



# **Protecting Public Health and the Environment by the Stroke of a Presidential Pen:**

**Seven Executive Orders for the President's First 100 Days**

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## Executive Summary

Since the great whirlwind of policymaking that defined President Franklin Roosevelt's first 100 days in office, new Presidents have recognized the importance of launching their administrations with a series of steps that reflect their top policy priorities and that set a tone for their administrations. Those initial weeks offer an opportunity to draw distinctions with the previous occupant of the Oval Office, to demonstrate that campaign commitments were more than empty rhetoric, and to seize and even generate political momentum.

But more than those things, the first 100 days offer an opportunity to do the people's business. In a broad sense, presidential campaigns are about Americans' hopes and aspirations, and they give voters a chance to choose someone to champion their cause for the next four years. Once in office, Presidents want a fast start, and voters want to know that their choice is staying true to the values and objectives that won their votes. Those first 100 days in office are therefore a time of great significance, not just for the new President but for the voters who sent him there.

A new President's first 100-day agenda is often imagined largely in legislative terms. And the new President's legislative agenda, and that of the new Congress, is of obvious importance. But the President's broad authority over the executive branch can be far-reaching, as well. By directing federal agencies to focus on particular priorities, and by reshaping the internal processes by which agencies do their business, the new President can effect great change.

As this white paper demonstrates, the new direction the next President gives to the agencies of his administration can be vitally important in both substantive and symbolic terms. He can make important headway on issues of great concern, reversing some destructive policies of his predecessor, and sending a clear message to the public—the electorate—that the change they voted for is under way.

This white paper recommends a series of seven Executive Orders to the new Administration, all in the areas of health, safety, and the environment. Each of the suggested Executive Orders directs agencies of the government to take specific steps that would make a real-world difference and simultaneously send a signal to the public, Congress, the business community, and others that a new course has been charted and that change has arrived.

The Orders cover a range of health, safety, and environmental issues, and are detailed in the pages that follow. In summary:

### **1) Executive Order on Climate Change, Part One: Reducing the Federal Government's Carbon Footprint**

Few issues that will confront the new President have an impact as far-reaching as climate change. Legislation to address the nation's disproportionate emissions of greenhouse gases is

A decision by the National Highway Traffic Safety Administration not to establish more aggressive fuel economy standards was a lost opportunity.



sorely needed. But the President need not wait for Congress to act to make a difference, or to send a message to the public and the world that the new occupant of the White House means business on the issue. According to one estimate, federal government operations in its 2005 fiscal year generated approximately 100 million metric tons of carbon dioxide-equivalent, around 1.4 percent of all U.S. greenhouse gas emissions that year.

The new President should issue an Executive Order requiring each federal agency to measure, report, and reduce its carbon footprint. Not only would the Executive Order have a meaningful impact on the federal government's carbon emissions, it could also lead to the creation of uniform, practical standards for measuring such footprints, standards that could be applied government-wide and beyond. Each of the provisions of this proposed Order is consistent with the goals of the National Environmental Policy Act.

## 2) Executive Order on Climate Change, Part Two: Considering Climate Change in Agency Decisionmaking

On an almost daily basis, federal agencies make decisions that have a major effect on climate change. For example, a 2006 decision by the National Highway Traffic Safety Administration (NHTSA) not to establish more aggressive Corporate Average Fuel Economy (CAFE) standards for light trucks was a monumental lost opportunity for great progress – a choice delegated to NHTSA by Congress, and therefore made entirely on NHTSA's authority, without need of congressional approval. In that instance, the Bush Administration simply gave scant attention to the issue of climate change when deciding whether a more ambitious set of CAFE standards would have been more appropriate.

The next President should issue a new Executive Order clarifying that all federal agencies are obligated to consider the global climate change-related implications of their actions. This proposed Order is consistent with the goals of the National Environmental Policy Act.

## 3) Executive Order on Children and Toxics: Taking Children into Account

Children are not merely “little adults,” especially when it comes to health issues. With that in mind, Congress wrote all of the major environmental laws to allow agencies to craft protections that take the special vulnerabilities of children into account. But the Bush Administration and some of its predecessors have generally ignored those provisions, with the result that the federal government does a poor job of protecting children from environmental harms. One example: the federal government has refused to require agribusiness to protect the young children of farm workers from exposure to inordinately high levels of pesticides, from which they suffer disproportionately.

The next President should amend Executive Order 13045 (issued initially by President Clinton and then amended by President Bush) to mandate that agencies establish an

affirmative agenda for protecting children from lead, mercury, perchlorate, phthalates, fine particulate matter, ozone, and pesticides; require the reform of risk assessment policy so that children are accounted for as a vulnerable group; and end the use of discounting the value of children's lives in cost-benefit analysis. As is the case with the provisions of the existing Order on Protecting Children, each of these recommendations is consistent with the goals of the various environmental, safety, and public health statutes.

#### **4) Executive Order on Environmental Justice: Keeping America's Promise**

U.S. environmental laws have dramatically improved the quality of the nation's air, water, and wilderness, while saving countless lives. But these efforts continue to produce radically unequal results among various populations. For example, African Americans have the highest asthma rate of any racial or ethnic group in the country, and poor children and children of color are eight times more likely to have elevated levels of lead in their blood than other children. The nation's environmental laws also produce inequalities based on diversity in culture and lifeways. Some Native American tribes in the Great Lakes region rely on subsistence fishing, and are therefore disproportionately harmed when fish are contaminated with mercury or other pollutants. Similarly, cap-and-trade proposals for addressing climate change could actually intensify local concentrations of particulate matter and other pollutants that accompany carbon emissions in poor cities, if polluters there choose to buy extra permits to pollute.

President Clinton's Executive Order 12898 promised to reshape federal agency action toward achieving environmental justice for minority and low-income communities, but is in dire need of overhaul. The next President should amend or replace the original Executive Order on Environmental Justice. The new Order should require a meaningful analysis of the environmental justice impacts and implications of all major new rules; impose on agencies a substantive obligation to take affirmative steps to ameliorate environmental injustice; launch an affirmative Environmental Justice agenda; hold agencies accountable for carrying out their environmental justice obligations; and clarify key terms from the current Order, including "environmental justice communities" and "subsistence," to avoid the kind of narrow interpretation of the terms applied by the Bush Administration. As is the case with the existing Executive Order on Environmental Justice, these recommendations are consistent with the goals of Title VI of the Civil Rights Act.

#### **5) Executive Order to Restore Open Government: Promoting Transparency Under FOIA and FACA and During Regulatory Review**

Open government is a cornerstone of American democracy. While secrecy is occasionally necessary, government should be biased toward transparency, so that the public can fairly

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The Framers of the U.S. Constitution could not have anticipated that federal agencies would someday seek to preempt state laws by federal regulation.

evaluate what is done in its name. Under the Bush Administration, the vital concept of transparency has been replaced by a presumption of secrecy.

The new President should issue an Executive Order restoring open government in three areas where unwarranted secrecy has developed. The Order should restore the presumption of disclosure concerning exemptions from the Freedom of Information Act (FOIA) so that political appointees and career government employees cannot operate free of scrutiny; forbid agencies from taking advantage of loopholes that limit the transparency provisions of the Federal Advisory Committee Act (FACA) so that the public can be assured that special interests do not have undue influence on agency decisionmaking; and improve the transparency of regulatory review by the Office of Information and Regulatory Affairs (OIRA) so that efforts by political appointees in the White House to override the judgment of scientists and other experts in regulatory agencies can at least be transparent to the public. All of the proposed Order's provisions are consistent with the goals of FOIA and FACA.

#### 6) Executive Order to Prevent Preemption: Shielding Protective State Laws from a Federal Power Grab

The U.S. Constitution makes clear that when federal laws conflict with state laws, federal laws take precedence. The Framers, however, could not have anticipated that, 220 years after the drafting of the Constitution, federal agencies would seek to preempt state laws not by act of Congress, but by federal regulation. That is precisely what regulatory agencies of the Bush Administration—the National Highway Traffic Safety Administration, the Food and Drug Administration, and the Environmental Protection Agency—have done, often in the absence of statutory language to support preemption. Not surprisingly, given the Bush Administration's ideological bent, such preemptions have invariably been aimed at state laws that protect citizens from various harms, putting the profits of polluters or manufacturers of dangerous products ahead of the interests of innocent victims.

The next President should issue an Executive Order halting the practice. Specifically, it should amend the existing Executive Order on Federalism to strengthen provisions setting forth a presumption against preemption; require agencies to provide a written justification for preemption; and require that, when a federal statute allows states to adopt more stringent standards or seek a waiver of statutory preemption (as in EPA's denial of California's Clean Air Act waiver), agencies must provide a written justification to the White House before denying the state's regulatory authority or waiver request. As is the case with the existing Executive Order on Federalism, these recommendations are consistent with the goals of the various statutes under which the environmental, safety, and public health agencies operate, including the National Environmental Policy Act.

