

## *SYMPOSIUM ARTICLES*

### ENVIRONMENT, JUSTICE, AND TRANSPARENCY: ONE YEAR IN, A REINVIGORATED ENVIRONMENTAL PROTECTION AGENCY

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*AT CHANGES TO THE REGULATORY STATE: PRESIDENT OBAMA'S  
APPROACH TO REGULATION AND ITS IMPACTS ON FEDERAL  
ENVIRONMENTAL AND HEALTH PROTECTIONS SYMPOSIUM HELD AT  
NYU SCHOOL OF LAW, MARCH 12, 2010*

Thank you so much, that was a very nice introduction. I appreciate it, and I'm very happy to be here at NYU this morning. I'm happy to be at this particular event. I've admired the work of the Institute for Policy Integrity, both as an academic, and now in my position at EPA, and I'm very happy to be here.

I have, as Dean Revesz and as Michael Livermore alluded to, been engaged as a law professor in the debate over cost-benefit analysis and regulatory review for some time. I've been a critic of cost-benefit analysis for some time, and now in one of those turns of fate an ironist would love, I find myself the primary overseer of EPA's cost-benefit analyses and the agency's primary liaison to OIRA, the White House office charged with overseeing our regulations and our cost benefit analysis. How strange and wonderful life is.

I'll talk more about cost-benefit analysis and regulatory review in a minute, but I'd first like to talk about what we're doing at EPA and give you a sense of the regulatory posture and the priorities of EPA today. I'd also like to give you perhaps a little bit of a sense of the mood at EPA today. Michael's already given you a tiny sense of that, but I thought I'd just amplify that point

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because I think that's something that doesn't come out in public accounts.

I arrived at EPA on January 21, 2009. That's the day after the inauguration. At that time as a political crew we had two schedulers, the White House liaison and me. Lisa Jackson herself arrived the following week after her Senate confirmation. The administration was so fresh, so kind of just-out-of-the-box, that the White House liaison that morning when she met me at the door to EPA still had her hair in the up-do from the night before at the inaugural balls. I believe she was still wearing the same shoes. And to me this moment was wonderful – was a tangible expression of the kind of giddy fluidity of the moment. Here we were moving – in a moment without time to change our shoes – from campaign, election, inauguration, to governing. And the moment was exciting and remains so. And in fact I don't think we've had time since to change our shoes.

And it may be, and this alludes to something that Michael just said, but it may be that when you think of an 18,000 member bureaucracy, when you think of a bureaucracy at all, when you think of a regulatory bureaucracy, the words that come to mind aren't necessarily: "swift," "agile," "creative." Other words might come to mind. In what I talk about this morning I want you to think "swift," "agile," "creative," because that's what the agency is filled to the brim with. Our dedicated career employees who when we walked in the door that very first day were ready to work and ready to go back to work on the basic pieces of our environmental mission. And if you say I don't think we can do it that way, they will come back and say I think we can do it this way instead. If you say I think we need that by tomorrow, they will say yes. It's an unbelievable staff, an unbelievable group of employees. And they're what have made it possible for us to do what we've done in the last year or so.

I'm going to first talk about what we've been up to and talk about it along three dimensions. I'm going to spend the most time on the first and a little bit less time on the second two, not because of importance but just because there are a few more details on the first. I'm going to talk about our environmental imperative. I'm going to talk about justice. I'm going to talk about transparency.

On the environmental imperative, our basic mission of course is to ensure clean air, clean water, and clean land. Mainly we do this through regulation, and nowadays we actually say that: that

that is our basic mission. Our environmental mission achieved mainly through regulatory action. I have to say it doesn't always make us the most popular agency in town. I will say though that when people call to ask why their water's brown, they like us. So that there is a tension – sometimes the same people who are telling us we shouldn't be quite so active are the same people who on another day might ask us about their drinking water or their air.

