



# After Midnight

The Bush legacy of deregulation and what Obama can do

---

Reece Rushing, Rick Melberth, and Matt Madia January 2009

# After Midnight

The Bush legacy of deregulation and what Obama can do

---

Reece Rushing, Rick Melberth, and Matt Madia January 2009

# Contents

## **1 Executive summary**

## **3 Bush midnight regulation**

- 3 The substance of the Bush administration's actions
- 4 The Bush process for issuing midnight regulations

## **6 Options for blocking and undoing midnight regulations**

- 6 Suspension of effective dates
- 7 Rulemaking
- 8 Court action
- 9 Congressional disapproval
- 10 Appropriations

## **11 Previous Bush regulatory rollbacks**

## **12 Bush blockades to regulation**

- 12 Regulatory review
- 13 Cost-benefit analysis
- 13 Scientific assessment

## **15 Conclusion**

## **16 Appendix**

## **19 Endnotes**

# Executive summary

The Bush administration rushed out a host of problematic regulations in its final months. Many of these “midnight” regulations actually represent deregulatory actions that weaken or eliminate safeguards protecting health, safety, the environment, and the public’s general welfare.

The appendix provides a list of several dozen of these regulations. They include, for example:

- A rule that relaxes enforcement against factory-farm runoff
- A rule that permits more waste from mountaintop mining to be dumped into waterways
- A rule seemingly designed to protect pharmaceutical companies from being held liable for marketing products they know are unsafe
- A rule that makes it more difficult for workers to take advantage of the Family and Medical Leave Act
- A rule that reduces access of Medicaid beneficiaries to services such as dental and vision care
- A rule that could limit women’s access to reproductive health services.

The Obama administration and new Congress are now faced with the question of how to respond to the Bush administration’s midnight regulation. The response is clear for proposed rules—rules that are in the pipeline but not yet finalized. Executive branch agencies, acting under the direction of new political leadership, can simply stop working on those rules and withdraw them from their regulatory agendas. Or agencies may choose to improve or strengthen Bush-proposed rules before publishing them as final rules.

Final rules present a more difficult problem. Executive branch agencies cannot throw out a final Bush rule with a stroke of a pen. They must conduct an entirely new rulemaking—the legal process by which regulations are made—which often consumes significant time and resources. Unless a rule’s effective date is suspended, which may be possible for a limited number of Bush rules, the rule remains law until a new rulemaking is completed.

Congress also can intervene to block or undo midnight regulation. The Congressional Review Act allows Congress to vote down Bush regulations completed after May 15, 2008, using special expedited procedures. Funding also may be withheld to block implementation or enforcement of undesirable rules.

The last option for dealing with midnight regulation is the courts. Lawsuits are likely to challenge many of the Bush administration's midnight regulations. The Obama administration will have to decide how to respond to these suits. In some cases, the administration may be able to enter into settlements that effectively torpedo Bush rules.

The Obama administration also must contend with Bush administration rules completed before the "midnight" period. Indeed, the Bush administration's final flurry was just part of an eight-year campaign to gut public safeguards in service to corporate special interests and right-wing ideology. As a result of these actions, the nation's air and water are less healthy, consumers and investors are more likely to be defrauded, food and other products are less safe, workers are at greater risk of being injured or killed, and public land is being degraded by rampant mining and drilling. President Obama faces an enormous challenge in reversing the damage.

This task is even more difficult because of procedural roadblocks erected under President Bush that serve to prevent protective regulation. These roadblocks generally skew analytical requirements to favor corporate interests and add bureaucratic layers to gum up the rulemaking process.

As the Obama administration reverses Bush policies, it also must move forward with a positive regulatory agenda that recognizes a fundamental responsibility to protect the public's health, safety, and general welfare. This will require open and honest assessment of risks, vigorous monitoring and enforcement, and new regulatory protections where there are gaps or where existing protections are not strong enough. The last eight years have left much work to be done.

# Bush midnight regulation

The Bush administration disputed news reports of heightened regulatory activity in its final months. “There’s no great increase in the number of regulations that we’re reviewing right now,” White House spokesman Tony Fratto told the press October 31 about the Office of Management and Budget’s customary review of agencies’ significant regulations.<sup>1</sup>

In fact, OMB’s Office of Information and Regulatory Affairs, or OIRA, approved 157 final rules from September 1, 2008, to December 31, 2008, according to RegInfo.gov. OIRA approved only 83 final rules during the same period in 2007; 92 in 2006; and 81 in 2005.

This increased output is not uncommon. Most administrations pump out a stream of new regulations at the end of a president’s term. These regulations are disparagingly called “midnight” regulations. But not all midnight regulations are created equal.

Most important is the substance. Few would object to a rule that delivers substantial public benefits just because it is issued in the “midnight” period. There is also the question of process. Some rules may be rushed, but others may be the product of careful, lengthy rulemakings that agencies seek to wrap up before the president’s term expires. But the Bush administration was unique both in its drive to dismantle regulatory safeguards and in the way it pushed rules out the door.

---

## The substance of the Bush administration’s actions

The Bush administration’s midnight regulation campaign was impressive in its breadth: environmental protection, worker rights, health care, civil rights, and traffic safety have all been undercut.