## 7) Executive Order on Stewardship of Public Lands:

### Promoting Ecological Integrity and Public Participation

The United States owns approximately 28 percent of the nation's land area. This immense trove of resources requires careful stewardship to ensure that current demands and short-term priorities do not degrade the long-term value of this heritage for the future. Over the past few years, however, the federal government has failed miserably at its stewardship responsibilities, permitting overexploitation and encouraging the commodification of resources, causing long-term damage to biodiversity and ecosystems. Climate change will only exacerbate the challenges ahead.

The next President should issue a new Executive Order declaring a national policy of promoting ecological integrity as a baseline requirement for sustainable public land use. The President should also revoke two Bush Administration Executive Orders issued in 2005 (Executive Orders 13211 and 13212) that made it easier to develop energy resources on public lands, even at the risk of causing long-term degradation of natural resource values. In addition, the President should amend a third Bush Order (Executive Order 13443) by providing equal opportunities for public participation in federal land use decisionmaking to a wide variety of constituencies, in addition to those promoting hunting. All of these measures are consistent with the goals of the various public lands statutes.

## Fostering the New Green Economy in the Age of Climate Change: Measuring, Reporting, and Reducing Agency Carbon Footprints

Evidence that the Earth is warming due to human activity is now “unequivocal,” according to the most recent report issued by the Intergovernmental Panel on Climate Change (IPCC), the Nobel Prize-winning consortium of scientists that has been studying the causes and consequences of climate change since 1988. As a result of increasing emissions of CO2 and other greenhouse gases and increasing destruction of forests and other carbon “sinks,” the average global temperature has already risen about 1.3°F since 1900 and is predicted to increase by as much 11.5°F more by the end of the next century.<sup>1</sup> If this trend continues unchecked, the potential consequences of global climate change could be devastating.

Conservative models (i.e., models based on the assumption that the polar ice sheets will remain intact) predict that global sea level could rise two feet by the end of the 21st century, potentially destroying and dislocating entire communities in low-lying coastal areas.<sup>2</sup> In recent years, however, climate scientists have grown increasingly worried that feedback loops may accelerate the melting of the massive ice sheets in Greenland and Antarctica, setting in motion catastrophic sea level rise, in the range of 6 to 20 feet, by the end of this century. Such a development would flood major cities and dislocate hundreds of millions of people.

In addition to increased temperatures and rising sea levels, global climate change is also likely to bring an increased number of droughts and heat waves, more intense hurricane events, accelerating rates of animal and plant species extinction, and the rapid migration of malaria and other vector-borne diseases to previously unaffected regions of the world.<sup>3</sup> Indeed, unless we take decisive action to change its current trajectory soon, global climate disruption will almost certainly have a negative effect on every human society and ecosystem on the planet. Moreover, decisive action must be taken immediately; greenhouse gases have long residence times in the atmosphere, so delays cannot be compensated for later.

The United States, with just 5 percent of the world's population, is historically responsible for 28 percent of the CO2 emissions now accumulated in the atmosphere. These are the emissions driving this destructive process, and the U.S. “contribution” is more than that of any other nation on Earth. Accordingly, nearly everyone now accepts that the U.S. government must regulate carbon emissions. But even under a best-case scenario, it will take several years for legislation regulating carbon emissions from the private sector to be enacted and implemented.

EXECUTIVE ORDER

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CURB THE FEDERAL GOVERNMENT'S  
CONTRIBUTION TO CLIMATE CHANGE

REQUIRE federal agencies to  
measure, report, and reduce  
their carbon footprint.

On the other hand, the President has much more direct and immediate control over the carbon emissions produced by the federal government itself, which are substantial. According to one estimate, federal government operations generated approximately 100 million metric tons of carbon dioxide-equivalent in FY 2005,<sup>4</sup> around 1.4 percent of all U.S. greenhouse gas emissions that year.<sup>5</sup> The federal government also wields substantial market power. As one of the world's largest purchasers of automobiles<sup>6</sup>, electronics, and buildings, the federal government can “play a unique role as a market transformer through the early adoption of new, energy-efficient technologies and practices.”<sup>7</sup>

Attempts to reduce the federal government's carbon emissions are not unprecedented. Recognizing the practical and symbolic significance of the federal government's large carbon footprint, the U.S. House of Representatives passed the “Carbon-Neutral Government Act” (H.R. 2635) in 2007. This legislation, introduced by Rep. Henry Waxman (D-CA), would have required the federal government to reduce its greenhouse gas emissions dramatically, with the aim of making government operations carbon-neutral by 2050. The bill passed the House by a vote of 241-172, but was never considered on the floor of the Senate.<sup>8</sup>

## **Solution by Executive Order**

The new President should sign an Executive Order requiring each federal agency to (1) measure, (2) report, and (3) reduce its carbon footprint. All of the requirements in this proposed Order are consistent with the provisions of the National Environmental Policy Act (NEPA). Section 101(b) of NEPA directs the federal government “to use all practicable means” to “assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings,” to “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences,” and to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.”

### **1. Measure**

The federal government could realize two important benefits from measuring its own carbon footprint. First, by conducting such a measurement, the federal government would generate a relatively comprehensive inventory of its greenhouse gas emissions. Such an accounting would enable the government to understand how its activities contribute to global climate change, and to identify strategies for reducing its own greenhouse gas emissions.

Second, the requirement to measure would offer the government an opportunity to develop a universal standard for measuring carbon footprints. Many entities—including governmental bodies, businesses, and nonprofits—have already begun to measure their carbon footprints, but no universal standard for conducting these measurements currently exists. The lack of a standard has resulted in inconsistencies that make it difficult to measure and compare progress across organizations.

Most carbon footprint measurements employ some version of a life-cycle analysis, which seeks to aggregate the direct and indirect greenhouse gas emissions of the goods and services used by an organization in the course of its operations. The biggest source of inconsistency involves the methodologically tricky issue of measuring indirect greenhouse gas emissions. The problem is that an analysis that literally accounted for all indirect emissions might go on *ad infinitum*. For example, a life-cycle analysis of the gasoline used to power an automobile fleet would clearly count the emissions from the vehicles themselves and might well count the emissions released by the drilling equipment used to draw the petroleum out of the ground. But what of the emissions produced by the automobiles used to get workers to the oil fields or those associated with the manufacture and transportation of the drilling equipment? At some point, indirect emissions get too cumbersome and attenuated to count, but where to draw the line is far from clear.

Because there is no obvious answer to these and many other “boundary” questions, the issue of indirect emissions can introduce a lot of variation and complexity into measuring carbon footprints. Through this Executive Order, however, the new President could take affirmative steps towards eliminating the inconsistency in carbon footprint measurement. Specifically, the Order should direct the Environmental Protection Agency to develop a comprehensive methodology for federal agencies to employ when measuring their carbon footprints. Such a methodology would provide a model for the private and nonprofit sectors as well.

## 2. Report

A crucial aspect of the Executive Order would require federal agencies to report annually the results of their carbon footprint measurements to the President, the Congress, and the public. These periodic reports would inform the public about the government's progress in reducing its carbon footprint and empower them to demand greater efforts when progress is insufficient. Moreover, reports of the federal government's progress in reducing its carbon footprint would set an example that might encourage both corporations and private individuals to strive voluntarily to reduce their own carbon footprints as well. Finally, these periodic reports can serve as a means to promote cooperation among federal agencies and to share best practices regarding their respective efforts to reduce their carbon footprints.

## 3. Reduce

Given the size of the U.S. government's activities, efforts to reduce the nation's total greenhouse gas emissions will remain fundamentally incomplete unless the federal government does its part. The government should therefore set clear, ambitious goals for reducing its greenhouse gas emissions, and commit itself to achieving them. In order to make such a commitment credible, it is essential that the goals be set for the near term, to be accomplished within the next presidential administration. Accordingly, the new Executive Order should require all federal agencies to reduce their carbon footprint by 10 percent by 2013 and by 25 percent by 2017. By adopting this ambitious goal, the federal government can send the message that it is seriously committed to fighting global climate disruption

aggressively. Not only will this message be stated in clear and understandable terms; it will also offer the potential for achieving meaningful and effective results.

In addition, the benefits of the U.S. government reducing its carbon footprint would reverberate far beyond any direct emissions reductions that the government is able to achieve. Given its role as a major market actor in the domestic and international economies, the federal government, by implementing comprehensive policies to reduce its greenhouse gas emissions, can transform entire markets for goods like energy efficient products and for alternative energy sources.

The Order should direct the EPA to develop a comprehensive methodology for federal agencies to employ when measuring their carbon footprints.



