

BEYOND NOTICE-AND-COMMENT: BRIDGING THE PARTICIPATION GAP FOR AN EQUITY-FOCUSED REGULATORY SYSTEM

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INTRODUCTION

Over the last four years, the Biden Administration has pursued a coordinated series of policy reforms aimed at democratizing the rulemaking process.¹ These efforts can be seen as building on the strong commitment to public participation that is embedded in federal administrative law. This commitment is perhaps best exemplified by the Administrative Procedure Act's (APA's) general requirement that agencies invite public input on their regulatory proposals and then actually incorporate that feedback into the final rule.² To give it teeth, this requirement is superintended by the courts as part of the general pre-enforcement review process.³

Significantly, however, one of the unstated premises behind the Biden Administration's reforms is that this notice-and-comment process, as it is known, does not work well for individuals—either working on their own or through local community-based organizations. Their experience can be contrasted with business lobby groups, national public interest advocacy organizations, and other sophisticated “repeat players” in the notice-and-comment rulemaking process.⁴

Relying on a series of quantitative analysis studies, this Article sets out to empirically test the intuition behind this premise. In previous research, we examined the public comments for five recent energy and environmental proposals to determine whether there was any clear pattern in the volume

1. See discussion *infra* Part II.A.

2. Administrative Procedure Act, 5 U.S.C. § 553(c).

3. 5 U.S.C. § 706(2)(D).

4. See Memorandum from Richard L. Revesz, Administrator, Off. Info. & Reg. Affairs, to Heads of Exec. Dep'ts. & Agencies, Broadening Public Participation and Community Engagement in the Regulatory Process 9–19 (July 19, 2023) [hereinafter OMB Memorandum], <https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/07/Broadening-Public-Participation-and-Community-Engagement-in-the-Regulatory-Process.pdf> [<https://perma.cc/56NN-SVH7>].

and general nature of the comments sent by individuals as opposed to those from organized, well-resourced interest groups.⁵ This research found a huge gap between these two general categories of participants, with individuals tending to submit mass comments containing little contextualized or novel information, whereas organized interests tended to submit massive comments that appear to be aimed at “packing the record” for later litigation opportunities.⁶ These findings appear to be consistent with other research, which has documented extensive influence by these same kinds of organized commenters during the rulemaking process, both before and during the formal notice-and-comment stage.⁷

By taking a deeper look into notice-and-comment participation, this Article builds on our previous research that analyzes the hypothesis that the notice-and-comment process does not serve individuals well as a mechanism for public engagement in the rulemaking process. Here, we look beyond simple quantitative measures to systematically examine the actual substance of the public comments. We do this by using text mining and keyword extraction to discern patterns in the types of policy or legal arguments that participants were making to influence the outcomes of federal rulemaking. Through this deeper dive, we sought to better characterize the different ways in which these categories of participants engage in this process and to better understand what drives these differences so that we can identify more effective policy solutions.

This Article proceeds as follows. Part I provides background on the APA and the obligations agencies must fulfill when engaging in rulemaking, the notice-and-comment period as an integral part of the rulemaking process, and how participation occurs (or does not) during this stage. Part II provides an overview of the main changes in rulemaking that took place during the Biden Administration, focusing on policies aimed at democratizing the rulemaking process, as well as describing advances made in the climate and energy space, focusing on the subset of rules that are at the core of our analysis.

5. See FEDERICO HOLM & JAMES GOODWIN, BRIDGING THE PARTICIPATION GAP: ASSESSING THE “TWO-TIERED” NATURE OF STAKEHOLDER ENGAGEMENT IN THE FEDERAL REGULATORY SYSTEM 3 (Aug. 2023), <https://cpr-assets.s3.amazonaws.com/wp/uploads/2023/08/Bridging-the-Participation-Gap-CPR-Analysis-2023.pdf> [<https://perma.cc/X7Y8-K54D>].

6. *Id.* at 1 (analyzing public participation disparities in rulemaking).

7. Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 252–56 (1998); Amy McKay & Susan Webb Yackee, *Interest Group Competition on Federal Agency Rules*, 35 AM. POL. RES. 336, 343, 350 (2007); Keith Naughton, Celeste Schmid, Susan Webb Yackee & Xueyong Zhan, *Understanding Commenter Influence During Agency Rule Development*, 28 J. POL'Y ANALYSIS & MGMT. 258, 261–62 (2009).

Part III discusses our analysis. It begins by reviewing previous research on how different kinds of stakeholders participate in the notice-and-comment rulemaking process, including our own. It then explains our research methodology, including the universe of rulemakings we examined. Next, it summarizes our major findings and interprets their significance in light of the U.S. Supreme Court's recent decisions related to agency rulemaking.

Drawing on our new findings, Part IV examines different reform options for improving public engagement, including technical assistance, institutionalizing communitarian discourse, and going beyond notice-and-comment as the main participation tool. We conclude by framing this issue in light of a new presidential administration, speculating how this critical issue will be affected by an emerging set of policy priorities.

I. BACKGROUND

A. *Administrative Procedure Act*

The APA establishes the general legal framework governing the federal regulatory system, including the basic rules for how agencies develop regulations.⁸ The APA governs most regulatory rulemaking procedures in the executive and independent agencies.⁹ The informal rulemaking process it establishes is distinguished by its notice-and-comment requirement, which directs agencies to seek out the public's input on their proposed rules and incorporate the feedback they receive into the final rule.¹⁰ Significantly, this notice-and-comment process is one of the few rulemaking requirements that seemingly enjoys broad support from stakeholders across the political spectrum.¹¹

B. *Notice-and-Comment and Problems of Participation in Agency Rulemaking*

Despite this widespread support, notice-and-comment has become subject to increasing criticism among regulatory experts in recent years.¹²

8. Administrative Procedure Act, 5 U.S.C. §§ 551–559.

9. TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 1 (2017).

10. 5 U.S.C. § 553.

11. See, e.g., Thomas A. Berry & Gregory Mill, *Courts Should Protect the Right to Participate in Agency Rulemaking*, CATO INST.: CATO AT LIBERTY (Mar. 31, 2023), <https://www.cato.org/blog/courts-should-protect-right-citizens-participate-agency-rule-making> [<https://perma.cc/A3TF-EGQL>]; Matthew Cortland & Karen Tani, *Reclaiming Notice and Comment*, LPE PROJECT BLOG (July 31, 2019), <https://lpeproject.org/blog/reclaiming-notice-and-comment> [<https://perma.cc/CRR3-TSCD>].

12. See, e.g., MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI, ADMIN. CONF. OF THE U.S., PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING 2 (2018), <https://www.acus.gov/>

Paramount among their concerns is its evident failure “to adequately engage many members of the public with a stake in a specific rulemaking—particularly individuals from structurally marginalized communities.”¹³ At the same time, policy researchers have demonstrated how notice-and-comment procedures tend to be dominated by more sophisticated actors who can draw on their superior resources and expertise to dissect and respond to sometimes complex and technical documents with the goal of influencing substantive policy outcomes to align with their narrow interests.¹⁴ This body of research also offers insights into how these more sophisticated stakeholders leverage their superior position to shape the design and implementation of policy.¹⁵

This large gap in engagement that separates sophisticated stakeholders from lay members of the public can be partially explained by the wide variety of material obstacles that ordinary individuals face, such as a failure by agencies to provide adequate notice of commenting opportunities (ordinary Americans do not read the *Federal Register*, after all) or the presence of language barriers for individuals who do not speak English as their first language.¹⁶ But, even if these obstacles could somehow be addressed, one crucial barrier would still remain: notice-and-comment is often a highly technocratic undertaking, and, as such, anyone who might lack the rarefied

sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf [https://perma.cc/639Y-ARWE] (noting that sophisticated stakeholders tend to flood the notice-and-comment process while individual members of the public forego involvement in the process).

13. JAMES GOODWIN & LEW BLANK, A BLUEPRINT FOR “REGULATORY DEMOCRACY”: EMPOWERING THE PUBLIC IN THE DESIGN AND IMPLEMENTATION OF NEW SAFEGUARDS 2 (2022), <https://cpr-assets.s3.amazonaws.com/documents/stop-corp-capture-act-polling-memo-cpr-dfp-final.pdf> [https://perma.cc/X5RD-EFJK].

14. Compare Golden, *supra* note 7, at 252–55 (analyzing which entities engage with the notice-and-comment process and noting that sophisticated business entities engage more vigorously than individual members of the public), with McKay & Yackee, *supra* note 7, at 349–51 (discussing how interest groups engage with the notice-and-comment process to influence rulemaking and policy outcomes).

15. See generally FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS (1993) (analyzing how the political system responds to the ebbs and flows of stakeholder influence); JEFFREY M. BERRY, THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS 2–7 (1999) (discussing how stakeholder advocacy influences and shapes congressional agendas); Daniel Carpenter, Kevin Esterling & David Lazer, *The Strength of Strong Ties: A Model of Contact-Making in Policy Networks with Evidence from U.S. Health Politics*, 15 RATIONALITY & SOC’Y 411 (2003) (analyzing how interest groups interact and influence the legislative process); Matt Grossmann, *Interest Group Influence on U.S. Policy Change: An Assessment Based on Policy History*, 1 INT. GRPS. & ADVOC. 171 (2012) (discussing how interest groups’ impacts on policy outcomes can best be measured and assessed).

16. OMB Memorandum, *supra* note 4, at 102.

expertise necessary for meaningful participation risks being excluded.¹⁷ To understand why this can happen, it is helpful to consider the work of political scientists Bruce Williams and Albert Matheny. In their 1995 book, Williams and Matheny identify three forms of discourse that characterize deliberations during the rulemaking process.¹⁸ The first is what they refer to as “managerial” discourse, which is exemplified by arguments that rely on technocratic expertise, often expressed through scientific or other technical research.¹⁹ The second form is “pluralist” discourse, which focuses on the task of balancing the competing interests that might be implicated by a given policy.²⁰ The third form they identify is “communitarian” discourse, which involves arguments grounded in the social, cultural, and historical contexts in which particular communities are situated and is often best expressed through the medium of storytelling.²¹

This tripartite framework reveals an important divergence in how different kinds of stakeholders participate in rulemaking. Of these three forms, sophisticated stakeholders—including, most notably, regulated industry and large public interest organizations—tend to be the most adept at engaging in managerial and pluralist discourse.²² In contrast, lay members of the public, when they are able to participate in notice-and-comment at all, are generally constrained to expressing their views through communitarian discourse.²³

What makes this divergence important is that prevailing administrative law doctrine assigns particular legal significance to the forms of discourse uniquely used by sophisticated stakeholders, especially the managerial form.²⁴ Specifically, when final rules are challenged in court, reviewing judges will generally only hold agencies accountable for failures to respond to arguments that reflect these forms of discourse.²⁵ In this way, courts continually reinforce the incentives agency decisionmakers face to myopically focus on comments submitted

17. See Cynthia R. Farina, Dmitry Epstein, Josiah Heidt, Mary J. Newhard & CeRI, *Knowledge in the People: Rethinking “Value” in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1186 (2012).

18. BRUCE A. WILLIAMS & ALBERT R. MATHENY, *DEMOCRACY, DIALOGUE, AND ENVIRONMENTAL DISPUTES: THE CONTESTED LANGUAGES OF SOCIAL REGULATION* (1995).

19. *Id.* at 11–19.

20. *Id.* at 20–24.

21. *Id.* at 24–34.

22. SANT’AMBROGIO & STASZEWSKI, *supra* note 12, at 104.

23. *Id.* at 2 n.8, 21; Elizabeth C. Fisher & Sidney A. Shapiro, *Storytelling, Rulemaking, and the Expertise of Administrative Agencies* (Feb. 25, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5153832 [<https://perma.cc/5UNN-N4Y9>].

24. See, e.g., *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977).

25. See, e.g., *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (“Normally, an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem . . .”).

by more sophisticated stakeholders. In contrast, they have comparatively little incentive to seek out or seriously consider contextualized information based on communities' lived experiences when crafting regulations.