Most of the new regulations from environmental agencies were in fact *deregulatory*. One EPA rule exempts factory farms from the agency’s regulatory authority under the Clean Water Act; those farms now self-police their runoff, which pollutes nearby bodies of water.<sup>2</sup> Separately, EPA exempted factory farms from reporting to the government the hazardous air emissions generated by animal waste.<sup>3</sup>

Other environmental rules give big breaks to the energy industry. An Interior Department rule makes it legal for mining operations to dump the waste generated during mountaintop mining into rivers and streams, turning great peaks and valleys into vast plains of rubble.<sup>4</sup> Interior also opened millions of acres of western land to oil shale development—a process by which energy companies extract liquid oil from solid rock by heating it.<sup>5</sup>

Some Bush rules targeted workers. The Department of Labor made it more difficult for workers to take unpaid leave to care for themselves or a family member without risking their pay, benefits, or position.<sup>6</sup> The rule also makes it easier for employers to speak directly to employees' health care providers. A Department of Transportation rule allows trucking companies to force their drivers to drive for 11 consecutive hours and shortens mandatory rest times, despite studies showing that extended hours increase the chances of fatigue and endanger both truck drivers and other motorists.<sup>7</sup>

Bush also used regulation to drive his ideological agenda. Bush's Interior Department lifted the 25-year-old ban on carrying loaded weapons in national parks.<sup>8</sup> The Health and Human Services Department wrote a new rule that could limit women's access to reproductive health services and information.<sup>9</sup> The rule requires providers receiving federal funding to certify in writing that they are complying with laws intended to preserve practitioners' right of conscience. The potential effect on patient needs is ignored.

*The appendix provides a list of Bush midnight regulations, with completion and effective dates.*

---

## The Bush process for issuing midnight regulations

Some of Bush's last-minute regulations were in the regulatory pipeline for years. But the administration was able to accelerate the progress of many others, truncating internal review times and cutting public participation.

OIRA spent an average of 61 days reviewing regulations in 2008, but dispensed with many of Bush's midnight regulations far quicker. OIRA reviewed a proposed draft of the Health and Human Services Department's provider conscience regulation in just hours, and reviewed the final regulation in 11 days. OIRA approved the Interior Department's oil shale leasing regulation after only four days.

Even more surreptitious was the Bush administration's willingness to sacrifice public participation for expediency. The administration proposed a handful of rules between July and September 2008 that it wanted to finalize by year's end. Agencies allowed only 30 days for public comment for several of those rules. (The public comment period usually lasts 60 days.)

In October, the Interior Department proposed stripping Congress of its power to prohibit mining on federal lands in emergency situations—a power that Congress had used in June to prohibit uranium mine leasing near the Grand Canyon. Interior allowed only 15 days for public comment on the rule. An Interior Department official defended the shortened comment period, saying the public already had been given a chance to comment on an earlier draft of the rule that was released in 1991.<sup>10</sup> Comments rushed in nonetheless; but the Bush administration paid little attention to public concern.

The Interior Department received 300,000 comments on a proposal to change the way the Endangered Species Act is implemented. Interior proposed eliminating the requirement that federal land-use managers consult with biological health experts before approving development projects that may affect endangered species' habitats. Most of the comments opposed the change. An internal email leaked to the Associated Press showed that Interior Department officials asked staff from around the country to come to Washington, D.C., to review all 300,000 comments in just one week. According to one calculation, Interior employees would have to review seven comments each minute to meet the deadline.<sup>11</sup> The final rule was published December 16 largely unchanged.<sup>12</sup>

This date is telling. In May 2008, the White House ordered agencies to finalize all rules by November 1, except in “extraordinary circumstances.” Sold as good government, this deadline, discussed in more detail below, was apparently intended to ensure that the wait-period between when a final rule is published and when it takes legal effect had elapsed before the new president's inauguration. Yet after the deadline passed, the spigot did not turn off.



# Options for blocking and undoing midnight regulations

The Obama administration and new Congress have a number of available options to block or undo the Bush administration's midnight regulations. The Obama administration may suspend the effective dates of rules where possible, initiate new rulemakings to repeal or revise Bush rules, or enter into court settlements that effectively reverse Bush rules. Congress can vote down Bush regulations finalized after May 15, 2008, under the expedited procedures of the Congressional Review Act or withhold appropriations for the implementation or enforcement of Bush rules.

The Bush administration also left behind a number of proposed rules that it did not complete, including a proposal that would allow more pollution from coal-fired power plants. Unlike final rules, these proposed rules are relatively easy to deal with. Agencies, acting under new political direction, must review them and decide whether they should be withdrawn from agency regulatory agendas, revised before being issued as final rules, or moved forward unchanged. This report is not intended to address proposed rules.

---

## Suspension of effective dates

Final rules generally take effect 30 or 60 days after they are published in the Federal Register, depending on their significance. Rules not in effect by the inauguration may have their effective dates suspended.

Should President Obama choose to suspend effective dates, he would be taking a cue from the Bush administration. Two hours after President Bush took office, then-White House Chief of Staff Andrew Card issued a memo to all agencies instructing them to suspend the effective dates of any rules finalized during the Clinton administration but not yet in effect.<sup>13</sup> This move did not by itself reverse any of the Clinton administration policies that Bush officials found objectionable, but the delay bought the new administration valuable time to plot its strategy. In some cases, the Bush administration ended up repealing suspended rules.

President Bush attempted to prevent the Obama administration from doing to his last-minute rules what he did to Clinton's. In May 2008, then-White House Chief of Staff Joshua Bolten issued a memo instructing federal agencies to finalize any regulation they wished to complete under Bush's tenure by November 1, 2008.<sup>14</sup> Bolten claimed that the

deadline was meant to curtail the usual flurry of last-minute activity that has characterized the final weeks of previous administrations. But many believe the White House's true intention was to ensure that Bush regulations would be in effect by January 20, 2009.

