

Public Access to Information, Participation, and Justice: Forward and Backward Steps Toward an Informed and Engaged Citizenry

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Transparency, participation, and accountability are central to effective environmental management, as well as to democratic governance.¹ Nevertheless, since 2002 the U.S. government has undermined the principle that the public has a “right to know” by quietly but increasingly shifting to policies and practices based on the public’s “need to know,” a standard that leaves the government in charge of determining who needs to know and what they need to know.

Since 2002, the executive branch in particular has fostered this culture of government secrecy, with a resulting adverse impact on efforts to achieve sustainable development. Starting in 2001, the Bush Administration began to assert executive privilege to curtail legislative and regulatory measures that sought to ensure effective environmental management and government administration through transparency, participation, and accountability. The terrorist attacks of 9/11 provoked—and provided further justification for—additional restrictions on public access.² While the threat of terrorism is real, in numerous documented instances the Administration’s invocation of concerns regarding terrorism and national security appears to overreach. In response to a general movement by the federal government to restrict access, states have also had an uneven response regarding transparency.

The most dramatic measures to improve public access to information and public participation have occurred outside the political arena. Increased use of cell phones and access to the Internet provide new tools for informing and mobilizing the public. The ability to obtain, combine, link, and share data on the environment has been revolutionized with tools such as Google Earth, YouTube, and Wikipedia. And environmental and political activists have used the Internet to inform and mobilize constituents, as well as to raise funds.

Newer environmental challenges—particularly those relating to climate change, ecosystem services, nanotechnology, and endocrine disruptors—should further shape the evolution of public access in the years to come. This chapter briefly examines the importance of access to sustainable development in the United States, and then analyzes measures affecting access since 2002. It concludes with recommendations for strengthening public access, participation, and justice, particularly at the federal level.

Public Access and Sustainable Development

The transition that the United States must make to achieve sustainability entails numerous reforms in how people live, work, and relate to one another. Transparent and participatory processes are essential if we are to engage the public in this reform process, build support for the reforms, and leverage the necessary resources. The American people need information to fully understand the environmental challenges the country faces, to motivate the commitment of resources necessary to address those challenges, and to track progress toward meeting the goals of sustainable development. Similarly, public participation in decisionmaking provides opportunities to educate potentially affected people about the impacts and options they face (e.g., through an environmental impact assessment or notice-and-comment rulemaking). It also allows different sectors of the public to have their voices heard and bring additional information to the attention of the decisionmakers, and ultimately to improve the quality of decisions and their implementation. Access to the judicial system is also key to ensuring that people's procedural and environmental rights are respected.

As Congress reaffirmed in 2007 when it adopted the OPEN Government Act, broad public access is central to good governance. Indeed, limiting access reduces opportunities for oversight and accountability, providing a context in which unsustainable decisions and actions are more difficult to detect, prevent, or remedy.

Recent Developments in Public Access

Developments in public access since 2002 have been characterized by divergent trends. Even as technological developments generated significant new opportunities for the public to use and share data, the

federal government sought to reduce public access in the name of executive privilege, national security, and economic development through regulatory changes and institutional practice. The actions by the federal executive were countered by a few legislative initiatives to enhance public access. Denials of access generated numerous legal challenges; in most cases, the courts upheld the right of those seeking access.

Access to Information

Changes in access to information include those resulting from revisions to federal law (and sometimes state law), modifications in institutional and administrative practices, and technological developments and initiatives outside the governmental sphere.

Legal and Regulatory Frameworks

Recent developments in the legal framework governing access to information have generally related to policies and practices that increase governmental secrecy. This trend includes developments with respect to the Freedom of Information Act, the Presidential Records Act, and the Toxics Release Inventory. The rare exceptions were the 2007 OPEN Government Act and proposed measures to develop publicly accessible greenhouse gas inventories.

Growing Governmental Secrecy. A 2007 report by OpenTheGovernment.org, an independent coalition of journalists, consumer advocates, and good government groups, described widespread increases in government secrecy.³ Classification of documents in 2006 was significantly higher (approximately 47 percent) than in 2001. Indeed, for every dollar spent in 2006 to declassify documents, \$185 was spent by the government to keep information secret. The report also noted the dramatic increase in presidential use of the “state secrets” privilege, by which the president can almost unilaterally withhold documents from Congress, courts, and the public. Between 1953 and 1976, during the height of the Cold War, the privilege was invoked only six times; since 2001 President Bush used it 39 times that are known.