Consequently, the technocratic nature of notice-and-comment rulemaking provides another critical participatory advantage for sophisticated stakeholders. They have the extensive training and knowledge necessary for submitting comments that will carry the most weight with agencies, or they have the resources to hire individuals with training and knowledge.²⁶ Short of demanding that lay members of the public pursue advanced degrees in engineering or biomedical sciences—a demand that is as unrealistic as it is undesirable—there are no obvious fixes for alleviating the technical advantage that sophisticated stakeholders enjoy in participating effectively in the notice-and-comment process.

II. REGULATORY DEMOCRACY UNDER THE BIDEN ADMINISTRATION

A. Reforms to Democratize the Rulemaking Process

From its first day in office, the Biden Administration began taking a series of coordinated actions to make the federal regulatory system more inclusive of and responsive to the public. President Joe Biden signaled that democratizing the regulatory system would be a top priority for his Administration by issuing a Day One memorandum on “Modernizing Regulatory Review.”²⁷ The memorandum departs from past presidential statements by explicitly recognizing the valuable role the regulatory system can play in protecting the public and promoting a fairer and more just society.²⁸ To this end, it called on the White House Office of Management and Budget (OMB) to ensure affirmative support of robust regulatory action by implementing a number of steps to overhaul the centralized regulatory review process that the White House Office of Information and Regulatory Affairs (OIRA) carries out pursuant to Executive Order 12,866.²⁹ Among these actions, it called on OMB to make the process more inclusive of the public.³⁰

26. See WILLIAMS & MATHENY, *supra* note 18, at 106 (“Politically neutral administrators trained in the supposed science of politics would be able to carry out policies in the most efficient manner possible and serve the public interest to a much greater extent . . .”).

27. Presidential Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7,223 (Jan. 26, 2021). The Trump Administration revoked the Executive Order in January 2025. Initial Rescissions of Harmful Executive Orders and Actions, Exec. Order No. 14,148, 90 Fed. Reg. 8,237 (Jan. 28, 2025).

28. *Id.*

29. *Id.*; Regulatory Planning and Review, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

30. Presidential Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. at

President Biden formally implemented the policy recommendations that OMB developed in response to the Day One memorandum through Executive Order 14,094, which he issued in April 2023.³¹ Section 2 of that order focuses on the “affirmative promotion of inclusive regulatory policy and public participation.”³² This section announced as policy that “regulatory actions should be informed by input from interested or affected communities” and that “[o]pportunities for public participation shall be designed to promote equitable and meaningful participation by a range of interested or affected parties, including underserved communities.”³³ To this end, it directed agencies to make it easier for the public to submit petitions for new rulemakings pursuant to the APA’s petition process.³⁴ It also called on agencies to proactively work with relevant stakeholders to inform the development of their semiannual regulatory agendas and plans, as required by Executive Order 12,866 and the Regulatory Flexibility Act.³⁵ The order separately directed OIRA to develop guidance and tools for agencies to modernize the notice-and-comment process to account for technological changes.³⁶ It also called on OIRA to support greater public participation in the meetings that OIRA hosts with stakeholders regarding rules that are undergoing centralized review.³⁷

In the months following the issuance of the order, OIRA sought to implement several of these requirements through guidance to agencies and training for the public.³⁸ Notably, it immediately issued a draft guidance on expanding public participation in OIRA meetings for public input.³⁹ In

7,223–24.

31. Exec. Order No. 14,094, 88 Fed. Reg. 21,879 (Apr. 11, 2023). The Trump Administration revoked the Executive Order in January 2025. 90 Fed. Reg. 8,237.

32. *Id.*

33. *Id.*

34. *See id.*; *see also* Administrative Procedure Act, 5 U.S.C. § 553(3).

35. Exec. Order No. 12,866, 58 Fed. Reg. at 51,738; Exec. Order No. 14,094, 88 Fed. Reg. at 21,879; Regulatory Flexibility Act, 5 U.S.C. § 602 (2018).

36. Exec. Order No. 12,866, 58 Fed. Reg. at 51,737; Exec. Order No. 14,094, 88 Fed. Reg. at 21,880.

37. Exec. Order No. 12,866, 58 Fed. Reg. at 51,735; Exec. Order No. 14,094, 88 Fed. Reg. at 21,879.

38. *See, e.g.*, Sam Berger, *Making Voices Heard in the Regulatory Process*, EXEC. OFF. OF THE PRESIDENT (July 19, 2023), <https://bidenwhitehouse.archives.gov/omb/briefing-room/2023/07/19/making-voices-heard-in-the-regulatory-process> [<https://perma.cc/D7KJ-XHVB>] (explaining the actions that the Biden Administration took in 2023 to increase public participation).

39. OFF. OF INFO. & REG. AFFS., EXEC. OFF. OF THE PRESIDENT, DRAFT GUIDANCE IMPLEMENTING SECTION 2(E) OF THE EXECUTIVE ORDER OF APRIL 6, 2023 (MODERNIZING REGULATORY REVIEW) (2023), <https://bidenwhitehouse.archives.gov/wp-content/uploads/>

December 2023, OIRA issued a final guidance that included a separate document explaining the feedback it received and how the final guidance was revised to account for it.⁴⁰ The agency also hosted a series of training sessions for the public to help them make effective use of OIRA meetings as a tool for public engagement.⁴¹

Beyond the Modernizing Regulatory Review initiative, the Biden Administration took several other actions aimed at expanding public engagement in the regulatory system more generally. For instance, in preparing the Fifth Open Government Action Plan, the Administration selected “Increase Civic Space to Engage the Public” as one of its five main themes.⁴² To advance this theme, the plan identified several steps the Administration would take, including commitments to expand public participation opportunities in such agency actions as rulemaking, scientific research, and procurement.⁴³

Even more significantly, in July 2023, the Biden OIRA issued a comprehensive memorandum to agencies providing guidance on “Broadening Public Participation and Community Engagement in the Regulatory Process.”⁴⁴ This memo helped advance some of the directives contained in the Modernizing Regulatory Review Executive Order, such as the requirement that agencies use the semiannual regulatory agenda as a tool for engaging the public in their ongoing and planned future rulemaking.⁴⁵ To this end, the memo provided agencies with detailed instructions on how to carry out that

2023/04/ModernizingEOSection2eDraftGuidance.pdf [https://perma.cc/R7CW-Y3Z5].

40. OFF. OF INFO. & REG. AFFS., EXEC. OFF. OF THE PRESIDENT, GUIDANCE IMPLEMENTING SECTION 2(E) OF EXECUTIVE ORDER 14094 (MODERNIZING REGULATORY REVIEW) (2023), https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/12/Modernizing-EO-Section-2e-Guidance_FINAL.pdf [https://perma.cc/5FNS-2W2F]; OFF. OF INFO. & REG. AFFS., EXEC. OFF. OF THE PRESIDENT, GUIDANCE IMPLEMENTING SECTION 2(E) OF EXECUTIVE ORDER 14094 (MODERNIZING REGULATORY REVIEW): EXPLANATION AND RESPONSE TO PUBLIC INPUT (2023), https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/12/ERPI-Modernizing-EO-Section-2e-Guidance_FINAL.pdf [https://perma.cc/Y7MR-7HK4].

41. The Biden White House, *E.O. 12866 Meeting Requests: A Video How-To Guide*, YOUTUBE (Jan. 9, 2025), <https://www.youtube.com/watch?v=1zxsAFsgJ3I> [https://perma.cc/P2J2-FHRN]; Notice of Training Sessions: Effective Participation in Executive Order 12866 Meetings with the Office of Information and Regulatory Affairs, 89 Fed. Reg. 51,375 (June 17, 2024).

42. EXEC. OFF. OF THE PRESIDENT, FIFTH U.S. OPEN GOVERNMENT NATIONAL ACTION PLAN 3 (2022), <https://www.gsa.gov/system/files/NAP5-fifth-open-government-national-action-plan.pdf> [https://perma.cc/JBD2-5A3V].

43. *Id.* at 7–9.

44. OMB Memorandum, *supra* note 4, at 102.

45. *Id.* at 10–12.

requirement as part of the development of their future regulatory agendas.⁴⁶ Notably, the memorandum directed agencies to take several steps to increase public engagement earlier in the rulemaking process—before the commencement of the notice-and-comment procedures—recognizing that this stage of the process is when the public is best equipped to have a meaningful impact through their participation.⁴⁷ Accordingly, it called on agencies to review and revise their existing policies on *ex parte* communications so that they permit this kind of early engagement, consistent with applicable law.⁴⁸ The memo also outlined several “leading practices” that agencies can adopt and adapt to accomplish effective early engagement with members of the public, with a particular focus on those who have not traditionally participated in the rulemaking process.⁴⁹ Lastly, the memo offered guidance to agencies on how they can take advantage of flexibility in the Paperwork Reduction Act to accomplish greater public engagement in a timely and efficient manner.⁵⁰

Again, OIRA followed up on this memorandum with training opportunities for the public and an updated report.⁵¹ The August 2024 report illustrates how agencies have implemented the memorandum—offering agencies and the public examples of how to maximize these reforms.⁵² The agency also created video and written training tools for the public on how to effectively participate in the notice-and-comment process.⁵³

46. *Id.*

47. *Id.* at 10.

48. *Id.* at 12–15.

49. *Id.* at 15–19.

50. *Id.* at 19–20.

51. *See generally* OFF. INFO. & REG. AFFS., EXEC. OFF. OF THE PRESIDENT, WITH THE PEOPLE, FOR THE PEOPLE: STRENGTHENING PUBLIC PARTICIPATION IN THE REGULATORY PROCESS 4 (2024), <https://bidenwhitehouse.archives.gov/wp-content/uploads/2024/08/OIRA-2024-Public-Participation-Report.pdf> [<https://perma.cc/GY5B-ZD36>] (demonstrating how agencies have strengthened public participation and community engagement in the regulatory process).

52. *Id.* at 12–22.

53. EXEC. OFF. OF THE PRESIDENT, HOW YOU CAN EFFECTIVELY PARTICIPATE IN THE REGULATORY PROCESS THROUGH PUBLIC COMMENT (Sept. 12, 2024), https://bidenwhitehouse.archives.gov/wp-content/uploads/2024/10/Public-Comment-on-Federal-Regulations_Final.pdf [<https://perma.cc/5VMG-6QEV>]; Notice of Training Sessions: Effective Participation in the Public Comment Process With the Office of Information and Regulatory Affairs, 89 Fed. Reg. 56,777, 56,777–78 (July 10, 2024); Notice of Training Session: Effective Public Participation in the Public Comment Process With the Office of Information and Regulatory Affairs (With Live Translation in Spanish, Mandarin Chinese, and ASL Interpretation), 89 Fed. Reg. 79,648, 79,648 (Sept. 30, 2024).

The Biden OMB also took steps to expand agencies' engagement with the public more broadly beyond the rulemaking process. In October 2024, it sought public feedback on a draft memorandum on "Broadening Public Participation and Community Engagement with the Federal Government."⁵⁴ This document sought to educate agencies about what public and community engagement entails and the value of such engagement for their work.⁵⁵ It also provides them with a general framework for thinking about what makes public engagement successful, as well as some specific strategies for how they might incorporate more engagement opportunities into their existing ways of working, including ways to develop internal agency capacity and how to carry out these actions consistently with the Paperwork Reduction Act.⁵⁶ Last, it gives agencies specific assignments aimed at operationalizing the memo's requirements, including designating internal leaders and producing an initial progress report.⁵⁷

OMB simultaneously elicited public feedback on a draft outline of a "U.S. Federal Public Participation and Community Engagement Toolkit."⁵⁸ This document is designed to provide agencies with a comprehensive set of resources for designing and implementing effective public and community engagement actions.⁵⁹ Similar to the draft memo it accompanies, this toolkit describes the basic theoretical framework underlying effective engagement.⁶⁰

54. Request for Feedback on Draft Materials for Broadening Public Participation and Community Engagement With the Federal Government, 89 Fed. Reg. 92,724, 92,724 (Nov. 22, 2024); OFF. OF MGMT. & BUDGET, EXEC. OFF OF THE PRESIDENT, REQUEST FOR FEEDBACK ON DRAFT MEMORANDUM: BROADENING PUBLIC PARTICIPATION AND COMMUNITY ENGAGEMENT WITH THE FEDERAL GOVERNMENT (2024) [hereinafter OMB DRAFT MEMO], https://assets.performance.gov/files/OMB_ParticipationEngagement_DRAFTMemo_vF.pdf [<https://perma.cc/4U8M-Y7MK>]; Loren DeJonge Schulman, *Broadening Public Participation and Community Engagement with the Federal Government*, PERFORMANCE.GOV (Oct. 29, 2024), <https://bidenadministration.archives.performance.gov/blog/2024-public-participation-federal-government> [<https://perma.cc/8SLD-YCBJ>].

