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BACKGROUNDER

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Environmental Conservation Based on Individual Liberty and Economic Freedom

Romina Boccia, Jack Spencer, and Robert Gordon Jr.

Abstract

America's primary environmental goal should be a cleaner, healthier, and safer environment for current and future generations. Yet, governing environmental laws have strayed far from intended purposes, and their implementations are imposing immense costs on Americans with few benefits in return. Too often they impose mandates, empower and enlarge ineffective bureaucracies, and cripple the efforts of free people to more effectively steward America's environment and natural resources. The Heritage Foundation's Environmental Conservation: Eight Principles of the American Conservation *Ethic offers specific reforms for today's challenges and principles to guide future policy decisions. This* Backgrounder *is a summary of the report.*

This paper, in its entirety, can be found at **http://report.heritage.org/bg2758**

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

The nation's primary environmental goal should be a cleaner, healthier, and safer environment for current and future generations, as well as conservation of America's resources while protecting people and their liberty. Regrettably, America's current environmental policy does not reflect these ideals. Indeed, America's governing environmental laws—like the Clean Air Act, the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act—and the management approach to the nation's Federal Estate[1] run directly counter to them. These laws empower and enlarge ineffective bureaucracies, infringe on private property rights, and confound the dynamics of a free market. The results are often negative environmental consequences, stifled individual freedoms, higher prices for materials and goods such as food and fuel, reduced innovation, and lower incomes.

This *Backgrounder* is a summary of the Heritage Foundation report *Environmental Conservation: Eight Principles of the American Conservation Ethic*.[2] It contains a selection of major recommendations from the original report. By employing the *Ethic*'s principles and

Key Points

- America's environmental laws have strayed far from their ostensible purposes and impose undue and immense costs on Americans.
- Federal environmental laws and regulations empower large, ineffective bureaucracies; trample property rights; choke free markets; stifle individual freedoms; result in higher prices for food, fuel, fiber, and minerals; reduce innovation; lower incomes; and, often, effect negative environmental consequences.
- Lawmakers should reject proposed policies to restrict CO_2 emissions and related policies that distort energy markets. The United States should also reject ceding control over elements of the nation's economic and individual liberties through ineffective global environmental negotiations.
- Effective stewardship respects individual liberty, property rights, and economic freedom. Such a foundation allows science and technology, markets, and a site-specific and situation-specific approach to yield real environmental benefits.

Eight Principles of the American Conservation Ethic

1. People are the most important, unique, and precious resource.
2. Renewable natural resources are resilient and dynamic and respond positively to wise management.
3. Private property protections and free markets provide the most promising new opportunities for environmental improvements.
4. Efforts to reduce, control, and remediate pollution should achieve real environmental benefits.
5. As we accumulate scientific, technological, and artistic knowledge, we learn how to get more from less.
6. Management of natural resources should be conducted on a site- and situation-specific basis.
7. Science should be employed as one tool to guide public policy.
8. The most successful environmental policies emanate from liberty.

recommendations, lawmakers can reverse course.

Protecting Private Property

The American Conservation Ethic recognizes that property rights are essential to a flourishing society and inspire the stewardship of natural resources. Whether for economic, recreational, or aesthetic benefit, private property owners have incentives both to enhance their resources and to protect them. There is also a direct and positive relationship between free-market economies that rely on the protection of private property and a clean, healthy, and safe environment.[3]

Today, private property rights are under threat in two main ways: (1) the taking of private property by eminent domain and (2) regulatory restrictions on private property.

The Supreme Court's *Kelo v. The City of New London*[4] decision undermined private property rights by broadening the "public use" exemption that allows government to seize private property, known as eminent domain. States should respond by restricting the use of eminent domain. States should ensure that private property is guarded from abuse by social planners, future legislatures, and local governments seeking to increase tax revenues by confiscating properties and turning them over to crony developers, as was the case in *Kelo*.

An even greater threat to private property is the insatiable growth of the regulatory state. Rather than seizing title to private property as in the case of eminent domain, a growing number of laws and regulations restrict the manner in which people may use their own private property. Imposing such restrictions for environmental reasons is increasingly common. Even owners whose private property is severely devalued by such "regulatory takings" are rarely compensated. While the owners may retain title, regulatory takings nonetheless constitute a "taking" of the use and some portion of the value of private property.

