



# Law for the Ecological Age

(VJEL, v.9, Issue 3, Spring 2008)

Joseph H. Guth, J.D., Ph.D.

Legal Director

Science & Environmental Health Network

[www.sehn.org](http://www.sehn.org)

**Wild Law Workshop**

**UK Environmental Law Association**

**GAIA Foundation**

**September 26-28, 2008**

**London, England**

# Key Elements of a Law's Decision-making Structure

1. The substantive resolution of conflicting interests that the law seeks to achieve
2. Burden of proof -- who must prove that the law should take action -- defines default position of the law

# Environmental Laws/Regulations

“Each agency shall . . . propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs”

Executive Order 12866, “Regulatory Planning and Review,” § 1(b)(6) (September 30, 1993), (available at: <http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf>). *See also* “Regulatory Analysis,” OMB Circular A-4, Office of Management and Budget (September 17, 2003) (providing detailed OMB guidance to all federal agencies on conduct of regulatory cost-benefit analysis under E.O. 12866) (available at: [www.whitehouse.gov/omb/circulars/a004/a-4.pdf](http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf)).

# Exceptions

- Water quality standards of the Clean Water Act.
- Health-based NAAQS's for certain pollutants under the Clean Air Act.
- Protections for endangered species under the Endangered Species Act.
- Clean Air Act's cap-and-trade system for sulfur dioxide.
- Recent legislative proposals for capping carbon dioxide emissions.
- Laws implementing precautionary principle. *See* "Precautionary Policy Clearinghouse" of Be Safe for compilation of laws, ordinances and policies reflecting precautionary principle at [www.besafenet.com](http://www.besafenet.com).

# Modern Common Law of Negligence

“Where an act is one which a reasonable man would recognize as involving a risk of harm to another, **the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act** or of the particular manner in which it is done.”

*Restatement 2d of Torts* § 291 (emphasis added). *See also* Keeton et al., *Prosser and Keeton on Torts* § 31 (1984).