55. Request for Feedback on Draft Materials for Broadening Public Participation and Community Engagement With the Federal Government, 89 Fed. Reg. at 92,724.

56. Schulman, *supra* note 54.

57. See OMB DRAFT MEMO, *supra* note 54.

58. Request for Feedback on Draft Materials for Broadening Public Participation and Community Engagement With the Federal Government, 89 Fed. Reg. at 92,724.

59. *Id.*

60. See OFF OF MGMT. & BUDGET, EXEC. OFF OF THE PRESIDENT, REQUEST FOR FEEDBACK ON DRAFT OUTLINE: A TOOLKIT FOR BROADENING PUBLIC PARTICIPATION AND COMMUNITY ENGAGEMENT WITH THE FEDERAL GOVERNMENT (2024), https://assets.performance.gov/files/OMB_ParticipationEngagement_DRAFTToolkitOutline_vF.pdf [<https://perma.cc/3T2Y-2UPJ>].

It also provides real-world templates, tools, and resources for conducting nearly every element of effective public and community engagement, including design, implementation, assessment, communication, compensation, and building public engagement capacity.⁶¹ The toolkit offers a brief overview of relevant legal considerations that might affect how they design and implement various kinds of engagement strategies.⁶² It is unclear whether the Trump Administration will ultimately finalize either of these efforts during its term, especially in light of its January 2025 revocation of the Biden Executive Order.

During the Biden Administration, individual agencies undertook their own initiatives to strengthen public participation in their rulemaking procedures, as well. In October 2023, the Environmental Protection Agency (EPA) released for public comment a draft update to its 2003 Meaningful Involvement Policy.⁶³ With this document, EPA sought to provide an updated vision for its Meaningful Involvement Policy, including the basic principles it comprises, as well as the broad set of capabilities that the agency needs to develop and refine in order to operationalize the policy effectively.⁶⁴ It outlines the fundamental process the agency will use for identifying the appropriate “level of” public participation for a given policy action.⁶⁵ Once this level has been identified, the policy outlines in detail the Public Participation Model the agency will use for designing and implementing the specific public engagement strategies for that policy action.⁶⁶ The agency finalized the updated policy in August 2024.⁶⁷

Separately, the Biden Administration’s priority of advancing racial and social justice provided yet another platform for promoting reforms aimed at democratizing the rulemaking process. Another important Day One action that President Biden took was the issuance of Executive Order 13,985 on “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.”⁶⁸ This order instructed covered

61. *Id.* at 2–6.

62. *Id.* at 5.

63. U.S. ENV’T PROT. AGENCY, ACHIEVING HEALTH AND ENVIRONMENTAL PROTECTION THROUGH EPA’S MEANINGFUL INVOLVEMENT POLICY: PUBLIC REVIEW DRAFT (2023), https://www.epa.gov/system/files/documents/2023-12/final_meaningful-involvement-policy_eams_11.7.2023_508.pdf [<https://perma.cc/38T4-JLRH>].

64. *Id.* at 2.

65. *Id.* at 10–11.

66. *Id.* at 14.

67. U.S. ENV’T PROT. AGENCY, ACHIEVING HEALTH AND ENVIRONMENTAL PROTECTION THROUGH EPA’S MEANINGFUL ENGAGEMENT POLICY (2024), <https://www.regulations.gov/document/EPA-HQ-OEJECR-2023-0326-0057> [<https://perma.cc/HCS5-7U2U>].

68. Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 25, 2021). The Trump Administration revoked the Executive Order in January 2025. Initial Rescissions of Harmful Executive Orders and Actions, Exec. Order No. 14,148, 90 Fed. Reg. 8,237 (Jan. 28, 2025).

agencies to carry out their missions in ways that affirmatively support underserved communities and advance racial equity, consistent with their legal authority.⁶⁹ Recognizing that meeting these goals “requires a systematic approach to embedding fairness in decision-making processes,” the order thus calls on agencies “to redress inequities in their policies and programs that serve as barriers to equal opportunity.”⁷⁰

To help agency implementation of the order, OMB issued a request for information in May 2021, seeking from the public best practices for federal agencies to prioritize equity and ensure that programs and policies reach underserved communities.⁷¹ Notably, one of the areas specifically raised in the request for information was “specific approaches to stakeholder and community engagement with underserved communities.”⁷²

In implementing these reforms, the Administration practiced what it preached, continually seeking public input and modeling best practices for public engagement. For example, in developing the July 2023 memorandum on “Broadening Public Participation and Community Engagement in the Regulatory Process,” OMB hosted several listening sessions with the public and conducted a round of public comment to inform the memorandum’s content.⁷³ In many cases, such as its final guidance on increasing public participation in OIRA meetings, OMB also released a separate document summarizing public feedback it received on draft actions and explaining the changes that it made to the final action in response.⁷⁴

Finally, it is noteworthy that President Biden appointed individuals to key roles within OIRA who had a long track record of research or advocacy in favor of democratizing the regulatory system. In particular, appointees Sabeel Rahman and Sharon Block served as Associate Administrators in OIRA, demonstrating how personnel was policy for the Administration on this crucial issue.⁷⁵

69. *Id.*

70. *Id.*

71. Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through Government, 86 Fed. Reg. 24,029 (May 5, 2021).

72. *Id.* at 24,032.

73. OFF. INFO. & REGUL. AFFS., EXEC. OFF. OF THE PRESIDENT, BROADENING PUBLIC ENGAGEMENT IN THE FEDERAL REGULATORY PROCESS, <https://bidenwhitehouse.archives.gov/omb/information-regulatory-affairs/broadening-public-engagement-in-the-federal-regulatory-process> [<https://perma.cc/P8AQ-VJ55>] (last visited Apr. 21, 2025).

74. See GUIDANCE IMPLEMENTING SECTION 2(E) OF EXECUTIVE ORDER 14094 (MODERNIZING REGULATORY REVIEW): EXPLANATION AND RESPONSE TO PUBLIC INPUT, *supra* note 40, at 109 (summarizing and explaining public feedback OMB received).

75. See David Meyers, *Biden Taps Second Voting Rights Leader to Join Administration*, FULCRUM (Jan. 27, 2021), <https://thefulcrum.us/demos-k-sabeel-rahman> [<https://perma.cc/7599->

B. *Climate and Energy Rulemaking*

Under the Biden Administration, federal agencies crafted a host of rules targeting electric power and energy efficiency, particulate matter, oil and gas, transportation, and others.⁷⁶ The overview below highlights some of the key actions taken as part of this robust regulatory agenda. Taken together, these actions help to reveal two important aspects of the administrative state, which often go overlooked. The first is the critical role agencies play in our everyday lives, establishing some of the most important building blocks for a well-functioning, safer, and healthier environment. These protections are democracy-enhancing to the extent individuals are better equipped to engage in civic affairs when they are healthier and enjoy some degree of financial security.⁷⁷ The second, which goes hand-in-hand with the first, is the critical need for rulemaking processes to be truly democratic.⁷⁸ This can only be achieved with meaningful public participation that allows for meaningful engagement beyond corporate or organized interests alone. We turn our attention to this issue by highlighting previous research that pondered this important topic and evaluating this aspect across multiple rules during the Biden Administration.

E8V4] (reporting Rahman’s experience in democracy-building work prior to his elevation to the Office of Information and Regulatory Affairs (OIRA)); Courtney Bubl , *The White House’s Regulatory Office is About to Lose Its Interim Director*, GOV’T EXEC. (Jan. 31, 2022), <https://www.govexec.com/management/2022/01/white-houses-regulatory-office-about-lose-its-interim-director/361389> [<https://perma.cc/K7GP-D48X>] (describing Block’s work in OIRA as “steady” while still pushing for “unprecedented” action to strengthen the rule-making process). For more on Rahman’s work on regulatory democracy, see K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2016). For more on Block’s work on regulatory democracy, see *Clean Slate for Worker Power*, HARV. L. SCH.: CTR. LAB. & JUST ECON., <https://clje.law.harvard.edu/clean-slate> [<https://perma.cc/9VAH-KURY>] (last visited Apr. 21, 2025).

76. See, e.g., Press Release, U.S. Env’t Prot. Agency, Biden-Harris Administration Finalizes Suite of Standards to Reduce Pollution from Fossil Fuel-Fired Power Plants (Apr. 25, 2024), <https://www.epa.gov/newsreleases/biden-harris-administration-finalizes-suite-standards-reduce-pollution-fossil-fuel> [<https://perma.cc/T8Y3-QMW5>] (outlining some of the actions taken by the Biden Administration to address public health environmental harms).

77. See, e.g., Thea Garon & Christina Plerhoples Stacy, *Civic Engagement is Higher Among Americans who are Financially Secure*, URB. WIRE (Oct. 28, 2024), <https://www.urban.org/urban-wire/civic-engagement-higher-among-americans-who-are-financially-secure> [<https://perma.cc/7J38-BH5G>].

78. See Reeve T. Bull, *The Administrative State “Safe for Democracy”: A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611, 612 (2013) (arguing that “modest reforms could be enormously beneficial . . . in quelling popular perceptions of a ‘democracy deficit’” within the administrative state).

With regard to electric power and energy efficiency, EPA published a legacy impoundment rule for coal plants on May 8, 2024.⁷⁹ A day later, it finalized greenhouse gas regulations for existing coal-fired power plants and new gas generators,⁸⁰ as well as supplemental effluent limitation guidelines for coal plants.⁸¹ On June 11, the Federal Energy Regulatory Commission (FERC) released its much anticipated long-range electric transmission planning and cost allocation rule, which requires U.S. grid regions to use a long-term temporal planning horizon (minimum of twenty years) and incorporate seven key economic and reliability benefits.⁸² FERC also released an important interim policy statement describing its procedures for evaluating climate impacts and describing how it will integrate climate considerations into its public interest determinations.⁸³ In addition, the Department of Energy (DOE) published multiple updated energy conservation standards based on its granted authority to establish energy-efficiency standards for certain appliances and equipment.⁸⁴ Two of these (energy conservation standards for consumer furnaces and for residential/consumer clothes dryers) are part of our case study.⁸⁵

79. Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments, 89 Fed. Reg. 38,950 (May 8, 2024) (to be codified at 40 C.F.R. pts. 9, 257).

80. New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 89 Fed. Reg. 39,798 (May 9, 2024) (to be codified at 40 C.F.R. pt. 60).

81. Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 89 Fed. Reg. 40,198 (May 9, 2024) (to be codified at 40 C.F.R. pt. 423).

82. Building for the Future Through Electric Regional Transmission Planning and Cost Allocation, 89 Fed. Reg. 49,280, 49,323–24 (June 11, 2024) (to be codified at 18 C.F.R. pt. 35).

83. Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 87 Fed. Reg. 14,104 (Mar. 11, 2022).

84. See Press Release, Exec. Off. of the President, Fact Sheet: Biden–Harris Administration Takes More Than 100 Actions in 2022 to Strengthen Energy Efficiency Standards and Save Families Money (Dec. 19, 2022), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/12/19/fact-sheet-biden-harris-administration-takes-more-than-100-actions-in-2022-to-strengthen-energy-efficiency-standards-and-save-families-money> [<https://perma.cc/H56V-K7Y5>].