Part of the excitement at the agency today I think has to do with the fact, the very simple fact, sort of not intellectually fancy fact, but the simple fact that we have returned to our basic environmental mission. As administrator Jackson said on the first year on the job: 'We are back on the job.' And there isn't a large, in some sense, a large again intellectual or scholarly framework behind it. It's just basic, good, bread and butter environmental work. If you look at the Administrator's statements about her priorities, basically they're about cleaning the air, cleaning the water, and cleaning the land. It's extremely important, extremely basic, and that's what we've been about.

For the past year we have been, as you may have heard, exercising some regulatory authority for the first time. Most famously here, of course, is our work on greenhouse gas emissions. We've also begun the process of dusting off some other authorities that haven't been exercised here, I think most prominent would be our work on chemical safety under the Toxic Substances Control Act. So we are actively engaged in regulatory work, in making up for lost time, in pursuing our basic environmental mission. But to say that, to say that we're predominantly a regulatory agency, to say that we're primarily about ensuring clean air and clean water and clean land, I think doesn't mean that we can't be reasonable. And I think part of the story from our first year is to think about what we've done, to look at it soberly and to try to see where we've tried to be creative and flexible. And I'll give you some examples: two from the area of climate regulation.

First, we have a rule which I may be inordinately – I don't think inordinately – but which I am very excited about, which is the greenhouse gas reporting rule. This rule, which is final now, established for the first time a comprehensive nationwide monitoring and reporting scheme for major sources of greenhouse gases. It targets the largest facilities: 25,000 tons or greater of emissions. And at the same time, it targets about 85% of

greenhouse gas emissions. So we targeted the very largest facilities, a very small percentage of total greenhouse gas emitters, but managed in doing that to capture really most of the emissions. But I think there are two features of this rule that I'll just briefly highlight in suggesting our regulatory posture.

One is just the power of information. This rule obviously will provide important information for regulatory policy going forward. It will also, I think, provide important information about how we might reduce greenhouse gas emissions. Much like the toxic release inventory provided some incentives for reducing emissions, and provided important information to the public about who was emitting what, I think this rule provides that kind of information and can harness disclosure as a tool for environmental protection. I think the other thing to note about this rule that may not be widely known is that this rule grew out of an instruction from Congress for us to establish a reporting rule. And that instruction didn't really say much more than that: require reporting. I mean I'm paraphrasing, but it really didn't say much more than that. And so we had a great deal of discretion in figuring out exactly what to do. And look at what we did: we targeted only the largest sources and in doing so we got most of the emissions. And so when people worry about what EPA might do, what those kinds of folks at EPA might come up with, I would invite them to look at the greenhouse gas reporting bill. Again, huge amount of statutory discretion, what we came up with I think is a very targeted rule that captures most of the emissions.

The second rule also gives you a glimpse into EPA's regulatory posture today, and that is the rule that will be issued jointly with the Department of Transportation and which regulates greenhouse gas emissions from motor vehicles. That rule is scheduled to be final at the end of this month. I think there are two noteworthy features of this rule as well. One, the rule is the product of not only interagency collaboration, collaboration with the Department of Transportation in its fuel efficiency rules, but it was, as you may know, the product of a coming together of the auto industry, of unions, of states, and other stakeholders, to come to an agreement on a national policy on automobiles. The idea was, and this became my least favorite word last spring: to avoid the "patchwork" that could have resulted from the operation of a number of different state laws and the potential for two different federal programs. But it was an incredible interagency and

externally collaborative effort that I think this administration actually does quite a lot of.

The second noteworthy feature that may not be as obvious or as well-publicized, is that if you look deep into the machinery of this rule I think you'll find that much of the flexibility in the rule comes from EPA's portion of the rule – comes from the Clean Air Act, which allowed much of the compliance flexibility that we called upon in issuing the rule. Again it's noteworthy in thinking about the statutes that we're administering and thinking about our own posture to them to find a good deal of flexibility, and I think creativity, in shaping this program coming from that statute. I think these rules and a lot of others, but I won't go through them all you'll be happy to hear, reflect a deep attention to and a respect for the environmental imperative, for our basic environmental mission at the agency. And they also reflect, as I suggested at the beginning, a very deep embrace of creativity and flexibility in getting the job done.

