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Sarah J. Fox*

The Biden administration entered office amid a flurry of executive orders and announcements, no small part of which focused on environmental actions.¹ More specifically, the administration entered with the stated intention of addressing the climate crisis through a variety of measures that include executive action as well as possible federal legislation. For the federal government to be focused on climate action for the first time in four years is an unequivocally positive change. However, the Biden administration will certainly encounter many roadblocks to fast action, including delays inherent in regulatory rollback and rulemakings, political hurdles and expenditure of political capital in Congress, the possibility of unfavorable judicial rulings on climate actions, and more.

Those realities weigh in favor of an aggressive federal push for climate action coupled with continued empowerment of state and local governments to take up the climate policy reins.² States that wish to engage in climate action generally have the authority to do so, unless preempted by federal law, and many states have taken a variety of climate actions.³ Local governments have also engaged in a considerable amount of action on climate change, though with less uniformity with regard to questions about their authority to engage in that action.⁴ Generally speaking, local governments operate under grants of home rule authority from their states, which vary widely in the kind of authority that they confer and the extent to which local

1. See, e.g., Lisa Friedman, *Biden Sets in Motion Plan to Ban New Oil and Gas Leases on Federal Land*, NY TIMES (Jan. 25, 2021), <https://www.nytimes.com/2021/01/25/climate/biden-climate-change.html> (describing early climate actions taken by the Biden administration).

2. See generally Sarah J. Fox, *Why Localizing Climate Federalism Matters (Even During a Biden Administration)*, 99 TEX. L. REV. ONLINE 122, 123 (2021).

3. See Sarah Fox, *Localizing Environmental Federalism*, 54 U.C. DAVIS L. REV. 133, 145 (2020).

4. *Id.* at 149.

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engagement will be subject to preemption by the state.⁵ Acknowledging the importance of the role that local governments play in filling gaps in climate policy—particularly in the absence of comprehensive federal climate legislation—the Biden administration may be able to assist local governments in shoring up their authority, protection from preemption, and ability to engage in climate action.

While local action on climate can be subdivided in a variety of ways, the bulk of activity that the federal government can engage with falls into the two main categories of climate adaptation and climate mitigation.⁶ Climate adaptation refers broadly to adjustments to the physical realities of climate change experienced either now or in the future by a local government. Climate mitigation refers to efforts to curb a local government's contribution to the climate crisis more broadly. Broadly speaking, adaptation efforts are less likely to be affected by state preemption, while mitigation efforts may be more likely to be targeted by state legislatures engaging in reactive forms of preemption.⁷ An accurate legal and political analysis of local ability to engage in these activities requires a more particularized look at the local and state legal frameworks in question.⁸ In general, though, many local governments can and do engage in both climate adaptation and mitigation efforts. During the Trump administration, this endeavor played an important gap-filling function in many parts of the country.⁹ Now, with a federal administration sympathetic to the need to act on climate change, there may be new opportunities for federal empowerment of these local efforts. At a high level, those opportunities may include federal legislation that includes funding for local climate action and/or that incentivizes or requires certain local activity,¹⁰ federal regulatory empowerment of local action,¹¹ federal funding of local climate efforts, generation

5. See Fox, *Climate Federalism*, *supra* note 2, at 125–26.

6. *Id.* at 123 (analyzing local climate action related to adaptation, litigation, proprietary action, and mitigation).

7. *Id.* at 126.

8. *Id.* at 124.

9. See Fox, *Localizing Environmental Federalism*, *supra* note 3, at 145.

10. See Fox, *Climate Federalism*, *supra* note 2. Any such federal legislation would of course be subject to limitations imposed by the Tenth Amendment in general, and the anti-commandeering clause in particular. *Id.* It is not currently known how the present Supreme Court would interpret federal legislation that attempted to empower local governments, particularly where that empowerment occurred over the objection of the state. *Id.* at 136, 139.

11. Regulatory empowerment of local governments by the federal government also faces unknown legal questions regarding the ability of the federal government to empower local activity, particularly over the objection of the state. *Id.* at 137.

and dissemination of federal climate data, and others. That broad range of options, as well as the need for thinking critically about the ability of local governments to take on climate change, has been explored elsewhere by this author¹² and others.

The goal of this Essay is to lay out in more concrete fashion some of the particular actions that the Biden administration could take in service of empowering local climate work. President Biden has called for a sweeping approach to climate change that involves not only the traditional environmental agencies, but all of the executive branch.¹³ Acknowledging that broad potential, the discussion herein focuses on a range of actions that executive branch actors could potentially take to further local climate action. The particular ways that these federal actions may be able to advance local initiatives, and whether any one locality will be benefited, depends on particularized analysis of local authority and preemption dynamics within the individual jurisdiction. These suggestions, however, are examples of the kinds of federal executive branch activity that could potentially help to advance local climate action.

The focus on the executive branch should not be taken to imply that comprehensive federal climate legislation is not both needed and highly desirable. Indeed, that kind of federal action is essential and could also play a role in empowering local climate action—or making that action less necessary. The challenges of passing that kind of comprehensive legislation, however, mean that it is worthwhile for the administration to consider actions within executive control. Executive action itself has a number of pitfalls, including its vulnerability to reversal by future administrations. Regardless, actions could be taken currently to help support local climate authority and shore up the potential for local action, particularly in the face of future federal administrations that may be less inclined to use federal authority to address the issue.