85. See Energy Conservation Program: Energy Conservation Standards for Consumer Furnaces, 87 Fed. Reg. 52,861 (Aug. 30, 2022) (to be codified at 10 C.F.R. pt. 430); Energy Conservation Program: Energy Conservation Standards for Residential Clothes Washers, 89 Fed. Reg. 19,026 (Mar. 15, 2024) (to be codified at 10 C.F.R. pt. 430).

Regarding particulate matter and other potentially harmful emissions, EPA published its ‘Good Neighbor Plan’ for smog-forming emissions on June 5, 2023, tightening pollution controls in coal and gas generation.⁸⁶ On February 7, 2024, EPA released a rule narrowing air quality standards for fine particulate matter.⁸⁷ Also related to hazardous emissions, on September 10, 2024, EPA issued a final rule establishing requirements for major sources of hazardous air pollutants, such as dioxin, asbestos, toluene, and metals such as cadmium or mercury.⁸⁸

Regarding oil and gas, EPA proposed regulations for methane and volatile organic compounds (VOC) emissions from fossil fuel facilities.⁸⁹ The rule, finalized on March 8, 2024, is aimed at slashing emissions of extremely potent greenhouse gasses⁹⁰ and has raised industry concerns over workability.⁹¹ Relatedly, EPA proposed a rule imposing fees on methane emissions from oil and gas operations on January 26, 2024.⁹² The rule was finalized on November 18, 2024,⁹³ leaving it vulnerable to rescission through the Congressional Review Act in the next Congress, and it has received many objections over exemptions and the potential impact on small producers and associated

86. Federal “Good Neighbor Plan” for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36,654 (June 5, 2023) (to be codified at 40 C.F.R. pts. 52, 75, 78, 97).

87. Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 89 Fed. Reg. 16,202 (Mar. 6, 2024) (to be codified at 40 C.F.R. pts. 50, 53, 58); *Final Reconsideration of the National Ambient Air Quality Standards for Particulate Matter (PM)*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/pm-pollution/final-reconsideration-national-ambient-air-quality-standards-particulate-matter-pm> [<https://perma.cc/U26N-F7LP>] (Apr. 30, 2024).

88. Review of Final Rule Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 89 Fed. Reg. 73,293 (Sept. 10, 2024) (to be codified at 40 C.F.R. pt. 63).

89. Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 89 Fed. Reg. 16,820 (Mar. 8, 2024) (to be codified at 40 C.F.R. pt. 60).

90. *Id.*

91. See Eleni Kouimelis & Joshua D. Brown, *Presidential Election Implications on Methane and VOC Regulations for the Oil and Gas Industry*, WINSTON & STRAWN, LLP (Oct. 30, 2024), <https://www.winston.com/en/blogs-and-podcasts/winston-and-the-legal-environment/presidential-election-implications-on-methane-and-voc-regulations-for-the-oil-and-gas-industry> [<https://perma.cc/Z3Q9-NYR9>] (discussing resistance to the Environmental Protection Agency’s final rule on reducing methane and volatile organic compounds emissions).

92. Waste Emissions Charge for Petroleum and Natural Gas Systems, 89 Fed. Reg. 5,318 (Jan. 26, 2024) (to be codified at 40 C.F.R. pts. 2, 99).

93. Waste Emissions Charge for Petroleum and Natural Gas Systems: Procedures for Facilitating Compliance, Including Netting and Exemptions, 89 Fed. Reg. 91,094 (Nov. 18, 2024) (to be codified at 40 C.F.R. pts. 2, 98, 99).

gas suppliers.⁹⁴ EPA also released a Subpart W rule tightening greenhouse gas emissions reporting requirements on May 14, 2024.⁹⁵ The rule, associated with the previously mentioned methane fee rule, updates emissions monitoring and calculation requirements that will be used to impose the corresponding methane fees once the rule goes into effect.⁹⁶

Regarding transportation—the largest source of greenhouse gas emissions in the United States—EPA and the Department of Transportation (DOT) released several rules related to greenhouse gas emissions standards and fuel economy standards for multiple categories of vehicles, as well as performance assessment of the National Highway System, among others.⁹⁷ For example, on April 18, 2024, EPA released multi-pollutant emission standards for light- and medium-duty vehicle model years 2027–2032 and later.⁹⁸ The agency also finalized “Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles—Phase 3” on April 22, 2024.⁹⁹ On June 24, 2024, the National Highway Traffic Safety Administration (NHTSA) published corporate average fuel economy standards for light- and medium-duty vehicles for model years 2027–2032 and later, and heavy-duty pickup trucks and vans for model years 2030–2035 and later.¹⁰⁰ Lastly, on December 7, 2023, DOT published a rule governing national greenhouse gas performance management measures and established a method for the measurement and reporting of emissions associated with transportation.¹⁰¹

94. See, e.g., Petitioners’ Motion to Stay, *Oklahoma v. EPA*, No. 24-1059 (D.C. Cir. Apr. 12, 2024).

95. Greenhouse Gas Reporting Rule: Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems, 89 Fed. Reg. 42,062 (May 14, 2024) (to be codified at 40 C.F.R. pt. 98).

96. *Id.*

97. U.S. DEP’T OF TRANSP., DOT REPORT TO CONGRESS: DECARBONIZING U.S. TRANSPORTATION (2024), <https://rosap.nhtl.bts.gov/view/dot/75677> [<https://perma.cc/D3T9-HALD>].

98. Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 89 Fed. Reg. 27,842 (Apr. 18, 2024) (to be codified at 40 C.F.R. pts. 85, 86, 600, 1036, 1037, 1066, 1068).

99. Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles—Phase 3, 89 Fed. Reg. 29,440 (Apr. 22, 2024) (40 C.F.R. pts. 86, 1036, 1037, 1039, 1054, 1065).

100. Corporate Average Fuel Economy Standards for Passenger Cars and Light Trucks for Model Years 2027 and Beyond and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030 and Beyond, 89 Fed. Reg. 52,540 (June 24, 2024) (to be codified at 40 C.F.R. pts. 523, 531, 533, 535–37).

101. National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure, 88 Fed. Reg. 85,364 (Dec. 7, 2023) (to be codified at 23 C.F.R. pt. 490).

III. CASE STUDY: PUBLIC PARTICIPATION GAPS IN AGENCY RULEMAKING

A. *Previous Work and Expectations*

In our previous research, we began to explore the two-tiered nature of our regulatory system when it comes to public participation.¹⁰² On one level, we observed sophisticated “repeat players” and, on the other, “individuals participating directly or mediated only through smaller, community-based organizations.”¹⁰³ Our analysis showed that 98% of all comments submitted to the agencies (based on a subset of climate and energy rules) came from individuals as opposed to organized actors such as non-governmental organizations or corporations, which is encouraging at first blush.¹⁰⁴ However, notice-and-comment procedures—one of the most important participatory mechanisms in the rulemaking process—“largely fail to translate this public power into real policy change.”¹⁰⁵ The enormous volume of individual comments we observed was obscuring the fact that the “system’s avenues for public participation are not [truly] designed to meet the public where they are.”¹⁰⁶

In short, our findings largely confirmed empirically what many had already assumed: different types of stakeholders participate in the notice-and-comment process differently. Sophisticated, repeat players submitted much longer comments that contained detailed technical information, consistent with the managerial discourse described above.¹⁰⁷ In contrast, most

102. HOLM & GOODWIN, *supra* note 5.

103. *Id.* at 4.

104. *Id.*

105. *Id.* (emphasis omitted).

106. *Id.* at 4–5.

107. *Id.* at 8; *see also, e.g.*, Nat. Gas Supply Ass’n & Ctr. for Liquefied Nat. Gas, Comment Letter on the Draft Greenhouse Gas Policy Statement (Apr. 25, 2022), <https://elibrary.ferc.gov/eLibrary/filedownload?fileid=8F4F5D72-1DE4-C869-A75C-806295F00000> [<https://perma.cc/WFU6-2N65>] (expressing concerns over the regulatory uncertainty created by different aspects of the greenhouse gas emissions Policy Statements). Their comments—spanning forty-three pages—are of a highly technical nature, showcasing the level of sophistication that repeat players have when participating in the rulemaking process. Similarly, *see, for example*, Sustainable FERC Project, et al., Opening Comments of Public Interest Organizations on the Draft 2022 Natural Gas Certificate Policy Statement and 2022 Greenhouse Gas Policy Statement (Apr. 25, 2022), <https://elibrary.ferc.gov/eLibrary/filedownload?fileid=0C5C77DE-0144-CD00-B887-806298300002> [<https://perma.cc/8NXV-HWWR>] (highlighting the critical need for updates to the way FERC reviews gas projects and providing extensive and highly technical information on how to address some of the flaws they identified in the rule’s Policy Statements).

individuals' comments contain little contextualized or novel information, most of them are anonymous, and the vast majority are identical copies stemming from coordinated campaigns conducted by organizations, leaving very little room for the emergence of contextualized or lived experience—that is, the communitarian discourse discussed above.¹⁰⁸

As we discussed in that study, these divergences are driven by resource and expertise disparities.¹⁰⁹ They are also concerning from the democratic perspective noted above. The sophisticated comments are more likely to receive attention from agency decisionmakers and influence substantive policy outcomes.¹¹⁰ The comments from individuals, however, are not well suited for contributing to the notice-and-comment process as it is currently constituted.¹¹¹ In other words, there is a distinctive failure of notice-and-comment procedures to meet the public where they are at or to promote the kind of useful contributions that individuals are uniquely able to make (i.e., informing agency decisionmaking through the valuable insights of communitarian discourse).¹¹²

B. *Materials and Methods*

In this study, we relied on text mining and keyword extraction to systematically examine the substance of the comments to uncover structural differences in policy or legal arguments that participants make to influence the federal rulemaking process. Here, we expand on previous research and study the same set of federal regulations promulgated during the Biden Administration related to climate and energy policy. Although we did not set out to achieve representativity with this small sample, we did select these to maximize the variance in terms of agency, topics, and salience of the rules, while remaining focused on climate and energy rules. The rules are:

- Building for the Future Through Electric Regional Transmission Planning and Cost Allocation (FERC);¹¹³
- Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews (FERC);¹¹⁴

108. HOLM & GOODWIN, *supra* note 6, at 5.

109. *Id.* at 8.

110. *Id.*

111. *Id.* at 5–8.

112. *Id.* at 11.

113. Building for the Future Through Electric Regional Transmission Planning and Cost Allocation, 89 Fed. Reg. 49,280 (June 11, 2024) (to be codified at 18 C.F.R. pt. 35).

114. Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 87 Fed. Reg. 14,104 (Mar. 11, 2022).

- Energy Conservation Standards for Consumer Furnaces (DOE);¹¹⁵
- Energy Conservation Standards for Residential Clothes Washers (DOE);¹¹⁶
- National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure (DOT).¹¹⁷

We analyzed every comment submitted during the notice-and-comment period for these rules, totaling 88,925 comments.¹¹⁸ This universe of regulations offers a valuable lens for considering the question of regulatory participation because climate and energy policy is a subject of growing public interest, embodies an important tension between technical complexity and widely shared values, and implicates a diverse range of stakeholders.¹¹⁹

We developed a dictionary of keywords to identify the presence of specific technical topics in the content of each comment.¹²⁰ The goal of this dictionary was to create a mechanism for identifying whether and to what extent different categories of stakeholders engaged in the kind of managerial discourse one might expect to find for these rules. In short, the prevalence of these specific terms in particular comments serves as a kind of marker for identifying managerial discourse. The dictionary was developed through an iterative process that combined a “face validity test” and an “empirical test.”¹²¹ The first step was to develop a list of candidate words based on expert knowledge. Once the list of candidate words was complete, two researchers double-checked each term and trimmed the list using a preliminary face validity test where words were kept if they were loosely related to the topics being researched.

115. Energy Conservation Program: Energy Conservation Standards for Consumer Furnaces, 87 Fed. Reg. 52,861 (Aug. 30, 2022) (to be codified at 10 C.F.R. pt. 430).

116. Energy Conservation Program: Energy Conservation Standards for Residential Clothes Washers, 89 Fed. Reg. 19,026 (Mar 15, 2024) (to be codified at 10 C.F.R. pt. 430).

