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PRIVATE PROPERTY RIGHTS LEGISLATION

STATEMENT OF JOHN R. SCHMIDT

ASSOCIATE ATTORNEY GENERAL

U.S. DEPARTMENT OF JUSTICE

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

APRIL 6, 1995



Department of Justice

STATEMENT

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UNITED STATES SENATE

CONCERNING

THE OMNIBUS PROPERTY RIGHTS ACT OF 1995

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I. INTRODUCTION

Mr. Chairman, and Members of the Committee: Thank you for the opportunity to provide the Administration's views regarding S. 605, the "Omnibus Property Rights Act of 1995," and similar bills that seek to expand the traditional concept of "takings."

It is sometimes worthwhile to state the obvious just to ensure that no one is laboring under any misconceptions. This Administration strongly supports the protection of private property rights. The right to own, use, and enjoy private property is at the very core of our nation's heritage and our continued economic strength. These rights must be protected from interference by both private individuals and governments. That is why the Constitution ensures that if the government takes someone's property, the government will pay "just compensation" for it. That is what the Constitution says. That is what the President demands of his government.

To the extent government regulation imposes unreasonable restrictions or unnecessary burdens on the use of private property, this Administration is committed to reforming those regulations to make them more fair and flexible. We have already implemented a number of significant regulatory reforms to alleviate burdens on property owners, and we are developing additional ways to improve federal programs to provide greater benefits to the public while reducing regulatory burdens, particularly for small landowners. I will describe some of these reforms in greater detail later in this testimony.

Mr. Chairman, no one could disagree with the concerns that underlie S. 605. All citizens should be protected from unreasonable regulatory restrictions on their property. But S. 605, and H.R. 925 passed by the House of Representatives, will do little or nothing to protect property owners or to ensure a fairer and more effective regulatory system. Rather, we are convinced that these proposals to require compensation in contexts very different from the balance struck under the Constitution itself are a direct threat to the vast majority of American citizens.

The truth is that this bill and similar proposals are based on a radical premise that has never been a part of our law or tradition: that a private property owner has the absolute right to the greatest possible profit from that property, regardless of the consequences of the proposed use on other individuals or the public generally.

As a result, passage of these arbitrary and radically new compensation schemes into law will force all of us to decide between two equally unacceptable alternatives. The first option would be to cut back on the protection of human health, public safety, the environment, civil rights, worker safety, and other values that give us the high quality of life Americans have come to expect. The cost of these protections and programs after passage of the proposed compensation legislation would be vastly increased. Ironically, if we chose this path, the value of the very property this legislation seeks to protect would erode as

vital protections are diminished. The other option would be to do what these proposals require: pay employers not to discriminate, pay corporations to ensure the safety of their workers, pay manufacturers not to dump their waste into the streams that run through their property and our neighborhoods, pay restaurants and other public facilities to comply with the civil rights laws. That is, each American would be forced to pay property owners to follow the law. In the process, we would end any hope of ever balancing the budget.

No matter which of these two avenues we pursue, hardworking American taxpayers will be the losers. Either they will no longer be able to enjoy the clean skies, fresh water, and safe workplaces they have come to expect, or they will be forced to watch as their tax dollars are paid out to corporations and other large property owners as compensation.

The Administration will not and cannot support legislation that will hurt homeowners or cost American taxpayers billions of dollars. The Administration, therefore, strongly opposes S. 605 and similar bills. The Attorney General would recommend that the President veto S. 605 or similar legislation.

II. THE COMPENSATION SCHEMES IN TITLES II AND V WOULD HARM THE OVERWHELMING MAJORITY OF PROPERTY OWNERS, COST AMERICAN TAXPAYERS BILLIONS OF DOLLARS, CREATE HUGE NEW BUREAUCRACIES AND A LITIGATION EXPLOSION, AND UNDERMINE VITAL PROTECTIONS

A. The Fifth Amendment to the U.S. Constitution

As you know, the Fifth Amendment to the Constitution of the United States provides that "private property [shall not] be

taken for public use, without just compensation." That short phrase has provided the compensation standards for takings cases since the founding of our country. Within its contours lies a balance between the authority of the government to act in the public interest and its obligation to provide compensation when those actions place an unfair burden on an individual's property. Before we consider proposals to alter and expand those standards, it is worth discussing what the Constitution provides and why we believe it has served the American people so well over the last 200 years.

The genius of the Constitution's Just Compensation Clause is its flexibility. In deciding whether a regulation is a compensable taking, the Constitution requires the government, and if necessary the courts, to consider the nature of the property interest at issue; the regulation's economic impact; its nature and purpose, including the public interest protected by the regulation; the property owner's legitimate expectations; and any other relevant factors. The ultimate standards for compensation under the Constitution are fairness and justice. Thus, we have never recognized an absolute property right to maximize profits at the expense of the property or other rights of others. For example, reasonable zoning by local governments has long been accepted as a legitimate means to promote safe and decent communities without requiring the payment of compensation to those whose property values might be adversely affected. Indeed, we recognize that the value of property in the community as a

whole is thereby enhanced. On the other hand, when government regulation "goes too far" (in the words of Justice Holmes) and imposes a burden so unfair on an individual property owner that it constitutes a taking, compensation must be paid.

This constitutional tradition has been carefully developed by the courts through hundreds of cases over the course of our nation's history. As I mentioned, its genius is its flexibility, for it allows the courts to address the many different situations in which regulations might affect property. It allows for the fair and just balancing of the property owner's reasonable expectations and property rights with the public benefits of protective laws, including the benefit to the property owner.

It goes without saying that the economic impact of a regulation is an important consideration in deciding whether it would be fair and just to compensate a property owner. But in the very case that established the concept of a regulatory taking -- Pennsylvania Coal Co. v. Mahon (1922) -- the Supreme Court was careful to emphasize that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." From the earliest days of our Republic, we have recognized that the government has a legitimate, and indeed a critical, role to play in protecting all of us from the improper exploitation of property. In America, we have an opportunity to use our property freely -- within the bounds we set through our communities and elected representatives. We have also recognized that our rights

as citizens entail a corresponding responsibility to refrain from exercising those rights in ways that harm others.

As we consider our constitutional tradition and the potential effects of S. 605, it is important to keep the takings issue in perspective. Certain advocates of compensation bills suggest that the government routinely disregards its constitutional obligation to pay just compensation when it takes private property. This is simply incorrect. The Justice Department's regulatory takings docket is actually relatively small. To cite but one example, of the 48,000 landowners who applied for a permit under section 404 of the Clean Water Act in 1994, only 358, or 0.7 percent, were denied a permit. Another 50,000 land-use activities are authorized annually through general permits under the 404 program. And we now have only about 30 takings claims involving the 404 permit program. These figures result from our commitment to ensuring that government programs are implemented in a way that respects property rights.

B. The Compensation Schemes in S. 605

A Radical Departure from Constitutional Tradition: The compensation schemes in S. 605 disregard our civic responsibilities and our constitutional tradition. They replace the constitutional standards of fairness and justice with a rigid, "one-size-fits-all" approach that focuses on the extent to which regulations affect property value, without regard to fairness, to the harm that a proposed land use would cause others, to the landowner's legitimate expectations, or to the

public interest. They ignore the wisdom of the Supreme Court, and they would wipe out many vital protections and generate unjust windfalls.

S. 605 would require the federal government to pay a property owner when federal agency action reduces the value of the affected portion of the property by 33 percent or more. The compensation requirement also applies to a wide range of state and local actions under federally funded, delegated, or required programs. The single exception to the compensation requirement is in the relatively rare instance in which the agency action does nothing more than restrict property use that is already prohibited by applicable state nuisance law.

It is important to recognize just how radical S. 605 and similar bills are. In 1993, every Member of the U.S. Supreme Court -- including all eight Justices appointed by Republican Presidents -- joined an opinion stating that diminution in value by itself is insufficient to demonstrate a taking. See Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 113 S. Ct. 2264, 2291 (1993). They not only acknowledged the correctness of this principle, but they characterized it as "long established" in the case law, a principle developed and accepted by jurists and scholars throughout our Nation's history. This constitutional principle does not result from insensitivity to property rights by the Founders or the courts, but instead from a recognition that other factors -- such as the landowner's legitimate

expectations, the landowner's benefit from government action, and the effect of the proposed land use on neighboring landowners and the public -- must be considered in deciding whether compensation would be fair and just. Because S. 605 precludes consideration of these factors, its single-factor test would necessarily result in myriad unjustified windfalls at the taxpayers' expense.

The compensation standard in S. 605 is also flawed because the loss-in-value trigger focuses solely on the affected portion of the property. The courts have made clear that fairness and justice require an examination of the regulation's impact on the parcel as a whole. E.g., Concrete Pipe, 113 S. Ct. at 2290; Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978). By establishing the affected portion of the property as the touchstone, the bill ignores several crucial factors essential to determining the overall fairness of the regulation, such as whether the regulation returns an overriding benefit to other portions of the same parcel. Moreover, under S. 605 a landowner could segment the parcel or otherwise manipulate the loss-in-value calculation in a manner that demonstrates a very high (if not total) loss in value in almost every case. For example, if a developer is allowed to develop 99 acres of a 100 acre parcel, but required to leave one acre undeveloped to protect a bald eagle's nest, the developer could seek compensation for that restriction on a single acre. Or suppose the civil rights laws require a restaurant to make its restrooms accessible to wheelchair users. Under S. 605, the

restaurant owner would not need to show a 33 percent loss in value of the entire restaurant, but only of the affected portion of the restaurant. In other words, it could argue that the space needed for this accommodation is no longer available for tables, and that because this small affected portion has been reduced in value, automatic compensation is required under the bill.

Sections 204(a)(2)(A) through (C) would freeze into law several additional compensation standards that appear to be loosely based on various Supreme Court cases. In our view, these standards in the bill reflect unjustifiably broad readings of the applicable case law.

The overall breadth of the bill's compensation requirement is staggering. It includes extremely broad definitions of "property," "just compensation," "agency action," and other key terms, some of which conflict with their accepted meaning as used in the Constitution. It applies without regard to the nature of the activity the agency seeks to prohibit. In many cases, large corporations would be free to use their property in whatever manner they desire, however reckless, without regard to the impact their activities have on their neighbors and the community at large.

Think of the consequences of this requirement for just the federal permit programs. A landowner would be able to claim compensation whenever an application for a federal permit is denied. For example, a landowner could apply for a federal permit to build a waste incinerator. If that permit is denied

for whatever reason and the denial decreases the value of the property, the government could be obligated to pay the permit applicant. It is not much of a stretch to conclude that applying for federal permits may become a favored form of low-risk land speculation. The more likely a permit is to be denied, the more attractive it may be under these schemes.

Because S. 605 goes beyond mere land-use restrictions and applies to all manner of agency actions, it is likely to have many unintended consequences that we cannot even begin to anticipate. The bill's various and confusing terms and conditions make it difficult to predict how the courts would apply it, but we can rest assured that plaintiffs' lawyers will seek the broadest possible application: compensation for businesses that must comply with access requirements under the Americans with Disabilities Act; compensation for a bank where federal regulators determine that the bank is no longer solvent and appoints a receiver; compensation for corporations across the country where the Congress adjusts federal legislation designed to stabilize and protect pension plans; compensation for virtually any federal action that might affect the complex water rights controversies in the West; compensation for agricultural interests that must comply with changing phytosanitary restrictions; compensation where food safety rules or product labeling requirements diminish the value of factories producing unsafe products; and so forth. The examples are virtually endless.

A Threat to Property Rights: Although these bills purport to protect property rights, they would undermine the protection of the vast majority of property owners: middle-class American homeowners. For most Americans, property ownership means home ownership. "Property rights" means the peaceful enjoyment of their own backyards, knowing that their land, air, and drinking water are safe and clean. The value of a home depends in large measure on the health of the surrounding community, which in turn depends directly on laws that protect our land, air, drinking water, and other benefits essential to our quality of life.

In fact, in a recent survey by a financial magazine, clean water and air ranked second and third in importance out of 43 factors people rely on in choosing a place to live -- ahead of schools, low taxes, and health care. By undercutting environmental and other protections, these automatic compensation bills would threaten this basic right and the desires of middle-class homeowners. In the process, the value of the most important property held by the majority of middle-income Americans -- their homes -- would inevitably erode.

