CONSULTANTS, THE ENVIRONMENT, AND THE LAW

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Conventional wisdom assumes that private-sector businesses will oppose, undermine, or distort government regulation. That assumption also underpins many areas of theoretical inquiry; theorists commonly assume that effective public-law regimes must be protected from the self-interested machinations of businesses, or that such protection is such a lost cause that most public regulation is doomed to fail. This Article investigates a different set of relationships between businesses and regulation. It does so by using the environmental consulting industry, which helps businesses and governments comply with environmental regulations, as a case study. An empirical inquiry into two subfields of the industry reveals that for-profit, private-sector actors can play distinctive and active roles in public-law regimes, and that these distinctive roles are motivated by a combination of economic incentives and cultural orientation. These findings have direct implications for several areas of inquiry, including studies of public choice theory, privatization, social movements, and the historic evolution of environmental regulation. Most importantly, they reveal how private actors can bolster public law.

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In addition to this Article, I have drawn upon this research in an associated article published in a peer-reviewed, nonlegal journal. *See* Dave Owen, *Private Facilitators of Public Regulation: A Study of the Environmental Consulting Industry*, REGULATION & GOVERNANCE (2019), https://doi.org/10.1111/rego.12284.

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INTRODUCTION

Every day, thousands of businesses must navigate the complex demands of governmental regulation, and thousands of regulators must work with businesses. Conventional wisdom predicts that these interactions usually will be adversarial and often will be completely dysfunctional. Stories of nefarious, law-evading corporations and of "job-killing regulations" are standard fare in both politics and popular culture.[1]

That conventional wisdom also permeates theories of regulation. Scholars and policymakers are accustomed to understanding business regulation through conceptual frameworks with conflict at their cores.[2] Activism, in a classic framing,

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1. *E.g.*, ERIN BROKOVICH (Universal Pictures 2000); *President Trump Eliminates Job-Killing Regulations*, WHITE HOUSE (Mar. 30, 2017), https://www.whitehouse.gov/articles/president-trump-eliminates-job-killing-regulations/.

2. *See, e.g.*, JUDITH A. LAYZER, OPEN FOR BUSINESS: CONSERVATIVES' OPPOSITION TO ENVIRONMENTAL REGULATION 333 (2012) (describing these adversarial relationships).

drives government regulation, and regulated businesses oppose or avoid that regulation when they can and comply, often grudgingly, when opposition and avoidance fail.[3] Some studies have added nuance to this model, noting, for example, that complying with regulations can help businesses with their branding and can save money.[4] Public choice theorists have identified other symbiotic but less salutary relationships between regulation and business; they emphasize the tendency of businesses to seek regulatory constraints upon their competitors.[5] And private-governance scholars have noted that some businesses have become sources as well as objects of regulation.[6] But the predominant conceptual model, which frames multiple areas of theoretical inquiry, still treats the business sector as the nemesis of government regulation.

This Article explores a different set of relationships between businesses and regulation. It focuses on the multi-billion dollar environmental consulting industry, which serves public and private entities seeking to comply with environmental laws.[7] For every major environmental regulatory program, there is a corresponding set of engineers, scientists, planners, and other technically-trained professionals who provide compliance services, often while employed by consulting firms that contract with regulated entities.[8] To provide a few examples, these consultants develop corporate environmental management strategies, investigate land for potential contamination problems, and draft environmental impact studies for proposed government projects. Regulation is their business; their ability to secure fees depends upon the existence of business and governmental entities with money to spend and regulatory challenges to navigate. Consultants pervade the environmental field, and interacting with them is a core and recurring task for regulators and regulated firms—as well as for attorneys.[9]

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3. *See* Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 60 (1992) (describing successful activism and industry opposition); Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 130–31 (2013) (describing this traditional understanding).

4. *See* Michael E. Porter, *America's Green Strategy*, 264 SCI. AM. 168, 168 (1991) (arguing that regulation will reduce costs by spurring increased efficiency).

5. *See* Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1515–16 (1999) (warning of these dynamics and providing examples); Jonathan R. Macey, *Transaction Costs and Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 508 (1988) ("[E]nvironmental protection statutes . . . often contain features consistent only with the protection of special interests.").

6. *E.g.*, Vandenbergh, *supra* note 3, at 141; Sarah E. Light & Eric W. Orts, *Parallels in Public and Private Environmental Governance*, 5 MICH. J. ENVTL. & ADMIN. L. 1, 25–26 (2015).

7. For a general overview of the industry, see generally MARISA LIFSCHUTZ, IBISWORLD INDUSTRY REPORT 54162: ENVIRONMENTAL CONSULTING IN THE US (2018).

8. *See infra* notes 40–49 and accompanying text.

9. *See Environmental Consultants*, THE LAWYER'S BRIEF, Nov. 14, 2007, at 1 ("The environmental laws and the potential liabilities under them have made the use of environmental consultants a prerequisite to almost every environmentally related action.").

This work makes environmental consultants integral to governance and law. While consulting firms are private, they often engage in the sort of deliberative, legally-inflected, and policy-oriented decision-making more traditionally associated with governments.[10] They also participate in lawmaking. Environmental consultants sometimes work directly with legislatures, but more often they work with administrative agencies to craft statutes, regulations, and guidance documents.[11] They also define standards of practice within regulated fields, sometimes in ways that gradually harden into legal obligations.[12] In short, private consultants play important roles not just in complying with, but also in shaping, public law. They therefore hold potentially important lessons for the many fields of academic inquiry that try to understand relationships between businesses and public regulation.

To seek those lessons, this Article examines two subfields of environmental consulting. One is contaminated-site management in Massachusetts. Since 1992, Massachusetts law has delegated authority over waste-site cleanups to the private sector, with state regulators providing regulations, guidance, and selective audits of private cleanups.[13] Participants unabashedly refer to this system as "the privatized model,"[14] and, by design, it gives consultants a central role.[15] The other is environmental impact analysis in California.[16] The California Environmental Quality Act ("CEQA")[17] requires state and local government entities to assess, and disclose the environmental consequences of, projects they will approve or carry out. These entities also must invite and respond to public comments on those impacts. The law thus reflects classic public law values; its basic goal is to facilitate informed, transparent, and democratic public decision-making.[18] But the actual work of CEQA compliance is partially privatized. By law, public entities must make final decisions on projects, but private consultants typically take the lead on all the research, writing, and deliberation that leads up to that final decision.[19] For each industry, I analyzed correspondence and advocacy materials produced by individual consultants and by consulting industry organizations. I also interviewed consultants,

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10. *See infra* notes 62–65 and accompanying text.

11. *See infra* Part III.

12. Cal. Attorney Interview 3 (Oct. 9, 2017) (explaining how consultants' methodologies evolved into accepted and then legally-demanded practices). For a full list of interviews, see Appendix I.

13. *See* Miriam Seifter, Comment, *Rent-a-Regulator: Design and Innovation in Privatized Governmental Decisionmaking*, 33 ECOLOGY L.Q. 1091, 1103–04 (2006) (describing and critiquing Massachusetts' program).

14. *E.g.*, *Guide: The Waste Site Cleanup Program*, MASS.GOV, https://www.mass.gov/guides/the-waste-site-cleanup-program (last visited May 2, 2018).

15. *See infra* notes 155–165 and accompanying text.

16. I have worked in both fields. From 1996 to 1999, I worked for an environmental consulting firm in Massachusetts. From 2003 to 2007, I practiced environmental law in California.

17. CAL. PUB. RES. CODE §§ 21000–21178.

18. *See* Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal., 764 P.2d 278, 283 (Cal. 1988) ("The [environmental impact report] process protects not only the environment but also informed self-government.").

19. *See infra* notes 165–67 and accompanying text.

environmental attorneys, representatives of client businesses and government agencies, environmental group staff members, and regulators.

I found that in both realms, consultants relate to regulators, and to public-law regimes more generally, in ways that often diverge from the adversarial dynamics traditionally associated with private businesses. Two key roles emerged (in addition to the primary task of delivering services to paying clients). In one role, consultants strive to operate as trusted intermediaries between regulators and regulated entities. In the other role, consultants act as practical environmentalists who advocate for policies that are manageable for regulated businesses but that also advance the underlying goals of public law. Consultants assume these roles partly out of economic self-interest, but they also arise from a cultural affinity for environmental protection. I do not claim that these findings are representative of the entire environmental consulting industry; given the size of the industry, its sensitivity to contextual factors, and its continuing evolution, it would be surprising if such a claim were true. For similar reasons, the results do not necessarily generalize to other private entities with incentives to promote public law.[20] But these findings do add new possibilities to older debates.

Most importantly, the study illustrates how private, professionalized, for-profit actors can bolster a public-law regime. Most conventional theories would not predict that outcome. Public choice theorists generally view interactions between private businesses and public regulation with deep suspicion; they assume that in those interactions, businesses will turn regulation to their own private ends.[21] Many privatization theorists express similar fears; while, unlike public choice theorists, they believe in the possibility of a public-spirited regulatory realm, they worry that transferring tasks into private hands will disconnect regulation from what ought to be its animating public values.[22] For many social-movement theorists, the key threat is not so much privatization as it is institutionalization; they worry that as a movement becomes more professionalized, it loses its vitality and force.[23] Under any of these theories, the increasing importance of a professionalized industry that sells compliance for a profit, and whose members unabashedly seek to serve their paying clients, ought to be deeply concerning. Yet I found compelling evidence that members of the industry are striving to improve the efficacy of environmental regulation and to promote the values that inspire environmental law.

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20. Nor do they necessarily generalize to other types of consultants. Compliance consulting is a huge and growing business sector cutting across many industries, and there likely are parallel dynamics in some other fields. But the work of political consultants, labor-relations consultants, or corporate management consultants, to provide three examples, is different from the environmental consulting work described here.

21. *See infra* notes 77–91 and accompanying text.

22. *See* Jody Freeman & Martha Minow, *Reframing Outsourcing Debates*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1, 4–6 (Martha Minow & Jody Freeman eds., 2009) [hereinafter GOVERNMENT BY CONTRACT] (explaining concerns).

23. *See infra* notes 120–33 and accompanying text.

More generally, an inquiry into the environmental consulting industry opens up new hypotheses for understanding how environmental regulation, and regulation more generally, can succeed. This is no small issue, for one of the most puzzling challenges of environmental law is figuring out why it often works.[24] The deck seems stacked against success. Environmental laws must emerge and then be implemented in the face of focused, highly motivated, and well-funded opposition.[25] The informational demands of environmental regulation also can be enormous,[26] and regulators must contend with massive uncertainties.[27] Those regulators typically work for government agencies, which politicians find easy to demonize and hard to fund.[28] While regulatory efforts are often bolstered by nongovernmental activism, that activism is often more than counterbalanced by aggressive industry lobbying and litigation.[29] Given this array of challenges—many of which are not unique to the environmental field—it is somewhat surprising that regulation ever succeeds. And while sometimes it does not (anemic responses to climate change are a particularly obvious example), there are many important measures by which both corporate environmental performance and actual environmental quality have improved dramatically since the advent of modern environmental law alongside massive economic growth.[30] This Article does not claim that the environmental consulting industry alone explains that improvement, nor that environmental consultants always work to bolster public-law regimes. But it does argue that if we wish to understand how government regulation can actually thrive, looking solely at government, regulated businesses, and nonprofit advocacy organizations will leave

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24. *See* Doris A. Fuchs & Daniel A. Mazmanian, *The Greening of Industry: Needs of the Field*, 7 BUS. STRATEGY & ENVT. 193, 193 (1998) (exploring reasons for an inadequate understanding of the drivers of improved industry performance).

25. *See* Rena L. Steinzor, *Toward Better Bubbles and Future Lives: A Progressive Response to the Conservative Agenda for Reforming Environmental Law*, 32 ENVTL. L. REP. 11421, 11422–23 (2002) (describing the gauntlets of opposition that environmental rules must navigate before becoming law).

26. *See* Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 DUKE L.J. 1619, 1623 (2004) (explaining environmental law's need for information, and how often that need goes unfulfilled).

27. John S. Applegate & Robert L. Fischman, Foreword, *Missing Information: The Scientific Data Gap in Conservation and Chemical Regulation*, 83 IND. L.J. 399, 399–400 (2008).

28. *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 235 (1989) ("No politician ever lost votes by denouncing the bureaucracy.").

29. *See* Melissa Wasserman, *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*, 93 TEXAS L. REV. 625, 666–67, 666 n.129 (2015) (describing and compiling multiple sources documenting the relative infrequency of environmental groups' claims).

30. *See, e.g.*, NEIL GUNNINGHAM ET AL., SHADES OF GREEN: BUSINESS, REGULATION, AND THE ENVIRONMENT 1 (2003) (noting that "almost all business corporations in economically advanced democracies are significantly 'greener' than their predecessors were a mere quarter century ago."); U.S. EPA, OFFICE OF AIR AND RADIATION, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020 (2011) (finding massive benefits).

us with an incomplete picture. Understanding the roles of private, for-profit actors with interests in the success of regulatory regimes, and with values aligned with those regimes, will also be a crucial part of the puzzle.

This Article's analysis proceeds as follows. Part I provides a brief overview of the environmental consulting industry's evolution and current reach, and then explains why it offers an intriguing case study for more general questions about public choice theory, privatization, social movements, and the evolution of environmental law. Part II briefly describes my research methodology. Part III summarizes results, and Part IV explores their significance by returning to the theoretical debates and explaining how the environmental consulting industry adds to our understanding of business and public law.

I. THE ENVIRONMENTAL CONSULTING INDUSTRY

Every day, many businesses navigate the complexities of environmental law without retaining an environmental lawyer. Public-sector entities often manage their environmental compliance needs in the same way. Much of these entities' compliance work, and in some circumstances nearly all of it, is done by private consultants working for for-profit companies.[31] This Section provides a brief overview of those consultants' industry. It then explains how that industry's emergence implicates important legal-academic debates.

A. Emergence and Growth of the Industry

In the 1970s, in one of the most remarkable legislative outbursts in the United States' history, Congress and state legislatures created much of the modern field of environmental law. Within a few years, statutes regulating air quality,[32] water quality,[33] endangered species protection,[34] hazardous waste management,[35] and contaminated site cleanup[36] transformed the American legal system.[37] Those statutes, and the regulations that soon followed, changed the work of American lawyers. In 1960, the phrase "environmental lawyer" would have attracted quizzical looks.[38] By the mid-1970s, a new legal discipline had emerged. Its practitioners

31. *See* LIFSCHUTZ, *supra* note 7, at 5–7.

32. Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676–1713 (codified at 42 U.S.C. §§ 7401–7671(q)).

33. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251–1387).

34. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531–1544).

35. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2975 (codified at 42 U.S.C. §§ 6901–6987).

36. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified at 46 U.S.C. §§ 9601–9657).

37. *See* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 67–97 (2004).

38. *See id.* at 47 (describing the 1969 event at which "[t]he term environmental law appears to have been formally coined.").

specialized in navigating or enforcing the complex requirements of the new regulatory systems.[39]

That same legislative outburst redefined other professional fields, and one major consequence was the emergence of the environmental consulting industry. The need for that industry flowed directly from the mandates of the new statutes.[40] Achieving clean air required engineers who understood how pollutants moved through the atmosphere and how pollution control systems worked.[41] Protecting biodiversity required biologists who understood animals and plants.[42] Managing property transfers and contaminated waste site cleanups created the need for engineers and scientists with expertise in the ways pollutants move through soil and groundwater.[43] Planning land uses and transportation infrastructure required another cadre of experts, including, as practices evolved, modelers capable of using complex computer programs to understand and simulate urban systems.[44] The National Environmental Policy Act ("NEPA") and its state-law counterparts, all of which require detailed analyses of the consequences of government decisions, demanded experts who could integrate all of these areas of expertise, and sometimes more, into often-encyclopedic written studies, and who could interact with affected human communities.[45] Those experts in turn needed support staff who could collect samples, record field observations, and help write reports.[46] Many companies and government agencies hired in-house staff to handle some of these responsibilities.[47] But a huge share of the work went, and continues to go, to outside consulting firms

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39. *See* Bernard Koteen, *A Trail Guide to Careers in Environmental Law*, HARV. L. SCH. 4–6 (2013), https://hls.harvard.edu/content/uploads/2008/07/full-working-draft.pdf.

40. *See Environmental Consultants*, *supra* note 9, at 1.

41. James D. Fine & Dave Owen, *Technocracy and Democracy: Conflicts Between Models and Participation in Environmental Law and Planning*, 56 HASTINGS L.J. 901, 909–10 (2005) (describing the Clean Air Act's emphasis on science-based decision-making).

42. *See* Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L.Q. 1029, 1041–56 (1997).

43. *See* Patrick Del Duca, *Management of Environmental Liabilities in Real Estate Transactions*, 41 ENVTL. L. REP. 10419, 10424–47 (2011).

44. *See* Dave Owen, *Mapping, Modeling, and the Fragmentation of Environmental Law*, 2013 UTAH L. REV. 219, 260–64 (2013) (describing urban simulation modeling).

45. *See, e.g.*, Memorandum from Peter N. Brush, Acting Assistant Sec'y, Env't, Safety, and Health, U.S. Dep't of Energy on Designating and Supporting NEPA Document Managers to Secretarial Officers and Heads of Field Orgs., U.S. Dep't of Energy (Nov. 24, 1998), https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-DOE-nepa_doc_managers.pdf (describing job responsibilities).

46. As an entry-level consultant, I spent most of my time doing fieldwork and writing reports.

47. *See Our Mission*, NAEM, https://www.naem.org/our-community/mission (last visited July 28, 2019) (explaining the role of in-house environmental health and safety managers).

specializing in environmental compliance.[48] Consequently, for many college and graduate students focusing on environmental science or engineering, environmental consulting now offers both a viable entry-level job and a potential career.[49]

Unlike environmental legal practice, which was an unnamed and inchoate discipline prior to the 1970s, the environmental consulting field was not entirely new. For decades, engineers had been helping state and local governments with wastewater treatment, and they had also pioneered initial efforts at other forms of pollution control.[50] Similarly, wildlife management was an old discipline,[51] and the idea of land use planning had been around for decades.[52] But the emergence of new laws transformed these fields. Name changes reflected a broader understanding of the field; for example, over the course of the 1960s "sanitary engineering" became "environmental engineering."[53] And the emerging ecological focus of the laws also brought a wave of scientists into fields that previously had been dominated by engineers.[54] Most importantly, the scale changed dramatically. The environmental consulting field is now a multi-billion dollar, international industry.[55] In an interview, one experienced environmental lawyer succinctly captured its reach and its integration with legal practice: "I can't even remember," she said, "when a consultant *wasn't* involved in a project that I'm working on."[56]

Beyond the scale and reach of the field, three other features of these consultants' work are worth noting. First, much of that work resembles (and sometimes competes with) legal practice: it involves reviewing governing statutes, regulations, guidance, and court cases, and applying them to the facts at hand.[57] For

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48. *See* LIFSCHUTZ, *supra* note 7, at 5–7; ENVTL. ASSISTANCE DIV., MICH. DEP'T OF ENVTL. QUALITY, WORKING WITH AN ENVIRONMENTAL CONSULTANT 1–3 (2001) (explaining what consultants do and when they are needed).

49. *See Environmental Consulting Career Advice*, PM ENVTL., https://www.pmenv.com/Environmental-Consulting-Career-Advice (last visited May 31, 2018).

50. *See* William C. Anderson, *A History of Environmental Engineering in the United States*, *in* ENVTL. AND WATER RES. HISTORY SESS. OF THE AM. SOC'Y OF CIVIL ENG'G CIVIL ENG'G CONF. AND EXPOSITION (2002), https://ascelibrary.org/doi/abs/10.1061/40650%282003%291.