Not every final Bush rule was completed by the November 1 deadline. Indeed, some highly problematic ones were not completed until January and well into December. But many midnight rules did take effect before President Obama's inauguration, and their effective dates cannot be suspended. They will be the law until the Obama administration completes a new rulemaking to revise or repeal them.

---

## Rulemaking

President Obama can direct executive branch agencies to undo final Bush regulations. Agencies, however, cannot legally throw out regulations with a stroke of a pen. They must conduct entirely new rulemakings, which are subject to legal requirements.

The Administrative Procedure Act is the primary framework under which rulemaking is conducted. Before a final rule can be issued, the APA requires agencies to first publish a notice of proposed rulemaking in the Federal Register and provide the public with an opportunity to submit comments, which the agency must consider along with other materials. A final rule must be published in the Federal Register at least 30 days before its effective date.

There are many secondary requirements on the rulemaking process. These include, for example:

- The Paperwork Reduction Act, which requires the agency to assess the paperwork burden associated with the rule
- The Regulatory Flexibility Act, which requires the agency to assess the rule's effect on small business
- The Unfunded Mandates Reform Act, which requires the agency to assess the rule's effect on state and local governments
- Executive Order 12866, which requires the agency to conduct a cost-benefit analysis that, in the case of major rules, is submitted to the Office of Management and Budget for review and approval

These requirements are government-wide and apply to all rulemakings, except those made by independent agencies such as the Securities and Exchange Commission. Each agency also responds to underlying statutes, such as the Clean Air Act or the Safe Drinking Water Act, that include additional rulemaking requirements, many times including scientific reviews.

Needless to say, this process can be resource-intensive and time-consuming—major rulemakings sometimes take years to complete. And once complete, the action moves to

the courts. Final rules are subject to judicial challenge, and industry groups frequently sue to overturn stronger regulations. Even when such challenges are without merit, they may still require significant resources to defend. All of this is to say the Obama administration will have its hands full if it wishes to overturn a large number of Bush rules through the rulemaking process.

---

## Court action

Challenges will certainly be brought in federal court to overturn Bush midnight regulations. Environmental groups and labor unions, for example, have both won victories overturning Bush regulations in previous years. And several Bush midnight regulations are attempted responses to court decisions overturning earlier versions. This includes the rule that increases the number of hours that truckers are permitted to drive in a day, which labor opposes.

An agency must observe its rulemaking requirements when promulgating regulation, including the Administrative Procedure Act, the underlying statute directing the action, and the various other analytical and procedural controls. A challenge can be won if a court finds that there are any procedural or substantive violations of these requirements. The court may then set aside the rule and send it back to the agency for revision or additional justification. Litigation may take years, however, and the rule may not ultimately be overturned.

A faster option is settlement. The Obama administration may choose to settle lawsuits against Bush rules that it does not support. The Bush administration did this with a number of Clinton rules, including a ban on snowmobiles in Yellowstone. The Obama administration may agree in a settlement not to enforce a Bush regulation while it moves to revise or repeal it.

The Obama administration may wish to enforce some rules, such as clean water standards, even if they are weaker than desired. An agreement not to enforce, however, makes sense for regulations that are completely undesirable. One example is the rule that threatens loss of funding to health care providers that refuse to allow their employees to withhold reproductive health services on religious or moral grounds.

Once a settlement is reached, it also may be challenged in court by parties supporting the rule. The administration thus must have a compelling justification for any settlement it reaches. Otherwise, the settlement could be overturned and the rule left in place.

---

## Congressional disapproval

The Congressional Review Act provides Congress with 60 “days of continuous session” to vote down a new regulation using special expedited procedures that block a Senate filibuster. If 60 session days have not expired by the end of one Congress, the clock starts over 15 session days after the start of the succeeding Congress.<sup>15</sup> What this means is that the new Congress can vote down any Bush-era regulation finalized after May 15, 2008.<sup>16</sup>

Just as with any bill, the president can sign or veto a congressional “resolution of disapproval,” as it’s called. A veto is virtually guaranteed when a resolution is directed against an action by a sitting president. For this reason, the Congressional Review Act is really only relevant in the transition from one administration to another—especially when the succeeding president and Congress represent the opposing party, as is the case with President Obama and the 111th Congress.

The CRA was enacted in 1996, but has been successfully used just once. As one of his first acts, President Bush signed a resolution of disapproval passed by the Republican-controlled Congress to repeal a last-minute Clinton ergonomics standard that sought to protect workers from repetitive-motion injuries. The new Congress and President Obama will have a similar opportunity to undo last-minute Bush actions, such as those listed in the appendix.

This option has a couple of advantages. It spares the Obama administration from going through a rulemaking to repeal problematic regulation. Resources can instead be devoted to other priorities. And unlike an executive branch regulation, a resolution of disapproval is not subject to judicial challenge, which can further sap resources.

There are some possible disadvantages of using the Congressional Review Act. Multiple rules cannot be voted on at once under the CRA. Congress would have to proceed one rule at a time. Taking up a significant number of rules may be an unwise distraction from the ambitious legislative agenda articulated by President Obama and the congressional leadership.

The CRA also prohibits the executive branch from promulgating a rule that is in “substantially the same form” as a rule voted down. The meaning of this language is untested. A regulation may be objectionable but still contain worthy parts. It is conceivable that the Obama administration would want to retain substantial parts of a repealed regulation. The administration, however, could be challenged in court as to whether this is permitted under the CRA.

