

The Environmental FORUM[®]

Advancing Environmental Protection Through Analysis • Opinion • Debate



Round Two: Obama, Triumphant, Faces a Divided Congress

Rating Obama
*A Report Card
and Scorecard*

Carbon Taxes
*Why Conservatives
Should Support*

Contaminants
*Water Treatment
and the New Arsenic*



THE FORUM

A Report Card on Obama's First Term, and a Scorecard on What He Needs to Do in the Next Four Years

This magazine has published many critiques of the government's efforts in environmental protection, but only rarely in the form of a report card. In the George H. W. Bush administration, Bruce Babbitt, then president of the League of Conservation Voters, gave Congress a D and Henry Waxman, the chair of an influential House panel, gave the president a C-. In the George W. Bush administration, the libertarian Property and Environment Re-

search Center gave the president a surprising D, for failing on market reforms. But if memory serves, that's about it.

In this issue we employed a more systematic approach, asking a broader group of observers and stakeholders to grade President Obama's first term. We also asked them to provide a scorecard on what the president can do — what he *needs* to do — in his second term to advance environmental protection.



“While President Obama’s record has not been perfect, he’s made enormous environmental achievements in his first term.”

Gene Karpinski

President
LEAGUE OF CONSERVATION VOTERS



“The business community would give the Obama administration’s first term a grade of, at best, a C– on regulatory policy.”

William L. Kovacs

*Senior Vice President,
Environment*
U.S. CHAMBER OF COMMERCE



“The most important thing Obama could do to promote public health is terminate his regulatory war on affordable energy.”

Marlo Lewis

Senior Fellow
COMPETITIVE ENTERPRISE
INSTITUTE



“If anything has defined the president’s first four years, it’s been the byzantine world of cost-benefit analysis.”

William J. Snape III

Senior Counsel
CENTER FOR BIOLOGICAL
DIVERSITY



“The 2008 election heralded a revival of environmental and energy issues, more than under any president in recent memory.”

Deborah Tellier

*Partner, Environment
Department*
FARELLA BRAUN + MARTEL LLP

An Impressive Record, and More Opportunities

GENE KARPINSKI

The 2012 elections didn't turn out the way many people expected. Two years ago, the pundits assumed that environmental champions — from President Barack Obama to others on the ballot — would be wiped off the map by the unprecedented money oil and coal-backed groups would pour into key races across the country. But when the votes were counted, we saw a very different outcome. President Obama was decisively re-elected, the Senate became decidedly more pro-environment, and four of the five House incumbents the League of Conservation Voters targeted specifically for denying climate change were defeated.

By delivering victories to President Obama and environmental champions further down the ballot, the American people picked leaders who support addressing the climate crisis, investing in clean energy, and protecting public health.

While President Obama's record has not been perfect, he's made enormous environmental achievements in his first term. For example, as part of the Recovery Act, President Obama made the single largest investment ever in renewable energy and energy efficiency, one part of a strategy that has resulted in a doubling of the country's use of wind and solar power. The president enacted national standards to dramatically increase fuel efficiency in cars to 54.5 miles per gallon by the year 2025, which will save consumers money at the pump, dramatically cut our dependence on oil, and reduce air pollution. Another historic step was implementing the first-ever national standards to limit mercury

and other toxic air pollution from power plants, which will save lives and reduce asthma attacks. President Obama's Environmental Protection Agency issued a science-based finding that carbon dioxide and other greenhouse gases are harmful pollutants, paving the way for steps he subsequently has taken to reduce carbon pollution from both vehicles and large stationary polluters.

Looking ahead to a second term, President Obama has the authority — and the support of the American people — to boldly address the climate crisis. A week before the electorate chose Barack Obama over Mitt Romney, who denied the overwhelming scientific consensus on global warming, Hurricane Sandy made it tragically clear that many communities are extremely vulnerable to climate change. That had the effect of boosting public acceptance of climate science and support for action to address global warming following a year marked by record-breaking high temperatures, an exceptionally harmful drought, and deadly wildfires.

