



Environmental Conservation: Eight Principles of the American Conservation Ethic

Preface

A small group of experts gathered nearly two decades ago in an effort to articulate a set of enduring principles to help policymakers develop sound environmental policy. After a period of debate and dialogue, these individuals produced eight principles rooted in individual liberty, property rights, and free markets that became known as the American Conservation Ethic, first published in 1996.¹ Following publication, the authors introduced these new ideas to a wider audience, often referring to them in speeches, writings, and other analyses.

This volume builds on the American Conservation Ethic by putting forth a comprehensive set of policy recommendations to go along with the principles. In the following pages The Heritage Foundation not only republishes the principles for a new generation of policymakers, it also calls on many of the Ethic's original authors and other experts to describe how precisely to put these principles into action.

¹ The first version of the American Conservation Ethic was crafted under the auspices of a conservative, free market conservation group, NWI, by Robert Gordon (then the organization's Executive Director), The Hon. Becky Norton Dunlop, The Hon. George S. Dunlop, James R. Streeter, The Hon. Kathleen Hartnett White, Alan A. Moghissi, PhD, and Lisa M. Jaeger, Esq.

Introduction

All Americans want a clean, healthy, and safe environment. Yet an important question remains: Which public policies will realize our environmental goals most effectively?

Since the 1970s, the volume of public policy addressing environmental issues has experienced explosive growth. These policies, however, are the products of an outdated and misguided command-and-control mindset. They all too often empower and enlarge bureaucracies, impose mandates, and cripple free markets.

The results of such policies are higher energy prices, lower incomes, less access to resources, and technological stagnation—all while often failing to produce tangible environmental benefits. Whether applied in the context of managing natural resources, industrial policy, or health care, this bureaucrat-centric approach is inherently destructive to a free and vibrant society.

Despite Washington's infatuation with heavy-handed public policy, history has shown that command-and-control policies are inherently inefficient and often counterproductive: Time and time again, the well-being of societies and individuals has depended on individual freedom, free markets, property rights, and limited government. With regard to environmental issues, an obvious reality—that the protection of liberty makes for superior policy—continues to be ignored.

Consequently, environmental policies often run roughshod over fundamental American values, an unfortunate development that has produced ineffective environmental policies. In order to realize our nation's primary environmental goal—a clean, healthy, and safe environment—policymakers should pursue regulations based on economic and individual freedom.

The American Conservation Ethic

The American Conservation Ethic is built around eight principles that are grounded in experience, science, wisdom, and the enduring values of a free people. The Ethic affirms that people are the most important, unique, and precious natural resource and maintains that Americans must be good stewards of the world around us—not only for the well-being of the current generation, but for the health of future generations as well.

The American Conservation Ethic is founded on a deep respect for the wonder, beauty, and complexity of our environment and is dedicated to the wise use of nature's bounty. It reflects every American's aspiration to make America's environment cleaner, healthier, and safer for future generations, and it draws its strength from the most powerful force for improving our environment—free people.

Central to the American Conservation Ethic is the fact that renewable natural resources, such as air, water, and soil, are not fragile and static but resilient and dynamic. These resources are continually regenerated through

growth, reproduction, and other naturally occurring processes that cleanse, cycle, or create resources anew. Because these resources are continually renewed, they can be used in a wise and responsible manner without fear that they will be lost forever.

The key to effective environmental stewardship is to better understand these renewable natural resources and the relationships among them. Applying this knowledge improves our ability to use these treasures wisely and conserve them for the benefit of current and future generations.

The American Conservation Ethic applies the tried and true values of individual rights and responsibilities to the conservation of these natural resources. Property rights create incentives that both reward good stewardship and empower individuals to protect their property from the harmful acts of others. The guarantee that people can reap the fruits of their own labor inspires the investments of time, money, and effort necessary to expand upon centuries of accumulated wisdom. As we learn more about our environment, we Americans are better able to be good stewards of natural resources.

The American Conservation Ethic relies on science as one tool to guide public policy. Science is an invaluable instrument for rationally weighing risks to human health and measuring other environmental impacts. The most important measurement of environmental quality is human well-being. Science also provides a means of assessing the costs and benefits of actions designed to reduce, control, and remediate environmental impacts.

In neither case, however, should science be the sole consideration. Scientific development, technological innovation, and economic growth are essential for a cleaner, healthier, and safer environment. As knowledge grows, productivity, efficiency, and the potential to innovate increases, thereby allowing Americans to better use energy, raw material, and other resources.

Rather than depending on an inefficient and restrictive centralized environmental bureaucracy, the American Conservation Ethic promotes workable means to reach environmental goals. By relying on the firsthand knowledge and practical experience of local people and accounting for widely varying conditions, a “site and situation”—specific approach provides practical solutions to environmental challenges. The greater the degree to which solutions reflect the knowledge, needs, and desires of those individuals most affected, the more successful these solutions will be.

Finally, the American Conservation Ethic recognizes that a sustainable and productive system of environmental stewardship depends on a free people. To this end, the Ethic empowers individuals to use, enjoy, and conserve the environment, and it inspires and challenges individual Americans to improve their surroundings and lives. This cumulative effort of individuals is the most effective and dependable means of ensuring a cleaner, healthier, and safer environment; conserving America’s unique resources; and protecting that which we all treasure most—people and liberty.

America has unsurpassed natural wealth. From her abundant mountains, plains, forests, and coasts to her lakes, rivers, and streams, America’s resources are unlike any others in the world. Along with America’s wildlife, these resources have provided for and have been cherished by millions of Americans. But our people—living, growing, and creating within our rich culture of liberty—are our greatest resource.

Americans aspire to improve upon our tradition of wisely using and conserving the world around us for generations to come. The American Conservation Ethic is the way to fulfill these aspirations.

Eight Principles of the American Conservation Ethic

Principle I: People Are the Most Important, Unique, and Precious Resource.

All environmental policy should be based on the idea that people are the most important, unique, and precious resource. The inherent value of each individual is greater than the inherent value of any other resource. Accordingly, human well-being, which incorporates such measures as health and safety, is the foremost measure of the quality of the environment: A policy cannot be good for the environment if it is bad for people. The best judge of what is or is not desirable policy is the individual who is affected by said policy.

Moreover, whether it be managing a habitat, responsibly securing affordable and reliable energy, or providing for food, minerals, and fiber, human intellect and accumulated knowledge are the only means by which the environment can be willfully improved or modified.

Environmental policies should inspire people to be good stewards. Through human creativity, we develop new sources of needed materials, more efficient means of collecting them, or sub-

stitutes for them—as well as the technology necessary to do so. Within the framework of equity and liability, individuals create incremental benefits in the quality or quantity of a resource or improve some aspect of the environment. Cumulatively, this improvement results in progress and provides direct and indirect environmental benefits to society.

Principle II: Renewable Natural Resources Are Resilient and Dynamic and Respond Positively to Wise Management.

Renewable natural resources—trees, plants, soil, air, water, fish and wildlife—and collections thereof, such as wetlands, deserts, forests and prairies, are the resources upon which we depend for food, clothing, medicine, shelter, and innumerable other human needs. Indeed, human life depends on both the use and conservation of these resources. Such resources are regenerated through growth, reproduction, or other naturally occurring processes that cleanse, cycle, or otherwise create them anew.

While all living organisms and activities produce byproducts, nature has a profound ability to carry, recycle, recover, and cleanse. These characteristics make it possible to use renewable resources now while ensuring that they are conserved for future

generations. As Teddy Roosevelt, a founding father of conservation, recognized, “The Nation behaves well if it treats the natural resources as assets which it must turn over to the next generation increased, and not impaired, in value.”¹

Principle III: Private Property Protections and Free Markets Provide the Most Promising New Opportunities for Environmental Improvements.

Ownership inspires stewardship: Whether for economic, recreational, or aesthetic benefit, private property owners have the incentive both to enhance their resources and to protect them. Polluting another’s property is to trespass or to cause injury. Polluters, not those most vulnerable in the political process, should pay for damages done to others. Good stewardship is the wise use or conservation of nature’s bounty, based on our needs. With some exception, where property rights are absent, they should be extended. If such extension proves elusive, the forces of the market should be brought to bear to the greatest extent possible.

There is also a direct and positive relationship between free-market economies and a clean,

¹ Theodore Roosevelt, “Quotes: Wildlife Conservation,” U.S. National Park Service, http://www.nps.gov/history/history/online_books/npsq/quotes/sec1a.htm (accessed June 19, 2012).

healthy, and safe environment.² Open and free-market systems that are rooted in economic freedom are superior at generating economic dynamism. Economic growth driven by such vibrancy is positively correlated with life expectancy, which is one of the most critical measurements of environmental policies.³ Despite assertions to the contrary, economic growth is generally good for the environment.⁴

Finally, there is a direct and positive relationship between the complexity of a situation and the need for freedom. Markets reward efficiency, which is environmentally good, while minimizing the harm done by unwise actions. In the market, successes are spread by competition, and since costs are borne privately rather than subsidized, unwise actions are typically on a smaller scale and of a shorter duration.

We must work to decouple conservation policies from regulation or government ownership. In the aggregate, markets—not

mandates—most accurately reflect what people value, and therefore choose, for their environment.

Principle IV: Efforts to Reduce, Control, and Remediate Pollution Should Achieve Real Environmental Benefits.

The term “pollution” is applied to a vast array of substances and conditions that vary greatly in their effect on man. It is used to describe fatal threats to human health, as well as to describe physically harmless conditions that fall short of someone’s aesthetic ideal. Pollutants can occur naturally or can be a byproduct of technology or industry. Their origin does not determine their degree of threat. Most carcinogens, for example, occur naturally but do not engender popular fear to the same degree that man-made carcinogens do. Microbiological pollutants, bacteria, and viruses, though natural, are by far the most injurious form of pollution.

Technology and its byproducts must be respected, not feared. Science is an invaluable tool for rationally weighing risks to human health or assessing and measuring other environmental impacts.

When we measure the impact of environmental policies, the well-being of real people is of greater weight than the well-being of theoretical ones. Human health

and safety, as well as other inter-related aspects of well-being such as economic well-being and liberty, should be the primary criteria by which we evaluate environmental measures. Science also provides a means of considering the costs and benefits of actions designed to reduce, control, and remediate pollution or other environmental impacts so that we can have a cleaner, healthier, and safer environment.

Principle V: As We Accumulate Scientific, Technological, and Artistic Knowledge, We Learn How to Get More from Less.

Society tends to become more efficient as it accumulates scientific, technological, and artistic knowledge. In the words of economics writer Warren Brookes, “the learning curve is green.” Technology promotes efficiency, and through efficiency we substitute information for other resources, resulting in more output from less input—which also means less waste and greater conservation. Technological advancement confers environmental benefits like more miles per gallon, more board-feet per acre of timber, a higher agricultural yield per cultivated acre, and more GDP per unit of energy.

Technological developments also made it possible for the modern American farmer to feed and clothe a population more than twice the size of what existed in

2 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>.

3 Angus Deaton, “Global Patterns of Income and Health: Facts, Interpretations, and Policies,” National Bureau of Economic Research *Working Paper* No. 12735, December 2006, <http://www.nber.org/papers/w12735.pdf> (accessed June 20, 2012).

4 International Monetary Fund, “Relationship Between per Capita Energy Consumption and GDP Growth,” Figure 3.3, http://www.imf.org/external/pubs/ft/weo/2011/01/c3/fig3_3.pdf (accessed June 20, 2012).

1949⁵—all while increasing exports almost twentyfold.⁶ Yet, despite this impressive output, over that same time period, the total acreage used in production *decreased*, falling from 387 million cultivated acres to 330 million cultivated acres.⁷ That is a decline of 57 million acres, an area larger than the state of Idaho, which is now available for other uses.

American agriculture has demonstrated that seeking more efficient means of production often yields unintended environmental benefits. To ensure that such technological breakthroughs continue, Americans must continue to accumulate scientific, technological, and artistic knowledge—a process fueled by restless competition in the free market.

Principle VI: Management of Natural Resources Should

5 Population comparing 1949 and 2006 as reported in U.S. Census Bureau, “Historical National Population Estimates: July 1, 1900 to July 1, 1999,” June 28, 2000, <http://www.census.gov/popest/> (accessed June 22, 2012), and U.S. Census Bureau, *Statistical Abstract of the United States: 2012*, October 1, 2011, p. 8, <http://www.census.gov/prod/2011pubs/12statab/pop.pdf> (accessed June 21, 2012).

6 Comparing agricultural exports from 1949 and 2006 as reported in U.S. Department of Agriculture, Economic Research Service, *Value of U.S. Agricultural Trade, By Calendar Year*, February 2011, <http://www.ers.usda.gov/Data/FATUS/#calendar> (accessed June 21, 2012).

7 Comparing 1949 and 2006, the most recent year, as reported in U.S. Department of Agriculture, Economic Research Service, *Crop Land Use*, 2006, <http://www.ers.usda.gov/data/majorlanduses/spreadsheets/croplandusedforcrops.xls> (accessed June 21, 2012).

be Conducted on a Site- and Situation-Specific Basis.

Resource management should take into account the fact that environmental conditions will vary from location to location and from time to time. A site- and situation-specific approach takes advantage of the fact that those who are closest to a resource or pollution problem are also those who are best able to manage them. Such practices allow for prioritization and the separation of problems into manageable units.

Natural resource managers on site and familiar with the situation are best able to determine what to do, how to do it, and when to do it—whether tending to the backyard garden or the back-40 pasture. For example, local landowners and stewards have specialized skill sets that allow them to identify multiple solutions to environmental problems more easily.

A site- and situation-specific management approach also allows conservation efforts to reflect unique environmental characteristics and variables as well as the needs and desires of local populations. Rigid government mandates and standards lack this flexibility. Additionally, a site- and situation-specific approach is more consistent with policies carried out at lower levels of government. Centralized management is more likely to

be arbitrary, ineffectual, or even counterproductive as it lacks the insight of local populations.

A site- and situation-specific approach avoids the institutional power and ideological concerns that dominate politicized central planning. Where laws and regulations to achieve environmental goals must be set, they should be meaningful, measurable, and objective and should contain bright legal lines—rather than bureaucratic requirements—as to how such standards are to be met.

Principle VII: Science Should Be Employed as One Tool to Guide Public Policy.

Science should inform societal decisions, but ultimately, such decisions should be based on ethics, beliefs, consensus, and other processes. Understanding science’s proper role is central to developing intelligent environmental policies. Specifically, science is the product of the scientific method, the process of asking questions and finding answers in an objective manner. It is a powerful tool for understanding our environment and measuring the consequences of various courses of action. It can help policymakers, for example, to assess risk and weigh costs against benefits. But it should not dictate public policy.

While science should not be substituted for public policy, public policy on scientific subjects

should reflect scientific knowledge. A law is a determination to force compliance with a code of conduct. Laws go beyond that which can be established with scientific certainty; indeed, laws are based on normative values and beliefs and are a commitment to use force.

Commitments to use the force of law should be made with great caution and demand a high degree of scientific certainty. To do otherwise is likely to result in environmental laws based on scientific opinions rather than scientific facts. Such laws are likely to be wasteful, disruptive, or even counterproductive, as scientific opinions change profoundly and

often at a faster pace than public policy. The notion behind the maxim “first do no harm” should govern the enactment of public policy.

Principle VIII: The Most Successful Environmental Policies Emanate from Liberty.

Americans have chosen liberty as the central organizing principle of our great nation. Consequently, environmental policies must be consistent with this most cherished principle. Choosing policies that emanate from liberty is consistent with holding human well-being as the most important measure of environmental policies. There is a strong

and statistically demonstrable positive correlation between economic freedom and environmental performance.⁸

Restricting liberty denies Americans their chosen environment and constrains their opportunities to improve it. Freedom unleashes the forces most needed to make our environment cleaner, healthier, and safer. It fosters scientific inquiry, technological innovation, entrepreneurship, rapid information exchange, accuracy, and flexibility. Free people work to improve the environment, and liberty is the most powerful energy behind environmental improvement.

⁸ Ben Lieberman, “A Free Economy Is a Clean Economy: How Free Markets Improve the Environment,” chap. 4 in Terry Miller and Kim R. Holmes, *2011 Index of Economic Freedom* (Washington, D.C.: The Heritage Foundation and Dow Jones and Company, Inc., 2011), <http://www.heritage.org/index/download>.

Private Property Rights

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Jessica Hill/Associated Press

Government Claims on Private Property draws from the writings of the nation's Founders, Supreme Court precedent, and indirect breaches of private property through environmental regulation to explain how property rights provide the foundation for environmental stewardship and puts forth recommendations to strengthen private property rights.

Government Claims on Private Property

The Honorable Kenneth T. Cuccinelli II

The government must protect the people's Fifth Amendment right to property. The Founders believed that protecting private property as an extension of man's self was of the highest public interest because it was essential to free government. They prescribed that the legislative branch could use the "despotic power" of eminent domain to acquire private property only for public use and with just compensation. Kelo v. City of New London redefined constitutional terms, inspiring states like Virginia to adopt legislation to prevent similar abuses of power. Regulatory takings have long since been an indirect taking of property by rezoning and devaluing of private property. Such indirect seizure has become increasingly pervasive and expensive under the Endangered Species Act, the Clean Air Act, and the Clean Water Act. Because the courts have failed to protect Americans' fundamental right to property, federal and state legislation is needed to restore private property and ultimately protect our resources more effectively.

At every level of government, public officials are proclaiming

that private property ownership is, and ought to be, subservient to the needs of the state. These officials behave as though landowners are tenants at will, capable of remaining on their lands until bureaucrats, in their infinite wisdom, can find better uses for it. In so doing, governments—local, state, and federal—are ignoring the principle that made America great: that property is a fundamental ingredient of any comprehensive social system that prizes individual liberty as the source of national greatness. Indeed, that is this volume's Principle I, and it should drive America's environmental policy.

America was founded on the principle that the purpose of government was to protect the property of a citizen. Indeed, property's indelible importance is made evident by its inclusion in the Bill of Rights along with Americans' sacred rights to freedom of speech, assembly, and religion. Found in the Fifth Amendment to the United States Constitution, the operative provision states: "[N]or shall private property be taken for public use, without just compensa-

tion." The Constitution's Framers intended the pithy words in the Fifth Amendment to implement the central insights of the great English philosopher John Locke: "[E]very man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his."¹

From this first premise, Locke defended the moral rightness of private ownership of land as the product of the ownership of his own body and his labor. For in a state of nature, "[a]s much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, inclose it from the common."² It was to secure these rights, Locke reasoned, that persons first established government "for the mutual preservation of their lives, liberties and estates."³

¹ John Locke, *Second Treatise of Government*, Sec. 32, 1689, <http://www.constitution.org/jl/2ndtr05.htm> (accessed April 13, 2012).

² *Ibid.*

³ *Ibid.*

Locke's exposition of property rights principles was transmitted to early American institutions directly through his writings, which were read by the Founding generation, and indirectly through the influence of Sir William Blackstone. Blackstone's *Commentaries on the Laws of England*, written in the decade prior to the American War for Independence, exercised enormous influence over the American colonies.⁴ His four-volume exposition remained the major legal textbook on English law well into the 19th century.

Distilling the judgment of his era, Blackstone wrote that securing property was a matter of the highest public interest and was accorded the greatest legal protections such that "the law of the land postpone[s] even public necessity to the sacred and inviolable rights of private property." From this premise, the principles of the Takings Clause follow: that land could be taken for public use, but only on payment of just compensation. Even in cases of necessity, the government should, in justice, pay for private property that is turned by state action to the use of the public as a whole.

For the Founding generation, as much as for Locke and Blackstone, the securing of private property was a preeminent duty of government. This understanding in-

formed the national debate regarding the shape of the United States Constitution and the formation of a new American government. The Founding generation agreed that a strong respect for the rights of property was no mere duty of government; this principle was, rather, *essential* to a free government. Indeed, shortly after the ratification of the federal Constitution, John Adams wrote, "The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. Property must be sacred or liberty cannot exist."⁵

Accordingly, the 1776 Virginia Declaration of Rights, penned by George Mason and a model for the Declaration of Independence, opens:

*That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.*⁶

In sum, it was almost uniformly held at the Founding that persons enjoyed an unalienable right to acquire, possess, and use property and that the security of those property rights guaranteed the independence of mind and deed that made political freedom a reality. After surviving the Atlantic passage and having flowered in American soil, that keen regard for property would find its expression in the words of the Fifth Amendment.

With those words, the Framers sought to circumscribe the exercise of the power of eminent domain: "the despotic power," as it was termed. This power—the power to take private property when state necessity requires—was deemed a power of both the federal and state governments, lodged in the legislative branch. Given to both levels of government, such power was considered necessary to facilitate government's operation. That power was granted to the legislature exclusively because that branch was seen as the most accountable to the people and, thus, the least likely to abuse it. Yet, by the same token, the Constitution charges the judiciary to see that just compensation is awarded to those whose property is taken for the public good.

Abuse of Eminent Domain

Recognition of the strengths and weaknesses of the legislative process did not blind the Framers to the need for limited judicial oversight. In fact, the great

⁴ See Sir William Blackstone, *Commentaries on the Laws of England*, Vols. 1–4, http://avalon.law.yale.edu/subject_menus/blackstone.asp (accessed April 13, 2012).

⁵ *Defence of the Constitutions of Government of the United States* in 6 THE WORKS OF JOHN ADAMS 8–9 (CHARLES FRANCIS ADAMS, ED., 1850–56), AVAILABLE AT [HTTP://PRESS-PUBS.UCHICAGO.EDU/FOUNDERS/DOCUMENTS/V1CH16S15.HTML](http://press-pubs.uchicago.edu/founders/documents/v1ch16s15.html).

⁶ The Virginia Declaration of Rights, 1776, http://www.constitution.org/bcp/virg_dor.htm (accessed April 13, 2012).

compromise that is embodied in the Fifth Amendment authorizes governmental takings of private property. Yet this compromise circumscribes both the reach and exercise of such takings. As the Supreme Court has recognized, it does this by “impos[ing] two conditions on the exercise of such authority: the taking must be for a ‘public use’ and ‘just compensation’ must be paid to the owner.”⁷ Thus, if the use is private, the government may not take the property even if just compensation is paid.⁸ And even if the use is public, the legislature must be willing to pay the price of the property it takes. The compensation aspect of this guarantee is honored for physical invasions of real property. The Supreme Court, however, has turned the law on the public-use component on its head.

In 2005, in the case of *Kelo v. City of New London*,⁹ the Supreme Court upheld a Connecticut city’s taking of private property from one private party and giving that property to another private party who had announced plans to use the land in question as part of a redevelopment plan to stimulate new jobs and increase tax revenue. While this misguided scheme resulted in neither new jobs nor increased tax revenue, it did result in Ms. Kelo’s home being demolished; the site is now used as a garbage dump. At the time of the dispute,

however, the Court concluded that a city’s supposed program of “economic development” satisfied the Fifth Amendment’s “public use” requirement, expressly rejecting “any literal requirement that condemned property be put into use for the general public.”¹⁰

Although *Kelo* opened the door to widespread federal and state abuse of eminent domain, the decision did acknowledge that states, under their own constitutions, could place further restrictions on the exercise of their takings power. In a show of genuine political accountability, many states acted swiftly: As of the date of this writing, 44 states have enacted measures to prevent their political subdivisions from abusing their powers of eminent domain as the city of New London did in *Kelo*.

Virginia provides an example of how states have curbed the abuse of eminent domain. Signed into law in April 2007, Senate Bill 781 prevents the Commonwealth of Virginia and its localities from taking property from homeowners, farmers, and business owners and handing that property over to private entities for the purpose of development to increase tax revenues or stimulate employment.¹¹

While SB 781 represents a significant step forward in protecting

property rights in Virginia, future sessions of the legislature could repeal that law or any part of it without the direct involvement of the people of Virginia. Preventing future repudiation will require amending Virginia’s Constitution; such an amendment has been passed a second time by the General Assembly in 2012 and will appear on the ballot as a referendum. That amendment enshrines the aforementioned protections but also guarantees that the compensation will be just by compensating for the real loss of the property owner, limiting the amount of property to be taken to the amount that is necessary for the public use, and placing on the government the burden to prove that the state’s taking is for a public use.

Regulatory Takings

Although binding legal guarantees often protect real property rights, real property receives far less protection from what is commonly called “regulatory taking.” It has long been accepted that governments may restrict land use in such a way as to indirectly reduce the value of property without being required to pay for that reduction in value. An example of such a regulatory taking occurs when the Environmental Protection Agency (EPA) declares private land with certain characteristics to be “wetlands” that must be preserved for certain wildlife and can no longer be used or developed in ways that are inconsistent with that objective. The loss of the opportunity to develop the land and the resulting

⁷ *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-32 (2003).

⁸ *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).

⁹ 545 U.S. 469 (2005).

¹⁰ *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, at 242.

¹¹ “Eminent domain; definition of public uses and limitations thereon,” SB 781, April 4, 2007, <http://lis.virginia.gov/cgi-bin/legp604.exe?071+ful+CHAP0901> (accessed April 13, 2012).

devaluation of the property are generally not compensable to the landowner.

The Supreme Court first articulated this legal principle in 1922 in *Pennsylvania Coal Co. v. Mahon* when it stated, “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”¹² That position has been extended to mean that without a physical invasion of land, an exercise of regulatory power creates a right to compensation only if it deprives an owner of all economically beneficial use of the property or, in the alternative, results in imposing a substantial economic impact that interferes materially with “distinct income-backed expectations” in the property.¹³

In the aftermath of the Roosevelt Revolution, the Supreme Court established the rule that no property owner has a right to be compensated for the exercise of federal regulatory authority or state police power until these extreme limits are met. Yet there is growing evidence that the Endangered Species Act, the Clean Air Act, and the Clean Water Act have been pushed well beyond the limits of diminishing returns for the economy as a whole. With regard to environmental regulation, EPA

regulations were more cost-effective in the 1970s and 1980s, when initial rules were yielding bigger reductions in air, water, and land pollution than the more ambitious requirements recently introduced. Now that pollution levels have decreased, further regulation cannot achieve as large an impact as the initial round of environmental legislation, which means that citizens and industry—and the American economy—are paying higher costs for smaller environmental benefits.