Congress can, of course, pass legislation reversing regulations without using the Congressional Review Act. This would avoid the CRA’s disadvantages, but it would likely be more difficult to achieve because the legislation would have to be passed according to normal rules, including the right to filibuster in the Senate.

---

## Appropriations

Congress has frequently added provisions to appropriations bills that block regulation under development. The Congressional Research Service recently identified a number of provisions aimed at preventing the issuance of Bush midnight regulations.

Congress may also withhold funding to restrict implementation or enforcement of rules already finalized. This approach likely does not make sense when a regulation involves restrictions on private-sector behavior. A weak clean water rule, after all, is still the law whether or not EPA has the resources to enforce it. The agency may be unable to ensure that even the weak rule is followed if Congress denies it resources.

There are cases where Congress could stop implementation of Bush-era regulations through the appropriations process. Rules that open public land to mining and drilling, for example, could be blocked by denying funds for issuing development permits. Congress also may choose to deny funds to enforce undesirable requirements, such as new Bush restrictions on state spending under Temporary Assistance for Needy Families. Of course, such restrictions may be unnecessary to the extent the Obama administration shares the view of Congress.

# Previous Bush regulatory rollbacks

The Bush administration's midnight regulation campaign is the capstone on an eight-year effort to weaken or eliminate public protections. The Bush administration consistently put narrow special interests over the broad public interest across government agencies and shirked its responsibility to safeguard the American people.

The Center for American Progress and OMB Watch released a report on May 2004, "Special Interest Takeover," that documented the damage over President Bush's first term.<sup>17</sup> A host of protective standards were reversed during that period, including standards on clean air and water, energy efficiency, miner safety, medical privacy, and health claims on food products, to name just a few. Precious public lands also were thrown open for unchecked mining, drilling, and logging. This assault continued over the second term. OMB Watch just released a report, "The Bush Legacy: An Assault on Public Protections," that covers the entire Bush record.<sup>18</sup>

Ex-industry lawyers and lobbyists frequently rewrote the rules for the benefit of their former employers or clients. Former deputy administrator of Interior J. Steven Griles, who previously worked as an oil-industry lobbyist, pushed to open millions of acres of public land to oil and gas development. Griles resigned in late 2004 to resume his lobbying career after being investigated for questionable dealings with former industry clients. He also actively worked with and supported Jack Abramoff on matters concerning the disgraced lobbyist's Indian clients. Griles was ultimately sentenced to prison for obstructing a Senate investigation into Abramoff's dealings.

The problems at Interior were hardly unique. Christine Todd Whitman in her book about her time as President Bush's EPA administrator lamented the influence exerted by "antiregulatory lobbyists and extreme antigovernment ideologues."<sup>19</sup> Indeed, Whitman objected to rolling back clean air standards for power plants, but the White House ordered her to move forward.

Midnight regulation gets most of the attention during transitions. But the Bush administration for eight years asserted its influence through hundreds of regulations across every executive agency. At the same time, it ignored emerging threats, such as global climate change, that must now be urgently addressed. The Obama administration also must deal with this larger legacy as it addresses midnight regulation.

# Bush blockades to regulation

The Bush administration's legacy is not limited to specific rules. It also has taken aim at the entire regulatory process by erecting blockades that tilt decision-making in favor of corporate interests and against new regulation. These blockades include a new executive order expanding White House power over regulatory agencies; skewed guidelines for cost-benefit analysis; tighter control of scientific assessments, including peer review; and procedures that undermine credible assessment of toxic chemicals.<sup>20</sup>

---

## Regulatory review

Bush issued Executive Order 13422 in January 2007, which amends Executive Order 12866 governing the planning and White House review of agency regulations.<sup>21</sup> The same day, OMB's Office of Information and Regulatory Affairs, which conducts White House regulatory reviews, issued its "Final Bulletin for Agency Good Guidance Practices." The two directives work in concert to alter the ways that federal agencies develop and enforce regulations. Specifically, E.O. 13422 and the "Final Bulletin for Agency Good Guidance Practices":

- Require that agency regulatory policy officers be presidential appointees and expand the powers of those officers, most notably giving them the sole power to initiate or stop a rulemaking.
- Shift the criterion for promulgating regulations from the identification of a problem such as threats to public health to the identification of a "specific market failure."
- Allow the White House to exert control over agency guidance documents, which subjects a new class of information to political consideration and possible delay. Agencies may issue guidance documents to clarify regulatory obligations to industry or explain complex technical issues. Guidance is not legally binding and therefore imposes no mandates on regulated entities, but significant guidance documents now undergo review and approval by OIRA before agencies can issue them.

The executive order and bulletin further remove agency discretion over the implementation of legislation and further centralize control over regulatory policy at OIRA. Moreover, it promotes free market fundamentalism at the expense of health, safety, the environment, and the common good.

---

## Cost-benefit analysis

OIRA issued a new directive in September 2003 that instructed agencies on how to conduct and apply cost-benefit analyses, “standardizing the way benefits and costs of Federal regulatory actions are measured and reported.”<sup>22</sup> This directive pushed agencies to estimate monetary benefits and costs, and to demonstrate “net benefits” by subtracting benefits from costs.

The problem with this is that many benefits, unlike costs, are inherently difficult to monetize. How much is a life worth? What is the dollar value of avoided injury or disease? What is the economic benefit of a clear view over our national parks or protecting endangered species? There is debate about whether we should even try to monetize these benefits. But leaving that aside, monetized cost-benefit analysis frequently produces an imbalance where only some benefits, but most costs, are monetized. Decision-making will inevitably skew against stronger regulatory action if it is guided by a rigid net benefits calculation.