President Obama needs to harness this moment and take three decisive steps to curb dangerous carbon pollution. First, he should speak out and help connect the dots for the American people between carbon pollution and extreme weather and the steps we can take to fight climate change. Second, he should use his executive authority to achieve badly needed reductions in the pollution that is disrupting our climate and harming our health, setting standards that cut carbon pollution from America's aging power plant fleet. And third, President Obama should resist dirty fuels like tar sands, starting with the Keystone XL tar sands pipeline, which is not in our national interest because it would unlock large amounts of additional carbon that we can't afford to burn, endanger health and safety, and risk critical water resources.

We are also counting on Presi-

dent Obama to keep moving ahead with protections against pollution and harmful development in a number of other areas, including issuing clear protections for threatened waterways and completing the first-ever national standards for toxic coal ash. President Obama should also move ahead with additional health protections for harmful air pollutants.

As the president said in his 2012 State of the Union address, it is time to “double-down on a clean energy industry that's never been more promising.” Survey after survey shows that the American public couldn't agree more.

Over the last four years, President Obama has achieved historic accomplishments and initiated serious efforts to make continued progress in his second term. He should feel emboldened by his victory and move ahead to address climate change — which could be a true legacy issue for the president — and the many other serious threats facing our planet. He's made a lot of progress, but there's more work to be done in his second term.

Gene Karpinski is President of the League of Conservation Voters, a national non-profit organization that works to turn environmental values into national priorities.

In a Second Term, We Fear A Repeat of the First Term

WILLIAM L. KOVACS

Overall, the business community would give the Obama administration's first term a grade of, at best, a C— on regulatory policy. Despite the promises made during the 2008 campaign to make government work smarter and better for everyone, the Obama administration quickly began working on unprecedented, massive new regulatory programs — over the objections of the businesses that would have to pay for them.

And despite promises that the administration would be more transparent than previous administrations, the most significant programs were often developed hurriedly and in virtual secrecy. In 2009, for example, EPA rushed through the essential framework for a new regulatory regime on climate in just eight months, ignoring warnings about the unintended consequences of that regime from businesses of all sizes.

EPA's climate rules represent a sweeping expansion of regulatory power that has potentially severe impacts on energy and businesses in all sectors of the U.S. economy. In 2010 Mr. Obama and his allies in Congress relentlessly pushed through the health care law despite serious misgivings from employers, particularly small business employers — who must deal with a multitude of new regulations to implement the law. Likewise, the Obama administration pushed for the Dodd-Frank law, which is having a chilling effect on financial service providers across the country.

While the regulatory cascade took a break for the campaign, certain actions taken in the first term will bind the second term of the

Obama administration to take certain regulatory actions. Specifically, the administration has entered into numerous consent decrees on a wide variety of issues with activist groups. Agencies agree to develop new rules (often with specific requirements dictated by the group who sued) on extremely tight deadlines. These settlements are reached behind closed doors, and affected groups — including state and local governments — are not consulted. Only after the settlement is put in a consent decree and lodged with a court are stakeholders given any opportunity to comment, which is usually too late to revise the final decree. Because the decree is signed by a judge, the settlement requires EPA to comply with its terms.

Advocacy groups have used this technique to persuade the agency to undertake numerous major regulatory initiatives: Utility MACT (for Maximum Achievable Control Technology), regional haze requirements that have resulted in federal implementation plans, New Source Performance Standards for greenhouse gases from power plants and refineries, Total Maximum Daily Loads and other federal water quality requirements for the Chesapeake Bay, federal water quality standards for Florida, critical habitat designations for multiple species, and revising the ozone National Ambient Air Quality Standard (even though the standard had been revised just two years earlier).

Each of these agreed-upon new rulemakings could impose a billion dollars or more on regulated entities. Indeed, during the past four years, agencies have proposed more billion dollar rules than ever before. To make matters worse, in these settlements agencies often accept deadlines for issuing rules they know cannot be met. As a result, EPA and other agencies are rushed to meet the deadlines. Hurrying through the rulemaking process increases the likelihood of serious errors (such as

requiring emission limits that cannot be met or basing the standard on factual predicates that don't actually exist). These errors result in the rule's having to be reconsidered, time-consuming litigation to correct problems, administrative and judicial stays of the regulation, and even further rulemakings to correct mistakes that shouldn't have been made in the first place. The sloppy rush to get regulations out also means agencies cut corners on doing the legally required consultations and reviews. Analyses of the costs and benefits of rules, as well as the likely impacts on small business, are very often cursory. Businesses are left to rely on flawed, incomplete regulatory impact analyses that do not convey the true impacts of mammoth regulations.

