

Environmental Policy Guide

167 RECOMMENDATIONS FOR
ENVIRONMENTAL POLICY REFORM

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Robert Gordon, Editor
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PREFACE

This document includes 167 legislative, appropriation, and oversight recommendations for environmental and energy policy. Each of the nine sections opens with an overview of the issues. Some of the recommendations may overlap from section to section, and adoption of some may make adopting others unnecessary. Each topic area was authored by a team of experts who are responsible for only the suggestions within their section; their inclusion as authors does not constitute endorsement of other sections. Nor does their individual endorsement necessarily reflect the views of organizations with which they are associated.

This product is a continuation of The Heritage Foundation's effort to champion a principled approach to environmental and related energy policy based on principles of *The American Conservation Ethic*.¹ A separate piece, *Environmental Conservation: The Eight Principles of the American Conservation Ethic*, contains detailed discussion of the principles and additional detailed discussion and recommendations on several of the issues addressed here.

Robert Gordon, Editor
Diane Katz, Associate Editor

CLEAN AIR ACT

The Environmental Protection Agency (EPA) has exponentially expanded regulation under the Clean Air Act (CAA) at great expense to Americans. States also have been robbed of their statutory role in environmental protection. Therefore, Congress must employ legislation, the budget process, and its oversight powers to constrain the EPA's regulatory abuses.

MAJOR POINTS

- The EPA claims authority under the CAA to impose an economically damaging and environmentally counterproductive regulatory regime designed to eliminate fossil fuel as a domestic energy source—a policy repeatedly rejected by Congress. The agency's energy policy is jeopardizing thousands of jobs, U.S. competitiveness, the affordability and reliability of the nation's electric power, and national security.
- Without any statutory authority, the EPA has extended its regulatory reach into other federal agencies' actions—including the Departments of Energy, Transportation, and State, and the Federal Energy Regulatory Commission.
- The technical risk assessment and regulatory impact analyses with which the EPA justifies many of its rules are fraught with implausible assumptions and extrapolation based on absurd use of the precautionary principle. As noted by Dr. Thomas Burke, who chairs the National Academy of Sciences' Committee on Improving Risk Analysis, the EPA's science is "on the rocks,"² meaning that the agency's regulations often lack a sound scientific basis.
- To restore rationality and accountability to environmental protection, Congress must limit the EPA's abuse of regulatory power and re-establish lawmakers' authority to set environmental and energy policy.

APPROPRIATIONS

Congress should prohibit the EPA from expending any funds for:

- Development, implementation, and enforcement of greenhouse gas regulations, including the proposed Carbon Pollution Standards for New and Existing Electric Generating Units, also known as the Clean Power Plan rules.
- Development, implementation, and enforcement of 2014 National Ambient Air Quality Standards (NAAQS) for ozone.
- Regulation under the CAA of any pollutant not expressly included in the language of the CAA.
- Regulation of source categories under Section 111(d) of the CAA if those source categories have been regulated under Section 112.
- Development, implementation, and enforcement of regulatory standards that do not comply with Section 111(a)(1) of the CAA. That is, the regulatory standard based on or derived from “best system of emission reduction” cannot exceed emission limits achievable with available technology that is commercially and economically demonstrated at scale.

LEGISLATION

To achieve the necessary statutory reforms of the EPA, Congress must:

- Restate and clarify in law that the Clean Air Act was never intended to regulate greenhouse gases as air pollutants, and declare in statute that greenhouse gases are not pollutants subject to regulation under the CAA.
 - Rescind the EPA’s Endangerment Finding that greenhouse gases and climate change pose a serious threat to public health and safety.
- Overturn the waiver issued by the EPA that allows the California Air Resources Board to set fuel economy standards.
- Prohibit the EPA from setting low-carbon-emissions standards or fuel economy standards for on-road vehicles.
- Restate and clarify in law that the EPA is prohibited from regulating source categories under Section 111(d) of the CAA if those source categories have previously been regulated under Section 112.

- Restate and clarify in law that the EPA is prohibited from developing, implementing, or enforcing regulatory standards that do not comply with Section 111(a)(1) of the CAA. That is, the regulatory standard derived from “best system of emission reduction” cannot exceed emission limits achievable through available technology that is commercially and economically demonstrated at scale.
- Restate and clarify in law that the EPA’s regulatory reach extends no further than the “source” of emissions originating from specific facilities rather than entire sites or regions in which emission sources are located. Also clarify that a “source” of emissions applies to individual stationary industrial units, and not to an entire industrial sector or state.
- Restate and clarify in law the parameters of federal and state authorities under the CAA. The prevention and control of air pollution is the primary responsibility of state government. The federal government sets NAAQS and New Source Performance Standards (NSPS); the states determine how the standards will be attained and/or applied.
- Require by law that the EPA must issue final assessments of states’ emission reduction obligations.
- Make the Information Quality Act (IQA) enforceable, and shift the burden of proof to the EPA for demonstrating that the agency’s risk assessments meet the IQA standards.
- Require that the NAAQS, NSPS, and Existing Source Performance Standards cannot be implemented until enacted by law.
- Repeal the Renewable Fuel Standard and all related programs.

OVERSIGHT SUBJECTS

Congress should examine the following:

- The legality of the carbon rules for new and existing power plants.
- The near-term impacts of the Clean Power Plan rule on electric power reliability and power plant closures.
- The EPA’s plans to control CO₂ within other sectors, including surveying, drilling, extracting, and processing oil and gas.
- The rigor and plausibility of the EPA’s risk assessment for ozone NAAQS and other regulations.