## Taking Climate Change Seriously: Incorporating Climate Change Considerations into Agency Decisionmaking

Federal agencies make decisions every day that exacerbate the causes and consequences of climate change. For example, in a 2006 rule, the National Highway Traffic Safety Administration declined to set more aggressive Corporate Average Fuel Economy (CAFE) standards for light trucks despite ample evidence of their viability and necessity. By one estimate, light trucks alone account for about 8 percent of annual U.S. greenhouse gas emissions.<sup>9</sup> Nevertheless, the Bush Administration gave scant attention to the issue of climate change when deciding whether a more ambitious set of CAFE standards would be more appropriate.<sup>10</sup>

Similarly, the United States Forest Service often approves projects to clear-cut forests. The nation's forests serve as invaluable sinks for greenhouse gas emissions, but the agency's Environmental Impacts Statements (EISs) often fail to consider the climate-disruption impacts of such projects.

Government decisionmaking can implicate global climate disruption in a second way as well. The design of agency programs or projects may make them more or less vulnerable to the effects of climate change that have already become inevitable. For example, the decision to site a new federal facility in a low-lying coastal area may make it especially vulnerable to the coastal flooding that climate change will bring in the coming decades. According to a 2008 National Research Council report, much of the federally funded transportation system

located in low-lying coastal areas is currently vulnerable to climate disruption impacts. Storm-related flooding threatens streets, mass transit systems, airport runways, and as much as 60,000 miles of highways. As federal agencies continue to initiate, fund, and approve projects like these, it is imperative that they consider the project's vulnerability to the likely effects of climate change.

As it happens, the National Environmental Policy Act (NEPA) requires federal agencies to consider the environmental implications of their decisions as part of the regular planning process for their proposed actions. Specifically, section 102(2)(C) of NEPA requires federal agencies to prepare an EIS prior to taking any major action that "significantly affect[s] the quality of the human environment." But federal agencies have applied these analytical requirements to climate change impacts sporadically and inconsistently, and even when they do consider climate change impacts, agencies are free to disregard those impacts when they ultimately make a decision.

### EXECUTIVE ORDER

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#### MAKE CLIMATE CHANGE A PRIORITY IN FEDERAL DECISIONMAKING

OBLIGATE all federal agencies  
to consider the global climate  
change-related implications  
of their actions.

More than a decade ago, in 1997, the White House Council on Environmental Quality (CEQ), the agency charged with implementing NEPA, issued draft guidelines calling on federal agencies to consider in NEPA documents both the potential for federal actions to exacerbate the *causes* of climate change and any potential for the *effects* of climate change to impact those federal actions. Even though the scientific consensus and sense of urgency regarding climate disruption has only *increased* since then, those guidelines have never been finalized. Nor, for that matter, has the Bush Administration made any other efforts to address the issue.

As they have done with respect to many aspects of global climate change, the states, rather than the federal government, have taken the lead in expanding the requirements of their respective state-level equivalents of NEPA—or “mini-NEPAs”—to account for the effects of climate change. Massachusetts was the first state specifically to require consideration of climate change impacts as part of its mini-NEPA process, and California is currently developing guidelines to accomplish the same.

## **Solution by Executive Order**

The next President should sign a new Executive Order clarifying the obligations of all federal agencies to consider the global climate change-related implications of their actions under NEPA. At a minimum, the new Order should include provisions that require (1) all agencies to consider climate change impacts in significance determinations; (2) all agencies to consider climate change impacts in EISs; (3) all agencies to consider the vulnerability of proposed actions to climate change in NEPA analyses; (4) all agencies to minimize or avoid the climate change impacts and vulnerabilities when undertaking actions; and (5) the CEQ to promulgate new regulations under NEPA for addressing climate change.

### **1. Considering Climate Change Impacts in Significance Determinations**

When determining whether a proposed federal action has significant environmental impacts triggering the obligation to prepare an EIS, all federal agencies should be required to consider the likely impacts of the proposed action on climate change. This analysis should include quantification of direct and indirect greenhouse gas emissions likely to be caused by the proposed action. It should also include a qualitative or quantitative analysis of the potential impacts of the proposed action on greenhouse gas sinks.

This requirement is consistent with section 102(2)(C) of NEPA, which requires all agencies to prepare an EIS for those “major Federal actions significantly affecting the quality of the human environment.” Those government actions that result in increased greenhouse gas emissions or decreased greenhouse gas sinks undeniably “affect[] the quality of the human environment.”

No federal agency should be permitted to take a proposed action that may have significant climate change impacts if there is a reasonable and prudent alternative means for achieving the objective of the proposed action that would reduce those impacts.

## 2. Considering Climate Change Impacts in EISs

Whenever they are preparing EISs pursuant to NEPA, all federal agencies should be required to consider the likely impacts of the proposed action on climate change, including a quantification of likely direct or indirect greenhouse gas emissions and a qualitative or quantitative analysis of the potential impacts on greenhouse gas sinks. They should also consider available alternatives and mitigation measures that would lessen the impacts of the proposed action on climate disruption.

This provision of the proposed Order is consistent with section 102(2)(C) of NEPA, which also requires all agencies to include in the EISs they prepare an analysis of “the environmental impact of the proposed action.”

## 3. Considering Climate Change Vulnerability in NEPA Analyses

When preparing EISs and Environmental Assessments (EAs), all federal agencies should be required to consider the extent to which the proposed action may be vulnerable to the anticipated effects of climate change, including sea-level rise, droughts, water shortages, melting glaciers, migrating vector-borne diseases, species extinction and migration, and others. They should also consider available alternatives and mitigation measures that would lessen the anticipated negative impacts of climate disruption on the proposed action.

This requirement is consistent with both sections 102(2)(C) and 101 of NEPA. Section 101 declares “the continuing policy of the Federal Government . . . to use all practicable means . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations” as well as to “assure for all Americans safe, healthful, [and] productive . . . surroundings.”

## 4. Establishing Substantive Requirements for Addressing Climate Change

No federal agency should be permitted to take a proposed action that may have significant climate change impacts if there is a reasonable and prudent alternative means for achieving the objective of the proposed action that would reduce those impacts. Likewise, no federal agency should take a proposed action that is determined to be significantly vulnerable to the anticipated impacts of climate change if there is a reasonable and prudent alternative means for achieving the objective of the proposed action that would avoid or be less susceptible to vulnerability to the anticipated impacts of climate change.

These requirements are consistent with section 101(b) of NEPA, which directs the federal government “to use all practicable means” to “assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings”; to “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences”; and to “fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.”

### 5. Promulgating New NEPA Regulations for Addressing Climate Change

The CEQ should be required to issue proposed and final regulations providing guidance to agencies on incorporating climate change impacts and vulnerabilities into the NEPA process. Climate change is a complex issue, and incorporating climate change considerations into the NEPA analyses requirements will likely present implementation challenges. New regulations will ensure that the incorporation of climate change considerations into NEPA is implemented in a thoughtful, consistent, and effective manner.

## Protecting Children from Toxics and Disease: Repaying Our Debt to the Future

Children, scientists tell us, are not “little adults,” especially when it comes to environmental threats such as exposure to toxic chemicals and the disease vectors expected to increase dramatically as a result of global climate change. Children breathe faster, eat and drink more in comparison to their body weight, spend more time outdoors, and are still developing fragile neurological systems. Toxics wreak havoc with their health, and they are significantly more likely to die if they contract malaria or other hot-climate diseases.

Rather than confront these vulnerabilities and embrace the social consensus that we must protect “kids first,” past administrations, and especially the Bush Administration, have systematically undermined efforts to protect children by erecting hurdles that make it difficult and often impossible for agencies to take effective action. These policies fall into three categories: simple neglect; distorted risk assessment; and “can’t win” economic rules.

- **Simple Neglect.** Scientific research regarding specific health threats to children is severely underfunded. For example, the Integrated Risk Information System (IRIS), an EPA database of toxicological profiles used by regulators around the world, lacks “inhalation values” (the numbers that determine when exposure to air pollution could harm people) for most hazardous air pollutants. The absence of these inhalation values makes it difficult to set hazardous air pollutants standards that are protective of children's health. Research assessing the cumulative exposure of especially vulnerable groups, such as children of farm workers or those who live in the inner city, lags far behind the growth in these populations. Decisions to stall regulation on toxics that pose a special threat to children—including mercury, perchlorate, organophosphates, polycyclic aromatic hydrocarbons, phthalates, ozone, and fine particulate matter—leave millions of children unprotected from clear and unacceptable risk.

Agencies have also been very quick to adopt remedies that put the burden on parents to keep their children out of harm's way, rather than ensuring that children can safely play in the natural environment or eat nutritious food. The preeminent example of this misguided embrace of “risk avoidance” approaches are “code red day” warnings that caution parents to keep their children inside on days when ozone levels in the outside air are expected to exceed health standards. Other examples: fish consumption

### EXECUTIVE ORDER

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#### ACCOUNT FOR CHILDREN IN DECISIONS ABOUT TOXICS

REQUIRE agencies to create plans to protect children from lead, mercury, perchlorate, phthalates, fine particulate matter, ozone, and pesticides; account for children in risk assessment; and stop discounting the value of children’s lives in cost-benefit analysis.

advisories that instruct parents not to feed their children too much tuna and other fish because it has become contaminated with mercury; and the expectation that low-income parents are responsible for protecting their children from the lead paint that is ubiquitous in inner city rental housing.

