ARTICLES

EARL BLUMENAUER*

Beyond the Backlash: Using Performance-Based Regulations to Produce Results Through Innovation

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I
INTRODUCTION

A. The Importance of Regulatory Reform

In January 2011, President Obama issued Executive Order 13,563, which addresses review of administrative regulations.[1] Announced by the President on the editorial pages of the *Wall Street Journal*,[2] this initiative has far-reaching potential. Administrative regulation is the issue that will not go away. This perennial political piñata, which has provided a target for generations of politicians, has new potency in an era of "death panels" and the "government takeover of healthcare." The federal government's responses to crises such as the Upper Big Branch Mine explosion,[3] the Deepwater Horizon oil platform fire and spill,[4] and the near-collapse of the nation's economic system have legitimized critics of government regulation, regardless of their point of view.

In May of 2011, the White House released agency reports responding to the executive order.[5] These reports marked the start of a public review process of existing and new regulations. However, it is now time to go beyond merely weeding out redundant, outmoded, and ineffective regulations. That exercise, while useful, fails to address the nature of the regulatory process itself and what it means for American governance.

The discussion of regulatory reform should be a discussion of how the federal government does business. There is a tremendous

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1 Improving Regulation and Regulatory Review, Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

2 Barack Obama, *Toward a 21st-Century Regulatory System: If the FDA Deems Saccharin Safe Enough for Coffee, then the EPA Should Not Treat It as Hazardous Waste*, WALL ST. J. (Jan. 18, 2011), *available at* http://online.wsj.com/article/SB10001424052748703396604576088272112103698.html.

3 Sabrina Tavernise, *Report Faults Mine Owner for Explosion That Killed 29*, N.Y. TIMES (May 19, 2011), *available at* http://www.nytimes.com/2011/05/20/us/20mine.html.

4 *See generally* NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING: RECOMMENDATIONS (Jan. 2011), *available at* http://www.oilspillcommission.gov/sites/default/files/documents/OSC_Deep_Water_Summary_Recommendations_FINAL.pdf.

5 *See, e.g.*, Dep't of Justice, PRELIMINARY PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES, THE WHITE HOUSE (May 18, 2011), http://www.whitehouse.gov/files/documents/2011-regulatory-action-plans/DepartmentofJusticePreliminaryRegulatoryReformPlan.pdf.

opportunity to craft better programs to create more value for the public and regulated entities, and to demonstrate the capacity of the political process to solve problems and make improvements.

This Article will examine the importance of a fresh approach to the federal regulatory process. Such an approach is important because regulation goes to the very core of governance. Regulation is how things are accomplished in the United States—how resources are allocated and activities are overseen. All the major domestic issues of the day—health, energy, infrastructure, climate, and finance—have significant regulatory components. Given the pervasive impact of regulation, the goal of regulatory reform should not just be to adopt a better approach to the regulatory process, but also to form a building block of trust and value-sharing that will promote better governance through a less toxic political atmosphere. At a time when the Obama administration and Congress have gone head-to-head over the executive confirmation process, government shutdowns, and the national debt, the stakes are high.

B. Regulatory Reform Presents an Opportunity

We urgently need to enact long-term, comprehensive, and often counter-intuitive solutions to address the challenges our nation faces. Unfortunately, such solutions are ill-suited for today's political climate or for the preferred communication tools of sound bites, blogs, Twitter feeds, and YouTube videos.

That is why the Obama Administration's current interest in regulatory reform is so significant. For a generation, every President has been involved with regulatory reform to some extent. Ronald Reagan created the Office of Information and Regulatory Affairs.[6] In 1993, Bill Clinton issued Executive Order 12,866, entitled "Regulatory Planning and Review," and asked Vice President Gore to lead a review and reform of federal regulation.[7] However, reforming the regulatory process offers the Obama administration a critical opportunity to improve the federal government's effectiveness as well as our political process. Rather than another instance of "business as usual," regulatory reform is more important now than ever before.