51. *See* Eric Biber, *Which Science? Whose Science? How Scientific Disciplines Can Shape Environmental Law*, 79 U. CHI. L. REV. 471, 495 (2012) (dating wildlife management science to the 1930s).

52. *See* Edward J. Kaiser & David R. Godschalk, *Twentieth Century Land Use Planning: A Stalwart Family Tree*, 61 J. AM. PLAN. ASSOC. 365, 368 (1995).

53. Scoping Interview 7 (Sept. 1, 2017).

54. Experienced consultants also credited the shift toward environmental science with bringing women into environmental consulting. In the 1970s, they told me engineering was an almost exclusively male field. Scoping Interview 6 (July 21, 2017); Scoping Interview 7, *supra* note 53.

55. LIFSCHUTZ, *supra* note 7, at 5.

56. Cal. Attorney Interview 3, *supra* note 12.

57. Environmental lawyers often note the gradual shifting of work from lawyers to consultants. *See* Dave Owen, *Field Notes*, ENVTL. L. PROF. BLOG (Nov. 22, 2013), http://lawprofessors.typepad.com/environmental_law/2013/11/field-notes.html. The growing

example, a wetlands consultant would likely be familiar with the United States Supreme Court's decision in *Rapanos v. United States*,[58] and would offer judgments, based partly on legal texts and experience working with local regulators, about whether a "significant nexus" exists between on-site wetlands and navigable-in-fact waterways.[59] Similarly, consultants preparing environmental impact studies must be familiar with state and federal statutes, regulations, and case law governing environmental review.[60] For large projects, they likely would do their quasi-legal work on teams with environmental lawyers, but many smaller-scale projects now proceed without environmental lawyers, and sometimes without any kind of lawyer, and the client relies instead on the consultants' legal expertise.[61]

Second, much of this consulting work involves types of decision-making that one might initially perceive as classically governmental. In debates over public–private boundaries, scholars often argue that decisions involving open-ended policy choices with broad public consequences belong with government.[62] Environmental law's application often requires such policy-laden judgment calls; though commentators lament the numbing specificity of environmental law, few environmental regulatory programs function like recipe books.[63] Instead, for example, someone must decide how many samples are sufficient to assess a large site's soil and groundwater contamination—a decision that implicates basic value questions about balancing health risk against compliance cost[64]—or which alternatives an environmental impact study should analyze.[65] Not all of those decisions can be made under the close supervision of government regulators, and instead many of them fall to the consultants.

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importance of non-lawyers to legal work is not unique to this particular field. *See* John Dzienkowski, *The Future of BigLaw: Alternative Legal Service Providers to Corporate Clients*, 82 FORDHAM L. REV. 2995, 3000–01 (2014).

58. 547 U.S. 715 (2006) (determining the scope of federal regulatory jurisdiction under the Clean Water Act).

59. *See* Donna Downing et al., *Technical and Scientific Challenges in Implementing Rapanos' "Water of the United States,"* 22 NAT. RESOURCES & ENV'T. 42, 42 (2007); Leah Stetson, *How to Hire the Right Wetlands Consultant*, WETLAND NEWS (Ass'n of State Wetland Managers, Inc.) June–July 2007, https://www.aswm.org/pdf_lib/consultant0607.pdf.

60. *See infra* notes 179–82 and accompanying text.

61. *See infra* notes 145, 180–82 and accompanying text.

62. *See* Shelley Welton, *Public Energy*, 92 N.Y.U. L. REV. 267, 282–83 (2017) (summarizing this literature).

63. *See* U.S. Steel Corp. v. U.S. Envtl. Prot. Agency, 444 U.S. 1035, 1035 (1980) (Rehnquist, J., dissenting from denial of writ of certiorari) (noting "[t]he fact that the requirements of the Clea[n] Air Act Amendments virtually swim before one's eyes"); Jedediah Purdy, *Coming into the Anthropocene*, 129 HARV. L. REV. 1619, 1649 (2016) (describing environmental law as "boring and alienating").

64. *See* U.S. ENVTL. PROT. AGENCY, GUIDANCE ON CHOOSING A SAMPLING DESIGN FOR ENVIRONMENTAL DATA COLLECTION FOR USE IN DEVELOPING A QUALITY ASSURANCE PROJECT PLAN 27 (2002) (describing many judgment-based choices).

65. *See* Nat. Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 834 (1972) (holding that a "rule of reason" governs alternative selection).

Third, consultants have a distinctive relationship with regulation. When they work for industry, and sometimes when they work for government,[66] consultants often represent clients that view regulation as a source of inconvenience and expense.[67] A consultant often needs to show empathy for those frustrations.[68] At the same time, if regulatory requirements did not exist or were easy to understand and fulfill, environmental consultants would not be hired.[69] Consultants also understand that even if discovering environmental compliance problems will frustrate clients, those discoveries can lead to additional consulting work.[70] Of course, many industries benefit from government regulation, but usually those benefits arise from constraints upon competitors[71] or because regulation ultimately leads to safer or more efficient practices.[72] An environmental consultant's relationship with regulation is typically more direct: "Regulation—particularly complex regulation—is the lifeblood of environmental consulting," as one experienced consultant explained, and most participants in the field are aware of this fact.[73]

B. Theoretical Intersections

The environmental field is heavily studied, and one might think that professional actors that are so important to that field would receive sustained academic attention. But academic inquiry into environmental consulting has been exceedingly limited.[74] In practitioner-oriented legal publications, coverage is more extensive, but that coverage generally focuses on issues like appropriate due diligence when hiring a consultant or ways to structure consulting contracts to

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66. When they manage land or infrastructure projects, government entities are often the regulated rather than the regulators. Government officials who operate in these capacities often share private industries' frustrations with environmental regulation.

67. I make this assertion based on my own experience working with clients.

68. I make this assertion based on my own experience working with clients.

69. *See* LIFSCHUTZ, *supra* note 7, at 7 (noting that regulation drives the environmental consulting industry).

70. When I was a consultant, we sometimes joked that the main difference between an audit report and a proposal was that we were paid to write the audit report.

71. *See* Biber, *infra* note 92, at 411 (noting that companies that compete with fossil fuels have interests in regulation of greenhouse gas emissions).

72. *See* Porter, *supra* note 4, at 168. For a more recent review, see Stefan Ambec et al., *The Porter Hypothesis at 20: Can Environmental Regulation Enhance Innovation and Competitiveness?* 3 (Resources for the Future Discussion Paper, RFF DP 11-01, 2011), http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-11-01.pdf.

73. Scoping Interview 2 (Apr. 27, 2017); Mass. Consultant Interview 8 (Feb 1, 2018) ("[W]ithout a doubt, regulations do create work for us"); LIFSCHUTZ, *supra* note 7, at 9 ("Introduction of stricter environmental regulation will be the primary driver of industry growth.").

74. *See* Bernard Sinclair-Desgagné, *The Environmental Goods and Services Industry*, 2 INT'L REV. ENVTL. & RESOURCE ECON. 69, 69 (2008) (noting the rarity of academic coverage of the environmental goods and services industry).

minimize the discoverability of the consulting firm's reports.[75] Absent from the literature is any effort to grapple with deeper questions about what the emergence of the consulting field actually means to environmental law, or to regulation more generally.

Yet that emergence has implications for several recurring areas of theoretical interest.[76] First, the environmental consulting industry complicates public-choice theorists' understanding of the relationships between private interest groups and public regulation. Second, environmental consulting has direct relevance to debates about the privatization, or "contracting-out," of governance, which has become a central concern cutting across many policy areas. Third, the environmental consulting industry holds potential lessons (though here the conclusions are more tentative) for efforts to understand how the environmental movement, and social movements more generally, can mature into sustained social change. All of these debates relate to more sweeping questions about how functional regulatory governance can actually occur. The discussion below summarizes each debate in turn.

1. Public Choice

Public-choice theory, which first emerged from the work of economists in the 1960s,[77] begins with the premise that legislators and bureaucrats are not altruists who idealistically seek to right social wrongs, but instead rational actors seeking to advance their own interest in accumulating and retaining power.[78] They do this by strategically responding to the needs of other powerful interests.[79] And while conventional democratic theory might have predicted that the most powerful interest would be a majority of voters, public-choice theorists turned this assumption on its head. Instead, they argued that, smaller, cohesive groups with focused interests were likely to be the most powerful political players, for those groups would be much more motivated and much better at coordinating their actions than a large, diffuse, and often only-slightly-interested public.[80] These basic insights have since spawned a huge volume of research.[81]

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75. *See, e.g.*, *Environmental Consultants*, *supra* note 9; Joel Schneider, *The Expanding Liability of Environmental Consultants to Third Parties*, 13 VILL. ENVTL. L.J. 235, 260–61 (2002).

76. An additional area of inquiry (which I address in a companion study) is the emerging literature on regulatory intermediaries. *See* Dave Owen, *Private Facilitators of Public Regulation: A Study of the Environmental Consulting Industry*, REGULATION & GOVERNANCE (2019), https://doi.org/10.1111/rego.12284; Kenneth W. Abbott et al., *Theorizing Regulatory Intermediaries: The RIT Model*, 670 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 14, 15 (2017).

77. For a summary of these origins, see Macey, *supra* note 5, at 474–75.

78. *Id.* at 476–77.

79. *See* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 371–72 (1983).

80. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

81. *See generally* A RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

These insights also have important implications for relationships between businesses and environmental regulation.[82] Businesses often form small, cohesive, and well-endowed groups with high levels of interest in regulatory decision-making, and therefore they are exactly the kinds of entities that public-choice theorists would expect to enjoy outsized influence in regulatory policymaking.[83] Consequently, public-choice theory predicts that businesses will effectively thwart public regulation or, even more problematically, that they will distort it to their own ends by using it to squelch less powerful competitors.[84] Public-choice theory, in other words, predicts that businesses will disconnect government regulation from the public-spirited values that otherwise might animate it.[85]

These insights have been enormously influential in the fields of environmental law and regulatory theory generally, but theorists have drawn very different lessons from similar premises.[86] For some influential, early environmental law theorists—most prominently, Joseph Sax—ideas reminiscent of (though not explicitly tied to) public-choice theory explained why agencies could never be fully trusted to serve the public interest, and why measures like citizen suits were necessary counterweights to industry influence.[87] Most proponents of such advocacy-based environmentalism were emphatically proregulation; they just thought that elements of public-choice theory helped explain the need to reinforce government regulation with additional public and judicial oversight.[88] For others, including many mainstream public-choice theorists, the prevalence of special-interest influence instead supported a more libertarian critique of the very idea of government regulation.[89] If regulation is inevitably hijacked by powerful special

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82. As Daniel Farber quipped, the most obvious implication for environmental regulation is straightforward: "There should not be any." Yet, obviously, there is. Farber, *supra* note 3, at 60.

83. *See* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 565–66 (2001).

84. *See, e.g.*, BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL / DIRTY AIR 59 (1981) (explaining how the coal industry in the eastern United States used the 1977 Clean Air Act Amendments to squelch competition from western coal producers).

85. *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 562 (2000) (describing the mainstream public choice view that "[p]rivate groups manipulate, pressure, bargain, and bribe to benefit themselves at the expense of others.").

86. Many theorists have also argued that public-trust dynamics can only partially explain government behavior, and that public-spirited dynamics also occur. *See, e.g.*, Christopher H. Schroeder, *Public Choice and Environmental Policy*, *in* A RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW, *supra* note 81, at 450.

87. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 560 (1969) ("[S]elf-interested and powerful minorities often have an undue influence on the public resource decisions of legislative and administrative bodies and cause those bodies to ignore broadly based public interests. Thus, the function which the courts must perform, and have been performing, is to promote equality of political power for a disorganized and diffuse majority.").

88. *See* JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION, at xxi (1970) ("The administrative agency . . . is an essential institution.").

89. *See* Jonathan Baert Weiner, *On the Political Economy of Global Environmental Regulation*, 87 GEO. L.J. 749, 754–55 (1999) (summarizing these arguments).

interests—groups that, according to many public-choice theorists, include environmental activists as well as businesses[90]—perhaps the best approach to government regulation is to avoid having it at all.[91]

In some recent writing, a third offshoot of public-choice theory has begun to emerge.[92] This view treats some level of public-choice dynamics as inevitable, but unlike the early environmental law theorists or the libertarians, it does not treat those dynamics as universally problematic. Instead, for example, Jonas Meckling and his coauthors have argued that public-law regimes ought to be structured to build up, and then be bolstered by, business entities whose interests align with the public-spirited goals of the public-law regime.[93] Conequently, climate-law regimes should be designed to promote renewable energy industries because once those industries reach some critical mass, they will then become advocates for the survival and even the expansion of the climate-law regime.[94] If public-choice dynamics are unavoidable, the argument goes, they might as well be harnessed to serve the public good.[95]

Meckling and his coauthors developed this argument in the specific context of climate law, and they have framed it primarily as an explanation of recent trends and a forward-looking strategy.[96] But renewable energy industries are not the only private entities whose interests might align with public law goals, and some of those entities, like environmental consultants, have been around for decades.[97] That raises an intriguing possibility, which a close examination of the consulting field helps explore: perhaps some version of this alternative form of public-choice dynamic has been around for decades; and perhaps its existence has advanced the partial success of environmental law.

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90. *See, e.g.*, Todd. J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 848–49 (1999).

91. Freeman, *supra* note 85, at 562 ("[T]he problem, in this view, is public power.").

92. Jonas Meckling et al., *Winning Coalitions for Climate Policy*, 349 SCIENCE 1170, 1170 (2015); Eric Biber, *Cultivating a Green Political Landscape: Lessons for Climate Change Policy from the Defeat of California's Proposition 23*, 66 VAND. L. REV. 399, 449–53 (2013).

93. Meckling et al., *supra* note 92, at 1170.

94. *Id.*

95. *See id.*

96. *E.g.*, Biber, *supra* note 92, at 402 (drawing lessons from a 2010 California ballot initiative for future climate policy).

97. The insurance industry is a particularly interesting example of this potential alignment. *See, e.g.*, Shauhin A. Talesh, *Data Breach, Privacy, and Cyber Insurance: How Insurance Companies Act as "Compliance Managers" for Businesses*, 43 L. & SOC. INQUIRY 417, 420–22 (2018) (explaining how the industry works to reduce data breaches).

2. Privatization

In recent decades, another major concern of the administrative law field has been the privatization of governmental functions.[98] Scholars have noted that in many realms, a traditional binary distinction between governmental and private functions no longer holds much descriptive force.[99] Instead, many traditionally governmental functions, ranging from military operations and prison administration to managing national park concessions, now are handled by private contractors.[100] These privatization trends have spawned vigorous debates about whether, and under what circumstances, these changes are desirable and how law should manage the resulting public–private hybrids.[101]

At a general level, the resulting literature has coalesced around two primary views.[102] One is that privatization offers major performance benefits.[103] According to this view, private contractors bring more nimbleness and talent to many tasks.[104] Because they may perform similar tasks for multiple governmental units, private contractors also offer greater specialized expertise.[105] Proponents of this positive view of privatization rarely argue that everything about governance should be privatized. Instead, they would often reserve tasks that require broad-ranging policy judgments to the public sphere.[106] But they do argue that many traditional government tasks could be handled more effectively by private companies.[107]

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98. *See, e.g.*, Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1229 (2003).

99. *See, e.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003); Freeman, *supra* note 85, at 547.

100. *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 439–40 (2005); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 989 (2005); *Concessions*, NAT'L PARK SERV., https://www.nps.gov/subjects/concessions/index.htm (last visited June 5, 2018).

101. *See generally* GOVERNMENT BY CONTRACT, *supra* note 22 (providing multiple perspectives on these debates).

102. There are scholars—most prominently, Jody Freeman, whose papers are cited throughout this article—whose work does not fit neatly into this dichotomy.

103. *See, e.g.*, Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1429–30 (2003) (asserting several advantages for private action).

104. *See* Stan Soloway & Alan Chvotkin, *Federal Contracting in Context: What Drives it, How to Improve it*, *in* GOVERNMENT BY CONTRACT, *supra* note 22, at 209–10, 212–13 (arguing that outsourcing gives government access to better technology, more talented workers, and greater flexibility).

105. *See* John D. Donohue, *The Transformation of Government Work: Causes, Consequences, and Distortions*, *in* GOVERNMENT BY CONTRACT, *supra* note 22, at 41, 44.

106. *See* Welton, *supra* note 62, at 282–83 (summarizing multiple sources sharing this view).

107. *See* Soloway & Chvotkin, *supra* note 104, at 192 (identifying outsourcing as "essential to help government achieve its mission.").

Many other commentators worry that privatization can erode public values.[108] In part, these worries trace directly to legal doctrine; privatization's critics warn that contractors are often not subject to statutory laws, like the Administrative Procedure Act,[109] that are designed to ensure transparent and deliberative governance, and are similarly exempt from constitutional due-process requirements.[110] But while these doctrinal effects are important, the concerns run even deeper. Critics also worry that the private sector, with its central focus on profit, will seek to turn legal compliance into a marketable commodity, often at the expense of the basic values underlying public law.[111] Indeed, in the most jarring accounts of privatization, this escape from public-law values and accountability is not just a consequence but a central policy goal.[112] As Jon Michaels has explained, privatization can sometimes be a method for surreptitiously expanding executive power, as government officials use private contractors to shield questionable initiatives from public oversight.[113]

Some of the studies bolstering these concerns have involved specialized professionals, and sometimes even consultants. For example, in a classic study of workplace discrimination response procedures, Lauren Edelman and her coauthors found that compliance professionals had convinced employers and judges that a grievance policy was the key component of a program to prevent sexual harassment.[114] This position initially had little basis, legal or otherwise; Edelman and her coauthors found scant evidence that these programs had traditionally bolstered legal defenses or effectively addressed discrimination.[115] But over time, private professionals convinced employers to emphasize these programs, and then they convinced courts to accept the existence of these programs as a key element of a legal defense.[116] From these findings, Edelman and her coauthors drew the disturbing conclusion that private organizations are constructing the concept of legal compliance in ways primarily designed to serve management's needs.[117]

A similar example—and a rare example involving environmental consultants—emerges from the field of stream restoration. There, a consultant named Dave Rosgen was remarkably effective at convincing regulators that his

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108. *E.g.*, Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, *in* GOVERNMENT BY CONTRACT, *supra* note 22, at 128 (arguing that the language of privatization excludes important value questions).

109. 5 U.S.C. §§ 551–706.

110. *See* Metzger, *supra* note 99, at 1413–21 (describing gaps in state action doctrine); Alfred C. Aman, Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 49 UCLA L. REV. 1687, 1703 (2002).

111. *See, e.g.*, Minow, *supra* note 98, at 1234.

112. *See* Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 717 (2010).

113. *Id*.

114. Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 406–08 (1999). Edelman et al.'s study does not discuss whether the professionals were in-house staff or external consultants.

115. *See id.* at 407–09, 445–49.

116. *Id.*

117. *Id.* at 445–46.

method for restoring impaired streams should become the regulatory standard, despite widespread concerns from scientists that the efficacy of his restoration methods was at best undemonstrated.[118] As geographer Rebecca Lave explains, "Consulting firms and state and federal resource and regulatory agencies throughout the United States are now staffed by people who associate stream restoration with Rosgen," an outcome that appears to be both a product and a driver of the heavy enrollment in his river restoration courses.[119] Like the accounts of workplace discrimination compliance, this example illustrates the concern that private actors, including consultants, will simply commodify legal compliance, turning it into something that is easy to buy and sell rather than something that advances the underlying values of the relevant public laws.