- The potential regulatory inconsistencies among various EPA regions that would arise if the agency undertakes its planned rule change.
- The reform of the State Implementation Process per the National Research Council's recommendations from 2004.³
- The reform of the EPA's methodology for risk assessments, especially its application of a "No Safe Threshold" (NST) linear regression analysis.
- The reform of the EPA's methodology for benefit-cost analyses, especially for the monetization of impacts and the use of particulate matter ($PM_{2.5}$) co-benefits.

CLEAN WATER ACT

Leveraging the ambiguity of the Clean Water Act, the Army Corps of Engineers and the EPA have vastly expanded their regulatory authority in a flagrant power grab. The agencies recently proposed a new regulatory definition of “Waters of the United States” that would cover virtually all waters in the nation and, by extension, much of the land.

MAJOR POINTS

- The Clean Water Act (CWA) was intended to divide regulatory authority over water between states and the federal government, reflecting principles of federalism and constitutional limits on federal powers. The CWA states: “It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources...”⁴
- The CWA covers “navigable waters,” defined in the statute as “the waters of the United States, including the territorial seas.” Under this broad and vague definition, the Corps and the EPA have expanded their own regulatory powers. In doing so, they have exceeded their constitutional limits and disrupted the federal–state balance by usurping the statutory “responsibility and rights of States” to protect and control local “land and water resources.”⁵
- The Corps and the EPA have consistently abused their power to regulate “navigable waters.” The U.S. Supreme Court has twice invalidated federal regulations as overly broad. In another case, *Sackett v. EPA*, Justice Samuel Alito stated: “The reach of the Clean Water Act is notoriously unclear.” Under agency regulations, “any piece of land that is wet at least part of the year” may be covered by the act, “putting property owners at the agency’s mercy.”⁶

- The EPA and the Corps recently issued an interpretive rule that narrows the exemptions for farmers and ranchers under Section 404(f)(1)(A) of the CWA. As a result, farmers and ranchers would have had to secure Section 404 permits for many activities that had not been covered under the law, including routine day-to-day activities, such as building a fence. However, Congress took action in the Consolidated and Further Continuing Appropriations Act, 2015, also known as the CROmnibus bill, which requires the agencies to withdraw the rule.
- The DC Circuit Court of Appeals in *Mingo Logan Coal Co. v. EPA* held that the EPA could retroactively revoke a Section 404 permit under Section 404(c), even if the permit holder is in full compliance with all existing permit conditions. If such a veto process is allowed to stand, permit holders will face indefinite uncertainty, undermining long-term investment and property values.

APPROPRIATIONS

Congress should prohibit agencies from expending any funds for:

- The EPA's and the Corps' "Waters of the United States" rule under the Clean Water Act.

LEGISLATION

To achieve the necessary statutory reforms in order to address the EPA's and Corps' regulations, Congress must:

- Define the waters covered under the CWA, generally limiting federal authority to regulating traditional "navigable waters." A clear congressional definition is critical. In his concurrence in *Sackett v. EPA*, Justice Alito noted, "Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act."
- Prohibit implementation of the EPA's and the Corps' proposed rule redefining "Waters of the United States" or any similar rule.
- Prohibit the EPA and the Corps from implementing or enforcing any rule that narrows the "normal farming" exception.
- Eliminate the retroactive veto power that the EPA has over Section 404 dredge and fill permits under Section 404(c) of the CWA.

- Expand the permit exemptions for farm and ranching activities under CWA Section 404(f)(1)(A). This should include exempting all common farming and ranching activities from Section 404 permit requirements, regardless of when such activities began or how long the activities have been ongoing.
- Establish a high threshold for triggering the “recapture” provision under Section 404(f)(2) or eliminate that provision entirely. The provision now states: “Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit.”⁷

OVERSIGHT SUBJECTS

Congress should examine the following:

- Whether the EPA likely violated the Administrative Procedure Act by issuing the “Waters of the United States” proposed rule *before* the agency’s report on *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* was finalized.
- How the EPA and Corps have used the EPA’s water maps for the proposed “Waters of the United States” rulemaking. These water maps were not made public until after House Science, Space, and Technology Committee investigators discovered their existence and confronted the EPA about them at a hearing.

LANDS AND WILDLIFE

The federal estate—lands controlled by the Bureau of Land Management, the U.S. Forest Service, the U.S. Fish and Wildlife Service, and the National Park Service, as well as smaller holdings of other agencies—is far larger than most Americans realize and only a fraction of it is composed of National Parks. Federal agencies are unable to adequately manage these lands and the natural resources on them. Nevertheless, the federal government continues to expand its land holdings, and to increasingly restrict public access to them. At the same time, wildlife and related laws such as the Endangered Species Act and wetlands regulations under the Clean Water Act increasingly erode property rights, result in partial takings—the loss of property value from government restrictions on its use—and often do so without significant conservation benefit or, worse, with adverse unintended consequences.

MAJOR POINTS

- The federal government’s land holdings are greater than the areas of France, Spain, Germany, Poland, Italy, the United Kingdom, Austria, Switzerland, the Netherlands, and Belgium combined, approaching a third of the U.S. land mass, including Alaska and Hawaii.⁸
- Environmental laws should not be allowed to erode the sanctity of private property, and the costs of government conservation programs should not be borne solely by private property owners.
- Federal land management agencies spend billions of taxpayer dollars each year on programs to improve the condition of federal lands, but many of these dollars never reach the ground or deliver tangible benefits, as they are consumed by environmental studies, compliance with handbooks, regulations and guidance, and lawsuits.