An Untenable Fiscal Impact: Because these bills are so broad and inflexible, and because they mandate compensation where none is warranted, the potential budgetary impacts are almost unlimited. Even if new regulatory protections were scaled back, these bills would still have a huge fiscal impact by requiring compensation for statutorily compelled regulation and other essential government action. The Administration agrees with the

assessment made earlier this year by Senator Richard L. Russman, a Republican State Senator from New Hampshire, who testified before the House Judiciary Subcommittee on the Constitution on behalf of the National Conference of State Legislatures. He stated:

As a fiscal conservative and believer in limited government, compensation-type "takings" bills represent expensive "budget-busters." Their purpose is to give taxpayer subsidies to those who have to comply with requirements designed to protect all property values, and the health and safety of average Americans.

Because the compensation scheme in S. 605 is so broad in scope, it is extremely difficult to provide even a rough estimate of its overall potential fiscal impact. I am told that one proponent of these bills testified, with respect to the Americans with Disabilities Act alone, that potential liability would make administration of the Act prohibitively expensive. A 1992 study by the Congressional Budget Office estimated that application of one takings proposal to just "high value" wetlands -- a proposal that also would have radically revised existing compensation obligations -- would cost taxpayers \$10-15 billion. S. 605 would, of course, apply to far more programs and agency actions than just these two examples. Because S. 605 goes beyond mere land-use restrictions and applies to all kinds of agency actions, it is likely to have many unintended consequences and untoward fiscal impacts that we cannot even begin to anticipate.

Proponents of these bills sometimes argue that these costs are already being absorbed by the individual landowners.

However, the potential costs of the bill are so high not because landowners are unreasonably shouldering these costs now, but because the bill would require compensation in many cases where compensation would be unfair and unjust -- for example, where the landowner had no reasonable expectation to use the land in the manner proposed, or where other uses would yield a reasonable return on investment without harming neighboring landowners or the public.

S. 605 also requires the federal government to pay compensation for many State and local actions even where State and local officials would have the discretion to pursue another course of conduct. Imposing federal liability for actions by State and local officials would remove the financial incentive to ensure that State and local action minimizes impacts on private property, and would thereby further expand potential federal expenditures under the bill.

In addition to the compensation costs, S. 605 would exact a tremendous economic toll by preventing the implementation of needed protections. For example, fish and shellfish populations that depend on wetlands support commercial fish harvests worth billions of dollars annually. If compensation schemes render the protection of wetlands prohibitively expensive, the commercial fishing industry would suffer devastating financial losses. Ironically, this bill might require the federal government to compensate the fishery and related economic interests whose profits are reduced by the government's failure to protect

wetland habitats. There is seemingly no end to the chain of compensation claims created by the bill.

At the end of the day, no one can really say how much S. 605 would cost American taxpayers, except to say that those costs would be in the billions of dollars. The answer given by some proponents of these bills is that the costs will depend on how regulators respond. But suppose that every regulator responds by doing everything possible to reduce impact on private property. The compensation costs for carrying out existing statutory mandates and providing needed protections would still be overwhelming. I urge every fiscally responsible Member of this Committee to insist on a realistic cost analysis of this bill before the Committee votes on its merits.

Huge New Bureaucracies and Countless Lawsuits: S. 605 would also require the creation of huge and costly bureaucracies to address compensation requests. Title II would greatly expand the grounds for filing judicial claims for compensation where regulation affects private property. Title V would establish an administrative compensation scheme with binding arbitration at the option of the property owner.

Agencies would need to hire more employees to process compensation claims, more lawyers to handle claims, more investigators and expert witnesses to determine the validity of claims, more appraisers to assess the extent to which agency action has affected property value, and more arbiters to resolve claims. The sheer volume of entitlement requests under these

schemes would be overwhelming. The result would be far more government, not less.

A Threat to Vital Protections: As I mentioned earlier, the passage of any of these compensation bills would pose a serious threat to human health, public safety, civil rights, worker safety, the environment, and other protections that allow Americans to enjoy the high standard of living we have come to expect and demand. If S. 605 were to become law, these vital protections -- which Congress itself has established -- would simply become too costly to pursue.

S. 605 evidently attempts to address this concern in a small way by providing an exception to the compensation requirement in Title II where the property use at issue would constitute a nuisance under applicable state law.

This narrow nuisance-law exception would not adequately allow for effective protection of human health, public safety, and other vital interests that benefit every American citizen. For example, the nuisance exception would not cover many protections designed to address long-term health and safety risks. The discharge of pollution into our Nation's air, land, and waterways often poses long-term health risks that would not be covered by the exception. Nor does the nuisance exception address cumulative threats. Very often, the action of a single person by itself does not significantly harm the neighborhood, but if several people take similar actions, the combined effect can devastate a community. Pesticide use, wetlands destruction,

discharges of toxic pollutants to air and water, improper mining, or other property use by an individual property owner might not constitute a nuisance by itself. However, in conjunction with similar use by other property owners, they can seriously affect the health or safety of a neighborhood or an entire region. In some states, special interest groups have lobbied state legislatures for exceptions to the nuisance laws that allow huge commercial enterprises to operate noxious facilities in family-farm communities and residential neighborhoods.

Furthermore, there are certain critical public-safety issues that are governed exclusively by federal law, such as nuclear power plant regulation. As a result, public safety in these matters could be held hostage to the government's ability to pay huge compensation claims. Nor does the nuisance exception address uniquely federal concerns, such as national defense and foreign relations. Had S. 605 been in effect during the Iranian hostage crisis, federal seizure or freezing of Iranian assets could have resulted in numerous statutory compensation claims.

The nuisance exception also fails to recognize that there are many important public interests that are not related to health and safety and not addressed by state nuisance law. As I have already discussed, these bills threaten civil rights protection, worker safety rules, and many other vital protections.

"Horror Stories": Much of the debate about these issues has been fueled by what appear to be horror stories of good, hardworking Americans finding themselves in some sort of regulatory nightmare where the government is forbidding them from using their property in the way that they want. It is important to look closely at these stories, for they often are not as they first appear. They sometimes contain a kernel of truth, but you should realize that you're not always getting all of the facts.

I am not suggesting that there are no genuine instances of overregulation. We all know of cases of regulatory insensitivity and abuse that are quite simply indefensible. As I will discuss later, this Administration has made great strides in reducing unreasonable and unfair burdens on middle-class landowners, and we are committed to continuing the effort to reinvent government until the job is done.

Before I address those efforts, however, I want to draw the attention of the distinguished Members to another set of horror stories: those that may result if these compensation bills become law. I am confident that these are not the consequences any of us want:

- Suppose a coal company in West Virginia removed so much coal from an underground mine that huge cracks opened on the surface of the land, rupturing gas lines, collapsing a stretch of highway, and destroying homes. If the State refused to take action, and the Interior Department required the mining company to reduce the amount of coal it was

mining to protect property and public safety, the mining company might well be entitled to compensation for business losses under this bill.

- Suppose a restaurant franchisee challenges the Americans with Disabilities Act provisions governing access for disabled individuals in public accommodations. If the franchisee could show that the requirements of the ADA somehow reduced his profits (perhaps by requiring a ramp that reduces the number of tables allowed in the restaurant) and thus diminished the value of the affected property, he could be entitled to compensation.
- Suppose the federal government restricts the importation of assault rifles. If an import permittee could show that the ban reduced the value of his overseas inventory, he could seek compensation under the bill.
- Suppose a group of landowners challenge the federal government's implementation of the National Flood Insurance Program, which imposes certain land use restrictions designed to decrease the risk of flooding. They could argue that such restrictions diminish the value of their land and obtain compensation.
- Suppose the Army Corps of Engineers denies a developer a fill permit under section 404 of the Clean Water Act because such development by the applicant and other nearby landowners would increase the risk of flooding of neighboring homes. Unless the Corps could bear the

difficult burden of showing that the development would constitute a nuisance under applicable state law, compensation could be required.

- Suppose the Coast Guard establishes a phase-out schedule of single hull tankers; or suppose the Federal Aviation Administration orders airlines to suspend use of certain commercial aircraft that raise serious safety concerns; or suppose the Federal Highway Administration issues out-of-service orders to motor carriers directing them to cease using vehicles or drivers that pose an imminent hazard to safety. The bill raises the possibility that the taxpayers would have to compensate affected corporations for economic losses where they have been directed by the government to cease operating unsafe equipment to protect the public.

These are just a few examples of the problems the "one-size-fits-all" approach of these compensation proposals raises. It is worth noting that most of these examples reflect actual situations in which property owners challenged government conduct as constituting "takings" entitling them to compensation. In each case, the court, often after noting the public benefit derived from the government action, concluded that there had been no taking of property. If S. 605 becomes law, a different outcome in those cases may well be the result. Other examples of potentially compensable agencies actions under the bill can be found in an article published earlier this week in a national newspaper, which reported that a Nevada rancher is claiming that

the government has "taken" his property by failing to prevent wildlife from drinking water and eating grass on public lands where the rancher has a grazing permit, and that California agribusiness operations who receive water from a federal irrigation project are hoping that bills like S. 605 will allow them to obtain compensation for reductions in federal water subsidies.

Opposition to Compensation Bills: It is because of these far-reaching and ill-conceived consequences that the Administration is in good company in opposing these bills. The National Conference of State Legislatures, the Western State Land Commissioners Association, and the National League of Cities have opposed compensation bills of this kind. Religious groups, consumer groups, civil rights groups, labor groups, hunting and fishing organizations, local planning groups, environmental organizations, and others are on record as opposing compensation legislation. More than 30 State Attorneys General recently wrote the Congress to oppose takings legislation that goes beyond what the Constitution requires. On the other hand, the corporate trade associations and many other organizations that support compensation bills like S. 605 do not purport to represent the interests of most Americans.

Activity in the States is particularly instructive. More than 34 state legislatures have considered and declined to adopt takings bills. The New Hampshire and Arkansas legislatures rejected takings bills in the last few weeks. Just a few months

ago, the citizens of Arizona voted down by a 60 to 40 margin a process-oriented takings bill subject to many of the same criticisms as the compensation bills before the Congress. States are concerned that compensation bills would cost taxpayers dearly and eviscerate local zoning ordinances, and that family neighborhoods would be invaded by pornography shops, smoke-stack industries, feedlots, and other commercial enterprises. The Administration shares these States' concerns that compensation schemes would bust the budget, create unjust windfalls, and curtail vital protections. Indeed, some of the federal compensation bills, including S. 605, would subject various State and local actions to the compensation requirement, raising significant implications for state-federal working relationships.

Conclusion: The Administration supports and values the private property rights of all property owners as provided for in the Constitution. We must find ways, however, to ensure that individual property rights are protected in a manner that does not threaten the property rights of others, does not create more red tape, more litigation, a heavier tax burden on most Americans, and does not undercut the protection of human health, public safety, the environment, civil rights, worker safety, and other values important to the American people. S. 605 and other automatic compensation bills fail in each of these respects. As a result, the Attorney General would recommend to the President that he veto any such proposal that reaches his desk.

III. A BETTER APPROACH TO PROTECTING PROPERTY RIGHTS

The broad-based compensation packages currently pending in Congress are not the answer to the horror stories that I know all of you have heard and may well hear from other panelists today. Rather, we believe the answer lies in crafting specific solutions to specific problems. If federal programs are treating some individuals unfairly, we should fix those programs.

As part of our efforts to reinvent government, the Administration has reformed specific federal programs to reduce burdens on small landowners and others. Many individuals and small businesses are already allowed to fill portions of certain wetlands without needing to get an individual permit. Three new initiatives announced on March 6, 1995, will give small landowners even greater flexibility. First, landowners will be allowed to affect up to one half acre of wetlands to construct a single-family home and attendant features such as a garage or driveway. The second initiative clarifies the flexibility available to persons seeking to construct or expand homes, farm buildings, and small business facilities where the impacts are up to two acres. Third, the Administration proposed new guidance that will expedite the process used to approve wetland mitigation banking, which will allow more development projects to go forward more quickly. In addition, the Army Corps of Engineers is reforming its wetlands program to make the permit application process cheaper and faster. These reforms will substantially

reduce or eliminate the burden for small landowners in many cases.