A major reason for the growth in regulation is the large-scale granting of broad authorities from state legislatures and Congress to state and federal regulatory agencies. This has created a system that allows politicians to support big, generic environmental goals (such as clean water, clean air, and "saved" species) while leaving the decisions on implementation to unelected bureaucrats, thus effectively shielding themselves from accountability.

The results are more, and increasingly strict, regulations that essentially give bureaucrats control over major sectors of the economy. For example, the effective result of the CO_2-emissions regulations mandated by the Environmental Protection Agency (EPA) is an eventual ban on coal-fired power plants, which is nearly infeasible given that coal currently provides approximately 38 percent of America's electricity. Effectively banning coal from the nation's power mix would yield exceedingly high costs for every American.

Yet, the purported benefits from many of the regulations are often small, outweighed by their unintended consequences, or downright illusory. To reverse this trend, state and federal governments should:

1. The Federal Estate refers to those lands, waters, and areas of the Outer Continental Shelf and their resources that the federal government owns.
2. Jack Spencer, ed., *Environmental Conservation: Eight Principles of the American Conservation Ethic*, The Heritage Foundation, July 27, 2012, http://www.heritage.org/research/projects/environmental-conservation#EightPrinciples.
3. Terry Miller, Kim R. Holmes, and Edwin J. Feulner, *2011 Index of Economic Freedom* (Washington, D.C.: The Heritage Foundation and Dow Jones and Company, Inc., 2011), http://www.heritage.org/index/download.
4. 545 U.S. 469 (2005).

- **Reaffirm state protections of property rights.** States can and should place restrictions on the exercise of their takings power. All states should reaffirm their protections for property rights by guarding those rights from abuse by social planners, legislatures, and local governments seeking to increase tax revenues by confiscating properties and turning them over to crony developers. Forty-four states have enacted measures to prevent their political subdivisions from using eminent domain like the city of New London did in *Kelo*. Other states should follow in their lead, and states should also consider building these protections into their state constitutions.

- **Establish a mechanism to compensate landowners for regulatory takings.** Congress should establish a simple mechanism for compensation of regulatory takings when, for example, use of private property is prohibited under laws such as the Clean Water Act and the Endangered Species Act. Congress should require that funding for compensation come from appropriated operating funds and prohibit further such regulatory takings if compensation funding is exhausted. This would encourage agencies to focus on conservation efforts that employ tools other than regulatory takings to meet their conservation objectives.

Federal Estate

The federal government owns nearly one of every three acres in the United States. The federal government also owns the outer continental shelf (OCS), which reaches from beyond state waters to 200 miles offshore, covering more than 1.7 billion acres.[5] While crown jewels, such as Yellowstone or Yosemite, are appropriately designated as national parks, large swaths of the Federal Estate contain huge and untapped quantities of oil, gas, minerals, water, and timber that, with responsible practices, could fuel economic growth and job creation.

The current approach to managing the Federal Estate inhibits good stewardship of these lands. Access to this land and these resources is highly restricted because of poorly conceived environmental laws, heavy-handed regulation, and aggressive litigation by political activists. Rather than enact policies for the benefit of most Americans, competing and partisan efforts pressure elected leaders to enact policies that benefit special interests or powerful constituencies.

Lawmakers should implement policies that decrease the size of the Federal Estate, devolve management to state or private entities, and foster economic prosperity. Specifically, lawmakers should:

- **Establish a rational regulatory process.** The regulatory process should allow for responsible resource use and cease being a mechanism for narrow special interests to severely delay or stop development. Regulations must allow resource management to be conducted on a site- and situation-specific basis, and science must be returned to its appropriate use as a tool for informing policy, not twisted into a means of thwarting human activity in the name of the "precautionary principle."[6]

- **Return responsibility to the states and citizens.** With few exceptions, such as "crown jewel" national parks, Congress should return ownership or management of federal lands to states and citizens. Doing so would give responsibility for managing the lands to those closest to it and those with the most to lose from its mismanagement or gain from its wise use.

- **Open access to federal natural resources for development.** Doing so will not only yield economic benefits, but also provide the means and motivation to advance conservation.