The Guardian of Every Other Right

For the Framers of the Constitution, the right to property was the essential principle of free government—“the guardian of every other right.” And yet, the Supreme Court’s recent *Kelo* decision undermined this right, and as a result, property owners are now faced with the possibility of losing significant economic value through regulatory takings.

Despite *Kelo* opening the door to abuse of the federal eminent domain power, states can and should place restrictions on the exercise of their takings power. And the large-scale delegation from state legislatures and Congress to state and federal regulatory agencies—a system that allows politicians to

vote for big, generic political goals (such as clean water, clean air, and clean land) while leaving the decisions on implementation to the bureaucrats—must be reversed.

This nation must also take bold steps to balance care for the environment with care for the economy, as both are so intertwined that one cannot flourish without the other. Those groups pushing for environmental regulations regardless of the cost have to recognize that economic growth underwrites environmental regulation. Only as societal wealth increases will a nation have the money and the will to tackle environmental concerns. In the end, therefore, only economic success can deliver environmental improvement, which follows Principle V: as we accumulate, scientific, technological, and artistic knowledge we learn how to get more from less.

No nation can enjoy the benefit of continuous growth unless its regulatory regime is sustainable. Such sustainability, in turn, cannot be achieved if courts and legislatures stress the gains from environmental regulation while ignoring its cost. That one-sided strategy does not work anywhere else in the public or private sector. It cannot work here.

¹² 260 U.S. 393, 413 (1922).

¹³ *Lingle*, at 242.

Recommendations

Even if property owners must bear the burden of regulation without compensation for the perceived “public” benefit, all citizens and public officials must ensure that overregulation does not cause serious economic dislocation for society as a whole. Indeed, now that the courts have generally failed to address regulatory abuse, legislative action at the federal and state levels is necessary, where appropriate, to begin rolling back regulation. Specifically:

Reaffirm state protections of property rights. All states should reaffirm their protections for property rights by guarding those rights 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. Homeowners must not have their land taken as part of schemes to enrich local governments, especially when such schemes never materialize (as was the tragic case in *Kelo*).

Ensure that costs of regulations do not outweigh benefits. Principle IV states that all regulations

to reduce, control, and remediate pollution should achieve real environmental benefits that outweigh the legislation’s costs. 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 the costs do not outweigh the benefits. Regulators must be directed not only to consider the intended benefit, but also to quantify the incidental burdens of regulation to property, jobs, industry, health, and the costs of goods and services.

Require congressional approval to enact major regulations. A determination of costs and benefits is not always amenable to expert analysis. Therefore, the U.S. House and Senate should first approve all major regulations before they are enacted. Such approval would be required by the Regulations from the Executive in Need of Scrutiny (REINS) Act, proposed by U.S. Congressman Geoff Davis (R-KY).

The REINS Act would require that no regulation having an annual economic impact of \$100 million or more on the American economy could take effect

without congressional approval. Such approval would be granted in the form of an enactment that would, in turn, be subject to presidential presentment—like any other standard piece of legislation. This change would honor the requirements of Article I of the U.S. Constitution that Congress alone exercise legislative power subject to the President’s veto. Furthermore, this approach would shift political power away from unaccountable bureaucrats and back to Congress, which is directly accountable to the American people.

Pursue state-level versions of the REINS Act. States should consider passing their own versions of the REINS Act to govern their regulatory activity, thereby giving their legislatures, after deliberation, the chance for an up-or-down vote on regulations with large and potentially negative economic effects. Such a move would enhance the political accountability so vital to America’s representative system of self-government and take away the legislator’s ability to blame nameless bureaucrats—the government officials to whom these same legislators have delegated such enormous power.

Regulatory Takings

2



[A Mechanism for Compensation of Regulatory Takings](#) discusses how regulatory takings under the pretext of environmental protections have become the greatest threat to private property owners and effective stewardship of natural resources. To rectify this problem, Congress must act to provide an accessible and straightforward means of compensation for regulatory takings.

A Mechanism for Compensation of Regulatory Takings

The Honorable Edwin Meese III and Robert Gordon

A growing number of government laws and regulations—for example, the Endangered Species Act (ESA) and Clean Water Act (CWA)—limit the use of private property on an environmental basis but provide no compensation. Such limitations run counter to the principle that the most promising new opportunities for environmental improvements lie in extending the protection of private property and unleashing the creative powers of the free market. Regulatory takings decrease private property rights through bureaucratic measures and often have an unintended (and frequently negative) impact on conservation goals. To address this erosion of private property rights, Congress must protect private property from both physical and regulatory takings.

The continuous growth of the administrative state has made the taking of private property through regulation one of the greatest threats—if not the greatest threat—to property rights. When laws like the Endangered Species Act (ESA) and the Clean Water Act (CWA) place significant limits on landowners' use of their

private property, such limitations constitute a taking—even though the government takes no physical property. Rather, a regulatory taking represents a “taking” of the use and some portion of the value of private property through regulation. It is properly understood as a taking even if the courts have not recognized it as one requiring compensation under the Fifth and Fourteenth Amendments. Like many other laws that protect civil and other rights, Congress is free to protect rights beyond those protections that the courts declare are required under the Constitution.

In order to compensate landowners for the loss of use of their property and to focus agency behavior on conservation goals, Congress should establish a mechanism for compensation of regulatory takings that occur under laws such as the Endangered Species and Clean Water Acts.

With respect to the sanctity of private property, the Fifth Amendment of the U.S. Constitution is quite unambiguous: “nor shall private property be taken for

public use, without just compensation.” This clause is known as the “Takings Clause” or “just compensation.” The thought behind this clause is that a citizen should be entitled to the fruits of his or her labor and that the government, through force, should not be able to take such fruits without compensating the citizen for his or her loss.

This clause is the basis for the compensation landowners receive when their property is taken by eminent domain so that, for example, a new road may be built or the boundary of a park expanded. The individual's property is being taken for some public use, such as a road or park, and the public—rather than the unfortunate landowner—should therefore bear the cost. This protection is the bedrock of a free society.

As powerful a force as it is, however, eminent domain, or the physical and complete taking of property, is not the greatest government threat to the sanctity of private property. The taking of private property through what is known as a “regulatory taking” has emerged

as an even greater threat. Through regulatory takings, the government compels property owners to use—or, more likely, not use—their property in some manner.

A growing number of government laws and regulations, such as the Endangered Species Act and the Clean Water Act, limit the use of private property on an environmental basis but provide no compensation. Such limitations run counter to Principle III, which holds that private property protections and free markets provide the most promising new opportunities for environmental improvements. Regulatory takings decrease private property rights through bureaucratic measures and often have an unintended (and frequently negative) impact on conservation goals. To address this erosion of private property rights, Congress must protect private property from both physical and regulatory takings.

Just Compensation

In a regulatory taking, the government does not seize the property in title; rather, it effectively seizes its use. For example, the U.S. Fish and Wildlife Service may prohibit a farmer from cultivating a portion of his farm where an endangered kangaroo rat resides. Likewise, the Environmental Protection Agency may forbid individuals who own a residential lot from constructing a house by asserting that wetlands would be filled in violation of federal law. In such instances, the farmer loses the use of some por-

tion of his property—perhaps one that generated revenue through cultivation for a federal program to conserve the kangaroo rat—or landowners are prevented from constructing a home on their property so that wetlands may be conserved.

The farmer and the would-be homeowners still retain title to their property—and, most likely, the property tax burden—but they can no longer use their own property as they wish. Furthermore, their property is no longer as valuable as it once was because the government, through regulation, has “taken” some of the possible uses and some portion of the property’s value.

As a matter of principle, advocates of protecting private property consider the just compensation of such landowners to be an obligation of the highest order—and certainly no less important than the need to compensate willing sellers or those whose property was taken by eminent domain. Landowners whose wetlands property was condemned to create Washington, D.C.’s Rock Creek Park¹ or purchased to create the Florida Panther National Wildlife Refuge² habitat for a federally protected

1 United States Department of Justice, Environment and Natural Resources Division, “Early Evolution of Eminent Domain Cases,” History of the Federal Use of Eminent Domain, last updated November 2010, <http://www.justice.gov/enrd/4613.htm> (June 1, 2012).

2 U.S. Fish and Wildlife Service, “Florida Panther National Wildlife Refuge,” June 2005, <http://www.fws.gov/southeast/pubs/FP-brochure.pdf> (June 1, 2012).

species were compensated. Why are other unlucky property owners not compensated for wetlands or species conservation projects similarly carried out for the good of all?

Unfortunately, the Supreme Court established draconian hurdles for compensation of regulatory takings: The government must either deprive an owner of all economically beneficial use of a property or impose a substantial economic impact that interferes materially with “distinct investment-backed expectations.”³ Despite this high hurdle set by the Court, it is unlikely that the Constitution’s signers would have agreed that landowners who lose half or even more of the economic use of their property do not deserve compensation.

Opposition to Compensation

Proponents of the administrative state offer several arguments against the establishment of a more just “trigger” mechanism—the factor that determines when a regulatory taking requires that the property owner be compensated. One such argument is that the number and severity of regulatory takings are exaggerated. If this were true, the amount of monies needed for compensation of regulatory takings would be low.

3 *Penn Central Transportation Co. v. New York City*, U.S. Supreme Court, June 26, 1978, http://www.law.cornell.edu/supct/html/historics/USSC_CR_0438_0104_ZS.html (accessed June 19, 2012).

Yet advocates of the administrative state also contend that providing compensation for regulatory takings is a prohibitively pricey proposition. This second argument is flawed for several reasons.

First, under the current system, the financial burden of regulatory takings is borne entirely by the unfortunate property owners. If landowners are compensated, the cost of the regulatory takings can be spread equally across the nation rather than burdening only the owners of the affected property. If the cost of compensating landowners for their loss is too great, the conclusion should be that the regulations are too costly—not that landowners should go without recompense.

Second, the “too expensive” argument also fails to comprehend that compensation mechanisms are not designed solely for the purpose of remuneration. Rather, such systems are also designed to alter the behavior of the bureaucracy. When government is required to compensate for the regulatory burdens it imposes, the goal, in part, is to prompt the government to focus on performing its essential functions without imposing undue burdens on people and the economy.

Finally, opponents of a compensation system also argue that implementing a structure for regulatory takings compensation would create a bureaucratic mess. Advocates of this argument are blissfully unaware of the real and unacceptable burdens the bureaucracy already foists on some landowners. Imposing regulatory takings on private citizens is not something that should be either free or easy for the regulatory state.

Further, many of the activities in question fall outside the federal government’s enumerated powers. These powers were enumerated so that the United States could be built on a sturdy foundation of limited government. Yet the federal government has wandered well beyond these enumerated powers, stretching the definition of “navigable waters” to trap property that is neither water nor navigable and prohibiting the use of private property because it is occupied by some rare cave-dwelling invertebrates with no connection to interstate commerce. If there are legitimate interests to be addressed by government in these two examples, they would be best addressed by states where no twisted rationale for authority is necessary. Additionally, management by a state (or even lesser levels of government)

is more consistent with Principle VI that the management of natural resources should be conducted on a site- and situation-specific basis.

Conclusion

While advocates of private property would prefer that the Supreme Court relax its extreme limitations against compensation of regulatory takings, a mechanism along the lines of the one outlined below could still significantly increase the protection afforded to the rights of property owners. It would be logical to focus on those federal laws that most commonly generate regulatory threats.

Requiring that funding for compensation come from appropriated operating funds and stipulating that, when the funding was exhausted, an agency could not issue determinations of violation would compel agencies to alter their behavior. Encouraging agencies to focus their conservation efforts while using other tools—as are addressed elsewhere—to meet their conservation objectives would protect fundamental liberties and foster a more productive relationship between landowners and those who are charged with implementing environmental programs.

Recommendations

The following recommendations will help protect fundamental liberties while fostering a more productive relationship between landowners and those who are charged with implementing environmental programs.

Establish a mechanism to compensate landowners for regulatory takings. While significantly changing the Supreme Court's hurdles to regulatory takings compensation is likely to be a long and arduous process, Congress is free to provide greater protections for property rights and other civil rights than even the Constitution requires (or the Supreme Court says it requires). Moreover, a simple mechanism for compensation of regulatory takings could be established legislatively. The Clean Water Act and the Endangered Species Act are two laws that, in particular, would be obvious candidates for incorporation of such a provision.

Define the "trigger" mechanism that will determine whether a regulatory taking is compensable. While the case can be made that such a trigger should provide full compensation, the reality is that, at the moment, the compensation level is at zero—a reality that did not transpire overnight but through the inexorable march of the administrative

state. Rather than provide full remuneration, therefore, this trigger mechanism would halt that march.

One possible definition for a compensation trigger would be a regulatory action that causes a property to be diminished in value by 50 percent or more of its intended use. While there is likely to be bitter disagreement over just what fractional loss should be compensable, it is easy to conceptualize "half" and difficult to argue that the government should be able to seize half of the value of a property without compensating the landowner. Additionally, given that the appraisal of value is to some degree an inexact art, such a trigger would likely provide protection for more than half of a property's value.

Require that regulatory agencies specifically define what they will—and will not—allow on regulated properties. Anyone familiar with the implementation of the CWA or the ESA will recognize that to reach the point at which one becomes eligible for compensation is often made difficult by federal agencies. These agencies may never offer a definitive opinion, thereby allowing a cloud to hang over a property or any particular use or proposed use. Given that these statutes have criminal provisions and can affect the economic viability of farms, ranches, or other eco-

nomic endeavors, landowners are placed in an unacceptable regulatory limbo.

Faced with the prospects of enormous legal bills or even the possibility of bankruptcy or jail, a landowner may give in to "offers" of some degree of assurance that they will have some use of their property or a portion thereof in exchange for meeting demands of the agency. For a regulatory compensation mechanism to work, it likely must be paired with some means of obtaining a reasonably prompt and definitive determination as to what an agency will or will not allow.

Establish means for landowners to obtain a definitive determination of what agencies will or will not allow. Such a device could be accomplished legislatively within whatever act—for example, the Endangered Species Act—includes the compensation provisions. It should have the following components:

1. A property owner might request, for example, that the Secretary of the Interior (in the case of the ESA) make a written determination as to whether a proposed use of the owner's property would or would not violate the act in question. The property owner would have to provide specific information about the proposed activity such as its nature, the specific location,

the lawfulness under state and local law, the anticipated schedule and duration of the proposed use, a demonstration that the property owner has the means to undertake the proposed use, and any anticipated possible conflict with the law in question that the property owner reasonably expects to occur as a result of the proposed use. This information should be legislatively specified by Congress, not determined by an agency.

2. Once the information required to make a determination had been provided, the Secretary would have a finite period of time to make a deci-

sion—for example, no more than 90 days from receipt of the specified information.

3. If the Secretary determined that the proposed use would violate the act in question, the property owner could then seek compensation through the regulatory taking compensation mechanism.

4. If the Secretary found that the use could proceed without a violation, then any use or action taken by the property owner in reasonable reliance on the Secretary's determination could not be treated as a violation of the law.

5. If the Secretary failed to provide a written determination before the expiration of the period, the proposed use would be deemed to be in compliance with the law.

Other “fine-tuning” provisions would likely be required, such as an ability to extend timelines if mutually agreeable, a provision for requesting additional information that a property owner neglected to include, and some provision for withdrawing a determination of compliance and issuing a determination that the proposed use would violate the act in question if new information became available.

Clean Water Act

3



[The Clean Water Act: A Problem with a Solution](#) argues that the act fails to balance Americans' concerns for the environment and their individual rights. Reforms that clarify the CWA's jurisdiction and require specificity would greatly improve its effectiveness.

The Clean Water Act: A Problem with a Solution

M. Reed Hopper

By pursuing environmental protection to the exclusion of other policy concerns such as housing, jobs, and the economy, the Clean Water Act (CWA) fails to balance Americans' concern for the environment with individual rights. The CWA can be enforced against any person accused of discharging a pollutant into "navigable waters" without a federal permit. Under the act, the Army Corps of Engineers and the Environmental Protection Agency assert jurisdiction over virtually all waters in the United States. As a result of its broad reach, as well as the severity of its penalties, the CWA presents an unparalleled risk to individual freedom and economic growth.

For many Americans, protecting the environment is an important issue—and one that must be balanced with concerns about housing, jobs, the economy, and individual rights. Some federal environmental laws, such as the Clean Water Act (CWA), fail to balance these competing societal values and instead pursue environmental protection to the exclusion of other human concerns.

Because of its unlimited capacity to restrict or prohibit ordinary human activity, the Clean Water Act poses a unique risk to individual and economic freedom while undermining American Conservation Ethic Principle VIII, which states that the most successful environmental policies emanate from liberty. Specifically, the act authorizes severe, sometimes ruinous civil penalties¹ and criminal liability for discharging a pollutant into "navigable waters" without a federal permit. Furthermore, the act can be enforced against "any person," whether a large corporation or private individual.

One of the primary problems with the CWA is the federal government's broad and inconsistent interpretation of the term "navigable waters"—the waters that the

federal government can regulate under the CWA. By promulgating an amorphous definition of navigable waters, the Army Corps of Engineers and the Environmental Protection Agency (EPA) have effectively federalized virtually all waters and much of the land in the United States, including artificial ponds and swimming pools. Such vague regulations allow federal officials to maximize the reach of the act while evading judicial review, thereby discouraging productive activity and economic investment.

Problems with the Clean Water Act generally involve either regulatory overreach or abusive enforcement. This paper offers several recommendations for reducing such overreach and abuse, including:

1. Adopting a bright-line definition of covered waters under the act;
2. Ensuring that changes in agency policies and practices are subject to public notice and comment, as well as judicial review;

¹ The cost of a permit is prohibitive, averaging 788 days and \$271,596 for an individual permit and 313 days and \$28,915 for a nationwide permit—not counting costs of mitigation or design changes. "[O]ver \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits." David Sunding and David Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," *Natural Resources Journal*, Vol. 42, No. 59 (2002), pp. 74–76, 81.

3. Prohibiting unilateral revocation of valid permits;
4. Providing fair notice of property subject to federal regulation;
5. Committing the agency to binding jurisdictional determinations, with right of judicial review;
6. Requiring proof of jurisdiction and any violation upon issuing an administrative order, with right of judicial review;
7. Assigning regulatory enforcement to a single agency; and
8. Deterring “nuisance” suits.

Enacting these reforms will help to balance America’s environmental regulations with other concerns, such as jobs and the economy—an approach that reflects the values of Conservation Ethic Principle VIII.

Regulatory Overreach

The Army Corps of Engineers and the EPA have a history of exceeding their authority under the Clean Water Act. Some of this history can be attributed to ambiguity in the law; most is the result of willful overreach. According to the U.S. General Accounting Office (GAO),² local districts of the Corps “differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the

[Clean Water Act’s] jurisdiction.”³ The GAO reports that even Corps officials working in the same office disagree on the scope of the CWA and that “three different district staff” would likely make “three different assessments” as to whether a particular water feature is subject to the act.⁴

This ambiguity is no accident. Federal enforcement practices differ from district to district because “the definitions used to make jurisdictional determinations are deliberately left ‘vague.’”⁵ Consequently, federal officials are able to assert the broadest possible interpretation of Clean Water Act jurisdiction on a case-by-case basis so as to avoid any facial challenge to their regulatory authority.

Examples of “vague” regulatory definitions abound. While the Clean Water Act prohibits unauthorized discharges of pollutants into “navigable waters,” the Corps and the EPA have extended their enforcement of the act to non-navigable waters, such as “streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds” and any wetlands adjacent thereto.⁶

This definition of “wetland”⁷ is so broad that it encompasses areas that are wet only “for one to two weeks per year.”⁸ In other words, a “wetland” may be mostly dry land.⁹ Under this definition, approximately 100,000,000 acres of wetlands are located in the lower 48 states—an area the size of California.¹⁰ Furthermore, approximately 75 percent of these wetlands are located on private land.¹¹ With half of its territory covered by wetlands, Alaska has the largest wetland acreage,¹² followed by Florida (11 million acres); Louisiana (8.8 million); Minnesota (8.7 million); and Texas (7.6 million).¹³

Likewise, the Corps and the EPA have interpreted the term “discharge” to include the mere movement of soil in the same area without any addition of material.¹⁴ Contrary to ordinary use and com-

7 Federal regulations define “wetlands” as those areas “inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” 33 Code of Federal Regulations § 328.3(b).

8 Gordon M. Brown, “Regulatory Takings and Wetlands: Comments on Public Benefits and Landowner Cost,” *Ohio Northern University Law Review*, Vol. 21 (1994), pp. 527, 529.

9 *United States v. Mills*, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993).

10 United States Environmental Protection Agency, “Wetlands—Status and Trends,” http://water.epa.gov/type/wetlands/vital_status.cfm (accessed May 15, 2012).

11 Jonathan H. Adler, “Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation,” *Environmental Law Review*, Vol. 29, No. 26 (1999), p. 52.

12 EPA, “Wetlands—Status and Trends.”

13 *Ibid.*

14 *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001).

2 Now known as the U.S. Government Accountability Office.

3 U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297, February 2004, p. 3, www.gao.gov/new.items/d04297.pdf (accessed May 14, 2012).

4 *Ibid.*, p. 22.

5 *Rapanos v. United States*, 547 U.S. 715, 727, 781 (2006).

6 33 Code of Federal Regulations § 328.3(a)(3).

mon sense, “adjacent” becomes “neighboring”¹⁵—sometimes miles away—and “tributary” includes “swales” and “storm drains.”¹⁶

These excessively broad definitions jeopardize economic vitality. By allowing regulators almost unfettered discretion to interpret the law, the CWA forces businesses as well as individual property owners to operate under a cloud of uncertainty. For instance, the prospect of regulatory takings under the CWA is difficult to predict, a development that discourages investment. Such ambiguity also undermines American Conservation Ethic Principle III, which states that private property protections and free markets provide the most promising new opportunities for environmental improvements. In fact, these broad definitions have sparked such egregious agency overreach that the U.S. Supreme Court has, on two separate occasions, intervened on behalf of private property owners.

- In 2001, the High Court held that the Corps and the EPA could not regulate isolated, non-navigable water bodies and emphasized that there are statutory and constitutional limits to the scope of the Clean Water Act.¹⁷ The Court also affirmed that regulation of local land and water use was the primary responsibility and right

15 33 Code of Federal Regulations § 328.3(c).

16 *Rapanos*, 547 U.S. 722.

17 *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

of state and local governments. This ruling is consistent with American Conservation Ethic Principle VI, which states that the management of natural resources should be conducted on a site- and situation-specific basis.

- Likewise, in 2006, the Court reiterated that the Corps and the EPA could not rely on a boundless interpretation of the act and regulate all water bodies with any sort of hydrological connection to “navigable waters.”¹⁸

More recently, the Corps has tried to scale back the long-standing farm exemption for prior converted croplands—an exemption that covers 53 million acres¹⁹—without utilizing the formal rule-making process. The Corps also asserts that it can now regulate upland drainage ditches as “navigable waters” under its Nationwide Permit Program—an expansion of regulatory power that could affect almost every development project in the country.²⁰

But these efforts to enlarge the CWA’s regulatory scope pale in comparison to the expansion of the act contained in a new EPA and Army Corps of Engineers agency

18 *Rapanos*, 547 U.S. 715.

19 Complaint, *American Farm Bureau Federation v. United States Army Corps of Engineers*, Case No. 1:10-cv-00489-RWR (Dist. Court, Dist. of Columbia 2010).

20 *National Association of Home Builders v. United States Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir. 2005).

guidance document entitled “Guidance Regarding Identification of Waters Protected by the Clean Water Act.”²¹ This guidance asserts federal control over virtually all waters in the United States. Indeed, this putative reach is so broad that the agencies refuse to categorically exclude even artificial ponds and swimming pools from federal regulation.²² It is undoubtedly the largest expansion of power ever proposed by a federal agency—and one that has already been sent to the Office of Management and Budget (OMB) for approval.²³

Abusive Enforcement

The Corps of Engineers and the EPA have a history of heavy-handed and arbitrary enforcement of the Clean Water Act. Contrary to the plain language of the act and past agency practice, the EPA claims it has authority under §404(c) to, at any time, revoke existing “dredge and fill” permits issued by the Corps under §404(a).

21 U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, “Draft Guidance on Identifying Waters Protected by the Clean Water Act,” http://www.epa.gov/indian/pdf/wous_guidance_4-2011.pdf (accessed May 23, 2012).

22 So broad is the agencies’ reach that they are unwilling to categorically exclude “[a]rtificial reflecting pools or swimming pools in uplands;” groundwater; or even “[e]rosional features (gullies and rills), and swales and ditches that are not tributaries or wetlands.” *Ibid.*, p. 21.

23 For a comprehensive analysis of this guidance, see Pacific Legal Foundation, “Re: EPA and Army Corps of Engineers Draft Guidance on Identifying Waters Protected by the Clean Water Act,” June 23, 1971, http://plf.typepad.com/Ltr%20to%20EPA%20Re_%20PLF%20Cmnts%20on%20Identfyng%20Wtrs%20Prctcd%20by%20CWA.pdf (May 23, 2012).

Under the EPA's interpretation of its "veto" power, permit holders would never receive a final permit; rather, they would remain in regulatory limbo, frustrated by an uncertainty that discourages productive investment and threatens property rights.

The EPA also engages in the nefarious practice of overriding the Corps' enforcement decisions and prosecuting landowners for Clean Water Act violations—even when the Corps has determined that no violation exists. This activity sometimes occurs as well at the state level, where, for example, a state issues a Clean Water Act permit through an EPA-approved delegated program, only to have that permit unilaterally revoked or modified by the EPA via a process called "overfiling." Such unilateral revocation is unacceptable: Innocent citizens should not be made to suffer because of inter-agency disputes.

But perhaps the most insidious use of federal power under the Clean Water Act involves the Corps' and

the EPA's increasing use of "warning letters," "cease and desist" directives, and compliance orders to browbeat small landowners into submission. Using the threat of ruinous civil fines and criminal prosecution, these agencies rely on intimidation to compel landowner action without a hearing or proof of violation. This practice discourages investment while unfairly constraining the reasonable use of land.

Finally, the Clean Water Act's citizen lawsuit provision is flawed. A literal cottage industry exists where opportunistic litigants bring imaginary or exaggerated claims in court against an individual or small business in hopes that the risk of enormous fines will precipitate a lucrative settlement. Alternatively, a citizen suit is brought only for the purpose of delaying or running up the cost of a disfavored project with little or no risk of cost to the plaintiffs. These types of "nuisance" suits provide no environmental benefit while stymieing economic growth.