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6 *See* Office of Mgmt. & Budget, *About OIRA*, THE WHITE HOUSE (Apr. 8, 2010), http://www.whitehouse.gov/omb/inforeg_administrator.

7 Regulatory Planning and Review, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

II
THE PROMISE OF PERFORMANCE-BASED REGULATION

A. The Pacific Northwest Experience

For over a third of a century, I have been deeply involved with public policy, environmental protection, and infrastructure development in the Portland metropolitan area. As a result, I've accumulated firsthand experience with federal regulation from the perspective of the regulated, as our community has earned a reputation for livability, environmental protection, and innovative design. We pioneered the early development of light rail transit and, more recently, the reintroduction of the modern streetcar to America's cities. The Pacific Northwest region has also pioneered impressive energy conservation achievements, using "least cost planning" for energy facilities to produce the equivalent energy of two Grand Coulee dams through conservation measures.[8]

We have also made great progress in the areas of land use, air quality, and water quality, emerging as a national model worthy of study and emulation. My experience with local examples of these issues convinced me of the importance of the President's Executive Order of January 2011. In fact, regulatory flexibility and innovation have been key to many of our most effective approaches. Starting with a key federal decision in the 1970s to allow resources for urban freeways to be redirected to light rail and smaller road projects, local governments embarked upon a series of partnerships with federal and state regulatory agencies that have dramatically enhanced our region's livability and environmental quality.

My experiences in Portland and in Congress have persuaded me that a key element of making regulations work more sensibly is to make those regulations "performance-based." By focusing on desired outcomes rather than proscribed procedures, such rules provide regulated parties with the latitude to develop solutions that achieve the required results within the required time. The rules may describe a particular approach or technology as a "safe harbor" that will be accepted as complying with the rule; however, that specific tool or technique is not required. Instead, regulated businesses, individuals, and communities are free to use a variety of solutions as long as they achieve the same required *results,* such as the elimination or reduction

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8 Ellyn R. Weiss & James Salzman, *The Greening of American Energy Policy*, 63 ST. JOHN'S L. REV. 691, 699 (1989).

of a pollutant, a reduction in workplace accidents, or an improvement in wetland function.[9]

The following real-world examples clarify the benefits of performance-based regulation. At the same time, these examples illustrate a point that I will turn to at the end of this Article. If we are to overcome the partisanship, rampant skepticism, and misinformation that frustrates public discourse today, our political system needs some success stories. Such stories would involve government programs that deliver tangible improvements with clear benefits to the public at minimum cost to the regulated.

1. Downtown "Parking Lid"

In the 1970s, policymakers urged the City of Portland to comply with part of an air quality maintenance plan required by the Clean Air Act. Together with the EPA and state regulators, the City permanently capped the total number of parking spaces in the downtown core[10] (at the time, downtown Portland had the largest concentration of office employment in the metropolitan area). The plan (nicknamed "the Parking Lid") allowed parking when it was part of new development in the downtown area, but parking was subject to strict ratios and only permitted up to a specified limit.[11]

Bolstered by improved vehicle technology, the Parking Lid helped the metropolitan region achieve compliance with Clean Air Act requirements.[12] However, the number of parking spaces in downtown Portland was bumping up against the Parking Lid.[13] Approaching the limit raised the prospect that proposed office buildings would be denied parking altogether, thereby hastening the pace at which new development was locating outside the downtown area.[14]

The city submitted a proposal to the Oregon Department of Environmental Quality (DEQ) that detailed a new approach to

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9 Cary Coglianese, Jennifer Nash & Todd Olmstead, *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection*, 55 ADMIN. L. REV. 705, 707 (2003).

10 *City Club of Portland Report on Downtown Parking*, CITY CLUB OF PORTLAND BULL., Mar. 19, 1993, at 285, 287, *available at* www.pdxcityclub.org/content/downtown-parking.