Another thing I want to say about our basic environmental work over the past year is that the Agency, and I think indeed the whole administration, recognizes that the environmental mission can't be solved through environmental law alone. Often we are thwarted in our attempts to achieve environmental protection by the routine operation of other governmental goals. So that sometimes our transportation policy might sometimes impede progress on the environmental front. Sometimes perhaps our housing policy impedes progress on the transportation front, and maybe also on the environmental front. And so I think one of the signature features of this administration is the willingness to have agencies come together, work together, work across their silos, or "cylinders of excellence" as some people call them, to try to achieve their missions together.

So let me give you one example of this. We have, at EPA, a partnership with HUD and with DOT on sustainable communities. Within my office now we actually are going to have an Office of Sustainable Communities. One of the primary features of that office will be participating in this partnership with these two other agencies. And the basic idea of the partnership is simple, but thrilling, which is that these agencies are working together to achieve outcomes that are more environmentally sustainable. So we are working with HUD and DOT to project ways that they might spend their considerable money in a more environmentally

sustainable way. I gave a talk on this precise point at Syracuse last week, and somebody in the audience afterwards basically said, “So what – that is really boring!” And he said, “So you have G15s in one agency talking to G15s in another agency – that is dull.” And, I don’t think so at all. I think it’s actually thrilling. And maybe I’m just too much of a dork to understand how dull it is. But when you have HUD, and DOT, and EPA interacting, on a daily, sometimes hourly basis, to try to figure out how to align their programs, to me that is something – you just want to stand up and walk around the room, you get so excited about it.

And so that is one of the things that we’re doing. That is a feature of this administration that runs throughout it. I’ve given you one example, but it runs throughout it, and I think it’s a fabulous development. It makes for an awful lot of interagency meetings, but that’s all right.

So, the basic message here on this first part of my remarks is that we’re working hard, on a variety of fronts; in the main, on regulatory fronts, but also in collaboration with other agencies, to try to achieve our basic mission. The story is pretty simple, pretty basic, may even be dull to some, but it’s a big moment. The Agency is up and running, in a major way.

We also have, I think, a real dedication at the moment, to begin to – at last – to begin to achieve real environmental justice. This has been one of the administrator’s top priorities from the first day. She is establishing structures within the agency, that may not be obvious to the public, but that I think will pay off in the long run, and she is in the process of trying to deliver on the promise of an executive order issued sixteen years ago last month that makes achieving environmental justice a part of the mission of every agency. One of the things we’re doing – I’m going to talk here about just one initiative rather than give you everything that we’re doing – but one initiative is trying to bring environmental justice into the process for developing rules at EPA. One thing you may not know – again, the same man in the audience from Syracuse would probably have the same response to this, but I find it extremely exciting – is that we have a very refined process for developing rules at EPA. We have the very beginning of the process, where the decision-maker gives early guidance – what should the new rule basically look like. The rule then moves through the process – there’s a point at which options are selected. And at the end of the day, there’s something called final agency

review, where everyone says either yea, or nay.

The reason I mention that, is that what we're trying to do is to make environmental justice part of that process from the very beginning. So that it's not just tacked on at the end, it's not something that's just sort of bolted on to a process that is already underway and rather complete, but that is intertwined with the process from the beginning. What will that do? It will allow that to be a real part of our decision-making on our rules at EPA. It will require the offices to think hard about that issue while they're developing our rules. It is also, I'll say, more durable. If you want to move a bureaucracy, one way to move it, I think, is to change the process. Bureaucracies are very tied to the process for achieving their outcomes. And so what we've done is tried to make it a part of the process from the beginning. I will say we're at the initial stages of this. We are trying hard to figure out exactly what this means, exactly what kind of analysis it will require, how to tailor analysis depending on the size of the rule and the importance of the rule, and so we welcome advice. We welcome guidance in this area. As I say, we're moving, I think, in a way we haven't moved before. We're moving at last, but we'll have challenges.