There have also been dramatic increases in withholding information that is not classified. Since the terror attacks of 9/11, the federal government has created categories that provide new rationales for withholding information from the public: thus, information is neither

classified nor available to the public. The largest of these pseudo-classification categories is SBU (Sensitive But Unclassified), which now will be subsumed under Controlled Unclassified Information.⁴

While recent governmental initiatives to limit public access often invoked national security and occasionally other established exemptions such as confidential business information (albeit historically more narrowly construed), numerous scholars view the efforts as part of a broader push by the Bush Administration to assert and exert executive privilege and authority.

Freedom of Information Act (FOIA). A 2002 memorandum to federal agencies by then-Attorney General John Ashcroft provided guidance on FOIA implementation.⁵ The memo assured agencies that the Department of Justice would defend them in the withholding of information as long as there was a “sound legal basis,” whereas the previous attorney general memorandum had instructed agencies to withhold information only when the release would cause “foreseeable harm.”⁶ This change of institutional philosophy—from encouraging disclosure to encouraging withholding whenever possible—was widely criticized as violating the spirit of FOIA.

Agencies’ FOIA processes have not been keeping up with demand. In 2006, the government received 21.4 million FOIA requests, an increase of approximately 7 percent from the previous year. However, agency backlogs in responding to FOIA requests continue to grow even faster, with the oldest pending request now more than 20 years old.⁷

In 2007, Congress enacted the OPEN Government Act to strengthen FOIA.⁸ This law makes a number of modest changes to FOIA, including provisions that are intended to speed up the FOIA process, reduce fees for a broader segment of journalists, expand the reach of FOIA to certain government contractors, create an ombudsman-type office to handle complaints, establish a publicly available tracking system of requests, and make it easier to recover attorney’s fees. The OPEN Government Act, however, neither reversed the 2002 Ashcroft directive nor reinstated a presumption of disclosure.

Toxic Chemicals. At the end of 2006, the U.S. Environmental Protection Agency (EPA) changed the Toxics Release Inventory (TRI), the nation’s premier right-to-know program, by relaxing reporting requirements for the companies and other facilities that emit toxic chemicals.⁹ EPA estimated that the new reporting thresholds would

eliminate reporting on only 16 chemicals, while OMB Watch estimated that it would eliminate reporting on 39 chemicals and reduce the reporting on 28 more by at least one-half. More than 122,000 public comments were received when EPA's plans were announced, with virtually all of them (more than 99.9 percent) opposing the plan.¹⁰ State legislatures and Congress have attempted to reverse the effects of this rule.¹¹ Officials from the Government Accountability Office (GAO) testified at an October 2007 congressional hearing that "EPA did not follow guidelines to ensure that scientific, economic, and policy issues are addressed at appropriate stages of rule development."¹² Within two months of GAO's testimony, 12 states sued EPA to challenge the 2006 regulation.¹³

Shortly after the 9/11 terrorist attacks, EPA removed from its website all risk management plans (RMPs), documents describing risks around chemical plants that the Clean Air Act requires companies to prepare and EPA to post.¹⁴ EPA replaced the RMPs with a message explaining that in light of the terrorist attacks the database had been "temporarily removed." The message also stated that the agency hoped to make the information available online again "as soon as possible." In 2004, EPA revised RMP reporting requirements to ensure that sensitive data would not be put in the executive summary. Yet, as of this writing, EPA has not replaced any of the data on its website, including the executive summaries.

Since 9/11, one of the most pressing issues has been chemical plant security and vulnerabilities. Despite initial discussions by EPA and the new U.S. Department of Homeland Security (DHS), there was no action on this topic until late in 2006 when Congress required DHS to issue regulations within six months.¹⁵ On April 9, 2007, DHS released its interim final rule that imposes federal security regulations for high-risk chemical facilities.¹⁶ The rule established risk-based performance standards for many chemical facilities and required them to prepare security vulnerability assessments, select security measures to satisfy risk-based performance standards, and develop and implement site security plans.