---

## Scientific assessment

The Bush administration also took aim at stifling or challenging the information used by agencies in their regulatory decisions. Many examples of political meddling in specific scientific assessments have been reported over the last eight years. But OMB’s Office of Information and Regulatory Affairs played a particularly active role in pushing government-wide policies that clamped down on information that might suggest a need for regulation.

The Data Quality Act, passed as part of an appropriations bill in 2001, emerged as a major tool in this effort. The Act charged OMB with issuing implementing guidelines to executive agencies. Then OIRA Administrator John Graham, however, went far beyond the congressional mandate and asked agencies to set new demanding standards for scientific risk assessment.<sup>23</sup>

Scientific assessments almost always contain a degree of uncertainty—and sometimes significant uncertainty. Graham sought to raise the burden of proof for the dissemination of such information and ultimately regulatory action.<sup>24</sup> Outside parties, including regulated industry, are able to launch administrative challenges against government information that they believe violates the guidelines.

Graham went a step further in late 2004, again citing the Data Quality Act, and issued peer review guidelines that tightly control the discretion that agencies have in conducting scientific reviews of critical information used in regulatory decisions.<sup>25</sup> The guidelines give OIRA significant power to demand peer review and control the process despite the lack of scientific expertise in the office.



OIRA also interfered with the way that the EPA assesses toxic chemicals. The Integrated Risk Information System, or IRIS, is a publicly searchable database that provides access to studies on the human health effects of hundreds of industrial chemicals and other substances. IRIS is used by state and federal regulators and scientists around the world to help set standards to protect public health.

OIRA asserted oversight of IRIS in 2004 and immediately slowed risk assessments conducted for the database. The Government Accountability Office, in a highly critical report, found that OIRA had scuttled five assessments in 2006 without explanation.<sup>26</sup> In April 2008, EPA unveiled process changes that formalized OIRA's role and created additional steps bound to further delay and undermine assessments.<sup>27</sup> One new provision gives other federal agencies, such as the Department of Defense and the Department of Energy, a guaranteed seat at the table during review of EPA's initial assessments. These agencies can potentially delay assessments by questioning the scientific certainty of EPA's work and demanding further study, keeping EPA in an interminable quest for more data.

# Conclusion

Reversing problematic midnight regulations is necessary, but the regulatory system suffers from fundamental problems. The rulemaking process is slow and unresponsive. The public has few opportunities to interact with agency officials. Key information is not always collected or shared. And rules are not adequately enforced.

President Bush exacerbated these problems, but they are longstanding and pre-date his tenure. As the Obama administration reverses Bush policies, it also must move forward with a positive regulatory agenda that recognizes a fundamental responsibility to protect the public's health, safety, and general welfare.

A panel of regulatory experts, coordinated by OMB Watch, submitted recommendations to then President-elect Obama and the new Congress in November 2008.<sup>28</sup> These recommendations, to which the authors of this paper contributed, are based on six principles:

- Regulatory decisions should be timely and responsive to public need.
- The regulatory process must be transparent and improve public participation.
- Regulatory decisions should be based on well-informed, flexible decision making.
- Authority to make decisions about regulations should reflect the statutory delegation granted by Congress.
- Agencies must have the resources to meet their statutory obligations and organizational missions.
- Government must do a better job of encouraging compliance with existing regulations and enforce them fairly.

It will not be difficult for the Obama administration to be better than the Bush administration in meeting these principles. But the standard should be much higher. The regulatory system is not working for the public and the common good. President Obama's job will be to fix that.

# Appendix

## Bush's midnight regulations

This list is not comprehensive. Rather, it offers a sample of problematic Bush midnight regulations. All rules listed here were finalized after May 15, and thus can be voted down by the new Congress under the Congressional Review Act. The list is ordered by effective date. The Obama administration may choose to suspend the effective dates of rules that are not in effect at the time of President Obama's inauguration.

Regulation	Agency	Description	Final publication	Effective date
Vertical tandem lifts	Occupational Safety and Health Administration (Dept. of Labor)	The rule allows maritime port operators to lift two or more empty containers secured together at the same time.	12/10/2008	4/9/2009
Country-of-origin labeling	Agricultural Marketing Service (Dept. of Agriculture)	The rule established country-of-origin labeling requirements for beef, lamb, chicken, goat, pork, fish and shellfish, certain nuts, and other perishable agricultural commodities. However, an overly broad definition of "processed foods" could exempt "over 60 percent of pork, the majority of frozen vegetables, an estimated 95 percent of peanuts, pecans, and macadamia nuts, and multi-ingredient fresh produce items such as fruit salads and salad mixes" from the labeling requirements, according to Wenonah Hauter, Executive Director of Food and Water Watch.	1/15/2009	3/16/2009
Partner Vetting System	U.S. Agency for International Development	The rule creates the Partner Vetting System, or PVS, which would screen charities, and their "principal" employees, who receive or apply for USAID funding for possible ties to terrorists. The government would then screen these employee names against classified databases (USAID will not specify which databases) that has information on terrorists. The rule also states, "The decision as to whether to implement PVS will be made by the incoming Obama Administration."	1/2/2009	2/2/2009
Air pollution reporting from farms	Environmental Protection Agency	The rule exempts factory farms from reporting air pollution emissions coming from animal waste.	12/18/2008	1/20/2009
Burning of hazardous waste	Environmental Protection Agency	The rule reclassifies thousands of tons of hazardous waste as fuel, allowing it to be burned instead of sensitively disposed of. The emissions generated by burning the waste would be more toxic than emissions from burning fossil fuels.	12/19/2008	1/20/2009
Access to reproductive health services	Dept. of Health and Human Services	The rule could limit women's access to reproductive health services. The rule requires health care providers to certify they will allow their employees to withhold services on the basis of religious or moral grounds or risk losing federal funding.	12/19/2008	1/20/2009
Pledge requirements for HIV/AIDS grantees	Dept. of Health and Human Services	The rule requires HIV/AIDS grantees to choose between adopting government policy (explicitly and unequivocally opposing prostitution and sex trafficking) for their entire organizations or setting up completely separate affiliated organizations. However, the degree of separation proposed is so severe that it is impractical to implement.	12/24/2008	1/20/2009
Truck driver hours of service	Federal Motor Carrier Safety Administration (Dept. of Transportation)	The rule allows truck drivers to drive up to 11 consecutive hours and shortens mandatory rest times between work weeks. It is nearly identical to a regulation struck down in the D.C. Court of Appeals in 2007.	11/19/2008	1/19/2009
Privatization of public toll roads	Federal Highway Administration (Dept. of Transportation)	The rule could lead to an increase in the privatization of public toll roads by forcing states to accept bids from private companies when reorganizing or transferring authority for operating toll roads.	12/19/2008	1/18/2009
Privacy of payroll records under federal contracts	Wage and Hour Division (Dept. of Labor)	The rule exempts contractors covered by the Davis-Bacon Act and the Copeland Anti-Kickback Act from including in weekly payroll record reports to the federal government the social security numbers and home addresses of workers. This will make it more difficult for the government to verify the accuracy of reports.	12/19/2008	1/18/2009