Reform Environmental Laws

America's environment is rich and abundant in renewable natural resources. The nation's soil, water, forests, minerals, fish, and wildlife provide for many human needs and desires—from energy to food and clothing to recreational spaces. The use of renewable natural resources often produces byproducts, some of which can be waste and pollution. Property owners are much more likely than government to manage natural resources in sustainable fashion.

However, absent property rights, valuable natural resources may be degraded and depleted by individuals unconcerned about the resource's

5. Bureau of Ocean Energy Management, Regulation and Enforcement, "Offshore Energy and Minerals Management (OEMM)," http://www.boemre.gov/offshore/ (accessed June 14, 2012).
6. The precautionary principle requires that a good, substance, or activity be presumed harmful unless its proponents demonstrate that it will cause no harm. This perniciously shifts the burden of proof and imposes a nearly impossible standard of proving "safety."

future condition. Without a clear system of individuals' rights and responsibilities, communal resources often suffer because of the incentive for individuals to maximize their own benefit before others seek to do so. Some believe that empowering the federal government to manage resources is the best way to mitigate this communal resource problem, often referred to as the "tragedy of the commons."

The problem is that the bureaucrats empowered to implement government policies often have varied interests that may have little to do with well-managed resources. They may be politically or ideologically motivated, or simply have a completely different idea of what conservation is than local populations whose lives and livelihoods are directly connected to the resource. That is why simply ceding management responsibility to the federal government does not yield good results.

Major Environmental Laws

In theory, many environmental laws were designed to protect public health and safety. The Clean Water Act is supposed to protect America's navigable waters from pollutant discharges, and the Clean Air Act is supposed to protect America's air from emissions of pollutants. The goal of the Endangered Species Act is to conserve species that face extinction. The National Environmental Policy Act seeks to ensure that federal agencies incorporate environmental considerations, along with economic and technical considerations, in their decision making.

In practice, these laws often fail to accomplish their intended ideals or fail to meet them without placing enormous and unnecessary burdens on property owners, businesses, and individuals. These policies, originating in the 1970s, are the products of an outdated and misguided command-and-control mindset that empowers and enlarges bureaucracies. By imposing mandates and undue restrictions, these laws impair the functioning of free markets and result in reduced prosperity for the American people. The nation's governing environmental laws also have their distinct problems, which are further addressed below.

The Clean Water Act (CWA). The CWA poses unique risks to individuals and economic freedom because of its unlimited capacity to restrict or prohibit ordinary human activity. The CWA prohibits any unauthorized discharges of pollutants into "navigable waters" and authorizes severe, sometimes ruinous civil penalties and criminal liability for discharging a pollutant without a federal permit. The primary problem lies with the federal government's broad and inconsistent interpretation of the terms "navigable waters" and "pollutant." By promulgating an ambiguous definition of navigable waters, the Army Corps of Engineers and the EPA have effectively federalized virtually all waters and much of the land in the United States, including artificial ponds and swimming pools.[7] Such vague regulations allow federal officials to maximize the jurisdictional scope of the CWA while evading judicial review, thereby discouraging productive activity and economic investment. Some states are fighting back. A federal court recently ruled in favor of Virginia, which had sued the EPA for overextending the CWA to regulate storm water. The EPA dictate to treat storm water as a pollutant would have cost Virginia taxpayers more than $300 million.[8]

The Clean Air Act (CAA). The CAA no longer provides an effective, scientifically credible, or economically viable means of air quality management and thus needs reform to once again be a viable tool to protect public health and the environment.

Under the CAA, the EPA has broad regulatory authority to enforce rules intended to protect public health and the environment. The Obama Administration has misused this authority, however, to regulate CO_2 in pursuit of an economically damaging, anti-conventional fuels policy. The Administration has pursued this course despite Congress's repeated rejections of legislation that would regulate CO_2.

