

D I A L O G U E

The (Not So) New Executive Order on Regulatory Review, and What to Expect

Editors' Summary

President Obama signed an Executive Order on January 18, 2011, requiring federal agencies to design cost-effective, evidence-based regulations that are compatible with economic growth, job creation, and competitiveness. The guiding principles include analysis of costs and benefits, transparency, public participation, coordination of regulations among agencies, flexibility, and reliance on objective scientific evidence. Perhaps most significantly, the EO requires a review of existing regulations according to these principles. While the principles may seem straightforward, their execution may be anything but. On March 29, 2011, ELI brought together an esteemed panel to discuss the practical consequences of the regulatory EO. They described the process that will be used, what environmental regulations and agencies were expected to receive greater scrutiny, and the role of Congress.

Panelists:

Roger Martella, Partner, Sidley Austin LLP (moderator)

Gary D. Bass, Executive Director, OMB Watch

Susan Dudley, Director, Regulatory Studies Center, George Washington University

Michael L. Goo, Associate Administrator, Office of Policy, U.S. EPA

Sally Katzen, Senior Advisor, Podesta Group, and Visiting Professor, NYU Law School

Rebecca Leamon: I'm Rebecca Leamon. I'm the director of the Associates Program at ELI. This program was funded by our very valued members of our Associates program. This seminar today is "The (Not So) New Executive Order on Regulatory Review, and What to Expect." Our moderator is Roger Martella. He's a very familiar face at ELI and a much appreciated contributor to our seminars.

Roger Martella is a partner in the Environmental Practice Group at Sidley. He recently rejoined Sidley after

serving as general counsel for the U.S. EPA [Environmental Protection Agency], and he was at EPA and the U.S. Department of Justice for 10 years. While he was at EPA, he served as agency counsel on six Supreme Court decisions, including *Massachusetts v. EPA*.¹ His current practice at Sidley Austin focuses on three areas: advising companies on climate change, sustainability, and clean energy; litigation and mediation; and advising multinational companies on compliance with environmental laws. Thank you, Roger.

I. Introductions

Roger Martella: Thank you, Rebecca, for that introduction, and thank you for the honor of allowing me to moderate this very distinguished panel, which I will be introducing in just a minute to discuss what I think is a relatively important, although I guess we'll be debating today whether it's important or not, regulatory development of the Obama Administration early this year.

You might recall back on January 18 of this year, several of us woke up to a surprising *Wall Street Journal* op-ed written by President Barack Obama in which he announced that later that day, his Administration would be releasing a new Executive Order intended to streamline regulatory review, and cited specifically to an example of EPA revising its own regulations under these concepts, as well as several other agencies.

Later that day, the Administration did release an Executive Order called "Improving Regulation and Regulatory Review," much of which looked familiar to those who have been students of Executive Order No. 12866 from the Clinton Administration. The Executive Order included several general principles we're going to be talking about, including reinforcing the need for regulations and agencies to do cost-benefit analysis and look at alternatives in going through the regulatory process. It also included provisions that look somewhat familiar, but somewhat novel as well, regarding public participation, integrity and innovation, flexible approaches, science, and a particularly curious provision, I thought, called retrospective review on how agencies should be looking retroactively at existing regulations as part of a regulatory reform process.

Editors' Note: Materials from this seminar are available to view or download at http://www.eli.org/Seminars/past_event.cfm?eventid=603.

1. 549 U.S. 497, 37 ELR 20075 (2007).

But, like most things that any agency or government organization does, it probably raised more questions than answers at the time. We hope to perhaps answer some of these questions today, but some of the questions went to what was driving the Executive Order regarding the timing of it. Was it really new at all, or merely a rehash of existing principles that have already been stated in other Executive Orders? Would it have any teeth, or did all the caveats and clauses and exceptions in there make it more symbolic than significant? Was this really focused whether directly or not on EPA, or a broader range of agencies? Would the provisions lead to more sensitivity for considering cost, or actually open the door to shrugging away cost considerations and promoting new rules? And what about this retroactive review provision, and where do we go from here?

Well, I'm proud to say that I can't imagine—sincerely—a more impressive panel to discuss these issues and these questions and talk about the Executive Order than what ELI has assembled today, and I'm going to introduce them now. I feel really fortunate in that not only do I get to moderate them, but talk about these issues with them.

I'd like to begin by introducing Michael Goo, who comes to us from a very busy and hectic schedule at EPA. Michael is the relatively new associate administrator for the Office of Policy at EPA. He comes to EPA after extensive time spent on Capitol Hill, most recently as a staff director and chief counsel for the U.S. House of Representatives Select Committee on Energy Independence and Global Warming. There, he played a key role in drafting and negotiating the House-passed Waxman-Markey clean energy legislation. Prior to serving on the House Select Committee, Michael was the climate legislative director for the Natural Resources Defense Council and spent time at the Senate Committee on Environmental and Public Works.

Sitting next to me is Sally Katzen. Sally is currently a senior advisor in the Podesta Group and a visiting professor at New York University School of Law. From August 2008 to February 2009, she served on the Agency Review Working Group for the Obama-Biden Transition with responsibility for the Executive Office of the President and governmental operation agencies. From 1999 to 2001, she served as deputy director for management at the Office of Management and Budget. From 1998 to 1999, she was deputy assistant to the president for economic policy and deputy director of the National Economic Council. And from 1993 to 1998, she was the administrator of the Office of Information and Regulatory Affairs (OIRA), in OMB [Office of Management and Budget].

Two seats to my right is Susan Dudley. Susan directs the George Washington University Regulatory Studies Center and is a research professor in the Trachtenberg School of Public Policy and Public Administration. She founded the Center in 2009 to bring high-quality academic research to bear on regulatory policy. She was the presidentially appointed administrator of OIRA and OMB from April 2007 through January 2009. Prior to OIRA, she directed the Regulatory Studies Program at the nonprofit Mercatus

Center at George Mason University, where she also taught courses on regulation.

And then finally, to Susan's right, Gary Bass is the founder and executive director of OMB Watch, a non-profit research and advocacy organization that promotes greater governmental accountability and transparency and increased citizen participation in public policy decisions. He is well-known for assisting nonprofit organizations and better understanding federal rules affecting their groups and constituencies, and in 2003, he created NPAction as a one-stop website on building nonprofit advocacy. He is also co-author of the 2007 book, *Seen But Not Heard: Strengthening Nonprofit Advocacy*, published by the Aspen Institute.

We are going to spend a little bit of time going through some general overview of the Executive Order and some reactions before we get into questions. I'm going to ask Sally to give a general overview and perspective on the Obama Executive Order and orient us all to some of the key issues. Susan and Gary then are going to follow up with their perspectives on some of the questions I raised already and some of their reflections on the Executive Order, and then turn it to Michael to talk about EPA's perspective and what EPA's doing at this time to implement the Executive Order, and then we'll be able to have some discussion among the panelists. So, Sally, with that, I'd like to turn it to you.

II. Overview of the Obama Executive Order

Sally Katzen: Thank you, Roger, and I'm delighted to be here. I've been a strong supporter of ELI. I think the work you do has been terrific, and I'm happy to contribute in some small way to these seminars. I was asked specifically to provide some history or context for those who do not live and breathe Executive Orders on centralized regulatory review. Actually, I envy you. At some point, I've got to get a life.

In the meantime, let me start with the concept of centralized review, and that is review of agency regulations by the Executive Office of the President. Centralized review has been around in one way or another since Richard Nixon, [Gerald] Ford, and [Jimmy] Carter. Then President Reagan took a ginormous step in his Executive Order No. 12291, which showed enormous faith in cost-benefit analysis—that you could actually reach a decision based on cost-benefit analysis. He set forth decisional criteria and, most importantly for the future, he institutionalized centralized review of draft proposed and final rules at OIRA at OMB. But there was a lot of criticism of the Reagan Executive Order, both with respect to the imposition of decisional criteria and the secrecy and the delay of the review process.

