

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**The Office of Public Participation**

)  
)  
)

**Docket No. AD21-09-000**

**COMMENTS OF THE INSTITUTE FOR POLICY  
INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW**

Pursuant to the Federal Energy Regulatory Commission’s (FERC or Commission) March 5, 2021 Notice of Virtual Listening Sessions and a Public Comment Period,<sup>1</sup> the Institute for Policy Integrity at New York University School of Law (Policy Integrity)<sup>2</sup> respectfully submits these comments highlighting the potential benefits of public participation by environmental justice communities and identifying best practices that FERC’s Office of Public Participation (OPP or Office) should adopt. Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

FERC solicited comment from interested parties on how the Commission should structure OPP to facilitate public participation.<sup>3</sup> Effective public participation will further FERC’s statutory mandates under the Federal Power Act (FPA) and the Natural Gas Act (NGA) and will improve regulatory outcomes. Congress granted FERC broad authority in determining how to structure this office and, given the benefits of effective public participation, FERC should follow best practices to drive participation in a meaningful way and maximize engagement.

---

<sup>1</sup> Notice of Virtual Listening Sessions and a Public Comment Period, *Office of Public Participation*, Docket No. AD21-9-000 (Mar. 5, 2021).

<sup>2</sup> These comments do not reflect the views of NYU School of Law, if any.

<sup>3</sup> Notice of Workshop and Request for Panelists, *Office of Public Participation*, Docket No. AD21-9-000 (Feb. 22, 2021).

Policy Integrity recommends the following practices to improve FERC’s decisionmaking and engage environmental justice communities:

1. Tailor any guidelines for participation to the type of regulatory action being taken;
2. Engage the public early in the regulatory process;
3. Use targeted community outreach efforts;
4. Overcome logistical barriers to ensure that the individuals who are representative of the affected community are engaged in public participation;
5. Provide public liaisons; and
6. Provide technical assistance.

In implementing these best practices, the Commission should look to participation practices that other agencies have implemented to provide lessons learned and inform OPP’s own policies.

In addition, OPP should provide compensation to intervenors where doing so will secure effective, additional public participation. The Office must recognize that one of the most significant barriers to public participation, particularly by environmental justice communities, is the financial costs of intervention. Without addressing this issue, OPP will not foster sufficient level of public engagement.

### **Table of Contents**

I.	FERC Has Broad Authority Under Section 319 to Establish an Office of Public Participation and Should Structure the Office to Maximize Engagement.....	3
II.	Well-Designed Public Participation Has Numerous Benefits.....	4
A.	Public Participation Facilitates FERC’s Statutory Mandates .....	4
B.	Public Participation Improves Regulatory Outcomes .....	5
III.	OPP’s Policies Should Incorporate Best Practices Identified by Past Studies.....	6
A.	OPP Should Tailor Guidelines for Participation to the Type of Regulatory Action Contemplated.....	7
B.	OPP Should Engage the Public Early in the Regulatory Process.....	9
C.	OPP Should Use Targeted Community Outreach Efforts .....	10
D.	OPP Should Work to Overcome Logistical Barriers to Participation .....	10
E.	OPP Should Provide Public Liaisons .....	12
F.	OPP Should Provide Technical Assistance .....	12
IV.	The Office Should Look to Other Agency Practices .....	14

## I. FERC Has Broad Authority Under Section 319 to Establish an Office of Public Participation and Should Structure the Office to Maximize Engagement

Section 319 of the FPA grants FERC expansive authority to establish an Office of Public Participation. The statute provides that a Director shall determine the functions and duties of the Office and that she shall “coordinate assistance to the public” and “coordinate assistance available to persons intervening or participating or proposing to intervene or participate in proceedings before the Commission.”<sup>4</sup> It also allows the Commission to provide compensation for a variety of costs to intervenors and participants.<sup>5</sup> This broad, but clear, authority enables FERC to structure the Office of Public Participation in a manner that will maximize its impact and spur meaningful participation.