I. The Realities of Local Climate Action

Action by local governments on climate change takes a variety of forms, including adaptation to climate impacts, climate litigation

12. *Id.*

13. Valerie Volcovici, *Explainer: How Biden Could Use His Whole Government to Take on Climate Change*, REUTERS (Jan. 19, 2021), <https://www.reuters.com/article/us/usabiden/climate-policy-explainer/explainer-how-biden-could-use-his-whole-government-to-take-on-climate-change?id=USKBN29O260> (quoting Biden adviser as saying that “[e]very agency is a climate agency now”).

efforts, local proprietary actions, and broader forms of voluntary or mandatory climate mitigation measures aimed at curbing local contributions to climate change.¹⁴ Whether a particular local government will be well-positioned to engage in these kinds of actions depends both on its grant of home rule authority from the state as well as whether that authority has been preempted by the state.¹⁵ Of the categories of local action laid out above, local mandatory mitigation measures are the most likely to be subject to state preemption, at least in parts of the country where local policy preferences do not match those of the state.¹⁶ In consequence, it is those local mitigation measures that stand to benefit most from empowerment by the federal government.

Local mitigation measures also have the biggest potential for playing a gap-filling role in terms of the U.S. climate response.¹⁷ Where federal or state climate efforts are incomplete or lacking entirely, these local responses can help to advance progress in emissions reductions. To be sure, a piecemeal approach by local governments on climate mitigation is unlikely to be as successful as a more coordinated, comprehensive response. But, in the absence of such a response, and without knowing when such a framework will be in place or how resilient it will be, this potential for local mitigation remains important. Federal empowerment of local action on climate can play an important role in shoring up the authority of local governments so that they can continue to play this gap-filling function going forward.

It may also be beneficial for the federal government to focus on local empowerment on the mitigation side because of the possibility of divergence between local climate action and local climate reality in terms of local adaptation. That is, there are likely to be strong incentives for local governments whose citizens and infrastructure are being impacted by climate change to respond in ways dedicated to preserving property or the current shape of a community, regardless of what climate science and policy research says about the ecological impacts of such actions or the likely future demographics of the region. Federal actors looking to empower a local climate response

14. See generally Fox, *Climate Federalism*, *supra* note 2, at 150.

15. *Id.* at 152.

16. For a more detailed analysis of the likelihood of preemption of these different forms of local climate action, see, for example, Fox, *Localizing Environmental Federalism*, *supra* note 3, at 135, 152–54.

17. See *id.* at 124, 135

should be cognizant of those dynamics and should avoid responses that would simply funnel federal money toward local actions unsupported by climate science. While local climate adaptation will benefit from federal financial support, an important function for the federal government in its provision will be using care in determining the kinds of local infrastructure or other actions that will be supported. Understanding when there is a good match between expected climate and environmental impacts and local response is also only possible where accurate climate data and predictions exist. That need for accurate understanding of expected climate impacts demonstrates another area where the federal government can support local actors—investment in the production and dissemination of climate science and data.

Again, discussion of the questions raised above, from the particulars of local authority to act and how that can best be supported, to what kinds of local climate responses are warranted in particular areas and which are not, necessarily depend on a more detailed analysis of the circumstances in a given locality. This is true not only for climate realities faced by particular areas, but also for the legal and political realities of the local government being discussed. It is therefore useful only to a certain extent to discuss the broad contours of federal empowerment of local governments. Recognizing the need to localize the conversation about how climate responses at all levels of government could and should play out,¹⁸ this Essay nonetheless suggests some general ways in which parts of the Biden administration could help to empower local regulatory action and further local climate adaptation and knowledge.

The emphasis within this Essay is how federal actors can empower local responses that would otherwise be prevented due to state preemption or other roadblocks, such as lack of resources. That discussion, which centers local governments that wish to engage in climate action, is necessarily different than one regarding how the federal government can provide mandates or incentives for action to local governments reluctant to act on climate change. In many ways, using federal authority to get at local climate inaction by choice may be an easier question than that of how best to preserve and promote desirable forms of local action being impeded by the state. Local climate nonactors could potentially be required or incentivized to act by federal statute or regulation, or could be encompassed within

18. See, e.g., Fox, *Climate Federalism*, *supra* note 2, at 124.

similar laws or rules that focus on the states or on uniform national standards.¹⁹ But given the current lack of these kinds of uniform emissions standards, and the likely difficulty that awaits any attempt to get them, the importance of federal empowerment at the local level becomes clear. Thus, the focus herein is not on making the case that local actors are the ones best suited for action on climate change; rather, it is to ensure that, where the federal government is able, it works to shore up the potential for local action that may at times be the best backstop against climate inaction at other levels.

II. How the Biden Administration Can Empower Local Climate Action

The federal government has many options for action on climate change. Particularly in the present moment, when the Democratic Party controls Congress and the Biden administration has stated its intention to make climate change a priority, both legislative and executive action may be possible. And both forms of federal engagement have the potential to be effective and to strengthen local participation in addressing climate change.²⁰ As noted, while sweeping federal climate legislation would be extremely welcome and should be pursued, passage of this kind of legislation is likely to be difficult given the slim Democratic majority at present and the focus of Congress on addressing the COVID-19 pandemic and its aftermath, and other issues that are likely to expend a great deal of the administration's political capital. Thus, while comprehensive federal legislation may be optimal, it is far from assured.

Given the stated intentions of the administration to support local climate action—and to involve federal actors across the executive branch—it is therefore useful to pinpoint the parts of the executive branch that could play a role in providing local support, and what kinds of actions they could take to do so. The suggestions are divided into four categories: regulatory empowerment of local actors; provision of federal funding; development and dissemination of better climate data; and creation of model codes for local climate planning. This Essay then makes those suggestions more concrete by providing examples of specific offices within the executive branch, and specific actions that they could take, to empower local action. While necessarily not an exhaustive list given the enormous range

19. Subject, of course, to the Tenth Amendment and other legal constraints.

20. *Id.* at 136, 140.

of potential for federal action and the number of potential actors involved, these examples should offer a sense of the possibilities for federal empowerment of local climate action.