- Federal land holdings include 50 percent of all land west of Nebraska. In individual Western states, federal holdings range from 29 percent to over 80 percent—and as much as 98 percent of individual Western counties.⁹
- Federal lands are detached from state property taxes and increasingly restricted from being used for economic purposes, such as development of oil, natural gas, and coal resources, forgoing billions of dollars in tax revenues and huge losses in economic activity as well as hundreds of thousands of jobs.¹⁰
- Western states manage their lands at much lower cost and with healthier and more sustainable conservation practices than federal lands managers.¹¹ The states also generate more revenue than the federal government from public lands.

APPROPRIATIONS

Congress should prohibit agencies from expending any funds for:

- Land acquisitions that result in a net gain in the size of the federal estate.
- Land purchases through the Land and Water Conservation Fund (LWCF). The LWCF expires on September 30, 2015, and no further appropriations should be made to it.
- Any study, proposal, or designation of new National Monuments, National Heritage Areas and Corridors, or Wild and Scenic Rivers. No additional funding should be appropriated for a Heritage Area or Corridor for which the authorization has expired.¹² (Advocates promoted Heritage Areas as only requiring start-up money from the federal government, and claimed they would become self-sustaining through activity fees.)
- The 22 Landscape Conservation Co-operatives and eight Climate Science Centers.
- Listing any species under the Endangered Species Act (ESA) without the U.S. Fish and Wildlife Service (USFWS) or the National Marine Fisheries Service first posting online (as appropriate for each regulatory action):
 - A list of the information supporting the petition, within one month of receipt.
 - A list of the information used to support a positive 90-day finding, two or more weeks before publication in the *Federal Register*.

- A list of the data used to document the existence of each of the five factors used to justify the listing of the species.
- ESA listings based on any information that does not meet the standards of the Information Quality Act. Any studies used to substantiate the existence of a threat or decline in population must be substantially reproducible, and failure to provide access to the data underlying a study is prima facie evidence that the study does not represent the best available data.
- ESA listing of the sage grouse unless and until all the data and assumptions used to develop projected population declines and habitat loss, as well as documentation of threats, are made available to the public (including Internet posting).
- Listings under Section 4 of the Endangered Species Act until the U.S. Fish and Wildlife Service and National Marine Fisheries Service adopt a regulatory definition of “data.”
- Promulgation or implementation of any regulation that creates a blanket prohibition against a “take” (pursuing, trapping, wounding, or killing) for any newly listed threatened species. (This restores the distinction that Congress intended between “take” of endangered and “take” of threatened species for any future listed species that was eliminated by a USFWS rule.)
- Settlements related to public lands under the ESA, the National Environmental Policy Act (NEPA), and the Federal Land Policy and Management Act, unless settlement terms and all related documents are made available to the public through a standard notice and comment period.
- Designations of critical habitat unless proposed designations consider the economic impact of both a listing and a critical habitat designation in the notice and comment period.

LEGISLATION

To achieve the necessary statutory reforms in order to improve federal policies on public lands and wildlife, Congress must:

- Allow the Land and Water Conservation Fund to expire.
- Require any land designations under the Antiquities Act to be no more than two square miles in area.¹³ Subject such designations to congressional

approval and the approval of the relevant state(s). Monuments not approved by the Congress or the relevant state legislature(s) become null and void one year after a designation. Additionally, require any area affirmed by Congress to be re-designated every five years.

- Provide a means of compensating private property owners for regulatory takings that result from the Endangered Species Act, the Clean Water Act, and other environmental laws.¹⁴
- Make fundamental improvements to the Endangered Species Act, including shifting reliance for species conservation to the states; a more limited redefinition of a species “taking”; prioritizing species listings; fixing the consultation process; and prohibiting the presumption that federal agencies possess greater regulatory expertise than states (per the Chevron Doctrine).¹⁵
- Require all listing petitions to be posted in a publicly accessible location on the websites of the USFWS and the National Marine Fisheries Service within seven business days of receipt.
- Repeal provisions of the Federal Land Policy and Management Act that allow Wilderness Study Areas to be so designated in perpetuity absent congressional action. Provide hard-release language (that is, the lifting of land-management requirements) for lands that Congress declines to designate as wilderness.
- Create a statutory mechanism for states to assume control of lands under the control of the Bureau of Land Management or U.S. Forest Service. Establish criteria for such devolution, including specific and reasonable criteria under which plans will be deemed acceptable and implemented if met. Such plans should provide protection for valid existing rights and traditional uses, such as grazing.
- Create a legislative mechanism for states and counties to take independent actions on federal lands when federal mismanagement has created a danger to property or public safety, such as dangerous fire conditions, insect infestation, weeds, or damage to watersheds and water rights.
- Clarify “standing” requirements (such as proof of a connection to and harm from the challenged action) and require bonds by plaintiffs seeking to block federal lands management decisions, with proceeds to offset harm to private parties and to taxpayers.

OVERSIGHT SUBJECTS

Congress should examine the following:

- Devolution of public lands and Utah's Transfer of Federal Lands Act.
- The legal basis claimed by state and federal authorities for their exercise of police powers on federal lands.
- Restrictions on the disposal of excess federal lands, including provisions of the Federal Land Policy and Management Act and other federal statutes.
- The scope and scale of law enforcement resources and activities of federal environmental and natural resources regulatory agencies.
- Overcriminalization in the application of federal environmental and public land management laws.
- The proper, limited use of federal agency powers over federal lands, water and grazing and, in particular, the lessons to draw from the appalling multi-decade litigation between Nevada rancher Wayne Hage (and his estate) and the U.S. government over actions taken or withheld by federal agencies.