When William J. Clinton was elected, there was a lot of speculation that he would do away with this process, but instead, he essentially kept the process in his Executive Order No. 12866. He made the process more selective, he made it more transparent, and he tried to level the playing

field between the assessment of costs and the assessment of benefits. When asked why he kept it, the answer that was generally offered was if it hadn't been there, he would have had to invent it; that it was essential for the president of the United States and those who were closest to him to be able to understand what the agencies were doing and to coordinate their actions with a centralized accountable political entity.

George W. Bush kept the same charter for the first six years of his Administration, with the exception of the role of the vice president. But after the 2006 election and the change in control of the Congress from the Republicans to the Democrats, he signed Executive Order No. 13422 that made some changes that were viewed by some as politicizing the process.

So, during the transition, as Roger said, one of the tasks that I was given was to review all of the George W. Bush Executive Orders to see which ones had already sunset, which should be modified, and which ones should be rescinded. There was a strong, strong view and absolutely no dissent that 13422 had to go, that it should be rescinded in the first order of business, and that happened on January 30, 2009, with the result that 12866, the Clinton order, was reinstated in its original form.

On that same day, in January of 2009, President Obama also issued a directive to OMB asking for recommendations for a new Executive Order. This was because there had been 16 years of experience under 12866, and certainly we have learned about regulatory tools, regulatory analysis, and even the process of regulatory review. OMB then took the unprecedented step of calling for public comments. It is unprecedented because Executive Orders are in the family, it's just for the management of the executive branch, they do not go out for notice and comment. But in this instance, it was thought that having some input would be highly beneficial to the decisionmaking process. So, there was a request for comments, and there were a lot of very thoughtful suggestions advanced, but no new Executive Order.

The time passed and Cass Sunstein was finally confirmed as OIRA Administrator. We have to do something about the confirmation process; that's another panel you could have. But even though there was no new Executive Order, we began to notice with Cass' confirmation that there were changes on the ground, with more emphasis on openness, proposals incorporating behavioral economics, more flexibility, the *Nudge* theory, and the like. And that's how the first two years of the Obama Administration went, against the backdrop of a relatively aggressive regulatory agenda.

Then there was an election, and elections have consequences. One of the consequences was that the sentiments of the business community—which I could describe as intense frustration, irritation, even anger and hostility—came through loud and clear. The president heard this and invited 50 CEOs for a session at the White House with four breakout sessions; one of them was on regulations.

The CEOs were very well-prepared. They said that there was an adverse effect of regulations on economic growth, competition, innovation, and job creation. And they said that not once, not twice, but at least three times.

It was several weeks later when Roger opened up the *Wall Street Journal* and saw the op-ed that the president had penned. It calls for balance, and he announced that the new EO [Executive Order] was coming. Let's look at the EO. The first sentence says: "Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competition, job creation." Interesting choice of words. Does it ring a bell? I mean, it is the echo of what he had heard from the business community.

Roger had said it's not clear that the new EO says a whole lot of new things. I think that's true at one level, but I think it is significant that the president said anything at all about regulations and about regulatory review, and I think that is in part the response to the election and what he heard from the business community. It's also significant, I think, that when you read the EO carefully, you will see the principles that he highlights from 12866 come from the cost side of the equation. He talks about how the benefits must justify the cost, the regulation should be tailored to impose the least burden on society, agencies should take into account the cost of cumulative regulations, and agencies should choose a regulatory approach that maximizes net benefits. This is heavy-duty emphasis on the cost side, although he does mention distributional equities and some of the other aspects of the benefit assessment that have always been in play.

Then, as Roger said, there's a section calling for retrospective analysis of existing rules. This is particularly interesting because a number of presidents have done that, and we'll be hearing more discussion, and then I would like to come back during the question-and-answer period because I presided over one such exercise during the Clinton Administration, where we looked back at existing rules to see if any needed to be modified.

But President Obama was calling to review those rules that might be outmoded, excessively burdensome, or otherwise in need of modification, along with those that need to be made more effective. Again, it's the balance that he is seeking in the *Wall Street Journal*, but if you read the sentence carefully, you sense that there's a little bit more emphasis on the syllable that is worrying about costs. There were also two memos that came out on January 18 along with the Executive Order, and I think Gary is going to speak about these. There was a Regulatory Flexibility, Small Business, and Job Creation Memo, and there was another one on compliance. So, it was a full package.

But, let me come back to where I said that it was important that the president said anything at all about this and be a bit more specific and somewhat more serious. Among other things, President Obama reaffirmed the role of OIRA. Big deal, you might say. What's a former administrator of OIRA to do but take pleasure from hav-

ing her office once again reaffirmed? But I don't think this is a parochial observation. Every Administration has gone through the process at the beginning of the term working out the relationship between the agencies and OIRA, and it is particularly difficult, I think, in Democratic administrations. So, the effect of the president reaffirming OIRA's role as set out in the Clinton Executive Order should not be underestimated. It is a very strong signal within the White House and among the agencies. With the stroke of a pen, he has newly empowered OIRA, and that is not insignificant, especially in this White House.

Now, the business community was generally pleased with these documents and, for the most part, applauded the president, though it's fair to say that they are waiting to see whether his actions, or more precisely, the actions of his agencies, match his words. There've been a few moves to either withdraw rules or delay rules that have given some comfort to the business community and some anxiety to the environmental community, but we will hear a little bit more about that in a few minutes.

Has there been enough to satisfy the business community? Can we now expect them to sit back and say, great? No, not yet, by a long shot, and there certainly has not been enough to calm the fever pitch on Capitol Hill. Any discussion of these Executive Orders has to have as context what's taking place on Capitol Hill, whether it's Chairman [Darrell] Issa's (R-Cal.) call for suggestions of regulations that could be eliminated, whether it was the introduction, and I assume soon passage, of the REINS Act, whether it's all the riders on the House-passed continuing resolution for FY [fiscal year] 2011. I think and I hope you will talk about this more during the question-and-answer period, because the issue of congressional activity is going to be quite consequential.

Roger Martella: Great. Sally, you raised a lot of good questions we definitely want to come back to. Susan was the head of OIRA for the latter part of the Bush Administration. A number of these themes, I'm sure, resonate with you as well as the curiosity about your reaction when you read the Executive Order yourself.

III. Significance of the New Executive Order and Evidence of Change

Susan Dudley: Thanks, Roger, and thanks ELI. Rebecca, thank you for bringing this group together for this important topic. I will echo a lot of what Roger and Sally have said. I'll first talk a little bit about the significance of the new Executive Order, and then look empirically at whether we have any evidence of change in regulatory activity since it was issued.

Regarding the implications of the Executive Order, I agree that there's really nothing earth-shattering in the words themselves. It supplements and affirms Executive Order No. 12866, and in so doing reinforces 30 years of regulatory policy and procedures. But I agree with Sally

that it's still significant, and the significance is that those 30 years of policy and procedure now have President Obama's imprimatur on them. As the statistics I will share in a minute show, that has not always been obvious during the first two years of the Administration, so, I do think it reflects a significant and welcome change.

On the substantive side, the order stresses the importance of maximizing net benefits—understanding what the costs and what the benefits of regulatory alternatives are, and quantifying them to the extent possible. But it also recognizes that some costs and benefits are difficult or impossible to quantify, as have previous Executive Orders issued by President Reagan and President Clinton. And it talks about the importance of including less quantifiable values, such as equity, human dignity, fairness, and distributive impacts.