3. Social Movements

Another area of theoretical interest involves the ways in which a social movement like environmentalism can turn into lasting and effective governance. For years, this has been a central concern of environmentalists, and of students of social movements more generally.[120] Environmentalism, like most social movements, enjoyed an initial groundswell of popular support, which quickly crystallized into a variety of federal, state, and local environmental laws.[121] But the maturation of the movement has not been easy. After a fairly brief period of consensus both within and outside the movement, environmentalism has been riven with internal dissent and beset by active, and often effective, opposition.[122] The election of Donald Trump was just the latest in a long series of blows, and it intensified questions about the movement's ability to sustain its past gains and to achieve new ones.[123]

The debates about the environmental movement, and about social movements more generally, are multifaceted, but one key facet involves the professionalization of the movement. Without question, environmentalism has been institutionalized; what started as a somewhat rag-tag collection of amateur—yet successful—activists has matured into a professionalized field filled with highly

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118. REBECCA LAVE, FIELDS AND STREAMS: STREAM RESTORATION, NEOLIBERALISM, AND THE FUTURE OF ENVIRONMENTAL SCIENCE 14 (2012).

119. Rebecca Lave, *Bridging Political Ecology and STS: A Field Analysis of the Rosgen Wars*, 102 ANNALS ASSOC. AM. GEOGRAPHERS 366, 371 (2012). While Rosgen's methodology has received widespread criticism, see *id.*, Lave's account suggests that Rosgen himself does believe in its efficacy.

120. *See, e.g.*, Cary Coglianese. *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 94–99 (2001).

121. *See* LAZARUS, *supra* note 37, at 67–84 (describing the movement's early legislative successes).

122. *See id.* at 94–97 (describing the early evolution of counterattacks); Purdy, *supra* note 63, at 1633 (noting internal dissent about whether the movement "has lost its fire and imagination").

123. *See* Marianne Lavelle, *In Trump's World, Environmental Movement Wrestles With Its Future*, INSIDECLIMATE NEWS (Nov. 14, 2016), https://insideclimatenews.org/news/14112016/donald-trump-environment-climate-change-paris-agreement-keystone-xl.

trained scientists and lawyers.[124] Some environmental advocates and scholars worry that this change has divorced environmentalism from the grassroots energy that once gave the movement its strength.[125] Others contest this view and argue that the current struggles of the movement have less to do with calcified institutionalization and more to do with the challenges faced by any movement that must do sustained battle with powerful and entrenched economic actors.[126] Few would dispute, however, that the shift is important.

Intertwined with the institutionalization debate is a debate about the appropriate relationship between environmentalism and private industry. Early in the environmental movement, that relationship was primarily adversarial; industry was a villain and a foil—and an obligingly bumbling one at that[127]—rather than a potential partner.[128] But as regulated industries mounted increasingly successful counterattacks against environmental regulation,[129] environmentalists began debating whether their movement should work more closely with powerful industries, or whether that closer relationship would compromise the movement's values and popular appeal.[130] Those discussions continue to the present day.[131]

These debates have never focused upon the environmental consulting industry. In the institutionalization debates, the primary foci instead have been

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124. Coglianese, *supra* note 120, at 116.

125. *See, e.g.*, Jedediah Purdy, *Environmentalism Was Once a Social-Justice Movement. It Can Be Again*, ATLANTIC (Dec. 7, 2016), https://www.theatlantic.com/science/archive/2016/12/how-the-environmental-movement-can-recover-its-soul/509831/ (noting critiques of "a movement of professionals and experts: lawyers, economists, and ecologists who have limited interaction with, and do relatively little to empower, the people who live with the most severe environmental problems"); PHILIP SHABECOFF, A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT 252 (rev. ed. 2003) (describing critiques of overly professionalized environmentalists).

126. For a sampling of these arguments, as well as claims that critics have underestimated the creativity of the environmental movement, see Oliver A. Houck, *Rumors of My Demise . . . A Review of Break Through: From the Death of Environmentalism to the Politics of Possibility*, 38 ENVTL. L. 627, 634 (2008).

127. *See* Jill Lepore, *The Right Way to Remember Rachel Carson*, NEW YORKER (Mar. 19, 2018), https://www.newyorker.com/magazine/2018/03/26/the-right-way-to-remember-rachel-carson (describing the chemical industry's tone-deaf response to *Silent Spring*).

128. *See* Paul Sabin, *Environmental Law and the End of the New Deal Order*, 33 LAW & HIST. REV. 965, 972 (2015) (describing early environmentalists' distrust of government and business).

129. For discussion of the evolution of these attacks, see Daniel A. Farber, *The Conservative as Environmentalist: From Goldwater to Reagan to the 21st Century*, 59 ARIZ. L. REV. 1005, 1024–41 (2017).

130. *See, e.g.*, Fred Krupp, *The Making of a Market-Minded Environmentalist*, STRATEGY+BUSINESS (June 10, 2008), http://www.strategy-business.com/article/–08201 (describing the Environmental Defense Fund's turn toward closer collaboration with business and some of the adverse reactions from other environmental groups).

131. *See, e.g.*, Joshua Ulan Galperin, *Trust Me, I'm a Pragmatist: A Partially Pragmatic Critique of Pragmatic Activism*, 42 COLUM. J. ENVTL. L. 425, 453–56 (2017) (describing and critiquing accommodationist approaches to environmental activism).

environmental advocacy organizations, and debaters have contested whether those organizations' staffing models and advocacy tactics reflected excessive or insufficient institutionalization.[132] Similarly, the literature on social movements and business has focused on activists' engagement with regulated industries, not on the consultants who assist those industries with their compliance.[133] Yet the consulting industry, even more than the shifting staffing of non-profits like the Sierra Club, represents the apotheosis of institutionalized environmentalism; it turns environmental work not just into a paid job, but a paid job within a for-profit company. And as this Article will show, a study of the consulting industry shows that institutionalization, though it obviously carries threats, can work in surprisingly salutary ways.

II. RESEARCH METHODOLOGY

This Article explores the environmental consulting industry by focusing on two subfields. The first is contaminated site management[134] in Massachusetts. The second is environmental impact assessment consulting in California.[135]

For each of these areas, I used two primary research techniques, both of them qualitative. I researched documents created by consultants—either individually or through trade associations—when those consultants sought to advocate for, or just inform, public policy-making. In contrast to documents prepared for clients, these public-advocacy documents signal the policy priorities and cultural orientation of the field.[136] Second, I interviewed consultants, attorneys, regulators, clients, and employees of environmental advocacy organizations. Interviews were semi-structured, and questions focused on ways in which consultants influence the development of law and on cultural differences (and similarities) between consultants, private attorneys, clients, and regulators.[137]

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132. *See, e.g.*, Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687, 689 (1995) (critiquing mainstream environmental groups for failing to empower grassroots activists).

133. *See, e.g.*, TERMS FOR ENDEARMENT: BUSINESS, NGOS, AND SUSTAINABLE DEVELOPMENT (Jem Bendell ed. 2017); Brayden C. King, *A Political Mediation Model of Corporate Response to Social Movement Activism*, 53 ADMIN. SCI. Q. 395, 409 (2008); Jamie R. Hendry, *Taking Aim at Business: What Factors Lead Environmental Non-Governmental Organizations to Target Particular Firms?*, 45 BUS. & SOC'Y 47, 49–50 (2006).

134. I use the term "management" rather than "cleanup" because many mildly contaminated sites are not actively remediated.

135. I used Massachusetts waste-site management and California environmental impact assessments consulting partly for geographic and subject-matter diversity and partly because my professional background familiarized me with each type of work.

136. These signals aren't perfect. Some self-selection occurs when consultants decide to become active in an industry organization, and any such organization will have different interests than the industries it claims to represent.

137. For both sets of interviews, I drew on my own professional connections to generate initial lists of interview subjects and then used snowball surveying (which means asking interview subjects for recommendations for other subjects while also trying to obtain a range of backgrounds and geographic locations). For the Massachusetts interviews, I also

	Consultant	Private Firm Attorney[138]	Govt.	Client	Envtl. or Pub. Health Advocate	Total
Scoping/ bkgrd.	5	3	0	0	0	8
Mass.	10	4	5	2	3	24
Cal. envtl.	11	8	3	2	2	26
Total	26	15	8	4	5	58

Table 1*: Number of interview subjects by category*[139]

This methodology cannot support definitive conclusions about the entire environmental consulting field. The field is heterogeneous, and practices in two specific sub-areas (both in politically liberal states) likely differ from practices in other states or countries.[140] Indeed, because the field lacks core defining traits—unlike lawyers, all of whom must attend law school, take the bar exam, and earn a legal license, environmental consultants face no universal educational or entrance requirements[141] and come from a wide variety of backgrounds—it is somewhat

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contacted a randomized sample of Licensed Site Professionals. I promised anonymity to all of my interviewees.

138. Some of the private-firm attorneys primarily represent developers, some primarily represent environmental or community groups, some focus on government agency work, and some represent multiple client types.

139. In addition to these interviews, which focused on the California and Massachusetts programs, I also conducted a series of interviews (some as background and some on the record) to refine my research focus and learn more about the history of the environmental consulting field. Additionally, some interview subjects had occupied more than one of these roles over the course of their careers. In this table, I have listed those subjects in the category upon which my interview questions primarily focused.

140. *See* LIFSCHUTZ, *supra* note 7, at 23 (describing the range of markets in which the industry operates and services it offers as well as trends toward consolidation). Interview subjects often drew contrasts between CEQA consulting and other areas of work in California and between waste site cleanup regulation in Massachusetts and analogous programs in other states. *See, e.g.*, Cal. Attorney Interview 2 (Oct. 6, 2017) (asserting that consultants "are more involved in the CEQA process . . . than just about anything else.").

141. Many consultants have passed professional qualifying exams and have professional certifications; the field has many professional engineers, professional geologists, and certified planners. But in contrast to lawyers, these examinations are not barriers to field

unclear where the boundaries of the field even are. The field is also evolving, as are the legal and business realms in which it operates, and today's truths may not last.[142] Nevertheless, this inquiry does demonstrate distinctive roles that consultants—and perhaps, other private entities—at least sometimes play, and even caveated conclusions about those roles can expand our understanding of regulatory governance and environmental law.

III. RESULTS

This Part explores several key ways in which consultants strive to affect the implementation of environmental law. To provide context, it begins with an overview of waste-site cleanup regulation in Massachusetts and of environmental impact analysis in California. It then describes two overlapping roles[143]—beyond the obvious role of delivering compliance services, for a fee, to clients—that consultants play in those fields. The first of these roles is *trusted intermediary*. In this role, the consultant cultivates a reputation as a trustworthy mediator between clients and regulators, generally by trying to provide accurate information and work within, rather than against, the boundaries of the regulatory program. The second role is *practical environmentalist*. In this latter role, the consultant does more than merely serve as a client agent, and instead tries to work—typically in quiet ways—to strengthen environmental protection.

A. The Programs

1. Waste-Site Cleanup in Massachusetts

In the late 1980s, after a series of scandals brought hazardous waste sites to national attention,[144] waste-site investigation and cleanup became central concerns of environmental law.[145] The largest cleanups were often handled under the federal Comprehensive Environmental Response, Compensation, and Liability Act.[146] But across the nation, there were, and still are, many more contaminated sites that remained subject to state oversight.[147] Massachusetts was no exception. Thousands of contaminated sites were discovered, and most of them remained under

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entry (often the exam is taken as a career-advancement step after several years of professional work), and there is no single standardized certification.

142. *See* LIFSCHUTZ, *supra* note 7, at 23 (describing industry consolidation).

143. For purposes of exposition, I have described these roles separately; but in practice the distinctions are blurry. A consultant might note, for example, that playing the role of neutral facilitator is a way to strengthen environmental law, just as a judge or neutral mediator arguably strengthens the legal system by serving as a neutral arbiter of disputes.

144. *See, e.g.*, JONATHAN HARR, A CIVIL ACTION 45 (1995) (describing the consequences of environmental contamination in Woburn, Massachusetts).

145. *See* LSP Association, *LSPA Suspending Disbelief*, YOUTUBE (Oct. 10, 2013), https://youtu.be/gE8EzSbLQoI.

146. 42 U.S.C. §§ 9601–9675 (2006).

147. *See* Revesz, *supra* note 83, at 595–97 (providing statistics on federal and state cleanup programs).

the oversight of the Massachusetts Department of Environmental Protection ("Massachusetts DEP").[148]

In the 1980s, Massachusetts developed a regulator-centered program to address investigation and cleanup of these sites.[149] At multiple stages of the process, site owners needed to obtain regulators' approvals of their reports and plans.[150] By the late 1980s, many people (within and outside the Massachusetts DEP) thought this system was failing.[151] Of the thousands of sites in the system, hardly any had been cleaned up, partly because owners were waiting for backlogged and cautious regulators to provide approvals.[152] That slow pace created real costs, and not just for regulated entities and their lenders.[153] Communities were frustrated with the persistence of contamination and the associated loss of developable land, and environmental advocates, not just in Massachusetts but across the country, worried that failures to redevelop contaminated urban properties were actually contributing to urban sprawl.[154]

Massachusetts responded to these challenges by convening a working group composed of regulators, private- and public-sector attorneys, lenders, environmentalists, and environmental consultants.[155] The group created an innovative proposal, which the Massachusetts Legislature soon enacted into law: regulatory oversight should be partially privatized.[156] Massachusetts DEP retained important roles: the agency drafted and periodically updates detailed implementing

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148. *See* COMMONWEALTH OF MASS., EXEC. OFFICE OF ENVTL. AFFAIRS, DEP'T OF ENVTL. PROT., INTERIM REPORT: WASTE SITE CLEANUP PROGRAM IMPROVEMENTS AND FUNDING RECOMMENDATIONS 78–79 (1990) [hereinafter 21E COMMITTEE REPORT] (providing statistics on site status).

149. *See* MASS. DEPT. OF ENVTL. PROT., THE MASSACHUSETTS WASTE SITE CLEANUP PROGRAM, APPENDICES: MEASURES OF PROGRAM PERFORMANCE 1993–2001 A-1 TO A-2, https://www.nj.gov/dep/srp/stakeholders/20070629massapp.pdf (last visited July 29, 2019) (describing the pre-1993 program).

150. *Id.*

151. *See id.* at 1–2; Mass. Regulator Interview 2 ("[I]t created an architecture that was extraordinarily difficult for the agency, frankly, to implement and for the private sector to deal with.").

152. *See id.* at 78–79; Seifter, *supra* note 13, at 1102–03.

153. Mass. Regulator Interview 3 (May 5, 2017) ("[I]t was becoming quite a disaster.").

154. *See* Joel B. Eisen, *"Brownfields of Dreams"?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883, 895–96 (describing economic and environmental problems created by abandonment of brownfields). Because these concerns align environmental protection with development, brownfield redevelopment has never been a particularly partisan issue. *See, e.g.*, Remarks by President George W. Bush, In the Signing of HR 2869, The Small Business Liability Relief and Brownfields Revitalization Act, Jan. 11, 2002, 2002 WL 27811 ("[O]ne of the best ways to arrest urban sprawl is to develop brownfields, and make them productive pieces of land, where people can find work and employment.").

155. 21E COMMITTEE REPORT, *supra* note 148, at 78–79; LSP Association, *supra* note 145.

156. *See id*. The proposal was codified as an update to Massachusetts General Law Chapter 21E.

regulations;[157] and it audits some sites for compliance with regulatory standards.[158] But primary responsibility for studying contaminated sites, deciding cleanup goals, selecting remediation methods, and determining when a site is sufficiently clean lies with "Licensed Site Professionals," or "LSPs."[159] To this day, participants in the Massachusetts program routinely refer to it as "the privatized model."[160]

As a practical matter, the reliance on LSPs meant reliance on environmental consultants. There are now over 400 actively licensed LSPs, and while some work directly for private property managers or for government agencies, most are consultants.[161] The Board of Registration of Hazardous Waste Site Cleanup Professionals, which administers a licensing exam,[162] reviews applications to become LSPs, and also handles discipline against existing LSPs, is composed primarily of practicing consultants.[163] Consultants also play central roles in the Licensed Site Professional Association ("LSPA"), a private nonprofit organization that supports and represents LSPs.[164] These consultants do not operate in a vacuum: they must answer to their clients and to regulators, they often work with lawyers, and lending institutions and potential property buyers also take a close interest in their work.[165] But consultants are the core participants in an important regulatory program.

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157. 310 MASS. CODE REGS. § 40.0000. Practitioners refer to these regulations as the "Massachusetts Contingency Plan," or "MCP."

158. *See Guide: Waste Site Cleanup Audit Program*, MASS.GOV, https://www.mass.gov/guides/waste-site-cleanup-audit-program (last visited June 6, 2018).

159. Seifter, *supra* note 13, at 1104–12. Even in states that do not use this model, and on federal cleanups, consultants do much of the fieldwork and report writing. The Massachusetts program differs from the traditional model by giving consultants more decision-making autonomy.

160. *E.g.*, *Guide: The Waste Site Cleanup Program*, *supra* note 14.

161. As of May 15, 2018, the exact number of actively licensed LSPs was 420. *See Search for Waste Site Cleanup Professionals*, ENERGY & ENVTL. AFF. DATA PORTAL, https://eeaonline.eea.state.ma.us/portal#!/search/lsp (last visited May 15, 2018).

162. While LSPs must pass this exam, consultants who work in support of LSPs, or consultants who work in other environmental consulting fields in Massachusetts, do not need to take the exam. For that reason, LSPs are a subset of consultants, and many of the consultants at the firm where I worked were not LSPs.

163. *Biographies of Licensed Site Professional Board Members*, MASS.GOV, https://www.mass.gov/service-details/biographies-of-licensed-site-professional-board-members (last visited June 1, 2018).

164. *See LSP Association Leadership*, LSP ASS'N, http://www.lspa.org/lspa-leadership (last visited June 1, 2018).

165. Mass. Consultant Interview 4 (Jan. 31, 2018) ("I'm sometimes surprised that my private real estate developers don't always have lawyers involved and rely on me."). When LSPs do work with lawyers, the roles sometimes blur. As one LSP explained, "it's a pretty cooperative venture here. Most of the attorneys we work with . . . they know us and we know them and the LSPs practice a little law and the lawyers practice a little LSP." Mass. Consultant Interview 1 (Nov. 30, 2017).

To this day, and as the discussion below will explain in more detail, participants praise that program.[166] Without any exceptions, my interview subjects described the program as a success; and consultants, attorneys, and government regulators offered consistent accounts of the reasons for success.[167] They explained the program had greatly accelerated the pace of cleanups, so that hundreds of properties had been studied, remediated if necessary, removed from the regulatory program, and made available for commercial use.[168]

2. Environmental Impact Consulting in California

Like its more famous federal counterpart, the National Environmental Policy Act, CEQA is an environmental assessment statute.[169] It requires state and local agencies to disclose and seek public comment on the significant environmental impacts of projects they would approve or carry out, along with alternatives to those projects and ways to mitigate their impacts.[170] Unlike NEPA, which famously lacks a substantive mandate,[171] CEQA also requires state agencies to avoid or mitigate significant adverse environmental impacts, to the extent that it is feasible to do so.[172] Because of the statute's reach, and because of a long tradition of demanding judicial oversight, CEQA now dominates environmental practice in California.[173]

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166. *See* R. Duff Collins, Woodard & Curran Inc., The Massachusetts LSP Program: 17 Years of Innovation (2010) (on file with author) (providing multiple slides with statistics). For a contrasting view, see Seifter, *supra* note 13, at 1098. Seifter reviewed audit reports and concluded that "LSPs routinely permit—or execute—deviations from state regulations governing hazardous waste site cleanups, sometimes creating serious risks to human health and the environment." *Id.* at 1098. She therefore concludes that the program "fails on its own terms." *Id.* Despite that conclusion, her comment remains agnostic about whether the program's other benefits outweigh these problems. *See id.* at 1098–99. In interviews, I often asked about disagreements between regulators and the regulated, and sometimes specifically mentioned Seifter's findings. Interview subjects, including regulators, consultants, and regulated entities, explained that the disagreements typically focused on the extent of needed site characterization; and that the differences were explained in large part by the demanding standards established by Massachusetts DEP. They never described the program as a failure.