117. National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure, 88 Fed. Reg. 85,364 (Dec. 7, 2023) (to be codified at 23 C.F.R. pt. 490).

118. The complete dataset of comments analyzed in this study can be found in Federico Holm & James Goodwin, *Replication Data for Holm, F. & Goodwin, J. (2025)*, HARV. DATAVERSE, https://doi.org/10.7910/DVN/GAD6GR_ [<https://perma.cc/B9UH-RFKR>] (last visited Apr. 21, 2025).

119. *About the Office of Public Participation*, U.S. FED. ENERGY REG. COMM’N, <https://www.ferc.gov/OPP> [<https://perma.cc/7L99-KXEY>] (Feb. 11, 2025).

120. See *infra* METHODOLOGICAL APPENDIX.

121. Hongtao Yi, Christopher M. Weible, Catherine Chen, Jennifer Kagan, Jill Yordy, Ramiro Berardo et al., *Measuring Policy Conflict and Concord*, 35 SOC’Y & NAT. RES. 684, 685–86 (2022).

After that, we checked that each word meeting the face validity test was used in the articles to refer to the topics under analysis (i.e., empirical test). If the words, used in context, did not relate to the topic they were initially associated with, they were eliminated. Additionally, during the process of checking the empirical validity of candidate words, we identified additional terms that we had not considered before. We proceeded to add them to the list to expand the dictionary even further. These parallel processes yielded the final list of keywords associated with each topic. We have included an extended discussion of this process, a description of the data collection and aggregation processes, and the full lists of keywords in the Appendix.¹²²

C. Findings

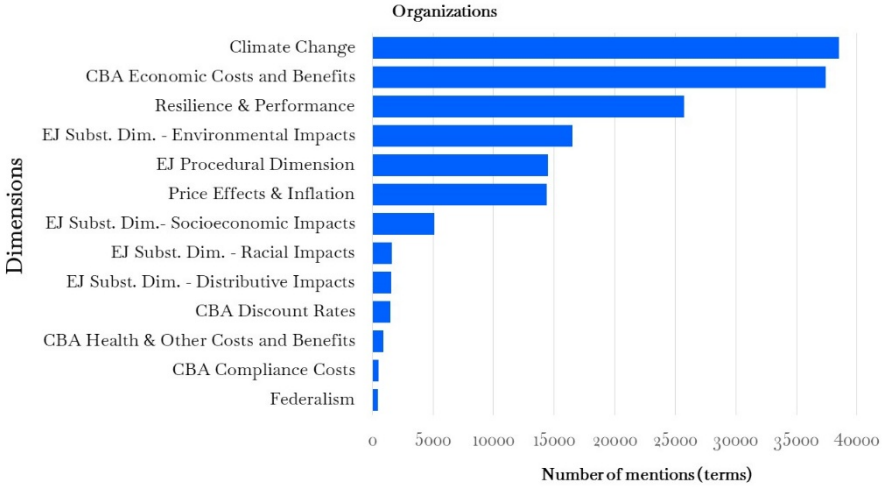
While our earlier research sought to capture the gap in public participation between individuals and sophisticated stakeholders in terms of form and frequency of public commenting, we were also interested in exploring how this gap defined the substance of the public comments submitted by these different categories of stakeholders. As noted above, our goal was to see how these stakeholders invoked the managerial form of discourse in their comments, if at all. Consistent with our earlier research, these new results provide strong evidence of the enormous gap that exists both between organizations and individuals, and among organizations, along this substantive dimension as well. Below, Figures 1 and 2 provide an overview of the topics that appear across all comments, with stakeholders grouped into two categories: organizations and individuals. They reveal that sophisticated repeat players invoked managerial discourse extensively—albeit in different ways. At the same time, in the limited circumstances in which individuals invoked topics suggestive of managerial discourse, it was often in the context of form letters organized by major national non-governmental organizations (NGOs). Communitarian discourse appeared rarely in comments, but when it did, it was in those submitted by individuals. For example, communitarian discourse appeared in some cases of individuals highlighting the impact that car-centric cities and towns had on their daily lives and lived experience within the communities they inhabit.¹²³

122. *See infra* METHODOLOGICAL APPENDIX.

123. Many of these comments were anonymous, which is a trend with comments submitted by individuals. We include the following comment as an example that captures the trend observed among public comments submitted by individuals to the Rule Docket for the “National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure”:

I was a bicycle commuter for 40-plus years in 5 different metropolitan areas and found it improved my physical fitness and mental wellbeing as well as keeping me financially afloat

Figures 1 (top) and 2 (bottom): Distribution of dimensions (topics) organized by the number of mentions received in comments.



as a starving grad student. In retirement I continue to bike at least occasionally for errands and exercise. But I see that traffic patterns and post-COVID behavior of drivers are making this more difficult. For the sake of the environment we need to do more to make cycling easier.

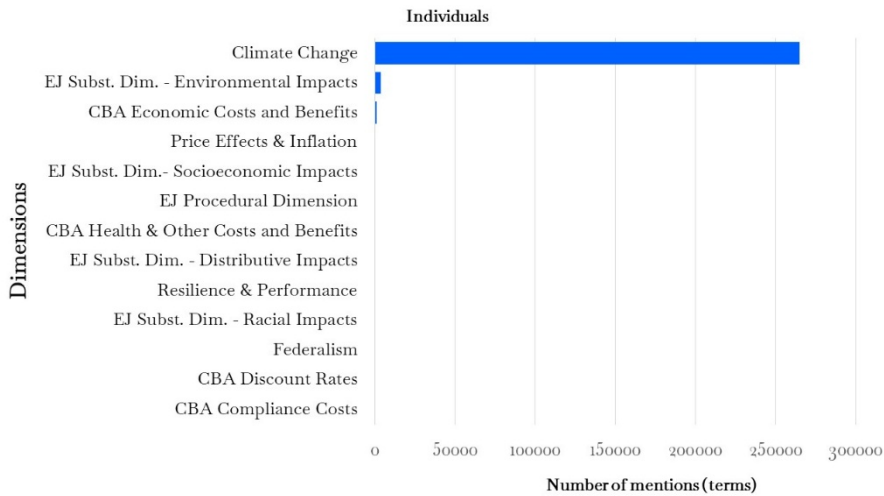
Thank you for proposing this rule to require states and regions to track emissions of greenhouse gases (GHGs) from surface transportation. I support the rule and encourage the Department of Transportation to finalize the rule quickly. I also encourage the US DOT to promote solutions beyond just electrifying the car fleet, including strategies to increase trips by transit, bicycling and walking.

Surface transportation is the largest source of GHG emissions in the United States, with most of these emissions coming from passenger cars, light-duty trucks (including SUVs and minivans), and medium- and heavy-duty trucks. By requiring states and metropolitan areas to set targets to reduce GHG emissions, we can reduce the harmful effects of climate change to our communities and our infrastructure. We can't fix a problem until we measure it.

We appreciate the US DOT's proactive stance on this, and hope that your efforts will continue through agency actions to promote complete streets, safe and accessible bicycling and walking, and will extend to include the adoption of electric bicycles and charging stations as part of your overall electrification plans.

Once again, I support the proposed rule for a GHG performance measure and proactive targets.

Al Tillson, Comment Letter on Proposed National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure (Aug. 30, 2022), <https://www.regulations.gov/comment/FHWA-2021-0004-11949> [<https://perma.cc/P4W6-HHRY>]. In this case, the first paragraph is heavily rooted in “communitarian discourse” appealing to the lived experience of this individual. The rest of the comment, however, is a copy of a mass mail campaign organized by a separate actor (most likely an organization), which contains more technical details.



These figures underscore the stark differences between organizations and individuals with regard to the volume and diversity of technical topics raised in their comments. First, this distinction is apparent in the basic commenting strategy that sophisticated organizations employ. Broadly speaking, most of these organizations operate either as “generalists”—that is, depending on their resources and involvement, they seek to address many issues in their comments—or “specialists”—that is, they explore a “single issue” of a rule in significant detail.¹²⁴ In our dataset, major environmental NGOs and large industry players (such as PJM Interconnection, LLC) are examples of generalists, and the large cluster of grassroots and faith organizations that submitted joint comments—included in Figure 3—are examples of single-issue commenters. Thus, whether acting as generalists or single-issue commenters, these stakeholders frequently engaged in a “hard” managerial discourse that might be characterized as sophisticated and strategic.

In contrast, individuals really do not meaningfully engage in either of these generalist or single-issue commenting approaches. While they do tend to focus on a single issue, their treatment of it rarely delves below superficial generalities. In addition, although there are a small number of fairly sophisticated individuals who submit comments, the vast majority are copy-and-pasted or form comments that are based on less than ten unique ‘templates’ and overwhelmingly address one single issue: climate change. Terms associated with climate change appear more than 260,000 times in over 52,000

124. Federico Holm & Alexandra Paige Fischer, *Combining Multiple Data Sources to Identify Actor Involvement in Environmental Governance: Wildfire in the American West*, 147 ENV’T SCI. & POL’Y 361 (2023).

comments from individuals.¹²⁵ The second biggest category is “EJ - Environmental impacts,” which captures terms associated with exposure to harmful pollutants (such as ozone and smog), air quality, and EJScreen.¹²⁶ As prevalent as it was, however, this category was still a distant second to terms associated with climate change. In short, individual commenters frequently engaged in “soft” managerial discourse that might be characterized as superficial and unskillful.

1. *Hall-of-Famers: How Are Issues Reflected Across Participants?*

We were able to dive deeper into our data to discern the apparent approaches that organized actors use in crafting their comments for the rules we studied. Figures 3–6 show the “top ten” organizations commenting on each topic.¹²⁷ Some plots show more than ten organizations per topic, as they might have mentioned a given topic the same number of times as other groups, thus ranking the same. This is very common when coalitions of organizations submit joint comments.

The results show the continuum of organizations noted above, ranging from single-issue groups to generalists. What makes the generalists distinctive among these groups is that they appear to use their comments as a tool for “packing the record,” covering in significant detail topics relating to a wide variety of aspects of the proposed rule. Given that these groups are also frequent participants in litigation over rulemakings, this commenting tactic appears to reflect the highly influential role that pre-enforcement judicial review now plays in shaping environmental policy in the United States.¹²⁸ For example, researchers have found cases of large environmental NGOs such as the Center for Biological Diversity or Sierra Club and state governments packing the record and covering extensive ground with their arguments, engaging in litigation once the rule has been published.¹²⁹

Nearly every environmental regulation of consequence is certain to be subject to such review, making the federal courts the critical venue for

125. See *infra* Figures 3–6.

126. *Id.*

127. *Id.*

128. See, e.g., Z. Payvan Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 942–43 (2022) (“By entertaining pre-enforcement challenges more frequently, courts routinely subject the Executive’s policies to judicial review even before a formal enforcement decision is made.”).

129. Ramiro Berardo & Federico Holm, *The Participation of Core Stakeholders in the Design of, and Challenges to, the U.S. Clean Power Plan*, 18 CLIMATE POL’Y 1152 (2018) (noting that joint litigation efforts hint at the considerable capacity of nongovernmental organizations to self-organize as a coalition throughout the process).

regulatory decisionmaking.¹³⁰ Unsurprisingly, many of the entities that participate in such litigation, either directly as parties or indirectly through amicus briefs, are also among the leading sophisticated stakeholders in the notice-and-comment process.¹³¹ For these stakeholders, their comments serve as much as a valuable tool for setting their litigation position as they do as a vehicle for shaping the agency's decisionmaking. As such, the substance of these comments reflects the dual purposes they are intended to serve.¹³²

Connections between notice-and-comment participation and litigation have been drawn in other research. For example, researchers found important differences in terms of the level of participation and diversity of arguments during the notice-and-comment period among those actors that litigated in support and against the Clean Power Plan.¹³³ Moreover, the perception of risk was found to be a powerful motivation to action: when faced with a potentially "hostile" rule, the risk of noncooperation from the agency (i.e., an outcome in which a rule does not incorporate the language that the actor desires) drives the actors to espouse more diverse arguments, seemingly trying to find as many "flaws" as possible.¹³⁴ To put it more colloquially, the stakeholder will attempt to throw as much spaghetti against the wall as possible during notice-and-comment to find out what sticks later during litigation.