Now, “human dignity” is a term that we haven't seen before in the Executive Orders. I think human dignity could mean different things to different people. OMB released in December a draft report to Congress on the cost and benefits of regulation,² and the examples it provides imply that human dignity is something that regulators confer on the public. According to the report, human dignity is achieved through regulations requiring greater handicapped access or more lighting in prisons to reduce the occurrence of prison rape. But I also think that many people would find human dignity in the ability to make our own choices about things, rather than have the government predetermine those choices. So, I think human dignity is an interesting term, and I'm interested in following how it is applied in regulatory practice.

The order also talks about “ensuring the objectivity of any scientific and technological information and processes used to support the agency's regulatory action.” I think basing regulatory actions on the best available information is essential, and I hope that there's really some substance here.

And, as Sally mentioned, there is, as you would expect with Administrator Sunstein as the head of OIRA, a preference for flexible approaches that nudge, rather than command. The Executive Order talks about “maintaining flexibility and freedom of choice for the public,” which I think is important.

One element contained in Executive Order No. 12866 and Executive Order No. 12291 that is not reiterated in Executive Order No. 13563 is the “regulatory philosophy” that agencies justify regulation by a “compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people.”³ That concept is incorporated by reference to Executive Order No. 12866, but it is not one of the elements that was reemphasized. Sally expressed the view that the Reagan Executive Order showed enormous faith—or maybe it was a “ginormous” faith—in the ability of cost-benefit analysis to

2. See http://www.whitehouse.gov/omb/infoereg_regpol_reports_congress/.

3. Executive Order No. 12866 §1(a).

be able to determine the right regulatory approach. I would argue that Executive Order No. 13563 reveals an even greater confidence by this Administration in the ability of regulators to determine through cost-benefit analysis what is in the private interest of American citizens. The first step in a regulatory analysis must be to identify a systemic problem—a compelling public need—that cannot be addressed by individuals acting on their own behalf. Otherwise, we run the risk of supplanting regulators' judgments for individuals'. Cost-benefit analysis necessarily relies on assumptions and simplifications, so if our economic model doesn't do a good job of predicting human behavior, we should assume it's because our model is wrong and we should go back and see what assumptions or inputs we used that were inaccurate. We should not have such faith in our analysis that if our model doesn't predict behavior, it's the behavior that's wrong, and through regulation we can create net benefits simply by telling people how they should behave.

This Administration does talk about the value of dispersed knowledge, citing the insights of Friedrich Hayek. But Hayek's big warning was to beware of the "fatal conceit,"⁴ the fatal conceit that we as a government can devise solutions that work for the diversity of the public.

On the procedural front, the OIRA review process has been maintained, and I agree with Sally, perhaps because I'm also a former administrator, that this is a good thing. OIRA is a very important entity, and I'm pleased that this Administration is keeping its oversight function. From its catbird seat in the Executive Office of the President, OIRA reviews regulations to ensure they are consistent with the president's priorities, and coordinates interagency review to avoid redundancy and conflict. With its cross-cutting mission, it is more interested in impacts on society broadly and less susceptible to special interest pressures than line agencies.

The order introduces two new procedural elements. One is a review of regulations that are already on the books. I do think that's worth doing, but as Sally mentioned, it has been done before. She was responsible for a similar effort under President Clinton; my predecessor John Graham started a retrospective review initiative under President Bush that I tried to follow through on.

These previous efforts at retrospective review of existing regulations have met with mixed success. To do that well—if we're to look at what's on the books and see what is no longer working and what we might do better—we really need to change the incentives regulatory agencies face, and I don't see that in the order. However, legislation being considered on Capitol Hill has the potential to change incentives in a constructive way.⁵

The other procedural change is an emphasis on opportunities for public engagement. Over time, we have seen

a continual increase in transparency. My predecessor, Graham, put OIRA meetings on the website and made it easy to track what's under review at OIRA.⁶ The Executive Order's emphasis on increasing public engagement at more points in the rulemaking process and through more avenues is important to encourage an open exchange of perspectives and information.

Now, let's look at available data on regulatory activity to see whether we've seen any changes as a result of the order. Information on the GSA-OIRA website, www.RegInfo.gov, shows that during the first two years of this Administration, executive branch agencies, which are the ones that send their regulations to OIRA, published 112 economically significant final regulations. Those are the major regulations that are expected to have an effect—benefit or cost—of \$100 million or more per year. On average, that works out to 56 regulations per year, in contrast to 45 regulations per year for both President Bush and President Clinton during their eight-year terms. These data confirm the perception that there's been more regulatory activity during this Administration than the previous two.

When one includes the independent agencies, over which the president arguably has less control, we've seen 84 major regulations on average per year over the last two years, compared to 62 in the Bush Administration, and 56 in the Clinton Administration.⁷ So, that's a 50% increase in major final regulations over the Clinton Administration.

Looking at these statistics since January 18, when President Obama published his *Wall Street Journal* op-ed and issued the Executive Order, we see a marked decline. Only two major executive branch regulations have been issued during that period, and that's in contrast to almost five per month, on average, during the preceding two years. We also see evidence that OIRA is scrutinizing regulations more. During the first two years of the Administration, OIRA took about 41 days, on average, to review major regulations. Since January 18, that average review time has increased to 58 days, an indication that OIRA is spending more time reviewing agency regulations. These data suggest that more effort is being devoted to implementing Executive Order No. 12866, which has been in place now for 18 years.

Sally mentioned that elections have consequences, and that's true. OIRA has two roles, and both of them are important. One is the procedural role of reviewing agencies' analyses and coordinating interagency review, but the other one is to ensure that the elected president's principles and policies are reflected in his regulations. During the first two years of the Administration, we've seen the consequences of the 2008 election, with President Obama's policies reflected in the data that I just presented. But since November, as Sally mentioned, there's been an effort for more balance; that is reflected in the op-ed and the other

4. FRIEDRICH A. VON HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* (Univ. of Chicago Press 1991).

5. Sen. Mark Warner (D-Va.) is considering a "Regulatory PAYGO." For a discussion of this and other possible reforms, see working paper at http://www.regulatorystudies.gwu.edu/images/pdf/regreform_dudley_workingpaper_20110405.pdf.

6. This and other information about the regulatory process are available at http://www.whitehouse.gov/omb/inforeg_regmatters.

7. Data on the major regulations of independent regulatory agencies are available at <http://www.gao.gov/fedrules>.

new policy directives that Gary is going to talk a little bit about. It's also reflected in that draft report to Congress that talks about promoting economic growth, innovation, competitiveness, and job creation.

One more set of statistics I want to share with you. I sliced the data a different way; before the November election and after the November election. Since the election, there have been nine major regulations published in almost four months; that's less than one-half the pace of regulatory activity before the election. OIRA review before the election averaged 39 days for major regulations, and after the election, it has averaged 61 days. So, maybe the turning point really wasn't the memo, but, as Sally said, the memo reflected a turning point that happened a few months earlier.

Whether we'll see long-term effects remains to be seen. The *Unified Agenda of Federal Regulatory and Deregulatory Activity* is published twice a year and lists all the regulatory activities of the federal government.⁸ The December 2010 agenda lists 4,225 regulatory actions under development. That's 182 more entries than at the same time last year—a 5% increase in activity over just a year ago. It also reflects a 21% increase in the number of major regulations under development, or 40 more major regulations listed in the agenda. And of the 224 major rules listed in the agenda, 48 of them appeared there for the first time. So, with that, I'll hand things back to Roger. But, if Gary tells you that this Administration has backed off on its regulatory agenda, I have some data that may well question that!

Audience Member: Having been an EPA person for quite a while, I mean, it takes at least two years and usually more to get a regulation together. So, I'm not questioning your numbers exactly, or what's on the agenda and all. That's highly relevant, but looking back at the first year of the Obama Administration, I mean, I can't believe that most of what they were able to get out wasn't well along in the Bush Administration. I mean, how could they do it?