At the Interior Department, Secretary Babbitt has already implemented several changes to the endangered species program to benefit landowners. For the first time ever, the Interior Department has proposed significant exemptions for small landowners. Under this new policy, activities that affect five acres or less and activities on land occupied by a single household and being used for residential purposes would be presumed to have only a negligible adverse effect on threatened species. Thus, under most circumstances, these tracts would be exempted from regulation under the Endangered Species Act for threatened species. The Interior Department has also announced an increased role for the States in ESA implementation, and new proposals to strengthen the use of sound and objective science. Under a new "No Surprises" policy, property owners who agree to help protect endangered species on their property are assured their obligations will not change even if the needs of the species change over time. And under a comprehensive plan for the protection of the Northern Spotted Owl, the Fish and Wildlife Service proposed a regulation that would generally exempt landowners in Washington and California owning less than 80 acres of forest land from certain regulations under the ESA associated with the Northern Spotted owl.

Proponents of statutory compensation schemes have argued that they are necessary because it is difficult and time-

consuming to litigate a constitutional takings claim in federal court. We note that a property owner who successfully litigates a takings claim is already entitled to recover attorneys fees, litigation costs, and interest from the date of the taking, a powerful aid to vindicating meritorious claims. The Justice Department is also committed to working with the courts on approaches to ensure that takings claims may be resolved quickly and efficiently, including the use of alternative dispute resolution techniques. Again, we believe that solutions that focus on the specific issues of concern are preferable to a rigid, one-size-fits-all compensation scheme.

IV. THE PROVISIONS GRANTING THE COURT OF FEDERAL CLAIMS
EQUITABLE POWERS AND REPEALING 28 U.S.C. 1500 ARE
UNNECESSARY AND UNWISE.

We are greatly troubled by the provisions in S. 605 that essentially discard the important distinctions between the Court of Federal Claims, an Article I court created by statute, and the district courts, Article III courts whose judges are life-tenured. For example, section 205 of the proposal would expand the jurisdiction of the Court of Federal Claims by giving it the authority to invalidate acts of Congress that adversely affect private property rights, the authority to decide all claims against the United States for monetary relief including those concerning the proper interpretation of statutes and regulations that are currently determined by district courts, the authority to grant injunctive and declaratory relief when appropriate in any case within its jurisdiction, and the authority to consider

related claims brought under the Federal Torts Claims Act (FTCA).

At the same time, the proposal would expand the jurisdiction of the district courts by giving those courts concurrent jurisdiction with the Court of Federal Claims over claims for monetary relief under the legislation. The proposal makes clear that "the plaintiff shall have the election of the court in which to file a claim for relief."

We should always be careful when we manipulate the jurisdiction of our courts, particularly when the jurisdiction of statutory courts such as the Court of Federal Claims are enhanced to the detriment of Article III courts. It is difficult to predict what the many consequences of such actions will be. However, we do know that these changes will give an Article I court the power for the first time to invalidate the actions of Congress. The power of invalidation is so great and raises such fundamental questions about the structure of the federal government that it has been traditionally reserved for Article III courts.

We also know that these changes would significantly blur the distinctions between the Court of Federal Claims and the district courts and, as a result, ignore the historical purpose and functions of the Court of Federal Claims. That Court was established by Congress pursuant to Article I of the Constitution to eliminate the need for Congress itself to consider private bills for monetary relief. Its function has been to provide a centralized forum -- with expertise in specialized issues arising

under federal law -- to grant adequate relief at law for certain types of claims against the United States. As a result, the Court of Federal Claims has the authority to grant injunctive and declaratory relief in only very narrow circumstances. The proposed expansion of that Court's powers to grant such relief and to consider questions of state law pursuant to ancillary FTCA claims would fundamentally change the nature of that Court and its relationship to the district courts.

We are also opposed to the repeal of 28 U.S.C. §1500, which bars the Court of Federal Claims from hearing any claim as to which the plaintiff already has a claim pending in another court. First, there is no need to repeal that section. According to the bill, repeal is necessary as current law "forces a property owner to elect between equitable relief in the district court and monetary relief (the value of the property taken) in the United States Court of Federal Claims." That is no longer the law. Loveladies Harbor v. United States, 27 F.3d 1545 (Fed. Cir. 1994). Second, the repeal of §1500 would create opportunities for savvy litigators to manipulate the courts in bringing not just takings claims but all claims over which the Court of Federal Claims has jurisdiction. For example, if §1500 were repealed, a plaintiff would be able to begin litigating aspects of a contract claim in district court and subsequently initiate a suit before the Court of Federal Claims in an effort to find the most sympathetic forum and to stretch the government's litigation resources. While the government presumably would have the right

to transfer the cases and consolidate them in one forum, the government might not learn until well into the litigation that a complaint filed in the district court involved the same dispute as a complaint filed in the Court of Federal Claims due to the minimal requirements of notice pleading. The government's ability to identify related actions would be further limited by the sheer volume of civil litigation involving the United States.

V. THE TAKING IMPACT ANALYSIS REQUIREMENT IN TITLE IV WOULD CREATE MASSIVE AND COSTLY BUREAUCRATIC RED TAPE AT THE EXPENSE OF IMPORTANT PROTECTIONS.

Section 403(a)(1)(B) of the bill would require all agencies to complete a private property taking impact analysis (TIA) before issuing "any policy, regulation, proposed legislation, or related agency action which is likely to result in a taking of private property." The Administration firmly believes that government officials should evaluate the potential consequences of proposed actions on private property. Indeed, we consulted with the Senate last year on a similar requirement during its work on the Safe Drinking Water Act, and we hope to continue to work with Members who are interested in this issue.

Because S. 605 establishes such a broad definition of "taking," however, Title IV would impose an enormous, unnecessary, and untenable paperwork burden on many aspects of government operations. This inflexible and unnecessary bureaucratic burden would apply to all kinds of government efforts to protect public safety, human health, and other aspects

of the public good. The bill would severely undermine these efforts by imposing an incalculable paperwork burden. At a time when the Administration is reinventing government to make it more streamlined and efficient, Title IV would result in paralysis by analysis and generate a vast amount of unnecessary red tape.

The specific requirements of section 404 are also disturbing. Among other things, it would require agencies to reduce actions that are compensable under the Act to "the maximum extent possible within existing statutory requirements." By elevating property impact above all other legitimate goals and objectives, section 404 would inevitably lead to less effective implementation of any federal protections that affect property rights.

The bill's enforcement mechanisms are unclear, but section 406 of the bill suggests that actions could be filed in federal courts to enforce the TIA requirement. Opponents of any government action would use legal challenges under the bill to delay or defeat the action by challenging whether an analysis must be done, whether every person with an interest received notice, and whether the analysis is adequate. Such litigation would result in an enormous additional burden on the courts' already overburdened docket.

VI. CONCLUSION

The Administration strongly supports private property rights. S. 605, however, represents a radical departure from our

constitutional traditions and our civic responsibilities. It would impose an enormous fiscal burden on the American taxpayer, generate unjust windfalls for large landowners, create huge and unnecessary bureaucracies and countless lawsuits, and undermine the protection of human health, public safety, the environment, worker safety, civil rights, and other vital interests important to the American people. As a result, it would hurt the overwhelming majority of American property owners, middle-class homeowners, by eroding the value of their homes and land.

The Administration would like to work with the Congress to find ways to further reduce the burden of regulatory programs on American property owners. S. 605, however, is a ham-fisted, scattershot approach that would impair the government's ability to carry out essential functions and would impose a tremendous cost on the pocketbooks of middle-class Americans. Accordingly, the Attorney General will recommend a veto if S. 605 or any similar automatic compensation scheme or compensation entitlement program were to pass.

PRIVATE PROPERTY RIGHTS LEGISLATION

STATEMENT OF JOSEPH L. SAX

COUNSELOR TO THE SECRETARY FOR POLICY

U.S. DEPARTMENT OF THE INTERIOR

BEFORE THE SENATE ENVIRONMENT & PUBLIC WORKS COMMITTEE

JUNE 27, 1995

Statement of
Joseph L. Sax
Counselor to the Secretary
and Deputy Assistant Secretary for Policy
U.S. Department of the Interior

Before the Senate Environment and Public Works Committee

June 27, 1995

Mr. Chairman, and Members of the Committee: Thank you for the opportunity to testify today on proposals to compensate property owners for regulation far beyond what the Constitution provides.

My comments will focus on interpretations of takings law by the United States Supreme Court spanning more than a century. I shall emphasize the interpretive tradition for three reasons. First, it represents a careful and continuing search by the Court for the basic principles of fairness and justice that ought to animate the relations between government and property owners. Second, the views of the Court have been remarkably consistent over many decades on a number of central points, reflecting a consensus among Justices that has focused largely on issues raised by pending legislation, issues such as diminution of value, segmentation of property, the importance of expectations in determining compensability, the effects of nuisance law on regulatory authority, and the search for a single, "bright-line" standard. Third, I will show why the courts have focused on these factors and explain why these remain relevant considerations today.

This review will show that these compensation bills are a radical departure from the Constitution. I would emphasize that this is not just my view. It is the view of the Department of Justice. It is also the view of some 125 legal scholars who joined

in a June 29, 1994 letter opposing such bills.

In a sense, this discussion is really about precedent. We usually think about precedent, if we think about it at all, as a rather formal legal doctrine, less influential today than it was in days gone by. Rare indeed is the opportunity to think about the meaning of precedent in the broad, political sense, giving weight to tradition, to experience, and to ideas that have endured the test of time.

However, we do have that opportunity today, when the Congress, perhaps for the first time ever, certainly for the first time in many years, has taken up Constitutional property rights as a legislative matter. Here is an issue in which we have precedent in the fullest and most mature sense of the word: the collective and considered view of the United States Supreme Court for more than a century and a half, spanning a docket of some 85 cases. Taken together, this body of precedent offers the collective judgment of the Court as an institution, transcending particular differences among justices, and the particular circumstances of a specific moment in the nation's history.

I believe Congress would be well-advised to give serious attention and respect to the Court's perspective, that it should impose upon itself a substantial burden of persuasion in departing from that perspective, and that it should attend to the Supreme Court's taking tradition and precedent. The compensation bills now before Congress do not take any such stance, and represent a radical departure from our Constitutional traditions and civic

responsibilities. Accordingly, the Secretary of the Interior would recommend to the President that he veto such bills.

Of course, the Court as an institution can be institutionally wrong, as it certainly was once in dealing with Civil Rights, and it can be particularistically wrong, as it was in the Japanese internment cases at the time of the Second World War. And of course, in such cases, respect for precedent should not constrain us. I do not believe, however--and I am confident that few thoughtful people believe--that the Court has been fundamentally and institutionally wrong for all this time in considering property rights, or that what it has said is of only limited pertinence for the Congress (which can go beyond simply implementing the Constitutional standard if it wishes).

The Supreme Court's views are particularly germane to the present Congressional enterprise because the Court has not limited itself to a narrow reading of the Constitution. I do not think it is possible to read the Court's decisions over the decades without concluding that its views on compensability do more than merely reflect the Constitution's formal mandate. They also describe the Court's sense of basic principles of fairness to property owners, and a sense of the appropriate balance between the rights of individual owners and the rights of the community to make demands on owners. These are the very questions Congress would appropriately be addressing in considering property rights legislation.

In saying the Court has considered basic fairness, I refer in

part to the court's willingness to extend the takings clause to regulation, rather than confining it solely to expropriation, as a narrow, legalistic interpretation of the Constitution might have suggested. I refer also to the Court's opinions on related doctrines, not only the takings clause of the Fifth Amendment, but due process (including substantive due process as expressed in Mugler v. Kansas¹), and the approach the Court has taken in cases involving the related provision dealing with the impairment of the obligation of contract as well. In all of these contexts, the Court has followed a common theme and approach.

In saying that the Court has addressed basic issues of fairness (and not just legal formality) I refer as well to the very wide range of justices who have spoken consistently on the property obligation, stretching all the way from Taney in the Charles River Bridge² case in 1837, to the first Justice Harlan in Mugler,³ Sutherland in Euclid,⁴ Stone in Miller v. Schoene,⁵ Holmes and Brandeis in Pennsylvania Coal⁶ and Holmes as well in Erie Railroad⁷

¹ 123 U.S. 623 (1887).

² Charles River Bridge v. Warren Bridge, 36 U.S. 341 (1837).

³ Supra.

⁴ Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

⁵ 276 U.S. 272 (1928).

⁶ Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1926).

