4 Protecting the Environment

The federal government owns 30 percent of the land in the United States. It wants to regulate all the rest, primarily through the Endangered Species Act (ESA) and the Clean Water Act's Section 404 wetlands regulations. The Endangered Species Act has proven bad for wildlife because it is bad for people. The ESA has largely failed to protect endangered plants and animals because the threat of regulatory takings creates perverse incentives for landowners to manage their land so that it does not provide habitat for listed species. Regulation of wetlands under Section 404 of the Clean Water Act has gone far beyond what Congress intended when it wrote the law. Congress should rein in the Obama administration's worst regulatory excesses involving the ESA and wetlands, while pursuing enactment of regulatory takings compensation legislation.

Congress should:

- Prohibit funds to be used to finalize and implement the proposed rule (79 *Federal Register* 27066) changing the criteria for defining critical habitat for species listed under the Endangered Species Act.
- Prohibit funds to be used for the 22 Landscape Conservation Cooperatives and eight Climate Science Centers established by order of the Secretary of the Interior in 2009.
- Prohibit funds to be used to finalize and implement the proposed Waters of the United States rule. Congress should tighten the statutory definition of wetlands so that it is within the limits of its constitutional authority.
- Enact takings compensation legislation to compensate property owners for regulatory takings under the ESA or the Clean Water Act's Section 404 wetlands regulations.

The Obama administration is in the process of finalizing a rule that would make major changes in the criteria for defining critical habitat for endangered species. Although the U.S. Fish and Wildlife Service (FWS) has described those changes as minor, they will in fact make it much easier for the FWS to designate much larger areas as critical habitat than under current regulations. Congress should prohibit that rule from going into effect through an appropriations rider.

In 2009, then-Secretary of the Interior Ken Salazar created by secretarial order 22 Landscape Conservation Cooperatives (LCCs)

and eight Climate Science Centers. The Climate Science Centers are meant to advise the LCCs on managing all land—private and government owned—for climate change using the Endangered Species Act. Since changes in the climate could cause habitats to change, species may have to migrate to survive. Planning for those projected changes could require a huge expansion in critical habitat designations under the ESA. Those two programs have never been authorized by Congress. Congress should eliminate funding for both the LCCs and the Climate Science Centers.

The U.S. Environmental Protection Agency (EPA) is finalizing a Clean Water Act rule that redefines the Waters of the United States. The proposed redefinition of jurisdiction to regulate wetlands constitutes a huge expansion of the EPA's authority that directly contradicts limits set on federal jurisdiction by two Supreme Court decisions: *SWANCC v. Army Corps of Engineers* and *Rapanos v. United States*. In those cases, the Court ruled that the term "waters of the United States" does not include "isolated waters" such as isolated wetlands but rather "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'"

Congress should prohibit finalization and implementation of that rule through an appropriations rider.

The underlying problem with both the ESA and Section 404 wetlands regulations is that regulators have no incentive to contain costs because the costs are borne by landowners. The solution is to enact regulatory takings compensation. Supreme Court decisions have acknowledged that regulatory takings can fall under the Constitution's Fifth Amendment provision: "nor shall private property be taken for public use without just compensation." However, the Court has also made it almost impossible to claim compensation, unless the regulation takes all or nearly all the value of the property.

The idea that the government and not private citizens should be required to pay for public benefits enjoys widespread popular support. During the 104th Congress, the House of Representatives easily passed legislation to allow landowners who have lost more than half the value of their property because of ESA, wetlands, and other land-use regulations to claim compensation. In 2004 and again in 2005, Oregon voters passed referendums by wide margins to provide compensation for property owners who have lost value in their property because of state land-use regulations.

It is critical for Congress to address takings compensation, as the Obama administration is preparing a new endangered species power grab over large parts of the country, as well as attempting to vastly expand wetlands jurisdiction. Currently, 1,563 animal and plant species are listed as endangered or threatened. In 2011, the Department of the Interior settled a lawsuit brought by two radical environmental pressure groups by agreeing to review 757 species for listing according to a work plan that would be completed within six years. The species under consideration for listing include 403 species of freshwater mollusks in the rivers of the southeastern United States. The economic damage that could be caused by those mass listings is frightening. The way to restrain the regulators is to require the federal government, not landowners, to bear the costs of their regulations.