A. Empowering Local Regulatory Action

As described previously, one area of local climate action can be broadly categorized as regulatory mitigation measures. These actions can be voluntary or mandatory in nature, and they can take a variety of forms, including buildings emissions limits, electrification efforts, transit planning, land use changes, and many others.²¹ While often within the ambit of a local government's home rule authority, these efforts are more likely than other local actions to attract preemption at the state level.²² The reasons for that preemption have been described elsewhere by this author²³ and are perhaps not difficult to understand. Unlike other categories of local action, which focus on locally felt impacts from climate change or core areas of local control, local regulatory efforts focus on addressing contributions to a global problem.²⁴ Thus, the possibility for spillover impacts and regulatory patchworks—and, perhaps, identity battles—are present and may prompt state reaction against this use of local authority. Where the state chooses to do so, it is generally able to remove local authority to act on climate or any other issue.²⁵ Thus, local authority remains particularly vulnerable in this context.

At the same time, local regulatory efforts are an important component of a U.S. climate response that has to date been severely lacking. Although no one local government will be able to solve climate change by reducing its emissions, the cumulative ability of localities to fill in gaps in climate response may be significant. Moreover, in the face of failure on the part of the federal government and many states to implement emissions reductions plans, local governments have taken on the mantle of incorporating needed changes within their own jurisdictions. Given the unlikelihood of an immediate comprehensive federal response to climate change, as well as the possibility that future administrations might dismantle any federal climate framework that is put into place, these local actions remain

21. See, e.g., *id.* at 131–35.

22. *Id.* at 126.

23. See *id.*

24. *Id.* at 132.

25. *Id.* at 136.

important. A federal administration sympathetic to these efforts may be able to empower local regulatory climate action—potentially even over the objections of the state in which the local government is located²⁶ and potentially in ways that may have lasting impacts for local authority to act on climate change.

1. ENVIRONMENTAL PROTECTION AGENCY

The broad mandate of the Environmental Protection Agency (EPA) includes administering the Clean Air Act, the most likely vehicle for federal climate regulation. Consequently, EPA is the agency behind past—and almost certainly future—federal climate rulemakings. Through such rulemakings, the EPA may be able to offer local governments authority to engage in climate action, even over the objection of the state. For instance, EPA's previous Clean Power Plan rule regulated greenhouse gas emissions from existing power plants. Within that rule, states were given a range of options for reducing emissions; if the state chose not to integrate these reductions into its own state implementation plan (SIP), then the federal government would come up with a plan for such reductions.²⁷ Advocates have called upon the Biden EPA to engage in similar rulemakings for vehicles, the power sector, and the oil and gas sector.²⁸ Vehicle emission standards are likely to remain an area of federal control, but, within a vehicle emission rulemaking, EPA could open up incentives for local governments to take actions such as engaging in comprehensive transit planning, or providing for electric vehicle charging infrastructure.

With regard to rulemakings to address greenhouse gas emissions from the power and oil and gas sectors, EPA is likely to lean again on forms of cooperative federalism involving the states.²⁹ Requirements placed on the states in this context could redound to the

26. *Id.* The success of this kind of approach would likely depend on surviving legal challenges to the federal government's ability to empower local actors over the objection of the state; the legal framework for these kinds of challenges has not been firmly settled, and is difficult to predict. *Id.* at 140.

27. Julian Spector, *Cities Speak Up to Save Obama's Clean Power Plan*, BLOOMBERG (Mar. 31, 2016), <https://www.bloomberg.com/news/articles/2016-03-31/national-league-of-cities-offers-defense-of-clean-power-plan>.

28. BRENDA MALLORY, JOE GOFFMAN & JENNIFER MACEDONIA, ENV'T PROT. AGENCY, CLIMATE 21 PROJECT: TRANSITION MEMO 22 (2021), https://climate21.org/documents/C21_EPA.pdf [hereinafter TRANSITION MEMO].

29. The basic operation of the Clean Air Act involves federal standards that are implemented by each state in a State Implementation Plan (SIP).

benefit of local governments, if local emissions contributions are considered as part of state emissions planning and Clean Air Act compliance.³⁰ In such cases, stricter federal standards may weigh in favor of preserving local authority to cut emissions in order to meet new state emissions reductions targets. Other kinds of regulation of the energy sector, such as stricter new source performance standards for natural gas plants,³¹ could also empower local regulatory action by setting up disincentives for states to preempt natural gas bans, either on the production side or the building electrification side.³²

A more dramatic act by the Biden EPA would include direct empowerment of local governments via federal rulemaking. While the legal viability of such an approach is untested with the current Supreme Court, some precedent suggests that federal regulatory authority could be used to empower local action even over the objection of the state.³³ The Biden EPA could test that theory by, for instance, focusing on emissions reductions at the local level as part of its rulemaking, or by making certain emissions reductions actions favored by local governments part of the array of options available for satisfying federal requirements. In the Clean Air Act context, taking such actions would require EPA to contend with the general principle that the agency cannot question the makeup of a SIP, provided that the state plan comes overall within EPA's prescribed emissions limits.³⁴ States have a high degree of flexibility and control in complying with their Clean Air Act obligations, and EPA will not be able to specifically dictate that compliance includes local action. But, by crafting its rules with an eye to encompassing or incentivizing local action, EPA may be able to flex its authority in support of local regulatory actions.

