



Institute for  
**Policy Integrity**

NEW YORK UNIVERSITY SCHOOL OF LAW

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**To:** Grid Deployment Office, U.S. Department of Energy

**Subject:** Grid Resilience and Innovation Partnerships Program Request for Information (DE-FOA-0002827)

**Contact:** Institute for Policy Integrity at NYU School of Law

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The Institute for Policy Integrity (Policy Integrity) at New York University School of Law<sup>1</sup> respectfully submits these comments to the Department of Energy (DOE, or the Department) in response to the Department's recent Request for Information (RFI)<sup>2</sup> regarding the grant program directed toward grid modernization and innovation established by the Infrastructure Investment and Jobs Act (IIJA).<sup>3</sup> Policy Integrity is a nonpartisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

DOE's Grid Resilience and Innovation Partnerships (GRIP) program implements three IIJA provisions requiring the Department to distribute \$10.5 billion in competitive grant funding to projects that enhance electric grid resilience, flexibility, and reliability.<sup>4</sup> The RFI seeks input about how to implement the first round of these grant programs and how to define and measure the community benefits that will result from the selected projects.

Allocated wisely, this grant funding could significantly enhance electric grid resilience and innovation and afford a range of benefits to disadvantaged communities. However, the RFI and the draft Funding Opportunity Announcement (FOA) do not clearly identify how the Department will evaluate grant applications or analyze the success of the program as a whole.

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<sup>1</sup> These comments do not reflect the views of NYU School of Law, if any.

<sup>2</sup> RFI on Grid Resilience and Innovation Partnerships Program, 87 Fed. Reg. 54,681 (Sept. 7, 2022) [hereinafter RFI].

<sup>3</sup> Pub. L. No. 117-58, 135 Stat. 429 (2021) (codified in scattered sections of the U.S. Code) [hereinafter IIJA].

<sup>4</sup> *Id.* §§ 40101(c), 40103(b), 40107.

Accordingly, to provide greater clarity and transparency to the grant program, DOE should:

- clarify how various priorities will be balanced when evaluating project applications;
- evaluate whether project proposals will provide societal benefits, including greenhouse gas emissions and local pollutant reductions;
- require applicants to submit a cost-benefit analysis that quantifies costs and benefits to the extent feasible;
- use a net-benefits test as part of the selection process;
- deprioritize projects that will lead to maladaptive hardening;
- identify specific metrics by which DOE will evaluate applications and program success;
- clarify its definition of “community benefits” and, where possible, harmonize that definition with definitions developed in other ongoing executive branch proceedings;
- consult with other executive agencies about how to prioritize project applications; and
- enhance transparency and accountability by publishing responses to this RFI and making applicant and awardee data publicly available.

We expand below on these suggestions, which are grouped broadly by topic area and then organized by RFI category and question.

## **I. Evaluation Criteria**

*Category 2.10 / 3.5 / 4.9: Any comment on the selection criteria specifics, relative weighting, and capacity for applicants to meet the criteria under this program.*

**Response: For each of the three grant programs, DOE should clarify how it will balance various priorities when evaluating project applications.**

In its Draft FOA, DOE offers four technical review criteria that it will use to assess applications to each GRIP program.<sup>5</sup> Each criterion contains several bullet-pointed components. For some criteria, particularly Criterion 1 for each topic area,<sup>6</sup> it is unclear how those components are related or how they will be balanced against each other. For example, Criterion 1 of the Grid Innovation program, “Impact and Market Viability,” accounts for 50% of a project’s evaluation. This criterion includes many considerations, but DOE provides no information on how each consideration will be weighed. For this program, the Department plans to consider the extent to which:

- The project addresses innovative approaches and deployment goals across systems.
- The project enhances collaboration between eligible entities and owners/operators.

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<sup>5</sup> DEP’T OF ENERGY, DE-FOA-0002740, BIL – GRID RESILIENCE AND INNOVATION PARTNERSHIPS (GRIP) 74–85 (2022) [hereinafter Draft FOA].

<sup>6</sup> *Id.* at 74–75. For the Grid Resilience and Smart Grid programs, Criterion 1 is called “Impact, Transformation, and Technical Merit”; for the Grid Innovation program, Criterion 1 is called “Impact and Market Viability.” *Id.*

- The project ensures reliability and resilience.
- The project provides enhanced system value and economic benefits.
- The project contributes to decarbonization of the electricity and energy system.
- The project has potential to deliver near-term impact.
- The project supports State, local, Tribal, and regional resilience, decarbonization, or other energy strategies and plans.
- The project could lead to the adoption of innovative approaches and widespread deployment, particularly using non-Federal money.<sup>7</sup>

In laying out this list of benefits that it will consider in evaluating applications, DOE does not explain how the benefits are related, whether DOE will balance the benefits against each other, or whether projects must provide all or just some benefits. Similar questions arise regarding the Smart Grid and Grid Resilience grant programs, for which 50% of application scoring will depend on several different potential project benefits under the heading of “Impact, Transformation, and Technical Merit.”<sup>8</sup> Again, it is unclear how DOE will weigh each benefit and balance benefits against each other, or whether a project must satisfy all the considerations or could be selected while satisfying only one.

