

While Necessary Economic Cost-Benefit Analysis Can Be Manipulated to Meet Policy Agendas & Objectives

[The following passages have been excerpted from Lawrence A. Kogan, *What Goes Around Comes Around: How UNCLOS Ratification Will Herald Europe's Precautionary Principle as US Law*, 7 Santa Clara Journal of International Law 23, 144-152 (2009), available at: <http://digitalcommons.law.scu.edu/scujil/vol7/iss1/2/>.]

According to one 1994 Congressional Research Service report (CRS 94-961) prepared out of concern that legislative proposals then simmering in the 104th Congress would “require EPA analyses of risks, costs, and benefits of proposed regulations” that could have constrained Clinton administration environmental policy,⁶⁰⁷ it is apparent that the Clinton administration had endeavored to effectuate subtle but much more broadly applicable national regulatory policy changes through the use of executive orders. In particular, the report compared and contrasted the Reagan administration’s now revoked E.O. 12291 (Feb. 1981)⁶⁰⁸ and E.O. 12498 (Jan. 1985)⁶⁰⁹ with the Clinton administration’s E.O. 12866 (Sept. 1993)⁶¹⁰ which superseded it,⁶¹¹ evaluating, in the process, how each administration respectively had required federal agency economic cost-benefit analysis⁶¹² that emphasized either ‘risk’ probability or hypothetical ‘hazard’ analysis.⁶¹³ The report noted how these subtle differences in policy objectives and prescriptions could have political significance and could result in different regulatory outcomes.⁶¹⁴

According to the report, President Clinton’s executive order expressly sought “to improve the process for [promulgating] Federal regulations and ensuring public transparency and oversight, while —President Reagan’s orders were intended [not only] to improve the quality *but also to reduce the number of regulations* [through more effective] oversight of the regulatory process (emphasis added).”⁶¹⁵ In addition, Reagan and Clinton E.O.s directed agencies to employ different criteria in pursuit of their respective regulatory objectives. Reagan E.O.s focused on “‘maximiz[ing] net benefits’ [i.e.] *achiev[ing] the greatest possible economic gain for society to the extent permitted by law*”, while Clinton E.O.s focused on “address[ing] significant problems or compelling public need’ — *[e]conomic impacts [were] not considered in the choice of objectives* (although prior to promulgating a regulation, agencies must determine that benefits justify costs, unless the regulation is required by law.”⁶¹⁶ Furthermore, Reagan E.O.s “directed agencies to choose the regulatory alternative with the *‘least net cost’*”, while Clinton E.O.s “established three criteria for choosing a regulatory approach: maximize net benefits, minimize the overall regulatory burden for various segments of society, and design the most cost-effective regulation or alternative to achieve the objective. *The philosophy of the Clinton order emphasize[d] the importance of net benefits . . . (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach. . .*”⁶¹⁷

CRS 94-961 also discussed how these differing economic philosophies and objectives had manifested themselves in divergent views toward the usefulness of federal regulatory agency science—risk assessments—in “identifying and quantifying the presence of public

environmental and health harms posed to humans, animals and particular subgroups from exposure to hazardous activities, chemicals or technologies.”⁶¹⁸ The report found that “[r]isk and economic analyses can be qualitative or, if information is sufficient, quantitative, but economists can only quantify economic benefits of environmental regulations if scientists can quantitatively estimate risks to health and the environment.”⁶¹⁹ It also noted the significant disagreements that continue to impair the usefulness of risk analysis, which typically concern the availability, quality and objectiveness of scientific information that such analyses provide.⁶²⁰

A subsequently prepared CRS Report (98-738) adopted an entirely different, and perhaps, ‘more evolved’ approach to addressing environmental concerns, in particular, those relating to the hazards attendant to climate change,⁶²¹ which is certainly relevant to any consideration of a future U.S. oceans policy. It conceived of three different policy lenses - technology,⁶²² economics⁶²³ and ecology⁶²⁴— through which U.S. federal agency regulations could then be tailored to achieve climate change mitigation as a matter of Presidential policy, and to simultaneously influence the direction of other related environmental and energy programs.⁶²⁵

It is significant to the current debate over the availability, applicability and stringency of UNCLOS environmental provisions to protect the marine environment from climate change that this report’s authors admitted how politics and fear perceptions, rather than science, had previously guided Clinton administration climate change policy and regulatory approach.