As new rules undergo court challenge, reconsideration, stays, or corrections through new rulemakings, businesses have little certainty regarding the regulations with which they are or will be required to comply. The cascade of new rules in health care, the environment, and financial regulation, together with the unsettled state of taxation policy, makes businesses, particularly smaller ones, reluctant to hire.

If the regulatory cascade continues, the outlook for the next four years will be more of the same. By itself, EPA has at least 35 major new rules that will be finalized or proposed in 2013, with more expected in 2014. As Bette Davis said in *All About Eve*, "Fasten your seatbelts, it's going to be a bumpy night."

William Kovacs is Senior Vice President for Environment, Technology, and Regulatory Affairs at the U.S. Chamber of Commerce.

Missing in Action: Constitutional Environmentalism

MARLO LEWIS

The most important thing the Obama administration could do in its second term to promote public health is terminate its regulatory war on affordable energy.

The state of the economy is a public health issue. Numerous studies show that poverty and unemployment increase the risk of illness and death. Loss of employment, income, and economic opportunity can damage a household's health and welfare more than all the emissions from the local power plant.

Affordable energy is critical to prosperity. Inconvenient truth: Without affordable energy, most labor and capital in a modern economy would be idle or not even exist. The administration's environmental agenda deserves failing marks because its central objective is to restrict the production and use of the carbon-based fuels that supply 83 percent of U.S. energy.

To be sure, President Obama claims to be a big booster of oil and gas production. His campaign web site boasted that U.S. oil production in 2010 reached its highest level since 2003 and natural gas production its highest level in 30 years. Those figures are correct but misleading. All the increases in U.S. oil and gas production occurred on state and private lands. On federal lands, oil and gas production decreased due to declines in leasing, the Gulf of Mexico drilling moratorium, and permitting delays.

Obama's aversion to affordable energy is long-standing. In January 2008, then-Senator Obama told the *San Francisco Chronicle* that under his plan for a cap-and-trade program, electricity prices would

"necessarily skyrocket." He also said anyone who builds a new coal power plant would go "bankrupt."

When cap-and-trade was exposed as a stealth energy tax, the American people turned against it, ousting in the mid-term elections 29 House Democrats who voted for the Waxman-Markey bill. Undeterred, Obama told the Washington press corps that cap-and-trade "was just one way of skinning the cat," and vowed to seek other means to the same end.

In his 2011 state of the union address, Obama called for a "clean energy standard" roughly equivalent to Waxman-Markey in its projected adverse impact on coal-based power. However, Obama's chief M.O. for skinning the cat has been to "enact" climate and energy policy via administrative action.

The administration's anti-coal agenda employs a pincer strategy, attacking coal both where it is combusted and where it is mined. EPA's Utility MACT (for Maximum Achievable Control Technology) and "carbon pollution" rules would each effectively ban the construction of new coal power plants. The MACT rule establishes emission limits below levels that can accurately be monitored, denying potential investors the assurance that new units installing costly state-of-the-art controls will be in compliance. Facing likely defeat by industry petitioners, the EPA agreed in July to reconsider the rule and set less stringent standards.

The proposed carbon pollution rule sets a performance standard (1,000 pounds of carbon dioxide per megawatt hour) that no commercial coal plant can meet. EPA picked that number because it is the emission rate of a typical natural gas combined cycle (NGCC) power plant. Performance standards are supposed to reflect the "best system of emission reduction" "adequately demonstrated" for a given source category. But NGCC is a type of

power plant, not an emission reduction system. The proposal absurdly assumes that a gas turbine is a pollution control device for a coal boiler. Congress never authorized the EPA to mandate fuel switching and would reject both the MACT and carbon pollution rules if introduced as legislation and put to a vote.

In 2010, EPA proposed saline effluent standards for mountaintop mining operations that Administrator Lisa Jackson acknowledged "no or very few" valley fills could meet. In 2011, the Department of the Interior interpreted the 1977 Surface Mining Control and Reclamation Act — a law adopted to authorize surface mining — as requiring a stream buffer rule that effectively prohibits surface coal mining. In the same month, EPA for the first time revoked a Clean Water Act permit granted by the Corps of Engineers to a coal mining project. The D.C. Court of Appeals struck down the effluent standards on procedural grounds and the permit revocation as exceeding EPA's authority. The fate of the stream buffer rule remains to be determined. Needless to say, legislation embodying those policies would be D.O.A. on Capitol Hill.