Safeguarding Human Rights

When government agencies exercise their regulatory power in excess of statutory or constitutional authority, or without regard to such power's impact on the citizenry, such agencies undermine this nation's constitutional foundation and become a law unto themselves. Consequently, citizens are left to conclude that the "rule of law" has no meaning and that rules and regulations are based on bureaucratic whim.

The protection of the environment is only one of many competing and important social values. In a society based on liberty, no single value can be pursued without regard to its cost. Environmental laws can and must be administered so as to safeguard—not thwart—fundamental human needs and rights. Therefore, the Clean Water Act must be administered to protect those needs and rights.

Recommendations

Because of the Corps' and the EPA's unwillingness to follow Supreme Court precedent and adopt new jurisdictional rules limiting the scope of the Clean Water Act, Congress is the only meaningful avenue for reform. Therefore, Congress should:

Clearly define federal jurisdiction under the Clean Water Act.

A delineation of which waters are covered will remove regulatory uncertainty and reduce enforcement costs. For such reform to be successful, federal officials must acknowledge that there are limits to federal power and that relying on state and local governments to protect local waters (including wetlands) is not only sufficient, but legally required to protect America's natural resources.

Prohibit the Corps and the EPA from changing agency policies or practices by means of judicially unreviewable "internal guidance." Such a reform will encourage regulatory consistency by requiring that changes in jurisdictional interpretations are subject to formal notice and a public

comment/rulemaking period that can be challenged in court if these interpretations exceed federal authority.

Prohibit the EPA from modifying or revoking a validly issued §404 permit. This change will reduce uncertainty, encourage reliance on validly issued permits, and unshackle economic investment.

Require that landowners be given fair notice that their property is subject to regulation under the Clean Water Act. Such a reform is essential to eliminating unintentional violations of the act.

Require that, upon request, the Corps or the EPA promptly provide landowners a legally binding determination as to whether their property is subject to regulation under the Clean Water Act—a determination that is subject to judicial review. Disputes about jurisdiction must be subject to immediate judicial review at the instigation of either party. This requirement will eliminate unintentional violations and deter unlawful enforcement of the act.

Require the Corps and the EPA to issue "warning letters," "cease

and desist" notices, and compliance orders only in writing and only on the basis of documented, site-specific evidence sufficient to prove both federal jurisdiction and a violation of the act. Disputes about jurisdiction, violations, or the terms of such orders must be subject to immediate judicial review at the instigation of either party. The current practice of issuing letters and orders based on "any evidence" without a judicial hearing or proof of violation is unfair. This solution will discourage agency bullying and commit the agency to a sound legal position that must be defensible in court.

Limit permitting authority to a single agency without interference from another agency. This limitation will bring greater certainty to the permitting process and encourage economic investment.

Create a disincentive for harassment lawsuits. Plaintiffs who bring suits against a private party should be required to post a special bond or pay attorneys' fees and costs if they lose. This reform will discourage abuse of the citizen suit provision.²⁴

²⁴ Michael S. Greve, "The Private Enforcement of Environmental Law," *Tulane Law Review*, Vol. 65, No. 339 (1990).

Clean Air Act

4



Clean Air Through Liberty: Reforming the Clean Air Act argues that the Clean Air Act (CAA) no longer serves its original purpose of protecting human health through the reduction of air pollution. The CAA's effectiveness can be restored by decreasing the power of unelected bureaucrats and placing greater responsibility for environmental stewardship with state and local governments.

Clean Air Through Liberty: Reforming the Clean Air Act

The Honorable Kathleen Hartnett White

Over the past 40 years, the EPA has incrementally expanded regulatory authority under the Clean Air Act. The current EPA, however, is on an unprecedented regulatory spree that jeopardizes electric reliability, jobs, U.S. competitiveness, and state economies. Despite the fact that America's air quality has improved dramatically over the past four decades, in recent years, the EPA has been misusing authority to regulate conventional pollutants to conceal an aggressive anti-fossil fuel agenda. Further, it has arrogated lawmaking powers under an Endangerment Finding to regulate greenhouse gases as pollutants under the existing Clean Air Act. This paper documents the remarkable improvement in air quality, the basic structure of the Clean Air Act, and the evolution of the EPA's sweeping, law-like authority to control basic economic activity and private conduct. The paper recommends five basic reforms of the Clean Air Act based on the Principles of the American Conservation Ethic.

The Clean Air Act (CAA) no longer provides an effective, scientifically

credible, or economically viable means of air quality management. Under the CAA, the Environmental Protection Agency (EPA) has broad regulatory authority to enforce laws intended to protect public health and the environment. The current EPA, however, has misused this authority in pursuit of an economically damaging, anti-fossil fuel energy policy—a policy that Congress has repeatedly rejected.

Clearly, the CAA needs major reform. After 40 years of air quality management under the Clean Air Act, federal policies need to absorb the dramatic improvement in our nation's air—a condition quite different from when the CAA was enacted. Congress should reclaim its constitutional authority to make major policy decisions about air quality in order to forestall the unnecessary economic and human damage already flowing from the current EPA's reckless aggression.

Congress also needs to clarify and strengthen the original CAA's recognition that the primary authority to manage air quality resides

with the states. The state and local governments' direct accountability to real people has catalyzed creative and cost-effective solutions to air quality problems in stark contrast to the heavy-handed control, bureaucratic red tape, and scientifically unjustified regulatory mandates characteristic of the EPA's approach.

As articulated in Principle VII of the American Conservation Ethic, the CAA needs to relegate science to its proper role as one critical tool to inform policy decisions but not a dictate for regulatory action. To limit the EPA's misuse of science, the CAA needs to establish minimal criteria for vigorous health-effects science and credible regulatory impact analyses of costs and benefits. To weld free-market principles to air quality improvement, the CAA should facilitate measurable environmental results through flexible performance standards—values expressed in Principles IV and VI. The structure of the CAA and organization of the EPA also need to be streamlined through integrated multi-pollutant strategies.

Most critically, federal air quality policies need to incorporate fundamental principles of individual liberty, private property, and the free market. Over the past 40 years, improvements in air quality have been driven by innovation, efficiency, and economic growth. Economic liberty, as noted by Principle VIII, has powerful environmental benefits because liberty promotes objectivity, science, creativity, investment, and problem solving.

That the CAA needs reform is a belief increasingly shared, at least outside of the EPA and activist organizations. A four-year project enlisting the input from 40 environmental experts from across the ideological spectrum concludes that the CAA has statutory arteriosclerosis.¹

Unprecedented Regulatory Overreach

Using—and often exceeding—the broad authority of the CAA, the current EPA is on a regulatory spree unprecedented in U.S. history.² The EPA is churning out

1 David Schoenbrod, Richard B. Stewart, and Katrina M. Wyman, “Breaking the Logjam: Environmental Reform for the New Congress and Administration,” Project Report, New York Law School and New York University School of Law, February 2009, <http://www.breakingthelogjam.org/CMS/files/39611235964787FACDBreakingLogjamReportfinal.pdf> (accessed June 8, 2012).
2 “Boiler Room Politics: Fake Restraint from the EPA as It Issues a Damaging New Rule,” *The Wall Street Journal*, March 2, 2011, <http://online.wsj.com/article/SB10001424052748703408604576164471769032958.html> (accessed June 8, 2012).

new rules with unparalleled speed, scope, stringency, costs, and job loss—but without rigorous scientific justification or measurable benefits. Since 2009, the EPA has been assuming—without supporting data—health risks at pollutant concentrations already far below the established federal standards to protect human health. The science underlying the current EPA’s regulatory onslaught is deeply flawed.³

Over 20 new regulations, collectively known as “the EPA train wreck” because of converging effective dates within the next three years, augur cumulative economic impacts of a magnitude never before experienced.⁴ The National Electric Reliability Council (NERC) predicts that four of the rules aimed at electric utilities could mean the abrupt loss of

3 Anne Smith, PhD, “An Evaluation of the PM2.5 Health Benefits Estimates for Regulatory Impact Analysis of Recent Air Regulations,” NERA, December 2011 http://www.nera.com/nera-files/PUB_RIA_Critique_Final_Report_1211.pdf; Louis Anthony (Tony) Cox, Jr., “Reassessing the Human Health Benefits from Clean Air,” *Risk Analysis*, November 2011 <http://www.cmpa.com/pdf/ReassessingCleanAirAug22.pdf>; Gina McCarthy, Assistant Administrator, Environmental Protection Agency, letter to Rep. Fred Upton, February 3, 2012; and Kathleen Hartnett White, “EPA’s Pretense of Science: Regulating Phantom Risks” Texas Public Policy Foundation, May 2012 <http://www.texaspolicy.com/pdf/2012-05-RR02-EPA’sPretenseofScience-ACEE-KathleenhartnettWhitet.pdf>.

4 Kathleen Hartnett White, “House Bill 2545 and Texas Participation in a Regional Air Quality Compact,” testimony before the Select Committee on State Sovereignty, Texas House of Representatives, April 7, 2011, <http://www.texaspolicy.com/pdf/2011-04-HB2545-testimony-CEE-khw.pdf> (accessed June 8, 2012).

8 percent of the country’s electric generation capacity by 2015.⁵

Indeed, the economic and human damage from the EPA’s reckless agenda is already emerging: Over 100 electric generating plants have announced closure, withdrawing 53,000 megawatts of electricity from the grid. Coal-fired electric generation has fallen to 36 percent of U.S. electricity from 50 percent only two years ago. Furthermore, utilities have announced sharply higher electric rates for consumers.

Evolution of EPA’s Vast Authority

Enacted in 1967, the first version of the CAA was predominantly a general policy statement about the societal value of healthy air. It was not until 1970 that the law assumed its current form: a broad and prescriptive template for controlling the sources of air pollution. The CAA was further strengthened in 1977 and again in 1990 by major amendments. Although the EPA has incrementally enlarged regulatory scope and stringency over the past 30 years, the current EPA’s regulatory aggression stands alone.

The CAA articulates five fundamental programs, the first three of which are the subject of increasing controversy.

5 North American Electric Reliability Corporation, *2010 Special Reliability Scenario Assessment: Resource Adequacy Impacts of Potential U.S. Environmental Regulations*, October 2010, http://www.nerc.com/files/NERC_Swift_Scenario_Aug_2010.pdf (accessed June 8, 2012).

First, the act lists six major “criteria” pollutants for which EPA must set standards: carbon monoxide (CO); lead; sulfur dioxide (SO₂); nitrogen oxides (NO_x); particulate matter (PM); and ground-level ozone (O₃). The EPA is directed to establish National Ambient Air Quality Standards (NAAQS) for each of the criteria pollutants, formulated as the maximum allowable atmospheric concentration for each pollutant necessary to protect public health “with a requisite margin of safety.” The CAA precludes the consideration of cost as a balancing factor when determining the NAAQS. The statute mandates that each state attain the NAAQS by means of a State Implementation Plan (SIP) that “demonstrates” that the state will meet the NAAQS at the specified date.

Second, the CAA requires that the EPA develop National Emission Standards for Hazardous Air Pollutants (NESHAP) from a list of 189 chemicals, which Congress enumerated in the 1990 amendments to the act. The other three statutorily required programs include reduction of air emissions contributing to regional haze (visibility) over national parks and wilderness areas, acid rain, and stratospheric ozone depletion.

Under the CAA, Congress delegated broad authority to the Environmental Protection Agency to protect human health and the environment by regulation of economic activity, consumer products, and private conduct. When the CAA directs the EPA to formu-

late national air quality standards adequate to protect health regardless of cost, Congress has effectively delegated law-making authority to unelected federal employees.⁶

One of the most intricate, sweeping, and rigidly prescriptive of all federal laws, the CAA is one of the first statutes to authorize administrative bureaucracies to operate as a federal master throughout the economy. The objective was to allow scientific experts rather than elected lawmakers to make the difficult policy decisions related to highly technical subject matter such as atmospheric chemistry and toxicology. Moreover, as Angelo Codevilla has written:

The scientization of American political life was just beginning. Between the 1950s and 2000, social policy was taken away from the voter because courts and “independent agencies” took them over. Beginning in the 1970s, courts and agencies began to take control of economic life through the pretense of scientific environmental management.⁷

Rule by an administrative state directed by unelected experts, however, undermines the basic func-

6 Jonathan H. Adler, “Would the REINS Act Rein in Federal Regulation?” Cato Institute *Regulation*, Summer 2011, <http://www.cato.org/pubs/regulation/regv34n2/regv34n2-2.pdf> (accessed June 8, 2012).

7 Angelo M. Codevilla, “Scientific Pretense v. Democracy,” *The American Spectator*, April 2009, <http://spectator.org/archives/2009/04/14/scientific-pretense-vs-democra/print> (accessed June 8, 2012).

tion of this nation’s constitutional democracy.⁸ And by asserting regulatory authority over greenhouse gases under the CAA—a policy rejected by Congress—the EPA has secured unparalleled power over basic economic activity.

EPA and CO₂ Regulation

In 2009, the EPA issued an “Endangerment Finding” that greenhouse gases endanger human health and welfare.⁹ This regulatory finding relies entirely on the Fourth Assessment Report of the U.N. Intergovernmental Panel on Climate Change (IPCC).¹⁰ The “Summary for Policy Makers” in this compilation of the climate science on man-made global warming concluded that an 85 percent reduction of greenhouse gases is necessary “to avert dangerous interference with the climate.” Reducing current levels of carbon dioxide by this magnitude would return this country to the level of industrialization in the late 19th century.

Carbon dioxide has none of the characteristics of conventional

8 Kathleen Hartnett White, “Taming the Fourth Branch of Government,” *Texas Public Policy Foundation Policy Perspective*, October 2011, <http://www.texaspolicy.com/pdf/2011-10-PP17-TamingtheFourthBranchofGovernment-CEE-KathleenHartnettWhite.pdf> (accessed June 8, 2012).

9 “Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act,” Environmental Protection Agency, December 2009.

10 IPCC Fourth Assessment Report: Climate Change 2007 (AR4), http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml#1 (accessed June 25, 2012).

pollutants. Unlike emissions of actual pollutants, which in certain concentrations can adversely impact human health, carbon dioxide (CO₂) is a ubiquitous by-product of natural processes and human activity with no ambient health effects. Unlike conventional pollutants measured in parts per million or billion, CO₂ is so ever-present that it is measured in tons. As a result of its Endangerment Finding, the EPA estimated that the number of businesses subject to regulatory requirements would increase from 15,000 to 6.1 million. The EPA estimated the cost to local governments and business at more than \$100 billion within the first few years.

The EPA admits that regulatory scope of this magnitude would be “absurd” because it would be administratively infeasible. On this conclusion, the EPA tries to justify narrowing the statutory emission thresholds so that this initial greenhouse gas regulation would apply to only the largest industrial facilities. In this action (Tailoring Rule), the EPA rewrote the black-letter law of its enabling statute.

The intended restraint of the Tailoring Rule, however, is only temporary because this is only the first of what the EPA plans as multiple phases of greenhouse gas regulation. The EPA already has begun a second phase. In April 2012, the agency proposed the first hard limits on carbon dioxide emissions from power plants. The rule’s preamble openly admits that this regulation will preclude any

new coal-fired power plant without carbon capture of 50 percent—an infeasible technology.

Expanding Bureaucracy, Escalating Costs, Immeasurable Benefits

Perhaps no other federal agency has such discretionary authority to issue prescriptive dictates across the economy. In fact, “two-thirds of the cost imposed by major rules issued by all federal agencies over the past decade [1995–2005] has come from rules issued by [the] EPA.”¹¹ The total cost of all major federal regulations issued in 2010 was \$26 billion; EPA regulations accounted for over \$23 billion of this total.¹² In the early decades of the Clean Air Act, the EPA’s dictates did not necessarily compel a reduction in economic output. The language of the act avers that EPA regulation must be achievable through existing technology,¹³ and regulated entities developed creative emission controls to meet the EPA’s limits. Increased production carried higher costs, but growth was not precluded.

But after decades of increasingly stricter regulations, the current EPA’s exponentially more strin-

gent limits now entail reduced production, compulsory change of the means of production, business closure, or relocation to another country. For example, electric generators in multiple states have had no choice but to close power plants, reduce operations, or switch to a different fuel.¹⁴

Thus, for the first time in the history of the EPA, the reliability of the nation’s electric supply is in jeopardy. As a founding trustee of the Environmental Defense Fund noted as early as 1988, “The EPA’s regulation has grown to the point where it amounts to nothing less than a massive effort at Soviet-style planning of the economy to achieve environmental benefits.”¹⁵ The EPA’s current regulatory agenda is filled with major rules carrying multibillion-dollar annual costs. Although most of these new mandates are not yet fully effective, the unprecedented impacts—job losses, sharply reduced electric capacity, and higher electric rates—are already being felt.

State of the Air Today: A Remarkable Record of Success

Over the past 40 years—and, in particular, the past 20—U.S. air quality has improved

11 David Schoenbrod, *Saving Our Environment from Washington* (New Haven, Conn.: Yale University Press, 2005), p. 62.

12 James L. Gattuso, Diane Katz, and Stephen A. Keen, “Red Tape Rising: Obama’s Torrent of New Regulation,” Heritage Foundation *Background* No. 2482, October 26, 2010, <http://www.heritage.org/research/reports/2010/10/red-tape-rising-obamas-torrent-of-new-regulation>.

13 See, e.g., Section 112(d)(3) of the Clean Air Act, 40 U.S.C. § 7412.

14 Kathleen Hartnett White, “EPA’s Capricious Lignite Rule Threatens Texas’ Electricity Supply,” *The Dallas Morning News*, July 8, 2008, <http://www.dallasnews.com/opinion/latest-columns/20110708-kathleen-hartnett-white-epas-capricious-lignite-rule-threatens-texas-electricity-supply.ece> (accessed June 8, 2012).

15 Schoenbrod, *Saving Our Environment from Washington*, p. 244.


TABLE 1

Air Quality Improvement, 1980–2010

	Ambient, 1980–2008	Ambient, 1980–2010	Emissions, 1980–2008	Emissions, 1980–2010
Carbon Monoxide (CO)	-79%	-82%	-58%	-71%
Ozone (O ₃)	-25%	-28%	-49%	No current data
Lead (Pb)	-92%	-90%	-96%	-97%
Nitrogen Dioxide (NO ₂)	-46%	-52%	-40%	-52%
Particulates (PM ₁₀)*	-31%	-38%	-46%	-83%
Fine Particulates (PM _{2.5})**	-21%	-27%	-36%	-55%
Sulfur Dioxide (SO ₂)	-71%	-76%	-56%	-69%

* 1990–2010 ** 2000–2010

Source: U.S. Environmental Protection Agency, “Air Quality Trends,” January 2012, <http://www.epa.gov/airtrends/aqtrends.html> (accessed April 18, 2012).

Clean Air Through Liberty: Reforming the Clean Air Act  heritage.org

dramatically,¹⁶ but how often do the media report on this environmental success? The table above documents the U.S.’s remarkable record of improving air quality. Although infrequently noted, these data are easily accessible on the EPA’s website. The table notes the percentage of reduction from 1980–2010. The condition, or trend, of air quality is measured in terms of ambient levels in the air and emission volumes. Emissions are an estimate of the volume of pollutants released into the air by human activities. The ambient levels are the key measure of health risk because they are a physical measurement of the actual concentrations of pollutants in the air to which humans are exposed.

Monitors measure ambient levels across the country while models estimate emissions.

The improvement of air quality in the United States is an unqualified success story—although a story rarely told and, more often, utterly denied. The current EPA Administrator, Lisa Jackson, repeatedly tells the public that outdoor air in the country “may kill you.”¹⁷ Yet the EPA’s own data, as documented in the table above, contradict Ms. Jackson’s misleading declaration.¹⁸ Since 1970, aggregate emissions of the six criteria pollutants regulated under the Clean Air Act have decreased 53 percent¹⁹—an achievement realized even as the U.S. gross domestic product (GDP) increased

over 200 percent. Virtually the entire country has attained the NAAQS for four of the six criteria pollutants.

Urban areas in some states continue to exceed the NAAQS for ozone and particulate matter, but the levels of exceedance as well as the number of non-attainment zones are rapidly falling. In 1997, EPA classified 113 metropolitan areas as non-attainment for ozone; now only 30 ozone non-attainment areas remain. Once vying with Los Angeles as the most ozone-polluted city in the country, Houston, Texas—home of the world’s largest petrochemical industrial complex—met the federal ozone standard in 2009 and 2010.²⁰

16 U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, *Our Nation’s Air: Status and Trends Through 2008*, EPA-454/R-09-002, February 2010, <http://www.epa.gov/airtrends/2010/report/fullreport.pdf> (accessed June 22, 2012).

17 Politico, “Jackson Gets Real,” October 24, 2011, at <http://www.politico.com/morningenergy/1011/morningenergy361.html> (accessed June 8, 2012).

18 EPA, *Our Nation’s Air*.

19 Steven F. Hayward, *The Age of Reagan: The Fall of the Old Liberal Order, 1964–1980* (New York: Three Rivers Press, 2001).

20 Kathleen Hartnett White, “Texas’ Ozone Success: Changing Standards Mask Texas’ Air Quality Achievements,” Texas Public Policy Foundation, Armstrong Center for Energy & Environment, May 2010, <http://www.texaspolicy.com/pdf/2010-05-RR04-Ozone-khw.pdf> (accessed June 8, 2012).

Evidence of the massive improvement in America's air quality abounds:

- Emissions from cars and trucks, now the predominant source of particulate matter and precursor emissions for ozone, have been reduced over 90 percent, while vehicle-miles traveled have increased 165 percent.
- Emissions of lead have declined by 97 percent, largely a result of eliminating lead in transportation fuels.
- The EPA's Toxics Release Inventory documents a 65 percent reduction since 1988.
- Between 1990 and 2008, mercury emissions declined by roughly 60 percent.²¹
- New power plants emit 90 percent–95 percent less sulfur dioxide than power plants built in the 1940s.²²

The long-term trend in cleaner skies is certain to continue with the turnover of old equipment and refinement of technologies. Indeed, as Principle V posits, “the learning curve is green.” The competitive private marketplace spurred technological innovations. Market-driven operational efficiencies to avoid costly wastes

simultaneously reduced emissions and conserved energy use. Privately owned enterprises, acting in a free market under a predictable and limited government, prospered and were thus able to absorb the steep costs of environmental controls.

As the Environmental Performance Index²³ and The Heritage Foundation/*The Wall Street Journal Index of Economic Freedom*²⁴ (among other studies) consistently demonstrate, those countries that structurally enshrine economic liberty under the rule of clear and limited laws also achieve environmental success. As Principle VIII notes, “Freedom unleashes forces most needed to make our environment cleaner. ...” Environmental quality remains an unaffordable luxury for most of the developing world and an elusive goal for countries that deny or undermine property rights.

The dramatic improvement in air quality across the U.S. is a major public policy success—albeit one to which the EPA or major media give less than lip service. And while the EPA's regulation played a role, the main engines driving this transformation were technological advances in efficiency and emission controls—innovations made possible by economic growth within the

dynamics of the free market. Objective science, creative technology, entrepreneurial investments of capital, and rapid information exchange—these hallmarks of the free market maximize continued environmental enhancement.

Conclusion

Harsh criticism of the current EPA's administration of the CAA in no way implies a rollback of meaningful environmental protections—let alone a slackening of future efforts to address air quality challenges. In fact, the reforms recommended in this chapter would support more effective, efficient, and meaningful management of air quality.

The policy principles articulated in this publication inform the recommendations on reform of a 40-year-old law that no longer provides effective, scientifically credible, or economically viable management of the quality of our nation's air. The CAA's foundational mission is the same as Principle I: The health and welfare of real people is the foremost measure of air quality.

The powerful incentives of the free market and private property rights (Principles III and VIII); effective technological advances (Principles II, IV, V, VI, and VII); and process efficiencies (Principle V) drove the recent improvements in air quality—improvements made as the economy grew and incomes increased. Creative, site-specific solutions

21 Hayward, *The Age of Reagan*.

22 Gregg Easterbrook, *A Moment on Earth: The Coming of Age of Environmental Optimism* (London, U.K.: Penguin 1995).

23 Yale Center for Environmental Law & Policy, “Environmental Performance Index,” February 7, 2012, <http://epi.yale.edu/> (accessed June 9, 2012).

24 Terry Miller, Kim R. Holmes, and Edwin J. Feulner, *2012 Index of Economic Freedom* (Washington, DC: The Heritage Foundation and Dow Jones & Company, Inc., 2012), p. 155.

developed at the state and local levels worked, and air pollution decreased (Principle VI). Objective, vigorous scientific methods enabled air quality management to work (Principle VII).

As one observer noted, the EPA speaks flexibility but practices rigidity. Left unchecked, the EPA has become a centralized economic planning agency in pursuit of an energy policy that defies both mathematics and physics. The EPA's regulatory agenda would not only "fundamentally change the economy," as the President has promised; the unelected technocrats at the EPA would undermine this nation's form of democratic governance—a system in which elected representatives, not federal employees, make the major policy decisions that affect the country and its citizens.

The principles inspiring this project have a proven record of environmental success and public health: Over the past century, lifespan in the U.S. has increased by 70 percent.

Recommendations

The Clean Air Act, now 40 years old, is in urgent need of reform. The CAA gave broad discretionary authority to the EPA to make what are now decisions jeopardizing the health of the entire economy, the livelihoods of real people, and national security. Many states now must devote finite resources to challenging the EPA's encroachment on fundamental state authority rather than to the hands-on job of protecting air quality.

If the CAA is to guide a broadly supported and effective response to the air quality challenges of the future, meaningful reform is therefore essential. Moreover, unless the EPA's authority is limited by amendments to the CAA, the courts have sparse legal ground to restrain the agency. Indeed, the National Academy of Sciences' recent conclusion that the EPA's science—the purported foundation of the agency's regulatory decisions—“is on the rocks” should be a clarion call for reform of the CAA.

The following recommendations articulate the basic categories for needed reform and address widely recognized problems that are now the subject of legal challenge to the EPA's actions in more than 500 lawsuits.

Restore Congressional Authority and Accountability.