- **Distorted Risk Assessment.** In one of the most perverse “catch 22” approaches to risk assessment, in devising worker protection standards, the federal government has refused to take steps that would require agribusiness to protect the young children of farm workers from exposure to inordinately high levels of pesticides, from which they suffer disproportionately. A primary justification for these misguided policies is that young children are not allowed to work and therefore should not be in the fields with their parents, an obtuse approach that ignores the plain reality that farm workers' sometimes desperate economic circumstances prompt them to bring children into the fields. These farm children are also exposed to toxics even when not in the fields, because their homes are in the path of pesticide drift from the fields and because their parents inadvertently bring toxics home on their clothes. To make matters worse, regulated industries are given opportunities to use human testing on adults to eliminate the standard “safety factors” that are used to adjust acceptable exposure levels of toxic chemicals to account for the physiological differences between children and adults.
- **“Can't win” economic rules.** The White House Office of Management and Budget (OMB) requires agencies to discount public health benefits at both a 3- and 7-percent rate into the future, diminishing and even “disappearing” benefits to today's children and future generations. The chief rationale for this harsh policy is the increasingly questionable assumption that future generations will be wealthier than current ones and will be able to afford any technological improvements that are necessary to salvage ruined natural resources or impaired public health.<sup>11</sup>

Discounting is not the only distortion in the cost-benefit enterprise as it is currently conducted. Researchers have pointed out, for example, that data on respiratory and cancer risks associated with exposures to ambient air toxics show that children of color in the Los Angeles Unified School District suffer potentially disparate health impacts, and that disparities in environmental risks may be associated with diminished school performance. Yet, conventional cost-benefit analyses often fail to account for the troubling distributional impacts of exposure and risk; nor do they account for the potential benefits of efforts to mitigate exposures and risk to children, such as benefits associated with increased academic performance. As this example illustrates, what gets included and excluded in the cost-benefit equation is subject to a high degree of manipulation that is not transparent.

Those rare instances in which past presidential administrations have focused specifically on the issue of protecting children's health have been generally ineffective. The most notable presidential measure on this issue came in 1997 when President Clinton issued Executive

All of the major environmental laws allow agencies to craft protections that take the special vulnerability of children into account.



Order 13045, which was entitled “Protection of Children from Environmental Health Risks and Safety Risks.” President George W. Bush has continued this Order with minor amendments. The Order pledges to make protection of children from environmental health and safety risks a “high priority,” but it requires nothing more than the appointment of an interagency taskforce that includes the Department of Commerce in addition to safety and health experts. The taskforce rarely meets and ignores the Order's periodic reporting requirements. Even if it did decide to meet, it would likely accomplish little; it has not been tasked with developing a proactive regulatory agenda to protect children, which would be the best justification for its existence.

### Solution by Executive Order

All of the major environmental laws allow agencies to craft protections that take the special vulnerability of children into account. The administrative policies detailed above contradict legislative intent. The next President should amend Executive Order 13045 to require the following initiatives: (1) an affirmative agenda for protecting children from specified toxics; (2) reform of risk assessment policy so that children are accounted for as a vulnerable group; and (3) ending the use of discounting in cost-benefit analysis. For purposes of this Order, “child” should be defined as any person under the age of 18. As is the case with the provisions of the existing Order on Protecting Children, these recommendations are consistent with the goals of the various environmental, safety, and public health statutes.

#### 1. Set an Affirmative Agenda, with Deadlines, for New Health Protection

The Order should identify each of the agencies and departments responsible for protecting children from harmful exposure to (1) lead, (2) mercury, (3) perchlorate, (4) phthalates, (5) fine particulate matter, (6) ozone, and (7) pesticides. The Order should require each of these agencies and departments to issue a public report to the President within six months after the Order's issuance. These reports should (1) describe what the reporting agency or department knows about these threats to children and the nature and scope of their exposure, (2) explain why the reporting agency or department has not yet taken action to eliminate such exposures, and (3) establish a timetable no longer than 18 months after issuance of the report for taking action to eliminate these exposures.

Representatives from the Environmental Protection Agency (EPA), the National Institute for Environmental Health Sciences (NIEHS), the National Toxicology Program (NTP), and the Agency for Toxic Substances and Disease Registry (ATSDR) should be required to list an additional five problems (including but not limited to diseases caused by climate change) every 12 months following these initial reports for similar attention.

#### 2. Reform Risk Assessment Policy to Focus on Children as a Vulnerable Group.

The new Executive Order should require all agencies and departments to consider the specific adverse health effects that could be suffered by children as a result of exposure to

environmental conditions. Any resulting rule, order, finding, action, or other conclusion must address these specific effects and eliminate or reduce them.

The interagency taskforce comprising EPA, NIEHS, NTP, and ATSDR should furnish bi-annual, public reports to the President identifying scientific research priorities that would assist the government in protecting children from environmental contamination and other threats.

### **3. Terminate Discounting in Cost-Benefit Analysis.**

Under the conventional cost-benefit analysis practiced by the Bush Administration, the benefits of an environmental rule are monetized at the rate of between \$6 million and \$7 million per life saved. But if the person exposed to the pollutant is a child who would not die until decades from now, this amount is “discounted” at an interest rate of either three or seven percent. At a three-percent discount rate, 100 lives saved today are only worth 52 lives in 2050, and at a seven-percent discount rate (the number most often used), 100 lives shrink to 5 lives in 2050. This practice means that children exposed to long-term threats are grossly devalued and future generations virtually disappear in the context of economic analysis, which is increasingly used as the determinative factor in regulatory decisions.

The new Executive Order should terminate discounting in cost-benefit analyses performed by the government that monetizes any benefits that would be provided by regulatory action for future generations. It should limit such analyses to *qualitative* characterizations of the benefits of the proposed action for the unborn.

## Environmental Justice: Keeping America's Promise

U.S. environmental laws have dramatically improved the quality of the nation's air, water, and wilderness, while saving countless lives. But environmental protection efforts continue to produce radically unequal results when compared on the basis of race, class, sex, and age. For instance, African Americans have the highest asthma rates of any racial or ethnic group in the country and are three times as likely as whites to be hospitalized for asthma treatment.<sup>12</sup> Poor children and children of color are eight times more likely to have elevated levels of lead in their blood than other children.<sup>13</sup> Respiratory illnesses and elevated blood lead levels are but a few of the troubling indicators that stem from documented disparities in exposure to a wide range of pollution and risk-generating practices.

The nation's environmental laws also produce inequalities based on diversity in culture and lifeways. For example, the fishing tribes in the Great Lakes, the Pacific Northwest, and elsewhere are disproportionately harmed when the fish on which they rely become contaminated with mercury. In fact, nearly one-third of Native American, Asian American and Pacific Islander, and "mixed race" women of childbearing age have blood mercury levels above EPA's "safe" threshold, putting their developing babies at risk. This level is more than double that for white women.<sup>14</sup>

Global climate change is also complicating the picture. Vulnerable populations like the poor and the elderly will be especially at risk as droughts, heat waves, and storms intensify.

Moreover, many fear that even well-intended policies to confront climate change could backfire in environmental justice terms. Cap-and-trade proposals—which promise efficient reductions in greenhouse gas emissions—could actually intensify local concentrations of particulate matter and other pollutants that accompany carbon emissions in poor cities, if polluters there choose to buy extra permits to pollute. In addition, investments to promote clean energy and expand "green collar" jobs run the risk of bypassing those in shuttered industrial towns or the crime-ridden inner city, reinforcing the country's "wealth gap."

Responding to such inexcusable disparities in the distribution of environmental benefits and burdens, Executive Order 12898, issued by President Bill Clinton in 1994, promised to reshape federal agency action toward achieving environmental justice for minority and low-income communities. The 15th anniversary of the Order will arrive just three weeks into the new President's term. Even cursory reflection reveals that Executive Order 12898 has failed to live up to its promise, and needs an overhaul.

EXECUTIVE ORDER

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ENVIRONMENTAL JUSTICE:  
KEEP THE PROMISE

REQUIRE agencies to analyze the environmental justice impact of rules and require them to address environmental injustice affirmatively.

The failures of Executive Order 12898 are in part attributable to shortcomings in the provisions of the Order itself. Its biggest fault is its timid approaches to key concepts like “environmental justice communities” and “subsistence.” For instance, the Order makes the mistake of framing too narrowly the inquiry of what an “environmental justice community” might be, insisting that its harms be “disproportional” to some undefined standard. As a result, intractable problems of proof stymie constructive action.

