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A CLIMATE AGENDA FOR THE NEW PRESIDENT

*Lisa Heinzerling** †

The Bush Administration squandered eight years denying the reality of climate change and delaying action on it. Nevertheless, the president who comes into office in January will face two happy realities. First, whatever the Bush Administration has done (through obstruction or inaction) on climate change can easily be undone due to its legal and scientific flimsiness. And second, statutes now on the books provide plenty of legal authority for swift action on the most important environmental issue of our time.

We will soon say goodbye to the administration with the worst environmental record in history. Its failures are many and varied. They include misguided deregulation (recall the “reforms” of the New Source Review program, which ensured that virtually no polluter in America would have to install the latest pollution control technology when it renovated its facilities), stubborn inaction (think of the administration’s position—lawless and foot-dragging—on climate change), and cynical dismissals of both law (consider the attempt to turn the word “daily” into “annual” in order to avoid stricter regulation of water pollution) and science (too many possibilities to mention here). There has been occasional progress, such as the regulation of air pollution from boats, lawn mowers, and other “nonroad” engines. But mostly we have seen either no forward movement at all, or large steps backward.

The good news is that the new president can undo these policy failures and cure these regulatory omissions. The bad news is that the Bush Administration’s assaults on law and science have nurtured a culture of cynicism and distrust within the agencies charged with protecting our health and environment, as well as in the courts and in the public at large. This culture will be much harder to dislodge than any discrete policy decision made in the last eight years.

Let’s start with the good news. A new administration can reverse any of the current administration’s policy failures, so long as the underlying statute does not command the result the agency reached during the Bush years.

The bad news, though, is that such a reversal will take time and a lot of words; as the Supreme Court held twenty-five years ago in *Motor Vehicle*

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Manufacturers Ass'n v. State Farm, an agency proposing a change in policy must explain its decision and draw a rational connection between the facts it has found and the decision it has made. The agency may not simply assert, "We won the election; now we get to change the policy." For example, if the new administration wants to heed the call of scientific advisors for the Environmental Protection Agency ("EPA") and strengthen the air quality standard for ozone, it must explain why the standard set in the Bush Administration was mistaken.

Ironically, the fact that many of the Bush Administration's decisions were so legally or scientifically inept will help the new administration: the courts have already invalidated some of these policies. In these cases—which include, for example, the ill-fated attempt to create a trading program for the toxic pollutant mercury—the new administration will likely have an easier time explaining its departure from the Bush Administration's approach.

However, because any change in policy will take time and resources, the new administration should carefully identify which changes ought to come first. To me, the answer is clear: the first order of business is to take action on climate change—the defining environmental issue of our time, and one for which the window of effective action is rapidly closing. When scientists tell us that "the Arctic is screaming" and that we must swiftly reduce greenhouse gases or face the prospect of living on a "different planet," an administration that has any hopes of pursuing sustainable environmental policies must first tackle climate change.

Here are just a few of the things the new administration should do, stat:

1. The EPA administrator should formally find that greenhouse gases endanger public health and welfare within the meaning of the Clean Air Act. The EPA has already done the work on this; the Advance Notice of Proposed Rulemaking it issued in July contained all of the evidence necessary to back up such a finding. Little more than the administrator's signature is required. The agency would do well to allow the public to comment on its conclusions before the administrator makes a formal finding. But even following a sixty-day comment period, the endangerment finding could be issued in the first 100 days of the new administration.

The endangerment finding would have a significant legal effect, triggering regulation of many different sources of greenhouse gases under the Clean Air Act. The finding would also have an enormous symbolic effect, ending eight years of denial and deception about the climate.

2. With the endangerment finding in hand, the EPA should regulate new stationary sources (pollutant sources, like factories or power plants, that are fixed in place) under the Clean Air Act. Here, too, the EPA has already done much of the necessary work. After the

Supreme Court ruling in *Massachusetts v. EPA*, the EPA devoted fifty-three employees and more than six months to working on standards for greenhouse gases, including standards for the largest stationary emitters. The EPA should turn its work on this project into law.