As a matter of policy, the elected branches of government are responsible for defining “healthy air.” While science should critically inform government decisions about air quality, it is inherently incapable of dictating a final policy decision that involves a complex balancing of interests, risks, costs, diverse benefits, relative effectiveness, and inherent scientific uncertainties.

Perhaps the most effective federal air quality programs to date were stipulated by Congress in the Clean Air Act and not left to the EPA's discretionary designs. Congress not only created these programs; it also specified the extent of emission reductions, the timetable for compliance, and the distribution of the burdens imposed by the regulations. Congress also injected regulatory flexibility through market-like mechanisms for emission trading.

These congressionally stipulated programs include the Acid Rain program, which cut relevant emissions by 50 percent; elimination of lead in gasoline; new engine standards, which cut 99 percent of three criteria pollutants from tailpipe emissions; and the stratospheric ozone

program.²⁵ As the Principle IV articulates, clear regulatory goals for measurable environmental benefits are the most effective.

To restrain the current EPA's overreaching actions and to forge a more effective CAA, Congress should:

- Reclaim the legislative authority delegated to the EPA to set the federal air quality standards for criteria pollutants and the emission limits for hazardous pollutants. “It is axiomatic that an administrative agency's power to promulgate legislative regulation is limited to the authority delegated by Congress,” according to the Supreme Court.²⁶ What authority Congress has delegated Congress can reclaim.
- Exercise authority to approve all the major rules proposed by the EPA and to establish minimal criteria for credible science and for meaningful regulatory impact analyses. The EPA should function in a far more advisory and less regulatory role. Congress could require the EPA to submit annual or biannual reports containing stipulated information on the following: air quality data,

25 David Schoenbrod and Melissa Witte, “Statutory Arteriosclerosis,” *American Enterprise Institute Environmental Forum*, Vol. 28, No. 5 (September/October 2011), <http://www.aei.org/files/2011/09/09/SCHOENBROD-FORUM.pdf> (accessed June 9, 2012).

26 *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).

progress reports, risk assessments, priority risks, and alternative implementation strategies.

- Require annual advisory reports that contain regulatory impact analyses of risk, cost, effectiveness, and benefits based on a methodology and scope determined by Congress. Numerous bills filed in the 112th Congress would require far more comprehensive regulatory impact analyses, including impact on jobs, electric rates, and electric reliability as well as cumulative impacts of multiple regulations.²⁷ For example, the increased electric rates projected as a result of the EPA's rules affecting electric generation would have harshly regressive impacts on low-income families.²⁸

Restore State Authority.

The EPA's predominant emphasis on process and micromanagement of state authorities impedes effective management of air quality. A 2004 National Research

Council study concluded that the inflexibility and complexity of the state implementation plan (SIP) process imposed on states is counterproductive. As noted by the National Research Council of the National Academies:

*The process now mandates extensive amounts of time and resources in a legalistic, often frustrating proposal and review process, which focuses primarily on compliance with intermediate process steps. This process probably discourages innovation and experimentation at the state and local levels; overtaxes the limited financial and human resources available to the nation's [air quality management system] at the state, local and federal levels; and draws attention and resources away from the more germane issue of ensuring progress towards the goal of meeting the NAAQS.*²⁹

The original CAA wisely asserted that "prevention and control of air pollution is the primary responsibility of the States and local government" because "those closest to a resource or pollution problem are also those best able to manage them," as Principle VI espouses.³⁰ The EPA, however,

increasingly treats state agencies as instruments of the federal government rather than as partners, much less as equal sovereigns. Under the current regime, the states have the responsibility on pain of sanctions to do whatever the EPA dictates.

To reestablish state control, Congress should:

- Clearly state the CAA's original allocation of federal and state authorities in law. As noted in 1977, "Congress carefully balanced State and national interests by providing for a fair and open process in which States and local governments, and the people they represent, will be free to carry out the reasoned weighing of environmental and economic goals and needs."³¹ The EPA has obviously strayed from this statutory framework. Consequently, Congress should forcefully restate the act's original allocation of federal and state powers.
- Abandon the current state implementation plan process. SIPs must now contain a mass of information: elaborate emission inventories, reams of photochemical modeling runs, and all control measures needed to attain the NAAQS in question. States must complete separate SIPs for each criteria pollutant and other federal programs,

27 Regulations from the Executive in Need of Scrutiny (REINS) Act, H.R. 10, S. 299 (2011); Transparency in Regulatory Analysis of Impacts on the Nation (TRAIN) Act, H.R. 2401 (2011); Clearing Unnecessary Regulatory Burdens (CURB) Act, S. 602 (2011); Freedom from Restrictive Excessive Executive Demands and Onerous Mandates (FREEDOM) Act, S. 1030 (2011); Regulatory Responsibility for Our Economy Act, S. 358 (2011); Unfunded Mandates Accountability Act of 2011, S. 1189 (2011); Regulatory Flexibility Improvements Act, H.R. 527 (2011); Small Business Regulatory Freedom Act, S. 474 (2011).

28 U.S. Bureau of Labor Statistics, Consumer Expenditure Survey 2009, October 2010.

29 National Research Council, *Air Quality Management in the United States* (Washington, D.C.: National Academies Press, 2004), http://www.nap.edu/catalog.php?record_id=10728 (accessed June 9, 2012).

30 Air Pollution and Control Act of 1967, Pub. L. No. 90-148.

31 The Clean Air Act, H.R. Rep. No. 95-294, at 46 (1977).

none of which are coordinated although all data and programs are interconnected. The current SIP process must be abandoned. The EPA could provide non-binding guidance for plans that the states choose to develop.

- **Eliminate the EPA's authority to disapprove of state programs.** Through SIP approval authority, the EPA asserts command-and-control authority over state governments. If the EPA now disapproves a state program considered a required component of the SIP, it can take over the state authority through a Federal Implementation Plan (FIP), impose freezes on road constructions, and withhold highway funds owed to the state.
- **Rescind the EPA's authority to compel state actions.** States may seek EPA counsel on air quality management, but EPA approval or guidance should not be binding. States may elect to form regional interstate compacts to combine resources or to address interstate air quality issues as several state legislatures already have done.³²
- **Encourage Performance Standards: Monitor Trump Models.** The EPA's implementation of the CAA increasingly emphasizes command of intermediate process steps at the

expense of achieving "real environmental benefits," as advocated by the Principle IV. After four decades of prescriptive emission standards and programs, air quality regulation should emphasize historically successful performance standards that focus on concrete environmental results. Congress should therefore require that the EPA:

- **Utilize performance standards based on measurable results.** Performance standards require objective, measurable results of what must be achieved in lieu of rigid and complex requirements that dictate how the entity will operate. Performance standards allow more flexibility in operation, maximizing the incentives of property rights (Principle III) and site-specific adaptation (Principle VI). The permit holder may choose how to operate and even expand production as long as the standard is met.

Performance standards include plant-wide emission caps, emission trading schemes, and other systems that incorporate market-like mechanisms and property rights. Cap-and-trade schemes may work for some traditional pollutants, but the trading system must be designed to minimize pitfalls that are typical when government creates and manages a market. Continual change of the rules of

the market and price controls undermine market dynamics.

Restore Objective, Rigorous, and Transparent Science.

The EPA justifies its regulatory actions on what it construes as scientific edicts. Yet scientific findings, inherently incomplete and uncertain, are incapable of weighing the complex policy considerations that inform and shape the law in a democracy, as Principle VII holds.³³

Science offers both the promise and the demise of meaningful management of air quality to protect human health—"the foremost measure" of environmental quality as articulated by Principle I. When developed and applied by a government body, science is easily manipulated to justify a predetermined policy preference. When objective, transparent, and rigorous in accordance with the scientific method, scientific knowledge provides a powerful tool to inform final regulatory decisions. Scientific findings, however, are categorically different from policy judgments. The wide body of environmental science existing today should guide but never dictate the major regulatory decisions under the CAA. To restore objective, rigorous,

³³ Michael Honeycutt, PhD, "Comments Regarding the Primary National Ambient Air Quality Standards for Ozone and PM, and the Utility MACT," October 4, 2011, http://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/100411_Honeycutt.pdf (June 9, 2012).

³² H.B. 2545, 82nd Leg. Sess. (Texas 2011).

and transparent science, Congress should:

- Mandate that regulatory actions are supported by third-party, independently peer reviewed cost-benefit analyses. The CAA requires that ambient air quality standards must be protective of public health with an adequate margin of safety—regardless of cost. The EPA increasingly uses this statutory rubric to legitimize unachievable regulatory mandates as if no risks were too low and no costs were too high. For decades, the EPA has adopted increasingly stricter NAAQS that now approach naturally occurring (and thus unpreventable) background levels. Objective and comprehensive cost-benefit analyses could provide critical information to policymakers and would prevent the implausible charade of the current EPA’s regulatory justifications.
- Reject the “no threshold” linear regression model to impute risk. The EPA implausibly assumes that a positive, linear, no-safe-threshold causal relation exists between any concentration of a pollutant above zero and the risk of premature death. Piling assumption upon assumption, the EPA attributes a 100 percent probability—and thus certainty—to the premise that there is no ambient level at

which human health is adequately protected. This statistical methodology enables the EPA to calculate health benefits far surpassing the regulatory costs. When, in 2009, the EPA began extrapolating risks at natural background levels of fine particulate matter (PM 2.5), the number of mortality risks that it attributed to this pollutant almost quadrupled from 88,000 to 320,000 deaths.

- Abandon the absolutist version of the precautionary principle.³⁴ Vague statistical correlations between death rates and pollutant levels cannot be transformed into causal connections. Costs and political interests invariably affect the EPA’s decisions, but the law’s absolutist terms shield the agency’s pretensions from judicial scrutiny. The CAA should acknowledge that consideration of the cost to society is a necessary, valuable, and ineluctable factor of any regulatory decision.
- Establish minimal criteria for scientific risk assessment of health effects. Many scientific bodies have harshly criticized the weakness of the EPA’s current science. The National Academy of Sciences, the National Research Service, and the EPA’s own Scientific Ad-

34 Indur M. Goklany, *The Precautionary Principle: A Critical Appraisal of Environmental Risk Assessment* (Washington, D.C.: Cato Institute, 2001).

visory Board, Board of Scientific Counselors, and Advisory Council on Clean Air Compliance Analysis have voiced concerns about the integrity of the science on which the EPA relies.

Minimal criteria for health-effects risk assessment would include the following:

1. EPA health-effects studies must be peer-reviewed by an independent body.
2. Toxicological studies and clinical trials demonstrating a causal connection between pollutant exposures and health effects carry more weight than ecological epidemiological studies indicating statistical correlations. Epidemiological studies alone are not sufficiently robust to support change to the NAAQS.
3. Health-based standards must incorporate average exposure and not implausibly assume that all people are exposed to the highest monitored level 100 percent of the time.
4. Physical measurement through monitored readings trumps models.
5. Health-effects findings must include a plausible biological mechanism.

Encourage Adoption of Multi-Pollutant Strategies by the States.

Most of the criteria pollutants and many hazardous pollutants share sources, precursors, and control strategies. A single, flexible management plan with integrated strategies to reduce multi-pollutants could facilitate cost-effective results. As highlighted by the Principles IV and VI, state and local authorities are far better situated than the EPA to devise and implement effective plans.

Consequently, Congress should:

- Allow states to develop multi-pollutant strategies. The current SIP process should be

replaced by a single integrated multi-pollutant plan devised by states. Such a comprehensive management plan should encompass both criteria pollutants and select hazardous pollutants. Since 1970, the EPA has focused all but exclusively on attainment of the NAAQS through the SIP process. Now that the criteria pollutants have been substantially reduced, the EPA's predominant emphasis on the NAAQS is no longer justified.

- Break down the EPA's bureaucratic silos to allow for integrated strategies. Acting under an organizational structure modeled on the statutory structure of the CAA enacted

in the 1970s, the EPA promulgates individual federal air quality standards for each of the six criteria pollutants in administrative silos. The EPA similarly compartmentalizes the national emission standards for hazardous air pollutants, permitting regimes, and other programs, and the air, water, and waste programs operate independently as if they were hermetically sealed from each other. Yet air pollutants, water contaminants, and waste issues are all interconnected. EPA's bureaucratic silos impede environmental improvements and create massive administrative burdens for state and local governments.

National Environmental Policy Act

5



The National Environmental Policy Act (NEPA) explains how 40 years of experience prove that NEPA fails to address present environmental, social, and economic realities. Ultimately, NEPA must be rescinded. In the interim, the authors offer several steps Congress can take to mitigate the harm of this obsolete statute.

The National Environmental Policy Act

Diane Katz and the Honorable Craig Manson

Predating the Environmental Protection Agency, the National Environmental Policy Act (NEPA) was the legislative vanguard for environmental laws and regulations, but 40 years of experience has proved that NEPA is out of sync with present environmental, political, social, and economic realities. The intended goal of environmental stewardship is thwarted by the project delays and higher costs imposed by the NEPA regulatory regime, as well as by the politicization of science and the influence of special interests. Ultimately, NEPA must be rescinded. In the interim, there are several steps Congress can take to mitigate the harm caused by this obsolete statute.

The National Environmental Policy Act 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, but four decades of experience has exposed fundamental flaws in the statute and its application, including costly project delays, politicization of

even mundane rulemaking, and protracted litigation. Thus, there are compelling reasons to rescind NEPA and to rely instead on more efficient and effective methods of environmental protection.

Since its passage in 1969, NEPA has remained largely unaltered despite dramatic changes in America's economic, social, political, and environmental landscapes. This continuity reflects, in part, the reverence bestowed upon the statute by the environmental lobby. It was NEPA, to a large extent, that signaled the launch of environmental regulation—the precursor to the Environmental Protection Agency and virtually all of the nation's environmental laws. It also provides activists with a powerful means of obstructing transportation, energy, and natural resource projects they oppose. But with dozens of other environmental regulations also in force, and considering NEPA's inherent flaws, there is little reason to preserve it.

The consequences of NEPA extend well beyond the Beltway. Agencies can require private companies to

pay for the NEPA analyses if their projects receive government funding, involve federal land, or require a permit, which is increasingly common given the unconstrained expansion of government. To the extent a project encounters opposition at any point in the process, it can be waylaid for months or even years, thereby increasing project costs and delaying the economic benefits that otherwise would accrue from investment. And there is no telling whether the project or permit will be authorized as planned; each agency has authority to dictate conditions regardless of whether the applicant approves or is equipped to carry them out.

Horror stories abound. For example, it took Revett Minerals 17 years to obtain a permit for mining in western Montana.¹ The average NEPA process ranges from three to six years, according to various studies.

¹ Testimony of Laura Skaer, Executive Director, Northwest Mining Association, before the Committee on Resources, U.S. House of Representatives, NEPA Task Force, April 23, 2005, <http://www.nwma.org/Issues/NEPA%20Testimony.doc> (accessed April 25, 2012).

How NEPA Works

As set forth by Congress, the purpose of NEPA is to:

[E]ncourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation. ...”²

Such sentiments reflect lawmakers’ faith that federal bureaucrats can dispassionately assess their own proposed actions as long as they amass enough data and solicit public comment (including comment from local, state, municipal, and tribal authorities).³ In actuality, the NEPA process is an administrative contrivance. A study of NEPA effectiveness by the White House Council on Environmental Quality (CEQ) found that agencies often conduct the environmental assessment *after* program planning is underway—too late for the results to influence strategic choices as lawmakers intended.⁴

The text of NEPA is relatively brief—just 3,200 words—but compliance is a protracted affair. For example, *The NEPA Book: A Step-by-Step Guide on How to Comply with the National Environmental Policy Act* runs to 475 pages.⁵

Unlike many other environmental statutes, NEPA is not a “substantive” law; rather than mandating specific outcomes, it imposes procedural obligations on federal agencies. The Council on Environmental Quality has crafted the steps that agencies must follow, but the agencies are responsible for deciding whether or how to modify project plans in light of the NEPA findings.

NEPA requirements kick in whenever a federal agency proposes a “major action” that could significantly affect the environment. The range of applicable actions is broad, encompassing government financing, technical assistance, permitting, regulations, policies, and procedures. Every agency in the executive branch must comply with NEPA requirements. (The statute does not apply to the President, Congress, or federal courts.)

Congress intended NEPA to be a planning tool capable of “integrat[ing] environmental concerns directly into policies

and programs.”⁶ For example, the Federal Aviation Administration (FAA), as part of its planning to construct a new air traffic control tower for the Toledo Express Airport, must conduct a NEPA assessment.⁷ The assessment will include, in part, the potential effects on air quality; biological resources (fish, wildlife, and plants); noise; land use (including coastal resources); geology and soils; solid waste; health and safety; environmental justice; children’s environmental health and safety; and water quality (including floodplains and wetlands). The FAA must also evaluate alternatives to the proposed action, if feasible, and solicit public comment on the plan.⁸

There are several steps in the NEPA process:⁹

- **Environmental Assessment.** This initial assessment determines whether the proposed federal action will significantly affect the environment. If the assessment indicates that the impacts will not be significant, the agency next prepares a “finding of no significant impact” (see below). If the

2 National Environmental Policy Act of 1969, 42 U.S.C. 4321-4347, January 1, 1970, <http://ceq.hss.doe.gov/nepa/regs/nepa/nepaeqia.htm> (accessed May 7, 2012).

3 Daniel R. Mandelker, “The National Environmental Policy Act: A Review of Its Experience and Problems,” *Journal of Law & Policy*, Vol. 32, No. 293 (2010), pp. 293-312.

4 Executive Office of the President, Council on Environmental Quality, *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years*, January 1997, <http://digital.library.unt.edu/ark:/67531/metadc31142/m1/1/> (accessed May 7, 2012).

5 Ronald E. Bass, Albert I. Herson, and Kenneth M. Bogdan, *The NEPA Book: A Step-by-Step Guide on How to Comply with the National Environmental Policy Act* (Point Arena, CA: Solano Press, 2001).

6 Mandelker, “The National Environmental Policy Act: A Review of Its Experience and Problems.”

7 U.S. Department of Transportation, Federal Aviation Administration, “Notice of Availability of a Draft Environmental Assessment for a Proposed Airport Traffic Control Tower and Base Building, Toledo Express Airport, Swanton, OH,” *Federal Register*, Vol. 76, No. 158 (August 16, 2011), p. 50809, <http://www.gpo.gov/fdsys/pkg/FR-2011-08-16/pdf/2011-20750.pdf> (accessed May 7, 2012).

8 Council on Environmental Quality, *The National Environmental Policy Act*.

9 Ibid.

impacts are likely to be significant, the agency must prepare an “environmental impact statement.”

- **Finding of No Significant Impact.** This is the determination by the agency that a proposed action will not have a significant impact on the environment and therefore does not require further action under NEPA.
- **Mitigated Finding of No Significant Impact.** This is a determination by the agency that a proposed action will not require further action under NEPA if specific mitigation requirements (e.g., erosion controls) are met.
- **Categorical Exclusion.** This constitutes a type of NEPA waiver for a category of actions that do not individually or cumulatively have an effect on the environment. An action that falls into a categorical exclusion does not require an environmental assessment or an environmental impact statement.
- **Environmental Impact Statement.** This is a thorough analysis of a proposed action’s effect on the “human environment,” as well as an evaluation of alternatives to the proposed action.
- **Record of Decision.** This refers to the agency’s rationale for choosing a specific course of

action, including an account of the factors considered by the agency and the alternatives evaluated, a description of any mitigation measures to be implemented, and an explanation of any monitoring requirements.

Public meetings or hearings may be held at various stages in the process. Documents and requests for comments are routinely published in the *Federal Register*, and every procedural step is open to scrutiny, comment, and legal challenge.¹⁰ Consequently, critics have considerable opportunity to delay project planning.

When analyzing potential impacts on the “human environment,” agencies technically are required to consider the aesthetic, historic, cultural, economic, social, and health effects of their proposed actions,¹¹ but agencies control the substance of a NEPA analysis by carefully shaping the “scope”—the delineated “purpose and need”—of their projects. How they do so effectively defines the parameters of the potential outcomes as well as the alternatives the agencies must consider.¹² Consequently, the agencies can effectively control

10 NEPA does not contain a citizen suit provision, but judicial review of agency actions may be secured under the Administrative Procedure Act.

11 Dinah Bear, “Some Modest Suggestions for Improving Implementation of the National Environmental Policy Act,” *Natural Resources Journal*, Vol. 43, No. 4 (Fall 2003), pp. 931-960, http://lawlibrary.unm.edu/nrj/43/4/02_bear_national.pdf (accessed May 7, 2012).

12 Mandelker, “The National Environmental Policy Act: A Review of Its Experience and Problems.”

the outcome of the NEPA review through deliberate scoping. This contradicts the conservation ethic Principle VI of managing natural resources on a site-specific and situation-specific basis.

Agency officials are required to solicit comments on their impact statements from other agencies that have relevant jurisdiction or expertise. (State and local agencies also may be included.) When asked for comment, agencies are required to respond, and interagency disputes are referred to the Council on Environmental Quality.¹³

As mandated by the Clean Air Act, the EPA reviews and comments on all environmental impact statements prepared under NEPA.¹⁴ In the event EPA officials regard an agency’s actions as “unsatisfactory from the standpoint of public health or welfare or environmental quality,” the case is referred to the CEQ. However, the lead agency is not obligated to alter its proposed course of action in the face of objections from either the EPA or the CEQ.

NEPA in Practice

The nation had little experience with environmental regulation

13 Holly Doremus, “Through Another’s Eyes: Getting the Benefit of Outside Perspectives in Environmental Review,” *Boston College Environmental Affairs Law Review*, Vol. 38, No. 2 (2011), pp. 245-278, <http://ssrn.com/abstract=1735748> (accessed May 7, 2012).

14 Aliza M. Cohen, “NEPA in the Hot Seat: A Proposal for an Office of Environmental Analysis,” *University of Michigan Journal of Law Reform*, Vol. 44, Issue 1 (Fall 2010), p. 169.

in 1969, when NEPA was written. Based on the construction of the statute, lawmakers appear to have been relatively naïve about the limits of environmental science, the machinations of bureaucratic self-interest, and the distortions of policy wrought by judicial activism—all of which have rendered the NEPA process costly, time-consuming, and riddled with conflict.

The Obama Administration acknowledged these shortcomings by effectively waiving NEPA requirements for “stimulus” projects funded under the American Recovery and Reinvestment Act. Ordinarily, NEPA review for federal construction projects spans an average of 4.4 years,¹⁵ but Energy Department Secretary Steven Chu said cutting the NEPA red tape was necessary to “get the money out and spent as quickly as possible. It’s about putting our citizens back to work.”¹⁶ A great many business owners can only wish that the federal government applied the same consideration to their attempts to comply with NEPA.

The very heart of NEPA—the environmental impact statement—is

grounded in a notion of the environment as static and predictable. That is, agencies construct a baseline measure of environmental conditions and model the anticipated impact of government actions. This approach conflicts with conservation ethic Principle II: that natural resources are resilient and dynamic. Furthermore, as researcher Sam Kalen notes, such a simplistic approach fails to account for the complex nature of ecosystems.¹⁷

In reality, perfect information about the environment does not exist, nor can scientists accurately forecast how complex environmental systems will respond to ever-changing conditions over time. Therefore, the impact analyses are largely grounded in assumptions with weak predictive quality.¹⁸

The scientific integrity of the NEPA process also suffers from a lack of consistent methodology. The CEQ has left agency officials free to apply any assessment approach of their choosing, but thorough cost-benefit analyses are rare. In fact, soon after enactment, NEPA drew criticism from some scientists as being little more than “massive amounts of incomplete, descriptive, and often, uninter-

preted data.”¹⁹ The American Conservation Ethic Principle VII, on the other hand, embraces science as one tool to guide public policy.

Also problematic is the fact that federal agencies are constantly embroiled in political skirmishes, simultaneously called to account by Congress, the White House, courts and activists. Given the broad discretion that agencies wield, officials must contend with the competing demands of various interests—including their own—at every step of the NEPA process. But as embodied in the American Conservation Ethic, private property owners, not government and politics, offer the most promising opportunities for environmental quality.

The complexity of NEPA is magnified to the extent federal projects require interagency coordination. As noted by the CEQ, “Agencies often have different timetables, requirements, and modes of public participation.”²⁰ Imagine the complications arising from states, local governments, and tribes having to meet 26 different federal planning requirements to obtain project funding from Washington.

Whether through compromise or by edict, the end result of the

15 U.S. General Accounting Office, *Highway Planning: Agencies Are Attempting to Expedite Environmental Reviews, But Barriers Remain*, RCED-94-211, August 2, 1994, <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-RCED-94-211/html/GAOREPORTS-RCED-94-211.htm> (accessed May 7, 2012).

16 Kristen Lombardi and John Solomon, “Obama Administration Gives Billions in Stimulus Money Without Environmental Safeguards,” *The Washington Post*, November 28, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/28/AR2010112804379.html> (accessed May 7, 2012).

17 Sam Kalen, “The Devolution of NEPA: How the APA Transformed the Nation’s Environmental Policy,” *William & Mary Environmental Law and Policy Review*, Vol. 33, No. 2 (2009), <http://scholarship.law.wm.edu/wmelpr/vol33/iss2/4> (accessed May 7, 2012).

18 Council on Environmental Quality, *The National Environmental Policy Act*.

19 D. W. Schindler, “The Impact Statement Boondoggle,” *Science Monthly*, Vol. 192 (1976), p. 509; S. M. Bartell, “Ecology, Environmental Impact Statements, and Ecological Risk Assessment: A Brief Historical Perspective,” *Human and Ecological Risk Assessment*, Vol. 4 (1998), pp. 843, 844.

20 Council on Environmental Quality, *The National Environmental Policy Act*.

NEPA process is unavoidably political in nature. This is evident, for example, in the NEPA guidelines on global warming. The CEQ issued these guidelines after more than a dozen lawsuits were filed to force agencies to include the impacts on climate change in NEPA reviews.²¹ While the guidelines reflect the political position of the Obama Administration, they lack scientific substance.

The deference granted to agencies under NEPA—both by statute and by legal precedent—presumes that agency personnel possess the expertise to complete a scientifically sound environmental assessment and that agency officials will follow NEPA requirements in a timely fashion. Such presumptions, however, fail to account for the organizational dynamics in play.