Enhancing public participation will benefit the Commission, including by facilitating FERC’s statutory mandates and improving regulatory outcomes, both discussed below. Improved participation policies can also ensure that environmental justice voices are heard and enable these communities to be effective participants in agency proceedings.<sup>6</sup> Through the participation of environmental justice communities, FERC can “more aggressively fulfill its responsibilities to ensure its decisions don’t unfairly impact historically marginalized communities.”<sup>7</sup> However, such benefits will accrue only if the Office is structured to maximize engagement and

---

<sup>4</sup> 16 U.S.C. § 825q-1(a)-(b).

<sup>5</sup> *Id.* § 825q-1(b).

<sup>6</sup> Jenny J. Tang, *Public Participation in Brownfield Redevelopment: A Framework for Community Empowerment in Zoning Practices*, 3 SEATTLE J. ENV’T L. 241, 251 (2013) (concluding that public participation mechanisms can help environmental justice communities to “gain mastery over their lives,” to feel competent to change a situation, and to feel confident that their efforts will produce positive outcomes); Marc Mihaly, *Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership with Experts and Agents*, 27 PACE ENV’T L. REV. 151, 164-65 (2009) (stating that public participation can serve as a “political entrance vehicle for new stakeholders” by bringing communities together to form new group identities and new community organizations that work together to “reorder public priorities and advocate for new governing processes”).

<sup>7</sup> Press Release, Fed. Energy Reg. Comm’n, FERC Chairman Acts to Ensure Prominent FERC Role for Environmental Justice (Feb. 2, 2021), <https://perma.cc/9J3Z-PAQD>.

opportunities for participation are well-designed. In order to drive meaningful and effective engagement, FERC should expressly task OPP with establishing procedural guidance for public participation in the Commission’s proceedings that are based on best practices identified in past studies and those used by other agencies. These practices are discussed *infra* Section III.

## **II. Well-Designed Public Participation Has Numerous Benefits**

Engagement of the public—and specifically environmental justice communities—can provide important benefits to the Commission. Meaningful participation by environmental justice communities will help FERC to fulfill its statutory mandates under the FPA and NGA. Furthermore, participation can enhance regulatory outcomes by helping the Commission obtain more comprehensive information on relevant issues and build public confidence in its ultimate decisions.

### **A. Public Participation Facilitates FERC’s Statutory Mandates**

Greater public participation by environmental justice communities can aid FERC in fulfilling its statutory mandates under the FPA and NGA. Both statutes declare that the interstate sale and transmission electric energy and gas “for ultimate distribution to the public is affected with a public interest.”<sup>8</sup> Likewise both statutes refer throughout to FERC’s obligation to act in the public interest in approving actions and setting wholesale rates that are just and reasonable.<sup>9</sup> And, while FERC may not have a “broad license” to protect the general public welfare, it is charged with setting rates that are just and reasonable in the public interest.<sup>10</sup>

---

<sup>8</sup> 16 U.S.C. §§ 824, 717a.

<sup>9</sup> *See, e.g.*, 16 U.S.C. §§ 824a, 824c, 717b, 717f(a); *see also* Nat’l Assoc. for the Advancement of Colored People v. Fed. Power Comm’n, 520 F.2d 43, 438-39 (D.C. Cir. 1975) (cataloguing references to the public interest in the FPA and NGA).

<sup>10</sup> Nat’l Assoc. for the Advancement of Colored People v. Fed. Power Comm’n, 425 U.S. 662, 669-71 (1976) (explaining that “the words ‘public interest’ in a regulatory statute is not a broad license to promote the general public welfare” but rather must be understood with reference to “the purposes for which the Acts were adopted”).

The engagement of environmental justice communities will help the Commission act in the public interest because these communities can identify problems, direct and collateral effects, unintended consequences, and novel solutions in a manner that will improve FERC's decisions.<sup>11</sup> In particular, because environmental justice communities are often disproportionately affected by energy prices and projects,<sup>12</sup> engaged environmental justice communities could provide information that will help bring to light potential disparate impacts and other issues early on. Early and active engagement by these communities could also avoid conflict and lengthy and costly legal processes. Meaningful and effective public participation by environmental justice communities can therefore facilitate FERC's accomplishment of its statutory mandates to act in the public interest.