To enhance clarity and ensure that it can evaluate project applications on a transparent and objective basis, DOE should indicate how it will weigh application components. This clarification might entail providing more explicit weights for each application component or revising how components are grouped together under each technical review criterion.

**Response: For each grant program, DOE should evaluate whether project proposals will provide societal benefits, including greenhouse gas emission and local pollutant reductions.**

While the Grid Resilience grant criterion specifically includes consideration of how the project will contribute to decarbonization, and all programs require applicants to address community benefits, DOE should clarify that, for each grant program, DOE will evaluate all proposals for whether and to what extent they will reduce greenhouse gas emissions and local pollution. Mandating a uniform set of “core benefits” for project evaluation and comparison reduces the risk of cherry-picking metrics that make projects look less or more favorable than they are, and thus makes projects more comparable.<sup>9</sup> While a uniform set of core costs and benefits need not be exhaustive, it would provide applicants with a standardized baseline of what DOE expects them to include in their analyses.

Furthermore, given DOE’s commitment to Justice40 and that initiative’s goal of enhancing community benefits,<sup>10</sup> the Department should ensure that, as part of some set of core

<sup>7</sup> *Id.* at 75; RFI, *supra* note 2, at 19. This final bullet includes consideration of various types of innovation—including regarding financial arrangements; planning, modeling, or cost allocation; or environmental siting, permitting strategies, or community engagement.

<sup>8</sup> Draft FOA, *supra* note 5, at 74–75.

<sup>9</sup> Inst. for Pol’y Integrity, Comment Letter on Building the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection 27 (Aug. 17, 2022), <https://perma.cc/Q9CS-VWZS> [hereinafter Policy Integrity FERC Transmission Comments].

<sup>10</sup> *Justice40*, THE WHITE HOUSE, <https://perma.cc/C43W-YG2H>.

benefits, all project applications provide information on and are evaluated for their ability to reduce both greenhouse gas emissions and local pollution. Such benefits are economic benefits to communities, ratepayers, utilities, and society overall, and should be accounted for in any cost-benefit analysis or other evaluation of projects receiving federal grants.

*Category 2.5: What evaluation criteria, and what accompanying evidence, should DOE seek to best achieve the goals of this program as laid out in the FOA?*

*Category 2.9 / 3.2 / 4.3: Information or analysis that could be submitted to help identify the highest impact projects and proposals that address (1) public benefit (e.g., cost/benefit of the project), (2) additionality (e.g., obstacles that additional funding would allow the project to overcome or would otherwise prevent the project from advancing in the absence of the funding), (3) stakeholder support (e.g., projects where a regional planning process is underway or is taking place), and (4) transformative potential of the project (e.g., the value of the project in catalyzing follow-on replication).*

**Response: For each grant program, DOE should require applicants to submit a cost-benefit analysis that quantifies costs and benefits to the extent feasible.**

In its “Project Financial Feasibility” criterion, the RFI makes no mention of how DOE will judge the economic viability and cost-effectiveness of project applications—there is no mention of how the Department will compare project costs and benefits to ensure that project benefits outweigh project costs. Furthermore, DOE will struggle to evaluate and compare project applications without a quantified estimate of project costs and benefits. DOE should therefore require each project applicant to submit a cost-benefit analysis as part of its application. DOE should also require costs and benefits to be quantified to the extent feasible with reasonably available information.

The use of cost-benefit analysis can enhance openness, transparency, and comparability.<sup>11</sup> Recognizing this fact, several executive agencies use cost-benefit analysis to evaluate applications for discretionary grant funding. The Department of Transportation (DOT), for example, administers several grant programs for which it requires applicants to submit cost-benefit analyses.<sup>12</sup> So too does the Department of Housing and Urban Development, for its Community Development Block Grant Mitigation program.<sup>13</sup> DOE should follow suit.

Furthermore, as part of that cost-benefit analysis, DOE should require applicants to quantify anticipated benefits (including community benefits) and to assess how costs and

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<sup>11</sup> See, e.g., Inst. for Pol’y Integrity, Comment Letter on Advanced Notice of Proposed Rule to Build for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection 42 (Oct. 12, 2021), <https://perma.cc/2EA8-MZUG> [hereinafter Policy Integrity FERC Transmission ANOPR Comments]; see also BURÇIN ÜNEL & AVI ZEVI, INST. FOR POL’Y INTEGRITY, TOWARD RESILIENCE, at ii (2018), <https://perma.cc/U92C-5CGK> (explaining that cost-benefit analysis should be used to evaluate resilience investments).