“Because of the enormous uncertainties associated with global climate change— whether global climate change is occurring or will occur, what the effects might be and their magnitude, the consequences that would follow from actions to reduce emissions of greenhouse gases, the costs of actions or of taking no action, the time frame of impacts, etc.—*each individual’s perception* of what, if anything, to do is strongly influenced by personal values, experience, education and training, and outlook in how to cope with uncertainty. These personal variations affect one’s definition of the issue and the weight one gives possible approaches to it. . . . *In the end, the origin of and support for different global climate change policy options arise from differing orientations to, or philosophies for, thinking about uncertainty*, taking risks, human progress and adaptability, and personal and community values” (emphasis added). ⁶²⁶

Also important, is CRS 98-738’s discussion of the ecologic lens, which may now be reviewed with 20-20 hindsight. It highlights the continuing trend in international politics and policymaking, especially within Europe, to emphasize communitarian, ethical/moral, humanitarian and religion-based environmental consciousness as a justification for governmental action. It should be noted that UNCLOS proponents had previously tapped into this trend more than a decade ago to promote global ratification of the 1982 and 1994 agreements.⁶²⁷ In addition to former Vice President Gore, the proponents of this legislative and regulatory approach consist of the 110th Congress’s majority leaders, and perhaps, President Barack Obama as well. They, too, appear to believe that a “wrenching transformation of society”⁶²⁸ (a/k/a progressive change) is necessary for the U.S. to achieve the environment-centric sustainable development long prescribed by the U.N. Brundtland Report.⁶²⁹

The subtle doctrinal (philosophical) differences underlying the divergent approaches reflected in the Reagan and Clinton executive orders with respect to the timing and types of economic-cost benefit analyses to be performed as the basis for public environmental and health regulation were recently highlighted by Susan E. Dudley, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget. In an October, 2007 speech delivered at Northwestern University School of Law,⁶³⁰ Ms. Dudley endeavored to explain the rationale behind the Bush administration's January 2007 issuance of E.O. 13422,⁶³¹ revising Section 1(b)(1) of Clinton E.O. 12866. The revision generally requires federal agencies to identify and explain, *beforehand*, the specific 'market failure' ("such as externalities, market power, lack of information . . . or other specific problem . . . including . . . failures of public institutions") necessitating corrective regulatory action.⁶³²

Ms. Dudley particularly noted the *modus operandi* of Clinton E.O. 12866 as set forth in its accompanying Statement of Regulatory Philosophy and Principles: to promulgate regulations "made necessary by compelling public need, such as *material failures of private markets to protect or improve the health and safety of the public*, the environment, or the well-being of the American people."⁶³³ She then highlighted why it was important for agencies to focus on identifying the 'market failure' prior to regulating. In that regard, she emphasized that the preferred regulatory philosophy should instead seek to harness the wisdom of 'decentralized crowds' possessing diverse, localized knowledge and a capability of processing dispersed information that no one individual (even a regulator) can obtain - a clear reference to decentralized market processes. As she explained, this approach will always be superior to a regulatory philosophy of "Government intervention [that] substitutes the judgment of a small group of experts for the wisdom of the crowds."⁶³⁴ In her expert opinion, "[G]overnment intervention. . . is best used in a limited way, such as in cases of a clear 'market failure' that cannot be adequately addressed by other means."⁶³⁵

Ms. Dudley's remarks were especially timely considering Europe's knack of identifying market failures that impede local, national, regional and global achievement of environment-centric sustainable development and require adoption and implementation of Helvetian-style 'legislation/regulation and education' campaigns⁶³⁶ grounded on Europe's Precautionary Principle. It would also appear that she was cognizant of how such campaigns have interested and influenced the thinking of the Majority members of during the second session of the 110th Congress. Not surprisingly, E.O. 13422 was roundly criticized as an effort to broadly circumvent the authority of Congress and to diminish current environmental and health standards (e.g., the Clean Air Act).⁶³⁷