## Bush's midnight regulations (continued)

Regulation	Agency	Description	Final publication	Effective date
Oil shale development	Bureau of Land Management (Dept. of the Interior)	Capitalizing on a recent decision by Congress to let the ban on oil shale development to expire, the BLM rule opens 2 million acres of western land to leasing. Environmentalists say oil shale development, which involves extracting liquid oil from solid rock by heating it, increases greenhouse gas emissions and requires intensive water use.	11/18/2008	1/17/2009
Revisions to the H-2A guest worker program	Employment and Training Administration (Dept. of Labor)	The rule weakens wage protections and housing standards for agricultural workers. The rule could also allow employers to hire more foreign workers without giving due consideration to U.S. workers.	12/18/2008	1/17/2009
Family and medical leave	Wage and Hour Division (Dept. of Labor)	The rule limits employee access to family and medical leave. Among other things, the rule makes it more difficult for workers to use paid vacation or personal time to take leave and allows employers to speak directly to an employee's health care provider. The rule also expands leave opportunities for military families.	11/17/2008	1/16/2009
Endangered species consultation	Fish and Wildlife Service (Dept. of the Interior) and National Oceanic and Atmospheric Association (Dept. of Commerce)	The rule alters implementation of the Endangered Species Act by allowing federal land-use managers to approve projects such as infrastructure creation, minerals extraction, or logging without consulting federal habitat managers and biological health experts responsible for species protection. The rule also forbids global warming from being considered as a factor in species decisions.	12/16/2008	1/15/2009
Mountaintop mining	Office of Surface Mining (Dept. of the Interior)	The rule allows mining companies to dump the waste, or spoil, from mountaintop mining into rivers and streams.	12/12/2008	1/12/2009
Gun safety in national parks	National Park Service (Dept. of the Interior)	The rule lifts the 25-year-old ban on carrying loaded weapons in national parks.	12/10/2008	1/9/2009
Emergency land withdrawals	Bureau of Land Management (Dept. of the Interior)	The rule removes existing regulations that provide for emergency land withdrawals. Specifically, the rule change revokes Congress's authority to require the agency to bar land from being developed in emergency situations. The rulemaking is largely in response to a June 25 Congressional Resolution which ordered BLM to immediately remove public lands adjacent to the Grand Canyon from uranium mining claims.	12/5/2008	1/5/2009
Union annual reports for trusts	Office of Labor-Management Standards (Dept. of Labor)	The rule requires labor unions to file extensive annual financial reports for trusts, such as pension funds, that they have established to benefit their members (T-1 Form). The rule, meant to replace a rule vacated in federal court in July 2007, is widely seen as a political effort to overload labor unions with paperwork.	10/2/2008	12/31/2008
Definition of solid waste	Environmental Protection Agency	The rule guts standards for the recycling of hazardous wastes under the Resource Conservation and Recovery Act, or RCRA. "In this proposed rulemaking, EPA clings to a concept of 'discard' that would exclude from regulation, by their own estimation, over 3 billion pounds of hazardous waste from over 4600 facilities in 530 industries," according to comments submitted by the Sierra Club, U.S. Public Interest Research Group, National Environmental Trust, and Safe Food and Fertilizer.	10/30/2008	12/29/2008
Rerouting hazmat rail shipments	Pipeline and Hazardous Materials Safety Administration (Dept. of Transportation)	The rule requires railcars carrying hazardous materials to reroute around densely populated areas; but it gives control of rerouting to the railroad industry without federal oversight or local input.	11/26/2008	12/26/2008
Rail transportation security	Transportation Security Administration (Dept. of Homeland Security)	The rule, which established security requirements for freight railroad carriers, preempts state tort law claims regarding the transport of hazardous materials.	11/26/2008	12/26/2008
Runoff from factory farms	Environmental Protection Agency	The rule could allow the runoff from concentrated animal feeding operations, i.e. factory farms, to pollute waterways without a permit. The rule circumvents the Clean Water Act, instead allowing for self-regulation.	11/20/2008	12/22/2008