<sup>12</sup> These programs include the Rebuilding American Infrastructure with Sustainability and Equity (RAISE) program and the Infrastructure for Rebuilding America program. Richard L. Revesz & Max Sarinsky, *The Social Cost of Greenhouse Gases: Legal, Economic, and Institutional Perspectives*, 39 YALE J. ON REG. 855, 881 (2022).

<sup>13</sup> *Id.* at 882.

benefits should be distributed across relevant communities and subpopulations.<sup>14</sup> DOE should instruct applicants to assess community costs and benefits on a geographically granular level so that aggregate statistics do not mask disparate environmental, health, and economic impacts on small geographic areas or disadvantaged communities.<sup>15</sup> DOE should also encourage applicants to disaggregate project costs and benefits among demographic subgroups so that DOE can evaluate whether different population groups will receive a disproportionately large share of a project's costs or benefits.<sup>16</sup> Where it would be too difficult to quantify benefits, DOE should require applicants to qualitatively describe anticipated benefits.<sup>17</sup> As DOT has concluded with regard to its grant programs, "a transparent, reproducible, thoughtful, and well-reasoned [cost-benefit analysis] is possible for all projects, even as the depth and complexity of those analyses may vary according to the type and scope of the project."<sup>18</sup>

To that end, DOE should provide project applicants with guidance on how to conduct a cost-benefit analysis that accurately accounts for distributional impacts and offer technical support where possible.<sup>19</sup> Doing so will help ensure that submitted analyses are comparable and that the highest-quality applications get selected for funding. Other agencies, including DOT and the Federal Emergency Management Agency (FEMA), provide this type of guidance,<sup>20</sup> and DOE could look to their examples in moving forward with this suggestion.

**Response: DOE should use a net-benefits test as part of the selection process.**

Relatedly, DOE should analyze and compare projects using a net-benefits approach (the absolute difference between estimated benefits and costs) as opposed to a benefit-cost ratio (BCR) (the ratio of benefits to costs). The Department should ask applicants to calculate the net benefits of proposed projects.

DOE does not specify what test it will use for evaluating the cost-effectiveness of projects. In the transmission context, some agencies and planners use a BCR threshold for

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<sup>14</sup> See generally JACK LIENKE ET AL., INST. FOR POL'Y INTEGRITY, MAKING REGULATIONS FAIR: HOW COST-BENEFIT ANALYSIS CAN PROMOTE EQUITY AND ADVANCE ENVIRONMENTAL JUSTICE (2021), <https://perma.cc/Z2BW-X46A> (providing recommendations for conducting a distributional analysis).

<sup>15</sup> *Id.* at 6–9.

<sup>16</sup> *Id.* at 10.

<sup>17</sup> See Richard L. Revesz & Samantha P. Yi, *Distributional Consequences and Regulatory Analysis*, 52 ENV'T L. 53, 96–97 (2022) ("While cost-benefit analysis prefers the quantification of costs and benefits, it contemplates the possibility that it sometimes might not be possible to do so because of the lack of accepted techniques. Unquantified benefits, however, have a place in cost-benefit analyses, and decision-makers are required to take them into account.").

<sup>18</sup> See, e.g., DEP'T OF TRANSP., BENEFIT-COST ANALYSIS GUIDANCE FOR DISCRETIONARY GRANT PROGRAMS 5 (2022), <https://perma.cc/T48V-H7TB>.

<sup>19</sup> DOE has previously explained the advantages of cost-benefit analysis in selecting which resilience measures to implement and outlined how to conduct such an analysis. See, e.g., DEP'T OF ENERGY, CLIMATE CHANGE AND THE ELECTRICITY SECTOR: GUIDE FOR CLIMATE CHANGE RESILIENCE PLANNING 60–76, 77 (2016), <https://perma.cc/XP7U-M4AU>.

<sup>20</sup> See, e.g., DEP'T OF TRANSP., *supra* note 18; *Benefit-Cost Analysis*, FED. EMERGENCY MGMT. AGENCY, <https://perma.cc/CP9W-ABA8>.

evaluating whether projects are sufficiently beneficial and comparing project proposals.<sup>21</sup> As a result, some applicants may, if not given direction, provide a BCR to demonstrate the cost-effectiveness of a proposed project. However, a net-benefits approach is more useful than a BCR in evaluating and comparing projects,<sup>22</sup> and should be used by DOE to select grant recipients. While a BCR can be used to determine if a project is “economic,” in the sense that its benefits outweigh its costs, it is well established that BCRs should not be used to compare competing projects unless the projects have identical costs.<sup>23</sup> Projects with high costs systematically have lower BCRs because of the bias inherent in the use of a ratio, yet projects with higher costs (and lower BCRs) may take advantage of economies of scale and may be more net beneficial than smaller projects with lower costs (and higher BCRs).<sup>24</sup> It is therefore only possible to meaningfully compare project BCRs if the projects have similar costs.