Susan Dudley: Since I was comparing President Obama's numbers to the previous presidents' numbers—presidents who also were working on regulations that had been begun in previous Administrations—I think the comparisons are fair and unbiased. But, I think another factor influencing those statistics is new legislation, such as the Dodd-Frank Wall Street Reform Act and the healthcare bill—two major pieces of legislation that require more regulations. And, in addition to new legislation, we have seen a more aggressive approach to existing legislation, including the Clean Air Act (CAA)⁹ and how it is applied to greenhouse gases. Some regulations are a result of new interpretations of existing legislation, and there definitely was a difference in perspective there.

Sally Katzen: There was a Supreme Court decision that suggested that EPA should do something sooner rather than later, but the Bush EPA postponed that decision, so if EPA was going to comply with the Supreme Court's mandate, it was going to have to be the Obama EPA.

IV. January 18 Memos: Regulatory Compliance and Small Businesses

Gary Bass: What I was asked to do is really talk about two other events that happened on the same day of January 18 that Sally made reference to. One was the regulatory compliance memo, and the other was a memo affecting small businesses. And then, what I want to do is put that in political context, in a different way than, say, Susan just did.

On January 18, the president released the regulatory compliance memo. It calls on agencies to do three things. First, it says agencies need to take all regulatory "compliance and enforcement activities," which is not defined, and make that—in their language—"accessible, downloadable, and searchable" to the public. So basically, we're talking about a public disclosure system for loosely defined compliance and enforcement data.

My understanding from conversation with Administration officials is the definitions are still developing. Compliance and enforcement activities may or may not include things like permit data. You might find a very broad definition of what is compliance data; for example, some people who deal with accountability issues want to include ethics data on compliance with a revolving door—that is, employment information about people coming in and out of government. So, it isn't just environmental information like the ECHO [Enforcement and Compliance History Online] database at EPA.¹⁰ The scope is likely to be a much broader initiative.

The second thing that memo required is for information technology experts in the government to come up with a way to make sure that the data can talk to one another; that is, enforcement and compliance datasets in one agency can talk to the datasets in another agency. This is a huge undertaking because it requires identifiers to link the disparate datasets. And all of you who have wrestled with linking environmental datasets know the problem of creating and maintaining a facility identifier, a headquarter identifier, and a corporate identifier as the means for mashing up data. These identifiers become even more complex and difficult when you move outside a facility-based approach to take into account other compliance and enforcement categories, such as climate or habitat. How do you define identifiers to link databases? The issue is huge. Nonetheless, this is the task that was assigned through the president's memo.

The third piece is to not just make the data talk to one another so that the public can mash it up and link disparate data, but to make it available on platforms that not

8. Available online at <http://www.reginfo.gov/public/do/eAgendaMain>.

9. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

10. See <http://www.epa-echo.gov/echo/>.

only the public can get to but that every agency can also use. The objective is to share each agency's data, so that one agency could build off of another agency's dataset to better improve compliance and enforcement actions in your own agency.

So, this presidential memo makes enormous sense as a lesson learned in the aftermath of the BP Deepwater Horizon disaster, where it was extremely difficult for reporters, public interest groups, and researchers to get any data what was going on, including information about the permits, the risk management plans, or how many past enforcement problems existed with BP and its contractors and partners. In many respects, this presidential memo was an attempt to be responsive to what we had experienced.

I'm sure I'll hear some criticism as I say this, but I heard no negative commentary on this presidential memo. In fact, the openness community hailed this as great a step in the push for transparency. The environmental community thought this was a wonderful effort to shine on spotlight on environmental compliance and enforcement. And the progressive regulatory crowd thought it was a great initiative to bring added accountability.

Even as I praise this as a really good policy piece, we need to keep in mind that implementation is at least going to be 18 months in length to have this really come to be. And the White House acknowledges that same message. So, this means we will not see full implementation until near the end of the Obama Administration's first term. That's one memo that came out, and I think it was great.

Now, the second memo that came out was on small business regulatory flexibility; the topic was "Regulatory Flexibility, Small Business, and Job Creation." As much as I loved the first one on regulatory compliance, I will try to find words to say how much I dislike the second one on small business regulatory flexibility. In some ways, you can discard the second presidential memo, because it really didn't add anything new in terms of agency tasks. It restated the fundamental principle to comply with the Regulatory Flexibility Act. That was basically the thrust of it.

However, it was a message statement, and optics are critical in Washington. It appears that the president is already running for election in 2012. The November 2010 election made pretty clear that the tables have shifted with Republicans picking up the House and the Tea Party's anti-government, antiregulatory platform seemingly gaining strength. In that context, it looks like the president wanted to put something out that was a political statement that he is listening to the business community, a strong base of political contributors. In addition to the small business memo, he did it with the *Wall Street Journal* commentary. And a few weeks later, he did it with the Chamber of Commerce speech that talked about balancing the interests of business with the need for federal regulation. He's clearly making a political statement.

What I think was most disappointing with the small business memo was the tone of it. It had a statement to

the business community, and I can pull it out and give you a quote, but I'll paraphrase. The goals of regulation are innovation, competitiveness, and language friendly to the corporate world, not just small business, but also big business. It did not discuss the benefits of regulations or that the purposes of regulations are to improve quality of life or protect people or help those in need or address the common good or other key reason for regulation.

In addition, the memo had a focus that was solely on reducing burdens. There was again nothing about the benefits, which is surprising, because past Executive Orders have provided some balance between costs and benefits. This did not. The third concern is that it had an implicit statement toward the end of the memo that conveyed a message that agencies just develop regulations willy-nilly. It does not mention the rigorous process that already occurs within the agencies or the role science plays in developing rules. The impression from the memo is that agencies just put together these regulations and poof, they come out the door. The memo states: "If regulations are preceded by careful analysis, and subjected to public comment, they are less likely to be based on intuition and guesswork and more likely to be justified in light of a clear understanding of the likely consequences of alternative courses of action." To me, this is dismissive of the hard work that goes on in the agencies. So, from my point of view, this memo, while it provided no new substance responsibilities, was sending a strong political message and was really written for the small business community and for the president's future election possibilities.

So, let's now put context around what I just said, Roger started with the president's *Wall Street Journal* article. But I'd like to start with A Pledge to America that the House Republicans put out prior to the election. There were several prominent statements, including a clear assault on federal regulation. This assault was wrapped in a philosophical, fundamental view that government is part of the problem. This was a tonal, substantive, and ideological message. When that Pledge came out, there were recommendations and policy positions to vastly undermine a number of public protections that have the net effect of putting a big bull's-eye on environmental protections.

So, let's take it to today. There are a number of activities that have already been put forward by antiregulatory advocates. You have cuts in agency budgets that will impair regulatory activities. You have riders on the continuing resolution, the bulk of which were environmental, but covering virtually everything in government. These riders would stop agencies from regulating in certain areas, would roll back various existing regulations, and severely limit agency authority. You have legislation, which I'll describe in a minute, that greatly changes the whole way the regulatory process works and tilts the regulatory playing field in favor of corporate interests. You have the whole "oversight machinery" of Congress and in particular the way the House has taken special aim at regulation. For example, in the first couple of months of this Congress nine-and-a-half hours

of House floor time has been devoted to regulatory burdens and problems to business interests, even though no bill has been considered. Additionally, there have now been about 40 House hearings, and it's teeing up an enormous array of legislation that's going to come forward. The Small Business Bill, properly called the Small Business Innovation Research/Small Business Technology Transfer Reauthorization Act, pending in the U.S. Senate right now, has about 10 to 15 different amendments that would impair the ability of environmental regulation to move forward.