## Bush's midnight regulations (continued)

Regulation	Agency	Description	Final publication	Effective date
Medicaid outpatient services	Centers for Medicare and Medicaid Services (Dept. of Health and Human Services)	The rule narrows the definition of outpatient hospital services to reduce Medicaid beneficiaries' access to those services, such as dental and vision care.	11/7/2008	12/8/2008
Employment verification by social security records	Dept. of Homeland Security	The supplemental to a 2007 final rule instructs employers how to respond to a "no-match" letter from the Social Security Administration indicating that an employee's name and social security number do not match SSA records. But as is often the case, a no-match letter could be triggered by a database error, such as a misspelled name, and does not necessarily mean a person is an illegal immigrant. "Because many employers mistakenly assume that the letter provides information about the immigration status of the individual workers named in it, they immediately fire, lay-off, or demote such workers without giving them a chance to correct discrepancies," according to the National Immigration Law Center.	10/28/2008	10/28/2008
Opening national forests in Idaho	Forest Service (Dept. of Agriculture)	The rule opens portions of national forests in Idaho to logging and road building. The rule is part of the Bush administration forest-by-forest repeal of the Clinton-era Roadless Area Conservation Rule.	10/16/2008	10/16/2008
Drug and medical device labeling	Food and Drug Administration (Dept. of Health and Human Services)	The rule protects pharmaceutical companies and manufacturers of medical devices from being held liable for marketing products they know are unsafe. The previous standard permitted these companies to add safety labels to their products, as new information became available, without seeking FDA approval. The rule prohibits adding such labels without FDA approval unless there is "evidence of a causal association."	8/22/2008	9/22/2008
Public disclosure of recipients of recalled meat and poultry	Food Safety and Inspection Service (Dept. of Agriculture)	The rule requires the Food Safety and Inspection Service to identify retailers and wholesalers that have received recalled meat (no such disclosure is currently required). This represents a positive step, but only the most severe recalls are covered. Advocates had hoped all recalls would be covered.	7/17/2008	8/18/2008
Diversion of contaminated wastewater into public drinking water supplies	Environmental Protection Agency	The rule allows contaminated wastewater to be diverted without a Clean Water Act permit into other bodies of water, including those used for public drinking water. In 2006, a federal judge ruled that the South Florida Water Management District needed to obtain an EPA permit to pump contaminated water from drainage canals into Lake Okeechobee. EPA's rule undercuts this decision. "EPA deliberately avoided even looking at the pollution implications of this rulemaking for public health across the nation because they know the consequences in many instances, as in Florida, would be a blatant violation of water quality standards," said Joan Mulhern, senior legislative counsel for Earthjustice.	6/13/2008	8/12/2008
Listing of polar bears as threatened species	Fish and Wildlife Service (Dept. of the Interior)	The rule lists the polar bear as a threatened species under the Endangered Species Act because of melting ice related to global climate change. However, in an accompanying interim final rule, the agency ruled out addressing greenhouse gas emissions, the primary cause of global climate change.	5/15/2008	5/15/2008