A simple example involving two projects illustrates this point. Consider two projects: A and B. Project A would provide a benefit of \$20 at a cost of \$1, and Project B would provide a benefit of \$2 billion at a cost of \$1 billion. Society would benefit far more from the development of Project B than Project A, yet Project A’s BCR is twenty times as high as Project B’s.<sup>25</sup> Because GRIP program funding will go to projects of varying sizes, comparing project BCRs will yield unhelpful results and will disadvantage high-cost projects in the application process, even though some of the largest infrastructure projects are also some of the most net beneficial.<sup>26</sup>

The more appropriate measure to target economically efficient projects is net benefits: total economic benefits less total economic costs that accrue due to the project. Any project with positive net benefits is economic, and projects with the largest net benefits provide the most benefit to society at the smallest possible costs.<sup>27</sup> Using a net-benefits approach (as opposed to a BCR) is also consistent with the Office of Management and Budget’s (OMB) Circular A-4, which states that “[t]he ratio of benefits to costs is not a meaningful indicator of net benefits and should not be used for that purpose” and that “considering such ratios alone can yield misleading results.”<sup>28</sup>

### **Response: DOE should deprioritize projects that will lead to maladaptive hardening.**

Maladaptation includes “actions taken that (unintentionally) constrain the options or ability of other decision makers now or in the future to manage the impacts of climate change,

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<sup>21</sup> See, e.g., Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act, 85 Fed. Reg. 18,784, 18,789–90 (Apr. 2, 2020) (proposing to adopt a benefits-to-cost test for transmission incentives and explaining that such a test is consistent with industry practice).

<sup>22</sup> See e.g., Inst. for Pol’y Integrity, Comment Letter on Notice of Proposed Rule to Revise Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act 15 (July 1, 2020), <https://perma.cc/8KNS-EDW7> [hereinafter Policy Integrity FERC Transmission Incentives Comments].

<sup>23</sup> Policy Integrity FERC Transmission Incentives Comments, *supra* note 22, at 15.

<sup>24</sup> Policy Integrity FERC Transmission ANOPR Comments, *supra* note 11, at 44–46.

<sup>25</sup> Policy Integrity FERC Transmission Incentives Comments, *supra* note 22, at 15.

<sup>26</sup> Policy Integrity FERC Transmission ANOPR Comments, *supra* note 11, at 45.

<sup>27</sup> Policy Integrity FERC Transmission Incentives Comments, *supra* note 22, at 15–16.

<sup>28</sup> OFF. OF MGMT. & BUDGET, OFF. OF THE PRES., CIRCULAR A-4: REGULATORY ANALYSIS 10 (2003) [hereinafter CIRCULAR A-4].

thereby resulting in an increase in exposure and/or vulnerability to climate change.”<sup>29</sup> Within the context of the electric grid, maladaptive activities include, for example, hardening existing fossil fuel infrastructure that will ultimately be phased out or hardening other utility infrastructure against sea level rise when retreat is a better option.<sup>30</sup> Maladaptation also “describes the extent to which adaptation fails or has been conducted in an unsustainable manner,”<sup>31</sup> which, concretely, includes resilience activities that exacerbate climate change. A quintessential example is resilience planning that focuses on the use of fossil-fuel backup generators.<sup>32</sup>

At least some grant applications will propose projects that may cause maladaptation; in other words, projects that enhance short-term grid resilience but that are unsustainable or would hinder efforts to mitigate climate change in the future.<sup>33</sup> Hardening activities could also reinforce existing energy and environmental inequities,<sup>34</sup> which would undermine the Biden Administration’s environmental justice goals.

In selecting grant recipients, DOE should consider a project’s potential for maladaptation. Accordingly, DOE should deprioritize projects that involve maladaptive hardening and prioritize those that will have the most long-term resilience benefits. DOE can do this by considering the costs and benefits of each proposal over a longer time period—fifty years, for example.<sup>35</sup> While such a time horizon may seem long, when it comes to making expensive electric grid investments, long time horizons are analytically reasonable, and even preferable.<sup>36</sup> As OMB Circular A-4 explains, “[t]he time frame for [an] analysis should cover a period long enough to encompass all the important benefits and costs likely to result” from agency action.<sup>37</sup> When analyzed over a longer time horizon, projects that look cost-effective in the short-term might ultimately be revealed to be inefficient or even maladaptive.<sup>38</sup> Additionally, DOE should consider whether applicants have provided information about whether the proposed hardening activities account for the potential that climate conditions will change. Hardening activities should promote future flexibility by enabling future design modifications as conditions change.<sup>39</sup>

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<sup>29</sup> JANE EBINGER & WALTER VERGARA, CLIMATE IMPACTS ON ENERGY SYSTEMS 90 (2011).