Based on the policy recommendations recently prepared for the Obama administration by New York University School of Law's Institute for Policy Integrity,⁶³⁸ academics arguably hope to reintroduce and further refine the Clinton era model of economic cost-benefit analysis. If adopted, these recommendations would not only eliminate Ms. Dudley's 'compelling public need such as material failures of private markets' trigger for regulatory action that emphasizes net costs,⁶³⁹ but they would also more broadly redefine *net benefits*.⁶⁴⁰ In addition, these proposals would require that cost-benefit analysis consider moral and ethical concerns and sustainable development-type intergenerational equities as noted below.

“V. Net Benefits: *Agencies should focus on maximizing net benefits* – including quantified and unquantified benefits – not on minimizing regulatory costs. VI. Ancillary Benefits: When accounting for the indirect effects of regulation, agencies should pay equal attention to both the positive and negative indirect effects. VII. Future Generations: The current practice of discounting benefits for future generations at a constant rate consistent with the return on traditional financial instruments should be abandoned in favor of a valuation mechanism that reflects fundamental *moral and ethical* difficulties that arise with regulations that have intergenerational effects.”⁶⁴

Only time will tell whether President Obama’s new OIRA administrator will accept these recommendations. No doubt, if he did, they would broaden the opportunity for federal agencies to promulgate stricter environmental regulations on net benefit grounds that would appeal to environmental pressure groups because they are more consistent with Europe’s Precautionary Principle.⁶⁴²

607. See Linda-Jo Schierow, Risk Analysis and Cost-Benefit Analysis of Environmental Regulations, CRS Report for Congress 94-961 (Dec. 2, 1994), <http://www.cnie.org/NLE/CRSreports/Risk/rsk-5.cfm>; Id. at Introduction, <http://www.cnie.org/NLE/CRSreports/Risk/rsk-5.cfm#INTRODUCTION>.

608. See Exec. Order No. 12291, 46 FR13193 (Feb. 19, 1981); CRS Report for Congress 94-961, President Reagan's Executive Orders (Now Revoked), (“[C]ost-benefit analysis was required for all proposed and final ‘major’ rules . . . ‘[M]ajor rules’ . . . were defined . . . to mean any regulation likely to have an effect on the national economy of \$100 million or more. Rules with a smaller economic impact were also ‘major’ if they were likely to result in: a major increase in costs or prices for consumers, individual industries, Federal, State, or local government, or geographic regions; or a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets *A requirement for risk analysis was not explicit in President Reagan's 1981 order but implied by the mandate to assess net benefits of environmental and health and safety regulations. Most benefits of such regulations are the risks avoided due to Federal action*”) (emphasis added), [http://www.cnie.org/NLE/CRSreports/Risk/rsk-5b.cfm#President%20Reagan's%20Executive%20Orders%20\(Now%20Revoked\)](http://www.cnie.org/NLE/CRSreports/Risk/rsk-5b.cfm#President%20Reagan's%20Executive%20Orders%20(Now%20Revoked)).

609. See Exec. Order No. 12498, 60 FR1036 (Jan. 1985).

610. See Exec. Order No. 12866, 58 FR 51735 (Oct. 4, 1993).

611. See Ashford, *supra* note 34, at 359; see also, 58 FEDERAL REGISTER 51735 (Sept. 30, 1993), <http://www.whitehouse.gov/omb/inforeg/eo12866.pdf>; see also Circular A-4—New Guidelines for the Conduct of Regulatory Analysis, Office of Management and Budget, Office of Information and Regulatory Affairs (Sept. 17, 2003), at 3-4, <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>; see also John Graham, Memorandum for the President’s Management Council Regarding OMB’s Circular No. A-4, New Guidelines for the Conduct of Regulatory Analysis (March 2, 2004), http://www.whitehouse.gov/omb/inforeg/memo_pmc_a4.pdf.