167. I did hear concerns about whether major staffing cuts at Massachusetts DEP will allow the program to sustain its success. Mass. Advocate Interview 2 (May 15, 2019).

168. Following Massachusetts' lead, several other states have created similar programs. *See* Heidi Gorovitz Robertson, *Legislative Innovation in State Brownfields Redevelopment Programs*, 16 J. ENVTL. L. & LITIG. 1, 47–63 (2001).

169. *See* Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts, 397 P.3d 989, 992 (Cal. 2017) (noting that CEQA "requires that public agencies assess the environmental impacts of projects requiring government permits.").

170. CAL. PUB. RES. CODE § 21002.

171. *See* Robertson v. Methow Valley Citizens' Council, 490 U.S. 332, 350 (1989) ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

172. *See* CAL. PUB. RES. CODE § 21081(a)(1); City of Marina v. Bd. of Trs. of Cal. State Univ., 138 P.3d 692, 697 (Cal. 2006) (explaining this obligation).

173. *See* Antonio Rossmann, *The 25-Year Legacy of Friends of Mammoth*, 21 ENVIRONS ENVTL. L. & POL'Y J. 63, 66 (1998) ("[T]he law was interpreted early and

CEQA has been a boon for the environmental consulting industry. Consultants prepare the vast majority of environmental impact reports and other CEQA studies, and a typical team for a large development project would likely include consultants with expertise in wetlands delineation, endangered species protection, land use planning, traffic and air quality modeling, water supply analysis, archaeology, and public outreach, among other disciplines.[174] Some members of the team would integrate the work of all of these disciplines into a larger report.[175] To an outsider, the degree of specialization can seem remarkable. For example, there are consultants who specialize in fields as narrow as urban wind tunnel effects and marine archaeology.[176]

Like LSPs in Massachusetts, these CEQA consultants blur public and private boundaries. When private CEQA consultants work for public agencies,[177]

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forcefully by the highest Court in the jurisdiction, which in turn was supported by the Legislature's refinements and essential ratification.").

174. *E.g.*, Cal. Attorney Interview 3, *supra* note 12 (noting that for a renewable energy project, "[T]he consultant team typically includes biologists and air quality and greenhouse gas . . . somebody on traffic, somebody on soils. And that is about as light as it gets."). For greenfield projects, the attorney added, "Now you're talking about a cast of a dozen consultants, each of whom occupies a narrow space, but very, very deeply." *Id.*

175. Cal. Consultant Interview 1 (Sept. 29, 2017) (describing this role).

176. Cal. Attorney Interview 3, *supra* note 12 (describing different varieties of consultants); *see* CAL. HIGH SPEED RAIL AUTH., DRAFT ENVIRONMENTAL IMPACT REPORT/STATEMENT: MERCED TO FRESNO 9-1 to 9-9 (2011), http://www.hsr.ca.gov/docs/programs/merced-fresno-eir/drft_EIR_MerFres_Vol1_9.pdf (listing 97 consultants involved in document preparation).

177. Consultants work for both private developers pursuing projects and for public entities reviewing the projects (though usually not at the same time). One attorney summarized the payment arrangements for government representation:

> [I]n California, there's a range of practices, all of which are perfectly legal, one of which is on the far end of the scale. The applicant supplies the administrative draft [environmental impact report], having chosen its own consultant, (and) gives it to the public agency. That agency has to review it and ultimately has to be comfortable with it and cannot issue a formal draft EIR until it reflects the independent judgment of the agency. And that's more common in southern California. The other end of the continuum is the culture at the lead agency is that developers are generally not trusted, and they get no input on the consultant and are told, "just write the check." The contractual relationship will be between the agency and the consultant and the agency chooses its own.

Cal. Attorney Interview 10 (Nov. 9, 2017). Another attorney who represents developers noted that developers' attorneys still try to influence the work product:

> [The consultants] try to stay neutral. But the fact is . . . the projects I'm working on, they're in it from $500,000 to north of $1 million in fees. So I consciously develop those relationships because if I send them a freaking project, I want to them to know where it came from. I want them to know how good I expect the work to be. And if they don't, they're never going to see another referral. So I have a lever at least to get them to do a good, professional job.

Cal. Attorney Interview 5 (Nov. 6, 2017).

they complete tasks one might think of as classically governmental.[178] CEQA, like NEPA, is an idealistic statute grounded in a faith in agency deliberation and public dialogue. Its core premise is that if agencies studiously consider their proposed actions, and seek and respond to public input on those actions, better governmental decision-making will result.[179] Yet in practice, it is often the private consultants who help define the range of alternatives that will be considered, facilitate public meetings, write responses to public comments, help the agency choose its path forward, and assess whether that path complies with governing law.[180]

As that last sentence suggests, CEQA consultants' work often resembles legal practice. Consultants consider an understanding of the statute, its implementing regulations and guidance documents, and recent court decisions to be essential to their work.[181] They also often explain law to clients and sometimes to lawyers. In addition to declining to hire their own CEQA counsel, or waiting to do so until litigation is imminent, some government agencies maintain firewalls between their CEQA consultants and the project proponent's attorneys, and the consultant interacts with a generalist city or county attorney.[182] Consequently, at key decision-making points, the consultant is often the leading environmental law expert in the room.[183] As one consultant put it, "it's actually fairly rare that cities and counties have highly experienced CEQA in-house counsel . . . we often feel like

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178. *See* Steven J. Kelman, *Achieving Contracting Goals*, *in* GOVERNMENT BY CONTRACT, *supra* note 22, at 178 (identifying a contract solicitation for environmental planning and public outreach as the mostly likely, among a pool of 200 solicitations, to be "problematic").

179. *See* Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 764 P.2d 278, 282–83 (Cal. 1988) (explaining CEQA's purposes).

180. *E.g.*, Cal. Consultant Interview 7 (Oct. 24, 2017) ("I get involved very much, also, on the public end of things. I will lead public meetings and workshops."); Cal. Consultant Interview 5 (Oct. 13, 2017). The latter consultant added:

> Oh, yeah, we're very hands on with that stuff. I mean, usually for alternatives, for example, we will set up a day where we go somewhere and we sit and we brainstorm alternatives with maybe five people on our team, depending on which disciplines are most important . . . I don't think I've ever worked on a project where the agency handed us that stuff. They really look to us to give them suggestions, give them ideas and defend it.

181. Cal. Consultant Interview 8 (Nov. 8, 2017) (describing how the consultant might use his knowledge of a recent case to advise a client); Cal. Consultant Interview 3 (Oct. 9, 2017) ("I don't think anyone should be doing environmental consulting work who hasn't read and re-read the procedural provisions of the regulations."); *see also id*. ("I am literally advising both public- and private-sector clients about how to produce the most defensible . . . administrative record . . . that's likely to withstand litigation.").

182. Cal. Consultant Interview 1, *supra* note 175 ("Some cities actually have a firewall . . . . We're not contacting the developer even though we're invoicing them.").

183. Cal. Attorney Interview 5, *supra* note 177 ("I can't think of any [environmental impact report] process I've gone through where the consultant isn't giving any direct advice to the client at some point, if not primarily. And then it's really a peer review by the lawyer.").

we're kind of pseudo-lawyers in the level of knowledge that we try to provide to our clients."[184]

B. The Roles of Consultants

Within each of these programs, consultants play a variety of roles. Most obviously, they deliver, for a price, information and documents that their clients use to show compliance with governing laws. But more subtly, consultants help shape the programs themselves, and thus help determine how environmental law will function in practice. The Sections below explain two of those roles and then describe specific episodes in which both roles were in play.

1. The Consultant as Trusted Intermediary

The core work of an environmental consultant is to deliver compliance services to paying clients. In practice, delivering those services often involves working with regulators. The consultants with whom I spoke repeatedly emphasized ways in which collaborative, trust-grounded relationships with regulators enabled them to perform client services more effectively. Sometimes the client services were specific to individual projects, and sometimes they involved providing more general feedback on challenges that clients faced, often in the context of a rulemaking or guidance update. But in both roles, consultants and regulators alike emphasized the consultants' roles as trusted intermediaries between regulated entities and their regulators.

One key element of that role is frequent communication about regulatory programs. Some of that discussion is just ongoing, informal dialogue; as one Massachusetts LSP noted, "we have our ongoing skirmishes, but by and large, DEP is pretty open with consultants . . . It's easy to talk to DEP people."[185] Consultants also routinely communicate on specific regulatory initiatives.[186] For example, in Massachusetts consultants comment on most DEP-proposed regulations and guidance; recent subjects include modeling or measuring the intrusion of toxic vapors into buildings,[187] treatment options for contaminants floating on top of groundwater tables,[188] and the use of deed restrictions to limit future exposures at partially-remediated sites.[189] California environmental consultants are similarly

184. Cal. Consultant Interview 6 (Oct. 17, 2017).

185. Mass. Consultant Interview 1, *supra* note 165; Mass. Consultant Interview 4, *supra* note 165 ("[T]hey've been fairly receptive, and in fact, they specifically reach out to us for help when they're revising the regulations.").

186. Mass. Regulator Interview 1 (Dec. 7, 2017) ("[W]e have a pretty active relationship with the Licensed Site Professional Association . . . [W]e communicate with them on policy developments and meet with them periodically.").

187. Letter from Paul McKinlay, LSP (LSPA President), and Wendy Rundle, to Gerard Martin, MassDEP, Bureau of Waste Site Cleanup (Feb. 2, 2015) (on file with author).

188. Letter from Paul McKinlay, LSP (LSPA President), and Wendy Rundle, to Liz Callahan, Action Division Director for Policy and Program Development, MassDEP, Bureau of Waste Site Cleanup (Nov. 3, 2014) (on file with author).

189. Letter from Paul McKinlay, LSP (LSPA President), and Wendy Rundle, to Margaret Shaw, MassDEP Bureau of Waste Site Cleanup (Sept. 22, 2014) (on file with author).

active in providing comments[190]: "We have a really good relationship with [Office of Planning and Research][191] staff," one California consultant remarked, and "sometimes they'll have us take a look at a pre-administrative process draft, see what we think."[192]

Consultants are not the only ones telling government regulators about compliance issues and costs; regulated industries routinely do the same thing.[193] But the relationships between consultants and regulators are different than those between regulated entities and regulators. The latter relationships are often adversarial and distrustful, with each side viewing the other, at least to some extent, as the enemy.[194] Additionally, as commentators have noted, another distinctive feature of many regulator-regulated relationships—and a feature that intertwines in harmful ways with distrust—is informational asymmetry, with regulated industries possessing information that would be useful to regulators yet declining to share it,[195] or sharing

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190. As one California consultant explained:

> So if the governor assigns a special task committee person and says "Hey, we want to look at reducing vehicle miles traveled in California," one of the first things [they're] going to do is reach out to California AEP and say . . . "who in your organization is working on these issues?" And [AEP has] a legislative committee, and they—there's a set call . . . there's constant dialogue about pending legislation.

Cal. Consultant Interview 3, *supra* note 181.

191. The Governor's Office of Planning and Research is an agency that "serve(s) the Governor and his Cabinet as the staff for long-range planning and research, and constitute(s) the comprehensive state planning agency." Governor's Office of Planning and Research, *About OPR*, CA.GOV, opr.ca.gov/about/ (last visited June 18, 2018).

192. Cal. Consultant Interview 6, *supra* note 184. Another consultant with prior experience in state government emphasized that this was a relatively new role, and that thinking through earlier regulatory changes was "99% done by in-house staff at OPR." Cal. Consultant Interview 10 (Nov. 21, 2017).

193. *See* Jason Webb Yackee & Susan Webb Yackee, *A Bias towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 128–29 (2006).

194. *See* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 15–16 (1997) (noting that traditional administrative processes encourage adversarial interactions between industry and regulators). This is not always true, and interview subjects in both California and Massachusetts noted that there is broad and increasing (though not universal) acceptance of the importance of environmental regulation among the clients for whom they work. As one California attorney put it,

> Everybody knows now who's under sixty-five or seventy years old—and that's most of the people running business now—that environmentalism is very important, it's a real issue, it's not bullshit. And here in California in particular people care about it, and we have really strong laws. So you just have to deal with it.

Cal. Attorney Interview 10 (Nov. 9, 2017).

195. *See, e.g.*, Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 DUKE L.J. 1619, 1619 (2004).

it in strategically selective ways.[196] In contrast, regulators tend to perceive consultants as trusted sources of useful information.

Regulators consistently echoed these themes. For example, one Massachusetts regulator described consultants' comments on potential regulatory changes:

> [A]lmost always, they're helpful. That's not to say we always agree with them . . . . But I think for the most part they come across as being sincere comments and you can see that the consultant has an issue in making a positive change in the program . . . . And they're very useful in terms of being able to get some background, different aspects of the program. Sometimes they indicate things that are being interpreted in different ways or things that are unclear . . . .[197]

Another Massachusetts regulator provided a similar assessment, noting that generally regulators rely on input in two different ways:

> One would be, the consultants tend to have areas of expertise where they're trained, they're educated, and we actively want that technical expertise involved . . . . And that may be expertise and a perspective that a neighborhood group or an environmental group or somebody from a law firm doesn't have . . . . And then there's also their client. You know, they're representing a broad range of clients, most of whom aren't really at the table. The people that actually own and operate the locations are often . . . kind of one-off clients . . . . So the consultants actually almost have to provide the perspective of those responsible parties [because] the [responsible parties] don't actually show up.[198]

Consultants consistently spoke of their interactions with regulators in similar terms. As one Massachusetts consultant explained, when summarizing input to regulators, "A lot of it has to do with . . . just boots on the ground, the implementation of things, and saying, 'hey, we found something that's a real challenge.'"[199] Similarly, a California consultant noted that his colleagues' comments and educational work draw on being "in the trenches every day, every

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196. *See, e.g.*, Freeman, *supra* note 194, at 11–12 n.27 (quoting an EPA official: "Usually, we get sent lots of information in the comment process but it's all in [the parties'] own self-interest.").

197. Mass. Regulator Interview 1, *supra* note 186. The regulator added,

> [I]n their jobs, they're balancing pressure from clients to keep costs down as well as trying to meet the regulations, so they have to bring those two things together and that's why I would characterize their comments as being pretty practical. I think you really can't do changes to the regulations without getting the consultants' comments, because in our program . . . they're the decision-makers and they're the ones who are making things happen. So they're a highly valued set of comments that we get from consultants.

Id.

198. Mass. Regulator Interview 5 (Dec. 21, 2017).

199. Mass. Consultant Interview 2 (Dec. 5, 2017).

week, on a project-by-project basis, tailoring the principles of CEQA to specific projects."[200] Consultants also found regulators receptive to the input that grows out of this experience. As one explained, when he offered to communicate, "they're very cooperative. I never get no for an answer."[201] Attorneys corroborated this view. As one Massachusetts attorney put it, "DEP might not be as responsive as the private sector would like it to be, but it certainly is responsive to input from the LSP community."[202]

For most consultants, these relationships seemed to involve genuine respect for regulators rather than strategic posturing. Consultants did sometimes criticize tendencies toward inertia or excessive caution, but they generally respected and supported regulators' work.[203] "Massachusetts DEP is a great regulating agency," one consultant stated, adding that the agency's staff is "in it for the same reason I'm in it, to clean up the environment and do it practically and efficiently."[204] Somewhat strikingly, and in contrast to most regulated businesses, some consultants also offered effusive praise for written regulations. One consultant, while noting that regulators "couldn't get the sites closed out," observed that "it was the state employees that developed this wonderful set of tools we use called the MCP regulations."[205]

The strongest evidence of this neutral broker role emerged from discussions of regulatory initiatives. But some consultants insisted that they maintain this role even when directly representing clients on individual projects. For example, one California consultant remarked:

> I think a lawyer can be an advocate for a client. I don't see ourselves as the advocate for the client in the majority of the work that we do. And while on the surface that might sound a bit odd, because we're working for the clients, the strength that I bring, that our firm brings to a CEQA analysis, is the objective scientific analysis . . . . And when I go in front of the agencies, or any type of reviewer, and I'm seen as the scientific expert and saying, "these are the facts," then that serves the client a lot more than a person that's advocating for the client.[206]

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200. Cal. Consultant Interview 6, *supra* note 184.

201. Mass. Consultant Interview 2, *supra* note 199.

202. Mass. Attorney Interview 4 (Dec. 5, 2017).

203. *E.g.*, Mass. Consultant Interview 2, *supra* note 199 (noting that after recent retirements, "[I]t's pretty thin [at DEP] right now.").

204. Mass. Consultant Interview 7 (Feb. 1, 2018). The consultant also added, "Sometimes financial realities may escape them to a degree." *Id.*

205. Mass. Consultant Interview 10 (Feb. 28, 2018); Cal. Consultant Interview 11 (Nov. 30, 2017) ("I find myself simultaneously being sympathetic to [clients needing approvals] and helping them get through the process quicker, but also being really thankful for the San Francisco Planning Department. . . . Those people are trying to do good work. I really believe that . . . .").

206. Cal. Consultant Interview 2 (Oct. 6, 2017); Mass. Consultant Interview 2, *supra* note 199 ("I've seen lawyers who I certainly respect toe the line where I think, 'wow, I couldn't do that.' Like I feel like I'd be putting my license at risk if I was doing that."). A

Another echoed this view:

> I think that most people that are actively engaged in our profession . . . would pretty consistently say that our job as environmental professionals is to be a neutral third party. We don't advocate for projects and we don't advocate against projects. Our job is to compile meaningful repositories of data to help decision-makers make good decisions.[207]

Those quotes may sound self-serving, of course.[208] Many people view their own work through rose-colored lenses, and that seems particularly likely for people who have worked in the same field for decades, as many of my research subjects had. But there are reasons against discounting these claims too much. Serving as neutral brokers reconciles, at least to some extent, the conflicting incentives consultants face. They need good relationships with their clients but also with regulators; and while regulation creates challenges for them and their clients, it also keeps them in business.[209] Add those incentives together, and sometimes the easiest course of action can be to simply play it straight.

The consultants' claims to serve as honest information brokers, at least in policymaking processes, also are consistent with the written comments that

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few consultants questioned these distinctions. *E.g.*, Cal. Consultant Interview 10, *supra* note 192 ("I haven't really seen a big difference at all between the approach of the lawyers and the consultants. I think the lawyers usually keep us being more conservative in our approaches and documenting our approach . . . . But I don't see a huge difference in how we approach things other than that.").

207. Cal. Consultant Interview 3, *supra* note 181; Cal. Consultant Interview 4 (Oct. 10, 2017) ("[W]e're very particular about not having our clients dictate results to us."); Cal. Consultant Interview 7, *supra* note 180 ("[T]his may sound like a soundbite, but at the end of the day, all I've got is my reputation. And so if I'm just a hired gun, that kind of thing gets around."); Mass. Consultant Interview 5 (Feb. 1, 2018) ("We do our best [to] find the reasonable, technically-based place to be."). As one California consultant put it,

> my company will play up . . . the fact that we seldom get into the role of . . . advocacy and we really do stick more to the science. And that has allowed us . . . to actually problem-solve more with the regulatory agencies because they see us as a trusted partner and not that we're trying to pull something over on them.

Cal. Consultant Interview 9 (Nov. 16, 2017).