For example, bureaucrats have every incentive to ignore information that does not comport with the prevailing view of the agency's mission—a penchant that researcher Holly Doremus refers to as “mission agency syndrome.”²² She and others also identify a “rubber stamp syndrome”; i.e., the tendency within government agencies to recycle data and analysis rather than approach each NEPA review as unique.²³ And then there are agencies prone to the “past performance syndrome,” whereby officials assume that no problem will

arise in the future because none has occurred in the past.²⁴

An astonishing number of laws and regulations intersect with the NEPA process.²⁵ Consequently, the NEPA outcome could conflict with the findings of the other regulatory reviews. As noted by the CEQ, “Similar potential problems exist with respect to other Federal, State and local compliance efforts.”²⁶

Congress has intervened with legislation to streamline the NEPA process for select federal programs. However, activists complain that such legislation undermines the purpose of NEPA and restricts their ability to affect agency decisions through judicial intervention.²⁷ But there is still plenty of opportunity for lawsuits—so much so, in fact, that agencies routinely attempt to create “litigation-proof” documents, a tactic which drains dollars and time without improving analytic quality.²⁸

The consequences of the litigation frenzy go well beyond the financial. In the case of the Army Corps of Engineers and New Orleans

levees, for example, the impact proved deadly. A lawsuit filed under NEPA in the late 1970s by local fisherman and an environmental group resulted in a federal court order enjoining the Corps from moving ahead on its New Orleans levee project. Ultimately, the Corps abandoned its original design and adopted an alternative that failed to protect New Orleans residents when Hurricane Katrina slammed the city.²⁹

The Need for Real Reform

In March 2012, the Council on Environmental Quality, as it has multiple times in years past, issued draft guidance on improving NEPA reviews, but other than encouraging agencies to be “concise” or to “concentrate on relevant analysis,” the guidance lacked meaningful reforms. Notwithstanding the good intentions of its creators, the National Environmental Policy Act has outlived its usefulness. Rather than inject environmental stewardship into the actions of federal agencies, the NEPA process has become little more than a bureaucratic boondoggle.

21 Cohen, “NEPA in the Hot Seat.”

22 Doremus, “Through Another’s Eyes.”

23 Ibid.

24 Ibid.

25 Council on Environmental Quality, *The National Environmental Policy Act*.

26 “Improving Implementation of the National Environmental Policy Act (NEPA),” The INGAA Foundation, Inc., June 1, 2000, <http://www.ingaa.org/INGAAFoundation/Studies/FoundationReports/274.aspx> (accessed May 7, 2012).

27 Mandelker, “The National Environmental Policy Act: A Review of Its Experience and Problems.”

28 Council on Environmental Quality, *The National Environmental Policy Act*.

29 Thomas O. McGarity and Douglas A. Kysar, “Did NEPA Drown New Orleans? The Levees, The Blame Game, and the Hazards of Hindsight,” *Cornell Law Faculty Publications*, Paper No. 51, September 8, 2006, http://scholarship.law.cornell.edu/lrsp_papers/51 (accessed May 15, 2012).

Recommendations

Few areas of federal law undergo the constant change that characterizes environmental statutes and regulation. Since adoption of NEPA in 1969, dozens of environmental laws have been enacted, and hundreds (if not thousands) of regulations have been added to Title 40 (Protection of Environment) of the Code of Federal Regulations. States and municipalities likewise have enacted environmental protections.

Federal agencies must comply with all environmental requirements just as private parties do. Consequently, NEPA is an anachronism that unduly complicates federal projects, encourages judicial activism, politicizes rule-making, and blurs distinctions between environmental risks.

Rescission of NEPA is the main goal. The following steps can pave the way to rescission and improve some of NEPA's problems:

Narrow NEPA reviews. The multitude of other regulatory requirements makes a full-scale NEPA review both unnecessary and redundant. Reviews should be limited to major environmental issues that are not dealt with by any other regulatory or permitting process.

Mandate time limits. As with many other environmental statutes, deadlines for agency decisions at every procedural step should be established. The lack of deadlines contributes to years of delay for projects, which in turn increases costs while eroding benefits.

Establish functional equivalence. Myriad other statutes require environmental impact analyses. Rather than duplicating others' work, NEPA should provide for agencies to treat existing analyses as functional equivalents of a NEPA analysis. When case facts among projects are similar, agencies also should incorporate previous analyses and those by other agencies rather than beginning anew.

Limit alternatives studied. The NEPA process is unnecessarily prolonged by evaluation of alternative actions that stray beyond the actual purpose of the proposed project. NEPA evaluations should be limited to alternatives that would accomplish the stated goal at less cost and with available technologies.

Establish a lead agency. For projects that involve multiple agencies, responsibility for NEPA should be assigned to a "lead" department. The involvement of other agencies should be strictly limited to issues that fall within their specified jurisdiction or expertise.

Eliminate GHG determinations. There is no credible scientific evidence that positively attaches a specified volume of greenhouse gases to environmental impacts. In the absence of any cause/effect nexus, there is no rational purpose to requiring agencies to undertake an analysis of GHG emissions as part of the NEPA process.

Endangered Species Act

6



The [Endangered Species Act: An Opportunity for Reform](#) challenges the federal government's micromanagement of the environment and its inhabitants and offers reforms that reflect the constitutional responsibilities of state governments.

The Endangered Species Act: An Opportunity for Reform

The Honorable John Shadegg and Robert Gordon

The goal of the Endangered Species Act—the conservation of species—is laudable. In practice, however, this Nixon-era command-and-control environmental law has proven itself to be a costly and ineffective conservation tool. The list of domestically endangered species has exploded and is now approaching 1,400; only 24 species have officially “recovered” and been “delisted.” The law has been particularly onerous in Western states with a large amount of public land and has imposed substantial costs on the private sector. Unlike National Parks or National Wildlife Refuges, many of the costs of this national taxpayer-funded program are imposed on private property owners. Any attempts to reform the program should include increased reliance on the states, a redefining of applicable regulatory thresholds, and protection for property owners.

Since its enactment in 1973, the Endangered Species Act (ESA)¹ has been described as both the crown jewel and the pit bull of environ-

mental law. Under the ESA, species² are added to an official “endangered” list if the government determines them to be threatened or endangered with extinction.³ The government may initiate this determination process on its own or in response to a petition and, often, a lawsuit. At the time of listing or after, the government must also designate critical habitat for the species—specific geographic areas that are subject to additional regulation.⁴

2 The term “species” is not used strictly in a biological sense. Under the ESA, it is defined to include species, subspecies, or a distinct population segment of a vertebrate species. The act also regulates any part, product, egg, or offspring as well as the dead body parts of an endangered species. By regulation, the National Marine Fisheries Service (NMFS) has incorporated the term “Evolutionarily Significant Units.” *Federal Register*, Vol. 56, No. 224 (November 20, 1991), <http://www.nmfs.noaa.gov/pr/pdfs/fr/fr56-58612.pdf> (accessed June 1, 2012).

3 The government eliminated much of the legal distinction between endangered and threatened statuses by promulgating a rule that applied endangered species protections to threatened species except in those instances in which a specific rule was promulgated removing the protections. For simplicity, the term “endangered” will be used for both statuses here.

4 For many years, the government claimed it did not have to designate critical habitat. In the late 1990s, the courts opined differently, leaving few exceptions.

Once an animal or plant is listed, the United States Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), depending on the species in question, usually prepares a plan to recover the species. FWS and NMFS also enforce regulations against “taking”⁵ (e.g., harming, harassing, killing) individual endangered species and against federal agencies taking actions that jeopardize a species or adversely modify said species’ critical habitat.

In theory, the enforcement of these regulations and implementation of other ESA provisions should result in an endangered species being conserved. Under the ESA, conservation has been achieved when the act’s provisions are no longer needed, and a species may be removed from the list—a process known as “delisting.”⁶

5 The Endangered Species Act, § 3 (8) and (16). Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct. Of these terms, “harm” has been interpreted in a broad and tenuous manner.

6 *Ibid.*, § 3 (3).

1 Endangered Species Act of 1973 (16 U.S.C. 1531-1544, 87 Stat. 884), as amended, Public Law 93-205, approved December 28, 1973.

All Cost, No Benefit

Having been in effect for over three decades, the ESA has proven to be a one-way street: Species are continually added to the list but rarely removed. As of December 5, 2011, the FWS reported some 1,358 domestic species and some 590 foreign species on the list.⁷ While the ranks of federally regulated species have swollen, only 24 species have been officially “recovered” and delisted.⁸

Even this relatively low number of successes is, regrettably, misleading and inflated. For example, erroneous data regarding population numbers, population trends, distribution, habitat threats, or reproductive potential led to an initially overestimated threat to numerous “recovered” species including the alligator, brown pelican, Concho water snake, Eggert’s sunflower, gray whale, Hoover’s woolly star, Tinian monarch, and, to a lesser extent, the Aleutian Canada goose.⁹

Given this poor record, ESA advocates have resorted to claiming

that the law has “saved” species from extinction. In support of these claims, advocates often point to increases in the number of individual members of specific species.

The weakness of such arguments is revealed when some of the “saved” species like Johnston’s frankenia, a Texas plant, are considered. At the time this plant was listed, the ESA believed that there were only 1,500 remaining individual specimens of Johnston’s frankenia; in reality, there were more than 4 million.¹⁰ In 2011, the FWS proposed to delist this misdiagnosed plant as “recovered”—despite knowing about this discrepancy for more than a decade. In a recent report to Congress, the agency trumpeted that Johnston’s frankenia is “improving” and that 75 percent or more of its recovery objectives had been met.¹¹

One recent “report” shilling the efficacy of the ESA would fail a middle-school science fair. The authors cherry-picked 110 endangered species specifically because the species—including some of the above-mentioned critters—

“have advanced toward recovery.”¹² From this anything but random sample, the authors meaninglessly conclude that 90 percent of species were meeting their delisting deadlines.

As the number of species “listed” continues to soar, the burden on taxpayers is also exploding. Specifically, in fiscal year 2010, federal and state expenditures on endangered species exceeded \$1.4 billion¹³—a number that includes, for example, \$2,495,323 on the valley elderberry longhorn beetle and still represents but a fraction of the annual cost of endangered species. Indeed, the “official” report of \$1.4 billion spent in 2010 does not encompass all federal and state expenditures and reflects none of the costs imposed on lesser governmental units and the private sector.

These additional costs, however, must be taken into consideration if one is to understand the true financial impact of the ESA. Lost economic activity for communities in the western U.S. and the restrictions—and subsequent loss of value—imposed on private

7 U.S. Fish and Wildlife Service, “Species Reports,” April 20, 2012, http://ecos.fws.gov/tess_public/ (accessed May 20, 2012). These counts may include some species more than once if, for example, there are two listings of the same species at different levels (endangered and threatened) or multiple distinct population segments of the same species.

8 U.S. Fish and Wildlife Service, “Species Reports: Delisting Reports,” April 20, 2012, http://ecos.fws.gov/tess_public/pub/delistingReport.jsp (accessed May 20, 2012).

9 *Implementation of the Endangered Species Act of 1973*, Majority Staff Report to the Committee on Resources, U.S. House of Representatives, May 2005, http://www.waterchat.com/Features/Archive/050517_ESA_Implementation_Report.pdf at (accessed June 7, 2012).

10 *Federal Register*, Vol. 76, No. 206 (October 25, 2011), <http://www.gpo.gov/fdsys/pkg/FR-2011-10-25/pdf/2011-27372.pdf> (accessed May 20, 2012). In its most recent recovery report to Congress, FWS entirely abandons the measurement of Recovery Objective Achieved.

11 U.S. Fish and Wildlife Service, *Report to Congress on the Recovery of Threatened and Endangered Species*, Fiscal Years 2007–2008, http://www.fws.gov/endangered/esa-library/pdf/Recovery_Report_2008.pdf (accessed May 22, 2012).

12 According to the report, the authors “identified 110 threatened or endangered species that have advanced toward recovery since being protected under the Endangered Species Act.” Kieran Suckling, Noah Greenwald, and Tierra Curry, “On Time, On Target: How the Endangered Species Act Is Saving America’s Wildlife,” Center for Biological Diversity, http://www.esasuccess.org/report_2012.html (accessed June 1, 2012).

13 U.S. Fish and Wildlife Service, *Federal and State Endangered and Threatened Species Expenditures, Fiscal Year 2010*, <http://www.fws.gov/endangered/esa-library/pdf/2010.EXP.FINAL.pdf> (accessed May 22, 2012).

property owners are just two of the secondary costs inflicted by the ESA. Yet these costs, regardless of the outcome or who must bear them, are no object under the act. According to the Supreme Court “Congress intended to halt and reverse the trend toward species extinction *whatever the cost*.”¹⁴

Since the ESA’s inception, its defenders have dogmatically opposed changes in the act. Given this law’s awesome power, such recalcitrance should come as little surprise. However, the act’s abysmal conservation record, when considered in concert with the United States’ profound spending challenges, skyrocketing debt, and anemic economy, offers lawmakers an opportunity to address the ESA’s numerous flaws. And as almost any changes in the law will be opposed, those who would champion reform might as well undertake something significant. Additionally, the instinctive proclivity of the bureaucracy—as well as some in the judiciary—to expand the government’s authority through regulation, policy, litigation, or opinion reduces the likelihood that lasting reform can be realized through legislative tinkering.

Therefore, this chapter will address two complementary possible courses of action:

- The focus of America’s endangered species conservation efforts could be shifted to the states; and,

14 *TVA v. Hill*, 437 U.S. 153 (1978). Emphasis added.

- For any species regulated at the federal level, meaningful thresholds both for determining endangered species and for regulating activities should be established along with changes to reduce or reverse the conflict between species and property owners.

Federal vs. State Authority

Any proposal to shift the responsibility for endangered species conservation from the federal government to the states requires an initial discussion regarding the authority to regulate wildlife. Despite the ESA’s poor record, there is a presumption by many that, with regard to species conservation, the federal government is the most appropriate and effective authority.

Traditionally, however, matters pertaining to the management and regulation of wildlife have been the purview of the states. States’ authority to regulate wildlife has rested on their police powers and under claim of ownership of wildlife within a state’s borders—authority that reigned supreme until the 1900s.¹⁵

The assertion of federal authority over wildlife stems in part from the Property Clause of the Constitution that states: “Congress

15 Phillip M. Kannan, “United States Laws and Policies Protecting Wildlife,” The 2009 Colorado College State of the Rockies Report Card, <http://www2.coloradocollege.edu/StateoftheRockies/09ReportCard/FacultyOverview.pdf> (accessed May 21, 2012).

shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”¹⁶ While arguably a sufficient basis for regulation of wildlife on federal lands, this authority does not extend to species on land beyond the federal estate. The claim of federal authority to regulate other wildlife, as well as an additional basis for a claim regarding wildlife on federal lands, is grounded on the interpretation of other powers, such as the power to make treaties and the Commerce Clause.¹⁷

A precursor of the current ESA, the Endangered Species Conservation Act of 1969, directed that the government seek an international treaty on the conservation of wildlife, a mandate that resulted in the Convention on International Trade in Endangered Species of Fauna and Flora (CITES).¹⁸ During debate over the current law, ESA proponents argued that the act is needed as a means of meeting the United States’ obligations under CITES—obligations that Washington helped to manufacture.

16 United States Constitution, art. 3, sec. 8, cl.

17 Territory in this context means those lands belonging to the United States that were not part of states. Property in this context applies to those lands owned by the United States.

17 *Missouri v. Holland*, 252 U.S. 416 (1920), http://www.law.cornell.edu/supct/html/historics/USSC_CR_0252_0416_ZO.html (accessed May 21, 2012). In *Missouri v. Holland*, the Supreme Court struck down a challenge to the Migratory Bird Treaty Act by Missouri, which claimed that the law was an unconstitutional interference with states’ rights.

18 Richard Little, *Endangered and Other Protected Species: Federal Law and Regulation* (Washington, DC: Bureau of National Affairs, 1992), p. 101.

Absent authorities accrued by treaty, the case can be made that constitutional authority for using the ESA to regulate many animals and plants not inhabiting the federal estate is questionable and, as a practical matter, would be more appropriately reserved for states. For example, ignoring the impracticality of such regulation, what reasonable constitutional grounds does Washington have to regulate an endangered invertebrate that is not an object of commerce and is found only within a single state? Only through painful contortions can the case be made—a feat accomplished by a U.S. Court of Appeals in affirming the government’s authority to regulate cave-dwelling invertebrates in Texas:

[T]he FWS can prohibit the Cave Species takes because such regulation is essential to the efficacy of—that is, the regulation is necessary and proper to—the ESA’s comprehensive scheme to preserve the nation’s genetic heritage and the “incalculable” value inherent to that scarce natural resource, and because

*that regulatory scheme has a very substantial impact on interstate commerce.*¹⁹

With these mushy assertions, the government’s Commerce Clause authority to “save” cave spiders and beetles by regulation on private property in one Texas county was upheld.²⁰ The need to reform the ESA is clear.

ESA Reform: Consistent with Key Conservation Principles

Implementing the reforms described below would substantially improve the ESA by transforming an unsuccessful, burdensome, and unsustainable instrument of land use control into a conservation tool that is consistent with several critical conservation principles: (1) that nature is resilient and dynamic; (2) that liberty is the key to effective environmental stewardship; and (3) that when considering environmental regulation, human beings are the most important species of all.

¹⁹ *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), <http://caselaw.findlaw.com/us-5th-circuit/1169742.html> (accessed May 21, 2012).

²⁰ On June 3, 2005, the U.S. Supreme Court declined to review this appeals court decision. The plaintiff in this case, GDF Realty, went bankrupt.

Recommendations

Congress and the Administration must recognize that the ESA, as currently implemented, is not working. The act's regulatory costs are immense and growing, and its record of saving endangered species is weak. Shifting as much species management as possible to the states is the most preferable course of action; any remaining federal endangered species program must be altered to fundamentally change agency behavior and program focus while ensuring protections for property owners.

Shift reliance to the states. Most, if not all, states have their own conservation programs and, unquestionably, more certain grounds to engage in conservation of many species.²¹ States are well suited to manage most species including, for example, species limited to a state, resident species populations, and endangered plant species (plants comprise the bulk of the federal endangered species list). Such a shift could also include species on federal lands.

Moving conservation initiatives to the states would ensure that officials implementing the programs were closer to a particular

21 U.S. Fish and Wildlife Service, "USFWS Management Offices—State, Territorial, and Tribal," September 13, 2011, <http://www.fws.gov/offices/statelinks.html> (accessed May 21, 2012).

site and situation. Further, while state regulation can be heavy-handed and create a counterproductive adversarial relationship between property owner (habitat owners) and species, advocates of protecting private property have, at the local and state level, greater access to officials and, therefore, a better opportunity to influence environmental policy.

Change federal agency behavior and program focus. For any species governed under a federal program, several aspects of the ESA need to be addressed: the listing process, the quality of science behind agency actions, and the two fonts of regulatory authority: the prohibition against "taking" a species and the consultation process for federal agency actions.

Focus federal efforts. The federal government should focus its conservation efforts on areas where such actions are firmly rooted in the Commerce Clause. This may be the case, for example, with many fish stocks that are commercially harvested. Using the Commerce Clause as a basis for federal regulation of wildlife was historically more justifiable when the specimens or parts or products thereof were commonly traded. This occurred, for example, with the millinery trade (feathers for women's hats), ivory, commercial sales of elk or deer meat, fur trapping, or

mussel shells harvested for the production of buttons.²² Today, determining species to be endangered because of commerce in actual specimens, parts, or products thereof would be the exception, not the rule.

Require a Commerce Clause basis for an "endangered" listing. A direct and demonstrable Commerce Clause basis should be required before any new species can be added to the endangered list.

Prioritize species. In determining both whether a species should be added to the endangered species list and what priority that species will receive, federal agencies should give preference to those species that are more taxonomically unique. Furthermore, higher-order species should be given preference over lower-order species. Several other factors such as recoverability and degree of threat could be incorporated. The FWS has employed a similar matrix to assign listing priority to species.²³

However, the current approach does not differentiate between a bug and a bird, and the listing process is subject to constant litigation. To be effective the process

22 The Lacey Act, which preceded the ESA, made it federally illegal to cross state lines with wildlife taken in violation of state law. 23 *Federal Register*, Vol. 48, No. 181 (September 21, 1983), <http://www.fws.gov/endangered/esa-library/pdf/48fr43098-43105.pdf> (accessed May 21, 2012).

would need to restrict or eliminate the listing process from lawsuits seeking to add species to the federal list while giving increased weight to higher order taxa.²⁴ Doing so would both focus conservation initiatives on species that were more unique and recoverable and be more consistent with the public's expectations for the program—that is to say, a bird should generally be accorded more resources than a bug.²⁵

24 The term “species” under the ESA is an expansive legal term. A species can be ever more finely divided, magnifying the perceived threat to the relatively smaller and more subjective units such as a “distinct population segment.” Under this construct, a minnow that is nearly identical genetically, morphologically, and behaviorally can be considered legally separate from minnows in a neighboring stream. Such critters are accorded the same legal status as something like the black-footed ferret or whooping crane. Additionally, over 36 percent of listed animals are invertebrates—insects, spiders, snails, clams, and such. When there may be in the neighborhood of over 30,000 different kinds of beetles in North America alone, the notion that the federal government can accurately catalogue and regulate nature with such precision begs credulity. Richard E. White, *Peterson Field Guides: Beetles* (Boston, MA: Houghton Mifflin Company, 1983).

25 A national survey by Professor Don Coursey at the University of Illinois at Chicago demonstrated significant difference in the value respondents placed on different animal species. At the top of the list “of mean importance” was the bald eagle, followed by animals such as the whooping crane, green sea and leatherback sea turtles, and the southern sea otter. At the bottom of the 246 species included in the survey were animals like the Tipton kangaroo rat, Tooth Cave spider, and Kretschmarr Cave mold beetle. Don Coursey, “The Revealed Demand for a Public Good: Evidence from Endangered and Threatened Species,” University of Chicago, Harris School of Public Policy Studies, Working Paper Series No. 94.2, January 1994, http://harrisschool.uchicago.edu/About/publications/working-papers/pdf/wp_94_2.pdf (accessed May 21, 2012).

Ensure compliance with relevant information quality guidelines.

To reduce the “scientific” conjecture and speculation underlying many government actions, the Office of Management and Budget (OMB) should ensure that agencies’ ESA actions comply with the Information Quality Act and related OMB guidelines; actions that fail to meet these standards must be rejected. Fostering more rigorous collection and consideration of scientific data provides a firmer footing for policies that should be informed by science and increases the likelihood that such policies will generate real environmental benefits.²⁶

Prohibit the presumption that federal expertise supersedes that of states. Under the Chevron Doctrine, federal courts defer to reasonable regulatory decisions by federal agencies. In practice, this means that federal courts presume, where a state has come to a different regulatory conclusion than the FWS or NMFS, that the federal agency has a greater level of scientific expertise than similar state agencies.²⁷

26 U.S. Office of Management and Budget, “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies,” October 1, 2001, www.whitehouse.gov/omb/fedreg_final_information_quality_guidelines (accessed May 22, 2012).

27 There should be an exception for a federal agency’s interpretation of its own regulations, setting of policies, and similar actions.

The ESA should prohibit federal courts from making such a presumption. Greater expertise should not be presumed to reside within a federal agency; rather, the deference to expertise should be earned with facts on a case-by-case basis. Indeed, on a particular issue, state agencies’ expertise may very well be equal to or greater than that of their federal counterparts.

In order to make this workable, federal appellate courts reviewing agency regulatory actions could appoint special masters to review the record and neutrally review the record evidence presented by federal and state government agencies and provide an independent assessment of the competing state and federal analyses and decisions. This proposed reform adheres to the principle that encourages a site- and situation-specific approach.

Refine the definition of “take.”

Reforming the government’s nearly limitless power to thwart private property use at no cost, or to indefinitely and ethereally cast a shadow over such use, could be accomplished in part by more precisely defining the term “take.” Such a clarification should include only those actions that result in actual physical harm to a member of the species at issue. With this redefinition as a threshold, a simple construct that would foster more cooperation between govern-

ment and landowner could be established with several key elements:

- Provide landowners “bright lines.” Landowners need to be able to get a definitive answer from regulators as to whether the government would consider a particular use of their property lawful under the ESA. Landowners also need such answers to be provided in a timely manner. One means to provide for this is addressed in chapter 2 of this volume, “A Mechanism for Compensation of Regulatory Takings.” Incorporating this mechanism would remove regulatory clouds and force agencies to focus on conservation priorities.
- Focus on contractual arrangements to achieve conservation goals. In those instances where an agency expects that a proposed use would unintentionally cause harm to endangered species (e.g., habitat destruction), the agency should seek contractual conservation agreements with private landowners for the conservation. Rather than being viewed as a constraint upon conservation, property rights should be embraced as a vehicle by which to find new ways to use market forces to further conservation.
- Provide compensation to affected landowners if their property is devalued or taken. Should the agency be unable

to reach a contractual agreement with a landowner, it could then acquire the property through eminent domain or, alternatively, impose restrictions that would be compensable under the mechanism addressed in chapter 2. This construct would fundamentally alter the regulator’s behavior by ensuring property owners just compensation and thereby prohibiting agencies from foisting the cost of a national conservation program on to individual property owners.

Fix the consultation process. One of the ESA’s most cumbersome regulations is its requirement that federal agencies (e.g., the Bureau of Land Management or Federal Highway Administration) consult the FWS or NMFA before taking actions that may affect an endangered species. Under this mandate, there are two possible ways an agency risks violating the law: (1) The agency takes action without consulting the FWS or NMFS or (2) the agency proceeds without regard for one of these agencies’ determinations.

The consultation requirement is a burdensome and bureaucratic process and is particularly onerous for Western states where federal lands are disproportionately located. Several changes could improve the process substantially:

- Refine the trigger for initiating consultation. The trigger for initiating consultation should be refined to “likely to jeopardize,” which mirrors the language in the statute, as opposed to the agency regulations’ lower standard of “may affect,” thereby reducing the waste of already scarce resources.
- Reduce bureaucratic limbo. Once a federal agency requests ESA-mandated consultation, the FWS or NMFS should be required to make a determination within a set period of time (e.g., 90 days). If the FWS or NMFS fails to make a timely determination, the other agency requesting consultation should be able to proceed, and this failure to provide a timely decision should constitute a defense against violation of the ESA. Coupled with the refinement of the definition of “take,” this reform would reduce the bureaucratic limbo often used to extract concessions.
- Create a meaningful appeals process. In the event that the FWS or NMFS determines that a proposed action would violate the law, the agency requesting consultation should be able to appeal to the President. The President could then either allow the action to proceed or uphold the FWS’s or NMFS’s determination. Given politicians’ proclivity to

punt on “hot” issues, failure to make a timely determination (e.g., within 60 days) could constitute a granting of the appeal.