<sup>30</sup> Romany M. Webb, Michael Panfil & Sarah Ladin, *Climate Risk in the Electricity Sector: Legal Obligations to Advance Climate Resilience Planning by Electric Utilities*, 51 ENV’T L. 577, 584 n.36, 585 (2021).

<sup>31</sup> Orr Karassin, *Mind the Gap: Knowledge and Need in Regulating Adaptation to Climate Change*, 22 GEO. INT’L ENV’T L. REV. 383, 389 n.31 (2010).

<sup>32</sup> See, e.g., Michael Panfil & Romany Webb, *Extreme Weather Is a Climate Change Inevitable; Our Responses Shouldn’t Worsen the Problem*, THE HILL (Nov. 4, 2021), <https://perma.cc/WR25-Q9Z2>.

<sup>33</sup> Webb, Panfil & Ladin, *supra* note 30, at 584–85.

<sup>34</sup> See generally Shalanda H. Baker, *Anti-Resilience: A Roadmap for Transformational Justice Within the Energy System*, 54 HARV. C.R.-C.L. L. REV. 1 (2019).

<sup>35</sup> Webb, Panfil & Ladin, *supra* note 30, at 585.

<sup>36</sup> Policy Integrity FERC Transmission Comments, *supra* note 9, at 10.

<sup>37</sup> CIRCULAR A-4, *supra* note 28, at 15.

<sup>38</sup> Cf. LANCE BOWMAN, INST. FOR POL’Y INTEGRITY, ENHANCING CONSIDERATION OF TIME FRAMES IN COST-BENEFIT ANALYSIS, at i (2022), <https://perma.cc/T5TX-6AU4> (“[I]n practice, agencies often choose an endpoint for their regulatory analyses that fails to capture the full stream of a regulation’s costs and benefits.”).

<sup>39</sup> See Inst. for Pol’y Integrity, Pre-Technical Conference Comments on Climate Change, Extreme Weather, and System Reliability 7–8 (Apr. 14, 2021), <https://perma.cc/5JLF-2TZV> (citing ALICE C. HILL & LEONARD MARTINEZ-DIAZ, BUILDING A RESILIENT TOMORROW: HOW TO PREPARE FOR THE COMING CLIMATE DISRUPTION 27–28 (2020)).

*Category 2.10 / 3.5 / 4.9: Any comment on the selection criteria specifics, relative weighting, and capacity for applicants to meet the criteria under this program.*

*Category 5.4: What are the most appropriate performance and other metrics to track community benefits?*

**Response: DOE should identify specific metrics by which it will evaluate applications and program success.**

The funding opportunity at issue is only the first of several; DOE plans to distribute around \$3.9 billion out of a total of \$10.5 billion in GRIP program funding in this first cycle. DOE will therefore want to evaluate the success of this current funding opportunity and learn from its experience so that future funding is distributed even more effectively. Accordingly, DOE should specifically identify what data it plans to collect from fund recipients and what metrics it will use to evaluate applications and program success.

These metrics should be informed by the policy priorities recognized by DOE as guiding its implementation of the Justice40 Initiative.<sup>40</sup> The Justice40 Initiative, laid out in President Biden’s Executive Order 14008,<sup>41</sup> sets an executive goal of distributing 40% of overall benefits from certain federal investments to “disadvantaged communities that are marginalized, underserved, and overburdened by pollution.”<sup>42</sup> The initiative applies to those benefits that flow from, among other things, investments in clean energy and energy efficiency.<sup>43</sup>

DOE’s Office of Economic Impact and Diversity, in consultation with stakeholders and the White House Environmental Justice Advisory Council, has identified eight policy priorities to guide its implementation of Justice40. These priorities include decreasing the energy burden in disadvantaged communities, increasing clean energy enterprise creation and contracting in disadvantaged communities, and increasing clean energy jobs, job pipelines, and job training for individuals from disadvantaged communities.<sup>44</sup> In its FOA, DOE should explain how it will evaluate whether an application furthers these priorities on the front end, how it will evaluate the success of selected proposals in furthering these priorities, and, consequently, what data it hopes to collect from awardees. Such data might include longitudinal information on household energy costs, community unemployment, and local income and job mix. To the greatest extent possible, this data should be quantifiable.