In the process leading to the 2007 rule, DHS stated in a December 2006 proposal that any state or local provisions that frustrate the "carefully balanced regulatory relationship" that "preserve[s] chemical facilities' flexibility to choose security measures to reach the appropriate security outcome" would be preempted. This created a fire-

storm of protest from states, emergency responders, and environmental advocates. DHS used less emphatic language in the final regulations but reaffirmed that state rules that conflict or interfere with federal provisions would be preempted. DHS said it knew of no state rules that would be preempted, and that it would allow a facility, state, or locality to submit a provision for review and receive an opinion from DHS regarding whether the provision is preempted.¹⁷

DHS would not speculate as to whether stricter state rules, such as requiring companies to use inherently safer technologies, would be preempted. This prompted some states, such as New Jersey, to strongly protest the new federal rules. Frustrated by DHS, Congress took stronger action. In the FY 2008 appropriations bill for DHS, Congress added language explicitly preserving the states' right to write stronger chemical security provisions than the federal rules.¹⁸ Congress has also been wrestling with legislation to make chemical security regulations permanent, but none of the bills supports public access to the vulnerability assessments or addresses how the issue should be resolved.

Administrative Practice

In addition to legal and regulatory reforms, administrative actions and practices over the past five or so years have significantly affected public access. These developments include changes in how scientific information is used and disseminated (reducing public access), development of indicators and a report on environment (some movement toward increasing access), implementation of the Information Quality Act (reducing), and closing of EPA libraries (reducing).

The same time period has seen a dramatic increase in the politicization of scientific information, leading one author to characterize it as "a war on science."¹⁹ This trend has been particularly evident with respect to climate change,²⁰ but also in establishing health-based regulations for air pollutants and in determining the listing status for threatened and endangered species. The extent of scientific manipulation is so extensive that the Union of Concerned Scientists (UCS) prepared the *A to Z Guide to Political Interference in Science*, and more than 12,000 scientists signed a statement denouncing the trend.²¹ In 2007, the UCS received survey responses from 1,586 EPA scientists, with 60 percent saying there was some degree of political meddling, ranging from unnecessary delays to forced resignations over the past five years.²² In response, Congress held numerous hear-

ings on the integrity of science in various committees and several bills were introduced to address some of the problems.

The government has not adopted integrated economic, social, and environmental indicators to track sustainable development. In 1995, Congress decided that many reports, including the annual State of the Environment published under the National Environmental Policy Act starting in 1970, were no longer required unless explicitly requested by Congress. EPA has focused on developing environmental indicators, and introduced these indicators in a 2003 draft report. The *Report on the Environment* issued in May 2008 refines indicators on the condition of air, water, land, and related changes in human health in the United States. Regular revisions are slated to feed into EPA's planning process.²³

A little-noticed legislative amendment to a 2000 spending bill, known as the Information Quality Act (sometimes called the Data Quality Act, or DQA), has drawn increased attention. The DQA required the Office of Management and Budget (OMB) to issue guidelines to federal agencies "for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies."²⁴ OMB then issued guidelines to implement the law.²⁵ By 2004 the Congressional Research Service (CRS) concluded the DQA can have "a significant impact on federal agencies and their information dissemination activities."²⁶

While ostensibly directed at improving the data used by federal agencies, the DQA has had adverse effects. An example is how the DQA has been used to thwart the use and dissemination of research addressing the harmful effects of endocrine disruptors such as atrazine, a leading weed killer. Existing research showed that atrazine had developmental effects on frogs at low-dose exposures and was expected to also impact humans.²⁷ As EPA was compiling research about atrazine's carcinogenicity, it was also preparing a review on whether to stop the market use of the chemical, as had been done in Europe. The manufacturer, Syngenta, funded its own research that did not replicate the findings of damaging health effects. This allowed groups such as the Center for Regulatory Effectiveness, the Kansas Corn Growers Association, and the Triazine Network to file a DQA challenge to EPA's use of research showing a link between atrazine and cancer. EPA largely dismissed the challenge, but concluded that hor-

mone disruption cannot be considered a “legitimate regulatory endpoint at this time”—that is, it is not an acceptable reason to restrict a chemical’s use—because the government had not settled on an officially accepted test for measuring such disruption. EPA added “that based on the existing data uncertainties, the chemical should be subject to more definitive testing once the appropriate testing protocols have been established.”²⁸ This illustrates how the DQA has become a means for slowing regulation, such as that of atrazine, because of scientific uncertainty—and since uncertainty always exists it will be difficult to regulate.