Managing the Federal Estate

7



The Federal Estate: Opening Access to America's Resources reveals how poorly the federal government manages its vast land holdings and natural resources. As a way to reverse this course and encourage responsible use of federal lands, the authors recommend policies that will devolve land management to state, local, and private actors and implement legal and managerial changes.

The Federal Estate: Opening Access to America's Resources

The Honorable Donald Paul Hodel and the Honorable Becky Norton Dunlop

The federal government owns nearly one-third of the United States, a percentage that continues to increase as federal bureaucracies expand their reach and the scope of their activities. Access to this public land is also becoming more difficult because of a flawed system of restrictions, regulations, and litigation. Not all public land is suitable for parks, wildlife refuges, recreation areas, and the like. On much of the other public land, some of our nation's richest natural resources are to be found. The current approach to managing the Federal Estate prevents good stewardship of these lands. Though a true solution ideally would come from devolving federal managerial power to the states, there are other policy decisions that could be made to further fruitful and responsible use of these federal lands.

The federal government owns nearly one in every three acres in the United States. Over 623 million acres make up this Federal Estate, which is located predominantly in the American West and

continues to grow.¹ The federal government also owns the Outer Continental Shelf (OCS), which reaches from beyond state waters to 200 miles offshore and covers more than 1.7 billion acres.² These lands and waters and their resources are herein referred to as “the Federal Estate.”

The Federal Estate contains huge and untapped quantities of oil, gas, water, timber, and minerals that, with responsible practices, could be used to enrich the U.S. economy and better the lives of all citizens. For example, there are 10.4 billion barrels of recoverable oil in the 2,000-acre slice of the Arctic National Wildlife Refuge (ANWR)—enough oil for roughly

1 million barrels per day, or 20 percent of American daily domestic production for *over 25 years* at current production rates.³ America imports about that much oil (1 million barrels) from Saudi Arabia every day.⁴ Yet the federal government denies American citizens the benefits of that oil because of allegations about the impact that development of ANWR's energy resources might have on wildlife.

A rational policy would insist that development take place and include appropriate remediation plans to minimize both short- and long-term environmental impact, but that is not how the Federal Estate is managed today. Instead, bureaucrats and politicians have stopped ANWR activities altogether despite substantial evidence that development would have minimal impact

1 “Federal Land Grab,” Heritage Foundation Infographic, September 16, 2009, <http://www.heritage.org/multimedia/infographic/2011/10/federal-land-grab>. See also U.S. Government Accountability Office, *Federal Land Management: Availability and Potential Reliability of Selected Data Elements at Five Agencies*, GAO-11-377, April 2011, <http://www.gao.gov/assets/320/317797.pdf> (accessed June 26, 2012).

2 Bureau of Ocean Energy Management, Regulation and Enforcement, “Offshore Energy and Minerals Management (OEMM),” <http://www.boemre.gov/offshore/> (accessed June 14, 2012).

3 Institute for Energy Research, “ANWR,” <http://www.instituteforenergyresearch.org/issues/anwr/> (accessed June 9, 2012).

4 U.S. Energy Information Administration, Petroleum and Other Liquids Database, “U.S. Net Imports by Country,” 2006 to 2011, http://www.eia.gov/dnav/pet/pet_move_net_i_a_ep00_IMN_mbbldpd_a.htm (accessed June 9, 2012).

on local wildlife.⁵ Blocking development of ANWR not only deprives Americans of the full potential of this country's natural resources, but also denies the federal government the financial resources that it needs to manage its own lands adequately. For example, the Forest Service, which manages millions of acres of forest lands, lost, on average, \$3.58 billion per year between 2006 and 2008.⁶ Not surprisingly, owners of state, tribal, and private forest lands do not lose money managing their timber lands.

This problem, however, can be fixed.

- First and foremost, Congress should return responsibility for many of our federal lands to states and private owners. Such a reform would give responsibility for managing the lands to those with the most knowledge of the land and the most to gain from its productivity.
- Reforms must also be put in place to ensure the rights of the individual to challenge the federal government's ability to take his land or to diminish the value of his land.
- This nation needs to affirm broad policies, expressing the

5 U.S. Department of the Interior, "Facts: Environmentally Responsible Energy Production in Alaska's ANWR," September 7, 2005, <http://www.doi.gov/initiatives/ANWRmediafactsheet.pdf> (accessed June 9, 2012).

6 Terry Anderson, "The Green Tea Party," Hoover Institution, *Hoover Digest*, 2012 No. 1, January 13, 2012, <http://www.hoover.org/publications/hoover-digest/article/105751> (accessed June 9, 2012).

overall national interest, to open access to its resources. Doing so will not only yield economic benefits, but also provide the means and motivation to advance conservation. The "national interest" needs to include considerations of the economy and jobs as well as national security.

- The regulatory process within those broad policies, while appropriately protecting the environment, should enable resources to be developed. It must cease to be a mechanism through which narrow (not national) interests are able to stop or severely delay all use or development of resources.

Needed: A New Steward

The federal government's numerous and overbearing restrictions on land use make the access, exploration, and development of resources exceedingly difficult. Such bureaucratic red tape also impedes this nation's ability to benefit economically from its resources—let alone to manage them wisely. Expecting the federal government to manage these resources is both bad policy and bad practice.

The very nature of the political process is such that a single hidebound bureaucracy is simply incapable of making action-oriented decisions. If anyone objects to any aspect of a decision, he can block it by litigation or by creating a political crisis. The result is that non-action is rewarded not because the bureau-

cracy is generally bad or incompetent, but because federal employees soon learn that taking no action is safe. Delay, study, hearings, and rehearings are acceptable activities. Deciding something may create a job-threatening political firestorm. The result? America's vast resources on federal land are inaccessible at a time when the poorest among us desperately need the relief they would provide.

There is scant evidence that the federal government is capable of responsibly managing the lands under its control. Consider a 2007 GAO report on "high risk" agencies as an example. This report stated that, while the Department of the Interior (DOI) spent \$1.6 billion on maintenance of public lands, it would take another \$9.6 billion to address all of the backlogged maintenance problems that the agency should have addressed *that year*.⁷

Federal control also leads to natural resources being either unduly restricted or overly stimulated. Even if the government did reach a proper equilibrium in its managerial philosophy, it is unlikely that such a harmonious condition would outlive many election cycles. Competing and partisan efforts pressure both America's elected leaders and the bureaucracy to enact policies that benefit special interests or powerful constituencies. Consequently,

7 U.S. Government Accountability Office, "Reducing Interior's Deferred Maintenance Backlog," January 2007, <http://www.gao.gov/highrisk/agency/doi/reducing-interiors-deferred-maintenance-backlog.php> (accessed June 9, 2012).

millions of people and our nation's natural resources are at risk of being captured by and subjected to a single-issue constituency or extreme resource management philosophy.

Devolution from Washington to the States

Reform begins with devolution of responsibility for management of the Federal Estate from Washington to the states. Overly prescriptive national regulations and mandates imposed from Washington preclude local creative problem solving and responsibility. The consequences of bad policy become much more difficult to reverse because they apply to the whole country, and the nation loses the benefit of experimentation and innovation that could be cultivated with a more decentralized approach.

For the sake of the management and protection of the lands themselves—the parks, wildlife refuges, open lands, and the like—a better approach would be to restore the proper relationship between the federal government and the states. Rather than one overriding entity, the states can function—as they originally were intended to function—with possibly different approaches to managing natural resources, environmental concerns, and economic problems and opportunities. Such localized management will result in a clash of ideas and philosophies, an explosion of creativity and competition that are more likely ultimately to produce policies that satisfy the

needs and desires of the American people as well as environmental concerns, all in accordance with the principle that the management of natural resources should be conducted on a site- and situation-specific basis.

For such a policy to succeed, Congress must exercise restraint and patience when an individual state acts contrary to congressional preferences. Actions that do not conform to the general ideas of a certain era are to be expected and desired. Some states will make mistakes in their management, being far too restrictive or far too lax, but such mistakes will provide great lessons to guide future policy decisions and will have far less adverse impact on the nation than would be the case if the same mistakes were made by the federal government.

Most likely, the majority of state actions will occupy a reasonable “middle ground.” At worst, the sum total of excesses from either policy direction—excessive regulation vs. too little regulation, for example—will demonstrate to most decision-makers the importance of wise and reasonable choices. Further, because renewable natural resources are resilient and respond positively to wise management, most mistakes are correctable and most damage is repairable, but if not, isn't it much, much better to have those mistakes made in a limited way, in a state or two, rather than across the board as occurs when the federal government is the instrument of error?

Protecting America's Most Precious Resource

Federal employees are public servants who hold the lands and resources of the Federal Estate in trust for citizens. They ought not to behave as arrogant owners or representatives of the “King” with little or no regard for the impact of their actions on local citizens. People, after all, are this nation's most important, valuable, and precious resource and should be treated with the respect that is due them.

As in no other country, the people—not the government—are the true owners of America's public lands. How the government manages the Federal Estate, a *national resource*, should reflect this fact, and insofar as possible, its goal should be the well-being of *all the people*. Resources needed for the benefit of the economy and national security need to be made available for appropriate development. While Congress should return responsibility for many of our federal lands to states and private owners, the Federal Estate must be properly managed, a continuum ranging from the development of valuable natural resources to restrictive preservation.

Finally, as long as the Federal Estate covers such huge swaths of our great nation, those Americans who live in it, live near it, or earn their livings from it should be treated as citizen-partners in the activities on those lands, and their well-being should be a major concern of the federal government.

Recommendations

Rein in the federal government.

The United States government must be prevented from using its huge economic and political power to violate the rights of individuals. When a victim of federal oversight attempts to defend himself against regulatory takings or burdensome regulations, the federal government can simply override and ignore anyone who lacks the immense resources needed to battle endlessly for his rights. The nation needs not only a way to restore the individual's rights, but also a mechanism for penalizing the agency and the people in the agency who perpetrate unjust actions.

Therefore, Congress and/or the Administration should:

- Review the suitability and terms of the Equal Access to Justice Act (EAJA). Government's abusive tactics need to be documented in detail. Such detail, in turn, will provide the foundation for action to reduce such abuse through hearings and litigation.

The EAJA was written originally to redress this imbalance by protecting small businesses and individuals from unreasonable regulatory and civil enforcement. However, its application has been distorted

and abused by extremists among the environmentalists at the same time that there has been an almost complete lack of transparency and reporting by the executive branch of payments made under the EAJA. Indeed, from the minimal reports that are provided, it is clear that large environmental groups use the EAJA to delay and, ultimately, prevent the federal government from taking action to allow development of natural resources—and those who abuse the act are richly rewarded by the EAJA for doing so through large awards of attorneys' fees that help fund their operating budgets.

Only entities and individuals that suffer real harm to their rights should get funds under the EAJA, not organizations that make a living by distorting the good purpose for which the act was created, and the executive branch should be required to make detailed annual reports to Congress of all settlements made pursuant to the statute.

- **Require proof of a "guilty mind" as an element of environmental crimes.** The abuses of federal prosecution—what Heritage calls "overcriminalization"—are outrageous. Congress should amend major environmental laws such as the Endangered Species Act, Clean Water Act, and Clean Air Act

to require proof of knowledge of illegality as an element of the crime. *Mens rea*, meaning "guilty mind," is the legal term requiring proof not only that a crime was committed, but also that there was criminal intent to commit the elements of a crime.

Environmental regulations are so confusing that people often do not even know that they have violated a regulation or, worse, committed a federal crime until the Environmental Protection Agency (EPA) or another federal entity issues a civil or even criminal citation. Few have the courage or the financial means to stand against a federal accusation, even if it is mistaken. The Supreme Court recently addressed such federal bullying tactics by the EPA encountered by Michael and Chantell Sackett.⁸ The outrage being perpetrated against Gibson Guitar for its alleged violation of the Lacey Act similarly dem-

⁸ Mike and Chantell Sackett of Priest Lake, Idaho, were told by the EPA that they could not get direct court review of the EPA's claim that their two-thirds-of-an-acre parcel was "wetlands." They were also facing up to \$75,000 in fines each day. In a unanimous opinion, the Supreme Court rejected the government's arguments and ruled that landowners have a right to direct, meaningful judicial review if the EPA effectively seizes control of their property by declaring it to be "wetlands." Pacific Legal Foundation, "PLF and the Sacketts Take EPA to the Supreme Court," <http://www.pacificlegal.org/page.aspx?pid=616> (accessed July 5, 2012).

onstrates the mindless power of federal agencies.⁹

Establish a Rational Regulatory Process.

Changes must also be made in the federal government's approach to regulation. Regulations must allow for resources 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 exploited as a delaying tactic founded on the "precautionary principle."¹⁰

With encouragement or, if needed, authorization from Congress, the Administration should, therefore:

- Create a digital, searchable database of past regulatory environmental studies. Since 1969, a huge number of studies have been performed on almost

every imaginable element of federal actions that may affect the environment. Computers now make a comprehensive and efficient database entirely possible and, in fact, a routine part of research.

- Allow Environmental Impact Statements to rely on prior studies.¹¹ There must be an end to duplicative environmental studies, administrative proceedings, and litigation regarding governmental decision-making. As it is, opponents of development are able to stretch out the permitting process with endless, often redundant environmental studies, Environmental Assessments (EAs), Environmental Impact Statements (EISs), administrative proceedings, and lawsuits. The resulting costs are horrendous both in dollars and in time, artificially increasing the expense of and even killing some projects that would otherwise benefit the entire nation. This problem is particularly acute where there is a group claiming to assert the "public" interest, which is in fact its own narrow interest, and there is no other group representing the general interest of the body politic at large to contest the matter.

One remedy is to establish the right to rely on prior studies that were deemed adequate when included in prior EISs. If a prior EIS that was deemed adequate exists and is cited and relied upon, the burden of proof that the study is not adequate and must be redone should be upon the objector.

- Refuse to reauthorize and appropriate funds for the Endangered Species Act (ESA) until sensible reforms are written into law. The ESA is out of control because it uses politicized science to bar activities on and the use of the Federal Estate. The listing decisions of the U.S. Fish and Wildlife Service (FWS) have no consistent thresholds and are highly subjective.

The reason for this subjectivity is simple: The FWS uses models and relies on studies that depend on other untested and unproven FWS studies and models of dubious accuracy or that are self-serving to the interest being represented by the FWS and for which the data are often not made public. The "experts" used by the FWS should be carefully weighed to represent a balance of the science in an area rather than one point of view. It is no surprise, therefore, that narrow, special interests have been able to use the ESA to kill projects, seize land, and harm local economies all across the country

⁹ Gibson Guitar has been accused by the Obama Administration of running afoul of the Lacey Act by having allegedly violated the laws of a foreign nation. The government alleges that Gibson Guitars may have been constructed of wood illegally harvested in Madagascar and India. Jim Roberts, "Regulatory Overreach: Obama Administration's Case Against Gibson Guitar Drags On," The Heritage Foundation, The Foundry, May 17, 2012, <http://blog.heritage.org/2012/05/17/regulatory-overreach-obama-administrations-case-against-gibson-guitar-drags-on/>.

¹⁰ The precautionary principle is an approach that allows policymakers to rely upon scientific unknowns or the mere, unmeasurable "potential" of risk inappropriately and to use these as justifications for doing nothing, allegedly to avoid some named risk but effectively in order to avoid the political risk of making a decision about a controversial issue.

¹¹ Environmental Impact Statements are statutorily required, thorough analyses of the effects on the "human environment" of a proposed major federal action, as well as an evaluation of alternatives to the proposed action.

but most significantly in the American West.

- Hold objectors financially responsible for unsustainable challenges. Though objectors can play an important oversight role, special interests too often use this option as a way to indefinitely delay and even kill projects. One way to help ensure that challenges to the EIS process are legitimate is to make objectors liable for the litigation cost of challenges that they lose. Legitimate questions can still be raised, but this reform would increase the cost of manipulating the system on unsubstantiated grounds.¹²
- End the irrational and endless wilderness review process. The wilderness review process has gone on in this country for 48 years. This process by which land is categorized as eligible or ineligible for wilderness designation by Congress must have a definitive end.¹³ Western states deserve an end to the federal wilderness study process on the ground that after all this time, all really deserving areas have long been officially identified as feder-

ally designated wilderness. Wilderness is the strictest land categorization in the Federal Estate. It includes unmanaged lands designated as preservation areas where no mechanized equipment is allowed.¹⁴ President Obama's 2009 Omnibus Public Lands Management Act added another 2 million acres to the already massive 100 million acres of wilderness area.

After federal agencies designate lands as "eligible" for wilderness designation by Congress, those lands are managed "as wilderness" and are unavailable for productive and even some recreational use until "released" by Congress. Additionally, some people continue to demand that more and more lands be designated as wilderness and to bar release of those lands already designated as "eligible for wilderness," effectively putting them off-limits to many legitimate uses.

Return Responsibility to the States.

It is our belief that transferring responsibility to the states

for managing many of the federal lands would address the problems of the Federal Estate most significantly. Not only would this reform relieve the federal government of huge expenses, but it would ultimately provide better care for these lands.¹⁵ Ownership inspires true stewardship.

Consequently, Congress and/or the Administration should:

- 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 forces state and local governments to figure out ways to circumvent federal rules and address economic and environmental concerns locally. Areas like national forests have become more of a financial and legal liability to the federal government because of its growing aversion to engaging in wise use of resources. In fact, states do a much better job of generating revenue from these lands. For example, for every

12 For a more in-depth discussion of EIS, see chapter 5.

13 Alexander Annett, "The Federal Government's Poor Management of America's Land Resources," Heritage Foundation *Backgrounder* No. 1282, May 17, 1999, <http://www.heritage.org/research/reports/1999/05/govts-poor-management-of-land-resources#pgfId=1020430>.

14 The absence of active land management caused by the wilderness area designation makes responding to environmental threats extremely difficult. For example, lacking any stewarding, the Wallowa-Whitman National Forest became infested with the western spruce budworm, which was allowed to wreak havoc for seven years before the regulations and comment period to address the issue finally closed.

15 Compared with other federal departments and agencies, those tending to America's natural resources, like the Bureau of Land Management and U.S. Forest Service, are relatively small entities that require disproportionately large budgets which are increasingly unavailable as the federal revenues are consumed on other priorities. The net effect is poorer and poorer management of these lands regardless of any good intentions of the agencies.

dollar spent on land management, states earn \$5.62 for school trust funds; the federal government earns a mere 76 cents.¹⁶

- **Encourage energy and mineral resource development.** In many cases, the federal government could turn water projects like managing hydropower projects and, where appropriate, fisheries over to states and communities for ownership and management. Those who benefit from these projects should enjoy the privileges and responsibilities of ownership and, ultimately, will take better care of them. The federal government's role would then be to enforce appropriate federal operating and environmental rules.
- **Allow states adjacent to the Outer Continental Shelf to manage those resources out to the full 200-mile limit.** States should be allowed to determine whether to pursue OCS exploration and development off their coasts. Giving states the freedom to manage these resources and to receive the majority of the royalty revenue would encourage development of America's rich energy resources.

16 Terry Anderson and Reed Watson, "From Parks to Pork," Hoover Institution, *Hoover Digest*, 2009 No. 4, October 9, 2009, <http://www.hoover.org/publications/hoover-digest/article/5471> (accessed June 9, 2012).

- **Encourage private-sector ownership and management of public lands.** Ideally, for the sake of improving the care and protection of public lands, including parks and refuges, states should further seek to devolve ownership and management of wildlife reserves, parks, public lands, and resources to the private sector. One such success story is George Washington's estate, which has been operated privately by the Mount Vernon Ladies' Association since 1853.

Natural and historic sites under federal management can be privatized successfully and profitably. The next Administration should commence a study to include examples of successful state and private ownership or operation of various such lands and parks and from that develop a multi-year plan setting forth the standards and processes to determine the order and manner in which federal lands should be devolved to the states. The goals are multiple, but key among them are enhancement of the protection and development of what is currently the Federal Estate.

Open Access to Development.

Finally, pending devolution, the federal government should encourage the responsible use of the Federal Estate. To the extent that the federal government

continues to own and manage the Federal Estate, it should make the land available for wise use and defend those who use it properly from special-interest groups that would bar such development. Not only would this reform provide direct economic benefits to citizens and the government; it also would result in better-managed assets.

In order to open access to responsible development, Congress and/or the Administration should:

- **Revise and revoke unsupportable anti-development Department of the Interior Solicitor opinions.** Consistent with the proposals in this paper, there are scores of DOI Solicitor's opinions that need to be revised or revoked. These opinions, accumulated over many decades, are often contradictory and need to be consistent with any reforms made in the management of the Federal Estate.
- **Reverse the improper designation of "roadless areas."¹⁷** Roadless areas are specially designated undeveloped property where land use is severely limited. They generally exceed 5,000 acres and are managed by the U.S. Forest Service. In

17 For a full description of roadless areas conservation, see United States Forest Service, "Roadless Areas Conservation," <http://www.fs.usda.gov/roadless/> (accessed June 9, 2012).

for the Tenth Circuit reversed a Wyoming federal district court decision holding that President Clinton violated the Wilderness Act of 1964 by designating “roadless areas” under U.S. Forest Service control in which development is barred even though roads existed in some of these areas.¹⁸ This decision effectively denies states the opportunity to determine how best to manage massive swaths of undeveloped land within their borders. A new President should reverse that order.

- **Establish a user-friendly permitting process.** The federal government should encourage, not challenge, investment by being predictable and reasonable. Uncertainty is the enemy of investment. The National Mining Association estimates that there is \$6.2 trillion worth of undeveloped minerals in America, and yet the U.S. spends \$5.1 billion annually importing minerals, many of which can be found in the U.S.¹⁹ Regrettably, America is ranked as the most investor-

unfriendly country for mine permitting because of delays that, on average, stretch out seven to 10 years.²⁰

- **Help the Interior and Agriculture Departments to become good neighbors.** As under the Reagan Administration, a guiding principle for the Departments of the Interior and Agriculture should be to act as “good neighbors” to the people in the vicinity of the managed areas. The next Administration should attempt to deal with the problem that arises when the federal employee in an area is seemingly “permanent” and the highest-paid person in the community. Since power tends to corrupt, this person becomes someone whom a local citizen cannot afford to offend if he ever needs a permit regarding anything related to federal land.

A system that rewards employee performance that is sensitive to local needs and encourages optimal public use of the Federal Estate so that “public ownership” becomes a reality, not just a slogan, and similar behavior would be very useful in achieving this goal. Some thought should be given

to mechanisms for bringing federal pay for comparable work in a remote community in line with pay scales in the area as a means of reducing the “I am more important than you (because I make more money)” impulse that is common to human nature.

Finally, opportunities for citizens to interact with the federal land management employees should be increased. Public servants should be accessible to citizens in the communities affected by the federal property at times that are most convenient to the public and in places that are most easily accessed by them.

18 Bret Sumner and Bill Sparks, “The 10th Circuit Court of Appeals Issues Landmark Decision Regarding Roadless Land Designation by the U.S. Forest Service,” Beatty & Wozniak, P.C., *Energy News Alert*, 2011, <http://www.bwenergylaw.com/News/documents/The10thCircuitCourtOfAppealsIssuesLandmarkDecisionRegardingRoadlessLandDesignations-bytheUSFo.pdf> (accessed June 9, 2012).
19 National Mining Association, “Minerals Make National Security,” Fact Sheet, <http://mineralsmakelife.org/resources/fact-sheets/minerals-make-national-security> (accessed June 9, 2012).

20 America even ranks below Ghana and Papua New Guinea, which suffer from severe corruption in their permitting processes. Behre Dolbear Group Inc., “2012 Ranking of Countries for Mining Investment: Where ‘Not to Invest,’” <http://www.dolbear.com/news-resources/documents> (accessed June 9, 2012).

Carbon Dioxide Regulation

8



[Carbon Dioxide Regulation and the American Conservation Ethic](#) explains that carbon dioxide reduction schemes cause artificially high consumer prices, hobbled economic growth, and threatened scientific integrity and do not lead to any significant environmental benefit. The authors therefore conclude that CO₂ should not be regulated as a pollutant.

Carbon Dioxide Regulation and the American Conservation Ethic

David W. Kreutzer, PhD, and Roy W. Spencer, PhD

Regulation of CO₂ imposes high costs on both the economy and the environment. Proposals to restrict CO₂ emissions explicitly by means of cap-and-trade legislation or a clean energy standard lead to higher energy costs and lower economic output. Less direct forms of CO₂ regulation, such as targeted loan guarantees and efficiency mandates, misallocate capital, drive up consumer prices, and hobble economic growth. Scientific integrity is another casualty of CO₂ regulations because the science used to justify the costly regulations is becoming increasingly politicized.

Though it is colorless, odorless, non-toxic, and critical to photosynthesis (the process upon which all green vegetation depends), carbon dioxide (CO₂) has been rebranded as a pollutant harmful to human health. This transformation—based on exaggeration and misinformation—is now fueling misguided calls for CO₂ regulation. Yet by relying on politically driven science, these new regulations will result in higher energy costs and lower economic growth while having little impact on CO₂ emis-

sions. Furthermore, CO₂ regulation impedes economic freedom—the greatest source of progress toward environmental protection.

Any discussion of carbon dioxide regulation must begin by noting two facts: CO₂ is a greenhouse gas, and anthropogenic (man-made) CO₂ emissions have likely contributed to the observed warming of the past 50 years. The calls for CO₂ regulation, however, are not based on these facts; rather, the current regulatory hysteria is the result of misinformation regarding the projected future levels of warming, as well as exaggerations over how much any future warming could be attributed to anthropogenic CO₂. In addition, extreme weather events are increasingly attributed to anthropogenic CO₂ emissions, despite a lack of evidence for any long-term change in these events.

Al Gore's *An Inconvenient Truth* is the most notorious purveyor of this exaggeration and misinformation. From the 20 feet of projected sea-level rise over the next century (18 feet–19.5 feet more than the amount predicted by the Inter-

governmental Panel on Climate Change) to hysterical predictions of hurricane activity, this movie embodies nearly all of the transgressions of the global-warming movement.