208. They also suggest greater differences between consultants and lawyers than the rest of my research would support. Both consultants and lawyers stressed that they are typically working together toward shared goals and with somewhat overlapping responsibilities. Consultants and lawyers also often volunteered—unprompted—that they generally like working with each other. *E.g.*, Cal. Attorney Interview 10, *supra* note 177 ("Some of my best friends are consultants. I hang out with them."). He then added, "I hear these guys bitch about obnoxious lawyers they have to deal with and how full of themselves they are, how arrogant they are. And you know the type, I'm sure." *Id.*

209. *See* Cal. Consultant Interview 6, *supra* note 184 ("Businesses like ours prosper in part because of CEQA requirements."); Mass. Regulator Interview 1, *supra* note 186 (commenting on the absence of a notable deregulatory bent to the consultants' comments, the regulator remarked, "Sometimes we wonder if they're kind of indifferent to that because it represents work for them either way.").

consultants submit to regulators. Those comments lack the histrionics and rhetorical flourishes that fill the writings of many other participants in environmental debates.[210] Instead of fundamental philosophical disagreement, they offer windows into conversations among technocrats, all of whom are looking for reasonable ways to get a job done.[211]

Finally, though here the evidence is less consistent, these claims are consistent with some nonconsultants' descriptions of consultant–regulator relationships.[212] As one attorney put it, "I feel like the consultants are seen less as advocates for developers or private interests . . . I feel that they do have a higher level of credibility."[213] A California government attorney familiar with legislative and rulemaking debates offered a similar observation: "they're engaged. But . . . they approach it from a technical point of view. You know, not whether [the] provision is good or bad, but . . . how it works, if it's sort of feasible."[214] And a Massachusetts attorney, describing interactions between consultants and the Massachusetts DEP, noted:

> There's a great deal of, I would say, respect between the LSP community and Mass DEP, and of recognition that we're kind of in this together. That doesn't mean the DEP's going to take the LSPA's comments and say, "oh, that's what the LSPA wants, we're going to do it." But they will listen.[215]

Not everyone shared these views. Most bluntly, one private-sector attorney remarked:

> [S]ome people have taken the position that, you know, consultants don't really just work for clients, they have a kind of public mandate for environmental protection, and most consultants that I know and

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210. *See, e.g.*, Dave Owen, *Little Streams and Legal Transformations*, 2017 UTAH L. REV. 1, 2 (2017) (quoting overwrought reactions to a water quality rulemaking); JOHN MCPHEE, ENCOUNTERS WITH THE ARCHDRUID 166 (1971) (describing the Sierra Club's famous—and effective—full-page *New York Times* advertisements opposing dams).

211. *See, e.g.*, Letter from Paul McKinlay, LSP, and Wendy Rundle to Gerard Martin, MassDEP, Bureau of Waste Site Cleanup, *supra* note 187 (offering prose devoid of any rhetorical flourish).

212. One consultant-turned-attorney described the challenges of making this shift. The attorney described how a first-year law professor talked about the need to

> spin the facts . . . And it drove me crazy for the first little while. It's like, they're the facts, you can't—and that was kind of a breakthrough moment, of trying to transition from engineering mode . . . to realizing that spinning them in the law was a big deal.

Cal. Attorney Interview 1 (Oct. 10, 2017).

213. *Id.*; Cal. Attorney Interview 5, *supra* note 177 ("[T]hey envision their role as being better off to be neutral. So they don't ever want to get caught looking like a developer's EIR preparer."); Cal. Attorney Interview 10, *supra* note 177 ("They do want to be objective and they do want to be credible and they know that they need to maintain their credibility, not just with the lead agency but also with the other agencies they interact with . . . .").

214. Cal. Attorney Interview 6 (Nov. 7, 2017).

215. Mass. Attorney Interview 1 (Dec. 11, 2017).

> all the lawyers that I know and all the clients that I know think that's complete bullshit.[216]

An environmental group attorney likewise commented that she had never seen a situation "where the consultant expressed some kind of opinion that diverged from what the client was pushing for at that point."[217] But other nonconsultants, while observing that not all consultants aspire toward a neutral role, thought that those who did provided more value. As one client representative explained:

> I'd characterize (some) as your A-team of consultants . . . they've built up that credibility with regulators . . . . And there are some that are just focused on getting the project through . . . . It sounds very harsh, but I'd put them on a lower tier, just in terms of quality or value that they're bringing to our organization.[218]

There were also some caveats to these claims of positive consultant–regulator relationships. Particularly in Massachusetts, consultants and regulators alike noted that they often disagree on the degree of investigation that sites require. As one consultant put it, "in the interaction I've had with regulators, absolutely I would say we're not on the same page. I mean, I think we're advocating for economic development . . . . Let's not get mired down in a research project."[219] One regulator, after saying that he "was always having these really constructive, very positive conversations with consultants," noted that others in government would hear "reams of complaints" from consultants, and concluded that "the consultants were having two sets of conversations," one of which was primarily devoted to gripes.[220] Concerns about the quality of consultants' advice also arose.[221] But the overall emphasis of the comments, from regulators, private attorneys, and consultants alike, was upon the existence of a constructive and technically-informed partnership to implement and improve the regulatory program. And consultants were essential to that partnership. Though part of the private sector, they were widely perceived as facilitators of better relationships between regulators and the regulated.

2. The Environmentalist Consultant

The foregoing discussion concludes that consultants perceive themselves as neutral facilitators trying to find efficient accommodations between the mandates of environmental laws and the goals of businesses. That finding alone contrasts with the standard expectation that private businesses generally oppose public regulation or seek to manipulate it to their own ends.[222] And a differently shaded picture also

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216. Mass. Attorney Interview 4, *supra* note 202.

217. Cal. Attorney Interview 12 (June 4, 2019).

218. Cal. Client Interview 2 (Nov. 20, 2017).

219. Mass. Consultant Interview 4, *supra* note 165. However, the consultant added, "Yes, I can certainly think of examples where my clients would love for things to be more lenient, and I don't . . . advocate for that because it's not in the interest of public health." *Id.*

220. Mass. Regulator Interview 2, *supra* note 151.

221. Cal. Attorney Interview 5, *supra* note 177 ("[T]heir experts, while often nominally experts, are often young people out of college with the right degree.").

222. *See supra* notes 79–119 and accompanying text.

emerged from the interviews and documents. Consultants, government officials, and lawyers all described, and the written record documents, consultants advocating an agenda—albeit gently and with modest impact[223]—of strengthening environmental law. In other words, consultants saw themselves not just as neutral facilitators seeking to serve their clients through an accommodational approach toward regulators, but also as ambassadors trying to advance environmental protection.[224]

The evidence of consultants' modest activism begins with their own descriptions of their professional identity. Particularly in California, there was a normative element, sometimes hinted at and sometimes explicitly mentioned, in the ways consultants described their work.[225] For example, the California Association of Environmental Professionals, which many consultants identify as representing the interests of their field, describes itself as "a non-profit association of public and private-sector professionals with a common interest in serving the principles underlying the California Environmental Quality Act."[226] Its president, in his February 2017 message to membership, began by noting that "[o]ur federal environmental policies and institutions are already under siege and I know that many AEP members are deeply troubled by this."[227] Similarly, individual consultants referred to themselves as "environmentalists,"[228] or talked about "working with clients to plan and develop projects in a sustainable and environmentally sound manner."[229]

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223. Cal. Attorney Interview 6, *supra* note 214 ("[T]hey have always offered themselves to me and my colleagues that work on CEQA, which is helpful. But they're just not usually a major force on bills.").

224. Cal. Consultant Interview 3, *supra* note 181. She explained:

> I've always thought it is the attorney's job to—they have a responsibility to advocate on behalf of their client, including exploiting whatever loopholes and shortcomings exist in adopted statutes, regulations, and practice. And I think the difference for environmental consultants . . . I think our job is to advocate on the legislative intent of CEQA.

Id.

225. There are intriguing parallels between these roles and idealistic descriptions of an ethical lawyer's role. *See* Robert W. Gordon, *Corporate Law as a Public Calling*, 49 MD. L. REV. 255, 255 (1990).

226. CAL. ASS'N ENVTL. PROF., https://www.califaep.org/ (last visited Sept. 7, 2019); *see also About*, CAL. ASS'N ENVTL. PROF., https://www.califaep.org/about.php (last visited Sept. 7, 2019) ("The specific and primary purposes of the association are to establish and operate a professional association of persons involved in and committed to improving the processing and implementation of environmental assessment, analysis, public disclosure, and reporting.").

227. Devin Muto, *President's Message – February 2017*, CAL. ASS'N ENVTL. PROF., https://web.archive.org/web/20170609055410/https://www.califaep.org/about-aep/president-message (last visited Sept. 21, 2019).

228. Cal. Consultant Interview 11 (Nov. 30, 2017) ("I'm an environmentalist and someone who cares about the environment and public health and environmental justice . . . .").

229. *E.g.*, Cal. Consultant Interview 2, *supra* note 206 ("[F]rom my personal perspective, as someone that's focused on stewardship of the environment, I certainly think that [the CEQA process] has value.").

These idealistic views extended to participatory processes as well as environmentally beneficial outcomes.[230] As one consultant asserted, after explaining some of his firm's pioneering efforts to provide translators at public meetings:

> [P]ublic participation and . . . public disclosure . . . [they're] basic, foundational aspect[s] of CEQA, and NEPA too. Not hiding, doing things in a vacuum, but letting people who are going to be affected by things know what's going on and giving them the opportunity to participate . . . . There's the science part of it, but then the public access and public disclosure are very key elements of both of those laws, in my view."[231]

Or, as another experienced consultant explained:

> I think the most fundamental thing CEQA did when it was passed is it opened up the door, right? It turned on the lights and blew the smoke out of the smoke-filled rooms . . . . It allows the public . . . to speak truth to power, to hold the decision-makers accountable . . . .[232]

Many consultants thought such views were typical in the field. One California consultant observed that "the vast majority of [California Association of Environmental Professionals'] members got into this profession because they have a strong belief in the goals of the environmental laws . . . ."[233] As another California consultant put it, "none of us are motivated solely by money . . . [E]ven the smartest people in our profession, if they were in some other profession, they could make a lot more money."[234] Attorneys echoed that view. As one remarked, "you probably would find empirical support for the assumption that the kind of person that becomes an environmental consultant is more likely to have very high commitment to environmental protection."[235]

That environmental consultants might express these views may seem unsurprising. After all, environmental protection and public disclosure can seem like things anyone would like. But to place these comments in context, it is worth noting that many people, even in politically liberal places like California, say very different things about environmental laws, and about regulation more generally. Indeed, the critiques are often particularly pointed when critics discuss the kind of procedural

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230. *E.g.*, Cal. Consultant Interview 8, *supra* note 181; Cal. Consultant Interview 11, *supra* note 228 ("I come to all of this with a very heavy interest in civic engagement and participatory planning.").

231. Cal. Consultant Interview 4, *supra* note 207.

232. Cal. Consultant Interview 8, *supra* note 181. These views of the consulting industry were not universally shared. One attorney charged that "where [consultants] have had some influence is turning the comments, the hearing on a draft EIR in most places [into] the most boring, uninformative waste of time you can imagine." *Id.*

233. Cal. Consultant Interview 9, *supra* note 207; Cal. Consultant Interview 5, *supra* note 180 ("[A] lot of the people we hire young, I think their dream job would have been to go work for The Nature Conservancy.").

234. Cal. Consultant Interview 4, *supra* note 207.

235. Cal. Attorney Interview 10, *supra* note 177.

environmental statutes that the California consultants were praising.[236] Regulated industry representatives and many agency staff have little love for these statutes, which they often blame for "analysis paralysis."[237] Many environmentalists question whether laws like CEQA or NEPA actually lead to better or more democratic decisions, and view them as useful primarily as tools for "monkey-wrenching"—that is, throwing spokes into the wheels of unwanted projects.[238] Even sympathetic academic writing questions whether the laws are premised on unrealistic hopes for synoptic, rational analysis and robust public debate, and suggests they may be useful primarily as penalty-default systems rather than as tools for fostering deliberation.[239] One California attorney, who bluntly dismissed CEQA as "a piece of shit," characterized his cynicism this way:

> [I]t's utterly ridiculous, and I do it, and I get paid boatloads of money to do it, and thank you very much fucked-up law, fucked-up judges, fucked-up people in the community. I'll get paid either way . . . . It's hugely time-consuming, largely irrelevant, and doesn't serve the world except it serves the economy of everybody in it.[240]

Consultants' positive views of CEQA were by no means a given. Instead, they differ from the views of many other participants in the environmental field.

Participants in the Massachusetts waste-site-cleanup program expressed similar views, though not as forcefully. As one consultant explained, "I would definitely say we're client advocates. You have to be, because your client is who's paying the bills for you. But . . . I think LSPs in general are people who are interested in preserving the environment and protecting it."[241] An attorney, while discussing consultants' rulemaking comments, put it similarly:

> I think that my clients are more focused on, "can I get from where I am to closure." And LSPs, when they're thinking about commenting on rules, I think they're concerned about that issue, yes, but also . . . "are you protecting the environment?" I do think LSPs vocalize a concern about protecting the environment more than lawyers or

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236. *See, e.g.*, STAFF OF S. COMM. ON OVERSIGHT & INVESTIGATIONS, 115TH CONG., MEMORANDUM ON THE FULL COMMITTEE OVERSIGHT HEARING TITLED, "THE WEAPONIZATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT AND THE IMPLICATIONS OF ENVIRONMENTAL LAWFARE" 2–4 (Apr. 23, 2018), https://docs.house.gov/meetings/II/II00/20180425/108215/HHRG-115-II00-20180425-SD027.pdf (discussing "the weaponization" of NEPA). For an academic summary of these critiques, see Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 341–42 (2004) (summarizing the views of the "NEPA skeptic").

237. *See, e.g.*, STAFF OF S. COMM. ON OVERSIGHT & INVESTIGATIONS, *supra* note 236.

238. Karkkainen, *supra* note 236, at 339–40.

239. *See, e.g.*, Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 925–26 (2002); Karkkainen, *supra* note 236, at 338 (arguing that NEPA does have value, but primarily as a deterrent to environmentally harmful projects rather than as a tool to foster deliberative decision-making and public participation).

240. Cal. Attorney Interview 5, *supra* note 177.

241. Mass. Consultant Interview 6 (Feb. 1, 2018).

> clients. I mean, I think they view their profession as a net benefit to the earth of doing good.[242]

Another attorney echoed that view:

> Once you get away from individual cases and you get to the program, that's where I'm more inclined to acknowledge a broader sense of purpose for the LSPs . . . . [I]t's not just having the program work better for clients, it's having a better program, period. They really . . . do care about this stuff, they like this stuff, it's interesting, and they want the program to work for everybody. . . . [P]eople spend—actually provide many, many free hours, involving themselves in stakeholder groups when there are regulation changes either the DEP is proposing or the LSPs have concluded on their own would be appropriate or necessary.[243]

More generally, consultants in both Massachusetts and California conveyed a positive view of environmental regulation, not just the specific programs in which they work. As one California consultant explained:

> I think there is an ambassador quality that comes with any profession . . . The big myth I'm working on dispelling, at the national level, we hear, with the current administration, day in and day out, talk about how the environment is holding the economy back. There's not a grain of truth in that . . . . So I do feel that as environmental professionals, we have a responsibility to kind of dispel those kinds of myths and misstatements.[244]

As that last quote captures, the consultants' environmentalism is of a distinctly business-friendly type. It rejects the assumption—which is widely adopted by many other businesses, environmental groups, and politicians—that environmental protection and business are necessarily in conflict.[245] And it also aligns, as some consultants acknowledged, with the consulting industry's own business interests.[246] But it still reflects a cultural commitment to the goals of environmental law.

3. Specific Initiatives and Controversies

On their own, consultants' proclamations that they are trusted information brokers, or that they work to advance the basic goals of environmental law, might just be cheap talk. But in several different ways, consultants have taken, or at least

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242. Mass. Attorney Interview 1, *supra* note 215.

243. Mass. Attorney Interview 4, *supra* note 202. That same attorney questioned whether LSPs bring some broader public mandate to individual client representation. *See* Freeman, *supra* note 194.

244. Cal. Consultant Interview 3, *supra* note 181.

245. *See* Alana Semuels, *Do Regulations Really Kill Jobs?*, ATLANTIC (Jan. 19, 2017), https://www.theatlantic.com/business/archive/2017/01/regulations-jobs/513563/ (describing political rhetoric attacking "job-killing regulations").

246. *E.g.*, Cal. Consultant Interview 6, *supra* note 184 ("[Y]es, businesses like ours prosper in part because of CEQA requirements.").

attempted, action consistent with these claims. Two examples, each of which illustrates both the trusted facilitator and the practical environmentalist roles, appear below. As readers will note, these are not dramatic stories—or, at least, they are not stories in which consultants played particularly dramatic roles. In the grand play of environmental law, environmental consultants are hardly ever the most noticeable actors on the stage.[247] Instead, the theme is relatively measured support for incremental improvements to regulatory systems. But that kind of incrementalism is often crucial to the success of a legal regime.

a. Creating the Massachusetts LSP Program

In multiple ways, consultants helped forge the LSP program and ensure its continued vitality. Their efforts began with the study group that recommended the creation of the program. Fellow participants described the group's consultants as key participants.[248] "[W]e were lucky," one regulator explained, "because the consultants we had were top-notch. They really knew their stuff . . . . [T]hey had a huge positive influence."[249] The regulator added:

> I also have to say that these consultants were pretty environmentally oriented. . . . [T]hey believed the site should be cleaned up. They believed people should be protected. They understood there was a real public health hazard for most of them. Now sometimes they felt we went overboard in terms of our protectiveness and we had reasonable discussions about what level of cleanup at a particular site or . . . what the standard should be . . . . But conceptually, they were very supportive . . . . [T]he environmentalists never pretended to be technical experts. The responsible parties were not technical experts. So between the consultants . . . and my staff, that was where all the technical expertise came from, and it was good to have both . . . . [W]e got a lot of credibility out of it by having good-quality, vociferous input from the consultants. So they felt heard and we often agreed with them.[250]

Once the working group issued its recommendations and the legislature enacted them into law, consultants continued helping to build a successful regulatory system. Massachusetts DEP needed to create the regulatory architecture for the LSP program, which meant, among other things, drafting an enormous regulatory

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247. *See supra* note 224 and accompanying text (noting consultants' relatively quiet roles in policy advocacy).

248. While consultants played important roles, they did not come up with the LSP concept. Mass. Consultant Interview 1, *supra* note 165 ("The fact that Rob Sargent, the guy from MassPIRG, is the one that suggested licensing consultants . . . I think says something.").

249. Mass. Regulator Interview 3, *supra* note 153. The consultants did oppose a model in which one firm would do the work and another would certify its completeness. "The consultants, as you would imagine, said, essentially, 'screw that.' If we're taking the responsibility and the liability, we at least want to be able to do the work and make some money at it on that side." Mass. Consultant Interview 1, *supra* note 165.

250. Mass. Regulator Interview 3, *supra* note 153; Mass. Regulator Interview 4 (Dec. 18, 2017) ("Because they are technically trained, you can have a technical conversation with them, and we had many . . . . ").

handbook for site cleanups.[251] Consultants remained heavily involved in that effort. As one explained:

> [T]he regulations were written by folks at the DEP, but we would sit in a room with them while they were writing certain sections and make suggestions . . . We were always thinking about, well, is this really a practical way to do it, or is there a better way? But the regulators were definitely on board with the fact that we kind of all worked together to make this happen. And it wasn't biased, in any way, other than, you know, everyone's goal was to protect public health and the environment.[252]

Similarly, consultants helped set up and give life to the governance structures of the new system. They serve on the LSP licensing board, which created and administered the LSP licensing exam, reviewed applications to become LSPs, and handled disciplinary proceedings against LSPs. In those roles, nonconsultants told me, the consultants were tough critics of their peers; they were determined to establish the credibility of their new profession and had little patience with what they saw as shoddy work.[253] In part because of these efforts, consultants, lawyers, and regulators all agreed that the quality of present-day work is high. "[I]n any system," one consultant explained, "there are people who will abuse it. Most of those, at this point . . . have been weeded out."[254]

This type of close relationship might raise concerns of regulatory capture,[255] but participants generally rejected those concerns. Both consultants and regulators generally agreed that while staff members at Massachusetts DEP's Bureau of Waste Site Cleanup listened to and trusted the consultants, they also remained strongly committed to their role of providing oversight.[256] Perhaps more tellingly, environmental activists agreed with this assessment. As one explained, when asked about capture, "I think there are parts of DEP where that has happened. I don't think it has happened in the Bureau of Waste Site Cleanup."[257] Another succinctly remarked that "DEP in Massachusetts was very, very good."[258]

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251. Massachusetts Contingency Plan, *supra* note 157.

