

COMMENT

The Potential of Visual Rulemaking to Strengthen and Democratize Rulemaking

Julia Anastasio

Julia Anastasio is the Executive Director and General Counsel of the Association of Clean Water Administrators (ACWA).*

Prof. Porter and Watts' article, *Visual Rulemaking*, is a timely examination of the increased use of visual images in the rulemaking process by the administration, interested stakeholder groups, and the public. The article explores the potential of visual images to "strengthen and further democratize" the rulemaking process by promoting transparency, accountability, and increased public participation.¹ The authors discuss the power of visuals to simplify and powerfully convey complex messages and emotions while also addressing the shortcomings and risks associated with the use of these visual tools. They conclude with an important discussion of the legal implications raised by the emergence of visuals in the rulemaking process.

I agree that the shortcomings and risks associated with visual rulemaking are not insurmountable, that the benefits associated with the use of visuals outweigh these risks, and that their use supports the objectives of administrative law.² I agree that strengthening and increasing transparency, political accountability, and public participation are fundamentally important values to encourage in the regulatory process. I therefore focus my Comment on highlighting some of the limitations associated with visual rulemaking, drawing upon my experience³ participating in the Clean Water Rule: Definition of "Waters of the United States" (CWR) rulemaking effort.⁴ I conclude my

**The opinions and statements outlined in this Comment are the personal opinions of the author and should not be interpreted to represent any opinion other than those of the author.*

1. Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1248 (2016) ("Ultimately, we conclude that the benefits of visual rulemaking outweigh its risks and that the administrative law doctrine and theory can and should welcome the use of visuals in rulemaking.")
2. *See id.*
3. While my comments draw upon my experience participating in the Waters of the United States (WOTUS) rulemaking process on behalf of the members of the Association of Clean Water Administrators (ACWA), the views presented here are my own and not the views of ACWA.
4. I use the phrase Clean Water Rule (CWR) to distinguish between the rulemaking activities under the Obama Administration versus the rulemaking activities that are currently underway in the Trump Administration. Clean

Comment by offering several recommended guidelines for federal agencies to consider as they inevitably develop a framework to engage in visual rulemaking.

Rulemaking has emerged as one of the most significant powers exercised by the federal government, so it is essential that the process promote increased transparency, political accountability, and public participation. From rules ensuring the safety of food and consumer products, to controlling environmental pollution, to providing oversight over financial institutions and markets, agencies publish thousands of regulations each year and collectively the impacts are enormous.⁵ The fundamental objective of the rulemaking process is for agencies to balance competing values, expertise, and politics when developing federal policy, and visual rulemaking is a valuable tool for agencies to use.⁶

Rulemaking by its very nature "is the most transparent and participatory decision-making process used in any branch of federal government."⁷ So it is not surprising, then, that many of us who professionally participate in the regulatory process inherently believe that "increased public participation will lead to better policymaking."⁸ Administrative law doctrine has created legal structures and processes to promote clarity, transparency, political accountability, and public participation. As the co-authors illustrate, the regulatory process will benefit from the growing phenomenon of visual rulemaking and its contributions to these same qualities.

For all its good and bad, there is little doubt that social media has transformed the way individuals communicate

Water Rule: Definitions of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015).

5. MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE FEDERAL REGISTER 1 (2016).
6. Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 44 ELR 10670 (Aug. 2014).
7. Cynthia R. Farina et al., *Rulemaking 2.0*, 65 UNIV. MIAMI L. REV. 395, 402 (2011).
8. Farina et al., *supra* note 6.

and share information and that visual images are an inherent feature of this form of communication. As the co-authors demonstrate, visual appeals are useful and effective because they are “easy to create and to digest in today’s social media culture,” and therefore, “visual rulemaking empowers a broader range of stakeholders.”⁹ Images powerfully and efficiently convey both information and emotion, and they can simplify complex and detailed subjects in a manner that is easier to digest and understand. Because of the increasing role social media plays in communication today, the increased use of visuals in rulemaking is inevitable and agencies should begin to take advantage of the benefits graphics provide while minimizing the potential shortcomings. At the same time, the advantages and strengths offered by visual images also represent their limitations and risks.