11 *Id.* at 287-88. To enable continued growth, the city and region expanded transit service to the downtown. *Id.* at 287.

12 Janet Christ, *Lifting the Lid*, OREGONIAN, Aug. 11, 1995, at B1 (on file with author).

13 *Id.*

14 *Id.*

enforcing limits on ozone and other automobile air pollutants. By eliminating the numeric limit (lid) on downtown parking spaces but continuing parking ratios and extending those to the areas surrounding the original downtown area, the City doubled the land area subject to parking regulations.[15] The DEQ approved the new plan, and incorporated it into the Portland region's maintenance plans for carbon monoxide and ozone.[16] The changes to the maintenance plan mandated continued compliance with the Clean Air Act while extending the transit-oriented and pedestrian-friendly character of the original downtown to more of the Central City.[17]

2. EPA Innovative Air Permits

In the 1990s, Intel Corporation participated in an EPA pilot project (administered by the DEQ) to develop an innovative alternative to the process-by-process, machine-by-machine agency review required by the Clean Air Act's new source review process. A flexible air permit gives companies the freedom to make operational changes at manufacturing facilities in exchange for ironclad commitments that limit the emissions of air pollutants.

The DEQ program was one of several state pilot permits supported by the EPA over a ten-year period. In 2002, the EPA issued an evaluation[18] of five of these pilots (including Intel Oregon's permit) that concluded that the pilots had "achieved 30 to 80 percent reductions in actual plant wide emissions and/or emissions per unit of production."[19] As a result, in 2009 the EPA amended its new source review rule for air permitting to incorporate the "flexible air permits" approach.[20]

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15 *Id*.

16 *See* Air Qual. Div., *Portland Area Carbon Monoxide Maintenance Plan*, DEQ (Dec. 10, 2004), http://www.deq.state.or.us/aq/planning/docs/pdxCOplan.pdf; *Central City Transportation Management Plan*, CITY OF PORTLAND (1995), http://www.pdx.edu/fap/sites/www.pdx.edu.fap/files/1995_Central_City_TMP.pdf.

17 *Id.*

18 Office of Air Qual. Planning & Standards, *EPA Evaluation of Implementation Experiences with Innovative Air Permits*, EPA (Dec. 20, 2002), http://www.epa.gov/ttn/caaa/t5/memoranda/iap_eier.pdf.

19 *Fact Sheet: Final Flexible Air Permitting Rule*, EPA (Sept. 29, 2009), http://www.epa.gov/NSR/documents/FAP_FactSheet.pdf.

20 *Id.*

3. Extension of Boardman Coal Plant's Air Conformity Deadline

Portland General Electric (PGE) and the DEQ are currently developing an example of air permitting flexibility aimed at resolving the future of Oregon's only coal-fired electric power plant. EPA's new rules—which require significant reductions in mercury emissions and other air contaminants—presented PGE, the Oregon DEQ, and environmental advocates with a dilemma. To fully amortize the cost of plant improvements needed to fully comply with EPA's rules by their 2014 deadline,[21] PGE would need to operate the plant until 2040.[22] The need for the plant until 2040 was bad news for the state and environmentalists who wanted to eliminate the plant's greenhouse gases as soon as possible.

Instead, DEQ and PGE reached a compromise: PGE would make partial improvements to the plant, fully meeting the mercury reduction requirements and coming close to satisfying other provisions of the rule. In exchange, PGE would commit to closing the coal-fired plant in 2020 (twenty years earlier than required for full compliance).[23] This example of flexible administration can become a model for performance-based regulatory solutions, and it is exactly why the President's review and the national discussion are so timely and important. It is past time to clarify and promote the value of flexible solutions that meet compliance objectives in a timely manner.