We are also engaged in quite an effort at transparency. We are trying to be open about what we do, trying to let the public know what we're up to, so that, first, the public can simply know, the public can give us advice, the public can understand what we're up to and can tell us where we're getting it right and where we're getting it wrong. We are working under both the government-wide open government directive that has been issued by OMB, and under our own initiatives. And, to some extent, they will be part of the same picture. We were well on our way to working on transparency, and the open government directive gave us even more impetus.

Here, too, I want to focus on just one initiative, and again, here I think I'm probably inordinately excited about this, but it is very cool. I hope you will run to your computers after this talk and go and check it out. It's called the Rulemaking Gateway and it's – should I give you the website? Ok, it's a long website and now I feel a little silly because it's so long but: <http://yosemite.epa.gov/opei/rulegate.nsf>. That was a little ridiculous. If you just google "Rulemaking Gateway" you'll get to it.

Here is the exciting thing about the Rulemaking Gateway: it provides you with information about the priority rules that are moving through the agency. It provides that information, I think, in a very accessible way. If it's not accessible, tell us. We're in a period now where we're taking comment on how well we're doing with this gateway, so if there's something we could do better we'd like to know about it. What you can do, what you can find at this site, is again information on our priority rules. What kind of information can you find? Well, basic information. Where can you comment? How can you comment on the rule? What kind of rule is it? Where is it in our process? So you can see actually where it stands in that internal process. What's our schedule for the rule? What groups might the rule affect? And here I think the information is particularly exciting. What we've asked our program offices to do is to tell us whether a rule is likely, for example, to have effects on children's health, or whether a rule is likely to have implications for environmental justice, or whether a rule is likely to have effects on states. And so that if you're interested, if you're one of those – in one of those groups or interested in one of those issues, you can go and sort by those effects, find rules we're working on, comment on them, think about them. And so it's our own expression of what effects we expect those rules to have.

One thing – and I think this is true of transparency in general – but one thing that this has also done is internally make us think about our own rules. That is, what do we think the effects of those rules are likely to be? Which category should they be in? And so it's had, I think, a good internal effect as well as the obvious external value. The gateway also provides, and here this is a contrived segue to the next part of my remarks on cost benefit analysis, it provides a link to documents arising out of the process of regulatory review at OMB. These documents, I can attest from my life as a law professor, were hard to find in EPA dockets. So you'd have a docket with 6,000 documents in it and it would be very hard to find particular documents in that docket. What we're trying to provide are links specifically to the documents that are provided under the executive order on regulatory review. So that you can see for example, the packages that went to regulatory review compared to the package as it emerged from that process.

So let me then turn to cost-benefit analysis and regulatory review today at EPA. As you know, most of our action on cost-



benefit analysis at EPA today arises under the Executive Order 12866 that has been in place since 1993, and that governs OMB's review of our rules. As you may know, most of our statutes do not contemplate cost-benefit analysis. Only one of our statutes, the Safe Drinking Water Act, actually explicitly refers to formal, quantitative, monetized cost-benefit analysis. But we do a lot of cost-benefit analysis pursuant to this executive order. That executive order as I say has existed in place since 1993. It continues in place today. The technical guidance developed pursuant to that executive order a few years ago, so-called circular A4, also remains in place. You can get a glimpse of the process of regulatory review under this executive order if you look at OIRA's new dashboard. I say OIRA, and I'm thinking you guys know what it is but then I'm thinking maybe not: Office of Information and Regulatory Affairs, the office within OMB that reviews our rules under the executive order. And they have this really cool new dashboard that allows you to see what's under review, how long it's been under review, what kind of item is under review, whether it's economically significant or not. A big improvement in transparency, I think.

Just to give you an example, if you look at our EPA stats you will see we continue to be the subject of loving attention from OMB. We have 17 regulatory actions there now as of last night. Three are economically significant. The others are significant under other pieces of the executive order. We have both proposed and final rules, and pre-rules. We have five notices there. On that last point, notices include guidance documents and other policy documents that remain subject to review under the executive order. There was a memo issued by OMB Director Peter Orszag last March that makes clear that those documents are still subject to review under the Executive Order. So the bottom line is that cost-benefit analysis very much remains part of our work at EPA – very much part of our work under the executive order.

