

C O M M E N T

Visualizing Accountability and Transparency Measures

by Martha Roberts and Surbhi Sarang

Martha Roberts is a Senior Attorney with the U.S. Climate Legal and Regulatory Program at the Environmental Defense Fund. Surbhi Sarang is a Legal Fellow at the Environmental Defense Fund.

Porter and Watts' article helpfully underscores the values that should be reflected in the regulatory process, including the worthy goals of making regulatory activities more transparent, increasing political accountability, and encouraging public participation. There is a long, bipartisan history of efforts to further these aims in the rulemaking process; Porter and Watts' piece illuminates one new emerging strategy to support these goals. As the authors point out, visual rulemaking has the ability to increase transparency of agency action, better convey how agency actions affect the public, and engage a more diverse segment of the public in agency rulemakings—all of which can help assure accountability in implementation of public health and safety protections. In an era during which foundational rulemaking values are under threat, reflecting on the history and future of rulemaking transparency and accountability is an opportunity to examine the importance of these qualities and evaluate current and potential sources of support.

I. A Long History of Reforms to Enhance Rulemaking Transparency

Recent efforts to enhance agency communication through compelling visuals build from and advance the aims of text-focused bipartisan reforms over several decades that have similarly aimed to encourage approachable, digestible regulatory documents and processes. Both aim to increase public understanding of the implications of the agency action at issue.

The Administrative Procedure Act (APA) itself was intended to bring transparency, public participation, and political accountability into the rulemaking process. The APA requires that agencies must provide notice when proposing new rules, allow the public to comment on proposed rules, consider seriously each comment they receive, and submit to judicial review of final agency actions. The APA was accordingly an early effort to embed democratic values into agency procedures.

Subsequent efforts have built on this foundation. Executive Order 12866, which built on the Reagan-era Executive Orders 12291 and 12498, underscores the need for a regulatory process that is “accessible and open to the public.”¹ As such, Executive Order 12866 emphasizes the need for agencies to “provide the public with meaningful participation in the regulatory process” including “a meaningful opportunity to comment on any proposed regulation.”² It also stresses that “[a]ll information provided to the public by the agency shall be in plain, understandable language”³—recognizing that engaging the public requires first that they understand the issue.

Executive Order 12988, which was issued almost three years after Executive Order 12866, directly stresses the importance of using plain language in regulations.⁴ Citing the important consequences that regulations can have for the public, Executive Order 12988 emphasizes a need to draft regulations that clearly inform the public about their applicability and effect, and urges that clear language should be a main regulatory priority.

Other reforms have focused on illuminating specific, critical aspects of rulemakings. Executive Order 12898, for instance, requires agencies to “identify[] and address[] . . . disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”⁵ Executive Order 13045, similarly, requires agencies to include in the administrative record “an evaluation of the environmental health or safety effects of the planned regulation on children [] and [] an explanation of why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency.”⁶ As a result of these Executive Orders, the Environmental Protection Agency (EPA) provides an environmental

1. Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

2. *Id.* at 51740.

3. *Id.* at 51742.

4. Exec. Order No. 12988, 61 Fed. Reg. 4729 (Feb. 5, 1996).

5. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

6. Exec. Order No. 13045, 62 Fed. Reg. 19885, 19887 (Apr. 23, 1997).

justice analysis and consideration of effects on children's health in separate, explicitly-labeled sections of its rule preambles, taking a step toward greater transparency by requiring the agency to directly address the impacts of its action on relevant communities.

II. The Role of Transparency in Assuring Accountability

Porter and Watts assert that visual rulemaking tools can help stakeholder communities understand the practical implications of agency decisions. They note the power of graphics to distill even complex and technical information.⁷ As an example, they point to an EPA-produced YouTube video that uses simple whiteboard drawings to explain how the Clean Power Plan (CPP) will reduce carbon pollution from power plants and why EPA considers the action necessary to address climate change.⁸

An examination of the role of earlier reforms in the current day helps demonstrate how informational graphics can serve transparency and accountability goals in practice. EPA under Administrator Scott Pruitt has attempted to reverse or delay a number of different safeguards for human health and the environment. The sections of rulemaking preambles that address executive orders on environmental justice and children's health have helped shed light and provide concrete, discernable information on the real-world impact of these rulemaking actions.