B. The Model for Performance-Based Rules: SO_2 Cap and Trade

Nationally, the most successful application of performance-based regulation is the cap and trade regimen for sulfur dioxide (SO_2). The 1990 Clean Air Act Amendments established the EPA's Acid Rain Program to address the public health, water quality, and environmental ills caused by emissions of sulfur dioxide (SO_2) and

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21 Statement of Need and Fiscal and Economic Impact Accompanying Proposed Rule Changes Relating to Regional BART Haze Rules, Or. Admin. R. 340-223-0060 (proposed Apr. 2, 2010), http://www.deq.state.or.us/aq/haze/docs/pge/fiscalEconImpSmtfinal.pdf.

22 *PGE Files Revised Resource Plan with OPUC*, PORTLAND GENERAL ELECTRIC (Apr. 9, 2010), http://www.portlandgeneral.com/our_company/news_issues/news/04_09_2010_pge_files_revised_resource_pl.aspx.

23 *PGE Files New Plan to Close Boardman Coal Plant by 2020*, PORTLAND GENERAL ELECTRIC (Aug. 31, 2010), http://www.portlandgeneral.com/our_company/news_issues/news/08_31_2010_pge_files_new_plan_to_close_b.aspx; Scott Learn, *PGE's Coal-Fired Boardman Plant Gets Approval to Close in 2020, with Fewer Pollution Controls*, OREGONIAN (Dec. 9, 2010), *available at* http://www.oregonlive.com/business/index.ssf/2010/12/pges_coal-fired_boardman_plant.html.

nitrogen oxides (NO_x) from coal-fired power plants.[24] The EPA's rules capped national SO_2 emissions at about half the 1980 emission level, set deadlines for compliance, and then issued "allowances" to each polluter for their share of the emissions permitted under the cap.[25] Companies that achieved greater than required reductions were free to sell their unneeded allowances to the owners of plants that needed more time or required more costly retrofits. This market flexibility greatly increased the private sector's motivation to comply, as well as the cost-efficiency of their efforts. A 2003 study by the Office of Management and Budget (OMB) concluded that "the Acid Rain program accounted for the largest quantified human health benefits—over $70 billion annually—of any major federal regulatory program implemented in the last 10 years, with benefits exceeding costs by more than 40:1."[26] This clear success has raised hopes that a similar flexible cap and trade system could also work for reducing carbon emissions.

C. Examples of the Need for Regulatory Reform

The successful cases where regulatory flexibility has enabled faster, cheaper, and environmentally better results make our current regulatory approach all the more painful. The following examples show the continued need for developing a new regulatory paradigm based on outcomes.

1. Bull Run Water Filtration

Federal cryptosporidium regulations, currently a major issue in Portland, are a perfect opportunity to implement performance-based standards. The city faces a daunting regulatory challenge: eliminating cryptosporidium contamination from a public water system that has no cryptosporidium. Portland draws its water from the Bull Run watershed, a reserve on the slopes of Mt. Hood set aside by the United States in 1895. No one lives in the forests above the Bull Run reservoir. Public access is prohibited. No logging occurs. The result is incredibly pure water—so clean that no filtration is required before it

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24 *Overview: The Clean Air Act Amendments of 1990*, EPA, http://www.epa.gov/air/caa/overview.txt (last visited Oct. 26, 2011).

25 *Id.*

26 *Cap and Trade: Acid Rain Program Results*, EPA, http://www.epa.gov/capandtrade/documents/ctresults.pdf (last visited Sept. 27, 2011).

flows into the city's water system. In particular, no cryptosporidium contamination has been detected in the city's water since 2002.[27]

Therein lies the problem. The EPA has written a rule that requires unfiltered water systems to be treated with two redundant disinfectants to ensure that no cryptosporidium oocysts sicken local residents. To comply with EPA rules, Portland must build a treatment plant it does not need—despite the fact that a yearlong water-testing program showed zero cryptosporidium contamination. Portland is now seeking a waiver[28] that is not even permitted under EPA rules; rather, it relies on a procedure in the Safe Drinking Water Act itself.[29] Its goal is to demonstrate to the Oregon Health Division (the EPA's delegate) that the city can continue to achieve the performance sought by the EPA's cryptosporidium rule[30]—a specified, very low level of oocyst occurrence in water samples—through watershed protection rather than through a $100 million new treatment plant.[31]

2. Combined Sewer Overflows

Federal regulators have been reluctant to embrace new technologies that might be cheaper and greener than more traditional engineered solutions. For example, engineered solutions for reducing combined sewer overflows (CSOs) have been the preferred alternative.