PROPERTY RIGHTS

Many regulatory decisions by federal agencies are based on the belief that private ownership of property is harmful to the environment. Private property owners have very little recourse when regulators engage in overreach or regulatory takings. Because private property is a cornerstone of freedom, the taking of private property by regulatory agencies must be stopped.

MAJOR POINTS

- Environmental laws should not be allowed to erode the sanctity of private property, and the costs of national conservation programs should not be imposed through regulation upon private property owners.
- The Environmental Protection Agency and the Army Corps of Engineers are attempting to reclassify vast swaths of private property as “Waters of the United States” in order to place them under the government’s regulatory authority. If successful, this reclassification would result in a massive devaluation of the affected properties, and do so without an effective means for property owners to collect compensation. The only remedy for a property owner would be to file a claim with the Court of Federal Claims—but only after applying for and being denied a permit, all of which amounts to an extraordinarily time-consuming, costly, and often futile process.
- The U.S. Fish and Wildlife Service routinely designates vast acreages of private land as “critical habitat” for species listed under the Endangered Species Act. A landowner’s only recourse is to file a claim with the Court of Federal Claims—but only after applying for and being denied a permit.
- Although the Department of Commerce has been repeatedly rebuffed by the federal courts, including the United States Supreme Court,¹⁶ the federal government continues to abuse private landowners under the rubric of the Rails to Trails program. Under this program, abandoned railroad

right-of-ways are “rail-banked” for use as public biking and hiking trails. Landowners have been forced to pursue expensive litigation to obtain the fair market value of easements imposed on their property to accommodate the trails. Although many private landowners have been successful in dozens of cases, the federal government refuses to make reasonable offers for the easements, forcing citizens to re-litigate the same issues repeatedly.

- The Land and Water Conservation Fund turns vast acreages of private property into public land. This is an entirely money-driven program, often with no ecological, environmental, or economic benefits.

APPROPRIATIONS

Congress should prohibit agencies from expending any funds for:

- Grants for infrastructure development to states or other jurisdictions that invoke eminent domain for purposes of economic development (as in the *Kelo* case) rather than for public use, such as roads, utilities, or government buildings.
- Expanding the EPA’s regulatory definition of “Waters of the United States.”¹⁷
- The designation of critical habitat unless such designations consider the economic impact of both listing and critical habitat designations in the notice and comment period.
- Accepting any additional railroad right-of-ways into the Department of Transportation’s rail-banking inventory.
- Garnishing wages for the payment of fines or penalties imposed without court order by the EPA, the U.S. Fish and Wildlife Service, or the National Marine Fisheries Service.

LEGISLATION

To achieve the necessary statutory reforms to strengthen private property rights, Congress must:

- Amend the Endangered Species Act and the Clean Water Act to provide just compensation to landowners whose private property has been taken through wetlands regulations, as just compensation is due whether the taking of property for a public purpose is a physical taking or a regulatory taking.¹⁸

- Amend the Rails to Trails Act so that abandoned railroad right-of-ways can be rail-banked only if they are first purchased at fair-market value from the affected landowners when those fee holders would otherwise obtain title to the abandoned right-of-way under state and federal law.
- Amend the Debt Consolidation Improvement Act to prohibit the EPA, the Fish and Wildlife Service, and the National Marine Fisheries Service from garnishing wages without a court order to collect fines or other penalties, or to refer such cases to the Treasury Department for wage garnishment without a court order.

OVERSIGHT SUBJECTS

Congress should examine the following:

- The amount of property held by the federal government, whether there is any limiting principle on government acquisition of private property, and how environmental conditions on public lands compare to private property.
- The economic impacts on landowners of the government designation of private property as wetlands.
- The economic impacts on landowners of the government designating their property as “critical habitat” under the Endangered Species Act.
- The amount of private property taken through the rail-banking program, and the difficulties experienced by private property owners in obtaining compensation.

“CLIMATE CHANGE” POLICY

“It is very difficult to find an issue that voters place lower on the list than climate change,” says pollster Whit Ayres.¹⁹ That is why Barack Obama barely mentioned it during his 2008 and 2012 presidential campaigns. And yet in June 2013, the President announced an ambitious climate action plan that he has put at the top of his second-term agenda. The President’s climate plan attempts to bypass Congress because there is as little support in Congress as there is in public opinion for policies that will raise energy costs, destroy jobs, and hamper economic growth, while having no discernible effect on global temperatures. The 114th Congress should use its appropriations and legislative powers to prevent implementation of the President’s climate action plan.

MAJOR POINTS

- Climate policies must have clear and documented net benefits for the United States.
- Any U.S. agreement with foreign countries on the subject of climate change should be in the form of a treaty, which requires Senate consent to ratification under the Constitution.
- Every international agreement must provide net benefits to the United States.
- Scientific and economic analyses used by regulatory agencies must conform to established law and be transparent, reproducible, and unbiased. The estimates for the “social cost of carbon” (SCC) and for the impacts of PM_{2.5} reductions do not meet these criteria.
- Subsidized loans and other financial support for commercial entities are fraught with cronyism and must be eliminated.