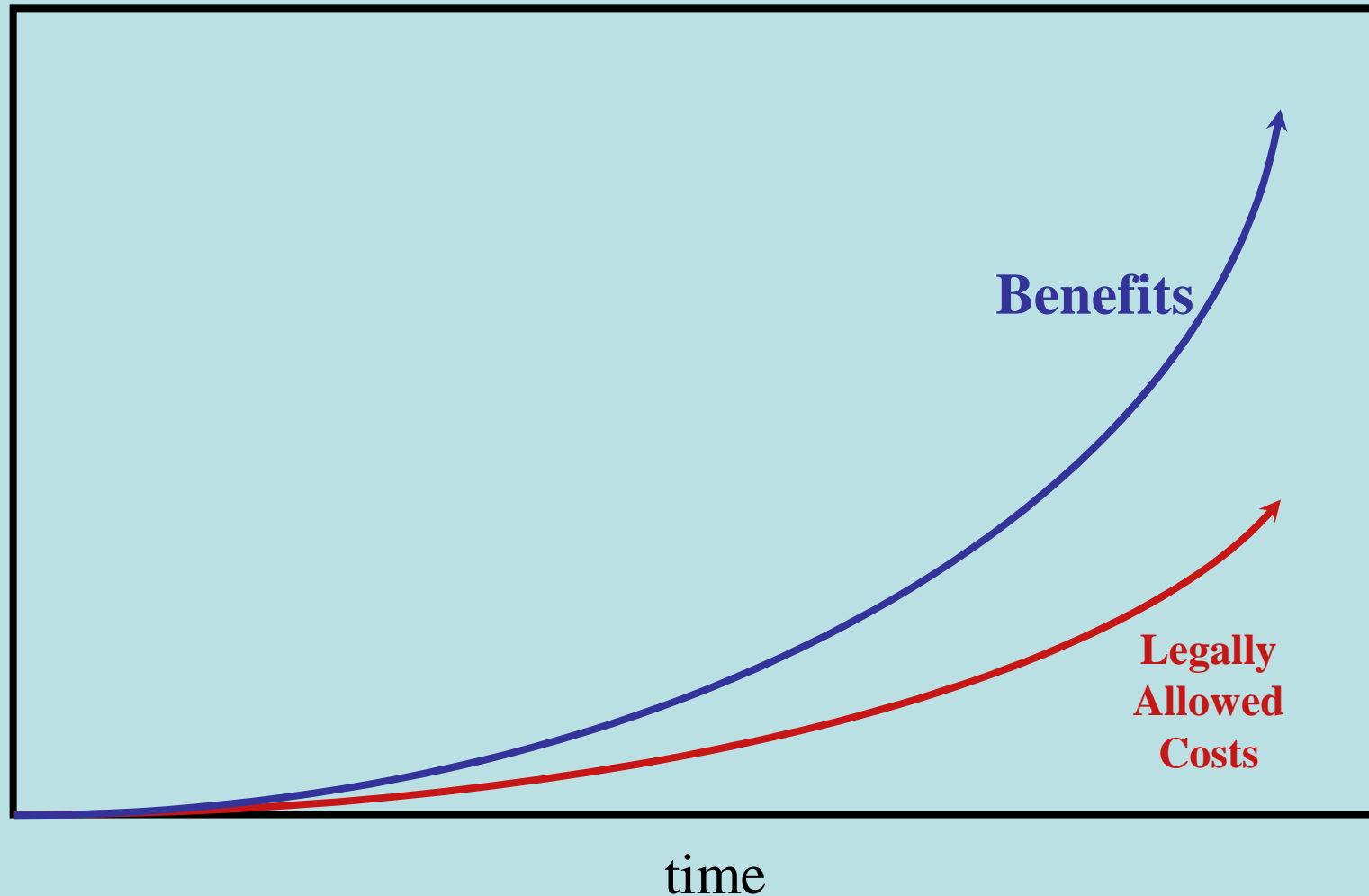
# Modern Common Law of Nuisance

“An intentional invasion of another’s interest in the use and enjoyment of land is **unreasonable** [and therefore a nuisance] if

(a) **the gravity of the harm outweighs the utility of the actor’s conduct . . .**”

*Restatement 2d of Torts* § Section 826(a). *See also Restatement 2d of Torts* § 826, comment (c) ( nuisance places burden of proof on plaintiffs and requires a balancing of the interests of the person harmed, of the actor and of the community); Keeton et al., *Prosser and Keeton on Torts* §§ 88, 88A (pp. 629-32) (same) (1984).