As Commissioner of Public Works for the City of Portland in 1990, I was charged with developing a program to reduce water pollution from our combined sanitary sewer and storm water system. This work was my first experience with what seemed to be the unnecessary rigidity of the federal regulatory process. The regulatory community had little interest in approaches that would have reduced

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27 Scott Learn, *Tests of Bull Run Water Find No Cryptosporidium; Portland Wants to Skip Treatment Plant*, OREGONLIVE.COM (Jan. 3, 2011, 8:49 PM), *available at* http://www.oregonlive.com/environment/index.ssf/2011/01/750_samples_of_bull_run_water.html.

28 Pub. Health Div., Or. Health Auth., *Bull Run Variance Request*, OREGON.GOV, http://public.health.oregon.gov/HealthyEnvironments/DrinkingWater/Pages/BullRunVarianceRequest.aspx (last visited Oct. 26, 2011).

29 Safe Drinking Water Act, 42 U.S.C.A. § 300f (West 1996).

30 Or. Health Auth., *supra* note 28.

31 *See* Office of Water, *Cryptosporidium: Human Health Criteria Document*, EPA (Feb. 3, 2001), http://water.epa.gov/action/advisories/drinking/upload/2009_02_03_criteria_humanhealth_microbial_crypto.pdf. On November 29 the Oregon Health Authority's Public Health Division proposed to grant a variance to the City. Jim Redden, *City May Win Bull Run Variance from State*, PORTLAND TRIB. (Nov. 30, 2011), *available at* www.portlandtribune.com/news/story.php?story_id=132260611069417200.

stormwater overflows through more passive treatment, such as bringing urban streams out of concrete pipes into a more natural state with bio-filtration; installing bioswales and drainage sumps to capture storm water from streets; and disconnecting downspouts from roofs. Other communities have successfully employed these and other similar steps to reduce the amount of water entering the sewers, putting less strain on the system. Had these lower-cost steps been implemented, some of the money that was ultimately spent on engineered concrete solutions could have been sent to upstream farmers and ranchers to reduce water contamination from fertilizers, pesticides, and animal waste. This approach would have resulted in a cleaner river, with the potential to save a great deal of disruption, construction, and money.

The EPA had a defined solution: giant underground pipes and tanks that would hold runoff from large downpours until the city's sewer plants could process the mixture of sewage and millions of gallons of rainwater. This gray, concrete solution was known to work, albeit at a great cost. In Portland, the system's total cost was over a billion dollars. However, the green solution had never been tested because the regulations didn't allow it.

The City of Portland started building the first phases of the federally required "big pipe" approach. At the same time, it also launched the Clean River Program, which included greener solutions. Such solutions included restoring wetlands; disconnecting downspouts from the sewers; "day lighting" streams long-buried in pipes; planting trees and using vegetative filters along stream banks; and creating "green streets" to soak up rainwater rather than let it flow directly into sewer pipes.[32]

By 1999, even though the "big pipes" had been installed or were being constructed to serve the northern and western parts of the city's system, Portland had also gained experience with the green components of the Clean River Project. Consequently, the City of Portland asked the DEQ and the EPA to modify the "Stipulated Final Order" governing the sewer cleanup.[33] Portland asked to be allowed to cancel the largest of the three pipe projects; instead, it wished to

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32 Lynne Terry, *Portland Hopes Testing Will Help It Avoid Building Water Treatment Plant*, OREGONLIVE.COM (Jan. 12, 2010, 2:11 PM), http://www.oregonlive.com/news/index.ssf/2010/01/portland_hopes_testing_will_he.html.