In short, the global-warming movement takes the general agreement concerning the modest warming that has occurred over the past century and asserts that there is a similar consensus about an impending climate catastrophe. It should be no surprise, therefore, that such scientific bait-and-switch yields poor public policies.

In addition to promising higher energy costs and lower economic growth, CO₂ policies have huge impacts on land use and put wildlife at risk. Reversing CO₂ policies will cut inefficient land use while increasing safety for bats and birds. Reducing the costly CO₂ regulations will also allow for a stronger economy, which in turn will create the wealth necessary for real environmental improvement. The regulation of CO₂ conflicts with several principles of the American Conservation Ethic.

Ignoring the Creative Powers of Free Markets

Even if the benefits of reducing CO₂ emissions were to exceed the costs, command-and-control approaches are the least efficient environmental policies. Specifically, such policies ignore the creative powers of free markets while diminishing the security of property rights—security that provides incentive to husband and improve resources.

Policies to regulate CO₂ violate Principle III of the American Conservation Ethic, which states that private property protections and free markets provide the most promising new opportunities for environmental improvements. Instead, CO₂ regulation taxes private property, channels resources toward politically preferred technologies, and expands government control of energy production.

CO₂ regulations take many forms, such as grant- and loan-guarantee programs to subsidize low-carbon technologies, efficiency mandates, cap-and-trade programs, and carbon taxes. In addition to these more direct controls on CO₂, other policies—moratoria on oil and gas drilling, increased regulatory burdens on resource extraction, restrictions or bans on necessary technology—can limit access to fossil fuels.

Grant- and loan-guarantee programs replace decentralized market interactions with centralized political calculations that

determine the mix of energy, its delivery, and its use. The recent failure of Solyndra illustrates how political influences drive an inefficient investment process; even the government's own procedures appear to have been violated for political expediency. As a result, the taxpayers stand to lose most, if not all, of the \$530 million loaned to Solyndra.¹

Efficiency mandates also sacrifice individual choice on the altar of political calculus. For example, consider appliance efficiency, home heating and cooling efficiency, and automobile efficiency (corporate average fuel economy, or CAFE) standards: Political concerns are at the heart of each of these mandates.

Almost invariably, the mandates are justified by the claim that the consumers will, on net, save money. The consumers in question are not just households, but commercial and industrial entities as well. The claim that mandates lead to savings assumes systematic avoidance of money-saving (and profit-creating) investment. Of course, all other things being equal, better energy efficiency is beneficial. However, on top of the higher initial purchase price, the calculations to support the cost-saving claims often ignore the

1 As is frequently the case with loan guarantees, the loan, while guaranteed by one agency (in this case the Department of Energy), was actually made by another, usually the Department of Treasury: That is, one federal agency guaranteed a loan made by another agency. In any event, the taxpayers are on the hook one way or the other.

value of convenience, safety, and reliability. And they always ignore consumer freedom.

For instance, automobile efficiency mandates, in the form of CAFE standards, push consumers into smaller and more expensive cars than they otherwise would choose. Though the smaller fleet may save fuel costs, the smaller cars are less safe, less commodious, and often less comfortable—all features that have real value to consumers.²

The need to mandate efficiency conflicts with the Environmental Protection Agency's own analysis of its voluntary Energy Star program. In an unsurprising development, the EPA's surveys reveal that consumers strongly prefer and will buy energy-efficient appliances.³ The difference between this voluntary program and mandates is that under a voluntary program, consumers and producers get to decide which energy savings make sense.

Cap-and-trade schemes for pollution control are nominally based on appealing economic logic.

2 News release, "New Crash Tests Demonstrate the Influence of Vehicle Size and Weight on Safety in Crashes; Results Are Relevant to Fuel Economy Policies," Insurance Institute for Highway Safety, April 14, 2009, <http://www.iihs.org/news/rss/pr041409.html> (accessed May 8, 2012).

3 U.S. Environmental Protection Agency, Office of Air and Radiation, Climate Protection Partnerships Division, *National Awareness of Energy Star® for 2009: Analysis of CEE Household Survey*, 2010, Environmental Protection Agency, <http://www.energystar.gov/ia/partners/publications/pubdocs/National%20Awareness%20of%20ENERGY%20STAR%202009.pdf> (accessed May 8, 2012).

However, several inconvenient realities have made a mockery of the “market-based” claims of such legislation’s authors:

- The scope and scale of CO₂ restrictions;
- The extremely weak link between cap-and-trade’s domestic CO₂ reductions and any environmental benefit; and
- The Byzantine special-interest regulations that larded the cap-and-trade bills offered by Congress (such as the Lieberman–Warner bill, the Waxman–Markey bill, and the Kerry–Boxer bill).

Estimates of the economic impact of the various cap-and-trade bills projected national income losses, as measured by lost gross domestic product (GDP), of up to \$10 trillion over the first 25 years—hundreds of billions of dollars per year. In addition, over a million jobs could be lost.⁴

Renewable energy standards (RES) mandate minimum fractions of electric power that must be produced by designated renewable sources. Typically, the fraction starts out low and ratchets up each year. By forcing a switch to the technologies cap and trade

would induce, an RES would have similar impacts on costs, income, and employment. An RES that starts out at 3 percent in 2012 and rises 1.5 percent per year through 2035 would reduce aggregate GDP by over \$5 trillion and lead to a million lost jobs.⁵ The costs of cap-and-trade and renewable energy standards generate no equivalent environmental benefits to offset their vast economic costs.

Though fossil-fuel access restrictions are often nominally justified on other grounds, the general intent is to reduce fuel use and, therefore, CO₂ emissions. Examples include postponing approval of the Keystone XL Pipeline, permit denial/deferral for Shell Oil’s lease in the Beaufort Sea, opposition to hydraulic fracturing, and onshore and offshore drilling moratoria.

The drop in oil and gas production from federal land and offshore reserves, especially given the contrasting sharp increases from private leases, reveals the magnitude of the problem. According to data compiled by the Energy Information Administration (EIA), crude oil and lease condensate production on federal and Indian lands is 13 percent lower than in fiscal year (FY) 2010. Furthermore, natural gas production on federal and

Indian lands has decreased every year over the past nine years and is 10 percent lower than in FY 2010.⁶ Meanwhile, from 2010 to 2011, there was a 14 percent increase in oil production on private and state lands and a 12 percent increase in natural gas production on private and state lands.⁷

Because energy is costly, consumers have an incentive to economize on its use. Indeed, since 1980, energy use per dollar of national income has dropped by over 40 percent.⁸ The CO₂ emitted per dollar of GDP has dropped by a similar amount.

In part because of the expanded use of hydraulic fracturing (a technology many environmentalists oppose), natural gas-fired electricity has displaced more CO₂ since 2000 than all wind and solar energy combined.⁹ That is, market-driven natural gas use cut CO₂ emissions more than all the wind turbines and

4 David W. Kreutzer, Karen A. Campbell, William W. Beach, Ben Lieberman, and Nicolas D. Loris, “What Boxer–Kerry Will Cost the Economy,” Heritage Foundation *Backgrounder* No. 2365, January 26, 2010, <http://www.heritage.org/research/reports/2010/01/what-boxer-kerry-will-cost-the-economy>.

5 David W. Kreutzer, Karen A. Campbell, William W. Beach, Ben Lieberman, and Nicolas D. Loris, “A Renewable Electricity Standard: What It Will Really Cost Americans,” Heritage Foundation *Center for Data Analysis Report* No. 10-03, May 5, 2010, <http://www.heritage.org/Research/Reports/2010/05/A-Renewable-Electricity-Standard-What-It-Will-Really-Cost-Americans>.

6 Institute for Energy Research, “Fossil Fuel Production on Federal Lands at 9 Year Low,” March 15, 2012, <http://www.instituteforenergyresearch.org/2012/03/15/fossil-fuel-production-on-federal-lands-at-9-year-low/> (accessed May 8, 2012).

7 Institute for Energy Research, “IER Analysis: Oil and Gas Production Declines on Federal Lands in FY2011,” February 23, 2012, <http://www.instituteforenergyresearch.org/2012/02/23/ier-analysis-oil-and-gas-production-declines-on-federal-lands-in-fy2011/> (accessed May 8, 2012).

8 U.S. Department of Energy, Energy Information Administration, *Monthly Energy Review*, October 2011, Table 1.7, <http://www.eia.gov/totalenergy/data/monthly/#summary> (accessed May 8, 2012).

9 David W. Kreutzer, “U.S. Way Ahead in Clean Energy Race,” The Heritage Foundation, The Foundry, October 25, 2011, <http://blog.heritage.org/2011/10/25/u-s-way-ahead-in-clean-energy-race/>.

solar installations combined even with their huge subsidies.

Negligible Benefits

The supposed goal of policies to reduce CO₂ emissions is the moderation of global warming. However, the policies proposed in the U.S., including cap and trade, would have a negligible impact on world temperatures. Regardless of whether the projected modest warming is a problem, policies focusing on the reduction of CO₂ emissions lack genuine environmental benefits. Therefore, CO₂ reduction policies violate Principle IV of the American Conservation Ethic, which states that efforts to reduce, control, and remediate pollution should achieve real environmental benefits.

Though the list of enacted and proposed constraints on CO₂ is long and costly, the impact of these constraints on CO₂ emissions is scant. In 2009, for example, the U.S. accounted for only 18 percent of all carbon emissions world-wide¹⁰—a percentage that continues to fall as other countries' economies (especially China's) continue to grow. Thus, even if the U.N.'s Intergovernmental Panel on

Climate Change (IPCC)¹¹ were correct in its best estimate that a doubling of atmospheric CO₂ (2XCO₂) will increase global temperatures by 3 degrees Celsius, the U.S. would be responsible for only about 0.5 deg. C of that total.

While one might argue that the U.S. is responsible for a much greater percentage of the extra CO₂ that has already accumulated in the atmosphere, the majority of the emissions that will be responsible for the doubling of atmospheric CO₂ has yet to occur. In fact, the world is only about 40 percent of the way to this expected doubling, and America's percentage contribution to future emissions will continue to fall as other countries grow and free-market technologies become less CO₂ intensive.

It would be difficult for the U.S. to reduce CO₂ emissions by a substantial amount without one of the following events: the development of a new energy technology, widespread and rapid construction of many dozens of nuclear power plants, or a collapse of the American economy. Consequently, America's contribution to the assumed 0.5 deg. C of future warming could not be reduced by much more than 0.1 deg. C, which is unmeasurable on the time scales involved (many decades).

And even this estimate is likely too large because the 3 deg. C best estimate for future warming could be overestimated by a factor of three or more. This uncertainty is related to the "sensitivity" of the climate system to extra CO₂, a controversial subject in the climate research community. Estimates of climate sensitivity based upon observations of today's climate system tend to support lower sensitivity than the IPCC has assumed.¹² As a result, the impact of any reasonable U.S. efforts to help forestall warming would be limited to hundredths of a degree—a minuscule, meaningless result.

While doing "something" about U.S. carbon emissions through, for example, the deployment of solar and wind energy might feel good, the amount of energy recoverable by these technologies is relatively small—unless America commits to covering vast tracts of land with solar collectors and wind turbines. The energy density of wind and sunlight is relatively low, whereas carbon-based fuels represent very concentrated forms of energy. Furthermore, wind and solar power plants have their own environmental impacts (for example, on the local wildlife). There are no zero-risk energy technologies, so their use always involves cost-benefit tradeoffs.

10 International Energy Agency, *CO₂ Emissions from Fuel Combustion: Highlights* (Paris: IEA Publications, 2011), <http://www.iea.org/co2highlights/co2highlights.pdf> (accessed May 8, 2012).

11 Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis* (New York: Cambridge University Press, 2007), http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg1_report_the_physical_science_basis.htm (accessed May 8, 2012).

12 Reto Knutti and Gabriele C. Hegerl, "The Equilibrium Sensitivity of the Earth's Temperature to Radiation Changes," *Nature Geoscience*, Vol. 1 (November 2008), pp. 735-743, <http://www.iup.uni-heidelberg.de/institut/studium/lehre/Uphysik/PhysicsClimate/equilibrium%20sensitivity%20ngeo337.pdf> (accessed May 18, 2012).

Finally, the premise that CO₂ emissions are necessarily harmful has not been convincingly established. It may well be that there is an environmental downside to a reduction in CO₂ emissions. Carbon dioxide is necessary for life on Earth to exist, as it is required for the photosynthesis at the beginning of the food chain on land and in the ocean. More CO₂ makes plants grow faster while increasing their tolerance to heat and drought. It is estimated that global agricultural productivity has increased by about 15 percent simply due to the increase in atmospheric CO₂ alone, while hundreds of scientific studies have established the positive benefits of CO₂-enriched air on a wide variety of plant species.¹³

While early research suggested that increasing CO₂ could harm ocean life through “ocean acidification” (a misnomer, since the oceans are alkaline and will never reach a pH below 7.0), recent research suggests that life in the ocean will experience little, if any, adverse effects from anticipated reductions in ocean pH, with even those pH changes projected to be weaker than the IPCC has predicted.¹⁴

13 Craig Idso and S. Fred Singer, *Climate Change Reconsidered: 2009 Report of the Nongovernmental International Panel on Climate Change (NIPCC)* (Chicago: The Heartland Institute, 2009), <http://nipccreport.org/reports/2009/pdf/CCR2009FullReport.pdf> (accessed May 8, 2012).
14 Craig D. Idso, Robert M. Carter, and S. Fred Singer, *Climate Change Reconsidered: 2011 Interim Report of the Nongovernmental International Panel on Climate Change (NIPCC)* (Chicago: The Heartland Institute, 2011), <http://www.nipccreport.org/reports/2011/pdf/2011NIPCCinterimreport.pdf> (accessed May 8, 2012).

Science Driven by Politics

There is general agreement that public policy should be guided by good science. In the CO₂ debates, this principle is turned on its head: Policy goals frequently direct the scientific research and significantly color the reported results. Principle VII of the American Conservation Ethic states that science should be employed as one tool to guide public policy rather than the other way around.

Over the past 50 years, the purpose of environmental regulation has undergone a radical shift. Although government regulation of the environment began as a series of policies designed to address real and pressing pollution problems—such as water pollution and particulate air pollution levels, which became dangerous on a local level to humans and wildlife by the late 1960s—such regulation is now an end in itself.

For example, the EPA continually pushes the acceptable levels of a variety of pollutants to increasingly minuscule levels—changes based upon the theory that any amount of those pollutants presents a risk and that the risk can be reduced to zero. Sometimes, the allowable levels are below what occurs naturally in the environment. On February 3, 2012, for instance, EPA Assistant Administrator Gina McCarthy informed Chairman Fred Upton (R-MI) of the House Committee on Energy and Commerce that the EPA considers no level of fine particulate matter (PM_{2.5}) emissions to be safe to hu-

man health—despite the fact that such particulates are naturally produced everywhere in the world (primarily from wind-driven soil erosion) and that relatively dry areas have natural PM_{2.5} levels above what the World Health Organization has deemed to be healthy.

Unfortunately, these regulations’ cost to society has become so large that the diversion of economic resources to achieve reductions can significantly increase risks to society associated with reduced prosperity. For instance, in the case of carbon dioxide, the Intergovernmental Panel on Climate Change was formed in 1988 to build the scientific case for regulation of CO₂ emissions. While the IPCC claims to be policy-neutral, the IPCC leadership highlights alarmist theories which, in turn, help achieve regulatory ends—all the while systematically minimizing or even ignoring peer-reviewed science that might deemphasize the need for greater regulation.

For example, the thousands of “Climategate” e-mails exchanged between the core group of IPCC scientists that were released in November 2009 and November 2011 reveal bias against any opposing scientific views and even collusion to pressure scientific journals into not publishing research that did not support the policy goals of the IPCC.¹⁵ These e-mails even reveal

15 Steven Mosher and Thomas W. Fuller, *Climategate: The Crutape Letters* (CreateSpace, 2010), p. 186.

admissions among those scientists that the IPCC leadership puts politics above the scientific evidence.

Clearly, the science of climate change has been so corrupted that in its present form, it cannot serve as the foundation for this nation's energy policy.

Toward Wise Stewardship

The American Conservation Ethic maintains that wise stewardship of the world's resources is essential to the welfare of both current and future generations. Policies, both proposed and implemented, to regulate CO₂ do not constitute wise stewardship; they offer only high costs and little to no benefit.

Instead of science driving policy, there is significant evidence that the reverse is occurring—that chosen policy outcomes are bending science toward predetermined conclusions. Furthermore, even if these conclusions were true, the policies in question do not achieve benefits commensurate with their costs and, in the process, erode the economic freedom that is a critical component of innovation and wise stewardship.

Recommendations

Explicitly exempt CO₂ from the Clean Air Act. CO₂ is colorless, odorless, nontoxic, and a byproduct of, or necessary nutrient for, all living organisms on Earth. Even if CO₂ were a problem, the Clean Air Act, which was designed to limit toxic emissions, is unsuitable for CO₂ regulation. When applied to CO₂, the extraordinarily broad scope of the CAA could place millions of additional businesses under costly and time-consuming EPA regulations—with little or no accompanying environmental benefit.

Oppose efficiency mandates.

Efficiency mandates suffer from a fundamental flaw: the assumption that neither consumers nor producers care about energy costs. The evidence is

overwhelming that consumers do care and that producers know this: Even surveys done by the EPA and Department of Energy for their voluntary Energy Star Program show that consumers pay attention to efficiency. Further, the manufacturers devote significant resources to meeting the demand for efficiency and to earning the Energy Star designation. What consumers and producers 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 do not want.

Repeal and prevent clean energy and renewable energy standards.

Though “clean” is a very appealing adjective, CO₂ is not dirty. Clean Energy and RES mandates threaten the stability and reli-

ability of electricity supply, raise costs to households and businesses, and provide little environmental benefit.

Eliminate subsidies for all forms of energy.

The growing list of failed firms and products that have received government subsidies provides a storehouse of object lessons for bad policy—Solyndra, Beacon Power, Evergreen Solar, and others. Worldwide, energy is a trillion-dollar market. Any energy source or technology that can capture even a fraction of a percent of the energy market will be rewarded with billions of dollars. That is plenty of incentive; government interference is not necessary. Subsidies will more often be pay-offs to technologies spurned by the market, not to a technology embraced by it.

International Environmental Policy

9



[Fixing the Flawed U.N. Approach to International Environmental Policy](#) analyzes international efforts to address environmental issues. The Stockholm and Kyoto Conferences serve as cautionary tales for democracies seeking to achieve environmental improvement and demonstrate what the U.S. should do to avoid the mistakes of its peers.

Fixing the Flawed U.N. Approach to International Environmental Policy

Christopher C. Horner, Henry I. Miller, MS, MD, and Brett D. Schaefer

The practice of addressing international environmental concerns (and, increasingly, domestic ones) through global forums is fraught with problems and contradicts conservative principles of free markets, property rights, individual liberty, and devolution of decision-making to the most local level possible. By agreeing to address environmental problems through global negotiations, the United States frequently places its negotiators in a position of weakness as merely one of numerous “equal” participants, the goal of many of whom is to ensure that the U.S. assumes disproportionate obligations. Another systematic problem is that U.S. participants often misapprehend that the object of the negotiation is the achievement of an agreement, rather than representing the best interests of the United States. The result is often an ineffective, costly exercise that fails to address key U.S. concerns or would inappropriately infringe on the economic and individual liberties of American citizens. Instead of this flawed approach, the United States should assess environmental concerns pragmatically, empha-

sizing that the process should be as narrowly participatory as is practical, acceptable to those states expected to bear the largest share of the costs of implementation, focused on the relevant issue(s), based on sound evidence rather than theoretical conjecture, cost effective, and respectful of the essential role played by free markets and property rights.

Is it true that “global problems require global solutions?” It has become virtually impossible to discuss any transboundary issue involving multiple states without someone trotting out the idea that the issue in question would be better addressed through global negotiations, often under the auspices of the United Nations. Indeed, self-deluded or self-interested proponents of the U.N. and global governance—individuals whose livelihoods and goals depend on the authority of international institutions—are eager to promote this position at every opportunity. The assertion that “global problems require global solutions and

global resources”¹ has become so ingrained in international discourse that individuals often recite variations of this cliché as if by rote.

At first blush, this “global solutions” sentiment may seem sensible. After all, given that “global” problems are by definition widespread and pervasive, should not every nation have a say in how they are resolved? And what better place to discuss and resolve these problems than the United Nations or other international organizations where nearly every nation is represented? As U.N. Secretary-General Ban Ki-Moon repeatedly assures us, not only do “global problems demand global solutions,” but “the United Nations is, truly, the world’s only

¹ Paul Wolfowitz, “Opening Address by the President of the World Bank Group,” in International Monetary Fund, *Summary Proceedings of the Sixtieth Annual Meeting of the Board of Governors*, September 19–20, 2006, p. 22, <http://www.imf.org/external/pubs/ft/summary/60/summary60.pdf> (accessed April 12, 2012).

global institution.”² However, the advocates for concerted global action through the U.N. seldom acknowledge the shortcomings of this strategy.

Foremost among these disadvantages is that negotiations in U.N.-affiliated and other forums open to a broad swath of countries operate principally on the idea of consensus as the basis for legitimate action. Achieving consensus among disparate, often strongly disagreeing parties—let alone “global” consensus—is elusive to say the least and all too often leads to lowest-common-denominator standards, clunky agreements weakened by unrelated issues, and mandates that have been included only to elicit support from reluctant nations.

Moreover, the proposed responses frequently result in uneven commitments. Often, only a relatively small number of countries have direct interests in a specific environmental concern or are in a position to contribute substantively to resolving the problem. These few countries are expected to bear the bulk of the burden, while the presence of the rest of the “globe” often serves more as a costly distraction than as a helpful addition. As a result, the inclusion of nations with little at stake or minimal ability to effect a solution to a problem can impede international action in a way that would not obstruct an

effort addressed through selective participation.

The situation is further complicated by the influential role played by non-governmental organizations that advocate ideological agendas, allegedly on behalf of civil society, at the international level. As Jessica Tuchman Mathews, then vice president of the World Resources Institute and currently president of the Carnegie Endowment for International Peace, observed years ago, “The United Nations charter may still forbid outside interference in the domestic affairs of member states, but unequivocally ‘domestic’ concerns are becoming an endangered species.”³ These NGOs often find international negotiations more receptive to their policy preferences than domestic electorates and thus embrace such talks as a means for circumventing domestic opposition. This circumvention can elicit opposition to the point where even moderate proposals are viewed as a predicate to more radical ones.

Such is the paradox: Insisting on global solutions to global problems all too often weakens efforts to resolve them, dilutes focus and diverts resources away from the central issue, and eschews the process critical for attaining broad-based support in democratic societies.

Increasingly, however, more issues, particularly environmental

ones, are being framed as global issues that require global action. Further, issues routinely become transmuted into “problems” with a breathlessness dictated by the “urgency” of the action they are said to require. The result is that the U.S. is pressured to engage in a flawed negotiating process and to support undesirable, unworkable outcomes. The process takes on a life of its own, and reaching an agreement becomes the goal, even if common sense and practical experience indicate that an alternative approach—possibly any other approach—would be preferable.

Evolution of Global Environmental Policy

Environmental policy is a recent focus in international affairs. Because a society must attain a particular level of wealth before placing a high value on environmental protection in the prevailing sense of the term, the current enthusiasm for international environmental agreements and regulation has coincided with the spread of wealth creation around the world, most particularly in the past 50 years.⁴ The use of widely participatory multilateral treaties to address shared environmental concerns among nations coincided with the emergence of a central role for the U.N. in facilitating and promoting global efforts to address environmental issues.

2 UN News Centre, “UN Best-Placed to Tackle Global Problems in Today’s World—Ban Ki-moon,” July 26, 2007, at <http://www.un.org/apps/news/story.asp?NewsID=23345> (accessed April 12, 2012).

3 Jessica Tuchman Mathews, “Chantilly Crossroads,” *The Washington Post*, February 10, 1991, p. C7.

4 See Iain Murray, *The Really Inconvenient Truths: Seven Environmental Catastrophes Liberals Don’t Want You to Know About—Because They Helped Cause Them* (Washington, D.C.: Regnery Publishing, 2008), esp. pp. 216–224.

The U.N.-sponsored 1972 Conference on the Human Environment in Stockholm, the first major international conference on environmental issues, is generally considered to have been the launch point for this trend. The 1972 conference was established to forge a common outlook and common principles to “inspire and guide the peoples of the world in the preservation and enhancement of the human environment.”⁵ The 1972 Declaration codified the environmental vision for the United Nations and, increasingly, multilateral efforts to address environmental issues generally:

In our time, man’s capability to transform his surroundings, if used wisely, can bring to all peoples the benefits of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and the human environment. We see around us growing evidence of man-made harm in many regions of the earth: dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies, harmful to the physical, mental

and social health of man, in the man-made environment, particularly in the living and working environment. ...

*A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well being depend. ... To defend and improve the human environment for present and future generations has become an imperative goal for mankind. ...*⁶

At the core of most of these modern environmental treaties, conferences, regulatory instruments, and bodies is the notion that human activity is harmful because of its consumption of scarce natural resources and destabilization of an inherently fragile global environment. Therefore, human activity and population growth must be governed, regulated, and otherwise forced onto a “sustainable” path. The preferred process for advancing this agenda is through treaties, regulations, and “voluntary” guidelines promulgated through international conferences and organizations.

In other words, the international strategy for addressing environmental issues inspired by the 1972 conference is the very antithesis of

a conservative approach to environmental protection as described in Principles II and III. Specifically, the international approach is premised on the belief that natural resources are not resilient and dynamic, but delicate and limited; that free markets and property rights represent a threat to the environment rather than creating incentives for prudent stewardship; and that government must therefore intervene to cordon off resources from the predations of human consumption. This approach to environmental protection—alarmist, intrusive, and anti-market—remains the bedrock upon which current international environmental protection efforts are founded.

The 1972 conference was followed by the U.N. Conferences on Environment and Development (UNCED) in Rio de Janeiro (1992) and Johannesburg (2002); several U.N. Conferences on Human Settlements/Habitat; the U.N. Conference on Population and Development in Cairo; 17 meetings of the parties to the U.N. Framework Convention on Climate Change; and a multitude of other meetings and conferences on various international environmental issues.