## **B. Public Participation Improves Regulatory Outcomes**

Public participation by environmental justice communities can improve FERC's regulatory outcomes by allowing the Commission to obtain more comprehensive information for use in its decisions. Frontline communities may be experts on the real-world consequences of FERC's regulatory decisions because of their personal experience, such as living near transmission lines, and can provide information and a deeper understanding that can only be gleaned from lived experiences.<sup>13</sup> Additionally, environmental justice communities might

---

<sup>11</sup> MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI, ADMIN. CONF. OF THE U.S., FINAL REPORT: PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING 11 (2018).

<sup>12</sup> Ariana Skibell, *Texas Grid Crisis Exposes Environmental Justice Rifts*, E&E NEWS (Feb. 23, 2021), <https://perma.cc/LC75-LRUP>; SARAH WRAIGHT ET AL., ENVIRONMENTAL JUSTICE CONCERNS AND THE PROPOSED ATLANTIC COAST PIPELINE ROUTE IN NORTH CAROLINA (2018).

<sup>13</sup> Cynthia R. Farina et al., *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1197 (2012) (explaining that these communities have "situated knowledge" of the "impacts, ambiguities and gaps, enforceability, contributory causes, and unintended consequences that are based on the lived experience in the complex reality into which the proposed regulation would be introduced"); Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENV'T. L.J. 3, 72 (1998) ("[F]ormal expertise cannot capture the knowledge that exists within affected communities."); SANT'AMBROGIO & STASZEWSKI, *supra* note 11, at 26.

provide further information about public opinion that can help FERC identify and analyze potential areas of conflict or litigation risk.<sup>14</sup> The Office of Public Participation can provide a clear and direct opportunity for environmental justice communities to pass on this information that the Commission might not otherwise obtain.

Moreover, engagement of environmental justice communities in the regulatory process can build public confidence in FERC’s decisionmaking. Stakeholders and the general public may be more supportive of agency action when they are given a meaningful opportunity to be heard.<sup>15</sup> Stakeholders may have greater confidence in a process that brings community interests to the forefront of the discussion by engaging environmental justice communities and reducing emphasis on stakeholder politics.<sup>16</sup> Where the public is able to participate in the process and see that their concerns are heard and considered, they may be more inclined to accept, or even support, the outcome of the process.

### **III. OPP’s Policies Should Incorporate Best Practices Identified by Past Studies**

The benefits of public participation will accrue only where opportunities for participation are well-designed and allow for meaningful engagement. Therefore, OPP should incorporate best practices identified by past studies to ensure that the Office achieves its goal of *effectively* securing “participation by tribes, environmental justice communities, and other affected

---

<sup>14</sup> Mihaly, *supra* note 6, at 164-65 (discussion how citizen participation can provide information about “the nature and depth of public opinion” and “the substance, weight, significance and politics of stakeholder concerns”).

<sup>15</sup> SANT’AMBROGIO & STASZEWSKI, *supra* note 11, at 17 (“[S]takeholders will be more supportive of agency rulemakings when their voices are heard by the agency, even when they do not get everything they want.”); *id.* (citing CYNTHIA R. FARINA & CERI, IBM CTR. FOR THE BUS. OF GOV’T, RULEMAKING 2.0: UNDERSTANDING WHAT BETTER PUBLIC PARTICIPATION MEANS, AND DOING WHAT IT TAKES TO GET IT 12 (2013) as providing some evidence for this theory); *cf.* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 402–03 (stating that public participation promotes democratic values because it allows agency staff to engage with groups or individuals that they may not regularly consult).