Experts: Myron Ebell, Marlo Lewis, Robert J. Smith

For Further Reading

Bonner Cohen, "The Endangered Species Act: Bad for People, Bad for Wildlife," *National Policy Analysis*, No. 511, May 2004, http://www.nationalcenter.org/NPA511.html.

Myron Ebell, "An Update on Endangered Species Act Reform," ALEC Issue Analysis, American Legislative Exchange Council, April 1995, https://cei.org/op-eds-and-articles/update-endangered-species-act-reform.

Ike C. Sugg, "Reforming the Endangered Species Act: The Property Rights Perspective," Testimony before the Endangered Species Act Task Force of the House Committee on Natural Resources, May 18, 1995, https://cei.org/outreach-regulatory-comments-and-testimony/reforming-endangered-species-act-property-rights-perspect.

FEDERAL LANDS POLICIES

The vast federal estate, comprising nearly 30 percent of the land in the United States, is far too large. Many federal lands are in poor environmental condition. At the same time, natural resource production on multiple-use lands continues to decline. The 114th Congress can take significant steps to improve federal land management, even in the face of opposition by the Obama administration.

Congress should:

- Stop buying more private land to turn into federal land. Do not reauthorize the Land and Water Conservation Fund (LWCF), which expires on September 30, 2015. If reauthorized, require major reforms to the LWCF's federal land acquisition component.
- Place a moratorium on further designations of federal lands as Wilderness Areas and other preservation classifications.
- Reform the antiquated Antiquities Act of 1906.
- Require the U.S. Forest Service to increase timber production in National Forests with mandatory targets and timetables.
- Work to restore balance in the management of multiple-use lands to increase resource production by requiring the Department of the Interior to increase oil and gas leasing on federal lands and offshore areas, including in the Arctic National Wildlife Refuge, with mandatory targets and timetables.
- Review and hold hearings on the extent of lands withdrawn administratively from mineral production under the General Mining Act. Legislation should be drafted to reopen many multiple-use areas to mineral production.
- Conduct oversight hearings on the Bureau of Land Management's and the Forest Service's treatment of Taylor Grazing Act permittees. Develop legislation to protect and confirm the valid existing rights of permittees.
- Prohibit through an appropriations rider the consideration of climate impacts or the use of the social cost of carbon (SCC) guidance document in the preparation of environmental impact statements under the National Environmental Policy Act.
- Comply with Utah's Transfer of Federal Lands Act.

The four federal land agencies control nearly 30 percent of the land in the United States. Ownership is concentrated in the western states and Alaska and ranges from 28 percent in Washington to 47 percent in California to 81 percent in Nevada. Federal stewardship of those lands varies widely, but on average the environmental condition of federal lands is poorer than that of similar private lands.

The reason is not because there is too much natural resource production on federal lands. Production has declined at the same time environmental conditions have declined. For example, timber production in the National Forests has been reduced by over 80 percent since 1990, but the condition of the forests has declined dramatically over the same period. Federal land managers do not own the land they are managing and therefore do not have the same incentives as private landowners to take care of it.

In much of the rural West and Alaska, massive federal landownership means that the federal land agencies control local economies. Continuing declines in timber production, hard rock mining, oil and gas leasing, and livestock grazing resulting from federal management are having devastating economic effects on many rural communities.

The federal government already owns far more land than it can take care of properly. To improve the environmental condition of the federal estate, the first thing Congress should do is to stop acquiring more private land. Since the Land and Water Conservation Fund was enacted in 1965, the federal government has appropriated over $15.5 billion to acquire about 5 million acres of private land, according to the Congressional Research Service. Federal taxpayers must pay the annual costs for managing and protecting those lands, which have been removed from economic production and property tax rolls. The LWCF's current 10-year authorization expires at end of fiscal year 2015. Congress should let it expire. Short of that, it should reform the LWCF so that any further land acquisitions are conditioned on selling 10 acres of federal lands back into private hands for every acre acquired or $10 worth for every dollar spent.