30. Arnold W. Reitze, Jr., *Air Quality Protection Using State Implementation Plans—Thirty-Seven Years of Increasing Complexity*, 15 VILL. ENV'T L.J. 209, 212 (2004).

31. See MALLORY ET AL., *supra* note 28, at 28.

32. See Fox, *Climate Federalism*, *supra* note 2 (explaining trend in preemption of local building electrification laws).

33. See *id.* at 136 (discussing *Lawrence Cty. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 263 (1985)).

34. See *Train v. NRDC*, 421 U.S. 60, 79 (1975) (“[S]o long as the ultimate effect of a State’s choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.”).

2. DEPARTMENT OF JUSTICE

While the Department of Justice (DOJ) is not directly responsible for making climate policy, it may still play an important if indirect role in protecting and promoting local authority. DOJ will be tasked with defending many of the actions taken by the Biden administration. There are still many unanswered questions about the extent of federal authority to empower local action.³⁵ DOJ could potentially help to answer those questions in support of local authority by being mindful of the ways that it is crafting its arguments regarding federal actions. For instance, the agency should avoid making arguments based on field preemption and should instead support maintaining state and local regulatory flexibility in imposing standards that go above, or can coexist with, the federal floor. By focusing on the importance of this continued flexibility, DOJ may help to avoid judicial decisions that limit the operation of federalism “hedging”³⁶ or potential for various actors within the federal system to act with regard to environmental issues.

Litigation strategy could go beyond arguments against blanket preemption however. The success of such arguments, as well as those that support the ability of the federal government to empower local environmental action even over the objection of the state, may depend on nuanced articulations of environmental federalism. Such arguments should focus on the role that local governments play within the federal system and should demonstrate how a commitment to dual federalism has never been the reality within environmental federalism.³⁷ Instead, local governments—and an integrated degree of dynamism, or moving between or among levels of government—have long been a hallmark of the environmental regulatory framework.³⁸ Cases like *Nixon v. Missouri Municipal League*³⁹ show that, in thinking about federal empowerment of local governments, federalism concerns may play a role in the Court’s reasoning. By crafting arguments in support of federal action in a way that plays up, rather than undermines, the overall operation of the federal

35. For further discussion of these uncertainties, see, for example, Fox, *Climate Federalism*, *supra* note 2, at 136.

36. See William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1049 (2017).

37. See, e.g., Fox, *Localizing Environmental Federalism*, *supra* note 3, at 159–60 (providing environmental federalism scholarship review).

38. *Id.* at 158.

39. 541 U.S. 125 (2004).

system in environmental law, and the role of local governments within that system, DOJ attorneys may play an important role in securing a foundation for local environmental action. Given the possibility of regulatory and political reversals that may impact other actions taken by the Biden administration, this potential for shoring up local authority as a matter of law could be critical in avoiding regulatory gaps that have occurred in the past when federal and state administrations were unwilling or unable to act on climate change.⁴⁰

3. DEPARTMENT OF TRANSPORTATION

As local governments consider ways to reduce vehicle emissions, the Department of Transportation (DOT) may play an important role in that transportation planning. As described below, DOT may be able to provide funding to encourage the build-out of more climate friendly transit. An area of regulatory action where DOT may play a particularly crucial role as well is in allowing local congestion pricing efforts to proceed. Congestion pricing, or pricing road access based on times of high traffic or other variables, has been proposed as an option for reducing automobile traffic and thereby alleviating harm from greenhouse gas emissions and environmentally harmful land use planning patterns. Where congestion pricing involves federal roads, it requires DOT's approval through the federal Value Pricing Pilot Program (VPPP).⁴¹ During the Trump administration, delays in receiving this approval represented a major roadblock, for instance, in allowing New York City to move forward with its congestion pricing plan.⁴² Ensuring that the agency is moving expeditiously on requests for approval from local governments could make that process much smoother. While congestion pricing is likely not a consideration outside the largest cities in the United States, reduction in vehicle emissions from those cities—combined with the potential emissions reductions from denser land use patterns that may result from congestion pricing—could have a considerable impact on greenhouse gas emissions.

40. *Id.*

41. See, e.g., Alissa Walker, *Secretary Pete Is Already Coming Through for New York City on Congestion Pricing*, CURBED (Feb. 23, 2021), <https://www.curbed.com/2021/02/congestion-pricing-nyc-approval-pete-buttigieg.html>; U.S. Dep't of Transp., Federal Highway Administration, Congestion Pricing, Frequently Asked Questions (Mar. 2, 2020), https://ops.fhwa.dot.gov/congestionpricing/faq/index.htm#faq_02 [hereinafter FAQ].

42. See, e.g., Walker, *supra* note 41; U.S. Dep't of Transp., FAQ, *supra* note 41.

Along with the more expeditious review and approval process for congestion pricing as a program, projects that involve a “major federal action” must go through the environmental review process under the National Environmental Policy Act. Transit projects in general are likely to be deemed major federal actions in need of environmental review. The federal government has a tremendous amount of influence over how fast or slow that process moves. Like the needed approval under the VPPP, the environmental review process did not move forward for New York City’s plan under the Trump administration. The Biden DOT has said that it will move the NEPA process forward much more quickly, another important way that the administration can aid local governments interested in carrying out congestion pricing schemes. These approvals by the federal government do not in themselves confer authority on local governments—or states, for that matter—to engage in congestion pricing.⁴³ Subfederal governments interested in implementing are subject to the particulars of state law constraints on the taxing power and on the extent to which that power has been conferred upon local governments.⁴⁴ But, by making sure that, where the need for federal approval exists, it is forthcoming, the Biden DOT may be able to empower local authority to engage in better transit options.