252. Mass. Consultant Interview 3 (Jan. 31, 2018).

253. Mass. Regulator Interview 3, *supra* note 153 ("[T]hey were pretty hard on their peers because they wanted to make sure that the profession had credibility.").

254. Mass. Consultant Interview 1, *supra* note 165.

255. "Regulatory capture" typically refers to situations in which private groups coopt government regulators to serve those private groups' own ends. *See* Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1340 (2013).

256. *E.g.*, Mass. Regulator Interview 1, *supra* note 186 ("We continue to do enforcement actions against the same people who come to our meetings. That can be a little awkward. But it's not as if we ever choose not to do something because we have—otherwise have—a pretty good working relationship with someone.").

257. Mass. Advocate Interview 2, *supra* note 167; Mass. Advocate Interview 3 (May 16, 2019) ("My experience just shows me that when it comes to protecting drinking water, DEP does not cave.").

258. Mass. Advocate Interview 1 (Dec. 31, 2018).

In summary, consultants played, and continue to play, integral parts in designing, building, and maintaining a regulatory program that is widely perceived as highly successful. They did so both by serving as trusted intermediaries between regulators and the business sector and by bringing their own environmental values into the regulatory system.

b. CEQA Reform

The second example comes from California, where consultants have been deeply involved in efforts to redirect and reform CEQA compliance. Most prominently, they have helped integrate climate change assessment into CEQA compliance, and they have cast themselves as moderating voices in debates about whether CEQA inhibits housing development and good urban planning. In these efforts, as in the formation of the Massachusetts LSP program, consultants were not crusaders at the environmental frontier. They instead have focused on trying to ensure that expansions in CEQA's coverage were workable and that reforms did not undercut the statute's core goals. But they have also staked out clear positions as believers in and supporters of CEQA's requirements.

The intersection of CEQA and climate change emerged as an important legal issue in the mid-2000s, when climate activists realized that the George W. Bush Administration would never do anything meaningful to respond to the problem.[259] Attention then turned to potential remedies under existing laws, and in California, that meant a turn to CEQA.[260] Environmental groups, led by the Center for Biological Diversity, began submitting comments demanding that local governments address the climate impacts of their proposed development plans, and then followed up those comments with lawsuits.[261] Those groups soon gained a powerful ally, as the California Attorney General's office began its own litigation campaign.[262] The intersection of climate change and CEQA became one of the hottest topics in California environmental law and a subject of national policy and academic interest, with debates raging about whether climate analyses fit into CEQA

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259. *See* Dave Owen, *Climate Change and Environmental Assessment Law*, 33 COLUM. J. ENVTL. L. 57, 72 (2008) (describing federal inaction).

260. *See, e.g.*, Letter from Matthew Vespa et al. to The Honorable Daryl Busch and City Council Members, City of Perris (Mar. 4, 2010), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2010/20100305_docket-E046237_settlement-agreement.pdf; Nat. Res. Def. Council v. Reclamation Bd. of the Res. Agency of the State of Cal., No. 06 CS 01228 (Cal. Sup. Ct., Apr. 27, 2007) (rejecting an argument that CEQA required analysis of a development project's climate-change-related vulnerabilities).

261. *CEQA Becomes Latest Battlefield in Dealing with Global Warming*, CALIFORNIA ENVIRONMENTAL INSIDER (May 17, 2007), https://www.ceitoday.com (account required to access article).

262. *See* Michael B. Gerrard, *What the Law and Lawyers Can and Cannot Do About Global Warming*, 16 SE. ENVTL. L.J. 33, 37 (2007) (describing litigation brought early in this campaign against San Bernardino County).

at all, which projects should trigger such requirements, and how—if at all—the analyses ought to be done.[263]

In 2007, the California Association of Environmental Professionals entered the fray by publishing a white paper on CEQA and climate change.[264] The document took few strong positions, other than asserting that government agencies should have some discretion to choose the appropriate mode of analysis[265] and that climate change adaptation should be a part of the CEQA inquiry.[266] Its primary focus instead was on identifying multiple ways in which a climate change analysis could be performed.[267] But importantly, the document took as a given that some CEQA analysis would occur. It thus validated, and slightly advanced, the shift from treating greenhouse gas analyses as an environmental litigants' aspiration to treating those analyses as an accepted part of CEQA processes.

Over the next decade, the intersection of greenhouse gas regulation and CEQA analysis continued to be controversial, and it has generated a series of new legislative enactments, multiple court cases, and important regulatory changes.[268] Environmental consultants, working through a climate change committee at the California Association of Environmental Professionals,[269] continued to churn out white papers and comment letters, as well as meeting more informally with regulatory staff.[270] The themes of that work remained consistent with the initial

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263. *See, e.g.*, Katherine M. Baldwin, Note, *NEPA and CEQA: Effective Legal Frameworks for Compelling Consideration of Adaptation to Climate Change*, 82 S. CAL. L. REV. 769, 770–71 (2009); Owen, *supra* note 259, at 84.

264. *See generally* MICHAEL HENDRIX ET AL., ALTERNATIVE APPROACHES TO ANALYZING GREENHOUSE GAS EMISSIONS AND GLOBAL CLIMATE CHANGE IN CEQA DOCUMENTS (2007).

265. *Id.* at 10 ("[I]t is the responsibility of the Lead Agency to select the most appropriate methodology based on the project's unique circumstances.").

266. *See id.* at 16–17 ("The effects that GCC may have on a specific project also need to be considered in CEQA reviews . . . . It is hoped that a greater number of California agencies will assess climate risks.").

267. *Id.*

268. *See* ASS'N OF ENVTL. PROF'LS, BEYOND 2020 AND NEWHALL: A FIELD GUIDE TO NEW CEQA GREENHOUSE GAS THRESHOLDS AND CLIMATE ACTION PLAN TARGETS FOR CALIFORNIA 14–23 (2016) (summarizing legislation, executive orders, regulatory changes, and court cases).

269. One consultant explained how this work was funded:

> The work on AEP policy-type or guidance papers, actually all work for AEP by Consultants with "day jobs", is not funded by grants or outside parties . . . . Consultants either volunteer their time or fold it into overhead time that could be paid by their employer as another part of her or his job. Most often, I've observed it is a combination of both.

Email from Environmental Consultant to Author, May 30, 2018, 7:45 AM PST (on file with author).

270. *See, e.g.*, Letter from American Planning Association, California Chapter, to Christopher Calfee, Special Counsel, Natural Resources Agency (Aug. 17, 2009), http://resources.ca.gov/ceqa/docs/proposed_amendments_comments/American_Planning_Association_California_Chapter.pdf (emphasizing the importance of analysis of climate impacts upon projects and of associated mitigation measures).

white paper.[271] The consultants left the task of pushing the legal envelope to environmental groups, the Attorney General's office, and elected politicians; instead, the consultants focused on asking for regulations that provided manageable standards, preserved agency discretion, and clarified the interactions among different provisions of governing law.[272] But they coupled those efforts with the publication of a series of papers designed to guide local governments through the complex processes of calculating current emissions and projecting future outputs.[273] In other words, the core goal was to take emerging legal requirements and make them workable, both by obtaining clarity and flexibility from regulators and by providing regulated entities with the tools they needed to meet the emerging standards.[274]

Consultants have played similar, and sometimes more publicly assertive, roles in other CEQA reform debates. In recent years, some CEQA critics have blamed the statute for thwarting development within already-urbanized areas—which are precisely the areas where, for a host of environmental reasons, development ought to occur.[275] According to this critique, CEQA is widely used by entrenched, wealthy, and often white neighborhoods to thwart development, driving

271. *See supra* notes 264–68 and accompanying text.

272. *See, e.g.*, Brief for California Ass'n of Councils of Govts et al. as Amici Curiae Supporting Respondents, Cleveland Nat'l Forest Found. v. San Diego Ass'n of Govts, 397 P.3d 989 (Cal. 2017) (No. S223603), 2015 WL 7313506 at *6 (arguing, in a case involving CEQA review of greenhouse gas emissions for a regional growth plan, for a more deferential standard of review than environmental plaintiffs or the California Attorney General's office had urged).

273. *See* ASS'N OF ENVTL. PROF'LS, *supra* note 268; AEP CLIMATE CHANGE COMMITTEE'S "THE CALIFORNIA SUPPLEMENT TO THE UNITED STATES COMMUNITY-WIDE GREENHOUSE GAS (GHG) EMISSIONS PROTOCOL" (2013); ASSOCIATION OF ENVIRONMENTAL PROFESSIONALS (AEP), FORECASTING COMMUNITY-WIDE GREENHOUSE GAS EMISSIONS AND SETTING REDUCTION TARGETS (2012) (draft report); ASSOCIATION OF ENVIRONMENTAL PROFESSIONALS (AEP), CALIFORNIA COMMUNITY-WIDE GREENHOUSE GAS BASELINE INVENTORY PROTOCOL WHITE PAPER (2011).

274. Email from Environmental Consultant, *supra* note 269 ("The motivation of AEP and APACA is what I would describe as supporting effective and efficient government decision-making regarding environmental issues, or 'good government decision-making.'"). Of course, consultants were also trying to supply tools that those same consultants might be hired to use on clients' behalf. As one environmental group attorney wryly observed when discussing the evolution of climate analyses: "I don't know if it's symbiosis or parasitism, or, just kind of, almost like an ecosystem of influences that are continually generating the need for more expert support to deal with . . . how the law is evolving." Cal. Attorney Interview 13 (June 17, 2019).

275. *See* Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 HASTINGS ENVTL. L.J. 21, 21 (2017) ("Most of the challenged projects are precisely the types of projects and plans that today's environmental and climate policies seek to promote."). Hernandez qualifies her arguments by observing that CEQA "continues to play a vital role" in limiting environmental impacts and compelling disclosure. *Id.*

up housing costs and harming people throughout the state.[276] More generally, some critics allege that CEQA analysis for urban projects has become an expensive charade that has little to do with facilitating environmental protection or good planning.[277]

Consultants have brought different perspectives to, and have taken different positions in, these debates. Their views of the CEQA process were generally more positive than those held by the more critical attorneys, and also exhibited less of a range than those of attorneys. While some expressed frustration with particular ways the CEQA process is used,[278] they consistently expressed a positive vision of the law. As one put it, in a typical remark, "I think we generally believe in the CEQA process as one that plays an important role in government decision-making, [and] contributes to good government, when done well."[279] They also have translated that belief into advocacy. For example, a group known as the Enhanced CEQA Action Team, which brought together consultants and attorneys, formed for the express purpose of "improv[ing] the effectiveness and efficiency of the environmental review process in a manner that helps lead agencies protect the environment, promote public involvement, and make well-informed decisions."[280]

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276. Cal. Attorney Interview 5, *supra* note 177 (criticizing "a bunch of white people trying to protect their stuff"). For research suggesting that these problems arise primarily from discretionary zoning review rather than from CEQA, see generally MOIRA O'NEILL ET AL., GETTING IT RIGHT: EXAMINING THE LOCAL LAND USE ENTITLEMENT PROCESS IN CALIFORNIA TO INFORM POLICY AND PROCESS (2018).

277. *See, e.g.*, Chiang-Tai Hsieh & Enrico Moretti, *How Local Housing Regulations Smother the U.S. Economy*, N.Y. TIMES (Sept. 6, 2017), https://www.nytimes.com/2017/09/06/opinion/housing-regulations-us-economy.html ("The California Environmental Quality Act . . . was written to protect green areas from pollution and degradation from large industrial projects, like new refineries or power plants. Its main effect today is making urban housing more expensive."); Scott Peters, *CEQA an Obstacle for Needed Housing in California*, SAN DIEGO UNION-TRIBUNE (Mar. 3, 2017), https://www.sandiegouniontribune.com/opinion/commentary/sd-utbg-ceqa-obstacles-peters-20170302-story.html ("[L]et's end—not excuse—CEQA's undemocratic, counterproductive paperwork and litigation obstacles to good development."). Peters, a Democrat, served in the state Legislature at the time he wrote this op-ed.

278. *E.g.*, Cal. Consultant Interview 1, *supra* note 175 ("I have a real problem when CEQA kind of gets co-opted by groups like, you know, unions and others, where there's a kind of strong-arming going on to make sure that certain stakeholders are getting their way.").

279. Cal. Consultant Interview 6, *supra* note 184; Cal. Consultant Interview 3, *supra* note 181 ("I think people with experience have found that environmental process, if used wisely, can help you build a better project and have less risk during construction."); Cal. Consultant Interview 5, *supra* note 180 ("[F]or those agencies that really take it seriously, that's the part I like about it, is that it really is, in my mind, CEQA as it's supposed to be. The public's involved, everybody's open-minded. The alternatives are on the table and you can pick anything that is logical."); Cal. Consultant Interview 7, *supra* note 180 ("I believe in the process. I think that CEQA is a good law.").

280. *Legislative Proposals to Enhance Five Key Areas of the California Environmental Quality Act*, CEQA (2011), http://califaep.org/docs/ECAT-CEQA-Amendment-Proposal_Sept-2011.pdf. [hereinafter ECAT Legislative Proposals]. This mission, the report added, was "founded on the premise that CEQA is an important and

The group's attempts to pursue that goal were generally modest and incremental; they addressed matters like the severability of judicial remedies rather than proposing fundamental changes to, or exemptions from, the statute.[281] And conspicuously absent from these proposals were demands for fundamental statutory revisions, or for major exceptions or gaps in coverage. Consultants' other CEQA advocacy is similar in its focus and style. In a recent presentation to legislators, for example, the California Association of Environmental Professionals pointedly observed that "CEQA gets a bad rap" on housing issues, and that other factors deserve greater attention.[282] And in letters to the California Resources Agency (which issues and updates CEQA's implementing regulations), the California Association of Environmental Professionals sometimes offers minor technical corrections,[283] often supports proposed changes,[284] and sometimes offers more substantive critique,[285] but nowhere in its correspondence does it launch foundational attacks on CEQA itself. The overall thrust of these documents instead is to draw upon consultants' expertise to make the regulatory process work more smoothly.

In summary, none of these examples involves environmental consultants chaining themselves to bulldozers or pushing for radical new environmental legislation. Nor does any example involve consultants seeking to tear environmental law apart. Instead, the theme is quiet, measured communication and gentle activism, largely in favor of incremental improvements to the status quo. That theme sets environmental consultants apart from many louder participants in environmental law and politics,[286] and it may explain why their roles generally escape notice. But,

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constructive element of California public agency decision-making . . . . This essential state environmental law needs to be preserved through the incorporation of constructive enhancements." *Id.* at 1.

281. *See id.* at 4. Some of these positions—particularly those seeking more deferential standards of review—differ from those of the attorneys and environmental groups that often challenge CEQA documents.

282. CAL. ASS'N OF ENVTL. PROF'LS, 2017 CEQA ISSUES: HOUSING, INFRASTRUCTURE, AND THE CHANGING FEDERAL ENVIRONMENT 13 (2017), https://www.califaep.org/docs/Final_2017_AEP_Hot_Topics_3-15-2017.pptx.

283. *E.g.*, Letter from Eugene Talmadge, President, Cal. Ass'n of Envtl. Prof'ls, to Christopher Calfee, Governor's Office of Planning and Research (June 1, 2012) (on file with author) (using a redline to provide very minor technical corrections).

284. *See, e.g.*, *id.* ("The revised proposed amendments to the CEQA guidelines are clear, concise, and well-organized."); *see, e.g.*, Letter from Eugene Talmadge, President, Cal. Ass'n of Envtl. Prof'ls, to Christopher Calfee, Governor's Office of Planning and Research (Feb. 24, 2012) (on file with author) (supporting streamlining efforts and requesting minor clarifying changes).

285. *E.g.*, Letter from Devin Muto, Executive Vice-President, Cal. Ass'n of Envtl. Prof'ls, to Christopher Calfee, Senior Counsel, and Holly Roberson, Land Use Counsel, Governor's Office of Planning and Research (Oct. 12, 2015) (on file with author) (offering extensive redlined edits with detailed explanations).

286. *See* Douglas A. Kysar & James Salzman, *Environmental Tribalism*, 87 MINN. L. REV. 1099, 1102 (2003) (describing the dominance of "warring camps" in environmental policy debates).

as the next Part explains, that sort of quiet insider work has an important place in a functional environmental law system.

IV. IMPLICATIONS

Stripped to its core, the discussion so far is a story of businesses recognizing opportunities in regulatory constraints and showing some appreciation for the laws that create those opportunities. That may sound like unsurprising human behavior within a system of regulated capitalism. But that story nevertheless contrasts in several important ways with conventional accounts of the roles of private-sector, for-profit businesses, and this final Part therefore argues that these environmental consulting stories offer important lessons. They offer new angles on public-choice theory and privatization debates, showing how both private influence and privatization can support public law values. They also shed new light on the potential role of institutionalization in sustaining a movement, and on the roles played by the private sector in the continuing evolution of environmental law.

A. Public-Choice Theory

For years, public-choice theory has offered one of the primary mechanisms for understanding relationships between businesses and regulators, and for understanding government regulation more generally.[287] According to traditional, mainstream public-choice accounts, relationships between businesses and regulators are defined primarily by rent-seeking,[288] as businesses seek to distort regulation to serve their own ends, and regulators (and legislators) secure support by catering to powerful businesses' needs.[289] While some public-choice-influenced theorists have suggested that citizen oversight and judicial review might provide a counterweight to these problematic dynamics,[290] many public-choice theorists argue that self-described public-interest groups really are just another special interest, and that their activity just compounds the underlying problems.[291] It would be better, one might conclude, to just minimize government regulation.

Some recent work has suggested an alternative, and moderately more optimistic, twist on this classic theory. These researchers argue that by facilitating the growth of businesses whose goals align with broader public interests, lawmakers can increase political support for regulatory programs that advance those interests, and thus harness public-choice dynamics to serve genuinely public ends.[292] For example, laws that subsidize the growth of renewable energy businesses might build political support for a carbon tax. But this otherwise-promising theoretical model has two important limitations.

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287. *See supra* notes 77–98 and accompanying text.

288. "In the field of public choice economics, 'rent-seeking' means the attempt to increase one's share of existing wealth through political activity." Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 286 n.3 (2d Cir. 2015).

289. *See* Weiner, *supra* note 89, at 754–55.

290. *See* Sax, *supra* note 87, at 560

291. *E.g.*, Zywicki, *supra* note 90, at 899, 910–11.

292. *See* Meckling et al., *supra* note 92, at 1170–71: Biber, *supra* note 92, at 434, 452–53.