<sup>16</sup> Ian E. Cecala & A. Bryan Endres, *Damnesia: An Examination of Public Participation and Evolving Approaches to Hydropower Development in the US and Brazil*, 55 IDAHO L. REV. 115, 122 (2019).

individuals, including those who have not historically participated before the Commission.”<sup>17</sup>

Specifically, OPP should adopt the following six practices:

1. Tailor guidelines for participation to the type of regulatory action contemplated;
2. Engage the public early in the regulatory process;
3. Use targeted community outreach efforts;
4. Overcome logistical barriers to ensure the individuals who are representative of the affected community are engaged in public participation;
5. Provide public liaisons; and
6. Provide technical assistance.

#### **A. OPP Should Tailor Guidelines for Participation to the Type of Regulatory Action Contemplated**

OPP should tailor any guidelines or general policies to the type of regulatory action contemplated given the potentially unique needs of the variety of actions taken by FERC.<sup>18</sup> A general policy should require consideration of the following questions:

(1) the agency’s goals and purposes in engaging the public; (2) the types of individuals or organizations with whom the agency seeks to engage, including experts and any affected interests that may be absent from or insufficiently represented in the notice-and-comment rulemaking process; (3) how such types of individuals or organizations can be motivated to participate; (4) what types of information the agency seeks from its public engagement; (5) how this information is likely to be obtained; (6) what the agency will do with the information; (7) when public engagement should occur; and (8) the range of methods of public engagement available to the agency.<sup>19</sup>

After considering these questions, OPP should develop a specific public engagement plan for each class of regulatory actions and publish these plans in the Federal Register, on the FERC website, and more broadly.<sup>20</sup>

---

<sup>17</sup> Notice of Workshop and Request for Panelists, *Office of Public Participation*, Docket No. AD21-9-000 (Feb. 22, 2021).

<sup>18</sup> See SANT’AMBROGIO & STASZEWSKI, *supra* note 11, at 157 (explaining that agencies should develop engagement plans, keeping in mind that the “public’s role may vary from issue to issue, and at different stages of the rulemaking process”).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 157-58.

Yet, the answer to these questions and what an engagement plan should encompass depend heavily on the type of action that FERC is contemplating. The Commission has a wide variety of obligations and must approve action by different actors. One well-known example of Commission action is its certification of pipelines. This infrastructure approval process has proven to have broad implications for the public and a wide swath of environmental justice groups. OPP will play an important role in facilitating public participation in the certification process of pipelines and particularly new infrastructure. The Office will need to set out guidance for a range of constituents with interests in protecting their land for private use, for environmental organizations seeking to prevent new long-lasting carbon-intensive infrastructure, and environmental justice groups seeking to reduce disproportionate impacts on their communities. In this setting, OPP's role in facilitating participation will be similar to that any agency might play.

OPP's role is likely to look very different in the majority of actions involving tariff amendment submissions by Regional Transmission Organizations and Independent System Operators (RTO/ISO). In some instances, market design changes, participation rules, and other tariff amendments will have clear implications for environmental justice communities and the public at large. Similarly, transmission planning processes could affect many communities. However, there is no clear avenue for these groups to participate in ISO/RTO decisionmaking processes. Therefore, OPP should consider how



it might represent the concerns of these groups in the RTO/ISO governance process or facilitate participation by the public in RTO/ISO decisionmaking.<sup>21</sup>

Policies for ensuring effective participation in a pipeline certification docket will necessarily differ from policies for participation in an RTO/ISO tariff change docket. By developing a publicly accessible general policy for public participation and tailoring this policy to each proceeding, OPP can facilitate more successful public participation by environmental justice communities.