There are likely many other possibilities for conferring some degree of regulatory authority on climate to local governments. For instance, agencies such as the U.S. Department of Interior and the U.S. Department of Agriculture may develop or expand upon certain programs that involve local governments as partners or stakeholders in the context of wildfire planning and the wildland-urban interface.⁴⁵ In the context of such work, a report written by former

43. See, e.g., U.S. Dep’t of Transp., FAQ, *supra* note 41.

44. *Id.*; see also, e.g., Jason Laughlin, *How Congestion Pricing Might Come to Philadelphia’s Streets*, PHILA. INQUIRER (Apr. 2, 2019), <https://www.inquirer.com/transportation/congestion-pricing-new-york-philadelphia-traffic-20190402.html> (noting, in discussing the possibility of congestion pricing in Philadelphia, that “[t]he state legislature determines what municipalities can tax, so Harrisburg would have to approve congestion pricing.”). The question of state versus local authority regarding congestion pricing also came up in the New York City context, where New York State preempted the City’s authority to enact a congestion pricing charge; the state legislature eventually passed its own state law allowing for congestion pricing, but the City’s authority remains preempted. See, e.g., Sarah Fox, *Localizing Environmental Federalism*, *supra* note 3, at 190 (citing N.Y. STATE DEP’T TAX’N & FIN., CONGESTION SURCHARGE (July 7, 2021), <https://www.tax.ny.gov/bus/cs/csidx.htm>).

45. See, e.g., ROBERT BONNIE, LESLIE JONES & MERYL HARRELL, DEP’T OF AGRIC., CLIMATE 21 PROJECT, TRANSITION MEMO 10 (2021), https://climate21.org/documents/C21_USDA.pdf.

USDA employees recommends that the agencies “work with governors and local communities on addressing new development in the wildland-urban interface and how to improve the ability of existing houses and other buildings there to withstand fire.”⁴⁶ One way to improve that ability is to ensure that local authority in land use planning—when exercised in accordance with climate science and projections—is preserved, along with local power when it comes to broader sustainability initiatives. Federal actors may be able to do that in either formal or informal ways by making that kind of local power an official part of any agreements or commissions that are created, by involving local actors as stakeholders in the planning process, or by exercising softer amounts of influence on state actors to encourage a lack of state preemption. Again, the appropriate protections for local control, and the degree to which it may or may not be threatened, depend very much on the specifics of the issue and the state and local relationship in question. But as federal agencies consider their own role in climate planning on a variety of fronts, they should also consider their points of contact with and influence over state and local actors. Through those connections, as well as through more formal actions, the Biden administration may have the ability to promote local regulatory authority on climate planning.

B. Empowering Local Climate Action via Federal Funding

The Biden administration could also work in even more straightforward ways to empower local climate action by focusing on providing funding to local entities. These funding opportunities take a variety of forms, and most if not all of the executive entities working on climate action will have some opportunity to better fund local action. This kind of federal support is important for several reasons. First, local governments face many budget challenges, and receiving money from the federal government may be necessary for certain local projects to come to fruition. Beyond the basic fact of making up for budget shortfalls, however, federal funds may be an important form of local empowerment in that provision of funds may also confer the ability to dictate how they are spent.⁴⁷ That is, federal funding may provide local governments with authority to spend money on climate work—and to be safe from state preemption or

46. *Id.*

47. See, e.g., Fox, *Localizing Environmental Federalism*, *supra* note 3, at 136.

interference in doing so.⁴⁸ In that way, receipt of federal funds offers a critical opportunity to encourage and promote local climate action in meaningful ways even without rulemaking action.

Many agencies have funding mechanisms in place already that could be used for local climate action, or converted to that purpose with little effort. For example, EPA could use grants to support funding of local work on climate planning. The agency already has in place a multipurpose grant program that supports state and tribal climate adaptation efforts.⁴⁹ Local governments are not eligible to be direct recipients of those grants. To the extent that states are so inclined, however, these grant programs may offer a way for states to work with local governments as stakeholders to fund certain local projects. Similarly, the Federal Emergency and Management administration (FEMA) already has in place a Building Resilient Infrastructure and Communities (BRIC) funding program.⁵⁰ The BRIC program allots money to pre-disaster hazard mitigation activities. Although local governments are not eligible to apply directly, they may be sub-applicants for the funds.⁵¹ By tailoring this federal investment in pre-disaster funding to focus on climate adaptation projects, FEMA grants could help local governments make these projects a reality—with the cooperation of the state.

Even where state willingness to partner with local governments or pass on funds for local climate projects does not exist, federal money may be available that could go more directly to local governments. For instance, an EPA grant program is already in place for remediation of brownfields contamination.⁵² Grants for those remediation projects can be made directly to local governments and may allow EPA to promote emissions reduction and adaptation “by working with developers on renewable energy siting and with state and local entities to address the impacts of climate change on contaminated properties.”⁵³ By focusing on congressionally authorized programs

48. *Id.*

49. EPA, MULTIPURPOSE GRANTS TO STATES AND TRIBES (May 25, 2021), <https://www.epa.gov/grants/multipurpose-grants-states-and-tribes>.

50. FEMA, BUILDING RESILIENT INFRASTRUCTURE AND COMMUNITIES (July 12, 2021), <https://www.fema.gov/grants/mitigation/building-resilient-infrastructure-communities>.

51. *See, e.g.*, FEMA, BEFORE YOU APPLY FOR BUILDING RESILIENT INFRASTRUCTURE AND COMMUNITIES (BRIC) FUNDS (Apr. 13, 2021), <https://www.fema.gov/grants/mitigation/building-resilient-infrastructure-communities/before-apply>.