The preamble to Administrator Pruitt's proposal to repeal the CPP provides an illuminating example. The CPP established the first nationwide limits on pollution from existing power plants, America's largest stationary source of carbon dioxide emissions. In Administrator Pruitt's proposed repeal package, the preamble focuses on statutory interpretation, justifying the repeal on the basis of a changed legal interpretation of Section 111(d) of the Clean Air Act. The consequences of this proposed action on public health or the environment are largely overlooked. Observers of the CPP repeal rulemaking have expressed serious concerns that the repeal rulemaking has been insufficiently transparent by, for example, obscuring information on the risks to the public from power plant pollution.⁹

In response to mandated rulemaking disclosure requirements, the preamble does provide some incremental level of information. As required under Executive Order 13045 on children's health, the preamble acknowledges that "[t]he CPP was anticipated to lower ambient concentrations of [fine particulate matter] and ozone, and some of the benefits of reducing these pollutants would have accrued to children."¹⁰ As required under Executive Order 12898, an environmental justice analysis is included that finds that the Clean Power Plan "anticipated reductions in CO₂ emissions, as well as lower concentrations of [fine particulate matter] and ozone" due to changes in power plant emissions and that low-income and minority communities located in proximity to power plants "may have experienced an improvement in air quality as a result of the emissions reductions."¹¹ Thus these executive orders that require agencies to explain certain particularly salient impacts for the public play a role in helping require that this preamble—which otherwise shortchanges information on the health impacts of revoking the Clean Power Plan—provides at least a minimum level of transparency on a proposal's practical implications.

These analyses can help alert individuals to impacts they may face from an agency action and allow them to be more informed in their engagement in the rulemaking process. For example, a blog post by Moms Clean Air Force, an organization dedicated to protecting children and families from air pollution, compiled a list of twelve actions by Scott Pruitt's EPA that would delay and rollback critical human health and environmental protections important for children's health, including the CPP repeal proposal. The post noted that in each listed instance, due to required Executive Order 13045 regulatory analysis, EPA had either acknowledged the adverse impact on children's health its current action would have or previously acknowledged that the safeguard would have benefited children's health.¹² This post displays how members of the public can use transparent language about agency actions in regulatory documents to hold agencies accountable.

III. Advancing Transparency in the Current Day

The APA and subsequent executive orders have taken steps to increase accountability and transparency, but unfortunately, these foundational values are currently under question. EPA's conduct under Administrator Pruitt provides an example of why these values are so critical to uphold. At the same time that Pruitt's administration has engaged in a

conceal the true health costs of air pollution. Its revised calculations diminish and devalue the harm that comes from breathing particulate matter, suggesting that below certain levels, it is not harmful to human health. This is wrong."

10. 82 Fed. Reg. 48035, 48048.

11. *Id.*

12. Molly Rauch, *12 Ways Scott Pruitt's EPA Threatens Children's Health—In the Agency's Own Words*, MOMS CLEAN AIR FORCE BLOG (Nov. 27, 2017), <http://www.momscleanairforce.org/12-ways-pruitts-epa-threatens-childrens-health/>.

7. Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183, 1245 (2016).

8. U.S. Envtl. Protection Agency, *Clean Power Plan Explained*, YouTube (June 2, 2014), https://www.youtube.com/watch?v=AcNTGX_d8mY.

9. See, e.g., William W. Buzbee, *Trump Administration's Clean Power Plan Repeal Proposal Is Illegal*, THE HILL (Oct. 29, 2017), <http://thehill.com/opinion/energy-environment/357557-trump-administrations-clean-power-plan-repeal-proposal-is-illegal> ("The agency, however, barely mentions the massive factual record and EPA findings supporting the Clean Power Plan. . . . Pruitt's EPA even purged contrary studies from its website, as if that would make them go away The repeal proposal does not discuss or justify the lost pollution reductions that motivated the original rule and are the focus of the Clean Air Act, although an accompanying cost-benefit analysis quantifies the changes in a document that itself is skewed and deviates from its past analyses."); Harold P. Wimmer & Stephen C. Crane, *EPA's Proposed Repeal Will Make Americans Sicker*, CNN (Mar. 13, 2018), <https://www.cnn.com/2018/03/13/opinions/epa-air-pollution-health-opinion-wimmer-crane/index.html> (criticizing the regulatory impact analysis published to support the proposed repeal: "The EPA has cherry-picked data to

rulemaking to repeal the CPP, it has obscured public access to climate science¹³ and removed information about the Clean Power Plan from its website.¹⁴ In a series of actions rolling back other public health and environmental safeguards, Pruitt's EPA completely closed the doors to public engagement and did not even provide an opportunity for public comment.¹⁵ Pruitt has further kept the public and elected officials at arm's-length, appearing for just two congressional oversight hearings in his first year at EPA, only one before the Senate Environment and Public Works Committee,¹⁶ and limiting his public appearances.¹⁷ Steps like these frustrate the goals of public participation because in order to provide informed comment the public must first know what the agency is considering and receive good information to assess that course, which depends on access to decisionmakers who will listen and answer questions in open dialogue.