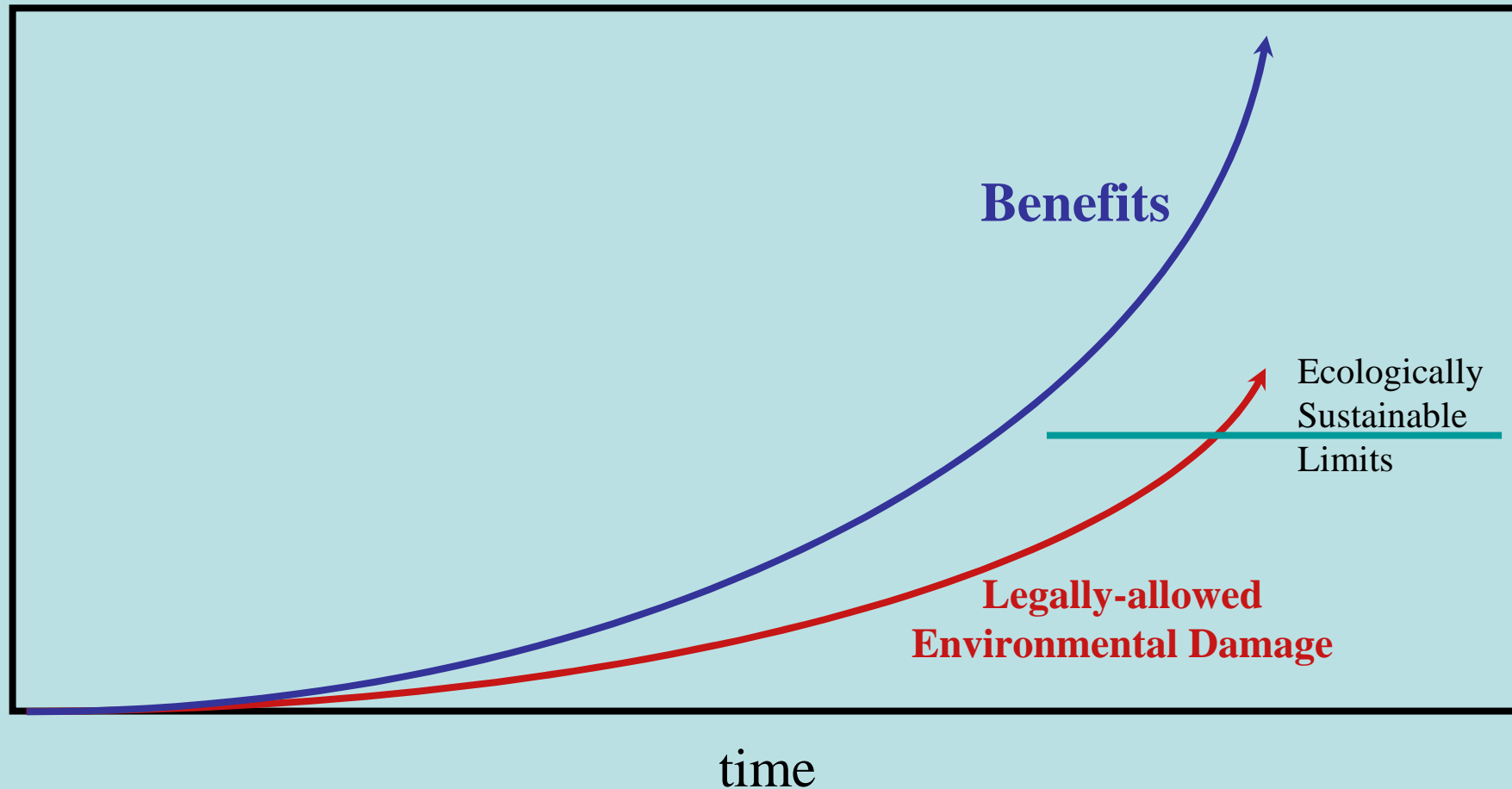
The Law Promotes All Activity Having Net Benefit,  
Allowing Both Benefits And Costs To Grow Forever



# The Earth -- Our Only Home

QuickTime™ and a  
TIFF (Uncompressed) decompressor  
are needed to see this picture.

# Cumulative Environmental Costs Can Surpass The Earth's Ecologically Sustainable Limits



# Law For the Ecological Age

## 1. A New Test For Reasonableness

Current test for reasonableness

*Does act provide net social benefit?*

New test for reasonableness

*Does act contribute to ecological degradation?*

# Law For the Ecological Age

## Who Bears the Burden of Proof?

- allocation defines interest the law chooses to protect in cases of doubt

## Prevailing Law

*Plaintiffs (government) bear burden of proof*

- protects economic interests from liability (regulation)

## Under New Law

*Enterprises must bear burden of proof*

- would protect ecological integrity of the Earth

# Tort of Ecological Degradation

- Sec. 1      A person is subject to liability for ecological degradation if his or her conduct is a legal cause of an unreasonable ecological threat.
- Sec. 2.     An ecological threat is any effect on the natural world that may contribute to ecological degradation.
- Sec. 3.     An ecological threat is *unreasonable* unless the person whose whose conduct is a legal cause of the threat *demonstrates by a preponderance of the evidence that the threat does not contribute to ecological degradation.*

## Tort of Ecological Degradation

- Sec. 4 A person whose conduct is a legal cause of an unreasonable ecological threat may be relieved of some or all liability for ecological degradation if the person demonstrates by a preponderance of the evidence that:
- (a) The person has no feasible alternative to the conduct; and
  - (b) The person is conducting a vigorous program to develop a feasible alternative to the conduct that is likely to contribute substantially less ecological degradation.
- Sec. 5. Any member of a community that may be affected by an ecological threat may bring an action for ecological degradation.