612. Ashford, *supra* note 34, at 359 (“The core substance of . . . President Reagan’s 1981 Executive Order 12291 . . . remains in effect under a 1993 executive order issued by President Clinton.”).

613. See John L. Moore, Cost-Benefit Analysis: Issues in Its Use in Regulation, CRS Report for Congress (June 28, 1995), <http://www.ncseonline.org/nle/crsreports/risk/rsk-4.cfm>; see also, Summary, <http://www.ncseonline.org/nle/crsreports/risk/rsk-4.cfm#SUMMARY>. 614. See, e.g., Seth Borenstein, *EPA Drops Value of an American Life*, Associated Press (July 10, 2008) http://news.aol.com/story/_a/epa-drops-value-of-an-american-life/20080710201309990001.

615. *Id.* at Regulatory Planning and Review in the Clinton Administration, <http://www.cnie.org/NLE/CRSreports/Risk/rsk-5b.cfm#Regulatory%20Planning%20and%20Review%20in%20the%20Clinton%20Administrati> on

616. *Id.* (emphasis added).

617. *Id.* (emphasis added).

618. *Id.* at Is It a Scientific Basis for Environmental Decisions? <http://www.cnie.org/NLE/CRSreports/Risk/rsk-5c.cfm#Is%20It%20a%20Scientific%20Basis%20for%20Environmental%20Decisions>.

619. See CRS Report Congress 94-961, *supra* note 608 at Executive Summary, <http://www.cnie.org/NLE/CRSreports/Risk/rsk-5.cfm#SUMMARY>.

620. *Id.*; see Borenstein, *supra* note 612.

621. See Larry Parker and John Blodgett, Global Climate Change: Three Policy Perspectives, CRS Report for Congress 98-738 (Aug. 31, 1998) (This divergence also spills over into the debate about climate change, which, no doubt, influences oceans policy), <http://www.ncseonline.org/NLE/CRSreports/Climate/clim-1.cfm>.

622. *Id.* at Technological Lens – Background, (“Viewed through the *technological lens*, an environmental problem is an ‘opportunity’ for ingenuity, for a technical ‘fix.’ This technologically driven philosophy focuses on research, development, and demonstration of technologies that ameliorate or eliminate the problem. Many uncertainties can be ignored if technology is available to render them irrelevant (a presumption underlying the ‘pollution prevention’ concept, for example). From this perspective, environmental policy entails the development and commercialization of new technologies; Government’s role can include basic research, technical support, financial subsidies, economic mechanisms, or the imposition of requirements or standards that stimulate technological development and that create markets for such technologies . . . The technological lens reflects a traditional American ‘can-do’ faith in technology, and in the country’s ability to find a ‘technology-fix’ to meet the needs of most problems The technological lens provides a view of the economy in which technology permits consumers to continue their preferred behaviors while concomitantly achieving environmental goals. It is not necessary for consumers to change their behavior to adjust to the “new reality” of an environmental problem”) (italics in original), http://www.ncseonline.org/NLE/CRSreports/Climate/clim-1a.cfm#_1_4.

623. *Id.* at Economic Lense – Background, (“Estimates of the benefits of a specific environmental action can be uncertain and can vary by an order of magnitude. Uncertainties about pollution taxes have focused attention on using economic incentives to increase polluters’ flexibility in achieving environmental standards based upon regulation . . . During the 1970s, four economic mechanisms were adopted to increase polluters’ flexibility in meeting the various requirements of the Clean Air Act. These mechanisms were offsets, bubbling, banking, and

netting. . . . Results from these tradeable permit systems are spotty . . . [w]hile this [*economic*] lens is sometimes regarded as the private market's alternative to a regulatory command-and-control program, the interactions are more complex. *The so-called 'market for pollution rights' would not exist if not for a governmental role in altering what the market would do in lieu of governmental action . . . [t]hose viewing environmental policy through the economic lens generally presume that governmental interference, whether through subsidies or regulation, should be minimal. In reality, the distribution of impacts through the market often leads to calls for political interventions that compromise efficiency and the 'polluter pays' principle. . . . Policymakers using the economic lens see consumers and producers adjusting their behaviors to the 'new reality' of an environmental problem by responding to the price signals that take into account a particular environmental goal.*"(emphasis in original), http://www.ncseonline.org/NLE/CRSreports/Climate/clim-1b.cfm#_1_8.