52. *See, e.g.*, EPA, FISCAL YEAR 2021 FREQUENTLY ASKED QUESTIONS FOR BROWNFIELDS MULTIPURPOSE, ASSESSMENT, RLF, AND CLEANUP (MARC) GRANTS (Sept. 22, 2020), https://www.epa.gov/sites/production/files/2020/09/documents/fy21_faqs_90220.pdf.

53. TRANSITION MEMO, *supra* note 28, at 22.

like this one that are already in place and allow for direct funding of local activities, EPA may find a variety of opportunities for direct federal aid to localities.

Similar ability to transfer federal money directly to local governments may exist in the transportation realm. As discussed above, transit planning can be an important aspect of climate mitigation strategies at the local level. Many local governments have begun to invest in expanded public transit options that focus on reducing the number of cars and the greenhouse gas pollution that they produce. The Biden Department of Transportation (DOT) could help facilitate these efforts by providing funding to local governments for such transportation projects or supporting infrastructure, such as charging stations for electric vehicles. In February 2021, DOT announced its 2021 round of the Infrastructure for Rebuilding America (INFRA) grant funding program,⁵⁴ which will award funding to projects that “result in good-paying jobs, improve safety, apply transformative technology, and explicitly address climate change and racial equity.”⁵⁵ As part of that announcement, DOT acknowledged the importance of this kind of funding to both state and local governments, particularly in the midst of the COVID-19 pandemic.⁵⁶ This kind of grant program, particularly if focused on local actions, is critical to the ability of local governments to engage in large-scale transit planning in ways that respond to climate change.

A comprehensive survey of grant programs by federal agencies is likely to reveal other areas where funding already within the control of the agency could be used to support local climate action. These kinds of grants from the federal government may serve as a means of assisting local governments in navigating state proscriptions on climate planning and/or mitigation strategies,⁵⁷ and can play a critical role in making sure that local climate action is able to advance, both legally and as a practical matter. They can therefore be an important and meaningful component of any federal climate response—provided that they are dispersed for projects that accord with current climate science.

54. U.S. Dep’t of Transp., U.S. Department of Transportation Announces FY 2021 Round of the Infrastructure for Rebuilding America (INFRA) Grant Program (Feb. 17, 2021), <https://content.govdelivery.com/accounts/USDOT/bulletins/2c222d8>.

55. *Id.*

56. *Id.*

57. *See, e.g.,* Fox, *Climate Federalism*, *supra* note 2, at 136 (discussing possible federal empowerment of local governments through funding, and detailing some of the legal questions that may accompany such an approach).

As noted, there may be a lack of proper incentives at the local level to plan appropriately for climate change when such plans would dictate loss of municipal land, loss of population, or changed aesthetics. Simply put, the political unpopularity of acknowledging and planning for such impacts means that local governments are instead incentivized to invest in projects such as shoreline hardening, beach restoration, and rebuilding in the face of repeat flooding, even where such actions cut against climate science and could engender additional environmental harms. Because planned local climate mitigation projects may fall into this category of unwise climate action, federal funds for local climate projects should be dispersed according to criteria that include the overall appropriateness of the project under climate science parameters. The Biden administration can respond to that challenge by ensuring that funds for local climate action are dispersed through the lens of climate science, and by rewriting relevant funding parameters and by reviewing decision-making processes accordingly.

C. Empowering Local Climate Action via Climate Data Generation and Dissemination

The federal government is also an important source of climate data for local governments. Many local entities do not have the expertise, resources, or funding to engage in climate science on their own. Instead, they rely on information from the federal government and their respective states to help them plan for likely climate change impacts. By investing in both the production and dissemination of data in ways that would be useful to local governments, the Biden administration can work to ensure that this federal function is being fulfilled.

For example, the National Oceanic and Atmospheric Administration (NOAA) “is the lead agency and repository for greenhouse gas emissions for the globe, and the lead agency on the National Climate Assessment in the United States. The National Center for Environmental Information within NOAA is the world’s largest provider of weather and climate data.”⁵⁸ NOAA has been engaged in making climate data available at the subfederal level for many years.⁵⁹ That

58. JEAN FLEMMING & MIRIAM GOLDSTEIN, NOAA, CLIMATE 21 PROJECT TRANSITION MEMO 8 (2020), https://climate21.org/documents/C21_NOAA.pdf.

59. See, e.g., Alice Kaswan, *Climate Change Adaptation and Land Use: Exploring the Federal Role*, 47 J. MARSHALL L. REV. 509, 537 (2013).

data can be useful to local governments in making well-informed decisions about how climate change is likely to impact their communities, and how best to engage in adaptation policies. In the context of climate adaptation, the hurdles to local action are less likely to come from questions about local authority and state preemption than from developing local institutional and political capacity to make planning decisions that respond to community needs and environmental realities.⁶⁰ As a result, the best uses of NOAA's authority and resources in empowering local climate action would include more investment in generation and dissemination of climate data to local actors in ways that are accessible.⁶¹

To improve upon the data available, as well as the ability to communicate that data to local partners, the Biden administration's NOAA is in need of funding for climate research.⁶² In addition, making that data of use to local governments requires coordinated dissemination to local governments. The unit within NOAA best positioned to do that work is likely NOAA's Regional Climate Centers (RCCs), along with its Regional Integrated Science and Assessment (RISA) program, which works to develop climate data at the more regional level. At the beginning of the Biden administration, "several regions of the country [were] not currently covered by RISAs," and "three of the six RCC lack[ed] permanent directors."⁶³ Filling in those gaps within NOAA, as well as developing more localized climate tools, would allow NOAA to act in much more effective ways to make available the most useful climate data to local governments.