The understanding of “subsistence” is troubling too, with potentially dire consequences for American Indian peoples' cultural resources and rights. For American Indian tribes and Alaska Native villages, subsistence goes beyond physical sustenance. Rather, it describes a communal way of life that has physiological, psychological, social, cultural, and spiritual dimensions. And it implicates practices to which Indian tribes have legal rights, including rights protected by treaties and the federal trust responsibility. The original Order, however, failed to make such an understanding explicit, and today many federal agencies too narrowly define subsistence to refer to a threshold level of individual caloric intake. If tribal members no longer meet this threshold, agencies do not count them as “subsistence” populations—and decline to consider whether agency actions contribute further to depletion and contamination of the fish, wildlife, and plant resources. Thus, under the original Order, agencies may permit contamination of fish, advise tribal people to curtail their intake of this traditional food, and then effectively penalize them if, as a result, fish no longer comprise the “principal portion” of their dietary intake. This approach actually undermines the subsistence way of life it is supposed to honor.

Additionally, the original Order provides little impetus for an affirmative environmental justice agenda. Its focus is primarily limited to the elimination of disproportionate environmental burdens. But the emergence of the new “green” economy holds the promise that environmental protection will spawn a new set of economic opportunities—new jobs, new investments in infrastructure, and new technologies. As these new environmental benefits begin to take shape, the U.S. government must ensure that they are distributed in a way that is inclusive and fair, so that all communities share in the dividends of the new green economy.

Finally, the original Order gives little direction to agencies in integrating environmental justice into their core missions, and provides no meaningful mechanism for measuring progress and holding agencies accountable over the long term. Agencies issue scores of regulations each year that have environmental justice implications. But these agencies often fail to ask who will bear the burdens and who will reap the benefits of a regulation, or to consider whether the regulation ameliorates or exacerbates current inequities.<sup>15</sup> As a result, environmental justice often fails to make it onto agencies' radar screens.

When agencies do identify environmental justice as a potential concern during the rulemaking process, their responses often indicate a misunderstanding of the relevant issues. For example, when EPA purported to assess the environmental justice impacts of its final “Clean Air Mercury Rule,” which would have postponed and weakened reductions in

mercury emissions, EPA observed that Native Americans, Southeast Asian Americans, and others would be better off with the rule's meager reductions than with nothing. Indeed, in a particularly callous twist, EPA asked “whether high fish-consuming (subsistence) populations would be disproportionately *benefited* by the final rule,”<sup>16</sup> despite EPA's own data showing that many in these groups would be left exposed to unsafe levels of mercury in fish.

## Solution by Executive Order

After nearly 15 years of false starts and neglect, the next President can take the first meaningful steps towards fulfilling the nation's commitment to Environmental Justice by amending or replacing the original Executive Order on environmental justice. The new Order should: (1) clarify the key terms “environmental justice communities” and “subsistence”; (2) require a meaningful analysis of the environmental justice impacts and implications of all major new rules; (3) impose on agencies a substantive obligation to take affirmative steps to ameliorate environmental injustice; (4) launch an affirmative environmental justice agenda; and (5) hold agencies accountable for carrying out their environmental justice obligations. As is the case with the provisions of the existing Executive Order on Environmental Justice, all of these recommendations are consistent with the goals of Title VI of the Civil Rights Act.

### 1. Clarify Key Terms

The phrase “environmental justice community,” while easily understood conceptually, has proved difficult to define with precision. The contexts in which environmental injustices occur vary widely, rendering abstract definitions inadequate. In addition, national databases do not typically capture all of the impacts that occur at the local level. Accordingly, a more appropriate framework for identifying “environmental justice communities” should be developed to account for these issues. This framework should include the following features: (1) a broad list of factors that allow for the identification of areas of concern without excluding disadvantaged communities; (2) a requirement that agencies consider both communities that are disproportionately impacted *and* those that face unacceptably high risks or exposures; and (3) language that is carefully phrased to avoid giving rise to debates about causation.

Second, the new Order should address American Indians' and Alaska Natives' unique concerns regarding “subsistence.” The original Order directs agencies simply to collect information about subsistence consumption of fish and wildlife and to issue consumption advisories when these resources are contaminated. While it provides that these agency responsibilities “apply equally to Native American programs,” it fails to address the special circumstances, political status, and legal rights of Indian tribes and their members. The next President should, after consulting with tribal leaders, take steps to address Indian tribes' subsistence concerns, by amending Executive Order 12898 (a) to correct its misunderstanding of “subsistence” and (b) to direct agencies, after consulting with tribes

according to Executive Order 13175,<sup>17</sup> to develop strategies to address the adverse impacts of federal programs, policies, and activities on the subsistence practices of American Indians and Alaska Natives.

## 2. Require a Meaningful Environmental Justice Analysis of Major Rules

The new Order should require agencies to conduct an environmental justice analysis for each major rule. Further, in order to ensure that such analyses are rigorous and meaningful, the new Order should direct the EPA to create an advisory committee charged with developing an appropriate methodology and protocol for conducting such analyses. This advisory committee should include members of the environmental justice community. It should also conduct a series of meetings around the country with various environmental justice communities and use their input in developing the methodology. The methodology should include specific procedures for agencies to conduct outreach to and obtain input from affected environmental justice communities in conducting these analyses.

## 3. Make a Substantive Commitment to Ameliorate Environmental Injustice

Analysis is a waste of time and resources unless it is linked to a commitment to take meaningful action. Section 1-101 of the existing Order directs agencies to “address” environmental justice concerns, but this language has proved to be too vague. Agencies often interpret it as requiring only analysis, not action. Accordingly, the new Order should impose on agencies a clear obligation to take affirmative steps to ameliorate environmental injustice to the maximum extent feasible, consonant with other legal obligations and constraints.

## 4. Launch an Affirmative Environmental Justice Agenda

The next President should launch an affirmative environmental justice agenda, announcing a set of goals aimed at ensuring that the benefits of the emerging “green” economy are distributed in a way that is inclusive and fair. These goals should include the development of “green-collar” jobs, job training, and new green businesses in traditionally disadvantaged environmental justice communities. The federal government can encourage the achievement of these goals through tax breaks, the creation of “green enterprise zones,” and other creative solutions. Accordingly, the new Order should also direct each federal agency to exercise its discretion, consistent with existing law, to promote the goals of an affirmative environmental justice agenda wherever possible. Further, the Order should direct each agency to develop a plan outlining how existing programs will be administered in order to promote these goals and recommending new programs for achieving them, including, where appropriate, new proposed legislation.

The next President should launch an affirmative environmental justice agenda, announcing a set of goals aimed at ensuring that the benefits of the emerging 'green' economy are distributed in a way that is inclusive and fair.

### 5. Hold Agencies Accountable

The new Order should include procedures for holding federal agencies accountable for carrying out their environmental justice obligations. Specifically, it should require each agency to develop an agency-wide environmental justice plan that identifies and addresses programs and policies that threaten to undercut environmental justice. These plans should also incorporate the affirmative environmental justice plan described above. To ensure the ongoing and effective implementation of these plans, the Order should require agencies to revise and update their environmental justice plan every two years and submit it as a public report to the President. Furthermore, the Order should require that the President designate a new or existing office within the White House to oversee implementation of the new Order.

## Restoring Open Government: Promoting Transparency Under FOIA and FACA and During Regulatory Review

Open government is a cornerstone of American democracy. The Framers of the Constitution regarded transparency as a necessary prerequisite to the proper functioning of the constitutional system of checks and balances, not least because without it, there is no possibility for public and press oversight of the government. There are exceptions, of course. Thoughtful people from the Framers to modern-day political scientists acknowledge that at times the government must act in secret. Accordingly, the Freedom of Information Act (FOIA), the nation's premiere open government law, recognizes a number of situations in which Congress has determined that the public interest may be best served by nondisclosure. Nevertheless, an underlying assumption of American democracy is that the people have a right to know what is going on in their government.

The new President has the opportunity to restore open government in three areas where unwarranted secrecy has developed. The President should adopt a new Executive Order on Open Government that (1) restores the presumption of disclosure concerning FOIA exemptions, (2) forbids agencies from taking advantage of loopholes that limit the transparency provisions of the Federal Advisory Committee Act (FACA), and (3) improves the transparency of regulatory review by the Office of Information and Regulatory Affairs (OIRA).

### Solution by Executive Order

#### 1. Restore a Presumption of Disclosure for FOIA Exemptions

When the Bush Administration took office, then-Attorney General John Ashcroft issued a memorandum instructing agencies that the U.S. Department of Justice (DOJ) would defend decisions not to release information “unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”<sup>18</sup>

The memorandum reversed a Clinton Administration policy that adopted a “presumption of disclosure.” This Clinton policy committed DOJ to defending decisions to withhold information “only in those cases where the agency reasonably foresees that disclosure would be

#### EXECUTIVE ORDER

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#### RESTORE OPEN GOVERNMENT

RESTORE the presumption  
of disclosure in FOIA requests; expose special  
interest participation in federal advisory  
committees to public scrutiny; and make  
OIRA's influence over agencies' proposed  
regulations visible.