After dramatic improvement in air quality and ever-stricter federal air-quality standards now approaching natural background levels (the levels at which covered pollutants occur naturally), the EPA recently concocted a method to create a vast reservoir of new health risks in order to justify more stringent regulation. Under the cloak of selective, highly uncertain science based

7. Pacific Legal Foundation, "EPA and Army Corps of Engineers' Draft Guidance on Identifying Waters Protected by the Clean Water Act," June 23, 2011, http://plf.typepad.com/Ltr%20to%20EPA%20Re_%20PLF%20Cmmnts%20on%20Idntfyng%20Wtrs%20Prctcd%20by%20CWA.pdf (accessed December 19, 2012).
8. Ken Cuccinelli, "Is Water a Pollutant?" Cuccinelli-Governor, January 2, 2013, http://www.cuccinelli.com/news/entry/1357143976 (accessed January 4, 2013).

on implausible assumptions, the EPA justifies unprecedented new regulations.[9]

The Endangered Species Act (ESA). The ESA seeks to conserve species.[10] After the government lists a species as endangered or threatened, it must also designate critical habitat for the species—specific geographic areas that are subject to restrictions on use. By law, conservation has been achieved under the ESA when the act's provisions are no longer needed for species protection, and the species may then be delisted. In effect, for nearly four decades, the ESA has proven to be a one-way street: Species are continually added to the list but rarely removed. As the number of "listed" species continues to soar, the burden on taxpayers is also exploding. In fiscal year 2010, federal and state expenditures on endangered species exceeded $1.4 billion.

This figure does not even include lost economic activity and the restrictions—and subsequent loss of value—imposed on private property owners. The ESA is costly and ineffective.

The National Environmental Policy Act (NEPA). The NEPA of 1969 requires federal agencies to assess the potential environmental impacts of proposed government actions, including public works projects, leasing federal lands, regulation, and permitting. NEPA requirements take effect whenever any executive federal agency proposes a "major action" that could significantly affect the environment. The range of applicability is broad, encompassing government financing, technical assistance, permitting, regulations, policies, and procedures.

The NEPA process is costly, time-consuming, and riddled with conflict. The statute ignores the limits of environmental science and enables bureaucratic self-interest to determine actions and judicial activism to distort policy. The environmental impact statement process is grounded in the notion of the environment as static and predictable, and fails to account for the complex nature of ecosystems. Even under the assumption that bureaucrats have the expertise to complete scientifically sound environmental assessments in a timely manner, agency personnel have exhibited biased decision making—ignoring information that does not comport with the prevailing view of the agency's mission, for example.

The consequences of the NEPA litigation frenzy include a host of distortions. It proved deadly in the case of the Army Corps of Engineers' New Orleans levee project. After the Corps abandoned its original design in response to litigation, the alternative levee design failed to protect New Orleans residents when Hurricane Katrina struck the city.[11]

Reforming Federal Environmental Laws

Absent an effort to repeal and replace federal environmental laws, there are several actions lawmakers can take to mitigate some of the problems with these laws.[12]

- **Ensure that the costs of regulations do not outweigh benefits.** Congress and the states (when the states are exercising non-federally delegated regulatory authority) should clarify that no regulation may be issued without an administrative finding, that any regulation must be based on rigorous scientific standards, and that the regulation's costs do not outweigh the benefits. Regulators must be directed not only to consider the intended benefit, but also to quantify the burdens of regulation to property, jobs, industry, health, and the costs of goods and services.

- **Require objective, rigorous scientific standards.** Scientific knowledge provides a powerful tool to inform regulatory decisions when it is acquired in accordance with the scientific method. EPA health studies should include minimal criteria for health-effects risk assessments[13] and must be peer-reviewed by an independent body. Major regulatory actions should also be supported by

9. Kathleen Hartnett White, "EPA's Pretense of Science: Regulating Phantom Risks," Texas Public Policy Foundation, May 2012, http://www.scientificintegrityinstitute.org/TPPF050112.pdf (accessed December 20, 2012).
10. The term "species" is not used in a strict biological sense here or in the Act. Under the ESA, species is defined to include species, subspecies, or a distinct population segment of a vertebrate species.
11. INGAA Foundation, "Improving Implementation of the National Environmental Policy Act (NEPA)," June 1, 2000, http://www.ingaa.org/INGAAFoundation/Studies/FoundationReports/274.aspx (accessed December 20, 2012).
12. For additional recommendations to reform specific environmental laws, see Spencer, ed., *Environmental Conservation*.
13. For a list of five minimal criteria for health-effects risk assessments, see Kathleen Hartnett White, "Clean Air Through Liberty: Reforming the Clean Air Act," in Spencer, ed., *Environmental Conservation*, Chap. 4.

objective and comprehensive cost-benefit analyses, carried out by a third party and independently peer-reviewed, to provide critical information to policymakers. Scientific findings, however, are categorically different from policy judgments. The wide body of environmental science existing today should guide but never dictate major regulatory decisions.