33 BUREAU OF ENVTL. SERVS., CITY OF PORTLAND, COMBINED SEWER OVERFLOW MANAGEMENT PLAN: DRAFT EXECUTIVE REPORT 3-1, 3-5 (1993) (on file with author).

rely on vigorous implementation of the natural treatment options of the Clean River Program, capturing and diverting enough stormwater to prevent sewer overflows into the river as effectively as the "big pipe" would. The EPA disagreed—it would continue to require concrete storage for runoff. However, state and federal regulators did allow the city to reduce the diameter—and cost—of the remaining big pipe.[34]

Although the natural, lower-cost options came later and at a smaller scale than we had originally hoped, the project did benefit from their inclusion—lessons that will hopefully benefit other cities as they work on their own CSO problems.

With over 1000 communities struggling with CSOs, opportunities abound for demonstrating the value and cost savings of a performance-based approach. The City of Philadelphia is currently working with EPA Region 3 and the Pennsylvania Department of Environmental Protection to apply these principles citywide to deal with their significant water quality problems.[35] Officials there hope to demonstrate how bioswales, removal of impervious surfaces, and rooftop downspout disconnects all hold significant promise for environmental protection and enhancing the livability of the city, while saving money.

My hope is that our federal partners are not just experimenting, but are actually building flexibility into their compliance requirements. The City of Philadelphia is not going away anytime soon. If they fail to meet their project commitments, federal regulators can certainly force compliance through engineering solutions that rely on "big pipes" and traditional treatment. There is little to be lost by allowing a reasonable and less expensive plan to proceed.

3. "TSUB"

Water and air quality rules and practices are not the only regulations that need to be reexamined. Transportation is filled with opportunities for comprehensive performance-based regulations. For decades, federal transportation dollars have been allocated for

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34 *Fact Sheet: Portland Combined Sewer Overflow (CSO) Management*, DEP'T ENVTL. QUAL., http://www.deq.state.or.us/about/eqc/agendas/attachments/2007june/L-AttACSO Factsheet.pdf (last visited Oct. 26, 2011).

35 *See* Philadelphia Water Dep't, *Green City, Clean Waters*, CITY OF PHILADELPHIA, http://www.phillywatersheds.org/what_were_doing/documents_and_data/cso_long_term _control_plan; *see also Building Green: A Success Story in Philadelphia*, EPA (2010), http://water.epa.gov/polwaste/green/upload/green_building_philly_widescreen.mov.

additional highways without any requirement to evaluate the impacts of these investments on congestion or air quality, much less their cost-effectiveness. In fact, highways are often the most expensive way to move people and goods, even without considering "external costs" to the environment, public health, or a community's livability.

Transit investments, however, are a different story. For years, the Federal Transit Administration (FTA) applied the "Transportation System User Benefit" (TSUB) rule[36] to measure the effectiveness of public transit capital projects.[37] However, the TSUB is based on the "travel time savings" for a commuter on public transit as compared to that of a commuter who drives a car in the same corridor. TSUB measurements focus on the distance traveled, vehicle speeds, and the amount of automobile congestion—a formula that favors long-distance commutes with few stops.[38] As a result, streetcars and local bus projects that provide short trips in urban centers and main streets—areas of more compact development where walking, biking and transit use make more sense than driving—do not receive the federal funding required to implement streetcars and local buses that would shorten trips. Shifting the FTA's focus to performance-based standards would enable communities to use federal investments to develop urban transit projects that meet local needs.

III
THE COMPONENTS OF SUCCESSFUL REGULATORY REFORM

A. Essential Elements of Performance-Based Regulation

Clearly, there is a real opportunity to cut through the regulatory morass by using performance-based regulations that focus on the desired outcomes (whether those outcomes are to remedy existing problems or to avoid creating new ones). Such regulations would include these elements:

1. Comprehensive rather than piecemeal solutions. Successful performance-based regulations must clearly identify a standard that is at least as strong and protective as the current regulatory approach.