Advisory committees have long functioned under the transparency provisions of FACA; there is no indication that secrecy is necessary or appropriate.

harmful to an interest protected by that exemption.”<sup>19</sup> According to a Government Accountability Office (GAO) study, the Ashcroft memo has had the impact of decreasing the information that agencies have disclosed under the FOIA.<sup>20</sup>

The next President should include in the proposed Executive Order a provision that directs DOJ to restore the presumption of disclosure that prevailed in the Clinton Administration. Such a presumption is more consistent with Congress's intention in adopting FOIA in the first place. Although Congress created exemptions to FOIA disclosure, it also made those exemptions discretionary,<sup>21</sup> signaling that they were to be used in a manner consistent with the goal of maximum disclosure of information to the public. This provision of the proposed Order is consistent with the goals of FOIA.

## 2. Forbid Agencies from Using Loopholes to Avoid FACA

When it passed the Federal Advisory Committee Act, Congress determined that these committees should operate in public view. A federal advisory committee is subject to FACA if it has members who are not government employees. FACA requires advisory committees to hold public meetings and to make committee minutes and all other committee records available to the public. A committee meeting may be closed, and documents may be withheld, if the information falls within one of the narrow FOIA exemptions and the government chooses to withhold it.<sup>22</sup> Agencies, however, can avoid this mandate through four loopholes that have developed in response to judicial interpretation of the statute:

- A “contractor” loophole permits agencies to avoid the statute by hiring private contractors to organize and operate an advisory committee.
- A “strict management” loophole invites agencies to avoid the statute by letting a regulated entity appoint the committee members and share joint control of the advisory committee's agenda.
- A “non-voting participant” loophole permits outsiders to take an active role in government committees, including attending meetings, providing information, offering advice, and possibly participating in committee deliberations, without the committee becoming subject to FACA.
- A “subcommittee” loophole allows agencies to avoid FACA by the simple expedient of creating subcommittees to do the real work of the committee.<sup>23</sup>

In practice, the use of these loopholes has been the subject of great controversy. For example, the much-criticized National Energy Policy Development Group, chaired by Vice President Cheney and better known as the Cheney Energy Task Force, served as the basis of the “non-voting participant loophole.” The task force, composed of federal officials, apparently met with various energy producers and trade associations but made no effort to meet with environmental or other public interest groups. Judicial Watch and the Sierra Club sued the government claiming that the task force violated FACA. Abandoning past

precedent, the D.C. Circuit Court rejected the organizations' claim, by enunciating the new “non-voting participant” loophole.

In another particularly egregious case, EPA managed to exploit the “strict management” loophole through its practice of holding secret meetings with pesticide manufacturers as it considered the re-registration of their pesticides, including the formation and utilization of two advisory groups composed of EPA employees and representatives from Syngenta.<sup>24</sup>

The House of Representatives has passed legislation that would close these loopholes,<sup>25</sup> but unless and until this legislation becomes law, the President should include a provision in the proposed Order instructing agencies not to take advantage of them. These loopholes are inconsistent with Congress's intent to ensure that the public and the press, as well as Congress itself, can monitor the work done by advisory committees. Advisory committees have long functioned under the transparency provisions of FACA; there is no indication that secrecy is necessary or appropriate. This provision of the proposed Order is consistent with the goals of FACA.

### **3. Require More Transparency for OIRA Regulatory Review**

The absence of transparency in the Office of Information and Regulatory Affairs's review of proposed and final regulations is a longstanding and major concern. OIRA is an obscure but powerful office within the White House's Office of Management and Budget and has been conducting regulatory oversight since the beginning of the Reagan administration. A series of Executive Orders has directed OIRA to review all major federal agency rules (i.e., rules that have some specified large impact on the economy or the federal budget) from the perspective of cost-benefit analysis. In theory, this review was intended to ensure that agency rules were economically efficient – that is, to ensure that the rule under review achieves the maximum amount of monetized net benefits over the monetized costs associated with implementing and complying with the rule. But in practice, OIRA has become a White House choke point for regulations, exercising broad policy discretion that Congress delegated to agencies, not to OIRA. While conducting its reviews, OIRA retains substantial authority to change agency rules or to return them to the submitting agency if it finds that the rule under review fails to achieve OIRA's conception of economic efficiency.

In response to the lack of transparency in OIRA regulatory review, Executive Order 12866, adopted during the Clinton Administration, required the agency whose rule was being reviewed to disclose any changes made during OIRA review, or in response to OIRA review, after the rule was promulgated. The Order also committed OIRA to disclose the status of all rules under review and the names of those involved in and the dates of substantive oral communications between its staff and outside parties.

In the Bush Administration, OIRA agreed to disclose substantive meetings and other contacts with outside parties at any time that they occurred (including during informal OIRA review); to disclose substantive telephone calls with outside parties initiated by the

Administrator; and to expand its website to disclose lists of regulations currently under review, reviews it concluded in the previous 30 days, and its meeting records with outside parties.<sup>26</sup>

Despite these measures, the OIRA regulatory review process is not sufficiently transparent, and the next President should include in the proposed Order on Open Government the following provisions:

- When the Bush Administration OIRA engaged in “informal reviews” (i.e., reviews prior to the formal submission of a proposed rule for review), it instructed agencies that they did not have to disclose to the public changes made at OIRA's suggestion.<sup>27</sup> As GAO has recommended,<sup>28</sup> the President should drop any distinction between formal and informal review for purposes of agency disclosure of changes in a rule.
- GAO found that the documentation agencies are required to provide to describe the changes that were made at OIRA's suggestion is not always available, and when available, not always clear or consistent.<sup>29</sup> The President should require OIRA to adopt and enforce procedures to remedy this problem.
- GAO also found that OIRA's database (1) did not differentiate between changes initiated by OIRA or by the agency whose regulation was under review, and (2) did not distinguish between changes that were significant (i.e., changes that affect the scope, impact, or estimated costs and benefits of the rule under review) and those that were minor (i.e., changes that are merely editorial or involve other minor revisions). As GAO has recommended,<sup>30</sup> the President should require OIRA to make both of these distinctions.
- OIRA's meeting log does not always indicate clearly the subject matter of meetings held with outsiders and the affiliations of those who attended the meeting.<sup>31</sup> The President should require OIRA to make this information consistently available to the public.

In theory, the President could choose to withhold this information involving the OIRA regulatory review process under the discretionary FOIA exemption for inter-agency memoranda. As discussed above, however, the fact that FOIA makes these exemptions discretionary suggests that Congress's goal under FOIA was to promote the maximum disclosure of information to the public. As such, these provisions of the proposed Order are consistent with the goals of FOIA.

## Removing Barriers to Local Innovation: Safeguarding Protective State Laws from Federal Agency Preemption

The Framers of the Constitution built into the U.S. system of government a profound respect for the principles of federalism and state sovereignty. These principles require the federal government to recognize and encourage opportunities for the exercise of state and local governments' authority, especially in areas of traditional state concern such as the protection of the health, safety, and welfare of their citizens.

The now-familiar metaphor of states as “laboratories of democracy” demonstrates that the exercise of concurrent power by state and local governments also has practical importance. When free to experiment, state governments have demonstrated their capacity to serve as leaders and innovators in a number of important fields of public policy, including environmental protection. For example, many state and local governments, led by California, have responded to the Bush Administration's failure to address the consequences of global climate change by enacting controls on automobile emissions of greenhouse gases and other such measures.

Such exercise of state and local authority to protect public health and the environment has taken on added significance in light of a combination of recent judicial, legislative, and executive branch decisions that have functioned to contract federal power to protect health and the environment. According to some observers, the Supreme Court has narrowed federal regulatory authority through its interpretations of the Commerce Clause (e.g., *United States v. Lopez* and *United States v. Morrison*) and the Tenth Amendment (e.g., *New York v. United States*), prompting questions about the constitutionality of such federal environmental programs that enjoy strong support by the states, such as the Safe Drinking Water Act.

Congress also has contributed to the weakening of the federal government's authority to protect health and the environment. First, it has exempted some agencies from the obligation to consider the potential adverse environmental impacts of their actions under such laws as the National Environmental Policy Act and the Endangered Species Act.

Second, it has subjected agencies seeking to protect the environment, such as EPA, to a series of new and unnecessary obligations that, at a minimum, strain the agency's ability to fulfill its environmental protection mission. The Data Quality Act, for example, requires agencies to adopt procedures for ensuring the quality and objectivity of the information they disseminate, even

### EXECUTIVE ORDER

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#### RESPECT STATE AUTHORITY TO PROTECT CITIZENS FROM HAZARDS

REQUIRE agencies to respect  
states' power to protect their  
citizens by reestablishing  
presumption against agency  
preemption of state laws.

though the agencies have to defend the quality and reliability of their information as part of the rulemaking process anyway.