So not only does the administration's environmental team not appreciate the importance of affordable energy to public health, it also does not respect the separation of powers. Constitutional environmentalism is unlikely to fare any better under the second Obama administration.

Marlo Lewis is a Senior Fellow at the Competitive Enterprise Institute.

A Poor Track Record, but a Chance to Excel

WILLIAM J. SNAPE III

It is tempting, and traditional policy analysis, to cast the president's first term environmental record as a predictable back slide from his smooth campaign rhetoric. President Clinton suffered temporarily from this malady, recall, before finishing out his eight years with a slew of major environmental initiatives, including the protection of millions of acres of national forest roadless areas and vast tracts of endangered species and migratory bird habitat as well as the designation of many national monuments under the Antiquities Act.

President Obama's challenge with climate change may be more formidable but the current White House holder also needs to define his turf. And this is the crux of the matter: what will Obama fight for? Even the creation of Yellowstone National Park, the crown jewel of this country's and the world's protected area system, necessitated a political brawl in the 19th century with opposing business interests. Would Obama have gone to bat for Yellowstone?

This is a fair question because if anything has defined the president's first four years, it's been the byzantine world of cost-benefit analysis. In other words, to Obama, it appears everything is a trade off. Domestic politics, economics, international relations: it's all one large chess match. While no one denies such balancing must occur, there need to be some science-based bottom lines. This president has not yet defined any environmental bottom line for which he is willing to duke it out against profiteering polluters.

Let's start with global warming. It is true that President Obama's Environmental Protection Agency

reversed the Bush administration's negative "endangerment finding" and concluded that greenhouse pollutants do harm public health and welfare (as the Supreme Court had essentially already held). It is also true that EPA issued long overdue toxic mercury rules for coal-fired power plants. And it is similarly true that Obama raised the automobile fleet's fuel efficiency standards — though not nearly as much as Japan and Europe.

But, really, beyond these relatively obvious or cursory things, the president has done practically nothing on climate change. That's right, close to nothing. His treaty negotiators at the State Department continue to block any progress with our world partners. EPA has issued only one final regulation on climate pollutants, a pre-construction permit rule that allows new sources to gain approval with "efficiency" improvements. Methane, a greenhouse pollutant over 20 times more powerful than carbon dioxide, is largely unregulated despite, or because of, the massive amounts leaked by the oil and gas industries annually in their drilling operations. A legally binding performance standard for big power plants and other industrial sources is stuck at the proposal stage, and does not include existing power plants. There is no over-arching scientific goal for the United States' ambient air quality under the Clean Air Act. The list goes on and on.

Simultaneously, President Obama brags about the amount of oil and gas that the United States is now producing, indeed the highest rate in many years. Obama's offshore oil drilling plan virtually mimics that of George W. Bush, including the disastrous idea to allow Shell and others to drill in the fragile Arctic, where an oil spill even a fraction of the BP oil gusher would mean the end to an ecosystem that stabilizes the world's weather patterns. Oil and natural gas fracking, the process of fracturing geologic rocks for

miles below then across the earth's surface, is being actively encouraged by this administration, even on federal public lands that are supposed to protect other long-term natural values. Further, the president joined with know-nothing Republicans to dump on Europe for daring to add a carbon tax to airline flights, and then approved a fast-track portion of the Keystone tar sands pipeline from Canada just days after 20,000 people surrounded the White House and asked him to stop the entire project. If these pro-drilling actions constitute a bottom line, we are all in big trouble.

It's not just energy politics but public lands, natural resource, and wildlife issues as well. Old growth logging in Alaska and the Pacific Northwest continues to be approved. In this era of tight budgets, the president can't seem to push for an end to destructive public land subsidies by resource-extractive industries. His embattled interior secretary, Ken Salazar, has made a mess of various endangered species decisions, including the premature delisting of the wolf, the refusal to protect the polar bear from greenhouse or toxic pollutants, and an Orwellian proposed policy that would prohibit the agency from looking at historic habitat loss when listing a species despite the fact that most species are threatened precisely because of habitat loss.

So the president's grade is incomplete. His work is nowhere near done. He could end up getting an A. He could end up failing. History has a harsh way of looking at cheap opportunists. The stakes are real and high.