APPROPRIATIONS

Congress should prohibit agencies from expending any funds for:

- Rulemaking or benefit-cost analyses that employ the SCC to calculate regulatory benefits or costs. Researchers have determined that estimates of the social cost of carbon are unreliable, and that the Obama Administration has slanted the numbers.²⁰ Basing benefit-cost analyses on the social cost of carbon deliberately ignores the enormous benefits of affordable energy, and is largely an attempt to justify a carbon tax.
- The design, implementation, or administration by any U.S. agency of any international climate change assistance policies or programs as described in President Obama’s FY 2014 Report to Congress on Federal Climate Change Expenditures, or for the Green Climate Fund.
- The design, implementation, or administration of policies or programs recommended by the Interagency Climate Change Adaptation Task Force;²¹ policies or programs related to Strategic Sustainability Performance Plans or Climate Change Adaptation Plans; policies or programs included in the National Fish, Wildlife and Plants Climate Adaptation Strategy; or any Interior Department activities described in President Obama’s FY 2014 Report to Congress on Federal Climate Change Expenditures.²²
- The design, implementation, or administration of the Securities and Exchange Commission’s “Guidance Regarding Disclosure Related to Climate Change,”²³ or any successor thereto.
- The EPA’s use of SCC calculations in any EPA rulemaking until the agency conducts a formal rulemaking on the proper calculation of SCC that complies with the Administrative Procedure Act and the Information Quality Act.
- The EPA finalizing Clean Air Act rules that:
 - a) Attribute co-benefits to a reduction of PM_{2.5};
 - b) Mandate the use of “commercially available” technologies that received federal funding or loan guarantees;
 - c) Require system-wide emissions reductions (“beyond the fence”) rather than site-specific reductions.

- EPA grants or contracts that are not disclosed on a publicly accessible agency website that lists the recipient; award date; purpose; and links to all grant or contract documents.
- The EPA’s Office of Environmental Education.
- The Goddard Institute for Space Studies. Any space-related programs should be shifted to the Goddard Space Flight Center in Greenbelt, Maryland. In recent years, the Goddard Institute has focused significant resources on climate change.
- Publishing or applying data that has not been validated in rulemaking, guidance, or policy from climate models run by NOAA, the National Center for Atmospheric Research, or the Goddard Institute for Space Studies.
- Using or disseminating data or reports from the Intergovernmental Panel on Climate Change or the U.S. Global Climate Change Research Program that do not comply with the Information Quality Act.
- Any climate-related activities involving the U.N. Intergovernmental Panel on Climate Change, the World Bank, the Green Climate Fund, the International Renewable Energy Agency, or any other international climate initiative.
- “Correction” (read: manipulation) of raw temperature data collected by any government agency.
- Any Department of Energy commercial projects, including “carbon capture and storage” and renewable energy.
- The Council on Environmental Quality’s consideration or application of the “social cost of carbon,” or indirect or cumulative greenhouse gas emissions, in any environmental impact statement developed under the National Environmental Policy Act.
- The Department of the Interior’s eight Climate Science Centers and 22 Landscape Conservation Co-operatives (established by Secretarial Order 3289).

LEGISLATION

To achieve the necessary statutory reforms to remedy flawed climate change policies, Congress must:

- Approve resolutions of disapproval (under the Congressional Review Act) of the EPA's greenhouse gas rules for power plants and for the ozone rule.
- Clarify that all EPA research and rulemaking conform to the provisions of the Information Quality Act, and that the agency's application of the act is judicially reviewable.
- Clarify in statute that the Clean Air Act does not apply to the regulation of greenhouse gas emissions or other climate-related rulemaking.
- Require that all research and data used by the EPA, NOAA, and the Department of Energy must be publicly accessible for validation and replication.
- Require public disclosure of all EPA and Interior Department communications and details of negotiations with plaintiffs in all litigation and threatened litigation or settlements.
- Abolish the Global Change Research Program.
- Transfer all space-related functions of the Goddard Institute for Space Studies to the Goddard Space Flight Center.
- Prohibit the use or dissemination of data or research from the Intergovernmental Panel on Climate Change and U.S. Global Climate Change Research Program unless the data and research meet the standards of the Information Quality Act. Require that agencies' application of the act to such data and research is judicially reviewable.
- Approve a resolution of disapproval on the climate change "agreement" between the United States and China.²⁴ The resolution should also state disapproval of any successor agreement to the Kyoto Protocol.

OVERSIGHT

Congress should examine the following:

- The misuse of PM_{2.5} epidemiological studies in rulemaking.
- Continual revisions of the historical surface temperature data by NASA and NOAA.

ENERGY

More than 80 percent of America's energy needs are met through conventional carbon-based fuels, which North America has in abundance.²⁵ The Administration is seizing powers from Congress and the states by unilaterally regulating emissions of carbon dioxide and energy use. Moreover, its actions on federal lands are stymieing energy production.²⁶ If Congress allows this to continue, it will significantly drive up energy costs for Americans and businesses without yielding any measurable benefit.

MAJOR POINTS

- Energy production, in particular shale oil and shale gas on private lands, has been one of America's greatest economic success stories in recent years. Households save money through lower energy bills when fuel supplies are abundant. However, energy production on federal lands is down²⁷ despite vast potential there.²⁸ Congress should open access to energy production on federal lands and offshore, reduce unnecessary regulations, and grant more regulatory authority over such lands to states.
- The U.S. and North America do not suffer from a shortage of energy resources, and there is no energy problem caused by a shortage. The U.S. has the world's largest resource base and any problems in energy have been caused by government policies. These policies must be reversed in order for the nation to meet its potential.
- Energy should be treated like any other good or service that is traded regularly around the world. Free trade in energy would draw investment, create jobs, and increase the supply of energy.
- Cronyism is rampant in the energy sector, and the government allocates special benefits to the well-connected rather than fostering a playing field that provides opportunity for all to compete. These subsidies obstruct the

long-term success and viability of the technologies and energy sources they intend to promote by distorting the actual costs of energy production and interfering with the price signals by which businesses monitor supply and demand. And, when the government plays favorites, valuable resources shift to less productive uses.