Finally, the executive branch has contributed to the weakening of the federal government's regulatory authority by diluting some of the substantive programs designed to protect the public health and prevent degradation of federal lands and resources.

Despite the growing importance of the exercise of state and local regulatory authority, the Bush Administration has used the doctrine of federal preemption to prevent state and local governments from supplementing weak federal regulations or filling the gaps created by the absence of federal regulations. For example, under the Bush Administration, federal agencies like the National Highway Traffic Safety Administration (NHTSA), the Food and Drug Administration (FDA), and the EPA have preempted, or supported the efforts of others to preempt, state and common law remedies. These agencies have included assertions of preemption in regulatory preambles, filed *amicus* briefs in litigation in which other litigants have argued that federal statutes preempt state law, and submitted to Congress draft legislation preempting state and local authority to protect health and the environment.

This strategy is especially alarming when it entails efforts to preempt state common law. It not only flouts the tradition of state judicial independence but also fails to recognize that state common law remedies are often necessary to compensate aggrieved plaintiffs, since federal public health and safety and environmental statutes typically provide no compensatory remedies. In *Geier v. American Honda*, for example, the Supreme Court concluded, with little statutory support, that a regulatory program created by NHTSA *implicitly* preempted state common law, thereby barring the plaintiff's tort claim. *Geier* is but one of many cases in which a court has held that a federal regulatory statute preempts state common law despite the absence of statutory provisions reflecting preemptive intent.

### **Solution by Executive Order**

To begin the process of restoring a vibrant and cooperative federalism in which all levels of government are able to contribute to the protection of public health and safety and the environment, the next President should amend the existing Executive Order on Federalism. The existing Order is sound in many respects, but its provisions addressing preemption issues should be strengthened by (1) reinforcing the executive branch's adherence to the traditional presumption against preemption and clarifying that the presumption applies only to "ceiling preemption"; (2) requiring agencies to provide a written justification to an appropriate office in the White House before taking an action that results in ceiling preemption; (3) where a federal statute allows states to adopt more stringent standards or seek a waiver of express statutory preemption, requiring agencies to provide a written justification to an appropriate office in the White House before denying the state's regulatory authority or waiver request ; and (4) amending the Order's consultation

procedures by incorporating the two new written justification requirements into them. As is the case with the provisions of the existing Executive Order on Federalism, all of these recommendations are consistent with the goals of the various statutes under which the environmental, safety, and public health agencies operate, including sections 101 and 102 of the National Environmental Policy Act.

### 1. Strengthen Presumption Against 'Ceiling Preemption'

The new President should amend the Executive Order to require federal agencies to adhere to a strong presumption against interpreting federal statutes to result in what CPR Member Scholar William Buzbee of Emory University has termed “ceiling preemption.” Ceiling preemption occurs when federal law preempts state laws that are more stringent or protective than federal laws. Professor Buzbee distinguishes between ceiling preemption and “floor preemption.” Floor preemption precludes states from implementing laws that are less protective than applicable federal requirements but allows them to set more stringent standards. The recommended change is necessary for two reasons. First, the language of the existing Order does not clearly require agencies to interpret their organic statutes in a manner consistent with the traditional presumption against preemption that is derived from the principles of federalism and state sovereignty. Second, the existing Order fails to clarify that this presumption applies only to ceiling preemption. When interpreting the statutes they administer, federal agencies should presume that Congress did not intend to preempt more protective state law but that it did intend to preempt less protective state laws. These presumptions against ceiling and in favor of floor preemption respect the principle of state sovereignty, while protecting the capacity of all levels of government to safeguard public health and the environment.

The presumption against ceiling preemption is especially important when the agency seeks to preempt a more stringent state law on the ground that its application would create an obstacle to the accomplishment of federal statutory goals. A strong presumption against a finding of implied preemption of more stringent state laws is an appropriate means of protecting state sovereignty, particularly when the state laws in question were adopted in the exercise of the police power, which has long authorized state and local initiatives to protect health, safety, and the environment.

In particular, the new President should amend the Executive Order so that it directs agencies to stop taking two kinds of actions that result in ceiling preemption. First, the Order should direct agencies to stop interpreting federal statutes as preempting more protective state law where the federal statute in question lacks an express preemption provision. Second, the Order should direct agencies to stop interpreting narrowly the savings clauses in federal statutes that preserve state regulatory and common law authority. This would establish a strong presumption against ceiling preemption, which agencies could only overcome by demonstrating a compelling need for taking either of these kinds of actions.

These presumptions against ceiling and in favor of floor preemption respect the principle of state sovereignty, while protecting the capacity of all levels of government to safeguard public health and the environment.

## **2. Establish a Rigorous Procedure for Overcoming Presumption Against Ceiling Preemption**

The new President should amend the existing Order to require agencies seeking to assert preemption to provide a written justification to the appropriate White House office for preempting state law despite the presumption against ceiling preemption. The approval would have to include a finding that the statutory scheme reflects congressional intent to preempt conflicting state or local law and that the agency has provided sufficient factual evidence and policy rationale to demonstrate that the state or local law in question does in fact conflict with federal law or policy or would otherwise frustrate the goals of the federal statute being implemented by the agency. A general assertion that the continued existence of state or local laws would frustrate the goal of uniformity would be insufficient to justify preemption. To ensure that these strict requirements are met, the Order should authorize the appointed White House office to review each written justification and to reject those that do not meet these requirements.

The existing Order only requires federal agencies issuing regulations that would preempt state law first to determine that “the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute or there is clear evidence to conclude that the Congress intended the agency to have the authority to preempt State law.” The Order lacks a broadly applicable and effective mechanism for ensuring that the agency has made this determination correctly, or even at all. Instead, the Order establishes a documentation requirement for only one category of regulations that preempt state law – those regulations subject to the regulatory review provisions of Executive Order 12866. The submitting agency must “include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.” But the Executive Order does not authorize—nor do these submitted certifications enable—the Office of Management and Budget (OMB), the entity that receives the submitted certifications, to review and verify independently that the required determination has been properly made.

## **3. Establish a Rigorous Procedure for Denying State Authority to Regulate More Stringently**

In some instances, federal statutes preempt state law but allow the states to request that a federal agency waive the prohibition on adopting supplemental state law. The provision in the Clean Air Act allowing California to adopt motor vehicle emissions controls more stringent than federal standards upon EPA’s approval is one important example. The current Executive Order should be amended to require any agency that wants to deny a state’s request for permission to regulate more stringently activities posing a threat of harm to the public health, safety, or environment to provide to the appropriate White House office a written justification for issuing the denial. The written justification would have to include evidence, in the form of facts and policy arguments, demonstrating that granting the

waiver would render the agency unable to implement the federal statutory program at issue in accordance with congressional intent. To ensure that these strict requirements are met, the Order should authorize the appointed White House office to review each written justification and to reject those that do not meet these requirements.

Under the current Executive Order, the federal government is only required to “grant the States the maximum administrative discretion possible.” This requirement is insufficient to safeguard state policymaking authority, because it only recognizes the states' interest in procedural flexibility to administer regulations according to substantive standards set by the federal government. The Order should instead ensure that the states' substantive policymaking authority is also protected by making it difficult for agencies to prevent states from going beyond existing federal law to set their own, more protective standards. In particular, it would require agencies to provide a much stronger justification for ousting state law than the one that EPA Administrator Stephen Johnson provided in 2007 when he denied California's petition for a waiver of the Clean Air Act's restrictions on state authority to adopt motor vehicle emissions controls so that the state could restrict greenhouse gas emissions from automobiles.<sup>32</sup>

#### **4. Amend the Order's Consultation Procedures**

The new President should amend the existing Executive Order so that its general consultation procedures are integrated into the written justification requirements required under the second and third recommendations above. To ensure compliance with these consultation procedures, the amended Order should direct federal agencies to include in any submissions that they make to the appointed White House office in connection with the second and third recommendations above a complete description of (1) the consultation that took place between the federal agency and affected state and local officials, and (2) the opportunities for state input and participation provided in the agencies' decisionmaking process. The Order should authorize the White House office to reject the agency's submission if it finds that either the consultation procedures or the opportunities for state input were inadequate.

## Restoring Wise Stewardship of Public Lands: Promoting Ecological Integrity and Public Participation

The United States owns approximately 28 percent of the nation's land area, and an additional 60 million acres of subsurface mineral rights underlying state and private lands. A hodgepodge of statutes divides up responsibility for managing these lands and resources among several agencies, including the National Park Service, the National Forest Service, the Fish and Wildlife Service, and the Bureau of Land Management (BLM). This immense trove of resources requires careful stewardship by these agencies to ensure that current demands and short-term priorities do not degrade the long-term value of this heritage for the future.

