regulation-social-justice

Massaro, Frank. 2018. "Public Participation in Rulemaking in the Age of Mass Comments." Washington, DC: Administrative Conference of the United States. https://www.acus.gov/newsroom/administrative-fix-blog/public-participation-rulemaking-age-mass-comments

Morrell, Erica. 2013. "Public Comment Periods and Federal Environmental Impact Statements: Potentials and Pitfalls from the American Experience." *Michigan Journal of Sustainability* 1. http://dx.doi.org/10.3998/mjs.12333712.0001.008

Moxley, Lauren. 2016. "E-Rulemaking and Democracy." *Administrative Law Review* 68 (4): 661–699. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2902892

Portman, Michelle. 2009. "Involving the Public in the Impact Assessment of Offshore Renewable Energy Facilities." *Marine Policy* 33 (2): 332–338. https://doi.org/10.1016/j.marpol.2008.07.014

Potter, Rachel Augustine. 2017. "Slow-Rolling, Fast-Tracking, and the Pace of Bureaucratic Decisions in Rulemaking." *Journal of Politics* 79 (3): 841–55. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2759117

Rosenberg, Andrew, and Genna Reed. 2020. "Re: Docket No. EPA-HQ-OA-2018-0259: Strengthening Transparency in Regulatory Science, Supplemental Rule." Union of Concerned Scientists. May 15. https://ucs-documents.s3.amazonaws.com/science-and-democracy/ucs-csd-strengthening-transparency-in-regulatory-science-suppl-comment.pdf

Rubin, Todd. 2018. *Regulations.gov and the Federal Docket Management System*. Washington, DC: Administrative Conference of the United States. https://www.acus.gov/sites/default/files/documents/Regulations.gov%20Report%20FINAL%2012%203%202018.pdf

Sant'Ambrogio, Michael, and Glen Staszewski. 2018. *Public Engagement with Agency Rulemaking*. Final report, November 19. Washington, DC: Administrative Conference of the United States. https://www.acus.gov/sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf

Solomon, Christopher. 2018. "Zinke and Trump Are Ignoring the Public." Outside Online, October 24. https://www.outsideonline.com/2356036/public-comment-erosion

Steinzor, Rena, Michael Patoka, and James Goodwin. 2011. *Behind Closed Doors at the White House*. Washington, DC: Center for Progressive Reform, November. https://cpr-assets.s3.amazonaws.com/documents/OIRA_Meetings_1111.pdf

Sunstein, Cass. 2014. "Democratizing Regulation, Digitally." *Democracy: A Journal of Ideas* 34. https://democracyjournal.org/magazine/34/democratizing-regulation-digitally

US Congress. 1946. FOIA Administrative Procedure Act. Public Law No: 404, 79th Congress. https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/01/act-pl79-404.pdf

Valdmanis, Richard. 2019. "Like Predecessor, Trump's New EPA Pick Favors Meetings with Industry." Reuters, February 1, 2019. https://www.reuters.com/article/us-usa-epa-wheeler-meetings/like-predecessor-trumps-newepa-pick-packs-schedule-with-industry-meetings-idUSKCN1PQ5SR

Wagner, Wendy. 2013. *Science in Regulation: A Study of Agency Decisionmaking Approaches*. Prepared for the consideration of the Administrative Conference of the United States. https://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation_Final%20Report_2_18_13_0.pdf

Woolf, Steven H., Emily Zimmerman, Amber Haley, and Alex H. Krist. 2016. "Authentic Engagement of Patients and Communities Can Transform Research, Practice, and Policy." *Health Affairs* 35 (4): 590–594. https://doi.org/10.1377/hlthaff.2015.1512

Yackee, Jason Webb, and Susan Webb Yackee. 2006. "A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy." *Journal of Politics* 68 (1): 128–139. doi:10.1111/j.1468-2508.2006.00375.x

Union of Concerned Scientists

FIND THIS DOCUMENT ONLINE:
www.ucsusa.org/resources/roadmap-science-decisionmaking

The Union of Concerned Scientists puts rigorous, independent science to work to solve our planet's most pressing problems. Joining with people across the country, we combine technical analysis and effective advocacy to create innovative, practical solutions for a healthy, safe, and sustainable future.

NATIONAL HEADQUARTERS
Two Brattle Square
Cambridge, MA 02138-3780
Phone: (617) 547-5552
Fax: (617) 864-9405

WASHINGTON, DC, OFFICE
1825 K St. NW, Suite 800
Washington, DC 20006-1232
Phone: (202) 223-6133
Fax: (202) 223-6162

WEST COAST OFFICE
500 12th St., Suite 340
Oakland, CA 94607-4087
Phone: (510) 843-1872
Fax: (510) 451-3785

MIDWEST OFFICE
One N. LaSalle St., Suite 1904
Chicago, IL 60602-4064
Phone: (312) 578-1750
Fax: (312) 578-1751

WEB: www.ucsusa.org