That climate data, in turn, would ideally provide a clearer picture for local governments, which are not otherwise well positioned to engage in that kind of climate research and data collection,⁶⁴ about what to expect from climate change and how best to plan for

60. See, e.g., Fox, *Localizing Climate Federalism*, *supra* note 3, at 1273 (explaining relative lack of preemption concerns surrounding local adaptation policies).

61. See, e.g., Andrew Freedman & Jason Samenow, *Under Biden, NOAA's Profile Is Set to Rise as Climate Change Takes Center Stage*, WASH. POST (Dec. 4, 2020), <https://www.washingtonpost.com/weather/2020/12/04/noaa-biden-transition-climate-leaders/>; see also FLEMMING & GOLDSTEIN, *supra* note 58, at 1 ("NOAA's goal in a new administration should be to expand and make climate data, products, and services even more easy to access and use, provide climate-related support to state and local governments as well as to the private sector, and connect people making specific adaptation and planning decisions with the tools and resources they need.").

62. FLEMMING & GOLDSTEIN, *supra* note 58, at 9.

63. *Id.* at 8–9.

64. See, e.g., Alice Kaswan, *Climate Change Adaptation and Land Use: Exploring the Federal Role*, 47 J. MARSHALL L. REV. 509, 536 (2013).

the resulting changes in their communities. In an ideal world, that information would spur wiser land-use planning patterns and other needed adaptation efforts. As discussed above, in many communities, the political and social difficulties of making choices to, for instance, retreat from the coastline or shrink a locality, may mean that local action does not accord with climate science and predictions.⁶⁵ Better data from NOAA can help to evaluate the appropriateness of local responses however. It can also help the federal government make more informed choices about what local actions are worth supporting, and which actions should not be backed by federal money. Thus, a key focus of the Biden administration should be to support its scientists and develop a more robust system of communicating the climate predictions that they produce.

The National Flood Insurance Program (NFIP) is another example of a federal program that could empower local climate action through better data. One structural component of the NFIP is the Community Rating System, which encourages community floodplain management where certain minimum requirements of the program are exceeded.⁶⁶ The minimum requirements of the NFIP are centered around Flood Insurance Rate Maps (FIRMs) that the Federal Emergency Management Administration (FEMA) creates. Those FIRMs are often out of date, and they do not necessarily reflect current climate data. Updating those maps may cause property owners in some communities to have higher rates of flood insurance or greater amounts of uninsurable land. That change alone may empower and make necessary better land-use planning by local governments. Alternatively, the incentives in place for such planning in the form of reduced insurance rates may help to create support around local climate planning.

Finally, the federal government can play a role in promoting generation of useful climate planning and data by ensuring that local governments are involved as stakeholders during the generation and dissemination process. A federal office likely well situated to perform that convening and policy coordination task is the Council on Environmental Quality (CEQ). Housed within the Executive Office of the President, CEQ was created by the National Environmental

65. See, e.g., Christopher Flavelle & Patricia Mazzei, *Miami Says It Can Adapt to Rising Seas. Not Everyone Is Convinced*, N.Y. TIMES (Mar. 2, 2021), <https://www.nytimes.com/2021/03/02/climate/miami-sea-level-rise.html?action=click&module=Top%20Stories&pgtype=Homepage>.

66. FEMA, NATIONAL FLOOD INSURANCE COMMUNITY RATING SYSTEM (July 12, 2021), <https://www.fema.gov/floodplainmanagement/communityratingssystem>

Policy Act (NEPA) as a means of coordinating federal environmental responses. As discussed previously, relevant federal offices can play an important role in NEPA reviews by helping favorable climate projects move along expeditiously. Beyond that, however, CEQ may be able to play a coordinating and disseminating role for local governments when it comes to climate policy and science.⁶⁷ Bringing local governments into conversations about planning for mitigation and adaptation presents another opportunity for the Biden administration to empower local expertise—and generate better understanding of resiliency planning from the local to the federal level. To the extent that the Biden administration is able to build on the CEQ’s convening powers by fostering broader state and local participation in federal climate planning and priority setting, it could provide a valuable means of furthering a comprehensive approach to climate resiliency in the United States.

D. Empowering Local Climate Action via Model Policies

The federal government may also have a role to play in facilitating generation of model policies for local climate action. As mentioned, local governments often have to contend with a lack of resources, expertise, and personnel to dedicate to the task of climate planning. Model policies can help lower barriers to local action in this area by offering a template for how such action can and should look.⁶⁸ While the federal government has not historically produced model local environmental policies, its experience in related areas may offer some guidance. For example, the Energy Star program is a longstanding joint program between EPA and the U.S. Department of Energy (DOE)⁶⁹ that offers federal standards on energy efficiency for consumer products. Manufacturers who wish to market their product as Energy Star certified must comply with the federal guidelines. This process gives consumers a standardized way to assess claims of energy efficiency and provides incentives for manufacturers who wish to market their products as such to meet these federal standards.

67. See, e.g., CHRISTY GOLDFUSS, TIM PROFETA, KRISTINA COSTA & JEREMY SYMONS, “EXECUTIVE OFFICE OF THE PRESIDENT,” CLIMATE 21, TRANSITION MEMO at 11–12 (2020), https://climate21.org/documents/C21_EOP.pdf

68. See Anthony Moffa, *Uniform Climate Control*, 54 U. RICH. L. REV. 993, 1040 (2020).

69. See, e.g., Memorandum of Understanding on Improving the Energy Efficiency of Products and Buildings Between The U.S. Environmental Protection Agency and The U.S. Department of Energy (Sept. 30, 2009), https://www.energy.gov/sites/prod/files/2013/12/f5/epa_doe_mou.pdf.