At a broad, cross-cutting level, you have Sen. [John] Cornyn's (R-Tex.) Sunset amendment. His Sunset Bill, proposed as an amendment to the underlying Senate small business bill, would give power to eight members of Congress to set up a schedule to review virtually any agency or program that it chooses for possible elimination, consolidation, or continuation. The schedule must include agencies and programs that are part of the Congressional Budget Office's annual report on expiring and expired authorizations. It must also include programs from the GAO [U.S. Government Accountability Office] report on duplication that recently just came out.

Once an agency or program gets on the schedule, which, by the way, is fast-tracked through Congress in a non-amendable format, then this Sunset committee will review that schedule and the programs on it to make recommendations for elimination, consolidation, or continuation. If Congress doesn't act on those recommendations within two years or reauthorize those programs, the program or the agency is automatically eliminated. This is a prescription for political manipulation, and its fast-track approach keeps the public from meaningful engagement. That's just one type of legislation I'm talking about.

There are a range of other bills. Some codify the regulatory review Executive Order; some expand the authority of what gets reviewed under the Executive Order; some give the Small Business Administration's Office of Advocacy more authority; some focus on the role of regulatory guidance; and some take aim at specific issues, such as climate change regulations, which is a favorite of Republicans in Congress right now. You could have a whole host of other ones.

Sally mentioned the REINS Act, and this is a whole new process. Under REINS, instead of something like the Congressional Review Act process, which says Congress has the right to do a resolution of disapproval, the bill says for all major rules, Congress will have to do a resolution of approval. If either the House or the Senate doesn't get that resolution done, the regulation cannot be implemented, and nothing can come back up in that Congress that is similar to that major regulation. This is a prescription for shutting down the regulatory apparatus of government and injecting more political manipulation of the regulatory process. It is a fundamental assault on government regulations.

And let me say this is not just some abstract thing. This is about putting corporate interests above the public inter-

ests. Whether it's food people eat, the air our kids breathe, the safety of our workplaces, it is about protecting people. We expect our government to protect us, and that there are the resources and the ability to do that. We can debate among ourselves about the best way of providing protections, including use of analytic tools, such as cost-benefit analysis, but the fundamental notion that the government must protect the people is a first principle that has to be protected, and it is being violated right now.

Now, I say all of this because it presages the president's *Wall Street Journal* article. In this political context, that *Wall Street Journal* article posited the wrong frame. It juxtaposed protecting the public with supporting business competitiveness. As I've said, protecting the public should be the first principle. The president improved on that frame when he spoke to the U.S. Chamber of Commerce by saying it is not either/or. He said he wanted regulations that do both, but he made the point that that fundamental principle is we must protect the public.

So, I worry as we go into this election cycle where moneyed interests will bring pressure to bear for the sake of their regulatory interests. I fear that the Administration's fundamental principles may be softened if not undermined under such pressure. And so I call on the president to continue the kind of work he's done of moving forward with environmental regulation or speaking first about protecting the common good and the people that the government serves.

Frankly, Susan, if there are a few more regulations that have been coming out under this Administration, whether it's because of new legislation or agency discretion, I applaud him. We had been in a period of time during the past Administration where regulation has been basically undermined and the cop was taken off the beat. So, I applaud him for beginning to get agencies to fulfill their statutory responsibilities, for providing added resources to regulatory agencies, and for putting the cop back on the beat. I'm going to stop here.

Susan Dudley: Just briefly, I was not trying to make a value judgment on the president's increased regulatory activity. I concur that the president came in, in January 2009, with a policy of using regulation to achieve policy goals, and I'm saying the data reflect that. We may have different views of whether that's actually protecting the public or harming the public, but I think it's a fact.

Gary Bass: The antiregulatory advocates have promoted a notion that regulations are job killers, which is largely a myth. This message needs to be directly addressed with hard data, real research. EPA has already got some data that addresses this in terms of clean air and clean water, I think. The EPA data demonstrates that benefits considerably exceed costs when it comes to clean air. Additionally, the Economic Policy Institute is about ready to release a lengthy document that goes into most of the major empirical research on regulations impact on jobs and the econ-

omy. That report will demonstrate that it just doesn't hold up that regulations are job killers, and it doesn't hold up in the environmental arena in particular.

Susan Dudley: I will object to the notion that all regulations protect us and that there's not a single regulation, there's nothing on the books, there's nothing that somebody might conceive of as a regulation that is not protective. The implication is that anytime anyone suggests evaluating or reforming regulation, it is tantamount to taking away protection. I think there's no evidence of that, and I disagree with that characterization.

V. EPA Perspective

Michael Goo: I can't speak to the whole government, but the number of EPA regulations has actually declined—fewer final rules have been signed by the Administrator in the Obama Administration as compared to the Bush Administration. In 2006, there were 85. In 2007, there were 66. In 2008, there were 82. So that's—now in 2009, there were 44. In 2010, there were 62. So, the actual pace of regulation at EPA has not increased; it has in fact decreased.

Michael Goo: I'd like to make three points. One, we are not backing off at EPA on basic environmental protection and our basic mission to protect public health in the environment. I think that's fully evident by all the public statements of Administrator [Lisa] Jackson, and, in fact, the Obama Administration. So, that is job one, and we don't intend to change that. We don't think the Executive Order does, in fact, change that as our basic mission. We also don't think the Executive Order will result in a decrease in environmental protection. We believe environmental protection will increase, but we will see a change in the way that we do business.

And in many cases, we want to look at the Executive Order as an opportunity to find ways to gain greater environmental protection, and sometimes at a lower cost or in a more cost-effective way, and to gain the greater transparency that was previously mentioned. For example, there's an enormous amount of data that the agency collects that can be put in electronic formats. Doing so will help us analyze and find out better who actually is complying. There's an enormous opportunity here to do things better and gain more environmental protection.

I am here to dispel the notion that some have floated and that I've heard at some of the public listening sessions that I've been at. That is, this Executive Order, at least EPA's implementation of this Executive Order, is a pro forma do-nothing process. Nothing could be further from the truth. We're very aggressively engaged in looking at our regulations, and I've personally been at listening sessions and a large number of my staff, and the staff of the agency are working on this. I've been with Administrator Jackson

when we've discussed it in meetings within the Executive Office of the President. So, we are working hard.

And I will say that despite the title, it is a new EO, even though I think it builds on a lot of the great work that you see that has been done here over the years by Sally, by Susan, and frankly, by Cass Sunstein. I think we're very proud to have such a brilliant mind and someone who cares about regulations but wants to do regulation in a better way leading OIRA. If you look at his book, *Nudge*,¹¹ which I keep by my bedside, it's full of good ideas. And we're implementing some of those. And we, at EPA, do have a good relationship with Cass. It doesn't mean that we don't have disagreements, but I think that there is a fundamental understanding that our basic mission is to protect public health and the environment, and we need to do that in a way that's consistent with the Executive Order. We need to take a closer look at costs.

So, again, the EO is a great opportunity for us to really think hard about how we go about achieving our regulatory objectives. We're on a very, very fast timeline to get our initial plan out, to get our initial list of rules out. The goal is to look for existing significant regulations that can be modified or streamlined, expanded, or repealed, and then to have a plan for doing just that. I joined EPA on January 31 and was immediately tasked with doing this. We got a website up and running. We think it's the best in the government. You can go there, you can click, you can submit your regulations, you can file them by category, or by media; you can file them in the all-important general category if you can't figure out where to put something. We're quite proud of that.

On February 23, we put out a *Federal Register* notice calling for input. And again, we held a national listening session in Arlington that I attended. I went there, and the first hour was primarily consumed with comments that the public needed more time to submit their lists of regulations. So, upon hearing that, on the spot, I told people that they would have until April 4; I extended the deadline for public comment by two weeks, because I thought it was that important. That means that we will have more work to do more quickly at the other end of the process, but it's very important that we get the best information that we can from people.