First, while self-interest can explain why emerging industries might support government regulation, the same logic also explains why incumbent industries would try to use regulation to crush their emerging competition.[293] For the model's positive feedback loops to begin, then, some other engine of reform must exist. Second, in these accounts of strategic symbiosis, business remains a largely amoral actor, which suggests it also remains dangerous.[294]At some point, one might expect, the no-longer-nascent industries will turn their attention to the traditional pursuit of anti-competitive protectionism rather than to advancement of a public-spirited legal regime. Crafting a regulatory system that genuinely serves public interests, and ensuring that the system survives the buffeting winds of interest group dynamics, therefore will remain tasks for public entities. And that work will likely be difficult. Clearly there are some political moments when self-interested dynamics weaken and public-spirited regulation can break through.[295] But even these modified public-choice accounts raise as many questions as they answer about how the results of these so-called republican moments can last.

However, the equation shifts if (as this Article finds) key elements of the private sector are driven by values as well as profit motives. Then, the pressures exerted by private industry, though still heavily influenced by economic incentives, will at least be moderated and redirected by a set of public-spirited values. And while a relatively small and quiet industry like environmental consulting might seem like a weak counterweight to development or resource-extraction giants, public-choice theory predicts that the consulting sector will be particularly well-positioned to influence administrative policy. After all, a foundational public choice claim is that discrete, focused groups with strong and shared interests will exert particularly powerful influence upon political processes.[296] That description fits the consulting industry well, even in comparison to other business interests, for its relationship with and interests in regulation are exceedingly direct. Consequently, the consulting industry gives environmental regulators allies who can help—indeed, *need* to help—turn republican moments into lasting law.

That does not mean, of course, that the presence of the environmental consulting industry removes any need to worry about interest group politics or public-choice dynamics in environmental law. The industry does have its own interests, and those will not always align with general public benefit. Tellingly, some—though by no means all or even most—attorneys alleged that these dynamics were at play in the increasing complexity of environmental compliance: "They've got a multi-billion dollar industry going here," one attorney remarked. "And they

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293. *See, e.g.*, Froma Harrop, Opinion, *Renewables Are Competitive, So Why Does Windy Wyoming Tax its Turbines?*, DEN. POST (Feb. 6, 2018), https://www.denverpost.com/2018/02/06/renewables-are-competitive-so-why-does-windy-wyoming-tax-its-turbines/ (tying taxes on renewable energy to political pressure from established fossil fuel industries).

294. *See generally* Biber, *supra* note 92 (explaining business interests' political participation in terms of economic self-interest, not values).

295. *See* Farber, *supra* note 3, at 65–66.

296. *See* OLSON, *supra* note 80, at 141–49.

don't want a shortcut. I mean, the volume is how you make money."[297] Additionally, the industry's power is modest, and it may well be limited by cultural factors. Public advocacy doesn't come easily to many scientists or engineers.[298] Finally, because this study focuses on just two sectors of a larger industry, it cannot support firm conclusions about the industry as a whole. But even with those caveats, a focus on the consulting industry can help us understand how functional and public-spirited regulatory governance can emerge, even in a field where the interest group dynamics described by public-choice theorists loom large.

B. Privatization

For similar reasons, the roles of environmental consultants hold lessons for debates about privatization. In their classic framing, these debates pit advocates who extoll the efficiency and creativity of the private sector against skeptics who worry about the loss of the procedures and values underpinning public law.[299] In the eyes of the former group, privatization allows work to be done more nimbly, often by people with more talent than those who choose to work within the civil service system.[300] To some adherents of this view—particularly those influenced by public-choice theory—even the existence of a public-values-driven public sector is also dubious.[301] But the latter group rejects this dark vision of the public sphere, at least partially. It sees value in public governance, and it worries that privatization means transferring important tasks to realms in which the procedural safeguards of public law no longer apply, and to people who will prioritize profit over the broader interests of the affected public.[302] The stark choice, then, is between private efficiency and public values.

My consulting examples—particularly the Massachusetts story—lend credence to the arguments in favor of privatization, but with some twists. The Massachusetts LSP program came into existence at a time of privatization fervor under a governor who strongly favored the privatization of governmental services, and was justified largely in terms concordant with traditional privatization rhetoric.[303] It is no wonder, then, that participants labeled it "the privatized model," a label that remains in widespread use to this day.[304] And by many important

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297. Cal. Attorney Interview 3, *supra* note 12.

298. *See* Denise Lach et al., *Advocacy and Credibility of Ecological Scientists in Resource Decisionmaking: A Regional Study*, 53 BIOSCIENCE 170, 171 (2003) ("Traditionally, many scientists have been reluctant to become involved in policy decisionmaking . . . .").

299. *See* Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1290 (2003).

300. *See* GOVERNMENT BY CONTRACT, *supra* note 22, at 4–6.

301. *See* Freeman, *supra* note 85, at 562.

302. *See supra* notes 99–108 and accompanying text.

303. Mass. Consultant Interview 1, *supra* note 165 ("So this sort of fit into the governor's worldview as well."); Mass. Regulator Interview 3, *supra* note 249 ("One of the mantras . . . of [the] taskforce was 'let the public sector do what it does best and let the private sector do what it does best.'").

304. *E.g.*, *What is a Licensed Site Professional*, LSP ASS'N, https://www.lspa.org/what-is-an-lsp (last visited June 22, 2018) ("In 1993, Massachusetts

measures, the model has worked well. The statistics are compelling; hundreds of Massachusetts sites have been cleaned up and have moved to closure, without repeating the public-health debacles that initially led to the program's creation.[305] Participants in the program perceive the model as highly successful, particularly when they compare it to more traditional regulatory programs in other nearby states.[306] "We get it assessed," one consultant explained, "we get it cleaned up, and we move on to some redevelopment much faster than in other New England states because of the privatized program."[307] Privatization, it would seem, worked as it was supposed to.

But the first twist on this story is that calling the Massachusetts system "the privatized program" or "rent-a-regulator" is misleading.[308] At the core of Massachusetts' "privatized" program is a longstanding and deep commitment to public regulation.[309] Massachusetts DEP continues to develop and update what one consultant described, without any hint of sarcasm, as "wonderful detailed regulations" for site cleanups.[310] Similarly, while LSPs make decisions about individual sites, audits—and the associated possibility of losing a license—provide a powerful incentive for careful work.[311] The regulatory system does contain

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created a model program that privatized the cleanup of hazardous waste sites in the Commonwealth.").

305. *See* Collins, *supra* note 166 (providing multiple slides with statistics).

306. Mass. Consultant Interview 10, *supra* note 205 (comparing the Massachusetts system to regulatory programs in New York and Vermont); Mass. Consultant Interview 3, *supra* note 252 ("[W]e just put everything we had into putting a program together that didn't exist, and it was a lot of hard work, but I think it's been very effective, and I think a lot of people . . . [who] were involved in it, they all feel very good about it.")

307. Mass. Consultant Interview 2, *supra* note 199.

308. *See* Seifter, *supra* note 13, at 1095.

309. Among my Massachusetts interview subjects, the strongest critique I heard was that this commitment was waning. One public health advocate argued that cuts to Massachusetts' DEP's enforcement capacity had limited the threat posed by audits, and thus the incentive for LSPs to do careful work. Mass. Advocate Interview 2, *supra* note 167. LSPs did not mention a similar dynamic, though some did mention concerns about staffing cuts at Massachusetts DEP.

310. Mass. Consultant Interview 8, *supra* note 73; Mass. Consultant Interview 6, *supra* note 241 ("[T]he regulations are quite detailed . . . . I think that's part of what makes the Massachusetts program work, is that . . . it's all laid out there, what you have to do. It's like a cookbook . . . albeit a pretty complicated one.").

311. He explained:

> [P]eople joke, when you get your LSP license, you have a target on your chest because you have to go out on a limb and stamp these documents and render your opinion, and it's true. And people are very careful about what they do, and they make sure it's in compliance with the MCP because once you do it, it's out there and you're—there's no statute of limitations on when you might get an audit . . . .

Mass. Consultant Interview 7, *supra* note 204. Mass. Consultant Interview 10, *supra* note 205 ("I don't make a decision on an LSP project without in the back of my mind thinking about that LSP board."). As of May 15, 2018, the LSP Board's searchable database listed 30 LSPs whose licenses had been revoked, surrendered, or suspended (plus two additional LSPs whose

important private elements; as many participants noted, the incentives of private lending institutions and potential purchasers also support careful site investigations and cleanup work.[312] And of course, the LSPs themselves are mostly private. But public regulation generates and backstops these private incentives, and no one involved in the program seems to lose sight of that important fact.[313] As the Licensed Site Professional Association explained in a recent letter to the state, "[t]he success of the Commonwealth's innovative, privatized waste site cleanup program is dependent on high performance from all three 'arms' of the program: highly competent and accountable LSPs, a strong regulatory framework and enforcement presence, and a credible and consistent licensing board."[314]

Neither the rhetoric of privatization nor the explicit emphasis on government regulation is quite as prevalent with CEQA implementation, but the benefits of partial privatization are readily apparent there as well. Rather than assign environmental assessments to in-house staff, who lack expertise in environmental

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licenses had been suspended for non-payment of fees). The database does not provide information about why these licenses were lost, but LSPs do sometimes surrender their licenses to settle disciplinary proceedings. *See* BD. OF REGISTRATION OF HAZARDOUS WASTE SITE CLEANUP PROF'LS, SUMMARY OF FINAL DISCIPLINARY ACTIONS (2013), https://www.mass.gov/files/documents/2017/10/04/LSP%20SUMMARY%20OF%20FINAL%20DISCIPLINARY%20ACTIONS.pdf.

312. Mass. Consultant Interview 3, *supra* note 252 (noting that the need for LSP opinions to "have weight and value in commerce" was one antidote to the "fox guarding the henhouse" problem); Mass. Client Interview 1 (May 11, 2018) ("[W]e're intending to sell the projects; we're looking to think about what the next buyer is going to say; we're looking for closure.").

313. *E.g.*, Mass. Consultant Interview 8, *supra* note 73 ("[T]he regulations provide a framework for how to get a site effective[ly] cleaned up, and that will pass a DEP audit, and it allows the private sector to manage that whole process, the checks and balances being, you know, the audits . . . that keep the LSPs honest in applying the regulations.").

314. Letter from Cole E. Worthy, LSPA President, and Wendy Rundle, LSPA Exec. Dir. to Secretary Richard Sullivan, Exec. Office of Energy and Envtl. Affairs 1 (Jan. 24, 2013) (on file with author). One LSP provided a more detailed description of how regulatory context matters when he disagrees with a client about what needs to be done at a site:

> I've had situations where a client has said to me . . . "if you're going to be my LSP, we're not going to take that step." And I'll say, "I'm sorry, I can't do that. If that's what you're saying, you can fire me and I won't be your LSP anymore." But then . . . I've never actually gotten fired in that situation, because I say, "here's why I need to do the right thing and here's why you need to the right thing as well . . . ." I mean, I think by me saying to them you have to do the right thing, here's what the law says, I think they realize that by them firing me I can put a memo into my file that says . . . "I was terminated right after telling the client they need to do x, y, and z." So if I ever got audited and this piece of information came forward, that would reflect very badly . . . ."

Mass. Consultant Interview 2, *supra* note 199. The consultant added that his own values would prevent him from taking actions that were not protective of public health. But, importantly, the presence of a regulatory structure removes the need for the consultant to frame disagreement with the client in moralistic terms, and instead allows a discussion based on client interests.

work and would face workload challenges taking on intense but short-term tasks, government entities can draw upon a cadre of highly experienced, specialized experts.[315] And despite all the complaints about CEQA costs and delays, that cadre of experts does move through a tremendous amount of work.[316] But the CEQA system, like the Massachusetts LSP program, retains important checks on private activity. Final decisions remain the responsibility of public entities.[317] And permissive standing requirements mean that the court system provides an active check on compliance.[318] In California, as in Massachusetts, the constraints of public law are not lost, and, indeed, one recurring complaint of industry insiders is that they are overly powerful.[319]

These dynamics underscore the potential for symbiotic relationships between privatization and regulation. That potential is disregarded by much of the privatization literature, which assumes that assigning tasks to private entities necessarily limits public authority.[320] And that assumption is not surprising; by definition, privatization does take tasks away from the public sphere, and its advocates often employ explicitly anti-governmental rhetoric and extoll the value of private competition.[321] Given that rhetoric, coupling privatization with more robust regulation might seem odd.[322] But the Massachusetts and California experiences

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315. *See supra* notes 40–49, 175–77 and accompanying text (describing the expertise of consultants generally and of CEQA consultants specifically).

316. *See* Governor's Office of Planning and Research, State Clearinghouse Summary of Postings, September 1–15, 2017 (2017) (providing annual statistics on completed CEQA documents).

317. California Native Plant Soc'y v. City of Santa Cruz, 99 Cal. Rptr. 3d 572, 586 (Cal. Ct. App. 2009) ("An agency may utilize staff or consultants to prepare the EIR but it must use its independent judgment in considering the information.") (internal citations omitted).

318. *See* Save the Plastic Bag Coal. v. City of Manhattan Beach, 254 P.3d 1005, 1011–15 (Cal. 2011) (upholding broad standing requirements, which extend to businesses as well as public interest groups and government entities).

319. *See* JENNIFER HERNANDEZ ET AL., IN THE NAME OF THE ENVIRONMENT (2015). *But see* Sean B. Hecht, *Anti-CEQA Lobbyists Turn to Empirical Analysis, but Are Their Conclusions Sound?*, LEGAL PLANET (Sept. 28, 2015), http://legal-planet.org/2015/09/28/anti-ceqa-lobbyists-turn-to-empirical-analysis-but-are-their-conclusions-sound/ (questioning Hernandez et al.'s methodology and conclusions).

320. *But see* Freeman, *supra* note 299; Minow, *supra* note 98, at 1230. Both Freeman and Minow provide conceptual accounts of successful public–private collaborations. My additional contributions are to provide a more specific example showing how that success can be achieved and to explore the potential role of the private sector in bolstering public norms.

321. *See* Matthew Diller, *Going Private—The Future of Social Welfare Policy*, 35 CLEARINGHOUSE REV. 491, 495–96 (2002) (describing this rhetoric); Freeman, *supra* note 299, at 1291–94.

322. That coupling is not a new idea, of course; much of utility law is founded on the premise that privatized functions should be coupled with public regulatory oversight. But extending that coupling outside the utility context, where natural monopolies provide a ready justification for regulatory oversight, and into realms where businesses compete is a less accepted idea.

illustrate another possibility, which is that privatization can be symbiotic with a robust regulatory scheme. If private delegates are embedded, as Massachusetts LSPs and California CEQA consultants are, in accountability networks involving robust public and private oversight, privatization can produce its theoretical benefits without creating its traditionally-feared costs.

Indeed, both case studies reveal ways in which partial privatization can actually bolster a regulatory scheme. One benefit can arise from shifts in workload. In Massachusetts, one goal of the LSP program was to free Massachusetts DEP from heavy involvement in the details of minor waste sites so staff could focus on larger problems and on improving the overall regulatory program.[323] As one regulator put it, when describing the pre-1993 program, "our own staff wasn't happy . . . because we were having to spend a lot of time on what we thought were really minor problems and we weren't getting to the sites that we thought presented the highest risks to public health and the environment." [324] Shifting authority to LSPs helped address this problem. As one consultant put it, "I really like the privatized system. It allows [Massachusetts DEP] to do a lot more . . . under the same budget."[325]

The second benefit can arise from a private role in advancing public values. In the classic story, these things are naturally opposed, and even in some of the more creative alternative accounts, the hope is that privatization might help public values diffuse into the private sphere.[326] Indeed, much of the literature on privatization emphasizes the importance of using additional legal constraints to minimize the slack between public values and contractor performance.[327] This is sensible advice, but something different has happened with consultants, at least in California. There, private-sector consultants strive to operate, at least sometimes, as the guardians of public values. They have adopted the idealistic goals underlying an important and controversial public law as a professional mission statement[328] and recruited employees who identify with those values.[329] They then explain those values to clients—many of whom are public sector employees.[330] More broadly, both in their client representation and in their advocacy, they have sought to strengthen the regulatory frameworks under which they operate.[331]

None of these observations undermine the extensive literature raising concerns about privatization. Nor should they alleviate concerns that private

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323. *See* MASS. DEP'T OF ENVTL. PROT., *supra* note 149, at A-1 to A-2 (describing the program's goals).

324. Mass. Regulator Interview 4, *supra* note 250.

325. Mass. Consultant Interview 7, *supra* note 204.

326. *See* Freeman, *supra* note 299, at 1290.

327. *See, e.g.*, Nina Mendelson, *Six Simple Steps to Increase Contractor Accountability*, *in* GOVERNMENT BY CONTRACT, *supra* note 22, at 253–60.

328. *See* ASS'N OF ENVTL. PROF'LS, https://www.califaep.org/ (last visited June 21, 2018) ("[W]e are a non-profit association of public and private sector professionals with a common interest in serving the principles underlying the California Environmental Quality Act (CEQA) which include environmental assessment, analysis, public disclosure, and reporting.").

329. *See supra* notes 206–217 and accompanying text.

330. *See supra* notes 166–168 and accompanying text.

331. *See supra* Section III.B.2.

interests will sometimes self-interestedly shape public law in ways that provide little public benefit. Instead, the narrower points are that there are alternative, and more promising, pathways for privatization than those emphasized by existing literature; that privatization and public regulation can boost each other; and that private attention to public norms can come from profit incentives and professional culture as well as from public-law constraints or contractual terms.

C. Social Movements

Just as an inquiry into environmental consulting offers qualified support for partial privatization, it also places the institutionalization of the environmental movement in a more positive light.

Viewing institutionalization as a benefit departs from some traditional views of the environmental movement, and of social movements more generally. In one classic critique, institutionalization means selling out. A famous quote from Dave Foreman, the founder of EarthFirst, succinctly captures this perspective: "Too many environmentalists," he argued, "have grown to resemble bureaucrats—pale from too much indoor light; weak from sitting too long behind desks; co-opted by too many politicians . . . . By playing a 'professional' role in the economic rational game, we, too, acquiesce in the destruction of the Earth."[332] Foreman's quote resembles critiques offered by many other activists, both within and outside the environmental movement, and by academics who argue that professionalization disempowers the people that a movement is supposed to serve and saps movements of their vitality.[333] Closely related are critiques primarily associated with the environmental justice movement; the movement has argued that the technocratic discourse of professionalized environmental management disempowers grassroots voices from disadvantaged communities.[334] For years, defenders of professionalization have offered counterarguments; they have claimed that no movement can achieve lasting gains without using professionalized staff and working with existing power structures.[335] But debates about the appropriate balance between professionalization and grassroots activism continue to rage.[336]

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332. SHABECOFF, *supra* note 125, at 252.

333. *See, e.g.*, Purdy, *supra* note 125; Claire Riegelman, *Environmentalism: A Symbiotic Relationship Between a Social Movement and U.S. Law?*, 16 MO. ENVTL. L. & POL'Y REV. 522, 524 (2009) (arguing that institutionalization has cost the environmental movement its public involvement and, therefore, its status as a social movement). For a summary of the extensive nonenvironmental work on this subject—much of which is significantly more nuanced than a short synopsis can convey—see generally Scott L. Cummings, *The Social Movement Turn in Law*, 43 L. & SOC. INQUIRY 360 (2017).

334. *See, e.g.*, Cole, *supra* note 132, at 689; Fine & Owen, *supra* note 41, at 936–38, 965–70; Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV 103, 103–107 (1996).

335. *See, e.g.*, David Schlosberg & John S. Dryzek, *Political Strategies of American Environmentalism: Inclusion and Beyond*, 15 SOC'Y & NAT. RESOURCES 787, 788–89 (2002) (quoting environmental group leaders who argue in favor of insider strategies).

336. *See, e.g.*, THEDA SKOCPOL, NAMING THE PROBLEM: WHAT IT WILL TAKE TO COUNTER EXTREMISM AND ENGAGE AMERICANS IN THE FIGHT AGAINST GLOBAL WARMING 6–7 (2013).