- The negative consequences of government interference in energy markets are perhaps best illustrated in the nuclear industry. Nuclear energy supplies 19 percent of America’s electricity (exceeded only by coal and natural gas). Yet protracted permitting, ill-conceived regulations, and other government-imposed market distortions stifle the industry’s growth.
- For far too long, the Department of Energy has attempted to use taxpayer money to drive technologies all the way to the market, crippling the role of entrepreneurs and wasting billions of taxpayer dollars in the process. Basic research that has promising commercial application will attract private investment. Some of those investments will succeed, and others will fail, but those investments should be made using private-sector dollars
- The federal government should ensure that energy programs for defense applications prioritize national security requirements over political interests. The Pentagon should pursue alternative energy sources only if they increase capabilities or reduce costs without sacrificing performance.

APPROPRIATIONS

Congress should prohibit agencies from expending any funds for:

- Implementation of hydraulic fracturing regulations from the Bureau of Land Management, the EPA, or any other federal agency. Funds should likewise be denied to EPA for any studies, guidance documents, or other policies intended to restrict hydraulic fracturing. Since companies obtain state permits for all wells, including federal wells, and must comply with all state regulations, federal fracking regulations are redundant.²⁹
- Designations of Wilderness Study Areas or other restrictive designations by the Department of the Interior, and Secretarial Order No. 3310, the Obama Administration’s unauthorized “Wild Lands Initiative.” Any new restrictive public lands designations should require congressional approval.

- Any new Department of Energy loans and loan guarantee programs (including Advanced Technology Vehicles Manufacturing and the Section 1703 loan guarantee program). Only outstanding commitments should be funded.
- Projects to commercialize wind, solar, nuclear, and natural gas technologies; biofuels, carbon capture and sequestration, integrated gasification combined cycle (IGCC), and advanced manufacturing programs.³⁰
- Implementation and enforcement of the Renewable Fuel Standard.
- The Federal Energy Regulatory Commission to study, design, implement, administer, or carry out climate-change or greenhouse-gas-related programs, projects, activities, and policies.

Congress *should* provide funds for:

- The Nuclear Regulatory Commission to approve the permit application submitted by the Department of Energy for the Yucca Mountain nuclear materials repository.

LEGISLATION

To achieve the necessary statutory reforms of Clean Air Act regulations, Congress must:

- Pass legislation that prevents the EPA and all other agencies from regulating greenhouse gas emissions, and that forces the EPA to withdraw its endangerment finding on greenhouse gas emissions.
- Require the North American Electric Reliability Corporation (NERC) to determine whether enforcement of any carbon dioxide regulations will jeopardize grid reliability. (Congress has charged NERC to ensure the reliability of the grid.)
- Pass legislation enforcing the timelines of the National Environmental Policy Act (NEPA) by deeming any energy project subject to NEPA as approved, as proposed, if the government fails to finalize the application after three years. This should include all future projects, as well as those currently in the NEPA review process.³¹
- Congress and the Administration should open all federal waters and all non-wilderness, non-federal-monument lands to exploration and production. Congress should force the Department of the Interior to conduct lease sales if a commercial interest exists, as well as force Interior to use its flexibility

under its current authority (whether it be streamlining of red tape or lower royalties) to attract interest to federal lands. Even achieving 10 percent of federal lands under lease for energy production (onshore and offshore) would be a tremendous step forward from the meager 2.8 percent today.

- Delegate authority to states for environmental review and permitting of energy projects on federal lands within their borders. States should return an appropriate federal share of revenues to the Treasury, and be compensated for management costs.³²
- Lift the ban on crude oil exports by reforming the Mineral Leasing Act of 1920, the Energy Policy and Conservation Act of 1975, and the Export Administration Act of 1979.
- Repeal Section 3 of the Natural Gas Act, which gives the Department of Energy's Office of Fossil Energy the ability to arbitrarily determine if liquefied natural gas exports to non-free-trade-agreement countries are in the country's "national interest."
- Pass legislation to prevent the use of cumulative environmental-impact analyses for energy exports. Such analyses would adversely affect exports of coal and set a dangerous precedent that could be used to halt many other major economic activities and provides no economic benefit.
- Repeal targeted tax credits for all energy sources and lower a broad range of tax rates. A more market-based energy sector would benefit consumers with reliable, affordable energy while eliminating government favoritism to special interests.³³
- Create an expedited process for nuclear power plants to obtain a Combined Construction and Operating License for applicants seeking to build nuclear power plants that meet certain conditions, such as building on the same site as an existing licensed site or adjacent to an existing licensed site.
- Establish a more effective management structure for America's national laboratories to work with industry while protecting taxpayer money and protecting the labs' ability to conduct the basic research necessary for the federal government.³⁴
- Establish a capabilities-based determination on the best way to ensure energy supplies for domestic military bases. An over-reliance on the commercial electricity grid is a concern for some military planners. While an

attack on the commercial grid could leave domestic military bases without power, this by itself does not justify alternative energy investments.³⁵

- End renewable energy mandates in the Department of Defense. Such mandates undermine the incentive for renewable energy producers to develop competitively priced products, thereby actually impeding the availability of alternatives to carbon-based fuels. In particular, under Section 2911(e) of Title 10 of the United States Code, the Defense Department is obligated to generate 25 percent of its electricity using renewable sources by 2025. This mandate, which is forcing the Pentagon to expend increasing resources on renewable energy rather than on military capability, should be ended immediately.
- Codify Executive Orders 13211, 13212, and 13302 to ensure that proposed agency actions do not adversely impact energy supplies or their availability or lead to higher prices for consumers, and that energy projects should be expedited wherever possible to ensure that the American public and businesses are not burdened by unnecessary government foot-dragging.
- Refuse to mandate more expensive Defense Department energy alternatives. Oil products may be expensive, but they are the least expensive option currently available. Forcing the military to purchase more expensive alternatives would leave fewer resources for training, modernization, and recapitalization, resulting in a less capable military.
- Repeal the Jones Act, which is a protectionist policy for the domestic shipping industry. The century-old act no longer serves a defense purpose and distorts trade and energy markets.³⁶

OVERSIGHT SUBJECTS

Congress should examine the following:

- How much the Department of Defense spends on alternative forms of energy, and whether these expenditures enhance or undermine the mission of the Defense Department—which has started more renewable energy programs than even the Department of Energy.³⁷
- Wasteful renewable energy programs and mandates.³⁸
- The disparity in energy production between federal lands and waters and lands owned and managed by states and private individuals.