To support their conclusion, Porter and Watts use several recent examples of visual rulemaking as a means of driving public awareness and support for regulatory actions, including the social media-driven campaigns used by the Environmental Protection Agency (EPA), the president, and interested stakeholders during the debate over the CWR. EPA and interested stakeholders, like the Farm Bureau, used visual-based campaigns to successfully increase public awareness of and interest in the CWR by drawing heavily on images that provoked emotions like fear over facts in an otherwise highly technical policy debate over federal clean water jurisdiction. The pictures and videos also contributed to the stakeholders’ understanding of this complex law and policy issue up to a point.

The Agency leveraged visual media such as infographics, videos, photos, and tweets on various social media platforms to both inform the public of the rulemaking and to persuade viewers to support the proposed rule. In response to similarly emotionally-tinged visuals used by various stakeholder groups, EPA also turned to visual media to counter the alternative narratives. While there was an enormous amount of public participation during the development of the CWR, the process and debate became highly politicized and fueled partisan politics which ultimately distracted from the highly technical, complex, and important deliberations.

The #DitchtheRule campaign, along with coordinated campaigns from other stakeholder groups, was very effective at increasing awareness about the rulemaking beyond just the Farm Bureau’s constituents. The #DitchtheRule video highlighted ambiguities in the CWR proposal and played upon this uncertainty and lack of clarity to raise stakeholders’ participation in the process. Because the CWR proposal left several key terms undefined and was not sufficiently clear and precise elsewhere in the rule, the Farm Bureau capitalized on this ambiguity by suggesting that the new rule would give EPA unfettered discretion to regulate ditches, ponds, and potentially any other drop of water on land to sway their members to participate in the rulemaking. However, the CWR did not intend to regulate

ditches or other traditional agricultural features and the #DitchtheRule campaign unnecessarily created fear over the potential impacts of the rule by putting forth a narrative that distorted facts, fueling the politicization of the process and appealing to the farming community’s fear of federal overreach.

Similarly, the EPA response campaign—#DitchtheMyth—focused on creating urgent public support for the CWR by countering the #DitchtheRule message with an overly simplistic narrative promoted through the Thunderclap¹⁰ campaign and the YouTube remarks of Administrator McCarthy,¹¹ who provided an overview of the importance of the CWR. In these messages, EPA implied that millions of Americans’ drinking water was at risk if the CWR was not finalized. The implication that in the absence of federal Clean Water Act regulation the drinking water of citizens across the nation was at risk is inaccurate and created unnecessary fear.

The provocative messages promoted by EPA and the Farm Bureau illustrate some of the limitations and excessive simplicity of visual rulemaking during the CWR. Each of these campaigns failed to address or acknowledge the important co-regulatory role states play in protecting and restoring the nation’s water resources. The majority of states are delegated to implement both the Clean Water Act and the Safe Drinking Water Act.¹² State water programs continuously strive to provide clean water for drinking, to support the state’s economy, and to protect the natural world within their borders. Crucially, they would continue to do this even in the absence of the CWR. The #DitchtheRule effort also failed to present this distinction in its counterpoints, and the campaign likely contributed to the politicization of the rulemaking effort.

Reliance on visual media campaigns during the CWR debate limited EPA and interested stakeholders’ ability to clearly explain the concepts of cooperative federalism and thereby failed to fully inform the viewer, and therefore likely diminished the meaningfulness of the comments. Ultimately, these messages distorted the overall policy goals and some of the facts, minimizing the benefits associated with visual rulemaking. Public participation is not merely a numbers game of generating a large quantity of comments, but rather rests on a foundation of expert-driven and technical facts to promote transparency and accountability. The simplicity of the messages, in combination with the appeal to emotions over technical, fact-based reasoning, turned the CWR debate into a high-stakes political battle that is still playing out.

10. U.S. Envtl. Protection Agency (U.S. EPA), *I Choose Clean Water*, THUNDERCLAP (last visited Apr. 4, 2018), <https://www.thunderclap.it/projects/16052-i-choose-clean-water>.

11. U.S. EPA, *EPA Administrator McCarthy Gives an Overview of EPA’s Clean Water Act Rule Proposal*, YouTube (Mar. 25, 2014), <https://www.youtube.com/watch?v=ow-n8zZuDY>.