Over the past few years, however, the federal government has failed miserably in abiding by its stewardship responsibilities. Many studies have documented the steady degradation of public lands and of the services, values, and benefits they provide.<sup>33</sup> In general, these studies describe how, driven by policies dictated by the current Administration, overexploitation and commodification of resources on public lands has caused long-term damage to ecological values (such as biodiversity) and to ecosystem services (such as water purification). To make matters worse, the federal agencies that are assigned the task of conserving federal lands often lack the necessary resources to protect federal public lands over the long run.

This poor record of stewardship is particularly distressing given that the federal government now faces its greatest land management challenge yet with the advent of global climate change. Climate disruption is anticipated to affect all kinds of ecosystems represented on the federal lands, including forests, fresh water and wetlands ecosystems, grass and shrub lands, and coastal and marine environments. Climate change is already causing glaciers to melt in such places as Glacier National Park, where the estimated number of glaciers has fallen sharply. Some scientists predict that if temperatures continue to rise, all of the glaciers in the park will be gone within 25 to 30 years. Furthermore, climate change will alter the habitat needed to support countless species. Species will have to migrate to new areas as the ecosystems that previously sustained them are radically altered. This migration may be impossible, however, if their current habitat is on federal lands adjacent to developed private lands.

The Constitution gives Congress the power to make rules governing management of public lands. However, most of the

### EXECUTIVE ORDER

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#### PROTECT PUBLIC LANDS

MAKE ecological integrity a baseline standard for public land use; revoke Bush Orders on energy development that result in long-term degradation; and provide opportunities for public participation in decisionmaking.

federal legislation that governs public natural resource management gives managing agencies wide latitude to exercise discretion in meeting statutory goals. Therefore, presidential recommendations can have a greater impact on public land conservation, for better or for worse, than it can on most other regulatory matters. For the bulk of federal lands and resources, Congress has established the goal of sustainable use, which requires management that avoids long-term degradation of resources in the federal estate. U.S. history boasts a strong tradition of presidential leadership in advancing conservation principles through Executive Orders. The new President should make it a high priority to restore the tradition of providing presidential leadership in natural resource conservation

### **Solution by Executive Order**

Without waiting for congressional action, the next President can take several important steps towards restoring wise stewardship of federal public lands. First, the next President should issue a new Executive Order to declare a national policy of promoting ecological integrity as a baseline requirement for sustainable public land use. Second, the next President should revoke two Bush Administration Executive Orders issued in 2005 (Executive Orders 13211 and 13212) that made it easier to develop energy resources on public lands, even at the risk of causing long-term degradation of natural resource values. Third, the next President should amend a third Bush Order (Executive Order 13443) by providing equal opportunities for public participation in federal land use decisionmaking to a wide variety of constituencies, in addition to those promoting hunting. All of these measures are consistent with the goals of the various public lands statutes.

#### **1. New Executive Order Promoting Ecological Integrity**

Before the Bush Administration, individual land management agencies had made some progress in moving toward ecosystem management by highlighting the fundamental importance of ecological integrity. For example, the Clinton Administration's 2000 Forest Service land and resource management planning rule generated support for the adoption of "ecological sustainability" as a baseline requirement for multiple-use, sustained-yield lands. In response, the regulations elevated "ecological sustainability" to the top priority in the agency's core mission. The agency recognized that vital national social and economic objectives cannot be sustained over the long term without the maintenance of ecological integrity, and that such maintenance is a prerequisite for optimizing a sustainable yield of multiple resources from public lands.<sup>34</sup> The Bush Administration revoked that rule in 2005.

Natural resource policy should promote "ecological integrity." This concept is preferable to "ecological health," another frequently cited goal for natural resources management. The concept of ecological integrity has received the bulk of the attention in the science and management literature over the past decade. In addition, the term "health" is susceptible to being stretched in ways that lead to results that are at odds with the goal of promoting sustainable public land use. The implementation of the "hazardous fuel reduction" program

authorized by the Healthy Forests Restoration Act of 1993 illustrates this problem. The term “forest health” soon became a Trojan horse for initiatives aimed at weakening environmental protection and public participation, in order to promote more logging.<sup>35</sup>

The proposed Executive Order should seek to tie the ecological integrity baseline goal to the principles of ecosystem management. It should ensure that all federal land management agencies incorporate ecosystem management principles into management activities, to the extent consistent with applicable law, and it should specify that the implementation of these principles must be directed toward promoting ecological integrity on all federal public lands.

One important component of an increased emphasis on ecosystem management involves coordinating conservation efforts across jurisdictional boundaries. The proposed Order should require the federal land management agencies to incorporate into their planning efforts consideration of the impact on federal public lands and resources of activities taking place on nearby private or state-owned lands. The Executive Order might, for example, establish interconnected networks of federal public lands or promote collaboration between federal agencies and the owners of neighboring lands. In addition, the Order should facilitate efforts to abate external threats to the federal conservation estate that come from sister agencies, such as the Departments of Defense, Energy, and Homeland Security. These agencies have sometimes invoked national security considerations as a justification for avoiding environmental requirements, even when compliance with these requirements is fully consistent with national security considerations.

Furthermore, the new Executive Order should explicitly recognize that adaptive management is a key technique for fulfilling a federal commitment to maintaining and restoring ecological integrity. Adaptive management builds flexibility into management decisions by regarding them as experimental.<sup>36</sup> The proper implementation of an adaptive management strategy requires extensive monitoring of public lands to understand the effects of government decisions on natural resources. To ensure that the necessary monitoring is undertaken, the proposed Executive Order should declare a commitment on the part of the executive branch to provide federal land management agencies with the necessary resources for carrying out these expanded monitoring activities.<sup>37</sup> It must also insist on clear criteria for evaluating the effectiveness of adaptive management strategies designed to achieve ecological integrity.

Finally, to complement the provisions of the general Executive Orders on climate change described above, the new Order on Ecological Integrity should include provisions that address public land management issues related to climate change concerns. In particular, these provisions should emphasize the importance of managing public lands to protect and enhance the resilience of ecosystems in the face of climate disruption. Acquisition priorities, inter-jurisdictional networks of protection, and migration corridors are among the tools that public land managers should employ in adapting to climate change. The Order should require the federal land management agencies to consider the impact of their land and

resource plans and significant implementing projects on resilience. It should require those agencies to describe in plans and records of decisions on significant implementing projects any alternatives the agency considered, whether they had greater potential to protect and enhance resilience, and why the agency did not choose those alternatives. Lastly, this Order should require all federal agencies to authorize the establishment of pilot projects to assist the transfer of low-carbon and low-methane emitting technology and techniques to the private sector whenever these agencies engage in mining, grazing, logging, road and building construction, and other activities that generate greenhouse gas emissions on public lands.

## 2. Revocation of Bush Executive Orders on Developing Energy Resources

In 2001, the Bush Administration, acting on two of the recommendations of the Cheney Energy Task Force, issued two Executive Orders that established unequivocally its commitment to energy development on public lands.<sup>38</sup> Executive Order 13211 requires all federal agencies undertaking certain types of regulatory actions to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), a “Statement of Energy Effects,” in which they evaluate the adverse impacts of the action on the distribution, supply, or use of energy and consider reasonable alternatives. Executive Order 13212 compels agencies to “expedite their review of permits or take other actions as necessary to accelerate the completion of” energy development projects. This Order also establishes an inter-agency task force “to monitor and assist” in the effort to expedite energy projects. Together these Orders have functioned to accelerate energy development projects on federal public lands, but often at the expense of understanding or weighing their detrimental effects on alternative land uses and ecological integrity.

Early in his administration, the next President should revoke both of the Bush Orders on developing energy resources on federal public lands. There is a role for energy development on public lands, but it should be undertaken only if it does not compromise the nation's ability to achieve other important social goals. Though there are some circumstances in which legislation compels prioritizing energy development, the executive branch generally has the discretion to balance energy development with competing uses and values.

## 3. Expanding Recreational Uses Beyond Hunting

In 2007, the Bush Administration issued Executive Order 13443, which requires the federal land management agencies to promote hunting opportunities. To be sure, the promotion of hunting opportunities is consistent with the policies established in many of the federal land management statutes. But the Executive Order lacks balance. Although hunting has long been allowed on many federal lands, it is but one of several important wildlife-dependent uses that deserve promotion on federal lands. Besides, states already do an admirable job promoting hunting opportunities and sustaining game populations.

The next President should modify Executive Order 13443. A better federal policy would allow the states to continue to lead efforts to promote hunting, while continuing to focus



The proposed Executive Order should seek to tie the ecological integrity baseline goal to the principles of ecosystem management.

scarce federal resources on promoting the other values associated with federal lands. Some federal statutes, such as those governing the national wildlife refuges, are designed to promote hunting along with other wildlife-dependent activities. Consistent with these statutes and a federal land management culture that embraces all wildlife-dependent recreation, the Order should be amended to create advisory councils for hikers, wildlife observers (such as bird watchers), and environmental educators. Agencies should be as encouraging of these activities as they are of hunting, because they all contribute to public support of conservation.

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## End Notes

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