### **B. OPP Should Engage the Public Early in the Regulatory Process**

OPP should engage the public as early as feasible in Commission proceedings to provide environmental justice communities the opportunity to meaningfully affect regulatory outcomes before irreversible first steps are taken.<sup>22</sup> Once an agency like FERC has expended significant time and resources on a proposed action, they may be less likely to take action to address concerns voiced by environmental justice communities.<sup>23</sup> Additionally, when participation is only offered late in the decisionmaking process, communities may feel that their voices are not really being heard, understood, or taken seriously, but rather that their participation is merely a formality.<sup>24</sup> Community members may see these late attempts to engage the public as a public relations tactic to validate government or corporate decisions.<sup>25</sup> As a result, they may lose

---

<sup>21</sup> OPP should seriously consider the remarks made by multiple panelists at the OPP Workshop regarding the need to facilitate greater public participation in the RTO/ISO process, such as the establishment of an RTO/ISO ombudsman. *See also* Shelly Welton, Grasping for Energy Democracy, 116 Mich. L. Rev. 581, 624, 631 (2018) (noting the challenges of incorporating public participation and particularly situational knowledge into RTO processes, which “operate through opaque, technical, deeply bureaucratic, and meeting-dense processes”).

<sup>22</sup> Sara Pirk, *Expanding Public Participation in Environmental Justice: Methods, Legislation, Litigation and Beyond*, 17 J. ENV'T L. & LITIG. 207, 209 (2002).

<sup>23</sup> *Id.* at 213; Tang, *supra* note 6, at 248 (finding that in the context of brownfield development, public comment requirements are unlikely to initiate changes in response to environmental justice because the developers, municipalities, and bureaucrats have already invested substantial time and resources into the redevelopment project).

<sup>24</sup> Pirk, *supra* note 22, at 209-10.

<sup>25</sup> *Id.*

confidence in FERC's decisionmaking process.<sup>26</sup> Therefore, it is important for OPP to ensure participation early in the regulatory process.

### **C. OPP Should Use Targeted Community Outreach Efforts**

OPP should use targeted community outreach efforts to help secure the participation of environmental justice groups. The goal of this targeted outreach is to solicit participation from individuals or entities that do not read the Federal Register, are unaware that they can participate in the rulemaking and adjudicatory processes, or are unable to effectively participate in the notice-and-comment or intervention process on their own.<sup>27</sup> OPP should consider publishing public notices outside the Federal Register, inviting participation where it would alert communities to potential impacts.<sup>28</sup> Specifically, the Office should consider posting notices with local media that might be more widely circulated and read by communities most affected.<sup>29</sup> OPP might also use a convening process to identify affected interests and issues that need to be addressed prior to the start of the formal public participation process.<sup>30</sup>

### **D. OPP Should Work to Overcome Logistical Barriers to Participation**

OPP should proactively reduce barriers such as geographical, language, and resource constraints to ensure that the individuals who are representative of the affected community can

---

<sup>26</sup> Jeff St. John, *New FERC Chair's Focus: Environmental Justice and Climate Change Impacts*, GREENTECH MEDIA (Feb. 15, 2021), <https://perma.cc/EFH5-3JX4> (noting Chairman Glick's goal is to help the public build confidence in FERC's regulatory proceedings).

<sup>27</sup> SANT'AMBROGIO & STASZEWSKI, *supra* note 11, at 4.

<sup>28</sup> Thomas Beirele & Jerry Cayford, *Democracy in Practice: Public Participation in Environmental Decisions*, 28 ADMIN & REG. L. NEWS 6, 16 (2013). As discussed above, there may be limits to when additional notices and convening processes are worthwhile depending on the nature of the proceeding and the action being taken.

<sup>29</sup> This is also a best practice that FERC has suggested applicants employ in their pre-filing activities. *See* FED. ENERGY REG. COMM'N, IDEAS FOR BETTER STAKEHOLDER INVOLVEMENT IN THE INTERSTATE NATURAL GAS PIPELINE PLANNING PRE-FILING PROCESS: INDUSTRY, AGENCIES, CITIZENS, AND FERC STAFF 7 (2001), <https://perma.cc/TRS8-NVAY>.

<sup>30</sup> Beirele & Cayford, *supra* note 28, at 16.

engage in public participation.<sup>31</sup> In order for public participation to be successful, the individuals participating must be racially, socio-economically, and geographically representative of the affected community. However, affected community members might be unable to participate when meetings are lengthy or held at inconvenient times and places. And, the rulemaking process might end up being overly dominated by traditional stakeholders (such as representatives from traditional environmental organizations, industry and other government agencies) and affected communities might therefore not be given a meaningful role in the process.