624. *Id.* at Ecological Approach – Background, (“The ecological lens magnifies elements that are psychological, philosophical, and theological. A policy decision to address a pollution problem generally involves a sophisticated and sometimes lengthy educational process of which economics and technological availability are only components. In this view, environmental education, Smokey the Bear, and environmental interest groups from Audubon to Greenpeace to Zero Population Growth represent efforts to inculcate the sense of moral obligation toward the environment -- to acculturate people to the importance of the environment as essential to long-term human health and welfare. . . . *The ecological approach understands the problem of environmental policy implementation to be the moral education of individuals and institutions to the dimensions of the ecological crisis, changing the climate in which decisions are made, and providing opportunities for individuals and institutions to make decisions based on ecological concerns, rather than having those choices limited to alternatives dictated solely by economic criteria.*”) (emphasis in original), <http://www.ncseonline.org/NLE/CRSreports/Climate/clim-1c.cfm#Ecological%20Approach>.

625. *Id.* at Introduction, <http://www.ncseonline.org/NLE/CRSreports/Climate/clim-1.cfm#Introduction>.

626. *Id.* (emphasis added).

627. *See* discussion, *supra*.

628. *See* Peter J. Smith, *Former Vice President Al Gore Makes Star Debut in Toronto as Global Warming Prophet*, LifeSiteNews.com (Feb. 22, 2007) (“Al Gore's environmental message is a development of ideas first set forth in his 1992 book: *Earth in the Balance: Ecology and the Human Spirit*, where he wrote: ‘*We must make the rescue of the environment the central organizing principle for civilization*’ *Gore calls for a Global Marshall Plan or Strategic Environmental Initiative, with the first goal as stabilising what he believes is an overpopulated world, with the end result of massively increasing the powers of government to engineer a wrenching change of society’ in order to save the world's ecology*”) (emphasis added), <http://www.lifesite.net/ldn/2007/feb/07022204.html>.

629. CRS Report for Congress 98-738, *supra* note 619 at Ecological Lens – Background, (“*The development of environmental protection as a national policy concern* reflects three factors: (1) the development of an environmental consciousness among the electorate, (2) a change in the climate of decision-making among individuals, businesses, and government at all levels, (3) the availability of opportunities to make concrete decisions based on environmental grounds . . . The underlying basis of an environmental consciousness is an understanding of the *interconnectedness of the planet's biological processes*, and a recognition that changes caused by

humans may have ecological effects beyond those intended or foreseen. From this perspective, it is in *humanity's self-interest* [as well as in the interests of non-human life] to protect the basic biological processes that are the foundation of all life; humans can protect those processes by being conscious of humanity's environmental impact and by avoiding or mitigating that impact to the greatest extent necessary (accepting that some impact is unavoidable, and that ecological science has a crucial role in discovering the effects of human activities) *The challenge of the ecological approach was given global scope by the 'Brundtland Report' of the World Commission on Environment and Development. Articulating the goal of 'sustainable development,'* its foreword describes the challenge this way: If we do not succeed in putting our message of urgency through to today's parents and decision makers, we risk undermining our children's fundamental right to a healthy, life-enhancing environment. *Unless we are able to translate our words into a language that can reach the minds and hearts of people young and old, we shall not be able to undertake the extensive social changes needed to correct the course of development . . .* We call for a common endeavor and for new norms of behavior at all levels and in the interests of all. The changes in attitudes, in social values, and in aspirations that the report urges will depend on *vast campaigns of education, debate, and public participation* (emphasis added).