And we're not merely looking for a list of someone's favorite rules that for whatever reason—as a regulated industry, or as a member of the public, or a small business entity, or a stakeholder—they don't like. What we need are sound, firm data and information as to why that rule doesn't work, ways in which it could be changed, ways in which it is duplicative or overly burdensome, ways in which we can achieve that same measure or a greater measure of environmental protection in the same with a lower cost to society.

Again, I think it's important that we consider—to Gary's point in this review, it's not just about taking things away,

11. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (Yale Univ. Press 2008).

it's not just about taking things off the table, although some have suggested a PAYGO kind of system for regulations. I don't know if the best way to do that is page-by-page or provision-by-provision, but there is the opportunity to figure out ways to strengthen and improve our regulations. There are some cases in which we may not have the full measure of environmental protection that we're capable of, and we are certainly seeking and soliciting input on that.

We also held regional meetings. Deputy Administrator [Bob] Perciasepe directed that all of the regions at EPA—we have 10 EPA regions—hold some form of listening session for receiving public input. We've had over 500 members of the public participate in 19 outreach sessions that we've done across the country. And we've heard a lot about the need to have more dialogue on EPA rulemakings, the need to increase coordination across federal agencies, as Gary mentioned, and then certainly within EPA. EPA does have a culture in which things are stovepiped. Administrator Jackson has announced that we will have "One EPA"—that's her principle—not six or seven EPAs, so, we're working to do that. That's a key role that the Office of Policy plays within EPA.

The need to look at the cumulative burden of EPA rules is another point I heard over and over again at the listening session. That is, you've got one reporting obligation, you've got two reporting obligations, you've got three, and they're all coming in sequence. It's difficult for the small business owner to do all of these reports at once. I don't know whether that's true or not. I suspect there may be some cases where it is. We need to hear from the public where those are. We need to have the data. We need to understand how these requirements come together.

I think it's important to understand that we at EPA have not been sitting still. EPA is a young agency, and we have put out a lot of rules, but EPA is an agency that constantly is innovating, constantly is reassessing its rules, and constantly is changing them. It's true, this is not the first effort to look at our rules and to revise and reform them, but it's also the case that many of the statutes that we are charged with implementing have embedded within them a periodic review process. The CAA and other statutory sections require us to do this. So, we don't stand still. We are constantly updating our regulations and looking for the latest science and information that can help us do things in a better way.

So, I'm going to mention a couple of things as well just to comment on the point that Gary made that we're in a time when we still have unemployment figures that are in the high 8%, hovering around 9%. We're in an ongoing recession. We have a Congress that in some instances is drafting legislation that's hostile to EPA regulation or to regulation as a whole.

And consistent with the basic mission of trying to move forward on environmental protection to try and move forward on some very tough things like greenhouse gasses—which I've been working on now for more than a decade—we have nonetheless been careful and prag-

matic in the rules that we have put out. We have worked closely with OMB to make sure that they do pass the straight-face test, to make sure that we do examine opportunities to tailor regulations or to tailor existing requirements of the statute in such a way as to make progress on environmental protection without causing undue impacts on the economy.

One example of this is the Boiler MACT [maximum available control technology] that we put out recently. We also recently signed the Toxics Rule. And yesterday, we put out the §316(b) rule for cooling water towers. And those, I think, all represent careful, pragmatic approaches to getting greater environmental protection at an appropriate balance—with an appropriate balance between the cost and the benefits.

And of course, as Gary has mentioned, in many cases, however difficult to quantify, the benefits for many of our rules, and particularly our CAA rules, vastly exceed the costs. And so these are a net benefit to the overall U.S. economy, and I think if you look at mainstream economic thought, you will see that that is in fact the case.

Roger Martella: Thank you, Michael, and you covered a lot of interesting topics. I, myself, identified eight or nine themes. I have lots of follow-up with you on—but I know we've got a limited amount of time, and we'll take questions from the audience. So, let me dive right into it.

We've talked a lot about the process ramifications of the Executive Order. Susan has suggested that perhaps regulations have slowed down. Gary has expressed support for what's happening. Michael has talked about some ways that the agency is incorporating the concepts. But the basic question I have for you is beyond the process, how do you envision this is going to affect the substance of rules? Is this going to have teeth at the end of the day in terms of actually modifying the substance, the stringencies of the rules that come out?

I looked at some of the provisions in here where there seems to be a back-and-forth in some of the language. I'll just cite a few examples. "Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs but recognizing that some benefits and costs are difficult to quantify." "Tailors regulations to impose the least burden on society but consistent with obtaining regulatory objectives." And then we frequently see: "To the extent feasible" and "where appropriate."

So, I'd like to start with you Sally. In your view, how do we see this having impacts on the substance of the rules beyond just some of the process issues that have been raised?

VI. Discussion

Sally Katzen: All the words in the EO are words that have been there, that were in earlier Executive Orders, or in statements by those who have administered them. Are there teeth attached to these things? No, because Executive

Orders do not confer any rights to go to court. They are for the internal management of the executive branch only. Do they send a strong signal? Yes, and that's part of what Gary was reacting to in the tonal aspects of the small business memo, and that I tried to present in the beginning.

I think that it is very difficult to just take a snapshot in time, and I'm going to wander back to the philosophical question, because I gave up my opportunity to comment earlier. I think it's important that we all recognize that this country is deeply divided. There may be many like-minded people in this room or on the call who believe that government is part of the solution, not the problem, and that the protection of the public that Gary called for is essential.

There's another part of this country that embraces what Susan called the freedom to make our own choices. It came up, for example, when the First Lady was talking about obesity, which sparked outrage that she should tell people not to feed their kids a lot of sugar. Who did she think she was? Why are they regulating what we eat? And it escalated and escalated, and I don't know how many of you listen to Right-Wing Radio, which is not a nice name, but that's what they call themselves sometimes, there was absolute fury that someone in Washington would regulate sugar or salt, for God's sake.

The country is deeply divided. We had, in effect, the perfect storm in that we had two major pieces of legislation—the health care legislation and the reg reform legislation—last year, which were going to produce an enormous number of regulations; 143 from Dodd-Frank, and I can't tell you how many from the health care legislation. And so, all the numbers that Susan has—I know it's nice to have data, but data in this field are easily manipulated, although Susan would never manipulate them—are not very meaningful, because you've got proposals, you've got final rules, you've got changes, you've got all sorts of things that make them incomparable. But, you had these two major statutes that got a great deal of attention during the election; people who said we can't have this happen, and yet the poster child is EPA, although there was no new environmental legislation last year. Waxman-Markey didn't pass, but everyone can get angry at EPA. And so, what you have here, unfortunately, is a conflict, a very basic conflict; this country is deeply divided. And I think it's important to try to think through how to move constructively forward in the face of the very, very different views.

So, in answer to your question, I think there'll be somewhat greater sensitivity to the business community. Is this going to be a complete new metamorphosis? No, but would the Boiler MACT rule have changed the way it did without the election, without the Executive Order? Maybe, it's possible. They got a lot of comments. They said that there were some things that were pointed out that they hadn't been fully aware of and fully appreciated. But to be sure, the Boiler MACT final rule did not look exactly like the NPRM [notice of proposed rulemaking] that was issued. Did the change in atmosphere maybe push it a little tiny bit? I don't know that it's worth speculating. We do know

that there is increased sensitivity to the effect of regulation on the economy. And I think it will have a salutary effect, because Michael says the objective is to make sure that we can protect the environment in an efficient, effective way. And so, I think, yes, is your answer.