By examining the potential of visual rulemaking, Porter and Watts helpfully illuminate one strategy that EPA and other agencies could employ to reinvigorate and return to the long history of supporting the democratic process of rulemaking. There can be meaningful benefits if agencies reach audiences where they are—increasingly on social media. Lay communities can face language barriers, lack access to technical experts, and have more constraints on their time that pose barriers to engaging with a complex, technical regulatory process. By using graphics to convey the importance of their regulations, and to break down complex, technical regulatory text to clearly demonstrate what an action means for the public, agencies can engage more stakeholders and empower them to better participate in decisions agencies are making about their health and environment.

However, visual rulemaking tools can only achieve so much when an agency's approach to rulemaking gives short shrift to transparency and accountability; indeed, visual brevity may as easily be twisted to serve the purposes of an administration looking to avoid disclosure. Pruitt's administration's approach has underscored the continued value of historical reforms that have made certain minimum disclosures mandatory.

While visual rulemaking has the potential to enhance transparency and public participation, its true value may only be realized under an administration focused on supporting these values. In the meantime, this article has shown that it is worthy of further study and consideration.

13. Michael Biesecker, *Emails Show Pruitt Monitored Changes to EPA Webpages on Climate*, PBS (Feb. 2, 2018), <https://www.pbs.org/newshour/politics/emails-show-pruitt-monitored-changes-to-epa-webpages-on-climate>.
14. Neela Banerjee, *Scott Pruitt Closely Monitored Scrubbing of EPA Climate Websites, Emails Show*, INSIDE CLIMATE NEWS (Jan. 29, 2018), <https://insideclimatenews.org/news/29012018/scott-pruitt-epa-climate-websites-erased-emails-reveal-close-involvement-clean-power-plan>.
15. See Letter From Scott Pruitt, Adm'r, EPA, to Howard J. Feldman, Director, American Petroleum Inst., Shannon S. Broome, Counsel, Tex. Oil & Gas James D. Elliott, Counsel, Indep. Ass'ns and Matt Hite, Vice President, GPA Midstream Ass'n (Apr. 18, 2017), https://www.epa.gov/sites/production/files/2017-04/documents/oil_and_gas_fugitive_emissions_monitoring_reconsideration_4_18_2017.pdf (informing industry representatives that EPA was suspending and reconsidering limits on pollution from oil and gas operations with no simultaneous public notice or opportunity to comment); *Notice Regarding Withdrawal of Obligation to Submit Information*, 82 Fed. Reg. 12817 (Mar. 7, 2017) (EPA providing notice of withdrawal of requests for information from oil and gas operators with no opportunity for public comments); *Extension of Deadline for Promulgating Designations for the 2015 Ozone National Ambient Air Quality Standards*, 82 Fed. Reg. 29246 (June 28, 2017) (EPA providing notice of decision to delay limits on ozone pollution by one year with no opportunity for public comments); *Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category*, 82 Fed. Reg. 19005 (Apr. 25, 2017) (EPA providing notice of stay and reconsideration of wastewater standards for power plants, only after earlier notifying industry representatives, and only providing an opportunity for public comment on further postponement of the standards more than a month later); Letter From Scott Pruitt, Adm'r, EPA, to Carroll W. McGuffey III, Counsel, Republic Servs., Barry Shanoff, Counsel, Solid Waste Ass'n of N. America, Kevin J. Kraushaar, Counsel, Nat'l Waste & Recycling Ass'n, and Carol F. McCabe, Counsel, Waste Mgmt. Disposal Servs. of Pa. (May 5, 2017), https://www.epa.gov/sites/production/files/2017-05/documents/signed_-_letter_-_municipal_solid_waste_landfills.pdf (notifying industry of grant of request to delay and reconsider pollution limits from landfills, with formal notice to the public not provided until over two weeks later).
16. Brady Dennis & Juliet Eilperin, *EPA Chief Once Said Trump "Would Be More Abusive to the Constitution Than Barack Obama—and That's Saying a Lot"*, CHICAGO TRIB. (Jan. 30, 2018), <http://www.chicagotribune.com/news/nationworld/politics/ct-scott-pruitt-trump-constitution-comment-20180130-story.html>.
17. William D. Ruckelshaus, *Pruitt Is Turning His Back on Transparency at the EPA*, WASH. POST (Nov. 1, 2017), https://www.washingtonpost.com/opinions/pruitt-is-turning-his-back-on-transparency-at-the-epa/2017/11/01/cd2c1b84-bd88-11e7-8444-a0d4f04b89eb_story.html ("Pruitt operates in secrecy. By concealing his efforts, even innocent actions create an air of suspicion, making it difficult for a skeptical public to give him the benefit of the doubt."); Emily Atkin, *What Is Scott Pruitt Hiding?*, NEW REPUBLIC (May 30, 2017), <https://newrepublic.com/article/142785/scott-pruitt-hiding> ("Public appearances are also rare for the administrator, as are on-the-record briefings with journalists.").