⁷ Erie Railway Co. v. Board of Public Utility Commissioners, 254 U.S. 394 (1921).

and Block,⁸ Brennan in Penn Central,⁹ Stevens in Keystone,¹⁰ Scalia in Nollan¹¹ and Lucas,¹² Souter in Concrete Pipe,¹³ and Rehnquist in Dolan.¹⁴ This is a span of over 150 years, and while it is by no means the whole pantheon of cases and justices, it is strikingly illustrative of the singularity of view the Court has taken about the basic rights of property owners over virtually the whole of our nation's history. This record emphasizes that we have a body of precedent that reflects the institutional sense of the Court--broadly considered--about fundamental fairness in respect to property.

I do not, certainly, mean to suggest that there are no significant differences among the Justices. Of course there are. What I do want to suggest is the very large gap between, on the one hand, where essentially all the Justices over a very long time have been (their common views), which is where the Court stands today, including the views of Justices very sympathetic to property

⁸ Block v. Hirsh, 256 U.S. 135 (1921).

⁹ Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

¹⁰ Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

¹¹ Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

¹² Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992).

¹³ Concrete Pipe & Products of California v. Construction Laborers Pension Trust for Southern California, 113 S.Ct. 2264 (1993).

¹⁴ Dolan v. City of Tigard, 114 S.Ct. 2309 (1994).

owners, such as Justices Scalia and Rehnquist; and where the major compensation bills before Congress stand, on the other hand.

These bills are so much at odds with the mainstream of the Court's position as to reflect a disregard, one might even say a contemptuous disregard, for the precedent that all these decades of consideration by the Supreme Court represent, and indeed, for the very notion of precedent and respect for experience.

I would point to the following factors as indicative of that difference, and as indicating what is fundamentally distressing about the compensation bills now before Congress, all of them stemming from an abandonment of what has always been at the center of the Court's inquiries, the search for fairness:

1. The Proposition that diminution in value alone--short of loss of all economic viability--is a key to compensation. In this respect, I note, as a long-time student of Holmes' taking theories, that I believe his views (drawn virtually exclusively from his decision in Pennsylvania Coal by proponents of compensation bills) have been seriously misunderstood and misrepresented by those urging the enactment of formulaic compensation legislation.

Bills that provide compensation based solely on the basis of reduction in value represent a departure from the Constitutional standard. Only two years ago, the Supreme Court unanimously stated that "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."¹⁵

¹⁵ Concrete Pipe, supra, at 2291.

Such bills take a purely mechanical approach: when property value can be shown to be reduced by some set amount--20% in the HR 925, 33% in S. 605-- an owner is automatically entitled to compensation subject only to vague and sharply limited defenses. They typically make no attempt to address the special problems faced by small landowners, and do not require consideration of the price an owner paid for the property, or whether the owner can continue to earn a reasonable return from the property with the use restriction.

In some cases, they may even allow abuses whereby owners seek approval for potentially lucrative uses they have no intention of undertaking, or make claims that allow one to turn a public subsidy into a compensable property right. One such example is illustrated by the Federal reclamation program. If the government orders individuals receiving water from a Federal reclamation project to stop practices that cause excessive runoff and resulting water pollution, the compensation bills could be read to obligate the government to pay the water users the fair market value of the water, rather than its actual cost. Some users receive Federal reclamation water at subsidized rates, and the difference between subsidized and fair market rates is large in some cases.

2. An invitation to segment property, both by percentage diminution standards and by use of legislative phrases such as "portion" and "affected portion" as triggers to compensation.

In assessing the fairness of regulatory burdens on property, the Court has consistently examined the property as a whole, rather

than segmenting it into smaller parts. The entire Court joined Justice Souter's recent reminder that "a claimant's parcel of property [can]not be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable ... [T]he relevant question is whether the property taken is all, or only a portion of the parcel in question."¹⁶ Even more recently, Chief Justice Rehnquist, writing for a majority, indicated there could be "no argument" to support a claim that a property owner has been denied all use of a portion of her property when she "operates a retail store on [a portion of] the lot."¹⁷

A focus on the whole parcel, rather than just an affected portion, is dictated by considerations of fairness. Regulation that limits the use of part of a property, such as setback requirements, is almost universally accepted as fair to both the public and to property owners. Similarly, the owner of a large tract, some fraction of which has been subject to restrictions, is still likely to be able to make a productive and profitable use of the land. Indeed, with adaptive and innovative modern techniques stimulated by local land use regulation, such as clustering of housing units to preserve open space, owners often end up with developments that are highly profitable and attractive to buyers, even though not every acre can be developed.

The risk here is owners "gaming the system" by rearranging

¹⁶ Concrete Pipe, supra at 2290.

¹⁷ Dolan, supra, at 2316, n. 6.

ownership patterns to maximize compensability, and by encouraging compensation essentially from the first dollar of loss. Such an approach basically overrides the notion that the community can demand anything of property owners by way of accommodating to community values. This approach leads to a tearing down of the very sense that we are a community. I would recall the statement in the Charles River Bridge case many years ago that "while the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depends upon their faithful preservation¹⁸." This, I suggest, is the point that has been forgotten in the bills that have been put before the Congress.

The point is that each case must be considered on its own facts, as the Court has repeatedly said. The one-size-fits-all language of the compensation bills that mandate compensation when any "portion" of a property has been limited, violates the Supreme Court's wise counsel to eschew set formulas and to acknowledge that the requirements of fairness can only be determined in the setting of a particular factual inquiry.

3. The omission of reasonable expectations as a factor, which opens the way to speculative gains, diminishes the ability to take account of the relevance to property rights of changes in the world around one, and moves away from fundamental fairness notions.

Here I would call attention to Justice Sutherland's famous language in Euclid, back in 1926:

¹⁸ Charles River Bridge, *supra*, at 431.

Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive ... While the meaning of Constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.¹⁹

Thus the Supreme Court has consistently recognized the importance of a property owner's expectations in determining whether a regulation effects a taking of property. The Court's recognition of the importance of expectations has extended to its ruling unanimously that, when government acts consistently with an owner's reasonable, investment-backed expectations, there is no taking.²⁰

More generally, the Court has consistently followed the reasoning in Euclid and recognized that regulation of property is a fact of modern life, which informs the expectations of property owners when they invest in property. Very recently Justice Souter, writing for the entire Court, reiterated that "those who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."²¹

Under the compensation bills, as noted above, expectations play virtually no role in determining compensability. Instead,

¹⁹ Euclid, *supra*, at 387.

²⁰ Ruckelshaus v. Monsanto, 467 U.S. 986 (1984).

²¹ Concrete Pipe, *supra*, at 2291.

compensation bills mechanically signal compensation whenever a property's value is reduced by a particular amount, thereby overlooking this fundamental aspect of fairness.

4. The effort to exalt nuisance into an all-embracing and exclusive defense to compensation.

The Court first rejected a "nuisance-based" takings jurisprudence in Mugler in 1887, and then in Miller v. Schoene, in 1928, and again in Keystone, exactly a century after Mugler in 1987. The effort to elevate the status of nuisance is based on a fundamental misunderstanding of both the nature and the limitations of nuisance law.

Compensation bills contain narrow exemptions which would avoid a duty to compensate if the regulated use constitutes a nuisance.²² However, the Court has expressly rejected a takings standard that required a determination of whether regulated activity was "a nuisance according to the common law."²³ Further, because so few actions have been determined to be nuisances, the Court has routinely allowed regulation for conduct that was not a nuisance--such as destruction of diseased trees,²⁴ liquor prohibition,²⁵ and conventional urban zoning.²⁶ Neither common

²² The House-passed bill (H.R. 925) contains some additional exemptions, as for actions whose primary purpose is to prevent identifiable damages to specific properties, the scope of which is quite uncertain.

²³ Miller v. Schoene, 276 U.S. 272, 280 (1928).

²⁴ Ibid.

²⁵ Mugler v. Kansas, supra.

law nuisance, nor the novel formulations in the House-passed bill provide the public with adequate protection.²⁷

Among the many activities that might require compensation under the Senate bill (S. 605) are prohibitions on the sale of dangerous medical devices, or on the sale or production of explosives or dangerous weapons, a suspension of an unsafe air carrier's operations, or orders directing motor carriers to stop using unsafe vehicles. Moreover, many environmentally harmful activities, now regulated by Federal law, are not nuisances in at least some states, among them the following: flooding caused by filling of adjacent property,²⁸ hazardous waste contamination of property,²⁹ groundwater contamination,³⁰ asbestos removal,³¹ and contamination of a creek by a leaking landfill.³²

State nuisance law was never intended, and has never served, as complete protection from all human health risks and other threats to public welfare. Indeed, the reason federal environmental laws

²⁶ Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

²⁷ Attached to this statement is a memorandum prepared in the Department of the Interior that discusses the scope of the nuisance exceptions in H.R. 925 and S. 605.

²⁸ Johnson v. Whitten, 384 A.2d 698, 700-01 (Me. 1978).

²⁹ American Glue and Resin, Inc. v. Air Products & Chemicals, Inc., 835 F.Supp. 36, 48-49 (D. Mass. 1993).

³⁰ Cereghino v. Boeing Co., 826 F.Supp. 1243, 1247 (D. Or. 1993).

³¹ City of Manchester v. National Gypsum Co., 637 F.Supp. 646, 656 (D.R.I. 1986).

³² O'Leary v. Moyer's Landfill, Inc., 523 F.Supp. 642, 657-58 (E.D. Penn. 1981).

were enacted in the first place was to address problems that were not being adequately addressed under state nuisance law. In 1979, the Senate heard testimony about the pollution of the Warrior River and its tributaries by seventeen industries and the resulting harm visited upon riparian owners:

There was just about every sort of polluter involved in that case, just about. They continued to pollute. Why? Because we could not find a successful vehicle under the common law, under nuisance law, that would adequately protect these individuals.³³

There are several reasons why nuisance law is inadequate to control widespread pollution. It is often difficult to prove a causal link between the harm at issue and the conduct of a particular defendant. It may be equally difficult to establish that any defendant is causing a nuisance where serious cumulative harm is caused by several sources, none of which, by itself, would cause significant damage. Moreover, a nuisance defendant's conduct often must be substantial and continuing in order to constitute a nuisance, which renders nuisance law ill-equipped to prevent single or intermittent discharges of toxic pollutants. Further, a nuisance exception would not extend to many protections designed to address long-term health and safety risks. Nuisance law is also inadequate to protect those who might be particularly sensitive to the harmful health effects of pollution, including children and senior citizens. Finally, nuisance law is uncertain and complex,

³³ Hazardous and Toxic Waste Disposal: Hearings Before the Subcomm. on Resource Protection and Environmental Pollution of the Senate Comm. on Environment and Public Works, 96th Cong., 1st Sess. 693 (1979).

and it may be difficult to determine how, if at all, a state's nuisance law applies to a particular activity.

Furthermore, some critical public safety activities are governed solely by federal law, and thus would not qualify for a nuisance exemption. Nor does such an exemption address uniquely Federal functions such as regulation of interstate pollution, the conduct of foreign relations, and providing for the national defense. Had some of the compensation legislation currently under consideration (e.g. S. 605) been in effect during the Iran hostage crisis, federal seizure or freezing of Iranian assets could have given rise to numerous statutory compensation claims.

A nuisance exemption also fails to recognize that there are many important public interests that are not related to health and safety and are not fully addressed by state law. For example, S. 605 threatens civil rights protection, worker safety rules, and other protections that might be viewed as limiting property use. In the 1960s, segregationists argued that our landmark civil rights laws unreasonably restricted their property use, and that they should be compensated because they were required to integrate. That view has been rejected. A much different result could occur with respect to new civil rights protections if rigid compensation legislation were to replace the flexible Constitutional standards. Indeed, had S. 605 been law during the Civil War, the Emancipation Proclamation would have required compensating former slaveholders.

5. The effort to articulate a bright-line, one-size-fits-all test.

Even Justice Scalia, perhaps the member of the present Supreme Court most attracted to categorical solutions, sees categorical standards as limited to two very restricted types of cases, physical invasion and regulation resulting in loss of economic viability. The Court, over the decades, has been unreceptive to anything but fact-specific, case-specific analysis. As the Court has said repeatedly, the key to determining compensation is "ad-hoc factual inquiry into the circumstances of each particular case."³⁴

Compensation bills reject the Supreme Court's search for fairness, presumably in favor of clarity, of a bright-line formula that will simplify and clarify compensation questions. The effort is largely illusory. The compensation bills, if enacted, will require the creation of large and costly bureaucracies in Federal agencies and departments in order to process and evaluate compensation requests. The more likely result will be the emergence of a new claims industry, providing much work for lawyers and appraisers, and little if anything that benefits owners of small properties.