Since the initial challenge on atrazine, DQA challenges are frequently filed with agencies regarding proposed actions.²⁹ There are many other examples, such as the challenges filed on the National Toxicology Program’s *Report on Carcinogens* (ROC), which is used by local, state, and federal authorities to set environmental policies, explore regulations on dangerous substances, and provide for preventative health measures. The latest ROC has been delayed for over a year. This may be why the CRS added in its 2004 annual report to Congress on implementation of the DQA that there were “numerous examples of agencies changing their policies and publications in response to administrative requests for correction from affected parties.” In addition, DQA challenges can be used to delay reports: according to the National Academy of Sciences, compliance with the law has resulted in serious delays in the U.S. Climate Change Science Program’s release of 19 of the 21 planned reports on climate change.³⁰ Congress held its first hearing on the DQA in July 2005 with three agencies—EPA, the Department of Health and Human Services, and the Fish and Wildlife Service—acknowledging that they had diverted resources to respond to DQA challenges.

Anticipating a proposed FY 2007 budget cut from \$2.5 million to \$500,000 for its network of 26 libraries, EPA closed some of its regional libraries. The agency presented the closings as part of an effort to keep pace with the changing way that people access information and to make research more efficient. Over 10,000 EPA scientists and researchers—more than one-half of the agency’s total workforce—signed a letter saying that the cuts would put thousands of scientific studies out of reach and hinder emergency preparedness, anti-pollution enforcement, and long-term research.³¹ EPA postponed any further closings pending review by Congress and until a better plan could be developed.³² Congress approved \$3 million in the FY

2008 spending bill to enable EPA to reopen the closed libraries and to report to Congress within months of this writing on steps that it has taken.

The Internet

In contrast to the generally growing constraints imposed by the Bush Administration on access to information, the private sector has enhanced access in many ways. The Internet has continued to revolutionize public access to information in the United States and around the world. For example, using Google Earth and other sources people can combine geospatial data to make their own maps. Websites continue to be an essential means for nongovernmental organizations (NGOs), as well as government agencies, to disseminate environmental information and engage the public. There has been a dramatic increase in YouTube and other file-sharing websites, which are becoming an important means for disseminating information on environmental issues.³³ By early January 2008, an average of 825,000 new videos were posted each day on YouTube alone, with approximately 70,000 environmental videos, including 11,000 relating specifically to climate change.

Internet-based news institutions supplement blogs and Web pages as a significant means for educating the public on environmental issues. In addition to advocacy organizations and the government, environmental and independent news organizations such as Grist and Indymedia.org have become popular e-news sites.

Public Participation

Developments in public participation since 2002 are also characterized by increasing governmental restrictions (particularly with respect to public participation in environmental impact assessment) and nongovernmental opportunities.

Since 2002, the Bush Administration has changed, largely through regulations, the procedural requirements for environmental impact assessment under the National Environmental Policy Act (NEPA). Many environmentalists assert that these changes significantly restrict public involvement in governmental decisions regarding public resources, undermine governmental accountability, and ultimately enable “environmentally damaging projects.”³⁴

In 2003, the White House's Council on Environmental Quality recommended that federal agencies scale back the analyses contained in their environmental assessments and expand use of categorical exclusions, which allows projects that do not have an effect on the environment to skip assessment and public review altogether.³⁵ The Bush Administration has used categorical exclusions particularly for forest management, for example through President Bush's "Healthy Forests Initiative,"³⁶ and changes in rules implementing the National Forest Management Act. Environmental groups have challenged the categorical exclusions in court, and at least one federal court has held that they violate NEPA.³⁷

The Internet has facilitated environmental activism. For example, in January 2007 a small group of climate change activists launched stepitup2007.org to help link groups and individuals working on climate change in the United States through an "open source, web-based day of action." Using the Internet, Step It Up engaged thousands of people in raising awareness about climate change and in building political support to respond to climate change.³⁸ In 2007, Step It Up organized about 2,000 demonstrations in all 50 states, helping to shift the debate on Capitol Hill.

Online social network services such as MySpace, Facebook, and Second Life have enabled like-minded people to find one another and come together, sometimes for social good. Telecommunications technologies—particularly the use of cell phones and text messaging—have also changed how environmental activists undertake campaigns.³⁹ Taken together, these Internet-based resources provide enhanced opportunities to inform, engage, and coordinate.