The program’s evaluation metrics should also be informed by the Biden Administration’s Environmental Justice Scorecard, a tool that the Council of Environmental Quality (CEQ) is developing to assess the federal government’s progress on its environmental justice goals.<sup>45</sup> CEQ has published an RFI regarding development of this Scorecard.<sup>46</sup> Comments will likely include

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<sup>40</sup> *Justice40 Initiative*, DEP’T OF ENERGY, <https://perma.cc/K3JP-56WX> [hereinafter *DOE Justice40 Initiative*].

<sup>41</sup> Exec. Order No. 14008, 86 Fed. Reg. 7619, 7631–32 (Feb. 1, 2021).

<sup>42</sup> *White House Justice40*, *supra* note 10.

<sup>43</sup> *Id.*

<sup>44</sup> *DOE Justice40 Initiative*, *supra* note 40.

<sup>45</sup> Press Release, The White House, Biden-Harris Administration Launches Public Process to Inform Developments of Environmental Justice Scorecard, First-Ever Tool to Assess Government-Wide Progress on Environmental Justice (Aug. 23, 2022), <https://perma.cc/J7LG-8J58>.

<sup>46</sup> Environmental Justice Scorecard Feedback, 87 Fed. Reg. 47,397 (Aug. 3, 2022).



recommendations that the Scorecard adopt clear and consistent definitions of “disadvantaged communities” and “investment benefit” and publicly report the data that agencies collect on community outcomes. Such recommendations may be applicable to DOE’s evaluation of projects.

While the details of the Scorecard have yet to be published, CEQ’s RFI explains that the agency plans to focus on three primary categories: (1) reducing harms and burdens born disproportionately by communities, (2) delivering investment benefits, and (3) undertaking institutional reform to center community voices in decisionmaking.<sup>47</sup> DOE should keep these categories in mind when developing its own evaluation metrics and should continue to align its metrics with those in the Scorecard as they are made public. DOE should also review comments submitted in CEQ’s RFI proceeding, particularly by environmental justice organizations and community members, to understand which metrics it should use in evaluating applications and the success of the program.

Finally, DOE should be sure that its chosen metrics account for a range of project impacts on environmental and energy burdens in a community, not simply the amount of dollars that are spent on or in a community. Dollars spent frequently diverges from other benefits accrued, like positive health and economic outcomes;<sup>48</sup> indiscriminately providing money to projects located in disadvantaged communities is unlikely to generate the transformative benefits that the IJA anticipates and that DOE hopes to achieve. Furthermore, to ensure that funded projects actually provide communities with their anticipated benefits, DOE should employ at least one evaluation metric that relies on collaboration with community members themselves;<sup>49</sup> members of impacted communities often notice social and environmental effects that nonmembers might inadvertently omit.<sup>50</sup>

**Response: DOE should clarify its definition of “community benefits” and, where possible, harmonize that definition with definitions developed in other ongoing executive branch proceedings.**

In the IJA, Congress requires DOE to distribute Grid Resilience funding to projects that “will generate the greatest community benefit (whether rural or urban) in reducing the likelihood and consequences of disruptive events.”<sup>51</sup> DOE adopts that language in its Technical Review Criterion 1.<sup>52</sup> In Technical Review Criterion 4, DOE also requires applicants to submit a

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<sup>47</sup> *Id.*

<sup>48</sup> See, e.g., George Galster et al., *Measuring the Impact of Community Development Block Grant Spending on Urban Neighborhoods*, 15 HOUS. POL’Y DEBATE 903 (2004); ULRICH BOSNER, CTR. FOR AM. PROGRESS, RETURN ON EDUCATIONAL INVESTMENT: A DISTRICT-BY-DISTRICT EVALUATE OF U.S. EDUCATIONAL PRODUCTIVITY 12–13 (2011), <https://perma.cc/FW8Z-93C3>.

<sup>49</sup> Cf. James Sadd et al., *The Truth, the Whole Truth, and Nothing but the Ground-Truth: Methods to Advance Environmental Justice and Researcher-Community Partnerships*, 41 HEALTH EDUC. & BEHAV. 281, 282 (2014) (explaining the concept of “ground-truthing,” a “form of [community-based participatory research] in which community partners, supported by researchers, gather data about pollution sources and their proximity to” sensitive populations, such as children and the elderly).

<sup>50</sup> See generally *id.*

<sup>51</sup> IJA, *supra* note 3, § 40101(c)(4).

<sup>52</sup> RFI, *supra* note 2, at 9.