Complicated and novel factual and legal questions will have to be resolved: What is an "affected portion of property."³⁵ When has a law been administered "in a manner that has the least impact on private property owners' ... other legal rights"³⁶ What is "a

³⁴ Concrete Pipe, supra, 113 S.Ct. at 2290.

³⁵ S. 605, sec. 204(a)(2)(D).

³⁶ S. 605, sec. 503(a)(2).

particular legal right to use ... property"?³⁷ What is a "right to use or receive water,"³⁸ as compared to a "water right" as understood in ordinary water law parlance? What is "identifiable ... damage to specific property other than the property whose use is limited"?³⁹ These are but a few of the novel interpretive questions with which agencies and courts will be grappling for years, perhaps decades, under what has been put forward as a bright-line standard. Further, compensation bills will encourage a flood of permit requests from property owners who have no intention of development but are seeking only to establish their eligibility for compensation.

Perhaps the most prominent feature of the Court's approach over the years has been a judicial respect for legislative judgments. Of course, a legislative compensation scheme--of the sort now before the Congress--is a horse of a different color. Yet it raises a profoundly disturbing question of its own. What would Congress be doing if it enacted one or another of these bills, creating a sort of anti-regulatory scheme at war with the regulation-generating laws Congress itself has enacted. The compensation bills reveal the incoherence of the approach the bills take:

-The House bill, for example, leaves agencies to reprogram appropriated moneys that Congress itself has given for

³⁷ H.R. 925, sec. 9(2).

³⁸ H.R. 925, sec. 9(5)(D).

³⁹ E.g. S. 605, sec. 203(6).

programs it presumably wants implemented.⁴⁰

-The bills create the risk that taxpayers will have to pay large sums in compensation when departments implement programs that are mandated by statutes, including mandates that leave little or no discretion to the implementing agencies.

-Some bills tell agencies to re-examine their programs and to reorder them in order to reduce impacts on property owners, but without instruction about how, or how much, the effectiveness of the program can or should be sacrificed in the process.⁴¹

-Congress has created federal standards in its statutes, but the bill before the Senate imposes a reverse preemption provision, compelling federal law enforcement to meet state law standards.⁴²

All this is really government at war with itself, and even with the best of will, I don't see how it could do anything but come apart at the seams.

How reassuring it would be if someone stood up in Congress and said: "Perhaps we should take a look back to those who have thought long and hard about these issues. Maybe, just maybe, they knew what they were talking about. Maybe, just maybe, the experience of the past has something to teach the present."

⁴⁰ H.R. 925, § 6(f).

⁴¹ E.g. S. 605 § 404(b).

⁴² E.g. S. 605 § 503(a)(1).

MEMO ON THE NUISANCE EXCEPTIONS
IN H.R. 925 AND S. 605

Introduction

Both the House-passed and Senate "takings" bills (H.R. 925, S. 605) use a nuisance exception to limit the compensation obligation they establish for government actions that diminish property values. The two bills differ in their specific language. H.R. 925 says "[i]f a use is a nuisance as defined by the law of a State...no compensation shall be made." (sec. 4).¹ S. 605 provides "[n]o compensation shall be required...if the owner's use...is a nuisance as commonly understood and defined by background principles of nuisance and property law, as understood within the State in which the property is situated." (sec. 204(d)(1)).

These are among the most important provisions of the bills, for they define the universe of compensable regulation. Those whose "use is a nuisance" will not be compensated, no matter how extensive the economic burden regulation imposes. Since "nuisance" is a familiar legal term of art, it may seem that a nuisance test would provide a clear test for compensation, and would definitively identify those owners whose activities are undeserving of compensation.

Unfortunately, that is not the case. The main reason is that nuisance law is full of restrictive technical requirements, with the result that much harmful conduct that is the subject of modern regulation is not legally a nuisance. In practice, few owners are likely to be denied compensation under these bills, however harmful and unjustified their conduct. A number of illustrative examples are noted below to show the difficulty of proving a use to be a nuisance.

The bills also present a variety of other interpretive difficulties that make them anything but "bright line" guides to compensability. For example, is the nuisance exception meant to

¹ H.R. 925 also provides that compensation shall not be paid where the "primary purpose" of the limitation on the use of property is to prevent an identifiable "hazard to public health or safety" or identifiable "damage to specific property other than the property whose use is limited." (sec. 5(a)). What regulations would not trigger the nuisance exception of H.R. 925, but would trigger its hazard or damage exceptions is not clear.

require a showing that the activity in question meets the technical standards of state nuisance law (as assumed in the preceding paragraph), or is it enough simply to show that the activity is 'nuisance-like'? If the former, as noted, the exception is very narrow. If the latter, it is very vague and uncertain.

There are other interpretive problems. For example, is it enough that the conduct would be a nuisance in some circumstances, though not in the particular circumstances of the case presented (see "Hazardous Waste in California", p. 5)? Is it enough that the conduct had been (or might have been) a nuisance previously, but state nuisance law is deemed preempted by the existence of Federal regulation (see p. 8)? These are only a few of numerous unanswered questions that assure plentiful dispute, confusion, and litigation over the nuisance exception should either H.R. 925 or S. 605 be enacted.

It should also be noted at the outset that while the drafters of the bills have appropriated some language from Supreme Court opinions, they have distinctly not adopted the Court's constitutional standard for determining when compensation is due. The Supreme Court has never said that compensation must be paid for value-diminishing regulation unless the conduct in question is a state-law nuisance. For example, the nuisance-oriented standard of the *Lucas*² case--language from which is picked up in S. 605--was only applied by the Supreme Court to the extreme and rare case where regulation deprives an owner of all economically beneficial use of land. The Senate bill would apply the *Lucas* language to a far more expansive range of regulation than the Supreme Court has done.

Indeed, the Court has not applied a formal nuisance standard at all to most regulation. In its 1987 decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,³ the Court said that in determining whether compensation must be paid for a regulation it is not necessary to "weigh with nicety the question whether the [regulated uses] constitute a nuisance according to the common law."⁴ Compensation is not required so long as "the State merely restrains uses of property that are tantamount to public nuisances...."⁵ Over the years, the Court has found the following uses, none of them nuisances at common law, all to be "tantamount to public nuisances" and thus amenable to regulation

² 112 S.Ct. 2886 (1992).

³ 107 S.Ct. 1232 (1987).

⁴ p. 1244.

⁵ p. 1245 (emphasis added).

without compensation: a brewery, legal when built, that was made less valuable by the enactment of a liquor prohibition law; cedar trees that were spreading a disease to nearby apple orchards; and land slated for commercial development that was zoned for less profitable development than the unrestrained market would have allowed.

What is Nuisance?

The essence of private nuisance is an interference by use on one property with the use and enjoyment of the land of another. The injury is not to the property owner, but to rights that attend property ownership--rights to the unimpaired condition of the property as well as reasonable comfort and convenience in its occupation. Paradoxically, nuisance is both extremely open-ended and uncertain in the scope of its coverage, and at the same time is encumbered with rigid technical rules that sharply limit its application. Dean Prosser in his treatise says "there is perhaps no more impenetrable jungle in the entire law than ... nuisance."⁶ While almost anything could be a nuisance, a great many of the most serious modern harms have not been susceptible of redress under the doctrine because of its technical limits, its requirements of proof, and the remedies it offers.

It is often said that modern regulatory statutes have been enacted precisely because nuisance law is poorly-suited to meet the increasingly complex problems of modern life, with sophisticated synthetic chemical products, and the complex risks they may create.⁷ Indeed, the legislative histories of the major environmental statutes confirm that Congress was concerned about the limitations of state nuisance law when it enacted laws to provide Federal protection of human health, public safety, the environment, and other important interests where state nuisance law was inadequate to the task.

For example, the legislative history of the Clean Air Act contains a report by the Secretary of Health, Education and Welfare regarding the problems of air pollution from stationary sources. The report discusses a rendering plant in Bishop, Maryland, and describes how malodorous emissions from the plant had endangered the health and welfare of the residents of

⁶ W. Page Keeton et al., Prosser and Keeton on the Law of Torts, sec. 86, at 616 (5th ed. 1984).

⁷ See, e.g., Humbach, Evolving Thresholds of Nuisance and the Takings Clause, 18 Colum. J. Envtl. L. 1, 7 n. 34 (1993); Rabin, Environmental Liability and the Tort System, 24 Hous. L. Rev. 27, 28 (1987); Rabin, Federal Regulation in Historical Perspective, 38 Stan. L. Rev. 1189, 1282-83 (1986).

Shelbyville and adjacent areas for some 15 years. Adverse health effects included "nausea, vomiting, lack of appetite; gasping, labored breathing, irritation of nose and throat, aggravation of respiratory ailments; emotional or nervous upsets ranging from anger to mental depression; and headaches, general discomfort, or interference with the ability to work or to enjoy homes and property." The offensive emissions also "discouraged industrial and business development, depressed property values, diminished real estate sales, [and] decreased business volume...." The report concluded that state nuisance law was inadequate to address these severe dangers to health and welfare:

Bishop Processing Company's dry rendering plant has had problems with malodors since it became operational in 1955. Officials from Delaware and Maryland recommended corrections but all efforts to obtain abatement by local and State officials through public nuisance laws have been fruitless.⁸

In 1979 the Senate heard testimony about the pollution of Alabama's Warrior River and its tributaries by seventeen industries and the resulting harm to riparian owners:

There was every sort of polluter involved in that case, just about. They continued to pollute. Why? Because we could not find a successful vehicle under the common law, under nuisance law, that would adequately protect these individuals.⁹

The cases set out below provide concrete examples illustrating some of the inadequacies of state nuisance law that have impelled Congress to provide Federal regulation.

The Technical Limits of Nuisance Law

The following are illustrative--but by no means exhaustive--examples of harmful conduct that are the subjects of Federal regulation, but are not considered nuisances under the law of one or more states. In each case, since the use does not constitute a state law nuisance, the Federal regulation would likely give rise to a claim for compensation under the bills now before Congress.

⁸ S. Doc. No. 63, 91st Cong., 2d Sess. 1679 (1970).

⁹ Hazardous and Toxic Waste Disposal: Joint Hearings Before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works, 96th Cong., 1st Sess., pt. 4, 693 (1979).

Wetland Filling in Maine: Plaintiff and defendant were abutting landowners in Winter Harbor, Maine. Water drained across plaintiff's land and onto the defendant's land, though there were no serious problems of water accumulation on defendant's land. Before the advent of the 404 program, defendant filled a part of his land, constructing a barrier that impeded the natural flow of drainage from the plaintiff's land onto his land. As a result, water backed up onto plaintiff's land, flooding plaintiff's basement at times of heavy rain. Plaintiff sued, claiming a nuisance. The Maine Supreme Court said there was no nuisance. If you obstruct the flow of water (as defendant did), rather than collecting and discharging it (as in a ditch), it is not a nuisance, though your neighbor is equally harmed either way.¹⁰

Land Subsidence from Mining in West Virginia: Coal mining caused subsidence which ruptured gas, power, and water lines, and opened cracks in the earth that were safety hazards. Previous owners of surface lands had sold to coal companies their property right against subsidence years earlier. Because nuisance is a property owner's legal claim, and the surface owners no longer had a property interest to assert, there was no nuisance. Moreover, there was apparently no violation of state regulatory law. But there was a hazard to public health and safety, which was finally cured by a cessation order issued by the Federal Office of Surface Mining under Federal law.¹¹

Groundwater Contamination in Oregon: In the 1960's and 1970's an industry disposed of industrial solvents (TCE and TCA) which migrated onto, and contaminated, the farmer plaintiff's groundwater. The contamination was not discovered until 1986. The farmer sued in nuisance, but was thrown out of court because an Oregon statute does not allow nuisance suits to be brought more than 10 years after the event claimed to be a nuisance. The defendant was, however, subjected to remediation under an order issued by the Federal EPA.¹²

Hazardous Waste in California: A former owner had left hazardous substances on the property and the current owner sought to recover from it the cost of cleanup by claiming a nuisance. But the court held that an act committed on your own property isn't a nuisance. A nuisance is an act committed on one property that

¹⁰ Johnson v. Whitten, 384 A.2d 698 (Me. 1978). See generally, Martin J. McMahon, Jr., Liability for Diversion of Surface Waters by Raising Surface Level of Ground, 88 A.L.R. 891, 897-98.