Access to Justice

The last five or so years have seen generally favorable judicial decisions regarding standing of citizens, NGOs, and states to sue to protect the environment and to compel compliance with environmental laws. The most dramatic ruling was in *Massachusetts v. EPA*, in which the U.S. Supreme Court recognized the standing of states, cities, and environmental NGOs to compel EPA to promulgate regulations for greenhouse gas emissions from motor vehicles, perhaps peeling back some of the hurdles to standing that had been created over the past 20 years.⁴⁰

There has also been a series of important federal circuit court cases on environmental standing over the past few years.⁴¹ Many of the recent cases adopt an expansive approach to NEPA standing.⁴² Even with an expansive approach to procedural standing, though, environmental plaintiffs sometimes are unable to satisfy the standing requirements.⁴³ One of the primary challenges is proving increased risk of harm (for example, from cancer) associated with an agency action and whether that comprises constitutionally cognizable injury-in-fact. The D.C. Circuit, which hears most challenges to environmental regulations, established a “substantial probability” test for determining standing in such cases, which has made it more difficult to prove standing.⁴⁴ This new test is not likely to settle the issue of standing, as questions remain regarding the scope and application of the test.⁴⁵

With many courts requiring rigorous evidence to support standing, plaintiffs are facing increased burdens, costs, and risks. Plaintiffs with sufficient resources are undertaking increasingly sophisticated analyses to prove standing; others who cannot afford to undertake such analyses must hope that the court does not reject their claims due to a failure to meet the heightened requirements for proof of injury. Since the 1990s, recovery of attorney’s fees has become less reliable, as defendants drag out litigation and generally reduce the certainty that public interest environmental plaintiffs will be able to recover their fees.⁴⁶

The favorable developments in standing case law are not secure. There is a solid block of four justices on the U.S. Supreme Court who have indicated in strongly worded dissents that they would reduce standing.⁴⁷ The retirement or death of one Supreme Court justice could convert this minority into a majority opposing a broad view of standing. Moreover, the Bush Administration has pushed hard to place conservative judges on federal courts, including about 300 on district and circuit courts in the first seven years, resulting in a solid majority for Republican appointees.⁴⁸ A statistical survey of 325 NEPA cases decided between 2001 and 2004 showed that there can be significant differences in how judges approach environmental cases, with judges appointed by a Democratic president ruling in favor of environmental plaintiffs more than twice as often as judges appointed by a Republican president, and about four times as often as judges appointed by President George W. Bush.⁴⁹ Anecdotal evidence also suggests similar distinctions with respect to judicial perspective on standing in environmental cases.⁵⁰

Trade Agreements

Since the incorporation of environmental and public participation considerations in the North American Agreement on Environmental Cooperation (NAAEC), an increasing number of bilateral and multi-lateral trade agreements and accompanying environmental instruments negotiated by the United States have incorporated provisions to promote access to information, public participation, and access to justice. These agreements include those with Central America (CAFTA-DR), Australia, Bahrain, Chile, Israel (on agriculture), Jordan, Morocco, Oman, and Singapore. These agreements have continued to promote public access, albeit not to the same extent as the NAAEC.

Recommendations

A 2002 assessment of public access in the United States recommended measures to improve public access for sustainable development.⁵¹ These recommendations included, inter alia, measures to adopt a new generation of access principles, organize and deliver data (including the development and use of indicators), engage citizens in decisionmaking, and provide international leadership. However, there has been little progress toward these recommendations. In most instances, the government has become less transparent, participatory, and accountable; most measures to improve the organization and delivery of data for sustainable development have come from nongovernmental sources.

The 2002 recommendations remain relevant today. Indeed, in light of governmental actions and inaction since that time, they are as necessary as ever. Recent events provide an additional context and guidance for future directions. Accordingly, we propose two broad recommendations with differing dimensions. Many of the dimensions were alluded to in the 2002 assessment, and recent scholarship and sociopolitical developments further inform these recommendations.

1. Focus access particularly in areas such as climate change, ecosystem services, and newer environmental and health risks. Since 2002, there has been dramatic growth in our understanding of environmental challenges and the measures necessary to move to a more sustainable nation and world. These developments particularly include understanding of climate change, ecosystem services, nanotechnology, and endocrine disruptors. The political momentum in ad-

addressing these areas provides a window for enhancing public access, and improving access in these areas provides an architecture of good governance for tackling these challenges.

It is important to *devise and use indicators based on the relationship of humans and ecosystems*. For example, clean drinking water and climate regulation (including carbon sequestration) are benefits of nature—ecosystem services—that require new ways of collecting, synthesizing, and providing clear information to the public. In order to protect our shared resources, we need to provide better information to the public and more effectively engage the public in sustainable development. With new information technologies, access to information can also serve as a feedback mechanism to understand how the United States as well as organizations, corporations, and local governments are using natural resources.