“Community Benefits Plan,” which appears to identify four components of community benefits: (1) meaningful community and labor engagement, (2) investment in America’s workforce, (3) advancement of diversity, equity, inclusion, and accessibility (DEIA), and (4) contribution to the Justice40 Initiative (described above).<sup>53</sup>

From this language, it is unclear how DOE defines or measures community benefits. It is unclear, for instance, whether DOE plans to evaluate community benefits in Technical Review Criterion 1 or 4, or how the Department will weigh various community benefits in relation to each other. DOE should clarify exactly what community benefits it hopes to achieve so that program applicants can tailor their projects and applications to DOE’s ultimate goals, and so the Department can best evaluate program success.

Furthermore, it is unclear which communities DOE hopes to benefit. The Justice40 initiative is directed at benefitting “disadvantaged communities,” but there exists no standard definition of who qualifies as belonging to a disadvantaged community. DOE has its own definition and created a mapping tool, the Disadvantaged Communities Reporter,<sup>54</sup> to identify disadvantaged communities. Oddly, however, the Department does not identify this tool in its Draft FOA. EPA also possesses an environmental justice screening and mapping tool, EJSCREEN, which DOE cites to in its draft FOA.<sup>55</sup> EJSCREEN and the Disadvantaged Communities Reporter use nationally consistent environmental and demographic data and is thus useful for making cross-state comparisons. However, both tools are quite broad, and CEQ is currently developing a new Climate and Economic Justice Screening Tool (CEJST) to better identify disadvantaged communities for purposes of the Justice40 Initiative.<sup>56</sup>

Until the CEJST is finalized, DOE should specifically ask project applicants to define disadvantaged communities using either the Disadvantaged Communities Reporter or EJSCREEN, two of the only national-level environmental justice screening tools currently available. DOE already indicates that it plans to do so,<sup>57</sup> but this information is missing from the RFI and Draft FOA. However, once CEQ finalizes the CEJST, DOE should instruct grant applicants to transition to using that tool to identify disadvantaged communities for which benefits should be prioritized.

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<sup>53</sup> Draft FOA, *supra* note 5, at 57–61.

<sup>54</sup> *DOE Justice40 Initiative*, *supra* note 40.

<sup>55</sup> Draft FOA, *supra* note 5, at 61.

<sup>56</sup> Press Release, The White House, CEQ Publishes Draft Climate and Economic Justice Screening Tool, Key Component in the Implementation of President Biden’s Justice40 Initiative (Feb. 18, 2022), <https://perma.cc/A6ZW-TGNU>.

<sup>57</sup> *DOE Justice40 Initiative*, *supra* note 40 (“DOE will use this working [disadvantaged communities] definition to ask applicants to Justice40-covered programs to identify how their projects benefit [disadvantaged communities].”).

## II. Coordination with Other Agencies

*Category 4.7: In the collective portfolio of awarded projects, any suggestions regarding project types that have special strategic importance? Should the program prioritize inter-regional multi-state or other types of projects that may be more transformative and provide multiple benefits on a large scale?*

**Response: DOE should consult with other agencies about how to prioritize project applications.**

In its RFI, DOE does not indicate whether it has coordinated with other agencies or plans to coordinate with other agencies over the course of implementing the GRIP program. Cross-agency consultation, particularly with the Federal Energy Regulatory Commission (FERC), could make the GRIP program more effective.

FERC has sought significant input from states, eligible entities, and other stakeholders on how to improve the electric transmission system<sup>58</sup>—what the Commission has learned may be valuable for understanding how to prioritize GRIP projects. FERC might also have input on whether DOE could prioritize projects that enhance compliance with various orders that relate to increased wholesale market participation by demand response, storage, and distributed energy resources, which can enhance the resilience of the electric system.

FERC is not the only agency with potentially valuable information. FEMA does significant work on microgrids, distributed energy infrastructure that DOE has committed to prioritize as part of the Grid Resilience grant program. FEMA offers grants for microgrid projects through its Hazard Mitigation Assistance programs,<sup>59</sup> and could likely offer DOE advice on prioritizing effective projects. Other departments and agencies are also likely to have information on what grid updates are needed and how DOE can best leverage the grant program to meet its stated objectives. For example, the Department of the Interior manages most U.S. public lands and regularly deals with transmission projects and clean energy permitting.<sup>60</sup> Likewise, the Forest Service could offer insight about enhancing grid resilience in the face of

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<sup>58</sup> See, e.g., Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection, 87 Fed. Reg. 26,504 (May 4, 2022); Climate Change, Extreme Weather, and Electric System Reliability; Notice Inviting Post-Technical Conference Comments, 86 Fed. Reg. 45,979 (Aug. 17, 2021); Climate Change, Extreme Weather, and Electric System Reliability; Notice of Technical Conference; Supplemental Notice of Technical Conference Inviting Comments, 86 Fed. Reg. 14,895 (Mar. 19, 2021).