William J. Snape III is Senior Counsel of the Center for Biological Diversity and a Fellow at American University Law School.

Grades Vary, But Record Is Strong, Future Is Bright

DEBORAH TELLIER

The election of Barack Obama in 2008 heralded a revival of environmental and energy issues, more than under any president in recent memory. He inherited a host of issues that were not effectively addressed during previous administrations. He countered with an economic recovery plan and initiatives designed to prevent the collapse of our economy while jump-starting a clean energy industry, promoting domestic energy production, restoring world leadership on climate change, and protecting the environment.

There are four areas in which we can grade the president's first term:

First, energy independence and forward-thinking domestic programs. Obama has achieved a great deal to advance clean energy despite an economy that was on the brink of collapse. The president declared a national goal of ending dependence on foreign oil and called on Congress to pass a stimulus bill to help "create a new American energy economy." The package provided billions for clean energy investments, a smart grid, energy efficiency measures, training programs for green jobs, and loans to the renewable energy industry. Unfortunately, what may be remembered most about these programs is the bankruptcy of Solyndra, a solar power manufacturer that received a \$527 million loan guarantee. Obama also called for a new generation of safe nuclear power plants, offshore oil and gas development, and using fracking to extract natural gas. Not surprisingly, these options did not endear him to many within the environmental community. Nonetheless, his grade is a B for broad thinking on using energy as a platform for jobs

and economic recovery while moving toward energy independence.

Second, attacking climate change via legislation. Many hoped that Obama could succeed in passing sweeping climate change legislation during his first term. Unfortunately, the issue became exceedingly partisan and the bill died in the Senate. His grade: B for effort, D for results.

Third, fuel efficiency standards through negotiation. In 2010, EPA adopted rules requiring automakers to boost the average fuel economy of new cars and trucks to 54.5 miles per gallon by 2025. This measure alone will reduce American's oil consumption by 12 billion barrels over the course of the program. Grade: A for Obama's work with auto industry during the bailout to garner support for and adoption of these rules.

Fourth, administrative regulation of greenhouse gases. The Supreme Court's 2007 landmark case of *Massachusetts v. EPA* ruled that greenhouse gases are a "public danger," and therefore subject to regulation under the Clean Air Act. This set the stage for EPA to issue its "endangerment finding" that six GHGs threaten the health and welfare of current and future generations. EPA's interpretation of the CAA was recently upheld by the D.C. Circuit Court as "unambiguously correct," which will pave a path for sweeping regulations affecting vehicles, power plants, and other industrial facilities. Grade: A-. While this will be a hard pill for the country to swallow, it will substantially move the needle toward cleaner air and a reduction in GHG emissions.

Finally, a short list of what to do in Obama's second term:

First, restore U.S. leadership on climate change. It is imperative that the United States — one of the world's largest emitters — provide stronger leadership. At home, Obama should look to models such as California's AB 32 legislation and New England's Regional Greenhouse Gas Initiative. Indeed, California just conducted its first auction of

tradable carbon allowances. On the international front, the United States can no longer afford to maintain its status quo position on climate change as it did at the November Doha climate conference.

Second, ensure environmental protection while pursuing energy production. America is experiencing a boom in oil and gas production, which has led to lower energy prices, greater independence from foreign oil, and more jobs. However, the technologies used to develop these resources, including hydraulic fracturing and deep horizontal drilling, can lead to significant environmental impacts. While such drilling is typically regulated at the state level, there is a role for the federal government to provide oversight.

Third, reform of chemical and product regulation under federal law. The Toxic Substances Control Act has not been significantly amended for over 35 years despite widespread agreement that the current regulatory framework is woefully out of date. EPA could take a lesson from the REACH model in Europe, and the administration should take a measured view of California's developing green chemistry initiative when undertaking reform of chemical and product safety in the United States.

Conclusion: The Obama administration has played a significant role in keeping America from falling into another depression. The president recognized the country's ability to pull itself up by its bootstraps and take charge on issues of energy and the environment. His administration created opportunities for economic recovery and energy independence. With the country now standing tall, there is no better time for Americans to lead on the important environmental and energy issues of the day.

Deborah Tellier is a Partner in the Environmental Law Department at Farella Braun + Martel LLP in San Francisco. The views expressed are her own and not necessarily those of the firm.