Roger Martella: Gary, Susan, do you have thoughts regarding the teeth of this and how it may substantively impact the regulations?

Susan Dudley: I think it remains to be seen, so I don't have anything to add to my opening remarks.

Gary Bass: I would say we, at least for the look-back portion, we need to wait to see what the agencies have actually come up with in their plans. But I would say, in a time where there are limited resources *and* if I'm correct, there are likely to be further agency cutbacks, it's going to be even more difficult than we think. As you look back, it will be harder to look forward. There's just limited dollars and staff. You can't do it all.

So, this balancing has got to be thought through carefully. I'm not sure, Roger, if the teeth in the EO is so much over individual rule-by-rule review. In fact, I would go as far out on a limb to say I don't think the new EO will actually make much difference in individual rule-by-rule review. I think politics make a bigger difference to me. And OIRA already has plenty of authority to slow down, speed up, interfere, or not interfere with the underlying EO. I don't think the new EO adds that much regarding review of each rule at OIRA.

Roger Martella: Michael, following up on the comment on the retrospective look-back, thank you for updating us all on what the agency has done. Can you share your sense of where you think the agency goes? I mean, one of the questions I think people have is, is this retrospective look-back a one-time deal? Is this something that the agency is considering putting kind of a process where it can revisit retrospective reviews on a moving-forward basis? You mentioned the in and out proposal, which doesn't sound like it's getting a lot of weight, but are there other ideas on how to incorporate these concepts moving forward at EPA?

Michael Goo: Obviously, we have a very fast time frame, as I mentioned, to get our plan to OMB on April 29, including an initial list of regulations to be reviewed. It will be finalized in May. That is really the beginning and not the end of the process. We anticipate that we will be working to look at the list of rules that we come up with over the next year-and-a-half, two years. And then, there will also be opportunities to conduct other reviews. So, we made it clear that we have to close the docket at some point on this one, but that we will reopen it up for comment, and there will be additional opportunities for further review going forward. We think that's essential. What we're trying to do

is actually institutionalize some of these principles in what we are doing.

And to the point that if you're looking back you can't look forward, we are trying to look back and look forward, and we're trying to look with our limited resources on what are the key targets, what are the most efficient things for us to do, what should we focus our resources on? So, crisis does have a clarifying effect on the mind.

Roger Martella: Just one point of clarification, you said a rule and a plan that's going to be—

Michael Goo: There's a list of rules, and there's a plan that accompanies it.

Sally Katzen: There's an aspect of the look-back that I think is important and that is that agencies are not free agents. They can only do what Congress told them to do. And my experience, and I think Susan's experience at OIRA, was that we sometimes saw rules where the benefits did not justify the costs, but Congress had specified what it wanted. I'm thinking of the Fastener Act or now the automatic train control rule, in which the costs were so much greater than the benefits, because Congress said you must incorporate this particular technology or something like that.

So, the question actually for Michael and for people here, are we thinking about ways of at least looking at some areas to increase effectiveness? I might mention RCRA [Resource Conservation and Recovery Act]¹² or a few other statutes where there are requirements to proceed in a way that may not be the most effective, so you can't really get rid of the rule, but you would have a leg up in arguing that there should be a change in the organic statute.

Roger Martella: Michael, we've got the question of NAAQS [national ambient air quality standards] as well, which has been cited several times in context with this Executive Order. Does this Executive Order invite either EPA or Congress to take a new look at the way NAAQS decisions were made?

Michael Goo: I actually think the NAAQS system has functioned well in protecting the basic level of public health for folks exposed to air pollution. But we have received a number of comments that relate to legislation, and we're looking at that. Nonetheless, in our thinking about this, we think that there may be room in our plan or in other venues to have a discussion, where there is in fact some statutory requirement that, frankly, it probably needs to be reexamined or looked at, or to find a better way for EPA to do what it's trying to do. So, that's our plan.

Gary Bass: With the look-back, will you also think about reassessing what the estimates of cost were? For example, in implementation of a rule, oftentimes the actual costs

are far less because of technological changes, market-based innovations, and a whole host of other reasons why cost becomes much less than predicted.

Michael Goo: Yeah, yeah. I think with Cass being there and with this Executive Order coming out, we are looking at the cost-benefit analysis, we are looking at the notion of the benefits justifying the cost. There is a lot of work that's done in the policy shop by the National Center for Environmental Economics on these issues. And we are going back, and you're absolutely right that the history has shown and I think more digging will show further that the costs cited by industry frequently are in excess of the actual cost. And we're doing in that area now.

Roger Martella: Susan had pointed out that one of the things that was novel was this concept of human dignity. And Gary and Sally, particularly in your views in terms of what do you—what comes to your mind when you're looking at this and the Executive Order? What is the way you think EPA and other agencies should be looking at to address this concept?

Sally Katzen: I think one of the reasons that we asked the president to call for recommendations for a new Executive Order is we've learned a lot over the last 16 years, now 18 years, of operating under 12866. And one of them is the inadequacy of words. The whole concept of cost-benefit analysis, it's so much more complicated than how costs and benefits fit together. I actually was happy to see something new. When I saw "human dignity" and I saw how they were intending to do it in terms of the ADA [Americans With Disabilities Act] and others, I thought, okay, that's good to have new concepts in there. There's a problem if you have too many guiding principles. You might lose the direction that you're supposed to go, but I like the emphasis, and I was pleased to see it.

Gary Bass: I'm basically underwhelmed by the Executive Order. This was an opportunity to do a radical overhaul. I think Sally is right. There are a lot of lessons learned over the period of time since she was involved in helping get President Clinton's Executive Order done. If one of the people who was involved in it said there are lessons to be learned, I'd say there are lessons to be learned. So, I'm disappointed in the Executive Order in that sense.

I'm pleased that the president put in the terms like human dignity. That's helpful. By the same token, there could be a problem with emphasizing some other words, such as "net benefits." This buzzword "net benefits" has gone around for a number of years. The only way you can get to a net benefit is when you start to put the things in dollars and cents, and yet this other concept of human dignity is taking us in a different direction to talk about qualitative factors, to talk about distributive impacts. I have yet to understand how we weave the concept of qualitative importance in with this net benefit concept.

12. 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011.

Sally Katzen: Judgment.

Gary Bass: Maybe that's the way. I hope maybe it is.

Sally Katzen: Look, think about cost-effectiveness analysis, if you don't want to think about cost-benefit analysis. I would like to see across the Grand Canyon. That would give me a great deal of pleasure if all the fog and smog and whatever is there is gone. Okay, so if you tell me that to clean it up, it would cost \$10. Yes! It will cost \$10 million. Yes! It will cost \$10 billion. Well, what other places would I want to use this money if I have limited funds? It's going to cost \$2 trillion. I'm thinking, well, maybe my desire to see across the Grand Canyon needs to be tempered. It's called judgment. Do the benefits justify the cost? It's judgment. It's a sense of, this is the right thing to do. It's the step you want to take.

Susan Dudley: Well, I think the judgment is made by the policy officials, but the cost-benefit—or regulatory impact—analysis should be a transparent accounting of what we know about the good and the harm and all the consequences of a regulation. That is presented to a policy official who then makes a judgment. So, some of those are quantifiable, some of them are not. But if you don't do that analysis, policy officials are just deciding based on no information, and that cannot be good. That will lead us to decisions that are not in the public interest. So, while I'm not—this always surprises people—I'm not a huge fan of cost-benefit analysis, but it's better than all the alternatives.

Audience Member: I represent local governments for environmental issues. I'm asking about the retroactive process. There is part of one of the environmental laws that has a prohibition on this and a certain type of pollutant, and it kind of makes its way into the permit process. It's implemented in a way that requires control of that discharge. The question is, is it possible for that discharge to be controlled for that type of pollutant? So, on your retroactive review, will you run from the regulation to the permit process to look at those kinds of questions—the connection between the regulation and the permit?