- How the Department of the Interior can better manage its energy resources for the benefit of consumers and taxpayers and foster a climate that creates more jobs and investment in the United States.
- How energy development and energy supplies would be affected by Western states having control of more of the federal lands within their borders.

REGULATORY REFORM

The American free enterprise system is the greatest engine of wealth creation in history, yet the economy has been underperforming for years and millions of people still are underemployed or jobless. Taxes are a primary factor, but regulatory excess increasingly inhibits economic growth. Unless constrained, the regulatory state will overwhelm America's entrepreneurial spirit and diminish the freedoms upon which this nation was founded.

MAJOR POINTS

- In exercising its legislative powers under the Constitution, Congress, as the elected representatives of the people, should not delegate policy decisions to executive agencies.
- Congress and the public frequently lack objective information about the impacts of regulation. Too often, agencies fail to properly perform scientific and economic analyses before imposing rules, and many of the analyses that are conducted are biased toward regulation. Regulators selectively pick findings from the academic literature to justify their actions and ignore evidence that contradicts their agenda.
- Reforms are needed to impose accountability on regulatory agencies *and* Congress. Failure to do so will mean ceding even more control of our lives to unelected and unaccountable bureaucrats.

APPROPRIATIONS

Congress should prohibit agencies from expending any funds for:

- Any regulatory activity not specifically authorized by legislation.
- Any regulation that has been promulgated on the basis of research that does not meet federal information-quality standards.

- Any regulation for which agencies have failed to minimize paperwork burdens as required under the Paperwork Reduction Act.
- Research (including risk assessment, benefit-cost analysis, and regulatory impact analysis) that does not conform to information-quality standards.
- Research used in decision-making (including risk assessment, benefit-cost analysis, and regulatory impact analysis) without public disclosure of all data, models, and methods used in research.

LEGISLATION

To achieve the necessary statutory reforms to improve federal regulation, Congress must:

- Require a regulatory impact analysis of legislation that contains major regulatory provisions before a bill can advance to a floor vote (“major” to be defined by statute). All such analyses must meet the standards of the Information Quality Act (to be codified by Congress).
- Require all new major regulations of both executive branch and independent agencies to be explicitly approved by Congress in order to take effect.
- Require a regulatory impact analysis (including benefit-cost analysis) for all major regulations.
- Establish a sunset date for all new major regulations to enable routine retrospective review. Each major regulation would expire on the prescribed date if not explicitly reissued by the relevant agency (through a notice and comment rulemaking) and subsequently approved by Congress.
- Codify and enforce information-quality standards on rulemaking, including regulatory impact analyses undertaken by executive branch agencies *and* independent agencies. Congress shall make compliance with such standards subject to judicial review, and explicitly state that noncompliance will cause regulation to be deemed “arbitrary and capricious.”
- Require all publicly funded research to adhere to information-quality standards if utilized in rulemaking and related decision-making, including risk assessment, benefit-cost analysis, and regulatory impact analysis.

- Require full public disclosure of all data, models, and methods of all research used for risk assessment, benefit-cost analysis, and regulatory impact analysis.
- Limit by statute the presumption of objectivity granted by regulatory agencies to peer-reviewed research used in rulemaking. Such presumption is to be rebutted by a showing, based on a preponderance of the evidence, that peer reviewers did not address information-quality standards, or any identified deficiencies in information quality were uncorrected before the research was used by the agency.
- As a condition of funding, require agencies to subject proposed settlements of litigation or threatened litigation to public notice and comment, as well as to congressional scrutiny. Proposed settlements must meet information-quality standards.
- Prohibit enforcement actions based on deviation from agency guidance. Codify provisions of the “Good Guidance Practices” bulletin from the Office of Management and Budget.³⁹
- Reduce the number of regulatory violations defined as federal crimes. Require *mens rea*⁴⁰ as an essential predicate for any violations treated as crimes, and codify due process requirements in regulatory enforcement. Adopt a “Mistake of Law” defense for any alleged regulatory violation treated as a crime.
- Increase professional staff levels within the Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs (OIRA) to be proportionate to the reasonable worst-case volume of new major regulations produced annually. The cost of staffing shall be borne by regulatory agencies, through a scaled fee levied on each regulation submitted to OIRA for review.

OVERSIGHT SUBJECTS

Congress should examine the following:

- Federal agencies’ adherence to and OIRA enforcement of information-quality guidelines.
- Federal agencies’ abuse of guidance.
- Federal agencies’ violations and OIRA enforcement of the Paperwork Reduction Act.

ENVIRONMENTAL HEALTH AND SAFETY

The Environmental Protection Agency and the National Toxicology Program have—for decades—misused research to misclassify chemicals and to exaggerate their toxicity and carcinogenicity. The agencies sow fear among an anxious public and political sector to engage in regulatory overreach using questionable methodologies. They tout the unobtainable—no health risk.