Particular attention should be paid to *improving access to information, participation, and justice related to climate change*. These improvements include collecting, organizing, sharing, and disseminating data on the potential effects of climate change, the effectiveness of adaptation measures, and information on mitigation measures. Climate change will also raise issues of public participation and use of the information to reduce our human footprint. With real-time information synthesized in ways that the public can understand, it is possible that right-to-know principles can lead to behavioral changes. However, many of the people who will be the most affected by climate change and by the responses to climate change will likely be those least able to cope. In order to ensure climate justice, effective participation of poor and marginalized communities will require particular attention. With numerous lawsuits seeking to compel action on climate change—and it is foreseeable that in the near future there will also be lawsuits resisting measures to respond to climate change—access to justice is likely to remain an issue, particularly in light of the shared nature of the injury. The efforts to adapt to climate change will also likely require new information, new ways of using the information, and means for engaging stakeholders in the management process.

Moreover, it should be a high priority to *collect and disseminate information related to new types of health and environmental risks, including those from nanotechnology and endocrine disruptors*. For nanotechnology, “existing science is clearly inadequate to manage the

potential adverse effects of the technology. We do not know much about what adverse effect to look for, and there is no consensus on the type of data necessary to determine adverse effects.”⁵² These considerations also apply to endocrine disruptors, and to a certain extent to the effects of climate change.

2. *Propose and adopt a new generation of access principles.* As set forth in the 2002 assessment, a new generation of access principles is essential. This is particularly true in light of the threat of terrorism and the overreaching response to limit access since that time. *Government must embrace the principle that secrecy does not always make us safer.* The Bush Administration has promoted a paradigm that is framed as national security versus public access, but that is a false choice. Making information available to the public can enable and empower citizens to take actions to make communities less vulnerable.

Specifically, *Congress and the next president should institute new national right-to-know standards.* Federal agencies should have an affirmative responsibility to disseminate information, making FOIA the vehicle of last resort. With the default assumption that disclosure is preferable, agencies would need to justify any action to withhold information.

Congress and the next president need to review and revise the classification and declassification systems. Too many documents are unnecessarily being classified, and not enough information that was classified is being declassified. Moreover, Congress and the next president should take actions that stop the proliferation of pseudo-classification.

Congress needs to address unchecked and unbalanced presidential powers. One step to addressing the unbalanced growth in presidential powers can be to strengthen the opportunities for citizens and NGOs to challenge executive branch actions that violate the law, including enhanced standing and expedited opportunities for obtaining attorney’s fees.

Congress and the next president should adopt policies that make public accessibility of online content and resources a priority. As a part of this effort, government databases need to be made searchable by indexers (such as Google) and by the public, and agencies should make application programming interfaces available to Web developers.

The next president should strengthen the infrastructure for agency dissemination practices and provide adequate resources. The quality of information should be timely and accurate. Common identifiers should be developed for facilities and parent companies so that information in different databases can be linked through mashups (Web applications that combine data from multiple sources) and other means. And agencies should have adequate resources to provide timely information to the public, including the capacity to meet FOIA demands and reduce backloads.

Congress and the next president should identify ways of providing incentives within the civil service system for strengthening the public's right to know. Rewards should be provided for innovative and efficient dissemination approaches, including free online translation tools. Protections for whistleblowers should be strengthened to reduce potential secrecy and threats to the integrity of science.

There also remains a profound need for leadership on international environmental matters and for advancing public access globally. This is an area where the *United States could provide significant international leadership.*

Conclusions

From a regulatory and administrative perspective, public access has generally stalled or declined since 2002. Executive privilege and national security (particularly in the wake of 9/11) have been frequently invoked to deny public access to information. There have been some modest positive measures to improve access from the Bush Administration, Congress, and federal courts, mostly since 2007. The most dramatic measures to improve public access to information and public participation have occurred outside of the political arena as the ongoing technological revolution, coupled with broadening access to the Internet and other telecommunications technologies, has increased the ability to obtain, combine, link, and share data.

Most important in the coming decade will be adopting and implementing a new generation of principles of transparency, participation, and accountability. Achieving sustainable development depends on the public having easy access to accurate, timely information, the opportunity to participate in making decisions, and the ability to hold government accountable. As technologies continue to evolve, it is difficult to foresee specifically what the next five or 10 years will bring.

These technologies present many opportunities, though, and governmental bodies need to work with the public to use these new and emerging technologies to advance sustainable development.