Michael Goo: I like to think that we at EPA don't require people to do things that are actually impossible. But, yes, we will look at the impact that our regulations have, and if a regulation requires something in a permit that is—to use the word—burdensome or excessive or impossible.

Audience Member: Impossible.

Michael Goo: Infeasible, I think, is probably more likely. There are very few things that are truly impossible. What is the cost, as Sally has mentioned. It is probably economically infeasible to try and remove the regional haze from the Grand Canyon at a cost of \$2 trillion, so we would say

we don't want to do that. But we will look at those issues as we go through our regulations.

Audience Member: I think there was agreement that the Executive Order reinforced the role of OIRA and the sense that in the first year or so of the Administration that OMB was allowing agencies to sort of take the lead, particularly on science issues. And I was struck by FDA's [Food and Drug Administration's] Commissioner [Margaret] Hamburg who used the term regulatory science. And as one of her first speeches, she gave it to her science advisory board about her commitment to regulatory science. I find myself speaking on FDA's role on regulatory science next week at the Food and Drug Law Institute conference, and an interesting concept, but when I first saw it I thought, isn't this something OIRA would have come out with in previous years? And I see Gary shaking his head. Is anybody familiar with FDA's commitment to regulatory science?

Sally Katzen: This goes back to the transition and one of the other very early presidential actions, a directive to the OSTP [Office of Science and Technology Policy] to come up with principles for scientific integrity. There had been some concern during the Bush Administration that maybe there had not been a high degree of integrity in that regard.

So, there was an attempt to rectify that situation, and the ball was handed explicitly by the president to the OSTP. They didn't meet their time frame either, because it took a bit of time for them to come up with their work product, which I think was in October or November of 2010. Until that time, OIRA was not going to walk into that room, because that was the OSTP's purview. But later, when they incorporated that in the new Executive Order, it shows that OIRA will once again at least look to make sure that the science is the right science.

Gary Bass: The only thing I would add is, as a result of the policy that Sally was talking about that you're familiar with, the agencies are all supposed to develop their specific plans on science integrity and send them to the OSTP soon. My understanding is the FDA version that came from that Commissioner's speech is being converted into that plan for the FDA. I think the Commissioner's speech, converted to a plan, would be a really good product. I was really impressed with the speech, actually.

My understanding is that prior to her coming into the Administration, she had a real interest in the role of science. But I also think that there is criticism leveled at the FDA that science was being put aside for political reasons, and their advisory committees came back to her right when she came in and said that. So, I think there is a lot of discussion.

By the way, it was true in your agency, Michael, at EPA that the Administrator put a high premium not only in transparency, but also in science. Several agencies really took the bull by the horns on that issue very early on, and I'm really pleased, too. I think you made reference to it in

the context of the new EO, and I think it's absolutely vital to have science integrity in all the work we do.

Audience Member: Are you doing anything new on science integrity at EPA?

Michael Goo: Anything new? We have a commitment to scientific integrity and to continue to look at those issues. So, I don't know if we would say we're doing anything new. We are continuing to do everything we can to ensure that our regulations are based on sound science.

Sally Katzen: When the Administration first came in, I think there was a change in the IRIS [integrated risk information system] process, where EPA brought it back into EPA, so there have been a few things in which EPA has staked out some turf in the science area.

Susan Dudley: Yes, and I would debate whether that improves the integrity of the resulting risk assessments. We all know what happens when things are siloed. We have problems of group-think if you restrict decisions to a few individuals in a silo. Science and scientific integrity thrives on experimentation and challenge, hypothesis testing, and debate, and if you prohibit debate and say only my scientist has integrity, your scientist doesn't, I think that's a problem. So, the new IRIS process, as I understand it, diminished interagency review, so other scientists in other agencies are less able to engage in discussion. It reduced peer review, so that EPA doesn't have to respond to peer reviewers' comments. So, it's not clear to me that the IRIS procedure changes improved integrity.

Audience Member: What is EPA doing under the Obama Administration to improve the understanding of how you do benefits analysis? And to the other members of the panel, if you've looked at any of the rules that had come out more recently, do you think EPA is doing a better job on the benefit side?

Michael Goo: As I think has been discussed it's easier to quantify the cost of a regulation. That's not hard. There are plenty of people, lawyers, lots of people who will tell us what the costs are. The hard part is quantifying the benefits, and I think we're doing a better job of this in the area. But with recent studies and information, as an example, particulate matter, the benefits of the Air Toxics Rule, which is admittedly an expensive rule, around \$10 billion per year annually, but the benefits are an order of magnitude higher.

But in other areas, for instance, water pollution, it's much harder to quantify the benefits. And we are actively engaged in trying to understand these benefits and look at unquantified benefits. We look at the relation between, say, a given measure of water quality protection and human health. There are any number of ways in which if you pro-

tect the drinking water source, it can have human health impacts, human health benefits. We need to have peer-reviewed, established scientific information that we can depend on that can stand the scrutiny that EPA rules get and being able to marry that with our desire to understand fully and quantify to the maximum extent possible the benefits. This is where we need more work, and where we're actively engaged in trying to do a better job.

Sally Katzen: This is ELI, and so you care more about the environment and EPA than other regulatory agencies. When I was asked which are the good agencies and which are the bad agencies, EPA was always in the good agencies category. They did better work, better analysis, along with a handful of other departments or agencies. And then at the other extreme, you would have an agency like the DHS [Department of Homeland Security], which I don't think knows how to add two and two, let alone what assumptions go into selecting two and two. But it's difficult for them, in large part, because how do you quantify the benefits of reducing the risk of an attack when you have a dynamic attacker who is able to respond, okay, harden that site, I'll move to this site? What's the benefit then?

So, I know that a lot of energy now is being directed at some of those more difficult conceptual, methodological issues and less about prodding EPA to get marginally better in this area. I think that's the right thing to do, because your first question is: Is this EPA or is this government-wide? This is governmentwide, and our interest in the environment here should not fog up that issue.

Gary Bass: I think that we still need to do a better job of estimating benefits. For example, under the Toxics Release Inventory, EPA had left blank the lines about benefit, because it's virtually impossible to put that into a number. Unfortunately, the blank line was scored as a zero in terms of dollar benefit. That is the kind of thing that methodologically nobody on this panel would support. So, there are problems within the actual apparatus itself that need to be improved.

Now, I also believe that we cannot put enormous stock in all these analyses. I mentioned the Small Business Bill on the Senate floor earlier with its various amendments. Sen. [Susan] Collins (R-Me.) has an amendment that would create an endless loop of doing indirect cost impacts. I get very nervous about believing that cost-benefit is a magical tool or that changes in processes to yield more information will result in better rules. We can end up like a hamster in a cage endlessly running round and round and round on a wheel going nowhere. I mean, I'm more inclined to judgment, as Sally and Susan talked about. Ultimately, regulatory decisions are about political judgments that need to be made; otherwise, we're just an endless loop of doing all these analyses.

Audience Member: The question is on the look-back analysis. We're about halfway through the period that the agencies have to prepare their first plans. Can you tell us where and how that will be published and available to the public, and will there be a comment period on this?

Michael Goo: The plan will likely be published at the end of May.

Audience Member: That's final?

Sally Katzen: But EPA and [at least] four other agencies have called for comments, so there is an opportunity for the public to participate. EPA was one of the first out of the door, but there are a number of other departments that have said give us your tired, your worn, those yearning to breathe free. You've heard words like that.

Roger Martella: Well, again, we knew this was going to be an exceptional conversation, given our panelists, and it lived up to the hype. So, thank you very much for making the time to come here and for the questions.