To ensure that public participation is representative of the affected community, OPP should overcome logistical barriers to public participation. Long public hearings can impose a barrier because many community members do not have the time or financial resources to spend at lengthy public hearings.<sup>32</sup> Even if OPP creates a schedule for each topic, these times are apt to change, requiring an individual who wishes to speak to sit through an entire meeting in the event that their issue is brought up early.<sup>33</sup> It can be challenging for individuals to travel long distances at inconvenient times to participate, especially if those meetings are held during the workday.<sup>34</sup> Finally, environmental justice communities may experience linguistic barriers that could inhibit meaningful participation.<sup>35</sup>

In sum, when planning the method of participation that will be used, OPP must take into consideration logistical and financial barriers the community members may face. In deciding

---

<sup>31</sup> SANT'AMBROGIO & STASZEWSKI, *supra* note 11, at 8.

<sup>32</sup> John C. Duncan, Jr., *Multicultural Participation in the Public Hearing Process: Some Theoretical, Pragmatical, and Analeptical Considerations*, 24 COLUM. J. ENV'T L. 169, 193-94 (1999).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 194-95.

<sup>35</sup> For example, key documents, like Environmental Impact Assessments, utilize highly technical language that is difficult to understand even for native English speakers. *Id.* at 195-97; SANT'AMBROGIO & STASZEWSKI, *supra* note 11, at 8.

what kind of participation mechanism to use, OPP should remember that intensive processes are more likely to be socio-economically unrepresentative of the public at large as compared to other forms, like public meetings, hearings, and non-consensus advisory committees.<sup>36</sup> OPP should work to hold hearings outside the workday and even provide multiple hearings for maximum flexibility for the public. Hearings should also be held, where possible, close to project locations and/or near the communities most affected. Further, OPP should ensure that translators are available to the public in hearings and that translated materials are available where appropriate.

#### **E. OPP Should Provide Public Liaisons**

OPP should provide public liaisons that can, at minimum, provide general information about processes and public participation rights. OPP should have liaisons available to provide potential participants with resources describing the various Commission processes and major points for public participation.<sup>37</sup> There are many procedural difficulties—statutory or regulatory deadlines, standing requirements, and filing requirements—that the general public may not be familiar with.<sup>38</sup> Liaisons should also be authorized to walk the public through these processes and be able to explain the procedures with clarity. OPP should also consider creating templates (or working with outside groups to create templates) that liaisons can provide to potential commenters or intervenors as a reference point for submission.

#### **F. OPP Should Provide Technical Assistance**

Finally, OPP should provide technical assistance to help environmental justice communities meaningfully participate. The technical complexity of proceedings “is bound to be

---

<sup>36</sup> Beirele & Cayford, *supra* note 28, at 16.

<sup>37</sup> Again, such resources can and should be tailored to the type of action contemplated, as discussed above.

<sup>38</sup> SANT'AMBROGIO & STASZEWSKI, *supra* note 11, at 8.

a barrier to the average citizen.”<sup>39</sup> Therefore, lack of expert assistance can inhibit successful public participation. An agency’s reliance on formal expertise in an administrative hearing can prevent those that lack expertise from participating fully.<sup>40</sup> General public comments or input may not be weighted as heavily because they may not be on the same technical level or experience as agency and other stakeholder experts.<sup>41</sup> And, communities may not have access to information relevant to the proceeding. For each of these reasons, environmental justice communities (and the public generally) are disadvantaged in the proceedings compared to other stakeholders with financial and technical expertise and resources. OPP should thus work to reduce technical barriers to the meaningful participation of the broader public.

More specifically, OPP could authorize money for open-source modeling and training for intervenors, and work with the Commission and stakeholders to make more data available to the public. Open-source energy modeling increases transparency and the credibility of the decisionmaking, allowing all intervenors to run their own assumptions and sensitivity tests. Further, it improves the quality of modeling and hence the results. Providing this kind of technical assistance, especially to local organizations, which might lack the resources and the technical expertise traditional stakeholder have, would help the public engage effectively. Such

---

<sup>39</sup> See Duncan, *supra* note 32, at 195.