- **Require congressional approval to adopt major regulations.** No regulation that has an annual economic impact of $100 million or more on the American economy should take effect without congressional approval. Such approval would be required by the Regulations from the Executive in Need of Scrutiny (REINS) Act, proposed by U.S. Representative Geoff Davis (R–KY).

- **Pursue state-level versions of the REINS Act.** States should implement their own versions of the REINS Act to require legislative approval for regulations with large and potentially negative economic effects.

- **Charge states with setting policy and regulatory standards.** Local knowledge is critical to understanding site-specific challenges, as well as the risks and rewards of different policies. A one-size-fits-all federal strategy does not give state and local governments enough responsibility to develop policies that meet federal regulatory standards while accounting for local economic and environmental interests. Even though many major federal environmental laws allocate significant authority to states, the problem is that, in practice, federal agencies routinely deny states these authorities. For example, regarding the Endangered Species Act, most, if not all, states have their own conservation programs and are well suited to manage most species, including species on federal lands.

- **Clearly define federal jurisdiction under legislative acts.** Limiting the delegation of authority by Congress to regulatory agencies is critical. In the case of the Clean Water Act, a delineation of which waters are covered will curtail unconstitutional regulatory bullying and reduce regulatory uncertainty as well as enforcement costs. Concerning the Clean Air Act, Congress should reassert its authority to set federal air quality standards for criteria pollutants and the emission limits for hazardous pollutants—effectively reclaiming the authority it has delegated to the EPA.

Carbon Dioxide Regulation

The ostensible goal of policies to reduce CO_2 emissions is the moderation of global warming. However, the policies proposed in the U.S., such as a carbon tax, would, at best, have a negligible impact on climate, failing to provide genuine environmental benefits.

The list of enacted and proposed constraints on emissions of CO_2 is long and costly in terms of the economy, liberties, and environment. CO_2 regulation taxes private property, channels resources toward politically preferred technologies, and expands government control. CO_2 regulations take many forms, such as grant and loan-guarantee programs, subsidies for low-carbon technologies, efficiency mandates, cap-and-trade programs, and carbon taxes. In addition to these more direct controls on CO_2, other policies—moratoria on oil and gas drilling, increased regulatory burdens on resource extraction, restrictions or bans on necessary technology—seek to increase the costs or limit access to CO_2-emitting fuels.

Lawmakers should reject policies that restrict CO_2 and repeal associated energy policies that distort markets and:

- **Explicitly deny the EPA authority to regulate CO_2.** CO_2 is a colorless, odorless, nontoxic gas and a byproduct of, or necessary nutrient for, all living organisms on Earth. CO_2 has none of the characteristics of conventional pollutants but is targeted for reduction, ostensibly to avert global warming. The Clean Air Act, which was designed to limit emissions of pollutants which in certain concentrations can adversely impact human health, is unsuitable for CO_2 regulation. Moreover, given the natural prevalence of CO_2, the scope of regulating it as a pollutant would be administratively infeasible. As written, the regulations will capture everything from large homes and apartment buildings to restaurants, office buildings, hospitals, schools, and large churches, leading to enormous economic consequences.

- **Oppose energy efficiency mandates.** Efficiency mandates suffer from a fundamental flaw: the false assumption that neither consumers nor manufacturers care about energy costs. What consumers and manufacturers do *not* want is efficiency that comes at too high a cost—whether in purchase price or inconvenience. Efficiency mandates frequently ignore these costs and force consumers to buy

products they would not otherwise choose.

- **Repeal and prevent low-carbon and renewable-energy standards (RES).** Low-carbon and RES mandates threaten the stability and reliability of the country's electricity supply, raise costs for households and businesses, and provide little environmental benefit.

- **Eliminate subsidies for all forms of energy.** Government interference to help new energy technologies gain foothold in the market is not necessary. Subsidies will more often be payoffs to technologies spurned by the market, not to a technology embraced by it.