630. See Susan E. Dudley, 30 Years of Regulatory Oversight: Lessons Learned, Future Challenges, Presented at The Searle Center Northwestern University School of Law (Oct. 11, 2007), http://www.whitehouse.gov/omb/legislative/testimony/oira/dudley_101107.html.

631. See Executive Order: Further Amendment to Executive Order 12866 on Regulatory Planning and Review, Press Release, The White House (Jan. 18, 2007), <http://www.whitehouse.gov/news/releases/2007/01/20070118.html>; 72 FEDERAL REGISTER 2763 (Jan 23, 2007), <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-293.pdf>.

632. See Memorandum for Heads of Executive Depts. and Agencies Reg., Executive Office of the President, Office of Management and Budget (Apr 25, 2007), <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-13.pdf>.

633. See Statement of Regulatory Philosophy and Principles: Executive Order 12866, *supra* note 610 (emphasis added).

634. See Susan E. Dudley, *supra* note 630.

635. *Id.* (emphasis added).

636. ERIC SAMUELSON, A BRIEF CHRONOLOGY OF COLLECTIVISM (1997), citing MORDECAI GROSSMAN, THE PHILOSOPHY OF HELVETIUS 16 (1926) (The philosophy of eighteenth century Frenchman, Claude Adrien Helvetius had left an indelible impression on the European social behaviorists of his time, and apparently, now, the politicians of today. Helvetian-favored communalism and utilitarian logic are most definitely the driving force behind the current indoctrination climate under which European cultural preferences are being converted into an almost universal and unquestioning acceptance of national, regional, and potentially, supranational governmental mandates to employ the hazard-based precautionary principle in every day economic life. Helvetius —advocated legislation . . . as the means by which happiness for the greatest number would be achieved.)), <http://www.mega.nu:8080/ampp/samuels.html#preserve%20the%20rights>.

637. See Curtis W. Copeland, Changes to the OMB Regulatory Review Process by Executive Order 13422, CRS Report for Congress (Feb. 5, 2007) at CRS-4, CRS-5, <http://www.fas.org/sgp/crs/misc/RL33862.pdf>.

638. See Richard L. Revesz & Michael A. Livermore, *Fixing Regulatory Review: Recommendations for the Next Administration*, Inst. for Pol’y Integrity, Report No. 2 (Dec. 2008), <http://www.policyintegrity.org/documents/FixingRegulatoryReview.pdf>.

639. *Id.* at Markup of Executive Order 12866 at 18-19 (—Regulatory Planning and Review Principles. Poorly-designed regulation, or the failure to regulate significant risks, imposes unacceptable and unreasonable costs on society Section 1. Statement of Regulatory Philosophy and Principles Federal agencies should promulgate regulations that are required by law, that are necessary to interpret the law, or that advance the public good by: correcting failures of private markets)).

640. *Id.* at 19 (“Net benefits include both unquantified and quantified economic, employment, environmental, public health and safety, and overall welfare effects. When choosing between regulatory alternatives, agencies should take due account of distributive impacts, including impacts on future generations and equity. The American public should be given ample opportunity to comment on regulatory alternatives, and the regulatory process should be conducted expediently, without unnecessary delay, and with sufficient coordination between federal agencies and with State, local, and tribal governments”).

641. *Id.* at Executive Summary, 1-2 (emphasis added).

642. *Id.* at 5 (“Retaking Rationality argues that cost-benefit analysis is a conceptually neutral tool to achieve a more rational system of regulation, but that this tool has often been used in the service of an ideological driven antiregulatory agenda. Due to this imbalance, *groups that favor an active regulatory role for government – such as environmental groups. . . have generally not participated in the debate over the methodology and uses of cost-benefit analysis.* As a result, both substantive and institutional biases with antiregulatory effects have emerged in cost-benefit analysis. Retaking Rationality identifies eight of these biases and proposes that *by embarking on a campaign to improve cost-benefit analysis, rather than end its use, pro-regulatory groups can have more success in pursuing their agenda* and promoting a more just and rational regulatory system”)(emphasis added).