<sup>40</sup> *Id.* at 195-97. It is important to note that individual FERC staff who conduct these hearings may pose a barrier to meaningful public participation because “their technical familiarity with the issues may result in less familiarity with the public’s viewpoint.” *Id.* at 197.

<sup>41</sup> *Id.* at 195-97; see also Nicholas A. Fromherz, *From Consultation to Consent: Community Approval as a Prerequisite*, 116 W. VA. L. REV. 109, 142 (2013) (“Although lay citizens may speak their piece without the benefit of technical expertise or legal representation, such input will, by and large, go unheeded. Environmental decisionmaking under NEPA and similar regimes is simply too complicated and nuanced for raw public input to have an effect.”).

technical assistance could be provided by full-time staff at OPP or through a program to provide competitive grants that would help the public.<sup>42</sup>

#### **IV. The Office Should Look to Other Agency Practices**

In adopting the best practices described above, the Office should look at participation practices that other agencies have implemented to provide lessons learned and inform OPP's own policies.

OPP might, for example, look at the Nuclear Regulatory Commission's Atomic Safety and Licensing Board Panel's (Board) practices for targeted outreach.<sup>43</sup> As part of its licensing activities, the Board often issues press releases that might be more accessible, in addition to the required Federal Register notice.<sup>44</sup> The Board also undertakes site visits that can be attended by all formal parties and other interest parties,<sup>45</sup> and holds public sessions where members of the public can voice concerns and support for the record.<sup>46</sup> While comments submitted in these sessions cannot have a direct effect on decisions because of the nature of formal adjudication,<sup>47</sup> the sessions provide an opportunity for the public to be heard.

---

<sup>42</sup> Stephanie Tai, *Three Asymmetries of Informed Environmental Decisionmaking*, 78 TEMP. L. REV. 659, 709 (2005).

<sup>43</sup> Notably, we do not herein suggest that the Board or any other referenced agency is a perfect model for public engagement or tribal consultation and compensation. Practices referenced might serve to inform what OPP can do to improve public participation in Commission proceedings, but they are not always implemented perfectly and should not be viewed, necessarily, as ideal solutions.

<sup>44</sup> *See, e.g.*, News Release, Nuclear Reg. Comm'n, Atomic Safety and Licensing Board to Hold Evidentiary Hearing on Proposed Expansion of Crow Butte Uranium Recovery Facility (Aug. 15, 2018), <https://perma.cc/6A8X-NZGS>.

<sup>45</sup> Memorandum (Memorializing Site Visit), In the Matter of Powertech USA, Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), Docket No. 40-9075-MLA (Sept. 24, 2013), <https://perma.cc/PEX9-U4MQ>. These visits are then formally memorialized and made available to the public. *Id.*

<sup>46</sup> Kerri Rempp, *Tribal Members Speak Against Mining*, RAPID CITY J. (Oct. 31, 2018), <https://perma.cc/LBA2-CB54>. The procedural right to make a "limited appearance" is provided to any person, whether or not they are a party to the proceeding, and is enshrined in the NRC's regulations. 10 C.F.R. § 2.315(a).

<sup>47</sup> 10 C.F.R. § 2.315(a).

Additionally, the Board engages in targeted outreach and attempts to minimize logistical barriers to participation. Public sessions are held close to the project location in order to provide easy engagement for those most directly affected. The same is true of many evidentiary hearings and oral argument sessions even though the Board has its own hearing room near D.C. The Board also allows those who cannot attend a public session in person to submit written and audio recorded statements.<sup>48</sup>