The Stockholm Conference also paved the way for the creation of several new U.N. agencies focused on environmental issues, including the U.N. Environment Programme (UNEP) in 1972 and the Global

5 U.N. Environment Programme, “Declaration of the United Nations Conference on the Human Environment,” June 16, 1972, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503&l=en> (accessed April 12, 2012).

6 Ibid.

Environment Facility (GEF) in 1991.⁷ However, the impact of the environmentalist agenda in the U.N. is by no means limited to these agencies. Indeed, the environmental agenda has permeated the U.N. system to the point that nearly every U.N. agency and program emphasizes that its actions benefit the environment.

The purpose of these U.N. conferences and organizations is to codify and advance what is described (using, at best, non-rigorous definitions) 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.

In general, these conferences and organizations reaffirm the sentiments of the 1972 conference. However, their demands upon participating governments, particularly those of developed countries like the U.S., have become increasingly strident and onerous. Until quite recently, multilateral environmental treaties were relatively issue-specific, limited

in scope, and evenly applicable to treaty parties. For instance, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) focused on a discrete issue—the prohibition of trade in endangered species or related goods—and applied treaty requirements equally to state parties. Similarly, the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter governs deliberate dumping of waste at sea from planes and aircraft.

As implied by Tuchman Mathews’ comment, quoted above, more recent environmental agreements are, however, typically broader in scope and intrude into areas previously considered the province of domestic policy or internal affairs. Notable environmental treaties drafted in the 1990s include the Convention on Biological Diversity, the International Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the U.N. Framework Convention on Climate Change (UNFCCC), and the Kyoto Protocol.⁸

These efforts are unidirectional—creating more restrictions and more regulations in a growing number of areas that are set and codified by a central negotiating

forum that is dismissive of alternative approaches. The ultimate endpoint of this process is predictable: the criminalization of damage to the environment, as defined by radical environmentalists. Such criminalization has been articulated in a concept called “ecocide,” which is defined as the “extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.”⁹

In other words, the intent is to make environmental damage an international crime prosecutable by an international judicial body. If this initiative succeeds—and it is clear that a sizeable constituency in the U.N. and NGO community is favorably inclined toward such a policy—it is certain to be tested on a range of environmentalists’ signature issues, especially climate change.

The Kyoto Experience

Of the major multilateral environmental agreements, none better exemplify the flaws and perils of the global solutions effort than the negotiations and agreements to address global warming.

In the 1980s, the environmental movement increasingly asserted

7 The Club of Rome guided U.N. involvement in environmental issues and in the modern environmental movement. Indeed, the agendas of these U.N. organizations were driven by some of that group’s stars, such as Maurice Strong. A longtime U.N. Undersecretary-General, Strong was chief organizer and secretary-general of both the 1972 Stockholm Conference and the 1992 U.N. Conference on Environment and Development (the first “Earth Summit”) in Rio de Janeiro. He also served as UNEP’s founding executive director.

8 See Terry L. Anderson and Henry I. Miller, eds., *The Greening of U.S. Foreign Policy* (Stanford, CA: Hoover Institution Press, 2001).

9 The Scientific Alliance, “Planetary Rights,” <http://www.scientific-alliance.org/scientific-alliance-newsletter/planetary-rights> (accessed April 12, 2012).

that greenhouse gases (GHGs), emitted through human activity (including the use of fossil fuels such as hydrocarbon energy sources), contributed to increased global temperatures.¹⁰ Governments convinced of the seriousness of this argument supported the creation of the Intergovernmental Panel on Climate Change (IPCC) in 1988. The first IPCC report was released in 1990 and, unsurprisingly, confirmed the global warming theory and laid the foundation for an international agreement to address the issue. The 1992 Rio Earth Summit produced the U.N. Framework Convention on Climate Change, wherein countries pledged to consider actions to limit global temperature increases and cope with the resulting impact of climate change.

These efforts were presented as a voluntary process, but from the advocates' perspective, such actions were necessary, and the "voluntary" aspect was acceptable only if nations met their promises. The climate convention was important "because it is so potentially invasive of domestic sovereignty," observed Tuchman Mathews, noting that it has the potential of "forcing governments to change domestic policies to a much greater degree

10 Greenhouse gases (GHGs) are atmospheric gases that are widely assumed to absorb radiation, principally water vapor, carbon dioxide, nitrous oxides, and methane. GHGs are necessary for life on Earth and are produced largely through natural processes in enormous, albeit varying, quantities from year to year. Combustion of fossil fuels, agriculture (livestock and soil tilling), and other activities produce relatively small quantities of GHGs.

than any other international treaty ... with the possible exception of the Helsinki Accords as they affected Eastern Europe, which led quite unexpectedly to the collapse of the Warsaw Pact."¹¹

Indeed, when the "voluntary" measure failed to elicit sufficient policy changes in the eyes of the IPCC, UNFCCC, and other advocates, these organizations pressed for a treaty imposing binding emissions targets on a select few countries. The resulting 1997 Kyoto Protocol set binding GHG emissions levels for 37 industrialized countries, including principally the European Community, by an average of 5 percent against 1990 levels over the five-year period 2008–2012.

The pact was, under any modeled scenario, climatically meaningless,¹² weakened not just by the enormity of such a task, but by its focus on forcing only select countries to, in effect, limit economic activity or else pay tribute to avoid such limits. Similarly, enormous loopholes crafted through the consensus process were designed to allow countries to avoid the economic consequences of actual emissions reduc-

11 Jessica Tuchman Mathews, speech to the Atlantic Forum, May 18, 1992.

12 It is projected that, if the Kyoto Protocol was implemented perfectly, it would delay projected warming by an undetectable 0.07 degrees Celsius for just six years. This also assumes a CO₂ forcing effect, which has largely been disproved over the past decade, when global warming halted despite ongoing increases in GHG emissions. T. M. L. Wigley, "The Kyoto Protocol: CO₂, CH₄ and Climate Implications," *Geophysical Research Letters*, Vol. 25, No. 13 (1998), at pp. 2285–2288.

tions while attaining the political benefit of claiming them:

- More than 150 countries had no reduction requirement, including China, which has since become the world's largest GHG emitter. Excluding China and other growing GHG emitters like India, Mexico, South Korea, and Indonesia from the agreement's restrictions renders the Kyoto Protocol ineffective. These developing countries represent almost the entirety of global GHG emission growth. The reality is that Kyoto covers only developed countries in which emissions have essentially leveled off—which is not to say that actual reductions are easy, given that in fact none managed it after Kyoto was agreed, prior to the current economic downturn.
- During the negotiations on the Kyoto Protocol, the European Union insisted on calculating emissions reductions using 1990 as the base year—an unusual choice for a 1997 agreement that would not take effect until 2008—and pooling GHG emissions across the EU-15 (the "Old Europe" bloc). Under these two provisions, nearly all EU-15 members were allowed to increase GHG emissions after Kyoto was agreed. The shift of the United Kingdom from coal to natural gas and the shuttering of East Germany's dirty industrial capacity after reunification provided a cushion of reductions from

prior, unrelated political decisions for all other EU parties to ride, covering for their own often appreciable emission increases.¹³

- Countries could avoid reducing their emissions through direct wealth transfers to and/or foreign direct investment in other nations.

Choosing to negotiate the Kyoto Protocol through a global effort proved fatal. It encouraged countries to make unrealistic demands, link tangential agendas to the negotiations, and game the system to minimize their own responsibilities. Even accepting all IPCC model assumptions, the net result of these loopholes is that the Kyoto Protocol would do virtually nothing to reduce emissions in covered countries, would do nothing at all to reduce them globally, and would have no detectable impact on climate change. But, by assuming that the climate was significantly more sensitive to increases in CO₂ concentrations than appears warranted, the assumptions also seem to have been overly pessimistic.

In the end, the treaty became less about reducing global GHG emissions than about advancing

13 For a more technical discussion of these pollution reductions, see Mark Winskel, "When Systems Are Overthrown: The 'Dash for Gas' in the British Electricity Supply Industry," *Social Studies of Science*, Vol. 32, No. 4 (August 2002), pp. 563–598, and P. Klingenberg, "The Electricity Supply Industry in Germany After Unification," IEE Colloquium on Electricity Supply Utilities—Experience Under Privatisation, February 18, 1992.

ing parochial political, social, and economic interests. Former French President Jacques Chirac hailed it as "the first component of an authentic global governance."¹⁴ Former European Union Environment Commissioner Margot Wallström called it an effort to "level the playing field" economically.¹⁵ Numerous leaders from exempt, less-developed countries have made it clear that they view the agreement as something of a restitution pact and a new source of foreign aid.¹⁶

Unsurprisingly, and to its credit, the United States (the world's largest GHG emitter at the time of the Kyoto negotiations) never became

14 Jacques Chirac, plenary address at the Sixth Conference of the Parties to the U.N. Framework Convention on Climate Change, The Hague, November 20, 2000.

15 Stephen Castle, "EU Sends Strong Warning to Bush Over Greenhouse Gas Emissions," *The Independent*, March 19, 2001, p. 14.

16 For example, one Chinese diplomat said, "Negotiations on a new treaty to fight global warming will fail if rich nations are not treated as 'culprits' and developing countries as 'victims.'" Associated Press, "China: Rich 'Culprits' on Climate Change," February 16, 2008. Brazilian President Luiz Inacio Lula da Silva weighed in, calling the Third World "victims of deforestation" and "victims of the global warming." "Although Lula admitted the importance of preserving the environment, he said it was necessary to take into consideration the social and economic needs of local populations." *Xinhua News*, "Brazilian President Says Rich Countries Do Not Follow Kyoto Protocol," *People's Daily* (Beijing), February 22, 2008, <http://english.people.com.cn/90001/90777/90852/6358958.html> (accessed April 12, 2012). Lula also complained that "rich countries consume 80 percent of the natural resources of the planet. They have to pay a trade-off to poor countries for them to conserve the environment." Reuters, "Brazil Urges Rich to Fund Environment Reform," February 22, 2008, <http://www.uk.reuters.com/article/oilRpt/idUKN2145533820080222> (accessed April 13, 2012).

a party to the treaty because it recognized that Kyoto would impose an unequal, onerous economic burden on American citizens while doing nothing to address the purported crisis of global warming.

The Kyoto Protocol expires at the end of 2012, and efforts to extend and, ultimately, to replace it are underway. These successor agreements continue to be the focus of multiple international conferences and meetings. Indeed, the Durban Climate Change Conference, the 17th meeting of the Conference of Parties to the UNFCCC, was held in November/December 2011 to "advance, in a balanced fashion, the implementation of the Convention and the Kyoto Protocol, as well as the Bali Action Plan, agreed at COP 13 in 2007, and the Cancun Agreements, reached at COP 16 last December."¹⁷

Little was expected to result from the conference, and those low expectations were realized; the Durban Climate Change Conference's grand achievement was a non-binding commitment by attending nations to reduce greenhouse gas emissions under the Durban Platform for Enhanced Action. In essence, the attending nations agreed to continue the process without making any firm commitments to actually do anything. But the U.N., environmental NGOs, and many countries have too much

17 United Nations, "Durban Climate Change Conference—November/December 2011," 2012, http://unfccc.int/meetings/durban_nov_2011/meeting/6245.php (accessed April 12, 2012).

invested in global environmental regulation to abandon the effort, and they succeeded in getting a commitment to negotiate “a protocol, another legal instrument or an agreed outcome with legal force” by 2015 with the intention of having it enter into force by 2020.

The Kyoto experience is a cautionary tale. Engaging in extended global negotiations on environmental agreements can lend legitimacy to a counterproductive approach for addressing international environmental issues.

Beyond Kyoto

Kyoto is not the only example of multilateral environmental agreements that should raise concerns. Other agreements could be used in unanticipated ways to influence policy in the U.S. and, once established, are difficult to reverse.

One example is the Stockholm Convention on Persistent Organic Pollutants (POPs), which seeks to ban certain chemicals that are purported to damage the environment. The United States signed the treaty in 2001 but has not ratified it. The treaty was relatively uncontroversial at first, banning or restricting use of 12 chemicals, most of which the United States had already prohibited or regulated. Another nine chemicals have since been added. Once chemicals are listed by POPs, the action is very difficult to reverse. For example, DDT continues to be a restricted substance under POPs, and parties are “required to notify

the Secretariat of the production or use of DDT or the intention to use DDT,”¹⁸ even though assertions about its destructive environmental effects have been disproved or found to be grossly exaggerated and despite its effectiveness in combating malaria.¹⁹

Moreover, even though the U.S. has yet to ratify the treaty, it has provided a pathway for pressuring the United States to expand America’s list of banned substances. One target is to ban industrial uses of chlorine, a building block of modern chemistry. Such a ban was floated in the United States early in the Clinton Administration but was rejected by Congress. Those seeking restrictions on chlorine use have sought to use the POPs treaty to circumvent congressional opposition by citing the authority of an international treaty.

Another example is the Convention on Biological Diversity. This convention cites three main goals: promoting conservation of biodiversity, sustainable use of its components, and fair and equitable sharing of benefits from using genetic resources “by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account

18 Stockholm Convention, “Overview: Dichlorodiphenyl-trichloroethane (DDT),” <http://chm.pops.int/Implementation/DDT/Overview/tabid/378/Default.aspx> (accessed April 12, 2012).

19 Richard Tren and Roger Bate, *Malaria and the DDT Story* (London: Institute of Economic Affairs, 2001), http://www.fightingmalaria.org/pdfs/malaria_and_ddt_story_IEA.pdf (accessed April 12, 2012).

all rights over those resources and to technologies, and by appropriate funding.”²⁰ The peril lies in the interpretation of “appropriate,” because the CBD also instructs parties to act according to the precautionary principle.

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.” For example, the 2000 Cartagena Protocol on Biosafety, which was produced under the auspices of the CBD, requires member nations to enact regulatory policies that are based on the precautionary principle and that are specific to the products of the newest, most precise, and predictable products of biotechnology.²¹ Consequently, countries establishing such regulatory policies rarely approve these products because “precautionary” policies provide regulators easy justifications to block approval—objections based on wholly conjectural concerns from anti-growth, anti-population, and anti-technology interest groups in the environmentalist movement. These unsupportable, anti-innovation policies have led to trade disputes and delays in regulatory approval of agricultural and industrial

20 Convention on Biological Diversity, at www.cbd.int/convention/convention.shtml (accessed April 12, 2012).

21 Henry I. Miller and Greg Conko, “The Protocol’s Illusionary Principle,” *Nature Biotechnology*, Vol. 18, No. 4 (April 2000), p. 360.

products and provide a real-world example of the negative consequences of violating Principle IV, which argues that the well-being of real people must be given greater weight than the well-being of theoretical ones and that theorized threats must not be granted equivalent stature with established ones.²²

Inherent Flaws

Beyond the weaknesses inherent in consensus-based global negotiations, the international organizations often charged with enforcing and overseeing the agreements are themselves flawed in ways that impede effective actions to address international problems.

First, the mechanisms established through international agreements or the international organizations charged with overseeing those agreements typically operate in a non-competitive, unaccountable manner. In key ways, U.N. organizations operate as a monopoly. Inefficiency and incompetence are not punished by “consumers” of their products or services spurning the U.N. and patronizing a more competent competitor. The organization, as the designated or recognized authority, is often singularly empowered to regulate the product or service in question.

Failure seldom reaps consequences. On the contrary, failure

22 David Adam, “UN Attempts to Boost Biosafety in Developing World,” *Nature Biotechnology*, Vol. 415, No. 6870 (January 24, 2002), p. 353.

is often rewarded with additional resources on the basis that, if the organization is not working properly, it must be due to insufficient resources. As evidence, one has only to look at the inexorable upward expansion of U.N. budgets and staff over the past decade without a corresponding increase in effectiveness.²³

Second, oversight, transparency, and accountability in international organizations is generally lacking and often deliberately weak. The U.N. did not have anything resembling an inspector general until 1994, when the Office of Internal Oversight Services was created after U.S. demands for such an office, backed by the threat of financial withholding. Even after this action, however, the U.N. lacks a truly independent inspector general as it is understood in the U.S., and the member states are denied full, unfettered access to internal U.N. audits and documents even though they pay for the organization and its activities.

Earlier this decade, three major scandals—the corruption in the Iraqi Oil-for-Food program, sexual abuse committed by U.N. peacekeepers, and corruption and mismanagement in U.N. procurement—spurred calls for stronger oversight and accountability. The scandals provoked a series of

23 Brett D. Schaefer, “United Nations: Urgent Problems That Need Congressional Action,” Heritage Foundation *Lecture No. 1177*, February 3, 2011, <http://www.heritage.org/research/lecture/2011/02/united-nations-urgent-problems-that-need-congressional-action>.

U.N. reports and resolutions that identified the problems and proposed solutions. Regrettably, these efforts are inadequate, and some have been reversed.²⁴

Third, lines of authority and responsibility in the U.N. are generally confused, and one often sees multiple U.N. organizations and bodies claiming overlapping jurisdiction, responsibilities, and purposes. For instance, dozens of U.N. offices, commissions, funds, programs, agencies, and other bodies claim to have environmental protection and sustainable development among their key objectives. They often work jointly on projects; rarely is it evident when a particular organization, much less a particular individual, is responsible for a particular project. Even more rarely is anyone held accountable for failure, ineffectiveness, misdeeds, or malfeasance. Indeed, the U.N. is still restricting access to documents of the Independent Inquiry Committee into the United Nations Oil-for-Food Programme in order to prevent public scrutiny.²⁵

Finally, international organizations are insulated from the types of checks and balances that are common to democratic governance, particularly by the absence

24 *Ibid.*

25 United Nations Secretariat, “Disposition of the Documents of the Independent Inquiry Committee into the United Nations Oil-for-Food Programme,” *Secretary-General’s Bulletin*, ST/SGB/2006/16/Amend.3, November 2, 2011, <http://www.iic-offp.org/documents/ST-SGB-2006-16.pdf> (accessed April 12, 2012).

of an electorate to change the status quo when officials act contrary to the public interest. International bureaucrats have no constituency beyond their superiors. U.N. officials are rewarded for making the bureaucratic machinery run. The tangible products of their efforts are reports, guidelines, white papers, and meetings. Production often matters more than quality, relevance, or feasibility.

A related phenomenon is what the leader of a prominent national delegation to the Codex biotech task force called “glamour fever.” This refers to the participants becoming so enamored of the trappings of the meetings (the formalities, deferential treatment, travel, expensive hotels, media attention) that they wish to prolong the experience and repeat it as often as possible. Indeed, one of the most common recommendations arising from international conferences is to hold a follow-up conference. It is hardly surprising, therefore, that U.N. officials, programs, and projects are characterized by egregious examples of arrogance, corruption, and incompetence.²⁶

26 Schaefer, “United Nations: Urgent Problems That Need Congressional Action.”

Recommendations

Quite simply, global negotiations on environmental issues often move counter to the practicalities of resolving them. The obsessive drive to address international environmental problems—real, imagined, or exaggerated—solely through the U.N. or other global forums lessens the effectiveness of proposed responses.

This is a direct assault on Principle VI, which articulates that the most effective management will be as local as possible because it will be more flexible, specialized to local concerns and circumstances, and able to secure local buy-in. It enables marginally affected parties to hold discussions and proposals hostage to tangential issues, such as wealth transfers to developing countries. It also allows some countries to game the system to avoid shouldering burdens in a way that is commensurate with their passion and rhetoric.

By agreeing to address “global” environmental problems through global negotiations, the United States frequently places its negotiators in a position of weakness. The result 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. In order to break this cycle, the U.S. must:

Preserve and defend the treaty process. By entering into treaty commitments, the U.S. government cedes some level of sovereignty, as well as the checks and balances of the U.S. constitutional system. 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.²⁷ Environmental advocates have long been frustrated by the inability of various international environmental agreements to pass Senate muster, so they advocate avoiding the supermajority requirement by substituting executive agreements. This ploy undermines the system of checks and balances in the U.S. government and mocks constitutional intent.

Along these same lines, the United States should end the practice of leaving signed but unratified treaties unresolved. Instead, this nation should, as a standard practice—assuming that the Senate has not given its advice and consent within a reasonable period—notify the treaty depository or other relevant authority that the United States does not intend to ratify the treaty and no longer has any legal obligations arising from its signature.²⁸

27 U.S. Constitution, Art. 2, Sec. 2.

28 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.

Reduce U.S. involvement with U.N. environmental bodies.

Some U.N. organizations serve limited and useful roles in addressing environmental issues, particularly the more technical agencies and treaty-monitoring bodies. For instance, the International Maritime Organization helps develop and monitor conventions focused on reducing marine pollution and does so in a focused and apolitical manner—for the most part. However, as discussed in the case of the UNFCCC, these bodies can fall victim to politicized agendas and other flaws that undermine their objectivity and ability to address environmental issues. The U.S. should reevaluate 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. The U.N. is not the only venue in which to address international environmental efforts. Other multilateral options for discussion exist including established forums, like the G-20 and

the Organization for Economic Co-operation and Development (OECD), or *ad hoc* efforts, which can bring key parties together to agree to realistic, achievable steps. 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 or activity from demonstrating that it causes harm to proving that it will cause no harm. But because it is difficult to prove a “nega-

tive,” it leads countries to impede approval of products based on unsubstantiated objections from the anti-growth, anti-population, and anti-technology elements of the environmental movement. In addition, the precautionary principle and the treaties that incorporate it provide countries with an excuse to shirk their General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO) obligations to base trade regulations (e.g., sanitary and phytosanitary) on demonstrated scientific concerns. 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.

If the United States is to pursue international environmental agreements that support—rather than undermine—its interests, it must reevaluate its policies through the lens of the principles articulated in this volume and apply them to international environmental issues, multilateral environmental treaties, and international environmental organizations. In some cases, environmental matters with international implications merit multilateral negotiation. In many instances, however, working outside a “global” framework may prove more effective in addressing international environmental problems, thereby benefiting both the United States and the global environment.

Contributors

Jack Spencer, Editor

Jack is senior research fellow in nuclear energy policy at The Heritage Foundation. His focus is on nuclear waste management, technological advances, industry subsidies, and international approaches to nuclear energy. Spencer previously worked on commercial, civilian, and military components of nuclear energy at the Babcock & Wilcox Companies, based in Charlotte, N.C.

The Honorable Kenneth T. Cuccinelli II is Attorney General of Virginia. He served as a Virginia state senator from August 2002 to January 2010. He is an advocate for Virginians' property rights, sponsoring a law (and now backing a constitutional amendment) to dramatically curb the state's eminent domain power.

The Honorable Becky Norton Dunlop is a vice president at The Heritage Foundation. She served as Secretary of Natural Resources for the Commonwealth of Virginia, Special Assistant and Deputy Assistant to the President in President Ronald Reagan's White House, and as Assistant Secretary of Fish, Wildlife, and Parks in the U.S. Department of the Interior.

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The Honorable Donald Paul Hodel, JD, is Chairman and Senior Vice President for Strategy and Policy to Summit Power. Mr. Hodel served as the Under Secretary of the U.S. Department of the Interior (1981–1982), Secretary of the U.S. Department of Energy (1982–1985), and later Secretary of the U.S. Department of the Interior (1985–1988).

M. Reed Hopper, Esquire, is a principal attorney in the Environmental Law Practice Group of the Pacific Legal Foundation. Hopper served as both an environmental protection officer and hearing officer in the U.S. Coast Guard enforcing the Clean Water Act in the Gulf Coast. In 2006, Mr. Hopper argued and won the landmark Clean Water Act case of *Rapanos v. United States* in the U.S. Supreme Court.

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Diane Katz is research fellow in regulatory policy at The Heritage Foundation. Katz was director of risk, environment, and energy policy at the Fraser Institute, and was director of science, environment, and technology for the Mackinac Center for Public Policy. On the editorial board of the *Detroit News*, Katz specialized in writing about science and the environment, telecommunications and technology, and the auto industry.

David Kreutzer, PhD, is research fellow in energy economics and climate change at The Heritage Foundation. Kreutzer was a Visiting Economist at the U.S. Food and Drug Administration and from 1984 to 2007 he taught economics at James Madison University in Harrisonburg, Virginia, where he also served as Director of the International Business Program.

The Honorable Craig Manson is General Counsel of the Westlands Water District, the nation's largest agricultural water agency. Manson served as Assistant Secretary for Fish, Wildlife, and Parks in the U.S. Department of the Interior (2002–2005), as a Superior Court judge in Sacramento (1998–2002), and General Counsel to the California Department of Fish and Game (1993–1998).

The Honorable Edwin Meese III holds the Ronald Reagan Chair in Public Policy and is Chairman of the Center for Legal & Judicial Studies at The Heritage Foundation. Meese served as the 75th Attorney General of the United States from February 1985 to August 1988. From January 1981 to February 1985, Meese held the position of Counsellor to the President—the senior job on the White House staff—and functioned as President Reagan's chief policy adviser.

Henry I. Miller, MS, MD, is the Robert Wesson Fellow in Scientific Philosophy and Public Policy at the Hoover Institution. Miller served for 15 years at the U.S. Food and Drug Administration (FDA) in a number of posts, including as special assistant to the FDA commissioner and as founding director of the FDA's Office of Biotechnology.

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The Honorable John B. Shadegg is a partner in the Washington and Phoenix offices of Steptoe & Johnson LLP. A former U.S. Congressman (1994–2010), Mr. Shadegg served on a variety of committees, including the Energy and Commerce, Budget, Financial Services, and Natural Resources Committees.

Roy Spencer, PhD, is a principal research scientist for the University of Alabama in Huntsville and the U.S. Science Team Leader for the Advanced Microwave Scanning Radiometer (AMSR-E) on NASA's Aqua satellite. Spencer has served as Senior Scientist for Climate Studies at NASA's Marshall Space Flight Center and is the recipient of NASA's Medal for Exceptional Scientific Achievement and the American Meteorological Society's Special Award for his satellite-based temperature monitoring work.

The Honorable Kathleen Hartnett White is distinguished senior fellow-in-residence and director of the Armstrong Center for Energy & the Environment. White served a six-year term as Chairman and Commissioner of the Texas Commission on Environmental Quality (TCEQ), the second largest environmental regulatory agency in the world after the U.S. Environmental Protection Agency.