<sup>59</sup> Press Release, Fed. Emergency Mgmt. Agency, Biden Administration Commits Historic \$3.46 Billion in Hazard Mitigation Funds to Reduce Effects of Climate Change (Aug. 5, 2021), <https://perma.cc/NS3U-QLAA>; Press Release, Fed. Emergency Mgmt. Agency, Hazard Mitigation Assistance Grant Funding for Microgrid Projects (June 25, 2021), <https://perma.cc/RTX2-JKA3>.

<sup>60</sup> See, e.g., *Plugging in Public Lands: Transmission Infrastructure for Renewable Energy: Hearing Before the H. Subcomm. on Energy & Min. Res.*, 117th Cong. (2021) (statement of Janca Scott, Counselor to the Assistant Secretary, U.S. Department of the Interior); Press Release, U.S. Dep't of the Interior, Biden-Harris Administration Advances Three Transmission Projects to Connect More Clean Energy to the Grid (Apr. 28, 2022), <https://perma.cc/26G8-MFJ9>.

more frequent wildfires, an issue it increasingly acts upon.<sup>61</sup> DOE should leverage the knowledge accumulated by other federal agencies to make its own grant program more effective.

### **III. Comments on Transparency in the Grant Evaluation and Selection Process**

#### **A. DOE should publish responses to this RFI.**

DOE states that it does not plan to publish responses to this RFI or to respond to individual submissions.<sup>62</sup> DOE should reconsider this decision. The public comment process—which typically includes the opportunity to view all submitted comments—fosters citizen participation, enhances agency accountability and legitimacy, and is a cornerstone of the administrative process.<sup>63</sup> Soliciting robust public participation is especially important considering that DOE hopes to use the GRIP program to help disadvantaged communities and meet Justice40 goals. DOE can better engage environmental justice groups and members of disadvantaged communities by publishing comments it receives and highlighting the voices of those it hopes to benefit. Frequently, members of affected communities can provide a deeper understanding of the problems they face and articulate which policies (and in this case, projects) will most help them.<sup>64</sup> Public comment also furthers DOE’s statutory mandate to “provide for, encourage, and assist public participation in the development and enforcement of national energy programs.”<sup>65</sup> Publishing submitted comments is the norm in agency action, and DOE should either abide by this norm or explain why it declines to do so.

#### **B. DOE should require applicant and awardee data to be made publicly available.**

In its RFI and Draft FOA, DOE does not address whether information collected as part of the application process or through the required reporting process will be made publicly available, except through the required biennial report to Congress<sup>66</sup> and the short project summaries/abstracts for public release.<sup>67</sup>

DOE should require that, to the extent possible without disclosing proprietary or sensitive business information, program data be made publicly available. Doing this will enhance

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<sup>61</sup> See, e.g., Land Uses; Special Uses; Procedures for Operating Plans and Agreements for Powerline Facility Maintenance and Vegetation Management Within and Abutting the Linear Boundary of a Special Use Authorization for a Powerline Facility, 85 Fed. Reg. 41,387 (July 10, 2020) (regulating forest management around grid infrastructure); see also Press Release, Forest Serv., USDA Forest Service Issues Rule to Manage Vegetation Inside Utility Corridors (July 13, 2020), <https://perma.cc/XN5Y-PLAF> (“The updated rule aims to enhance electric grid reliability[ and] reduce wildfire risk in electric transmission and distribution rights-of-way . . .”).

<sup>62</sup> RFI, *supra* note 2, at 29.

<sup>63</sup> See Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, OKLA. L. REV. 601 (2018); Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL’Y REV. 79, 85 (2012).

<sup>64</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 affected 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.”).

<sup>65</sup> 42 U.S.C. § 7112(15).

<sup>66</sup> IJA, *supra* note 3, §§ 40101(i), 40103(d)(2)(C).

<sup>67</sup> Draft FOA, *supra* note 5, at 54.

accountability and allow DOE and external stakeholders to evaluate the success of the grant program as it continues over the next five years. Program data made publicly available should include the information contained in each applicant's Report on Resilience Investments, a report that all Grid Resilience applicants must submit that "detail[s] past, current, and future efforts by the eligible entity to reduce the likelihood and consequences of disruptive events."<sup>68</sup>

## **Conclusion**

The GRIP funding opportunity represents a crucial opportunity to facilitate grid resiliency and innovation throughout the United States. DOE should ensure that it distributes the money entrusted to it by the IIJA to maximize net benefits across the country, and particularly for disadvantaged communities, while accounting for distributional goals and environmental concerns. It can do this by specifically identifying how it will balance project priorities, precisely defining metrics and what communities it aims to serve, and by requiring project applicants to undertake cost-benefit analysis.

Respectfully submitted,

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<sup>68</sup> IIJA, *supra* note 3, § 40101(c)(2)(B).