# Endnotes

- 1 Press Briefing by Deputy Press Secretary Tony Fratto, October 31, 2008. Transcript available at <http://www.whitehouse.gov/news/releases/2008/10/20081031-6.html>.
- 2 "Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision," U.S. Environmental Protection Agency, 73 FR 70418, November 20, 2008. The regulation went into effect December 22, 2008.
- 3 "CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste at Farms," U.S. Environmental Protection Agency, 73 FR 76948, December 18, 2008. The regulation is scheduled to go into effect January 20, 2009.
- 4 "Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams," U.S. Department of the Interior, 73 FR 75814, December 12, 2008. The regulation went into effect January 12, 2009.
- 5 "Oil Shale Management – General," U.S. Department of the Interior Bureau of Land Management, 73 FR 69414, November 18, 2008. The regulation is scheduled to go into effect January 17, 2009; A similar passage appears in "The Bush Legacy: an assault on public protections," OMB Watch, January 2009.
- 6 "The Family and Medical Leave Act of 1993," U.S. Department of Labor Wage and Hour Division, 73 FR 67934, November 17, 2008. The regulation is scheduled to go into effect January 16, 2009.
- 7 "Hours of Service of Drivers," U.S. Department of Transportation Federal Motor Carrier Safety Administration, 73 FR 69567, November 19, 2008. The regulation is scheduled to go into effect January 19, 2009; A similar passage appears in "The Bush Legacy: an assault on public protections," OMB Watch, January 2009.
- 8 "General Regulations for Areas Administered by the National Park Service and the Fish and Wildlife Service," U.S. Department of the Interior National Park Service and Fish and Wildlife Service, 73 FR 74966, December 10, 2008. The regulation went into effect January 9, 2009.
- 9 "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law," U.S. Department of Health and Human Services, 73 FR 78072, December 19, 2008. The regulation is scheduled to go into effect January 20, 2009.
- 10 *USA Today* editorial board, "Our view on the presidency in transition: 'Midnight regulations' return as Bush term runs out," *USA Today*, December 8, 2008. Available at <http://blogs.usatoday.com/oped/2008/12/midnight-regula.html>.
- 11 "Feds rush to ease endangered species rules," *The Associated Press*, October 21, 2008. Available at <http://www.msnbc.msn.com/id/27312289/>.
- 12 "Interagency Cooperation Under the Endangered Species Act," U.S. Department of the Interior Fish and Wildlife Service and U.S. Department of Commerce National Oceanic and Atmospheric Administration, 73 FR 76272, December 16, 2008. The regulation is scheduled to go into effect January 15, 2009.
- 13 Andrew H. Card, Jr., "Memorandum for the Heads and Acting Heads of Executive Departments and Agencies; Subject: Regulatory Review Plan," January 20, 2001, available at [http://www.whitehouse.gov/omb/inforeg/regreview\\_plan.pdf](http://www.whitehouse.gov/omb/inforeg/regreview_plan.pdf).
- 14 Joshua B. Bolten, "Memorandum for the Heads of Executive Departments and Agencies, the Administrator of the Office of Information and Regulatory Affairs; Subject: Issuance of Agency Regulations at the End of the Administration," May 9, 2008, available at <http://www.ombwatch.org/regs/PDFs/BoltenMemo050908.pdf>.
- 15 5 U.S.C. § 801(d). For a summary of the Congressional Review Act, see Curtis W. Copeland, Congressional Research Service, "Midnight Rulemaking: Considerations for Congress and a New Administration," Nov. 24, 2008, p. 12. available at <http://www.fas.org/sgp/crs/misc/RL34747.pdf>.
- 16 This date is reached by counting backward from the end of the 110th Congress—and specifically the House, whose calendar is controlling in this case—60 "days of continuous session." "Days of continuous session" include weekends but exclude calendar days in which both houses are not in session for more than three days.
- 17 Center for American Progress and OMB Watch, Special Interest Takeover, May 2004, available at <http://www.americanprogress.org/kf/specialinterests.pdf>.
- 18 OMB Watch, "The Bush Legacy: An Assault on Public Protections," January 2009, available at <http://www.ombwatch.org/bushlegacy.pdf>.
- 19 Mike Allen and John F. Harris, "It's Her Party and She'll Cry If She Wants To," *Washington Post*, January 2, 2005.
- 20 OMB's website provides a list of government-wide regulatory policies adopted during the Bush administration at <http://www.whitehouse.gov/omb/inforeg/regpol.html>.
- 21 Executive Order 13422: Further Amendment to Executive Order 12866 on Regulatory Planning and Review, January 18, 2007, available at <http://edocket.access.gpo.gov/2007/pdf/07-293.pdf>. *Final Bulletin for Agency Good Guidance Practices*, January 25, 2007, available at [http://www.whitehouse.gov/omb/fedreg/2007/012507\\_good\\_guidance.pdf](http://www.whitehouse.gov/omb/fedreg/2007/012507_good_guidance.pdf).
- 22 Office of Management and Budget, *OMB Circular A-4: Regulatory Analysis*, available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>. See also memorandum from John D. Graham to the President's Management Council on "OMB's Circular No. A-4, New Guidelines for the Conduct of Regulatory Analysis," March 2, 2004, available at [http://www.whitehouse.gov/omb/inforeg/memo\\_pmc\\_a4.pdf](http://www.whitehouse.gov/omb/inforeg/memo_pmc_a4.pdf).
- 23 Office of Management and Budget, "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies," December 21, 2001, available at <http://www.whitehouse.gov/omb/fedreg/reproducible.html>.
- 24 In early 2006, Graham also proposed a government-wide Risk Assessment Bulletin. But this proposal was ultimately dropped after the National Research Council concluded it was "fundamentally flawed."
- 25 Office of Management and Budget, "Final Information Quality Bulletin for Peer Review," December 15, 2004, available at [http://www.whitehouse.gov/omb/inforeg/peer2004/peer\\_bulletin.pdf](http://www.whitehouse.gov/omb/inforeg/peer2004/peer_bulletin.pdf).
- 26 Government Accountability Office, "Chemical Assessments: Low Productivity and New Interagency Review Process Limit the Usefulness and Credibility of EPA's Integrated Risk Information System," March 2008.
- 27 U.S. EPA, "IRIS Process (2008 Update)," April 10, 2008, available at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=190045>.
- 28 Gary Bass, et. al., "Advancing the Public Interest through Regulatory Reform: Recommendations for President-Elect Obama and the 111th Congress," November 2008, available at <http://www.ombwatch.org/regulatoryreformrecs.pdf>.

---

## About the authors

**Reece Rushing** is director of regulatory and information policy at the Center for American Progress.

**Rick Melberth** is director of federal regulatory policy at OMB Watch.

**Matt Madia** is regulatory policy analyst at OMB Watch.

---

### About the Center for American Progress

The Center for American Progress is a nonpartisan research and educational institute dedicated to promoting a strong, just and free America that ensures opportunity for all. We believe that Americans are bound together by a common commitment to these values and we aspire to ensure that our national policies reflect these values.

We work to find progressive and pragmatic solutions to significant domestic and international problems and develop policy proposals that foster a government that is “of the people, by the people, and for the people.”

---

### About OMB Watch

OMB Watch is a nonprofit government watchdog organization dedicated to promoting government accountability, citizen participation in public policy decisions, and the use of fiscal and regulatory policy to serve the public interest.

---



Center for American Progress  
1333 H Street, NW, 10th Floor  
Washington, DC 20005  
Tel: 202.682.1611 • Fax: 202.682.1867  
[www.americanprogress.org](http://www.americanprogress.org)



OMB Watch  
1742 Connecticut Avenue, NW  
Washington, DC 20009  
Tel: 202.234.8494 • Fax: 202-234-8584  
[www.ombwatch.org](http://www.ombwatch.org)

---

A decorative footer graphic at the bottom of the page consists of a dark blue background with a pattern of white stars and a light blue wave-like shape.