MAJOR POINTS

- Observational population studies in toxicology are rife with unreliable science. They often involve data dredges intended to establish even the weakest associations between chemicals and health risks to justify ever more regulation.⁴¹
- Rodent studies that expose lab mice and rats to massive doses of chemicals are not a reliable means to establish the risk of cancer to humans, but are commonly used to do so.⁴²
- A “No Safe Threshold” linear regression analysis assumes that any chemical posing a health threat at a high exposure will also pose a health threat at all exposure levels, no matter how low. That assumption is not accurate. There are always thresholds at which any chemical can pose a health risk, and smaller exposures at which toxic effects do not exist. In many cases, very low exposures may actually produce benefits.⁴³
- When regulatory agencies fail to meet federal Information Quality Act standards or the evidentiary requirements delineated in the Federal Judicial Center’s *Reference Manual on Scientific Evidence*,⁴⁴ they nullify the intent of Congress to maximize “the quality, objectivity, utility, and integrity of data and other information used in rulemaking and policy.”⁴⁵

APPROPRIATIONS

Congress should prohibit agencies from expending any funds for:

- Grants to study well-known chemicals that have been safely used for decades, such as Bisphenol A.⁴⁶ Additional rodent studies and statistical analyses that encourage researchers to engage in data dredging are not useful.

LEGISLATION

To achieve the necessary statutory reforms of health and safety policies, Congress must:

- Pass legislation to require Information Quality Act guidelines that are judicially enforceable to control agency science-based policymaking.⁴⁷
- Require regulatory agencies to demonstrate that existing limits on chemical exposures have been set based upon *measurable and significant* risks to public health based on the best-available, peer-reviewed science that employs a weight-of-the-evidence standard and complies with judicial evidentiary standards.
- Require that agencies' rules and regulations should produce economic and health benefits that outweigh the economic costs of the regulations.⁴⁸
- Codify lead-abatement opt-out that would allow homeowners to opt out of the EPA's lead-abatement rule (which regulates removal of lead paint in older dwellings) if there are no children under six and no pregnant women living in their homes, as outlined in a 2008 EPA rule. This opt-out provision was eliminated in 2006, even though lead poses little risk to adults and the rule is expensive to homeowners.⁴⁹

OVERSIGHT TARGETS

Congress should examine the following:

- The need for rules to ensure that agencies abide by Information Quality Act standards and judicial evidentiary standards in the regulation of chemicals.
- EPA programs—both voluntary and mandatory—that undermine chemicals based on regulatory application of the precautionary principle or exaggerated hazard profiles, rather than scientifically sound risk assessments.⁵⁰

- Overly cautious linear non-threshold, carcinogen listings issued by the National Toxicology Program.
- The Food and Drug Administration's actions on Tricolsan to ensure that the agency is considering the best-available, peer-reviewed science in its review of the substance.⁵¹

SCIENCE, DATA ACCESS, AND INFORMATION QUALITY

Federal agencies too often mask politically driven regulations as scientifically based imperatives. The supposed science underlying these rules is often hidden from the general public and unavailable for vetting by experts. But credible science and transparency are necessary elements of sound policy.

MAJOR POINTS

- The Data Access Act⁵² requires federal agencies to ensure that data produced under grants to and agreements with universities, hospitals, and non-profit organizations is available to the public through procedures established by the Freedom of Information Act (FOIA).⁵³ However, the Office of Management and Budget (OMB) has unduly restricted application of the Data Access Act in its guidance to agencies for administering grants.⁵⁴
- The Information Quality Act requires the OMB “to promulgate guidance to agencies ensuring the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.”⁵⁵ However, the Information Quality Act’s effectiveness has been limited by a lack of agency accountability. Courts have ruled that the act does not permit judicial review of an agency’s compliance with its provisions.⁵⁶

APPROPRIATIONS

Congress should prohibit agencies from expending any funds for:

- Any grant for which the recipient does not agree to make all data produced under the grant publicly available in a manner consistent with the Data Access Act, and in compliance with the standards of the Information Quality Act.

LEGISLATION

To achieve the necessary statutory reforms to improve federal policies on data access and information quality, Congress must:

- Require the OMB to amend its guidance on compliance with the Data Access Act (Circular A-110)⁵⁷ in a manner consistent with the plain language of the law, that is, make all federally funded research data subject to FOIA. Lawmakers should also expand the scope of the Data Access Act to include risk assessments, surveys, and administrative orders.⁵⁸
- Amend the Data Access Act to require federal agencies to ensure that data produced under grants and cooperative agreements with state and local governments are available to the public through FOIA.
- Amend the Federal Acquisition Regulation⁵⁹ to require federal agencies to ensure that data produced under contracts (which agencies must use if procuring services) are available to the public through FOIA.
- Mandate that federal awarding agencies require recipients of grants, agreements, cooperative agreements, or contracts to make *all* data produced under the award publicly available in a manner consistent with the Data Access Act.
- Amend the Information Quality Act to (1) allow judicial review of agencies' adherence to the act and to implementing agency guidance, for any final agency action (under any statutory authority), and handling of correction requests under the act; and (2) mandate that agency failure to comply with the Information Quality Act or with its guidelines is an automatic finding of arbitrariness and capriciousness under the Administrative Procedure Act.
- Mandate federal awarding agencies' adoption of the "Final Information Quality Bulletin for Peer Review,"⁶⁰ but eliminate the presumption in the bulletin that "[p]rincipal findings, conclusions and recommendations in official reports of the National Academy of Sciences" adhere to information-quality standards and principles.

OVERSIGHT SUBJECTS

Congress should examine the:

- Agency implementation of the Data Access Act and the Information Quality Act.

ENDNOTES

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