¹¹ M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995).

¹² Cereghino v. Boeing Co., 826 F. Supp. 1243 (D. Or. 1993).

interferes with the use of another property. The former owner was subjected to regulation under both CERCLA and RCRA.¹³

A similar case arose in Massachusetts when a landowner tried to recover in nuisance from a company that had spilled chemicals on its property in the course of deliveries. The suit was dismissed because nuisance only deals with interference by a use one owner makes of his property with the use and enjoyment of the property of another.¹⁴

Asbestos Removal in Rhode Island: A City sued asbestos manufacturers in nuisance for the cost of having to remove asbestos from schools and other public buildings. The suit was dismissed because under the law of nuisance a defendant must be in control over the instrumentality that constitutes the nuisance, and here the manufacturer, having already sold the asbestos, no longer had control over it.¹⁵

Problems of Proof in Nuisance Law

Even if all of the arcane, technical limitations on a nuisance action, some of which have just been pointed out, are overcome, impediments to a successful suit remain. The most onerous of these is proof. Indeed, nowhere is the limit of nuisance clearer than in the standard of proof of harm required in nuisance law, as compared to standards of proof deemed appropriate for regulatory regimes, as illustrated by the following case:

Leaking Landfill in Pennsylvania: A landfill discharged hundreds of thousands of gallons of foul-smelling leachate every year. Neighbors brought a nuisance action claiming contamination of a nearby creek and of drinking water. The State Department of Environmental Resources issued an order directing correction of the discharging activity, but the court found insufficient evidence of harm under the standards of common law nuisance to support a nuisance suit, and made the following observation:

Plaintiff's failure to make out the nuisance claims is no indication of the potential hazards posed by the landfill. Witnesses expert in water and solid waste management and toxicology noted the risks posed by leachate containing

¹³ In re Cottonwood Canyon Land Co., 146 B.R. 992, 36 ERC 1304, 23 Bankr.Ct.D. 1010 (U.S. Bankruptcy Court, D. Colo. 1992).

¹⁴ American Glue & Resin, Inc. v. Air Products & Chemicals, Inc., 835 F. Supp. 36. (D. Mass. 1993).

¹⁵ City of Manchester v. National Gypsum Company, 637 F.Supp. 646 (D. R.I. 1986).

known and suspected carcinogens.... In short, the harm caused by the landfill's discharges, toxic and otherwise, is not proved and not known. These failures of proof are fatal to the common law negligence and nuisance allegations of the present complaint.¹⁶

These same proof problems were noted by Members of Congress when it considered Superfund legislation. Senator Javits, for example, opined that a Federal statute "is so much better" than state nuisance law in addressing the problem of toxic and hazardous wastes. He warned that lawsuits based on nuisance would "take 20 years in the sense that [it is] very, very difficult to prove that buried drums were the cause of a public nuisance...."¹⁷

Remedies Provided by Nuisance Law

The limited availability of remedies, and the limitations inherent in those that are available, renders nuisance often unhelpful in dealing with the harms which are addressed by Federal regulation. Much Federal regulation aims to prevent harm before it occurs. Nuisance, in contrast, is in many ways a backward-looking doctrine that usually comes into play only after harm has already occurred. In cases of private nuisance, money damages are usually the only remedy available. More often than not, a court will refuse to order the abatement of a private nuisance.¹⁸ Injunctive relief is generally limited to cases of public nuisance, but often is available only after harm has already been done. Although a court can enjoin a prospective nuisance, it can only do so upon finding it "highly probable" that the activity will lead to substantial injury.¹⁹ This stringent standard for issuing an injunction makes nuisance law especially ill equipped to deal with modern toxic and environmental risks.

¹⁶ O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 658 (E.D. Pa. 1981).

¹⁷ Hazardous and Toxic Waste Disposal: Joint Hearings Before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works, 96th Cong., 1st Sess., pt. 1, 246 (1979).

¹⁸ W. Page Keeton Et al., Prosser and Keeton on the Law of Torts, sec. 87, at 623 (5th ed. 1984).

¹⁹ William L. Prosser, Handbook of the Law of Torts, sec. 90, at 603 (4th ed. 1971).

The analysis it dictates requires courts to engage in the sort of risk assessment that is more appropriate to legislatures. Legislatures not only have the technical and scientific expertise readily at hand to enable them to consider such problems, but they are also called upon to make value judgments about what risks to human life and health society is willing to accept. Furthermore, if a decision is going to be made that the public has to bear the risks of a certain pollution-generating activity, it is more appropriate for legislatures than courts to assign such risk. Also, some regulation sets tolerable risk levels through "technology forcing standards" that require industry to develop technologies that will minimize or eliminate risks altogether. While courts may be theoretically capable of bringing about such desirable technological innovation in their adjudication of nuisance actions by, for example, issuing an increasingly stringent pollution abatement schedule, they lack the technical expertise needed to construct and supervise such regulatory regimes effectively.²⁰ For all these reasons, judicially fashioned nuisance law has not developed sufficiently to cover many of the problems addressed by modern regulatory programs.

This limitation of nuisance is magnified when it comes to cumulative and long term impacts. Frequently, the action of an individual polluter does not cause harm, but if several people take similar action, the combined effect can be devastating. In the typical nuisance case, though, a court will only have one defendant before it; namely, the party alleged to be creating a nuisance by the use of its property. In this traditional two-party context, the problem of cumulative impacts cannot be adequately addressed. All of the above problems of proof are, understandably, even more difficult in cases of long-term harm, where the ill effects of toxics and pollution may not appear for many years.

Preemption of Nuisance by Federal Regulatory Law

Sometimes conduct that would have been a nuisance is no longer a nuisance because courts hold that the very existence of a regulatory regime has, and was intended to, displace common law remedies like nuisance. This situation could result in a most

²⁰ Courts themselves have not hesitated to point out the limitations of nuisance in addressing modern environmental harms and have expressed diffidence about their own capacity to protect the public from such harms through the adjudication of nuisance actions. See, e.g., *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871 (N.Y. Ct. App. 1970); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 658 n. 40 (E.D. Pa. 1981); *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 717 (Mich. 1992).

ironic outcome under the bills now before Congress where non-compensability under the regulatory regime may depend on the existence of a common law nuisance.

Radio Signals in Michigan: Residents of Oak Park, Michigan sued in nuisance, complaining that the defendant radio station's signals were interfering with operation of their home electronic equipment. Their case was dismissed on the ground that the Federal Communications Act preempted state nuisance law in the area of radio frequency interference.²¹ The residents were able to get the FCC to intervene, and it ordered the station to take costly measures to eliminate the problem. Had S. 605 been law, the FCC action could have been compensable because the nuisance exception might not have been available.

Airport Noise in Chicago: Landowners near airports can't bring nuisance actions concerning the number of flights per hour, aircraft technology, or takeoff angle of planes because such subjects are the exclusive province of the FAA.²²

Preemption and Interstate Nuisance

Interstate pollution is peculiarly a subject for Federal law. Bills like S. 605 seem not to take account of this fact. For example, interstate water pollution was traditionally governed by a Federal common law of nuisance. The Supreme Court has now held that the Clean Water Act preempted the Federal common law of nuisance.²³

While state nuisance law still exists, the Supreme Court has ruled that only the law of the state that is the source of the pollution is applicable.²⁴ This ruling potentially presents a quite troublesome situation. For example, under the Clean Water Act, the EPA can (and perhaps must) refuse to issue a discharge permit if the discharge would violate a downstream state's water quality standards.²⁵ Under section 204(d)(1) of S. 605, however, compensation may be required for such a refusal unless

²¹ Broyde v. Gotham Tower, Inc., 13 F.3d 994, 997-98 (6th Cir. 1994), cert. denied 114 S.Ct. 2137 (1994).

²² Bieneman v. City of Chicago, 864 F.2d 463, 473 (7th Cir., 1988), cert. denied 109 S.Ct. 2099, 2100 (1989).

²³ Illinois v. Milwaukee, 101 S.Ct. 1784 (1981).

²⁴ International Paper Co. v. Ouellette, 107 S.Ct. 805, 809, 812 (1987).

²⁵ Arkansas v. Oklahoma, 112 S.Ct. 1046, 1056 (1992).

the discharge constitutes a nuisance in the state "in which the property is situated" (the source state). In such circumstances, the discharger seeking a permit is unlikely to be violating its own (source) state's law. S. 605 could thus interfere with the administration of interstate pollution law under the Clean Water Act.

Nuisance and the Background Principles of Nuisance

So far this memo has assumed that the nuisance exception in the bills before Congress would require a showing that a regulated activity meets all the technical standards of nuisance in order for the exception to be triggered. That seems to be the standard of H.R. 925;²⁶ it is less certain as to S. 605 which refers to the background principles of nuisance and property law. It is possible that the bills (and particularly S. 605) intend to impose a less technically rigorous standard, and that it would be enough to show 'nuisance-like' conduct to avoid the compensation requirement.²⁷ If so, a problem of a quite different sort is presented. The issue would no longer be whether conduct meets the many technical requirements of nuisance, but rather the vague and open-ended question: What is the scope of the phrase "a nuisance as commonly understood and defined by background principles of nuisance and property law?"

Should this be the question presented by the bill, all hope of a bright-line, simple, and straightforward compensation law will quickly evaporate. It would be hard to imagine a standard more prone to produce extensive litigation and uncertainty, precisely the goal the proponents of the bills say they want to avoid.

Perhaps the best way to illustrate what is likely to be in store is by looking back to the Supreme Court's decision in the 1987 case, *Keystone Bituminous Coal Association v. DeBenedictis*.²⁸ The case involved a state law regulating coal mining in order to prevent surface subsidence. The Justices divided 5-4. In effect the question before them was whether the state was engaged in

²⁶ As noted above, whether a regulated activity falls within the limited section 5(a) hazard or damage exceptions is a question that will have to be answered as well.

²⁷ However, section 501(6) speaks about compliance "with current nuisance laws," which seems more directed to technical nuisance.

²⁸ 107 S.Ct. 1232 (1987).

abating activity "akin to a public nuisance."²⁹ Justice Stevens and four of his colleagues found that Pennsylvania was merely restraining "uses of property that are tantamount to public nuisances"³⁰ and that it is not necessary to "weigh with nicety... the question whether [the activity] constitute[s] a nuisance according to common law."³¹ Chief Justice Rehnquist and three of his colleagues insisted, on the contrary, that "[t]his statute is not the type of regulation that our precedents have held to be within the 'nuisance exception' to takings analysis."³²

If the Justices of the United States Supreme Court have to struggle so much to determine where to draw the line over the nuisance principle, one can only imagine what the claims process would look like under an enacted S. 605.

Public and Private Nuisance

Public and private nuisance are two quite different legal wrongs. Neither H.R. 925 nor S. 605 distinguishes between them, and presumably the use of the term nuisance in both bills is meant to embrace both public and private nuisance. While most of the discussion above is directed to private nuisance, the same basic point applies to both public and private nuisance. That is, both have certain technical requirements that have to be met, or a nuisance claim will be dismissed by a court.

Public nuisance interferes with the exercise of public rights (rather than private property rights). Widely disseminated water and air pollution can be public nuisances, and classic public nuisances are keeping a house of prostitution, storing explosives in the midst of a city, making loud and disturbing noises, and blocking public thoroughfares.

This distinction means that pollution making water unusable for many downstream landowners in the use of their land is not a public nuisance because it only interferes with private rights. But pollution that interferes with the public right to fish in a river, or the public right of navigation, is a public nuisance. Thus, many harms--even widespread ones--are not public nuisances because they don't interfere with rights one has as a member of the general public. There has, however, been a resurgent and sometimes successful modern application of public nuisance

²⁹ p. 1243.

³⁰ p. 1245.

³¹ p. 1244.

³² p. 1256.

actions by state prosecutors, especially in hazardous waste cases.³³

Federal Law Encroachment on State Jurisdiction

While nothing in either H.R. 925 or S. 605 directly preempts state authority to define state nuisance law, one potentially undesirable consequence of the bills, if enacted, would be to engage Federal agencies and courts in an ongoing process of defining the boundaries and rationale of nuisance law in all 50 states. It seems inevitable that this process will bring a significant Federal influence to bear on the interpretation and content of an area of state law that has always been the special domain of the states. The Federal influence could be especially strong in influencing nuisance law, where state-law development has not been extensive in recent years, having been largely displaced by extensive regulatory statutes.