130. Andrew B. Whitford, *The Structures of Interest Coalitions: Evidence from Environmental Litigation*, 5 BUS. & POL. 45, 46 (2003).

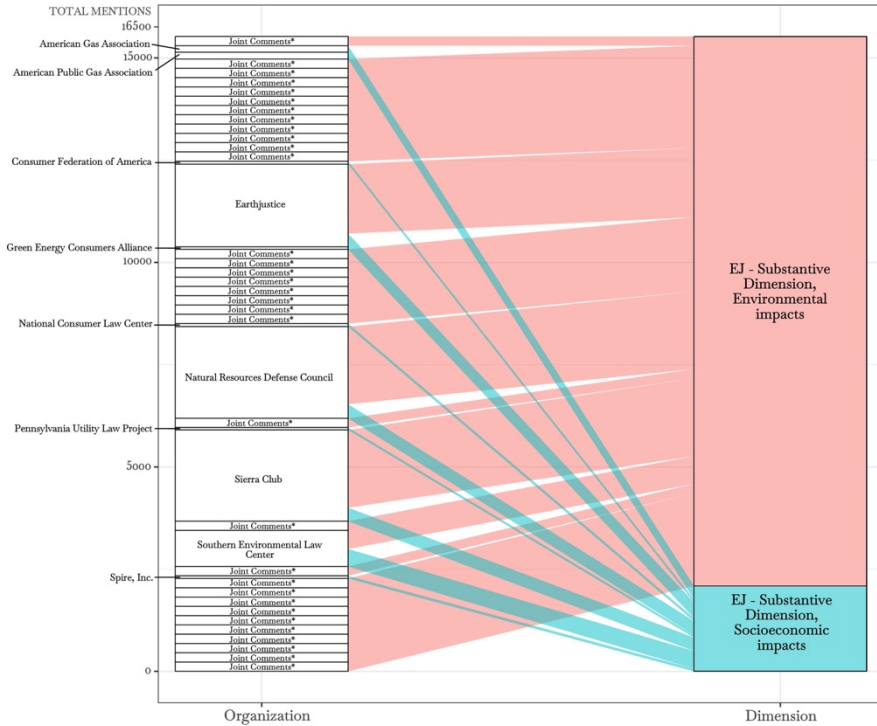
131. *See id.*

132. *Id.*

133. Berardo & Holm, *supra* note 129.

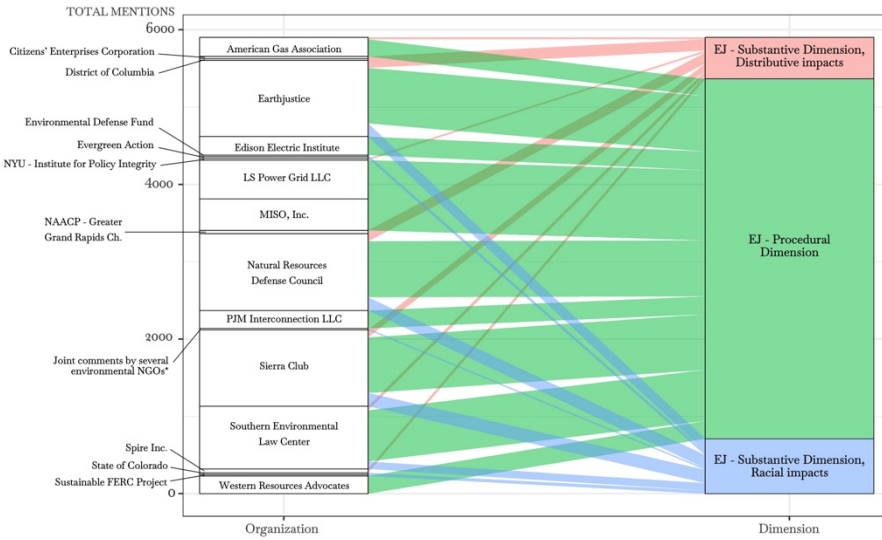
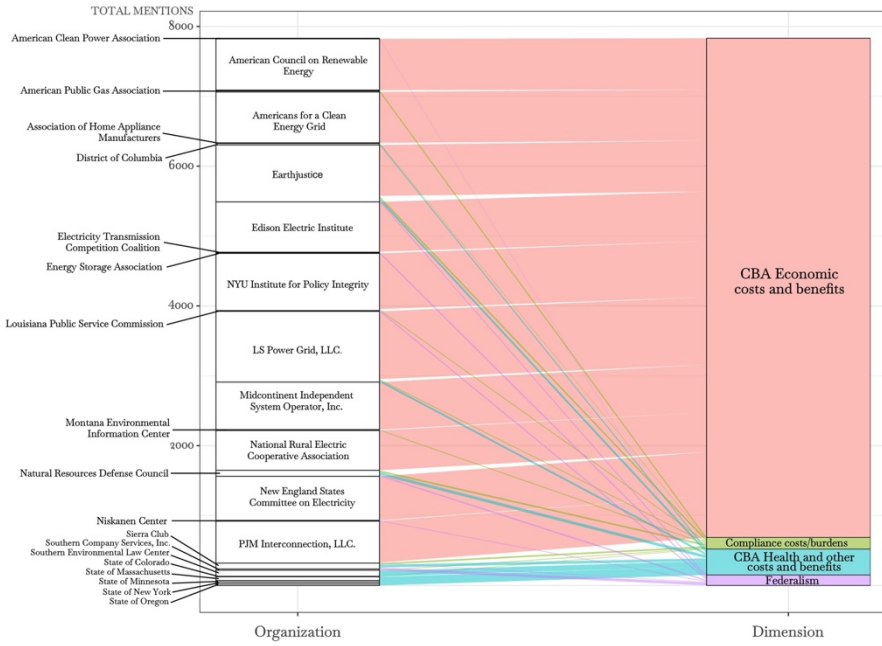
134. Federico Holm, *Environmental Policy Across Space and Time: A Comparative Approach to the Study of Advocacy Coalitions in Climate Change and Energy Policy in the United States* (2021) (Ph.D. dissertation, The Ohio State University), https://etd.ohiolink.edu/acprod/odb_etd/ws/send_file/send?accession=osu1623919453512319&disposition=inline [<https://perma.cc/V79R-47W7>].

Figures 3 (top) to 6 (bottom): ‘Top 10’ commenters across each topic or issue.¹³⁵

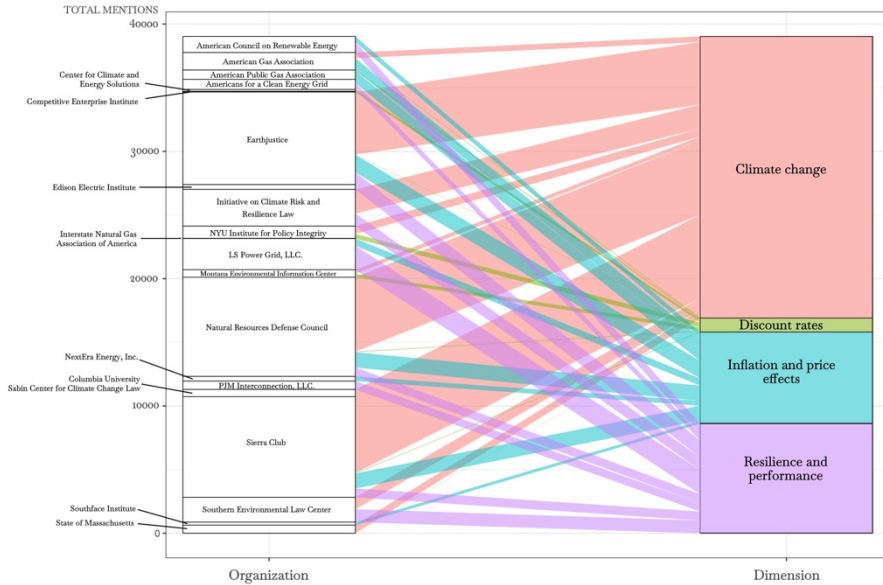


¹³⁵Joint comments submitted by several organizations: Accelerate Neighborhood Climate Action, Capitol Heights Presbyterian Church, CatholicNetwork, GDP Energy & Environment Initiative, Citizens Alliance for a Sustainable Englewood, CO Jewish Climate Action, COCIN Colorado Community Rights Network, Colorado Businesses for a Livable Climate, Colorado Call to Action, Colorado Cross Disabilities Coalition, Colorado Physicians for Social Responsibility, Community for Sustainable Energy, Green House Connection Center, I-70 Vasquez Blvd Citizens Advisory Committee, Indivisible Ambassadors, Littleton Business Alliance, Mental Health & Inclusion Ministries, Metro State Student, Montebello Neighborhood Improvement Association, Mothers Out Front, North Range Concerned Citizens, Sisters of Loretto, Southwest Organization for Sustainability, Spirit of the Sun, Sunnyside United Neighbors Inc, System Change Not Climate Change, Together Colorado, Transit Riders Alliance, Unite North Metro Denver, Wall of Women, Wilberding Consulting, Womxn from the Mountain, Working for Racial Equity.

135. When an organization is shown to have contributed to two different topics in the same figure, it means that it was among the top ten in both topics. The height of the organization’s box represents the sum of the number of times organizations mentioned each topic. The height of the topic box captures the total number of times this topic was mentioned, and the width of the line represents the relative time an organization mentioned each topic.



* Joint comments submitted by several environmental NGOs: Appalachian Mountain Advocates, Assateague Coastal Trust, Chesapeake Climate Action Network, Citizens for Clean Air-Water Brazoria, Clean Energy Now Texas, Food & Water Watch, Friends of Nelson, Healthy Gulf, Louisiana Buckles Brigade, Milwaukee Riverkeeper, NJ Conservation Foundation, Preserve Montgomery County VA, Protect Our Water Heritage Rights, Waterkeeper Alliance, West Virginia Rivers Coalition.



Some care is required when interpreting these results. First, because comments serve a dual function for sophisticated stakeholders—particularly those who take generalist approaches to their comments—it is not uncommon for the same topic to be invoked by different organizations but in the service of very different policy goals.

As an example, consider the following situation involving a rule that promotes the use of renewable energy sources. The Natural Resources Defense Council (NRDC) would likely use its comments to appeal to the rule’s likely “socioeconomic impacts,” such as the future economic benefits from clean energy development and the public health benefits from reductions in conventional air pollutants. In contrast, the American Gas Association would also likely appeal to the rule’s “socioeconomic impacts” by arguing that the displacement of fossil fuels could result in increased energy prices for consumers, which will affect low-income people the hardest. For the environmental organizations, the appeal to socioeconomic impacts is aimed at the policy goal of speeding up the clean energy transition. For the fossil fuel industry transition, the same type of argument rooted in socioeconomic concerns targets the clean energy transition. The same topic is brought up to highlight different potential impacts of the rule. This evidences the inherent complexity of environmental and energy rulemaking, and it can indicate which issues are ripe for debate in litigation.

As this example demonstrates, a single topic such as “socioeconomic impacts” provides the same set of “discursive tools” to each of these

sophisticated stakeholders, but they are noticeably deployed toward very different ends. The main purpose, of course, in invoking this topic is to influence the content of the rule itself. Stakeholders generally provide input to the agency seeking to steer the rulemaking process in their favor. Concretely, this means including their own policy preferences in the text of the final regulation. Increasingly, however, the purpose of comments for many sophisticated stakeholders now includes teeing up a successful legal challenge against the rule. Packing the record with input on a wide variety of topics that the rulemaking covers lays the foundation for sophisticated commenters/litigators to do just that.