3. The EPA should reverse course and grant California permission—a “waiver,” in Clean Air Act parlance—to regulate greenhouse gases from motor vehicles. Section 209(b) of the Clean Air Act provides that California may regulate motor vehicles as long as its standards will be at least as protective as federal standards and, among other things, its standards are necessary to meet “compelling and extraordinary conditions.” In denying the waiver in the Bush Administration, the EPA departed from longstanding practice and ruled that, with respect to regulation of greenhouse gases, California’s program to regulate motor vehicles, standing alone and apart from the rest of California’s clean air program, must meet the conditions for a waiver. The EPA then ruled that the greenhouse gas program did not meet those conditions because climate change will be bad everywhere, and thus California’s problems related to climate are not “compelling and extraordinary.”

Undoing this ruling should be like shooting fish in a barrel. The EPA must first return to its decades-long policy, supported by explicit statutory language, of looking at California’s standards “in the aggregate” when deciding whether the conditions for a waiver are met. Then the EPA must recognize—as it previously had for a long time—that the existence of a problem in states other than California does not preclude California from enacting its own standards.

Granting California’s waiver will have an appreciable effect on greenhouse gases from motor vehicles. Eighteen states have adopted or are in the process of adopting California’s program. Together, these states represent almost half of the U.S. population. Granting the waiver will thus change the greenhouse gas profile of new cars bought by millions of Americans.

4. The United States Forest Service should do whatever it needs to do to revive the Clinton-era rule protecting almost sixty million acres of roadless areas in our national forests and then ensure that the rule remains in force. The rule has been tangled in legal proceedings almost since the day it was announced. After a legal challenge to the Clinton-era rule, the Bush Administration replaced this protective rule with one simply allowing states to ask for protection of the roadless areas within their borders. A district judge in California invalidated the Bush rule and reinstated the Clinton rule, only to have a judge in Wyoming recently de-

cide that the Clinton rule was unlawful after all. The new administration should make its way through whatever procedural knots confront it to reinstate and implement the original rule. Reinstatement of the rule should include renewed protection for the Tongass National Forest in Alaska, the largest national forest in the country. The Bush Administration exempted the Tongass from the Clinton-era rule, and the California court's reinstatement of that rule did not include the Tongass. Taking these steps will help to address climate change, not through traditional pollution control, but through the preservation of carbon sinks that can absorb some of the carbon we discharge into the atmosphere.

Needless to say, this is only a handful of the projects the new president can and must undertake to begin to address climate change. Despite the incompleteness of the list, three features of the new administration's opportunities to tackle climate change stand out. First, the new president can take swift and significant action immediately after taking office, under the laws already on the books. While Congress slouches toward a federal law on climate change, the new executive can show the way. Second, the next administration must attend to agencies beyond the EPA and to statutes beyond the Clean Air Act. Third, pollution control is not the only way to begin to take on climate change. Protecting carbon sinks, and other similar strategies, must also be part of the picture.

While pursuing these policies, the new administration must also be mindful of the damage done by the Bush Administration's dismissive attitude toward law and science. Civil servants at the EPA, the Forest Service, the Department of the Interior, and other agencies must receive the attention and respect of the new president. Many experienced civil servants have hung on through the lean years, hoping for an electoral change that will let them do their jobs again. Repairing the relationship between the White House and civil servants will require sincere and sustained effort on the part of the president.

Two concrete first steps would help. First, the president should resolve not to "break ties" between the agencies and the White House by stepping into a technically complicated dispute and simply taking sides, as the Bush Administration did in choosing the form of the new air quality standard for ozone. Second, the president should put a tighter leash on (or perhaps cage entirely) the Office of Information and Regulatory Affairs, which in the past eight years has become the go-to place for deregulation and inaction. In the name of "smarter regulation" and economic efficiency, this office has squelched or softened many rules that made sense from both an environmental and an economic perspective. The president should put the agencies, not a small cadre of anti-regulatory economists, back in charge of regulatory policy.

The Bush Administration's failed environmental policies have also taken a toll on the agencies' relationships with the courts. When the D.C. Circuit—not exactly the leading edge of the environmental movement—

takes to comparing the EPA to Lewis Carroll's Queen of Hearts, you know something is amiss in the agency-court relationship. With time, and with careful attention to—rather than abrupt dismissal of—the statutes under which they operate, the agencies should be able to set things right with the courts.

And perhaps most importantly, the new administration must restore credibility with the public. Indeed, not much of the project described above will succeed unless the public is on board; the actions needed to address climate change are too dramatic to go forward if the public balks. The new administration must unwind the tight ball of cynicism and distrust that has grown during a lawless and deceitful presidency. On climate, an important first step is finally to say—publicly, formally, and forcefully—that climate change is upon us, that we are to blame, and that we must do something about it. Now.