So I thought I would talk to you about some of the projects we have under way in the Office of Policy along those lines: to try to improve our cost-benefit analyses, and to try to do analytical justice to our rules in the context of this process.

One, we are working on the initial analytical foundations for robust environmental justice analysis. We're working on internal agency guidance on characterizing the effects of our rules from an environmental justice perspective. So this is initial work, it's not

the end-of-the-day kind of work, but what we're trying to do is just get a first quantitative picture of how some of our major rules affect potentially disproportionately impacted communities. What I think this kind of analysis will do, again it's in its early stages, but one potential benefit of this analysis, even apart from the obvious benefits for beginning our work on environmental justice, is the transparency aspect of it. That is, if we do this work to find out actually who a rule affects, what communities, in what way, then we will have a lot of information available about the concrete effects of our rules. They will not be, if we do this kind of analysis, simply national abstractions that don't affect neighborhoods, but the idea would be to get a really quite refined picture of the on-the-ground effects of our rules.

We are also working in the Office of Policy on trying to improve our estimates of regulatory costs. This is kind of the forgotten piece of cost-benefit analysis. You can understand why. The benefits analysis is so interesting. It's so much sexier to think about the value of life than it is to think about the cost of technology, right? And so, so much attention has been focused on the benefits side of the equation, we think that it has been a mistake in the sense that we have a hunch, though we're not certain, but we have a hunch that we're not doing justice to our rules. In many cases, we believe we overestimate the costs of our rules and there are some structural reasons, I think, for this. For example, some of our statutes use a criterion of affordability. They say: can the industry afford this technology? If they can it's a go, if they can't, it's not. And so the tendency is to think, in defending those standards, "Well, let's just take the costs that industry gives us, because if they give us the costs and it's still affordable we're in. Right?" It's legally defensible, very solid. But the trouble is that then that paints a picture of the regulation that may be unduly pessimistic. That is, we may think the best estimate of cost is really quite a lot lower than we think, if we're that conservative about estimating costs. And so what we're trying to do is trying to get a handle on whether we are indeed overestimating costs, and if so, by how much and for what reasons. So that perhaps, and this is in early stages, but perhaps one day we can say something systematic about any bias in our cost estimates.

"So what we have underway is a project: The Retrospective Cost Study. And in our office we are, again, noticing that the estimates of cost – the ex ante estimates of cost, before regulations

are imposed – are often quite different from ex post reports on costs. And we’re trying to get a handle on why that might be so, and trying to determine whether there are any systematic biases in our cost estimates and to describe those potential biases.

So we’re building a database of case studies, and we’re trying to choose the rules in a thoughtful way, ultimately picking the rules we’ll settle upon in a random way, in other words, random in a good way, trying not to select them in any kind of biased way. And again our hope is that at the end of the day we’ll have something robust to say about how we’re doing with respect to cost estimates. We’re also looking at benefits, as you may imagine. And here we have a number of different projects underway in my office.

One, we are looking at mortality risk valuation. As you may know, what we have typically looked at is called value of a statistical life. That’s what we’ve called it, we say we aggregate the value of a collection of rather small risks, and then call that the amount of money we spent to save one life the value of statistical life. People including me have criticized the nomenclature, in the sense that at the end of the day we don’t claim to have produced a value of life itself, we have produced a value of risk. And so one of the modest proposals we are working with the SAB [Science Advisory Board] on is to change that nomenclature, to change it to “reduction in risk,” not value of statistical life. That statistical word usually is lost, and what people think is that we’ve come up with a value of life, which is rather a tall order. So that’s one process we have in place.

Another is to look at the challenge of benefit transfer, which we have taken predominantly when we look at the value of statistical life. We have looked predominantly at studies from the labor market and have taken them and used them in our environmental rules for the value of reducing risk, and the trouble here is that those are quite different contexts. The populations vary, they vary by age, and they vary by the nature of the risk, by the nature of the disease, by the nature of the death itself that might result if we don’t act. And so what we’re proposing to do is to try to come up with a more fine-grained estimate of the value of risk, looking at the very different contexts by which the studies have been conducted, that is predominantly workplace risk, and the context in which we find ourselves, which is responding to environmental risk. So all of this we have underway – a proposal

to the SAB, all of this in fairly short order, I think will be the subject of public discussion.