Another important caveat is that the specific topics used in our analysis (and the dividing line between them) can be hard to tease out in some cases. Words have multiple meanings, and they change depending on the context. For some topics, such as “climate change” or “administrative burdens to comply,” it is possible to establish fairly clear distinctions between them. Making these conceptual distinctions can be much harder in other cases, such as those involving terms like “price effects and inflation” and “EJ - distributive impacts.” In these latter cases, we went to great lengths to differentiate between arguments associated with price effects in general and those that discuss price effects that are uniquely regressive for structurally marginalized communities and lower-income groups, but they overlap to some extent.

2. *Differences in Commenting Approaches Between ‘Repeat Players’ and Individuals*

Supporting the conclusions drawn in previous research,¹³⁶ we see sophisticated repeat players dominating the landscape. In this study, however, we see that their dominance is not just reflected in the volume of their comments but in the breadth of topics covered as well. In this regard, many repeat players act as generalists as described above.¹³⁷ This means they have enough capacity and expertise to include arguments that address multiple issues across all comments. For example, national NGOs like the Sierra Club or NRDC or corporate actors like the American Gas Association or LS Power Grid can allocate time, money, and trained and educated staff necessary for covering a lot of ground in terms of topics.

On the other end of the spectrum of repeat players are the groups that tend to be more “single issue” or at least limited in the range of issues they address in their comments. In contrast to the generalist repeat players, these groups are often smaller in size and capacity and frequently operate at the

136. HOLM & GOODWIN, *supra* note 5.

137. Holm & Fischer, *supra* note 124.

local level. Notably, these actors appeared to rely more heavily on the strategy of submitting “joint” or “sign-on” comments, in which they seek to demonstrate the “strength of numbers” behind their arguments by inviting as many allied organizations as possible to join or sign onto the comments. Our analysis found this practice to be most common among those organizations commenting on the substantive dimension (environmental impacts) of EJ and the procedural dimension of EJ. Many of these smaller single-issue organizations also submit comments individually but do not show up in the figures due to their small contribution to the overall count of mentions.

In stark contrast to these different kinds of repeat players, the most common mode of participation by individuals is through mass comment campaigns involving “form letters” that limit their ability to supply their own language. While these mass comment campaigns have some participatory value, their major shortcoming is that they try to shoehorn individuals into adopting the legally incentivized managerial discourse, albeit in a very superficial manner. Irretrievably lost in the process is a unique and invaluable opportunity for the individual to offer their unique perspective on a rule through the use of a communitarian discourse.

These results shed more light on the “two-tiered” nature of public participation in the rulemaking process and the challenges that policymakers face in seeking to democratize the process by making it more inclusive of and responsive to ordinary members of the public, and especially those from structurally marginalized communities. The truncated nature of how individuals participate in the rulemaking process effectively prevents agency decisionmakers from being exposed to an authentic account of the individual’s or community’s lived experience as it might relate to the rulemaking. This is one of the main reasons why notice-and-comment is not an effective vehicle for gauging contextualized lived experience. It also deprives individuals of the ability to offer their distinctive expertise on the policy problem that a particular rule is meant to address, which in turn risks yielding policies that are ineffective or, worse still, that have unintended harmful consequences.

D. *Interpreting These Results in Light of* Loper Bright v. Raimondo *and* Ohio v. EPA

Taken together, the findings of our two studies provide powerful empirical evidence for the existence of a massive participation gap in notice-and-comment procedures between individuals and more sophisticated repeat players. Their findings suggest that these procedures do not provide individuals with a meaningful opportunity to influence the substantive outcomes of the rules that affect them, raising significant concerns about the regulatory system’s failure to live up to its full democratic potential.

More significantly still, these findings offer empirical support for some of the common theories regarding the institutional forces and incentive structures that help drive the massive gap in participation between individuals and sophisticated repeat players. Most notably, they suggest that prevailing legal doctrines strongly incentivize the managerial discourse that is uniquely available to repeat players while discouraging the communitarian discourse that is uniquely available to individuals.¹³⁸

Notably, two recent Supreme Court decisions threaten to reinforce these dynamics, potentially widening this gap in participation even more. The first is *Loper Bright v. Raimondo*,¹³⁹ in which the Court's conservative supermajority jettisoned the longstanding *Chevron* deference doctrine.¹⁴⁰ That legal doctrine called on reviewing judges to defer to agencies' interpretation of the statutes underlying their regulations, so long as those interpretations were reasonable.¹⁴¹ Under *Loper Bright's* new standard of review, judges now have the power to identify, on their own, a single best reading for every statutory term, no matter how unclear or ambiguous.¹⁴² Industry groups already had plenty of incentive to challenge the statutory authority of every rule they opposed. By further incentivizing these types of legal attacks, though, *Loper Bright* will almost certainly spur industry groups to pack their rulemaking comments with even more audacious and creative arguments regarding rules' statutory basis so that they can later raise those theories during judicial review.

Of even greater significance is the second case: *Ohio v. EPA*.¹⁴³ There, a narrow majority of the Court agreed to temporarily halt implementation of an EPA air pollution rule pending the completion of judicial review.¹⁴⁴ The majority opinion claimed this action was justified because EPA appeared to have failed to adequately respond to a particular comment that it received from an industry group and that this error was significant enough that opponents of the rule would likely succeed in getting it thrown out in court.¹⁴⁵ As the dissent pointed out, though, it is not clear that the particular issue cited by the majority was even raised.¹⁴⁶ In any event, it appeared that EPA had responded, just not with the attention that the majority demanded.¹⁴⁷

138. See *supra* text accompanying notes 18–24.

139. 144 S. Ct. 2244 (2024).

140. *Id.* at 2273.

141. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

142. See 144 S. Ct. at 2266.

143. 144 S. Ct. 2040 (2024).

144. *Id.* at 2058.

145. *Id.* at 2053–54.

146. *Id.* at 2061–62 (Barrett, J., dissenting).

147. *Id.* at 2060–64 (Barrett, J., dissenting).

While courts do police agency efforts to account for public comment during judicial review, the degree of intrusiveness of the *Ohio* Court's review was extraordinary. The concern is that conservatives on the lower courts will take this as a green light to apply a similarly exacting level of review of agency responsiveness to comments. This, in turn, would further incentivize sophisticated industry challengers of rules to go on "fishing expeditions" in the rulemaking comments, raising every technical or legal issue they can think of—no matter how tangential—just to force a detailed response from the rulemaking agency. If the agency fails to respond, then industry could seek a stay of the rule's implementation on judicial review.

IV. REFORMS FOR IMPROVING PUBLIC ENGAGEMENT

Researchers, advocates, reformers, and policymakers have suggested a wide variety of proposals for making the rulemaking process more inclusive and responsive to the public, particularly members of structurally marginalized communities.¹⁴⁸ The findings from this research enable us to evaluate these options as well as to identify new ones.

A. *Technical Assistance*

Under the technical assistance approach, the government seeks to provide individuals and communities with technical and other forms of support so that they can attempt to replicate the managerial discourse when participating in rulemakings. In other words, the goal of this approach is to reduce the participation gap by making it so that individuals and communities act more like sophisticated repeat players. One example of this approach is the creation of an Office of the Public Advocate, as proposed in the Stop Corporate Capture Act, which would be tasked with "facilitating means by which individuals and populations that have not historically participated in the rulemaking process may be better included in the rulemaking process."¹⁴⁹ Another example is the intervenor compensation programs that exist in many states, which help members of the public defray the cost of participating in regulatory proceedings before their Public Utility Commissions, including pay for technical support and legal expertise.¹⁵⁰

148. See, e.g., Sidney A. Shapiro, *Marginalized Groups and the Multiple Languages of Regulatory Decision-Making*, REG. REV. (Mar. 14, 2022), <https://www.theregreview.org/2022/03/14/shapiro-marginalized-groups-multiple-languages> [<https://perma.cc/HZ9G-7DM8>].

149. Stop Corporate Capture Act, H.R. 1507, 118th Cong. § 11 (2023).

150. See DENA ADLER, ANGELA PARNAY, ELIZABETH B. STEIN & BURÇIN ÜNEL, INST. POL'Y INTEGRITY, *PROCEDURAL EQUITY AT PUBLIC UTILITY COMMISSIONS: DEVELOPING A BASELINE ASSESSMENT OF BARRIERS AND OPPORTUNITIES* 9, 11–12 (2024), https://policyintegrity.org/files/publications/Procedural_Equity_at_PUCs_Report.pdf [<https://perma.cc/5TA6-R973>].

While technical assistance offers a relatively straightforward mechanism for strengthening individual participation, it comes with some drawbacks. For example, it seems unlikely that such policies could ever fully alleviate the significant capacity advantages that regulated industry, in particular, enjoy relative to individuals, and even more sophisticated national NGOs. Instead, it is likely to spur a kind of “arms race” with industry investing even more heavily in overwhelming agencies with extensive, technical comments. Thus, even when presented as a form of managerial discourse, individuals’ comments would remain at great risk of being drowned out by the excessive filings from industry groups. The upshot is that the efficacy of this reform approach would likely be enhanced if paired with the other approach described below.

B. Institutionalizing Communitarian Discourse

Rather than try to make individuals talk and act like sophisticated repeat players, institutionalizing communitarian discourse instead focuses on adopting reforms aimed at encouraging, obtaining, and ultimately accounting for the communitarian discourse that individuals are already capable of engaging in during the rulemaking process. By necessity, this approach focuses on the agency side of the public-government communication dyad to ensure that these interactions successfully transmit information that agency officials can then readily use and integrate into their decisionmaking along with other relevant inputs. One example of reform consistent with this approach includes hiring new staff with training in social work or community organizing or providing existing staff with training in relevant skills. Another would be to seek changes in legal doctrines so that agencies are held accountable for failing to account for communitarian discourse when developing new rules.

While this approach is receiving some attention in the academic literature, no explicit attempts at relevant reforms have been pursued as yet.¹⁵¹ Arguably, though, the Biden Administration’s July 2023 guidance on “Broadening Public Participation and Community Engagement in the Regulatory Process” opens the door for sustained action under this approach.¹⁵² Most notably, that document calls for affirmative outreach to individuals and communities most likely to be affected by particular rules, with a focus on those who have not traditionally participated in rulemakings in the past.¹⁵³ It is hard to imagine this recommendation bearing much fruit without greater agency attention to accounting for communitarian discourse. Another

151. See, e.g., ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW 93–95 (2020).

152. OMB Memorandum, *supra* note 4.

153. *Id.* at 14.

positive development came in the Federal Trade Commission's recently finalized rule banning certain kinds of noncompete clauses in employee contracts.¹⁵⁴ The preamble begins with fifteen vivid stories from real people about the harms they suffered from noncompete clauses, which the agency pulled from public comments it received.¹⁵⁵ At a minimum, agencies should strive to encourage and replicate this practice.

This approach to democratizing the rulemaking process offers a lot of advantages and should be a priority for policymakers, particularly one carried out in conjunction with the other approaches outlined here. These reforms are the most likely to result in sustained and meaningful engagement from the public. In addition, the communitarian discourse that individuals and communities are uniquely equipped to provide would make essential inputs for agency decisionmakers that would substantially improve the quality of regulations (both in terms of effectiveness in meeting their goals and of avoiding unintended harmful consequences).¹⁵⁶ The major drawback is that these reforms would be the hardest to institutionalize of the three approaches. They run counter to prevailing practice and legal doctrine.¹⁵⁷ And, to the extent that they are perceived as disempowering industry groups, they will likely encounter fierce resistance from those groups and the policymakers with which they are allied.

C. *Looking Beyond Notice-and-Comment*

The final option is to enhance or create new public engagement opportunities outside of notice-and-comment procedures, particularly at the earliest stages in the process before an agency has developed a formal regulatory proposal. Examples of this approach include conducting pre-proposal stakeholder consultations and inviting the public to shape agencies' regulatory agendas. Significantly, the Biden Administration's July 2023 guidance prioritizes this general approach.¹⁵⁸ This approach is also widely discussed in academic literature.¹⁵⁹ Another variation on early participation worth considering is enhancing public participation in agency scientific research—a concept generally referred to as “citizen science”—which can be employed in later regulatory decisions.¹⁶⁰

154. Non-Compete Clause Rule, 89 Fed. Reg. 38,342 (May 7, 2024) (to codified at 16 CFR pts. 910, 912).

155. *Id.* at 38,344–45.