ENDNOTES

1. See Frances Irwin & Carl Bruch, *Public Access to Information, Participation, and Justice*, in *STUMBLING TOWARD SUSTAINABILITY* 511, 514-15 (John C. Dernbach ed., 2002).
2. See, e.g., TED GUP, *NATION OF SECRETS: THE THREAT TO DEMOCRACY AND THE AMERICAN WAY OF LIFE* (2007).
3. PATRICE McDERMOTT & EMILY FELDMAN, *SECURITY REPORT CARD 2007: INDICATORS OF SECRECY IN THE FEDERAL GOVERNMENT* (2007), available at www.openthegovernment.org/otg/SRC2007.pdf.
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5. Ashcroft Memo, available at www.usdoj.gov/oip/foiapist/2001foiapist19.htm.
6. *Id.*
7. McDERMOTT & FELDMAN, *supra* note 3.
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11. See, e.g., California A.B. 833, available at www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0801-0850/ab_833_bill_20070601_amended_asm_v97.pdf.
12. Testimony of John B. Stephenson Before the House Energy and Commerce Committee, Environmental Right to Know: EPA's Recent Rule Could Reduce Availability of Toxic Chemical Information Used to Assess Environmental Justice, Government Accountability Office: GAO-08-115T (Oct. 4, 2007), available at energycommerce.house.gov/cmte_mtgs/110-ehm-hrg.100407.Stephenson-Testimony.pdf.
13. *New York v. Johnson*, No. 07-CV-10632 (S.D.N.Y. filed Nov. 28, 2007), available at www.oag.state.ny.us/press/2007/nov/07-11-28%20TRI%20Complaint.pdf.
14. OMB WATCH, *OMB WATCH WINS IN COURT FOR ACCESS TO RISK MANAGEMENT DATA* (2005), available at www.ombwatch.org/article/articleview/2915/1/242?TopicID=1. Risk Management Plans are required under Section 112(r) of the Clean Air Act.
15. The provision was attached to the FY 2007 Department of Homeland Security Appropriations Act, Pub. L. No. 109-295, signed into law Oct. 4, 2006, available at www.iaem.com/committees/governmentaffairs/documents/PL109-295DHSAppropFY07andFEMARreform.pdf.
16. Chemical Facility Anti-Terrorism Standards (CFATS), 6 C.F.R. Part 27. The April version of the CFATS regulation only had a preliminary list of the

chemicals covered by the regulation (i.e., Appendix A to the regulation). The regulation was not to come into effect until the final Appendix A was published. It was published November 20, 2007, and included a list of approximately 300 chemicals and “associated screening threshold quantities” in Appendix A.

17. 6 C.F.R. §27.405.
18. New Jersey’s Sen. Frank Lautenberg added the language to the appropriations bill, *available at* <http://lautenberg.senate.gov/newsroom/record.cfm?id=290166&>.
19. CHRIS C. MOONEY, *THE REPUBLICAN WAR ON SCIENCE* (2005).
20. Andrew Revkin, *Report by E.P.A. Leaves Out Data on Climate Change*, N.Y. TIMES, June 19, 2003, *available at* www.nytimes.com/2003/06/19/politics/19CLIM.html?ex=1371441600&en=95b0a43f25f8e0c8&ei=5007; Andrew Revkin, *Ex-Bush Aide Who Edited Climate Reports to Join ExxonMobil*, N.Y. TIMES, June 15, 2005, *available at* www.nytimes.com/2005/06/15/science/14cnd-climate.html.
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24. Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, 114 Stat. 2763 (Dec. 21, 2000).
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26. CURTIS W. COPELAND, CONG. RESEARCH SERV., *THE INFORMATION QUALITY ACT: OMB’S GUIDANCE AND INITIAL IMPLEMENTATION* (updated Sept. 17, 2004), *available at* www.ombwatch.org/info/dataquality/RL32532_CRS_DQA.pdf.
27. The research was conducted by Tyrone Hayes, a professor in the department of integrative biology at the University of California, Berkeley. Ironically, the initial research was funded by atrazine manufacturer Syngenta, which in 1998 hired EcoRisk, a small Seattle-based environmental and toxicology consulting firm, to test and analyze possible health effects associated with the herbicide. Hayes later received additional funds and replicated the initial research.
28. EPA response to DQA challenge, Mar. 26, 2003, at 18, *available at* www.epa.gov/QUALITY/informationguidelines/documents/2807Response_03_27_03.pdf.
29. *See, e.g.*, two challenges at HHS, *available at* <http://aspe.hhs.gov/infoquality/request&response/18a.shtml>; <http://aspe.hhs.gov/infoquality/request&response/25a.shtml>; and two challenges at EPA, *available at* <http://epa.gov/quality/informationguidelines/documents/05001.pdf> and

www.epa.gov/quality/informationguidelines/documents/2807.pdf. All are industry-led challenges.

30. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, *EVALUATING PROGRESS OF THE U.S. CLIMATE CHANGE SCIENCE PROGRAM: METHODS AND PRELIMINARY RESULTS* (2007), *available at* www.nap.edu/catalog/11934.html.
31. *See* www.libraryjournal.com/index.asp?layout=articlePrint&articleID-CA6349087.
32. DAVID M. BEARDEN & ROBERT ESWORTHY, *RESTRUCTURING EPA'S LIBRARIES: BACKGROUND AND ISSUES FOR CONGRESS* (updated June 15, 2007).
33. Nielsen/Net Ratings reported that YouTube had 51 million users in June 2007, more than MySpace, AOL, and Yahoo combined. Miguel Helft, *Google Aims to Make YouTube Profitable With Ads*, N.Y. TIMES, Aug. 21, 2007, at C1, C7.
34. *See* Natural Resources Defense Council report, *available at* www.nrdc.org/legislation/rollbacks/tr2004.pdf.
35. MODERNIZING NEPA IMPLEMENTATION, THE NEPA TASK FORCE REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY (2003), *available at* www.nepa.gov/ntf/report/finalreport.pdf.
36. Information on Bush Administration's "Healthy Forests" *available at* www.whitehouse.gov/infocus/healthyforests/; www.fs.fed.us/news/2004/releases/12/planning-rule.shtml; www.eenews.net/eenewspm/2007/03/30/archive/1.
37. *See* www.eenews.net/features/documents/2007/03/30/document_pm_01.pdf (subscription required).
38. *See* Step It Up website, <http://april.stepitup2007.org>.
39. *See* Mobile Active website, <http://mobileactive.org>; *Connecting to Earth*, WORLD CONSERVATION 21 (May 2008), *available at* http://cmsdata.iucn.org/downloads/00_w_c_2008_02_connect.pdf. More broadly, cell phones are transforming environmental governance in remote corners of the world. Indigenous people in the Pizarro Reserve in northwest Argentina have used mobile phones to monitor environmental conditions and call for help when state government threatened to auction their land. J. Oberman, *SMS Mobilizes to Demobilize Rainforest Destruction* (2005), *available at* www.personaldemocracy.com/node/756.
40. 549 U.S. 497 (2007).
41. *Natural Res. Defense Council (NRDC) v. EPA I*, 440 F.3d 476 (D.C. Cir. 2006); *NRDC v. EPA II*, 464 F.3d 1 (D.C. Cir. 2006); *Util. Air Reg. Group (UARG) v. EPA*, 471 F.3d 1333 (D.C. Cir. 2006). *See also* *Friends of the Earth v. Mosbacher*, No. C-02-04106-JSW, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005).
42. *See, e.g.,* *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961 (9th Cir. 2003); *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18 (1st Cir. 2007); *Ouachita Watch League v. Jacobs*, 463 F.3d 1163 (11th Cir. 2006). *See also* *Ctr. for Biological Diversity v. Brennan*, 2007 WL 2408901 (N.D. Cal. 2007).

43. *E.g.*, Nuclear Info. & Resource Serv. v. Nuclear Reg. Comm'n, 457 F.3d 941 (9th Cir. 2006); Ctr. for Biological Diversity v. Lueckel, 417 F.3d 532 (6th Cir. 2006).
44. See ELI, Recent Cases: DC Circuit Cases Involving "Increased Risk of Harm" From Agency Action, *available at* www.endangeredlaws.org/case_DC.htm.
45. NRDC v. EPA, 489 F.3d 1364 (D.C. Cir. 2007); Public Citizen v. Nat'l Highway Traffic Safety Admin. (NHTSA), 489 F.3d 1279 (D.C. Cir. 2007).
46. See William W. Buzbee, *The Story of Laidlaw, Standing and Citizen Enforcement*, in ENVIRONMENTAL LAW STORIES (Richard Lazarus & Oliver Houck eds., 2005), *available at* <http://papers.ssrn.com/abstract=721643>.
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50. Savage, *supra* note 48.
51. Irwin & Bruch, *supra* note 1.
52. J. CLARENCE DAVIES, PROJECT ON EMERGING NANOTECH., EPA AND NANOTECHNOLOGY: OVERSIGHT FOR THE 21ST CENTURY (2007), at 17.