We also have work underway on water quality. As you know, our water rules suffer on cost-benefit analysis. Indeed, one of the lines that was repeated like a mantra in the OMB reports on the costs and benefits of federal regulations for many, many years – not in this year’s reports – but for many, many years, was that the cost-benefits of the water regulations may indeed be negative – that they were a bad idea. This is another way of saying they were a bad idea. And that they were a bad idea year after year after year for over a decade, we would have been better off doing nothing. And that’s a striking outcome, and it’s one that I think doesn’t do justice to the benefits of cleaning up the water. I think it’s an outcome that we’re trying to improve. One of the Administrator’s major priorities is to clean up water pollution. And so what we’re trying to do is to try to more richly describe what is it that we get when we clean up water pollution. The challenge is that many times, most of the time I would say, the main benefits are ecological benefits. They’re not benefits in terms of human health, reductions in human mortality, and frankly, that is an area that is less well developed, and so we need to work hard here. But that’s what we’re doing – in the policy office and in the policy office in conjunction with the office of water, what we’re trying to do is to find better ways, again, to more richly describe what we get when we clean up the water. We think it’s not an accurate portrayal to say we may have been better off doing nothing for more than a decade to clean up water than we were for more than a decade doing something about it. And so we have to figure why it is we came up with those results and what can we do about it. This is a major priority for us.

Last I want to talk about, and I know was given an hour to talk, but I think that’s a long time to talk at any hour, I think it’s a long time to talk on a Friday morning, so I’m going to spare you that and leave a little time for questions. I wanted to give you one other area that we’re working hard on in our office, and frankly elsewhere in the government, and that is the social cost of carbon. As you may know, or may not know, many of the activities that the federal government undertakes affect greenhouse gas emissions one way or another, and an interagency group has been at work since last summer, maybe even last spring – for a long time – trying to derive a social cost of carbon. What is the damage

associated with a ton of carbon over hundreds of years? It's a daunting task. The benefit of undertaking the task, even though we know that we need to keep working on it, even though we need to improve, is that in the absence of the effort, the number would be zero. So what we've done is we've convened an interagency group that worked on a so-called interim value for the social cost of carbon, and now it has produced a final value which is available in the explanation of the Department of Energy's rule on small motor efficiency. If you go and look at that rule you can see the value that this interagency group has come up with. We ended up with – I won't give you all of the details about what we came up with, you can go and check them out yourself – but we've ended up looking at, on the low end, a somewhat lower discount rate than in the interim value, a 2.5% rate. At the upper end, we included a value that we thought might reflect more representation of larger effects on the climate than the other values represented. We have also, in our explanation of the cost we've come up with, emphatically promised to do further work on this. One of the things that we found, in doing this work, was how little research there is, effectively, on tying the physical science to the economic effects of climate. And so in my office, what we're doing right now is first trying to take apart the models – the integrated assessment models – that we used as the basis for our social cost of carbon, and really figure them out. Really, we have brought to the office two of the models in house. The third model, one run by Richard Toll, the so-called FUND Model, we are also trying to bring that in-house, so that we can figure out exactly how that model works and then eventually, the hope is, we can build our own. And if we build our own model, then we can make it available to the public, and the public can see what the assumptions are, change assumptions, work with it, and we can all be in this very difficult challenge together.

So those are the areas. We have a lot more work than that going on – I've only offered a glimpse at it – but I hope I've said enough to make you understand how busy we are, why all those employees at EPA that Michael knows look tired but excited, to understand that we're moving on a variety of fronts. Whatever we do, we're trying to make available to you and transparent to you so you can tell us how we're doing. And in our own shop, in the policy shop, we are working to try to make our rules look as good as we think they are. So thank you very much.