-end-

³³ Sevinsky, Public Nuisance: A Common Law Remedy Among the Statutes, 5 Natural Resources and Environment 29 (1990).

PRIVATE PROPERTY RIGHTS LEGISLATION

STATEMENT OF MICHAEL L. DAVIS

CHIEF, REGULATORY BRANCH

U.S. ARMY CORPS OF ENGINEERS

BEFORE THE SENATE ENVIRONMENT & PUBLIC WORKS COMMITTEE

JULY 12, 1995



**US Army Corps
of Engineers®**



STATEMENT OF

**MICHAEL L. DAVIS
CHIEF, REGULATORY BRANCH
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**BEFORE THE COMMITTEE ON THE
ENVIRONMENT AND PUBLIC WORKS**

UNITED STATES SENATE

JULY 12, 1995

Mr. Chairman and Members of the Committee: Thank you for the opportunity to provide the Administration's views regarding the effect of wetlands protection programs on the rights of private property owners and the effects that so-called "takings" bills would have on these same programs if enacted as law. I am Michael Davis, Chief of the Army Corps of Engineers Regulatory Branch, which has primary responsibility for the administration of the Clean Water Act Section 404 program. Section 404 is the primary Federal regulatory program for wetlands protection and will be the focus of my testimony today.

To say that the protection of wetlands through regulation has engendered considerable controversy in the past few years may be one of the few points of common ground between those that believe that the Section 404 program is no more than a Federal rubber stamp allowing the destruction of wetlands and those that suggest that the program tramples on the rights of private property owners. Opinions about the program too often ignore the facts, but instead are based on anecdote. This has led to legislative proposals such as H.R. 925 and S. 605 (takings bills) and H.R. 961 S. 851 (wetlands bills). We do not have to create a dichotomy between property rights and environmental protection. The Section 404 program has been successful in balancing the interests of all property owners -- allowing reasonable development while protecting our Nation's aquatic resources.

When deciding whether changes to a particular program are needed or desirable, it is important to first understand how a program actually performs. In this case, how does the Section 404 program affect landowners? Before discussing the problems associated with S. 605 and similar takings bills such as H.R. 925, I will highlight recent Section 404 statistics and a few of the wetlands initiatives currently being implemented by the Administration. More detailed information will be provided in an upcoming Subcommittee hearing dealing specifically with wetlands.

Section 404 Statistics -- How the Program Works

Permits

As noted in Figures 1 and 2, in Fiscal Year 1994 over 48,000 landowners asked the Corps for a Section 404 permit to discharge dredged or fill material into the waters of the United States, including wetlands. Over 80 percent received authorization under a general permit in an average time of 16 days. Less than 10 percent were subjected to the more detailed individual permit evaluation, where the average time was 127 days. Less than one percent of the 48,000 applications were denied. It may be that in a few cases the Corps took too long to evaluate an application and perhaps subjected landowners to an unnecessarily lengthy evaluation process. But these cases are very rare compared to the ones that go forward in a timely manner with minimal regulatory burdens.

As a case is made that generally the program is fair and working well from a landowner's perspective, some continue to criticize the Corps for issuing too many permits. What these individuals fail to recognize is that the Corps has been very successful in reducing wetlands impacts and adverse effects on other landowners, through the regulatory evaluation and conditioning process, including the general permit process. Most applicants are willing to avoid, minimize, and mitigate for project impacts. Through effective application of the environmental criteria and the public interest review, the Corps is successful in striking the correct balance between protection of the overall public interest and reasonable development of private property.

Enforcement

Much has been said about a few highly publicized Section 404 wetland enforcement cases. The reality is that only approximately one percent of all Section 404 enforcement actions result in any kind of civil or criminal judicial action by the Federal Government. As indicated in Figure 3, the vast majority of violations are resolved by after-the-fact permits and voluntary actions by the landowner. Only in extreme cases does the Government find it necessary to pursue litigation.

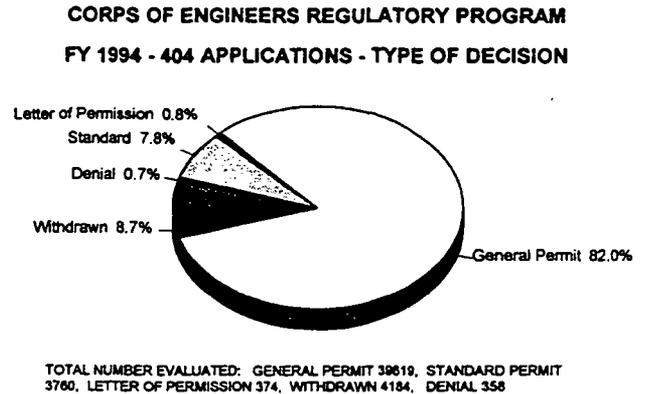


Figure 1.

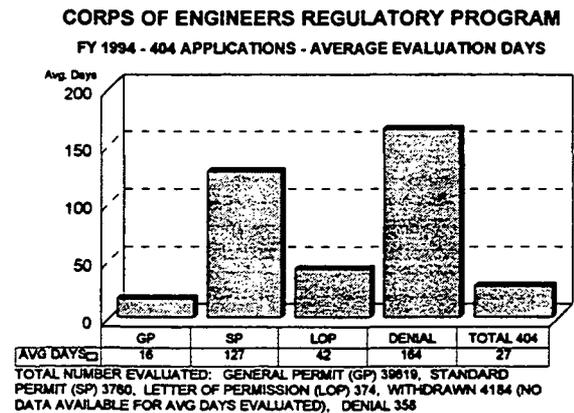


Figure 2.

**CORPS OF ENGINEERS REGULATORY PROGRAM
FY 1994 - ENFORCEMENT CASES**

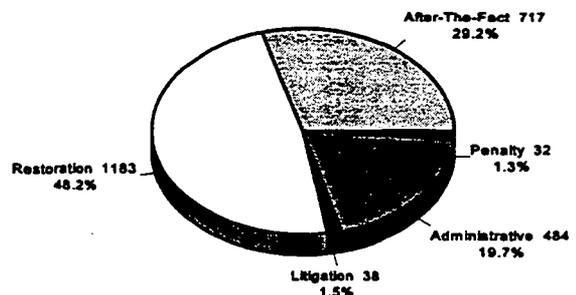


Figure 3.

Administration Wetlands Initiatives -- A Fair, Flexible, and Effective Approach

Notwithstanding the statistics noted above, the Section 404 program is not perfect -- from either the environmental protection standpoint or the regulatory burden perspective. There are a few real problems, and improvements can and should be made. The Clinton Administration is using its August 1993 Wetlands Plan as a policy roadmap for making all wetlands programs more fair, flexible, and effective. This 40-point plan emphasizes improving wetlands policy by:

- o streamlining the wetlands permitting program to eliminate unnecessary regulatory burdens;*
- o increasing cooperation with private landowners to protect and restore wetlands;*
- o basing wetland protection on good science and sound judgement; and*
- o increasing participation by States, Tribes, local governments, and the public in wetlands protection.*

One criticism of the Section 404 program is that it treats landowners unfairly, particularly the "mom and pop" landowner. It should, however, be clear that the Corps and this Administration strongly support private property rights. The right to own, reasonably use and enjoy private property is vital to our nation's economic strength and to our Constitutional heritage.

A central tenet of the Administration's wetlands plan is to ensure that the Section 404 program is administered in a manner that is fair to all landowners and to the general public and the public interest. We have taken action to reduce delays and streamline the process for small landowners. As proposed on March 6, 1995, the Corps will soon issue a new general permit that will allow landowners to build or expand single-family homes in non-tidal wetlands without an individual permit when the total impacts are less than one-half acre. On March 6, 1995, the Corps and the Environmental Protection Agency (EPA) issued guidance to their field offices stating that for the construction of homes, farm buildings, and the expansion of small businesses impacting less than two acres of non-tidal wetlands, alternative sites not owned by the applicant are presumed to be impracticable. The Corps will soon propose for public comment a new program that will allow landowners to appeal a wetlands jurisdictional determination or a permit denial without going to court. In January 1994, the Corps, EPA, and the Fish and Wildlife Service (FWS) signed a memorandum of agreement with the Department of Agriculture's Natural Resources Conservation Service (NRCS) that gives NRCS the lead for wetlands determinations on agricultural lands -- for both the Food Security Act and CWA Section 404. Farmers no longer run the risk of getting two different answers from two Federal agencies. Later this year the Corps expects to finalize a program that will allow the government to rely more on private sector wetland consultants. This should free Corps personnel to conduct wetlands determinations more quickly for small landowners, and should reduce the overall time to evaluate applications for

larger projects. The Corps, EPA, FWS, NRCS, and the National Marine Fisheries Service are in the process of finalizing guidance on wetlands mitigation banking. When properly implemented, mitigation banking can provide another compensatory mitigation tool that is good for the aquatic environment and that provides landowners additional flexibility in meeting permit requirements. These are a few examples of how this Administration is working to reduce burdens on landowners and to make the program more fair.

There are some who believe that all wetlands are the same, and others who believe that we regulate all wetlands with the same rigor. While neither of these notions are true, those misunderstandings have led some to believe that we permit the destruction of too many wetlands, and led others to call for national classification, or ranking, of wetlands.

This administration has been unequivocal in stating that all wetlands are not the same, and should not be regulated in the same way. The regulatory response to a proposed project in wetlands should be commensurate with the relative functions and values of the resource and with the nature of the impacts associated with the particular project. For example, if a project involves a low-value wetland resource and has minor impacts, we should not require a rigorous evaluation of a permit application. In the alternative, if moderate to high value wetland resources are involved and the project impacts are substantial, we should require a detailed evaluation. We have emphasized this approach through regulatory guidance, and this is the way the program currently works. Using general permits, which authorize over 80 percent of all Section 404-regulated activities, and individual permits which take into account the specifics of the resource and the development project, we have the flexibility to make sound, common sense decisions based on the project impacts and the risk to the resource.

In the past year or so much has been written about the proper role and size of the Federal government. This has been discussed explicitly in the context of wetlands regulation. In the President's Wetlands Plan it is clear that this Administration recognizes fully the importance of developing strong partnerships with state, tribal, and local governments which have wetlands programs. In short, we will not meet our wetlands protection objectives if we rely solely on the Federal government. While we must maintain strong Federal programs, including the Section 404 program, we must work with the states, tribes, and local governments to create a national wetlands program -- not just a Federal program.

To create a national program we must recognize that there are effective state and local regulatory programs in place. In such cases the Section 404 program should not duplicate the regulatory actions of another level of government. The Federal government should instead work with the state or local government as a partner where each has clearly defined responsibilities and the Federal government maintains responsibility for programmatic evaluation of the state or local program. Existing authorities such as state assumption of the program authorized by EPA pursuant to Section 404(g) and programmatic general permits issued by the Corps provide the necessary vehicles for building this national program. The Corps is currently working with the states to develop programmatic general permit guidance -- an approach that shows great promise.

The guidance will both encourage programmatic general permits and set the limitations on their use. The basic principle will be that if a state, tribal, or local regulatory program provides the same level of protection as provided by the Federal Section 404 program, and if such protection will be sustained in the future, the Corps should not duplicate such a program. If properly implemented, the environment will be better protected and the regulated public will be spared unnecessary, duplicative levels of regulation. The Corps will then be able to prioritize better its work -- focusing on larger projects with potentially greater impacts.

Effect of S. 605 on the Section 404 Program

Summary

S. 605 or similar bills would engender unjustified, but nonetheless, huge and virtually unlimited, claims against the Corps Civil Works budget. For the reasons set forth below, the Army would recommend that the President veto S. 605, if passed in its current form, or similar legislation. The potentially immense administrative and liability costs such laws would impose on the Corps budget would drastically affect the Corps' ability to carry on essential civil works functions such as responding to floods and other disasters, and protecting and enhancing the public interest through development and operation of water resources projects for navigation, flood control, and environmental restoration. Payments required by such laws would drain the Corps regulatory funds, making it impossible to continue protecting public health, safety, environmental values, and the overall public interest through administration of the Corps regulatory program (i.e., pursuant to Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act of 1899, and Section 103 of the Ocean Dumping Act). Moreover, once all regulatory funds have been expended through the payment of claims, the Corps would be forced to cease operation of the program, leaving thousands of applicants and potential applicants unable to obtain permits for their activities that would affect waters of the United States.