Environmental consultants have never been featured in those debates. The primary focus, both within the environment-specific literature and within the social-movement literature more generally, has been upon activist organizations, with critics and defenders analyzing the composition and staffing of those organizations and their relationships with bureaucracies, elected politicians, and regulated businesses.[337] Even in the literature that directly focuses on businesses, social movements, and the environment, that focus on activists and regulated entities remains, and environmental consultants are absent from the discussion.[338] Yet consultants have obvious relevance to these debates. The typical consultant is a highly trained professional whose paid career is to communicate—often in data tables and dry, technical prose—with businesses and bureaucrats as they work to ensure compliance with the hard-won results of environmentalists' political campaigns.[339] An environmental consultant is thus the pinnacle of the environmental movement's professionalization.

To an advocate of stronger grassroots environmentalism, this may sound troubling. Yet a close look at the work of environmental consultants makes it hard to imagine the environmental movement succeeding without people playing this kind of role. There are several reasons why.

First, environmental consultants help clients figure out how to comply with environmental laws. That observation may sound too obvious to be worth mentioning, but it matters. Though basic values questions do often arise, the primary arguments against environmental laws usually come down to cost and complexity, with critics alleging that regulated entities become unnecessarily and expensively entangled in legal webs.[340] An industry that can help untangle those webs, and can do so at billable rates that are often less than half of those of attorneys,[341] therefore has an important role in making environmental law workable. That is not a trivial accomplishment. Sometimes the frustrations of regulated entities are just

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337. *See* Cummings, *supra* note 333 (summarizing social movement literature); *see, e.g.*, Jonathan P. Doh & Terrence R. Guay, *Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective*, 43 J. MGMT. STUD. 47, 47 (2006); Mariette van Huijstee & Pieter Glasbergen, *NGOs Moving Business: An Analysis of Contrasting Strategies*, 49 BUS. & SOC'Y 591, 591–93 (2010).

338. *See* Sarah A. Soule, *Social Movements and Markets, Industries, and Firms*, 33 ORG. STUD. 1715, 1715 (2012) (reviewing literature on social movements and business organizations); Erin M. Reid & Michael W. Toffel, *Responding to Public and Private Politics: Corporate Disclosure of Climate Change Strategies*, 30 STRATEGIC MGMT. 1157, 1157–62 (2009) (summarizing writing in this field); *see, e.g.*, Schlosberg & Dryzek, *supra* note 335, at 787–89; Ian Bogdan Vasi & Brayden C. King, *Social Movements, Risk Perceptions, and Economic Outcomes: The Effect of Primary and Secondary Stakeholder Activism on Firms' Perceived Environmental Risk and Financial Performance*, 77 AM. SOC. REV. 573, 573 (2012).

339. *See supra* notes 37–73 and accompanying text (describing consultants' work).

340. *See* LAZARUS, *supra* note 37, at 99 (describing Ronald Reagan's reservations about environmental law).

341. Mass. Client Interview 1, *supra* note 312.

strategically exaggerated griping,[342] but for many businesses and public entities, environmental compliance is a genuine headache, which requires serious and sustained work.[343] A cadre of people who can help businesses and governments navigate those challenges is therefore an indispensable bulwark against the backlashes that inevitably beset any social movement.[344]

Relatedly, that professional cadre can also compensate against the inability of movements to provide sustained attention to all the details of environmental compliance. Movements tend to draw their most powerful energy from short-lived, high-profile controversies.[345] For example, a project like the Keystone Pipeline is a classic rallying point for the environmental movement.[346] Yet environmental challenges rarely involve just a few spectacular events; instead, many modern environmental challenges arise from the accretionary effects of thousands of individual actions and decisions.[347] And while the proliferation of local environmental groups, often armed with petition rights and citizen suit provisions, has enabled the environmental movement to contest many of these fronts, its resources still are too limited for it to participate in every decision where environmental compliance is at stake.[348] Moreover, much of environmental law attempts to prevent problems from occurring, which is a salutary goal but also means avoiding exactly the sorts of debacles that could arouse political support.[349] Consequently, implementing environmental law often means applying sustained and somewhat meticulous attention to management challenges that have not risen, and hopefully never will rise, to a level of public salience. That creates a profound

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342. *See* Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159, 176–84 (1997) (describing chronic overestimation of compliance costs).

343. *See* J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 767 & n.23 (2003) (citing sources on the prevalence of noncompliance and the belief among corporate environmental managers that achieving full compliance is difficult, if not impossible).

344. *See generally* LAZARUS, *supra* note 37 (describing repeated cycles of advancement and backlash).

345. *See* Farber, *supra* note 3, at 66 (describing the importance of periods of heightened public attention).

346. *See* Matthew Yglesias, *The Difference Between Organizing and Policy Analysis*, SLATE (Jan. 24, 2014), http://www.slate.com/blogs/moneybox/2014/01/24/keystone_xl_is_a_huge_organizing_success.html (noting that the Keystone Pipeline helped environmental groups rally support).

347. *See* Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141, 143–44 (2012).

348. *See* David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 ARIZ. ST. L.J. 3, 52 (2018) (describing how resource limits force environmental groups to pick their battles); *see also* Robert J. Brulle, *The Climate Lobby: A Sectoral Analysis of Lobbying Spending on Climate Change in the USA*, *2000 to 2016*, 149 CLIMATIC CHANGE 289, 289 (2018) (showing that industries vastly outspent environmental organizations).

349. *See* Eric Biber, *Climate Change and Backlash*, 17 N.Y.U. ENVTL. L.J. 1295, 1298–99 (2008) (noting this problem with preventive regulation).

mismatch between the capabilities of a nonprofessionalized grassroots movement and the goals it often wishes to accomplish.[350]

Perhaps some of those challenges could simply be handled by regulators and regulated entities, with environmental groups occasionally weighing in. And, in fact, there are professionals, like corporate health and safety managers, who work within regulated entities and play important facilitative roles in ensuring compliance.[351] But on the whole, a basic environmentalist-regulator-regulated model is short of facilitators; it lacks any entity with strong incentives to see each of the other parts of the system succeed. By contrast, an environmental consultant, works at a firm that depends upon both environmental law and a thriving business sector for its viability,[352] is likely staffed by people who share the environmental movement's basic goals,[353] and will have at least some of the professional education and expertise to maintain credibility with the other participants in environmental policy implementation. That will not always occur, of course; some consultants do shoddy work and a few have gone to prison for professional malfeasance.[354] But the basic incentive structure under which the consulting field operates encourages it to strengthen environmental law and to do so in ways that grassroots activism can support but cannot replicate. Those benefits of institutionalization do not mean that grassroots activism is unimportant or that tensions between activism and institutionalization are any less real. But they do explain how professionalization and institutionalization could be essential to a social movement's lasting success.

CONCLUSION

One of the most intriguing questions about regulation—both within and outside the environmental field—is why it often succeeds. The United States now has cleaner air, cleaner rivers, and fewer uncontrolled hazardous waste sites than it did in the dawn of the environmental law era, and it has coupled those changes with massive economic growth.[355] While huge unsolved challenges remain, they tend to

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350. *See* Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1156 (2009) (noting this challenge of turning moments of attention into lasting change).

351. As one consultant-turned-client noted, the consultant's primary client contact, at least when working for a larger company, is often an environmental manager and therefore a person who is likely to share the consultants' professional orientation toward environmental compliance. Cal. Client Interview 1 (June 12, 2019).

352. *See* LIFSCHUTZ, *supra* note 7, at 5–7 (noting that corporate profits and robust government regulation both help the industry).

353. *See supra* notes 222–231 and accompanying text.

354. *See, e.g.*, United States v. Ellen, 961 F.2d 462, 464 (4th Cir. 1992) (upholding a conviction for illegally filling wetlands); Jason Fazone & Cynthia Dizikes, *2 Sentenced for Falsifying Reports on Soil Samples at Hunter's Point*, S.F. GATE (May 3, 2018), https://www.sfgate.com/crime/article/Two-sentenced-for-falsifying-reports-on-soil-12886564.php; Roger Pearson, *Consultant Pleads Guilty to Illegal Relocation of Frogs*, CAL. ENVTL. INSIDER, Nov. 30, 2000.

355. *See, e.g.*, U.S. ENVTL. PROT. AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020 (2011) (finding major gains, with value greatly outweighing the associated economic costs); William L. Andreen, *Water Quality Today—Has the Clean*

occur for problems, like greenhouse gas emissions or non-point-source water pollution, that have fallen outside the traditional boundaries of regulatory oversight.[356] Theoretically, these achievements are somewhat puzzling; many models of political and administrative behavior would have predicted much less success.[357] It is therefore important, particularly at a time when many political leaders seem eager to dismantle public regulation, to understand the features of regulatory systems that have allowed these successes to occur.

This Article has focused on one portion of that inquiry. It demonstrates that private environmental consultants, motivated partly by profit and partly by values, strive to play quiet but significant roles in improving regulatory governance. More generally, it demonstrates that the focus of academic and policymaking debates, including discussions of privatization and of the institutionalization of social movements, should expand beyond the traditional foci on activists, regulated business, and governments, and should also examine the roles of business entities that might help bolster regulatory regimes. I make no claim that private consultants will always play those salutary roles or that they are unique in doing so; nor have I attempted to quantify the extent of their influence. Additional research into other parts of the environmental consulting field, and into other kinds of business entities, may reveal parallel dynamics or very different forms of influence. But at the very least, these examples show that private businesses can help privatization to succeed, a social movement to endure, and functional regulation to take place.

APPENDIX I: TABLE OF INTERVIEWS

Reference used in article text	Date	Type of Interviewee	Location/Means of Communication
Scoping			
Scoping Interview 1	April 3, 2017	envtl. attorney	in person (San Francisco)
Scoping Interview 2	April 27, 2017	envtl. consultant	telephone
Scoping Interview 3	May 5, 2017	envtl. attorney	telephone
Scoping Interview 4	May 17, 2017	envtl. attorney	in person (San Francisco)
Scoping Interview 5	May 19, 2017	envtl. consultant	telephone
Scoping Interview 6	July 21, 2017	envtl. consultant	telephone

Water Act Been a Success?, 55 ALA. L. REV. 537, 569–78 (2004) (comparing Clean Water Act benefits and costs).

356. *See* Dave Owen, *After the TMDLs*, 17 VT. J. ENVTL. L. 845, 858 (2016) (describing the Clean Water Act's exemptions for nonpoint source pollution).

357. *See, e.g.*, Farber, *supra* note 3, at 59 ("Yet, from the perspective of positive political theory, the puzzle is not that Congress produces public goods such as clean air so inefficiently, but that Congress manages to produce any public goods at all.").

Scoping Interview 7	September 1, 2017	envtl. consultant	telephone
Scoping Interview 8	September 21, 2017	envtl. consultant	telephone
California			
Cal. Consultant Interview 1	September 29, 2017	envtl. consultant	telephone
Cal. Consultant Interview 2	October 6, 2017	envtl. consultant	telephone
Cal. Consultant Interview 3	October 9, 2017	envtl. consultant	telephone
Cal. Consultant Interview 4	October 10, 2017	envtl. consultant	telephone
Cal. Consultant Interview 5	October 13, 2017	envtl. consultant	in person (San Francisco)
Cal. Consultant Interview 6	October 17, 2017	envtl. consultant	telephone
Cal. Consultant Interview 7	October 24, 2017	envtl. consultant	telephone
Cal. Consultant Interview 8	November 8, 2017	envtl. consultant	telephone
Cal. Consultant Interview 9	November 16, 2017	envtl. consultant	telephone
Cal. Consultant Interview 10	November 21, 2017	envtl. consultant	telephone
Cal. Consultant Interview 11	November 30, 2017	envtl. consultant	telephone
Cal. Attorney Interview 1	October 10, 2017	private firm envtl. attorney	in person (San Francisco)
Cal. Attorney Interview 2	October 25, 2017	government envtl. attorney	telephone
Cal. Attorney Interview 3	October 30, 2017	private firm envtl. attorney	telephone
Cal. Attorney Interview 4	November 1, 2017	envtl. group attorney	telephone
Cal. Attorney Interview 5	November 6, 2017	private firm envtl. attorney	in person (San Francisco)
Cal. Attorney Interview 6	November 7, 2017	government envtl. attorney	telephone
Cal. Attorney Interview 7	November 8, 2017	private firm envtl. attorney	telephone
Cal. Attorney Interview 8	November 8, 2017	private firm envtl. attorney	telephone
Cal. Attorney Interview 9	November 8, 2017	private firm envtl. attorney	telephone
Cal. Attorney Interview 10	November 9, 2017	private firm envtl. attorney	telephone
Cal. Attorney Interview 11	November 15, 2017	government envtl. attorney	telephone

Cal. Attorney Interview 12	June 4, 2019	envtl. group attorney	telephone
Cal. Attorney Interview 13	June 17, 2019	private envtl. attorney	telephone
Cal. Client Interview 1	June 12, 2019	local government planner	telephone
Cal. Client Interview 2	November 20, 2017	energy infrastructure development company employee	telephone
Massachusetts			
Mass. Consultant Interview 1	November 30, 2017	envtl. consultant (LSP)	telephone
Mass. Consultant Interview 2	December 5, 2017	envtl. consultant (LSP)	telephone
Mass. Consultant Interview 3	January 31, 2018	envtl. consultant (LSP)	telephone
Mass. Consultant Interview 4	January 31, 2018	envtl. consultant (LSP)	telephone
Mass. Consultant Interview 5	February 1, 2018	envtl. consultant (LSP)	telephone
Mass. Consultant Interview 6	February 1, 2018	envtl. consultant (LSP)	telephone
Mass. Consultant Interview 7	February 1, 2018	envtl. consultant (LSP)	telephone
Mass. Consultant Interview 8	February 1, 2018	envtl. consultant (LSP)	telephone
Mass. Consultant Interview 9	February 14, 2018	envtl. consultant (LSP)	telephone
Mass. Consultant Interview 10	February 28, 2018	envtl. consultant (LSP)	telephone
Mass. Attorney Interview 1	December 11, 2017	private firm envtl. attorney	telephone
Mass. Attorney Interview 2	December 14, 2017	private firm envtl. attorney	telephone
Mass. Attorney Interview 3	December 18, 2017	private firm envtl. attorney	telephone
Mass. Attorney Interview 4	April 19, 2018	private firm envtl. attorney	telephone
Mass. Regulator Interview 1	December 7, 2017	regulator	telephone
Mass. Regulator Interview 2	December 8, 2017	regulator	telephone
Mass. Regulator Interview 3	December 14, 2017	regulator	telephone
Mass. Regulator Interview 4	December 18, 2017	regulator	telephone
Mass. Regulator Interview 5	December 21, 2017	regulator	telephone
Mass. Client Interview 1	May 11, 2018	real estate developer	telephone

Mass. Client Interview 2	May 17, 2018	real estate developer	telephone
Mass. Advocate Interview 1	December 31, 2018	envtl. advocate	telephone
Mass. Advocate Interview 2	May 15, 2019	public health advocate	telephone
Mass. Advocate Interview 3	May 16, 2019	community advocate	telephone

APPENDIX II: LIST OF CALIFORNIA ASSOCIATION OF ENVIRONMENTAL PROFESSIONALS DOCUMENTS RELATED TO CEQA AND CLIMATE CHANGE

Document	Date
Alternative Approaches to Analyzing Greenhouse Gas Emissions and Global Climate Change in CEQA documents	June, 2007
California Community-Wide Greenhouse Gas Baseline Inventory Protocol White Paper	June, 2011
SB375 Consistency and CEQA	May, 2012
Forecasting Community-Wide Greenhouse Gas Emission and Setting Reduction Targets	May, 2012
AEP Climate Change Committee's "The California Supplement to the United States Community-Wide Greenhouse Gas Emissions Protocol"	December, 2013
Beyond 2020: The Challenge of Greenhouse Gas Reduction Planning by Local Governments in California	March, 2015
Amicus Brief, *Cleveland National Forest Foundation v. San Diego Association of Governments* (jointly filed with many other organizations)[358]	September, 2015
Letter from AEP Climate Change Committee to California Air Resources Board re: Comments on CARB's June 17, 2016, *2030 Target Scoping Plan Update*	July, 2016
Final White Paper: Beyond 2020 and *Newhall*: A Field Guide to New CEQA Greenhouse Gas Thresholds and Climate Action Plan Targets for California	October, 2016
Comment Letter on CARB's January 20, 2017 Draft 2017 Climate Change Scoping Plan Update, The Proposed Strategy for Achieving California's 2030 Greenhouse Gas Target	April, 2017
Production, Consumption and Lifecycle Greenhouse Gas Inventories: Implications for CEQA and Climate Action Plans	August, 2017

358. 397 P.3d 989 (Cal. 2017) (No. S223603), 2015 WL 7313506.

APPENDIX III: CALIFORNIA ASSOCIATION OF ENVIRONMENTAL PROFESSIONALS DOCUMENTS RELATED TO CEQA STREAMLINING AND RELATED REFORMS

Document	Date
Legislative Proposals to Enhance Five Key Areas of the California Environmental Quality Act (prepared by the Enhanced CEQA Action Team)	September, 2011
Letter to Christopher Calfee Re: Comments on the Proposed Addition to the California Environmental Quality Act (CEQA) Guidelines Implementing SB 226 (Simitian)	February 24, 2012
Letter to Christopher Calfee, Governor's Office of Planning and Research, re: Comments on Revised Proposed Amendments to Public Resources Code Section 21094.5.5	June 1, 2012
American Planning Association, California Chapter; Association of Environmental Professionals; and Enhanced CEQA Action Team, Recommendations for Updating the State CEQA Guidelines	August 30, 2013
Amicus Brief, *California Building Industry Ass'n v. Bay Area Air Quality Management District* (*with the California Chapter of the American Planning Association*)[359]	April 15, 2014
Letter to The Honorable Bob Wieckowski, Chair, Senate Environmental Quality Committee, re: SB 122 (Jackson & Hill) – Support	April 8, 2015
Amicus Brief, *Sierra Club v. County of Fresno et al*.[360]	May 6, 2015
"Taking CEQA Forward": Results from the 2015 AEP Institute Event	July, 2015
Letter to Chris Calfee, Senior Counsel, and Holly Roberson, Land Use Counsel, Governor's Office of Planning and Research, re: AEP's Comments on OPR's August 11, 2015 *Proposed Updates to the CEQA Guidelines*	October 12, 2015
Letter from Devin Muto, AEP, to Holly Roberson, Governor's Office of Planning and Research, Re: AEP Comments on *Discussion Draft: Proposed Changes to Appendix G of the CEQA Guidelines Incorporating Tribal Cultural Resources*	December 18, 2015
Letter to Christopher Calfee, Senior Counsel, Governor's Office of Planning and Research, Re: AEP Comments on OPR's January 20, 2016 *Revised Proposed Updates to the CEQA Guidelines on Evaluating Transportation Impacts in CEQA*	February 29, 2016

359. 362 P.3d 792 (Cal. 2015) (No. S213478), 2014 WL 1765287.
360. 431 P.3d 1151 (Cal. 2018) (No. S219783), 2015 WL 13811870.

Letter to The Honorable Das Williams, Chair, Assembly Natural Resources Committee, re: Assembly Bill 1569 (McCarty) – Support	March 30, 2016
Letter to The Honorable Das Williams, Chair, Assembly Natural Resources Committee, re: Assembly Bill 1886 (Steinorth) – Suggested Amendments	March 30, 2016
Letter to Christopher Calfee, Senior Counsel, Governor's Office of Planning and Research, Re: AEP Support and Comments to OPR Discussion Draft of Proposed Amendments to CEQA Guidelines Section 15126.2(a) and *Consideration of Significant Effects and Hazards in the CEQA Guidelines*	November 21, 2016