12. See *Clean Water Act (CWA) Compliance Monitoring*, U.S. EPA (last updated Feb. 15, 2018), <https://www.epa.gov/compliance/clean-water-act-cwa-compliance-monitoring>; *Primacy Enforcement Responsibility for Public Water Systems*, U.S. EPA (last updated Nov. 2, 2016), <https://www.epa.gov/dwreginfo/primacy-enforcement-responsibility-public-water-systems>.

9. Porter & Watts, *supra* note 1, at 1187.

Furthermore, while Porter and Watts do not address the rise of bots or algorithm-generated social media posts, it is not hard to imagine, based upon recent developments, the risks and shortcomings such computer-generated campaigns may pose. Posts from bots, or others who wish to cause mischief, could virally spread misleading or false information. This flood of information and misinformation could paralyze the regulatory process and undermine agency policy deliberations and distort the amount of public support for or against a rule. Neither of these possibilities would add meaningfully to the regulatory development process and both could contribute further to the general public's distrust of government actions.¹³

The visual rulemaking activities of the CWR development process occurred on two parallel and distinct tracks and muddled the discussion and debate over the technical facts of the proposed policy. On one track, EPA employed visual tools to raise public awareness and generate public support, as well as to counter opposing narratives, through various informal social media channels such as Facebook and Twitter. The second track focused on the official notice-and-comment process that was occurring in the federal docket on Regulations.gov, and it is where the technical, specialized advocacy occurred. While the public's ability to form an informed conclusion was minimized through highly-politicized, dueling campaigns, interested and savvy stakeholder groups like the Farm Bureau, Association of Clean Water Administrators (ACWA), and others participated fully in the official rulemaking process and provided high-level, expert-driven comments on the CWR. Both processes minimized the democratization potential of visual rulemaking. Porter and Watts demonstrate that for visual rulemaking to successfully promote and support the fundamental goals of administrative democracy, it is essential that agencies merge the two parallel tracks.

In many of the visual efforts used in the CWR process, EPA did not adequately explain to the public these two tracks and how members of the public could participate in the rulemaking process in a meaningful way. Thus, because the Agency failed to connect its visual media efforts to the official record, the benefits of using visual rulemaking to increase transparency and accountability were undercut. Additionally, the Agency failed to clearly articulate the social media guidelines it would follow when confronting (or not confronting) comments or responses that presented an opposing narrative.

As the discussion above illustrates, it is essential that agencies using visual rulemaking establish a clear framework that guides staff using these tools to ensure the legitimacy of the rulemaking process. The basis of this framework must be communication that provides clarity and consistency. Agency guidelines should clearly divulge and link to resources that provide a broader and deeper focus that conveys an accurate picture of the choices being considered and the costs and benefits associated with the policy. Agencies employing visual rulemaking in the future will also need to develop strategies to address the risks associated with computer-generated social media campaigns by those who would wish to distort the process.

Equally importantly, agencies must merge the two parallel universes of potential commenting to fully achieve the goals of administrative law. Agency guidelines must clearly convey where stakeholders can provide comments in the official docket so that the legal legitimacy of the process is preserved. Agencies employing visual campaigns through social media outlets must find some way to either link social media comments to the official docket or alert the public to the official record so that their comments can be included in the deliberations, or both. The CWR generated a huge quantity of comments both through social media channels and through the docket, but not all of these comments became part of the materials the Agency used in its deliberations. By establishing clear guidelines for visual rulemaking and feedback, federal agencies can promote transparency, political accountability, and public participation in the regulatory process.

My experience in the CWR regulatory process supports the conclusion that increasing the use of visuals in rulemaking would promote transparency, political accountability, and public participation in the rulemaking process. And, while the CWR process illustrates that visual rulemaking can improve the regulatory process in some ways, it also demonstrates the limitations and hurdles associated with these techniques. Regardless of these drawbacks, agencies should continue (and increase) the use of visuals to promote rulemaking activities and encourage public participation levels, but also take steps to establish clear guidelines for the use of visual rulemaking. The impact of regulations is great, and thus, the democratization of the regulatory process is a worthy goal which, with the proper foresight, can be enhanced greatly by the rise in graphic information-sharing.

13. Carroll Doherty et al., *Public Trust in Government Remains Near Historic Lows as Partisan Attitudes Shift*, PEW RESEARCH CENTER (May 3, 2017), <http://www.people-press.org/2017/05/03/public-trust-in-government-remains-near-historic-lows-as-partisan-attitudes-shift/>.