The Office might also look at agency practices for compensating federal Indian tribes who lend their time and expertise to fulfilling statutorily mandated processes, including those under the National Historic Preservation Act and the National Environmental Policy Act, as example in considering compensation mechanisms. While the Nuclear Regulatory Commission does not directly provide compensation, licensees and applicants regularly pay an “honorarium” to tribes to compensate them for the integral role they play in helping the government meet their obligations in the application process.<sup>49</sup> Meanwhile, the Bureau of Land Management and the Federal Communications Commission both have policies for paying tribes directly for their assistance as contractors in meeting obligations.<sup>50</sup> While these policies are specific to instances where federal tribes are acting as contractors or consultants, they demonstrate that environmental

---

<sup>48</sup> *E.g.*, Notice of Hearing (Notice of Evidentiary Hearing and Opportunity to Provide Oral, Written, and Audio-Recorded Limited Appearance Statements), In the Matter of Crow Butte Res., Inc. (Marsland Expansion Area), 83 Fed. Reg. 37,828 (Aug. 2, 2018). The Board allowed members of the public to submit audio recordings at the request of the Oglala Sioux Tribe’s counsel, who noted that “it’s well known that native peoples . . . [t]hey make statements orally, they’re more comfortable, many of them are more comfortable, particularly the traditional and elder people from the Tribe, are more comfortable making statements orally.” Transcript of Teleconference at 175, In the Matter of Crow Butte Res., Inc. (Marsland Expansion Area), Docket No. 40-8943-MLA-2 (May 16, 2018) (ADAMS Accession No. ML18138A469).

<sup>49</sup> *See, e.g.*, Letter from Cinthya I. Román, Chief, Env’t Rev. Branch, Nuclear Reg. Comm’n, to Trina Lone Hill, Dir., Cultural Affairs & Historic Preservation Off., Oglala Sioux Tribe (Dec. 6, 2017) (proposing applicant provide compensation to federal tribe in form of reimbursements and Honorarium).

<sup>50</sup> *See* BUREAU OF LAND MGMT., H-1780-1, IMPROVING AND SUSTAINING BLM-TRIBAL RELATIONS, at Appendix 2 (2016); FED. COMM’NS COMM’N, VOLUNTARY BEST PRACTICES FOR EXPEDITING THE PROCESS OF COMMUNICATIONS TOWER AND ANTENNA SITING REVIEW PURSUANT TO SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT 14 (2004).

justice communities have specialized knowledge and expertise that makes their participation particularly useful to agencies in fulfilling their statutory obligations for which they should be compensated.

Respectfully submitted,

/s/ Sarah Ladin

Sarah Ladin  
Attorney  
Institute for Policy Integrity at  
NYU School of Law  
139 MacDougal Street, 3<sup>rd</sup> Fl.  
New York, NY 10012  
sarah.ladin@nyu.edu

/s/ Jack Lienke

Emma Farrow  
Jack Lienke  
Helen Sprainer  
Regulatory Policy Clinic  
Institute for Policy Integrity at  
NYU School of Law  
139 MacDougal Street, 3<sup>rd</sup> Fl.  
New York, NY 10012  
jack.lienke@nyu.edu

/s/ Burcin Unel

Burcin Unel, Ph.D.  
Energy Policy Director  
Institute for Policy Integrity at  
NYU School of Law  
139 MacDougal Street, 3<sup>rd</sup> Fl.  
New York, NY 10012  
burcin.unel@nyu.edu

/s/ Ana Varela Varela

Ana Varela Varela, Ph.D.  
Economic Fellow  
Institute for Policy Integrity at  
NYU School of Law  
139 MacDougal Street, 3<sup>rd</sup> Fl.  
New York, NY 10012  
ana.varela@nyu.edu

Dated: April 23, 2021



**CERTIFICATE OF SERVICE**

In accordance with Rule 2010 of the Commission’s Rules of Practice and Procedure, I hereby certify that I have this day served by electronic mail a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 23rd day of April 2021.

Respectfully Submitted,

/s/ Sarah Ladin

Sarah Ladin

Attorney

Institute for Policy Integrity at

NYU School of Law

139 MacDougal Street, 3<sup>rd</sup> Fl.

New York, NY 10012

sarah.ladin@nyu.edu