Similar policies could be explored in developing models for state and local governments to use and could potentially be developed in many different areas by many different agencies. For example, EPA, perhaps in partnership with DOE, could develop model policies to advance local electrification of buildings.⁷⁰ Federal agencies would not need to start from a blank slate in doing this work. Nonprofit and academic entities have already engaged in a tremendous amount of work in creating model policies.⁷¹ Having the federal government engage in this kind of model policy production could offer another means by which to use the superior resources and expertise of the federal government to encourage and foster local climate action.

The development of these kinds of policies would not directly confer authority on local governments. Model policies are therefore likely most useful for local governments that have interest and authority to act, but perhaps lack local capacity to develop their own climate ordinances. Model policies are likely less useful for local governments facing preemption of their authority by the state. For instance, if EPA and DOE were to develop model policies for electrification of buildings, those federal models would not empower local governments where the state has preempted local authority to act. Moreover, unlike federal standards like the Energy Star program, which preempt state and local action unless the federal government waives that preemption,⁷² model federal policies would likely not preempt different forms of action at subfederal levels.

Addressing the question of state preemption and local authority is, however, something that could and should be considered as part of the drafting and development of these models. For instance,

70. See MALLORY ET AL., *supra* note 28, at 14.

71. See, e.g., Moffa, *supra* note 68 (discussing the Sustainable Development Code and Legal Pathways to Deep Decarbonization as two comprehensive examples). The Sustainable Development Code, <https://sustainablecitycode.org>, is explicitly targeted at local governments and offers a wide array of best practices and model policies for local governments to draw upon. *Legal Pathways to Deep Decarbonization*, published by the Environmental Law Institute, is a comprehensive resource explaining the technical and policy pathways for reducing U.S. greenhouse gas emissions by at least 80% from 1990 levels by 2050. While not limited to local action, it provides a vast array of ideas for reducing greenhouse gas emissions, many of which could be adopted at the local level.

72. See DOE, Office of Energy Efficiency & Renewable Energy, State Petitions for Exemption from Federal Preemption, <https://www.energy.gov/eere/state/petitions-exemption-federal-preemption> (last visited July 13, 2021) (explaining that “[f]ederal energy efficiency requirements for residential products generally preempt state laws or regulations concerning energy conservation testing, labeling, and standards,” but that the federal government can waive that preemption).

in the context of building electrification, a number of states have passed legislation preventing local governments from enacting bans on natural gas in new development.⁷³ Model federal policies could suggest natural gas bans as an alternative, but acknowledge the fact that, if preempted, other local actions are potentially available to achieve similar policy goals. Crafting the models in that way may be helpful to local governments that otherwise feel stymied by state preemption. Moreover, for local governments worried about preemption, not having to pour their own resources into development of local policies may help lower the barriers to entry and result in overall greater numbers of local governments enacting these kinds of provisions—even if some are ultimately preempted.

III. Conclusion

Agencies and offices across the Biden administration can use the categories of possible federal executive actions suggested above to develop their own plans for supporting local climate action. Even within—perhaps especially within—an administration focusing a tremendous amount of attention and resources on a federal climate response, it is crucial that the federal actors involved finds ways to maintain state and local flexibility to act as well. This is not because subfederal actors are the best positioned to address climate change, particularly on the mitigation front. But given the changing dynamics at the federal level that have occurred in the past, and the possibility that they will change again in the future, preserving state and local ability to act on climate is critical for ensuring the long-term viability of the U.S. climate response.

Different types of federal actions, of course, can empower different kinds of local climate policies. Given that local regulatory actions on the mitigation side face the greatest possibility of preemption by the state, federal agencies engaged in rulemakings or responsible for federal approvals should think about ways to build regulatory empowerment for local governments into those federal actions. Federal funds that can go directly to local governments may also be helpful in promoting this kind of local authority, as agencies involved may be able to attach certain conditions to receipt of those funds that allow for local action that would not otherwise be

73. See, e.g., Fox, *Localizing Environmental Federalism*, *supra* note 3, at 133–34 (discussing state preemption trend regarding building electrification).

possible. On the adaptation side, local governments generally have the authority to take on the land-use planning and other actions required and are less likely to face preemption from the state. They often, however, face funding shortfalls that make it difficult to engage in the kind of projects that adaptation may require. Here, the federal government's control of funding can also be helpful, both in making some of those projects possible and in allowing federal agencies to direct funds to adaptation efforts that align with climate science and projections, and will not create further environmental or social harm. Development of data and model standards can help on both the mitigation and adaptation side; they offer a means by which to use the generally superior resources at the federal level to empower local efforts.

Within each of those categories there are likely a wide array of options available to the Biden administration. The broad outlines and examples provided in this Essay are designed to be a starting point for thinking about how the current administration can use its time in office to empower local climate action and to ensure that such action is able to continue regardless of the political control at the federal level. Many legal questions remain to be answered regarding the authority of the federal government to empower local action, particularly over the objection of the state. Focusing on the realities of the role that local governments play within the system of environmental federalism may help to shore up arguments for why this kind of federal empowerment is appropriate and needed. By keeping in mind those broad principles, and the overall goal of flexibility and participation for local actors that wish to be involved, the Biden administration may be able to do crucial work not only in spurring a comprehensive federal climate response, but in securing a place within that response for local actors that accords with local needs, climate science, and the overall value in having regulatory gap-fillers available if the federal climate response is lacking.