After letting the LWCF expire, Congress should address the lockup of federal lands. More and more federal lands managed under the Multiple-Use and Sustained-Yield Act are being withdrawn from multiple uses and placed in specific preserva-

tion classifications that exclude other uses. Wilderness Areas and National Parks require congressional enactment, but most withdrawals are being done administratively by the Bureau of Land Management and the Forest Service. Placing land into a preservation classification almost always restricts recreational access and ends all natural resource production.

Through an appropriations rider, Congress should place a moratorium on all further reclassifications of multiple-use lands into preservation, while the Department of the Interior and the Forest Service produce an inventory itemizing the lands currently under preservation classification.

Congress should also reform the Antiquities Act so that the president cannot designate vast areas of federal lands as national monuments without congressional and state approval.

Most of the areas rich in minerals in the United States are federally owned. Congress should require that natural resource production be increased on multiple-use federal lands by setting mandatory targets and timetables for timber production and for oil and gas leasing. Congress should also develop legislation to reopen areas of mineral potential to entry under the General Mining Act.

Congress should investigate continuing attempts by the Bureau of Land Management and U.S. Forest Service to drive grazing permittees off the land and develop a response. Livestock grazing on federal lands is economically important in the intermountain West and is also essential to maintain ranges in good environmental condition.

Over the past four decades, environmental pressure groups have perfected the misuse of the National Environmental Policy Act (NEPA) to delay proposed major projects to death. Now they have an ally in the Obama administration, which is requiring that the direct, indirect, and cumulative carbon dioxide emissions produced by the project be taken into account using the Department of Energy's SCC guidance document and a December 2014 guidance document issued by the White House Council on Environmental Quality, which oversees NEPA. Congress should prohibit the use of any funds to apply these two guidance documents or any other consideration of climate impacts in the preparation of NEPA environmental impact statements. Congress should prohibit the use of any funds to apply the SCC in NEPA environmental impact statements or any other federal regulations.

The Transfer of Federal Lands Act, enacted by the state of Utah in 2012, requires the federal government to transfer federal lands in Utah, excluding National Parks and Wilderness Areas, to the state by December 31, 2014. Congress should comply with the terms of the Act and prepare to comply with similar legislation being considered in other western states.

Experts: Myron Ebell, Marlo Lewis, Robert J. Smith

For Further Reading

American Lands Council. Library website, http://www.americanlandscouncil.org/library.

Robert J. Smith, Testimony on S. 2543, the National Heritage Partnership Act, before the Subcommittee on Parks of the Senate Committee on Energy and Natural Resources, June 24, 2004, http://cei.org/pdf/4091.pdf.

Carol Hardy Vincent, "Land and Water Conservation Fund: Overview, Funding History, and Issues," August 13, 2010, http://www.cnie.org/NLE/CRSreports/10Sep/RL33531.pdf.

CHEMICAL RISK REGULATION

Originally passed in 1976, the Toxic Substances Control Act (TSCA) grants authority to the U.S. Environmental Protection Agency (EPA) to regulate all chemicals in commerce except those regulated under other federal laws, such as pesticide and cosmetics laws. Members of Congress have debated revising TSCA for more than a decade without success. At the heart of the debate is the law's robust, science-based risk standard, which limits the EPA from imposing needlessly onerous regulations that could unintentionally undermine public health, the environment, and economic well-being. Environmental advocacy groups would like reform to empower the EPA to regulate more, whereas industry groups want reform that will preempt the emergence of myriad overlapping and conflicting state chemical laws.

Congress should:

- Maintain the Toxic Substances Control Act's reasonable risk standard and apply similarly robust, science-based risk standards to other chemical regulation programs.
- Demand that TSCA reform preempt states from passing additional, overlapping, and conflicting chemical laws and regulations.