156. FISHER & SHAPIRO, *supra* note 151.

157. *See supra* Part III.D.

158. OMB Memorandum, *supra* note 4, at 12–19.

159. *See, e.g.*, SANT'AMBROGIO & STASZEWSKI, *supra* note 12.

160. *About Citizenscience.gov*, U.S. GEN. SERVS. ADMIN., <https://www.citizenscience.gov/about> [<https://perma.cc/MH8E-LJZU>] (last visited Apr. 21, 2025).

We agree that this approach holds a lot of promise for ensuring more meaningful engagement in the rulemaking process. The early stages of the process are better suited for eliciting and actually using communitarian discourse to inform regulatory decisionmaking.¹⁶¹ In contrast, as the process plays out and reaches the notice-and-comment stage, the demand for more technical expertise and information increases,¹⁶² thereby raising the risk that individuals and communities will become relegated to the sidelines. More broadly, research has shown that those who participated early in the rule design stages can have a significant impact in affecting how agencies devise final regulations.¹⁶³ This becomes critical when we consider who has access to the agency based on political positioning and ideological alignment with the administration. In other words, affirmative efforts to engage individuals early in the rulemaking process can be an effective means for reducing power disparities more generally between individuals and sophisticated repeat players.

We also urge policymakers to consider increased public engagement after the notice-and-comment process—namely, during compliance monitoring and enforcement. As regulatory compliance (or noncompliance) manifests in real-world impacts, the situated knowledge that individuals and communities bring can be a real asset to this aspect of policy implementation as well. Accordingly, policymakers should consider expanding opportunities for citizen enforcement where appropriate.

While our findings appear to provide support for all three general approaches, we believe the last two hold the greatest promise for effectively democratizing the rulemaking process. Accordingly, we urge policymakers to prioritize reforms aimed at institutionalizing communitarian discourse as part of public engagement and expanding or creating new opportunities for public engagement outside of notice-and-comment procedures.

CONCLUSION

Our analytical results largely confirmed our expectations that there is a stark contrast in the types of substantive arguments that individuals make in their rulemaking comments as compared to sophisticated repeat players. The comments from these repeat players were far more closely associated with managerial discourse, which holds special legal authority in the rulemaking process. In contrast, we found that on the rare occasion when

161. SANT'AMBROGIO & STASZEWSKI, *supra* note 12, at 7–8.

162. *Id.* at 90.

163. WESLEY A. MAGAT, ALAN J. KRUPNICK & WINSTON HARRINGTON, RULES IN THE MAKING: A STATISTICAL ANALYSIS OF REGULATORY AGENCY BEHAVIOR 168–69 (1986); Naughton et al., *supra* note 7.

communitarian discourse was introduced, it was through the comments submitted by individuals. More often, though, individuals eschewed the opportunity to engage in this discourse, which is legally disfavored, and instead attempt to mimic a superficial version of managerial discourse through form letters organized by larger NGOs. Taken together, these findings reveal the extent to which the notice-and-comment process encourages certain kinds of behaviors and types of discourse tailored to those who have expertise and abundant resources, resulting in a system that does not work for individuals. They also build on our previous work, providing further evidence that the notice-and-comment process fails to provide the public with a meaningful opportunity to engage in agency rulemakings.

In addition, we found that repeat players were significantly more likely to invoke technical issues that currently predominate in legal or policy disputes over rules—issues such as cost–benefit analysis or a policy’s inflationary effects. This second finding, in particular, suggests how prevailing legal and policy influences can feed back into the policymaking process and reinforce and even aggravate existing disparities in public participation in notice-and-comment rulemaking procedures. We predict that the Supreme Court’s recent decisions in *Loper Bright* and *Ohio v. EPA* will further reinforce this phenomenon.

Several options exist for bringing the regulatory system closer to its full democratic potential. Our findings suggest that two broad approaches in particular—institutionalizing communitarian discourse and creating new engagement opportunities outside of the notice-and-comment process—hold a lot of promise for achieving this goal.

METHODOLOGICAL APPENDIX

This appendix describes how we searched, downloaded, aggregated, and analyzed the data for the study, as well as the process for developing the dictionary of keywords. The first section presents the data sources and the data retrieval process, the second section describes data aggregation, and the third section describes the development of the dictionary of keywords.

A. Data Acquisition and Aggregation

1. Data Acquisition (Searching and Downloading Comments)

This report assesses comments submitted regarding five Federal Regulations: (1) the Energy Conservation Standards for Consumer Furnaces (U.S. Department of Energy); (2) Energy Conservation Standards for Residential and Consumer Clothes Dryers (U.S. Department of Energy); (3) Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews (Federal Energy Regulatory Commission); (4) Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection (Federal Energy Regulatory Commission); and (5) National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure (U.S. Department of Transportation).

We used Docket numbers to search for comments associated with each rule. Comments submitted to DOE and DOT were available via Regulations.gov. To retrieve the comments, we used the option “Bulk Data Download” on the website that provides a comma-separated values (CSV) file with several fields associated with the comments, including data of submission, author, type of organization (if an organization submitted the comment), and either a URL with the comment location or a field with the comment itself. We used these two downloads to retrieve the content of each comment. Rules from FERC do not offer a bulk download option, so the comments were manually downloaded using FERC’s eLibrary. Whenever a comment was related to more than one docket, we followed an expansive approach, meaning that if a comment was related to the rule under consideration, it was included irrespective of its association with additional dockets.

2. Data Aggregation

a. Organizational-level Participation

Many organizations submit comments to multiple rules or even submit multiple comments per rule. We grouped participation at the organizational

level by appending all unique comments submitted by each organization into one “long comment.” This yields one text file per organization that captures the entire involvement of the group in the notice-and-comment process.

Additionally, comments are sometimes submitted (or co-signed) by multiple organizations. In these cases, we assign the comment to every organization that submitted or co-signed. For example, if two environmental organizations co-signed a comment, each organization appears as a commenter in our database and both their comments are identical.

Although this approach “duplicates” the number of comments, it remains appropriate for our analysis, as we seek to assess the content of the comments submitted by all actors and understand the differences that emerge in their involvement. Thus, if a coalition of powerful organizations submits lengthy comments together, replicating and associating the same information with each organization (despite “duplicating” information) captures precisely the dynamic we seek to study.

b. Individual-level Participation

Comments submitted by individuals do not show the same propensity for co-submitting or co-signing as organizational comments do. We followed the same approach when this was the case, but the number of joint submissions did not reach 0.01% of comments. The overwhelming majority are mass campaign comments that replicate the same set of claims or are identical copies of each other.

To that end, another critical aspect of analyzing individual-level participation is defining mass-campaign and purposeful comments, as well as authored and anonymous comments. This task was performed manually, reading each comment and assessing the similarity of their content. This task was possible as the vast majority of comments submitted by individuals are only a few paragraphs long, and they are organized in bullet points in the exact same way, using identical language. This allows for a fairly quick evaluation of the content. To determine authorship, we used keywords such as “sincerely,” “best regards,” and “submitted by” as regular expressions to extract individual names associated with each comment. We performed a manual check to validate the approach.

B. Keyword Definition and Analysis

1. Keyword Definition

As mentioned in this Article, we developed a dictionary of keywords to identify the presence of specific topics in the content of each comment. This approach followed an iterative process that combined a “face validity test”

and an “empirical test.”¹⁶⁴ The first step was to develop a list of candidate words based on expert knowledge. Once the list of candidate words was complete, two researchers double-checked each term and trimmed the list using a preliminary face validity test where words were kept if they were loosely related to the topics under research.

After that, we checked that each word meeting the face validity test was used in the articles to refer to the topics under analysis (empirical test). If the words, used in context, did not relate to the topic they were initially associated with, they were eliminated. Additionally, during the process of checking the empirical validity of candidate words, we identified additional terms that we had not considered before. We proceeded to add them to the list to expand the dictionary even further. There were some instances in which a word that was initially associated with one topic actually reflected a different topic in the context of the comments. In these cases, we made a decision based on a majority rule: if a word reflected a different topic a majority of the time, we switched it to a different sublist. These cases were not numerous, but they showcase the inherent uncertainty associated with working with language models. All these parallel processes yielded the final list of keywords associated with each topic.

KEYWORD LISTS FOR EACH TOPIC

EJ Subst. Dimension - Racial Impacts		
people of color	language other	other than white
ethnicity	minority population	african american
minority group	minority populations	african-american
minority groups	difficulty with English	tribal
limited English	linguistic isolation	tribes
hispanic	racial	environmental racism
latino		

EJ Subst. Dimension- Socioeconomic Impacts		
rural population	low-income	poverty
rural populations	unemployment	lower-income
rural community	unemployed	affordable
rural communities	high school	affordability
low income	high-school	Justice40

164. Yi et al., *supra* note 121, at 685–86.

EJ Subst. Dimension – Environmental Impacts		
EJScreen	fine particle	air pollution
EJ Screen	exposure	environmental benefit
frontline	traffic	environmental benefits
PM 2.5	superfund	environmental harm
PM2.5	hazardous	environmental harms
ozone	air quality	

EJ Procedural Dimension		
input from communities	translation	stakeholder
impacted communities	translator	stakeholders
affected communities	exclusion	mistrust
engagement	local knowledge	public input
consultation	local experience	public participation
consult	communicating	participation
representation		

EJ Subst. Dimension - Distributive Impacts		
fair distribution	vulnerable communities	inequality
equitable	vulnerable group	unequal
fairness	vulnerable groups	disproportionately affected
equality	EJ communities	disproportionate impacts
underserved	EJ	disproportionate impact
vulnerable community	disadvantaged communities	inequality

CBA Economic Costs and Benefits		
employment impact	cost allocation	economic benefits
employment cost	benefit allocation	economic cost
employment benefit	allocation of cost	economic costs
employment impacts	allocation of benefit	transmission rate
employment costs	allocation of costs	transmission rates
employment benefits	allocation of benefits	lowest reasonable cost
electricity rates	economic burdens	competitiveness
electricity prices	economic benefit	jobs

CBA Discount Rates	
employment impact	economic benefits

CBA Health & Other Costs and Benefits		
health benefit	social benefits	health impact
unmaterial benefit	equity benefits	health impacts
social benefit	increased deaths	health conditions
equity benefit	reduced deaths	impact on health
health benefits	fewer deaths	cumulative impacts
unmaterial benefits	life expectancy	

Resilience & Performance		
reliability improvement	reliability	flexibility risk
reliability impact	resilience	flexibility improvements
reliability gain	less reliable	flexibility impacts
reliability risk	more reliable	flexibility gains
reliability impacts	flexibility improvement	flexibility risks
reliability gains	flexibility impact	intermittence
reliability risks	flexibility gain	intermittent
reliability improvements		

CBA Compliance Costs		
compliance cost	small businesses	regulatory costs
compliance costs	administrative burden	cost of the regulation
cost of compliance	administrative burdens	bureaucratic cost
cost of complying	regulatory burden	bureaucratic costs
complying with the regulation	regulatory burdens	non-economic burdens
small business	regulatory cost	

Federalism		
state control	level of government	individual states
state authority	federal authority	individual state

Climate Change		
climate impacts	carbon emissions	climate adaptation
greenhouse gas emissions	carbon intensive	carbon tax
GHG emissions	carbon intensity	low-carbon
GHG	cap and trade	carbon-intensive
climate change	cap-and-trade	clean energy
climate crisis	climate resilient	cleaner grid
lower emissions	climate resilience	clean grid

Price Effects & Inflation		
price increase	net benefit	increase costs for consumers
price increases	cost to consumers	cost of electricity
price reductions	cost on consumers	save consumers
price reduction	savings for consumers	benefits to consumers
inflation	savings	increase prices
price level	additional cost	increased prices
price levels	cost savings	save consumers
fiscally responsible	subsidies	cost consumers
net cost	subsidy	