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36 49 C.F.R. § 611 app. A (2001).

37 It is important to note here that similar effectiveness evaluations have never been required for large, expensive, and often times questionable highway projects.

38 Dep't of Transp., *Introduction to Major Investment Planning*, FED. TRANSIT ADMIN., http://www.fta.dot.govt/12304-2416.html (last visited Oct. 26, 2011).

2. Responsible Partnerships. Government agencies, businesses, and industry partners must be held accountable. Parties that have a history of abuse, mistakes, or hostility should not be included.

3. Specific, quantifiable outcomes, transparent processes, and measurements. This is not the time for subjective decision-making and murky processes; the success of performance-based regulations depends on the confidence of the public as well as the regulated parties.

4. Accountability enforcement. If the regulated parties do not meet their commitments, there needs to be specific compliance measures taken to ensure that public health and safety, taxpayer investments, and the environment are protected. Penalties for noncompliance should provide disincentives—not just for participants, but for others who may consider performance-based regulation in the future. The public must have confidence in the integrity of the process as well as the likelihood of the outcomes; participants must be assured that everyone who partakes will be held responsible for meeting the standards.

5. Voluntary participation, at least initially, as performance-based regulations are developed. Whether regulations apply to air and water quality, transportation, or finances, affected parties should have a variety of ways to comply, including voluntary participation in performance-based programs. As we develop a track record of successful programs, we will undoubtedly see greater interest and participation. Hopefully, we will be able to replace traditional regulatory approaches with effective performance-based regulations.

B. Key Advantages of Performance-Based Regulations

A performance-based regulatory approach offers several significant advantages. First, performance-based regulations create an opportunity to foster innovation and harness market forces. Harnessing market forces to reduce a power plant's SO_2 and NO_x emissions is quicker and less expensive than a traditional, prescriptive approach. Similar opportunities abound for people to innovate, lower costs, and increase markets as they participate in allocating responsibilities and benefits.

Performance-based regulations can also create more incentives for compliance. A classic example is the environmental cleanup of

Superfund sites, particularly if the site has been "orphaned" (i.e., the parties responsible for the contamination are no longer present). Since no one has any incentive to clean up the site, there is little or no value placed on accelerated performance, getting rid of the pollution faster or recycling the land to productive use.[39] In other regulatory contexts, no one person is actually responsible for the ultimate outcome; for example, no one agent is actually responsible for saving an endangered species. The current regulatory systems offer no incentives for early compliance. As a result, the years of study, litigation, struggle, and political dispute embedded in our current regulatory framework result in increased costs, continued pollution, and ultimately, delays in accomplishing the stated objectives. Regulatory reform gives us an opportunity to actualize the benefits of earlier compliance, which are certainly real and important.

By moving to a performance-based system and allowing parties to retain any savings gained from earlier compliance, we can reward responsible performance rather than punishing those who attempt to avoid compliance, delay required activities and investments, and/or game the system. Americans have become increasingly concerned about the government's ability to implement solutions at a time when federal agencies charged with consumer, financial, and environmental protections are stressed, underfunded, and challenged by conflicting political demands. This lack of ability poses serious problems. However, we can design performance-based regulations to be less onerous for regulatory agencies, as well as for those being regulated. In a time of great controversy and scarce resources, this is a very significant advantage.

The federal government is ideally equipped to deal with large corporations or governments through long-term relationships, funding streams, and enforcement powers—capabilities that can be used, through performance-based regulatory approaches, to create a less adversarial relationship between the regulated and the regulators.