The Toxic Substances Control Act's current risk standard allows the Environmental Protection Agency to regulate chemicals that pose an "unreasonable risk of injury to health or the environment." The EPA must also consider (a) the effects and exposure to humans and the environment, (b) the benefits of various uses of regulated chemicals and the availability of substitutes, and (c) the proposed regulation's potential economic consequences and impacts on small business, technological innovation, the environment, and public health (15 USC §2605[c][1]). It also requires that the agency apply restrictions only "to the extent necessary to protect adequately against such risk using the least burdensome requirements" (15 USC §2605[a]). Citizens should demand at least as much before any government body issues regulations that undermine the freedoms necessary for society to progress and innovate.

Nonetheless, environmentalists and Democrats have pushed for TSCA reform that replaces the law's science-based standard with a political one based on the precautionary principle—a concept that calls on regulators to act *even in the absence of scientific justifications*. Once the precautionary principle is accepted as a matter of policy, it presses policy makers to make regulations as stringent as possible and encourages lawmakers to ban certain technologies because they *might* pose safety risks. But resulting policies, in fact, may prove more dangerous.

For example, environmental groups complain that TSCA did not allow the EPA to ban all asbestos uses, even though existing uses are safe, and a ban could have increased fatalities (see Safer Chemicals, Healthy Families website, http://saferchemicals.org/). That issue came to a head in 1989 when the EPA released a very ambitious TSCA rule banning most asbestos uses that affected dozens of businesses and applications, including uses for automotive brakes (54 *Federal Register*, vol. 29, no. 460, 1989; EPA Asbestos website, http://www.epa.gov/asbestos/pubs/frl-3476-2.pdf). But the Fifth Circuit Court of Appeals opinion in *Corrosion Proof Fittings v. EPA* stated not only that the EPA's rule failed to prove that the regulation was necessary to protect public health but also that the agency ignored the fact that "substitute products actually might increase fatalities," because of potential resulting brake failures. Moreover, the rule was unlikely to improve public health in other ways, because the type of asbestos and the limited human exposures related to current uses pose negligible risks.

Early draft legislation offered by Sen. Frank Lautenberg (D-N.J.) focused on changing TSCA's risk standard to make it more precautionary. Before passing away in 2013, Sen. Lautenberg cosponsored a compromise bill with Sen. David Vitter (R-La.), the Chemical Safety Improvement Act (S. 1009), that would have maintained some key features of the current law's reasonable risk standard but would eliminate the law's requirement that the EPA pursue the "least burdensome" regulations. It would have also expanded the EPA's power to collect data from industry and included a provision that would allow the agency to preempt state laws covering certain chemicals after it promulgated regulations covering them. In February 2014, Rep. John Shimkus (R-Ill.) began circulating a draft bill, the Chemicals in Commerce Act, which included some of the

same provisions of the Lautenberg-Vitter bill, including state preemption.

However, reform efforts fell apart at the end of the 113th Congress because of opposition from Senate Environment and Public Works Committee Chair Barbara Boxer (D-Calif.), who along with many environmental groups, strongly opposed state preemption provisions and the risk standard. Boxer offered her own draft legislation in September 2014, the Boxer Toxic Chemicals Control Act, which stripped out the preemption provisions and changed the risk standard to make it precautionary in nature. Refusing to negotiate, Sen. Vitter and his new Democratic cosponsor, Sen. Tom Udall (D-N.M.), indicated they would wait until the next Congress to advance their version of the legislation.

Expert: Angela Logomasini

For Further Reading

Angela Logomasini, "The Real Meaning of 'TSCA Modernization': The Shift from Science-Based Standards to Over -Precaution," *Issue Analysis* 2012 No. 2, Competitive Enterprise Institute, March 2012, http://cei.org/sites/default/files/Angela%20Logomasini%20-%20The%20Real%20Meaning%20of%20TSCA%20Modernization.pdf.

———, *A Consumer's Guide to Chemical Risk: Deciphering the "Science" behind Chemical Scares*, Washington, DC: Competitive Enterprise Institute, 2014, https://cei.org/issue-analysis/consumers-guide-chemical-risk.