International Environmental Policy

The purpose of environmental United Nations conferences and organizations is to codify and advance what is described as "sustainable" management of resources and the safeguarding of such resources for the benefit of present and future generations. International law expressed and codified through conventions and treaties negotiated at these forums remains the primary means for advancing this goal. However, global negotiations on environmental issues often move counter to the practicalities of resolving them.

The obsessive drive to address international environmental problems—real, exaggerated, or imagined—solely through the U.N. or other global forums lessens the effectiveness of proposed responses.

Solutions that reflect specialized local, national, or regional concerns work much better. Such approaches better represent the most affected populations, thus securing their support, which is ultimately required for successful policy. Unfortunately, the structure of most global environmental efforts empowers marginally affected parties to advance tangentially related issues, such as wealth transfers to developing countries by hijacking the proceedings. These international efforts also allow some countries to game the system by avoiding burdens commensurate with their expressed interests in environmental conservation.

The result of global environmental negotiations is often an ineffective, costly initiative that unnecessarily demands that the United States cede control over some element of its own economic and individual liberties. Instead, the U.S. government should:

- **Preserve and defend the treaty process.** By entering into treaty commitments, the U.S. government cedes some level of sovereignty. Thus, pursuing treaties is a serious responsibility, a fact further evidenced by the Founding Fathers' requirement that two-thirds of the Senate consent to a treaty prior to ratification.[14] Ceding sovereignty is acceptable only if a greater U.S. national interest is served. A treaty should not be entered into merely as a symbolic gesture or public relations effort, but must provide direct, tangible security, political, or economic benefits. Most U.N.-led environmental efforts do not meet this standard. The United States should notify the treaty depository or other relevant authority over treaties which have been signed and remain unratified by the Senate within a reasonable period—that the United States does not intend to ratify the treaty and no longer has any legal obligations arising from its signature.[15]

- **Reduce U.S. involvement with U.N. environmental bodies.** The U.S. should re-evaluate the costs and benefits of membership in these bodies and target its support on specific projects, ideally through voluntary—rather than assessed—contributions that are demonstrably useful or vital to U.S. interests.

- **Limit negotiating parties to key nations.** During negotiations to address an international environmental (or any other) issue, the incentives, constituencies, and alliances that could undermine an effective negotiation increase with the number of extraneous parties participating in the talks. In the context of a purportedly binding agreement, the inclusion only of parties that are necessary to an agreement is the approach most likely to yield a focused, effective outcome.

- **Oppose the precautionary principle and other open-ended principles that lend themselves to manipulation and abuse, or are otherwise flawed.** The precautionary principle perniciously shifts the burden of proof for restricting a substance

14. U.S. Constitution, Art. 2, Sec. 2.
15. The Vienna Convention and customary international law state that the signatories should not undertake actions inconsistent with signed treaties, which gives such documents influence over U.S. foreign and domestic policy even though they have not been ratified.

or activity from demonstrating that it causes harm to proving that it will cause no harm. The United States should challenge the validity and application of the precautionary principle and other concepts like "ecocide" that lend themselves to politicization and abuse.

A Better Approach

The primary purpose of the nation's environmental policies should be to protect public health and to promote the conservation of America's natural resources for the benefit of current and future generations. Doing so requires an approach that first reflects the traditional American values of private property rights, free markets, and individual liberty and responsibility. Those values then must be coupled with an accurate understanding of the environment. That is precisely what the principles of the American Conservation Ethic do. America's most significant environmental protection laws, such as the Clean Water Act, the Clean Air Act, the Endangered Species Act, and the National Environmental Policy Act, do not meet these standards. Consequently, these laws are often inefficient and even counterproductive.

By implementing a reform agenda consistent with the American Conservation Ethic, lawmakers could give America policies that promote environmental improvement and economic prosperity.

*—**Romina Boccia** is Research Coordinator in the Thomas A. Roe Institute for Economic Policy Studies, and **Jack Spencer** is Senior Research Fellow in Nuclear Energy in the Roe Institute, at The Heritage Foundation. **Robert Gordon Jr.** is Senior Advisor for Strategic Outreach in the External Relations department at The Heritage Foundation.*