The existing regulatory processes may no longer be relevant to today's problems. From taxation, to energy, to agriculture, the increasing complexity of today's issues often eclipse the federal government's capacity to implement or enforce meaningful regulations using current approaches. Performance-based standards

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39 *See generally Summary of the Comprehensive Environmental Response, Compensation, and Liability Acts (Superfund)*, EPA, http://www.epa.gov/regulations/laws/cercla.html (last visited Oct. 26, 2011).

that give latitude to individual participants can change that dynamic by providing an incentive—as well as the flexibility—to do it faster, cheaper, and more efficiently.

IV
CONCLUSION

The President's executive order on regulation comes at a critical juncture for our nation. The current era of political battles, media deconstruction, and special interest empowerment has fundamentally altered the political and economic landscape.

Major issues of our day, such as climate change, have been hopelessly distorted. For example, large numbers of the public dismiss the consensus of the scientific community, just as they continue to entertain and sow doubts about the President's birthplace despite overwhelming factual evidence to the contrary.

Public opinion polling has consistently shown that Republicans and Democrats differ profoundly in their attitudes and beliefs. Importantly, it is those different worldviews—those individual frames of reference—that determine in significant part how, and whether, people perceive factual information.[40]

Examples abound. A majority of Americans are convinced that President Obama raised taxes when, in fact, the Economic Recovery Act *reduced* tax levels for ninety-five percent of working families.[41] Similarly, half of the American public thinks that gas taxes rise every year,[42] even though the federal government has not raised gas taxes since 1993. This belief greatly complicates our efforts to raise enough revenue to rebuild and renew our country and replenish the depleted highway trust fund. Finally, surveys repeatedly show that the public thinks that the portion of our budget that goes to foreign aid is too high—even as they continually overestimate the actual portion (one percent) by a factor of ten.

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40 *See generally* GEORGE LAKOFF ET AL., DON'T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE (1st ed. 2004).

41 COUNCIL OF ECON. ADVISORS, EXEC. OFFICE OF THE PRESIDENT, THE ECONOMIC IMPACT OF THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009: SECOND QUARTERLY REPORT, (Jan. 13, 2010), *available at* http://www.recovery.gov/About/Documents/100113-economic-impact-arra-second-quarterly-report.pdf.

42 Melissa Lafsky, *How Often is the Gas Tax Raised? Most Americans Have No Clue*, THE INFRASTRUCTURIST (Jan. 21, 2010), http://www.infrastructurist.com/2010/01/21/how-often-is-the-gas-tax-raised-most-americans-have-no-clue/.

It is clear that we need to find a different way to communicate if we are to make any progress. A Presidential initiative to embrace performance-based regulations would be a powerful step towards restoring the American public's confidence in the government, and it would reshape the public's view of major national issues and controversies.

Creating a tangible outcome that does not require interpretation is the most compelling antidote to rampant skepticism about government performance. A simple action by the federal government would set an unmistakable example of credibility and common sense confidence to the American public. For example, we could embrace California's standard for environmental review (which is arguably stronger[43] than the federal requirement) rather than insisting on a separate, redundant, and expensive NEPA process. We should not miss the opportunity to do so.

Allowing a city to save a hundred million dollars by avoiding an unnecessary treatment plant to prevent a nonexistent threat from cryptosporidium requires no third-party interpretation or political spin. Empowering local communities to employ cheaper, greener, and simpler technologies for the same or better results is an important step in demonstrating that the federal government can listen, process, and deliver results.

As the world changes, it is clear that the United States is going to have to operate differently. We will continue to be challenged by the intensity of activity, the increased need for subsidies, and questions about who benefits, how much, and at what price. To the extent that we are able to build a foundation of trust due to successful performance-based regulation of essential government functions, that ultimate task will be easier and progress will come more smoothly and quickly.

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43 *See* David Huard, *What is Really Causing Renewable Project Failures in California?*, ENVIRONMENTAL LEADER (May 17, 2011), https://www.environmentalleader.com/2011/05/17/what-is-really-causing-renewable-project-failures-in-california/.