The Section 404 Program Protects Private Property Rights

The Corps is committed to protecting the property rights of all landowners and operates its regulatory program accordingly. The legally binding regulations that govern the Corps regulatory program clearly establish respect for and protection of private property rights as one of the cardinal principles guiding all regulatory actions and decisions. See 33 C.F.R. § 320.4(g) (stating that "[a]n inherent aspect of property ownership is a right to reasonable private use. However, this right is subject to the rights and interests of the public in the navigable and other waters of the United States, including the federal navigation servitude and federal regulation for environmental protection.") This follows the basic common law principle that "no one has the right to use his or her property to harm another." As the Army, acting through the Corps of Engineers, administers its regulatory program, it reduces the impact of these important regulations on private property owners as much as possible, while still allowing the Corps to protect other property owners and the overall public interest.

As noted clearly in the statistics presented above, the Corps authorizes tens of thousands of activities annually, most with little or no delay or expense to the regulated public, but with general permit conditions to minimize adverse effects on neighboring and downstream landowners and on the overall public interest. Even for the larger-scale proposals that must be authorized by individual permits, the Corps annually grants approximately 10,000 individual permits, and denies only about 500; the majority are denials "without prejudice", made necessary by a state's denial of a water quality certification or coastal zone management certification. Thus, in the vast majority of cases, the Corps regulatory program authorizes owners of private property to use their land profitably, subject to reasonable conditions to protect the rights and property values of others, and the overall public interest.

One of the successful aspects of the Section 404 program is the ability of the Corps to balance the objectives of an individual landowner with the interests of other landowners that are potentially adversely affected by the filling-in of aquatic areas, and by other development-related impacts. In the vast majority of cases the permit applicant is allowed to accomplish his or her objectives in a manner that protects the interests of the other landowners and the public in general. Through this process the Corps must consider fully how a particular action not only affects the environment but how it affects other people. For example, the loss of important wetlands may harm the quality of water in the Chesapeake Bay, which in turn would reduce blue crab populations, which would do economic harm to the region.

We have observed first hand numerous examples around this Nation where the Section 404 program has protected the rights of property owners. For example, in Georgia, through the Section 404 program a developer was required to mitigate for the illegal, unauthorized filling of wetlands that resulted in the flooding of adjacent property owners. The homeowners in the affected subdivision expected, and in fact demanded, that the Corps and EPA enforce the Section 404 program in this case.

Even though the Corps operates its regulatory program in a manner that is highly respectful of the rights of private property owners in the vast majority of cases, upon rare occasion an incident occurs in which private property rights may appear to be insufficiently considered. The Corps regrets those rare deviations from the normal operation of the program, and tries to correct them whenever they are discovered.

Enactment of S. 605 Would Create Overwhelming Problems

The general problems associated with S. 605 and similar "takings" bills have been explained in the written statement of Mr. John R. Schmidt, Associate Attorney General, Department of Justice (DOJ), presented to this Committee on June 27, 1995. We support the DOJ position regarding why those "compensation" bills would allow and encourage a vast number of unjustified claims against the government.

~~In the opinion of the Army, the inflexible terms of S. 605 and similar bills are unworkable.~~
They would impose an unmanageable administrative burden and cause the Corps to cease to protect the public interest through the regulatory program (i.e., by ceasing to impose permit conditions, permits denials, enforcement actions, etc.), or, alternatively, to subject the Corps Civil Works budget to a growing, practically limitless number of potentially large claims. These could amount to many hundreds of millions of dollars, perhaps billions, every year. Furthermore, the inflexible terms of S. 605 and similar bills would result in many or most of those claims being paid from funds appropriated for operation of the Civil Works program.

If S. 605 or any similar bill were to become law, it would invite and encourage a multitude of individuals to file claims against the Corps, even though the vast majority of those claimants would not have a real economic loss or a reasonable grievance against the Corps, regulatory program. This is true for several reasons. For example, S. 605 would encourage speculators to purchase wetland and riparian property, and to subdivide larger tracts containing wetlands or riparian land, for the primary purpose of creating claims for the "affected portion" of property under the terms of S. 605. This new "land rush" to acquire and to "segment out" wetland property would quickly inflate the value of wetlands, not because wetlands are actually suitable for development, but because S. 605 would allow and encourage speculators to use wetland claims to exploit the Federal Treasury.

Similarly, S. 605 would encourage the owners of wetlands or riparian lands to generate bogus or highly speculative permit applications, or to seek unneeded jurisdictional determinations or enforcement actions, in order to create claims under the terms of S. 605. There is a substantial risk that the Corps would be forced to pay many (and probably most) of the anticipated myriad of claims, because the unreasonable terms and procedures of S. 605 would require that result. For example, S. 605 would not require claimants to document actual or clearly predictable losses in order to assert compensable claims, and the claims procedures of S. 605 would virtually ensure a recovery for any wetland property owner who can find a cooperative "qualified appraisal expert" (undefined in S. 605). Thus, S. 605 would force the Corps to pay claims that could amount to many hundreds of millions (or perhaps billions) of dollars yearly to claimants who would deserve nothing under the constitutional standards for "regulatory takings", or in terms of fundamental fairness or common sense. S. 605 invites wholesale exploitation and abuse of the Federal Treasury, would constitute a monumental "giveaway" of scarce public funds, and would cost huge sums merely to administer.

Because the terms of S. 605 would allow so many abuses, if that bill or any similar bill were to become law, it would create the risk of unjustified and virtually unlimited, claims against the Corps Civil Works budget, plus very large administrative costs. Presumably, the first effect of S. 605, would be that the Corps would no longer have sufficient funds to support the regulatory personnel who process and issue the tens of thousands of separate Corps regulatory authorizations that U.S. citizens need every year so they can legally carry on their legitimate activities in or affecting the waters of the United States. The budget for the Corps regulatory program is \$101 million for Fiscal Year 1995, with approximately 70 per cent of that budget going to pay the

salaries of the Corps regulatory personnel. Because the numerous multi-million dollar claims engendered by S. 605 would soon force the Corps to eliminate the regulatory staff for lack of funds to pay them, U.S. citizens would soon have to defer activities subject to regulation indefinitely, or proceed with their projects without the needed permits, thereby endangering other landowners and the environment, as well as breaking the law and subjecting themselves to civil and criminal enforcement actions, as well as injunctions resulting from CWA citizens lawsuits. Soon, however, the large and unjustified claims that S. 605 would engender would exhaust the limited budget of the Corps regulatory program itself, and would begin rapidly to deplete the Corps Civil Works appropriations needed for responding to flood control needs, navigation, shore protection, and environmental restoration.

Since 1968, when the Corps regulatory program began to provide reasonable and balanced protection for all aspects of the public interest (including environmental values such as wetlands), experience has shown that the Corps regulatory program deprives property owners of the use of their land so as to constitute a constitutional "regulatory taking" only in very rare and exceptional cases. Instead, in practically every case the Corps regulatory program allows the property owner to carry out a proposed project and to make economically viable use of his or her land, but in a manner that minimizes adverse effects on adjoining property owners, water quality, downstream flooding, and other public interest and environmental values. For any case where a landowner feels aggrieved, the Tucker Act and the U.S. Constitution guarantee him or her the right to bring suit in the Federal courts to seek compensation under the Fifth Amendment, or other legal relief. If the property owner's claim of a "regulatory taking" is meritorious, he will not only receive full compensation, with interest, but also reimbursement for all of his attorneys' fees under 42 U.S.C. 4654(c). Clearly, the Tucker Act, the U.S. Constitution, 42 U.S.C. 4654(c), and the Federal courts already adequately protect aggrieved property owners, so the additional provisions of S. 604 and similar bills are unnecessary. The fact that over the years very few court decisions have held that the Corps regulatory program resulted in a constitutional taking reflects the facts that the regulatory program in the vast majority of cases accommodates the legitimate development goals of the regulated public, and respects the needs and rights of private property owners.

If enacted, S. 605 would make it virtually impossible for the Corps to continue to protect the public interest through its regulatory program, and in fact, to operate that program at all, for the various reasons indicated in this statement. For example, S. 605 would radically change the established legal standards governing when the denial or conditioning of a Corps permit would require Federal compensation. The end result would be that for the many thousands of times every year when the Corps is required by statute and by legally binding regulations to condition a permit, bring an enforcement action, make a jurisdictional determination, or deny a permit application, thereby restricting the ability of a property owner to fill in or otherwise destroy any area of the waters of the United States, the affected property owner could (and presumably would) demand compensation under the terms of S. 605. Moreover, under the new rules of law and procedures created by S. 605, a property owner/claimant often would be able to obtain compensation from Corps funds, no matter how small the area or interest protected compared to the total area developed, no matter how grievous the harm to public interest caused by the

landowner's proposed activity, and whether or not the landowner's proposal or claim was actually supported by reasonable, investment-backed expectations, fundamental fairness, or by common sense.

Section 501 -- The Findings that Underlie the Bill are Inaccurate and Misleading

Section 501 of S. 605 refers to the protection afforded to property rights under the Fifth Amendment to the Constitution, and states that the Section 404 program has been implemented "in a manner that deprives property owners of the use and control of their property." These findings might be read to suggest that regulation under the Section 404 program routinely interferes with constitutionally protected property rights. As to the Section 404 program, an August, 1993, report of the U.S. General Accounting Office found that of the 13 cases decided by the Claims Court (now the Court of Federal Claims) involving the Section 404 program as of May 31, 1993, only one resulted in a final judicial determination of a taking that required compensation under the Constitution. (One other case was settled prior to decision by the court.) It is thus inaccurate to suggest that the Section 404 program has significantly impaired constitutionally protected property rights.

Section 501(a)(3) of the bill states that property owners are being forced to resort to expensive and lengthy litigation to protect their constitutional rights. Yet the President's comprehensive Federal wetlands policy, announced in August of 1993, contains several features designed to reduce the time and expense of challenging wetlands determinations, such as allowing administrative appeals of jurisdictional determinations, permit denials, and administrative penalties. The 1993 wetlands policy also requires most permitting decisions to be made within 90 days. Moreover, the relative lack of success of takings challenges to regulatory actions under the Section 404 program suggests that the length and expense of these cases is attributable, at least in part, to their lack of merit.

Section 501(a)(8) of the bill incorrectly suggests that the Section 404 program is unrelated to the protection of human health and public safety. In fact, wetlands enhance flood control, protect against coastline and riverbed erosion that might threaten public safety, and filter out pollutants that would otherwise contaminate our Nation's drinking water and waterways.

Section 503 -- The Requirements in Section 503 Would Undermine the Stated Purposes of the Bill

Section 501(b) states that the purpose of the bill is "to provide a consistent Federal policy" for the protection of private property rights and other constitutional rights. Yet section 503 of the bill would undermine such consistency. Section 503(a) states that, in implementing the ESA and the Section 404 program, "each agency head shall comply with applicable State and tribal government laws, including laws relating to private property rights, and privacy" This requirement would lead to inconsistent Federal policy because the states and tribal governments have different, and perhaps even conflicting, laws relating to property, privacy, and other matters. (Ordinarily, nationwide consistency in Federal legal policy is advanced by Article VI of the

Constitution, which provides that the Constitution and Federal laws are the supreme law of the land, notwithstanding any conflicting state law.) Moreover, to the extent that section 503(a) is intended to waive Federal supremacy, we question whether the language employed is sufficient under applicable Supreme Court case law. See generally, U.S. Department of Energy v. Ohio, 112 S. Ct. 1627 (1992); United States v. Nordic Village, Inc., 112 S. Ct. 1011 (1992).

Section 503(a) requires that the Section 404 program be administered "in manner that has the least impact on private property owners' constitutional and other legal rights." It is not clear whether this provision is aspirational or enforceable. In addition, the "least impact" standard ignores the fundamental truth that environmental protection necessarily involves a delicate weighing of competing concerns. This standard might be read improperly to elevate a property owner's individual rights over and above the public's legitimate interest in the protection of human health and the environment.

S. 605 Would Create Huge New Bureaucracies and Countless Lawsuits

S. 605 would also require the creation of huge and costly bureaucracies to address compensation requests. Title II would greatly expand the grounds for filing judicial claims for compensation where regulation affects private property. Title V would establish an administrative compensation scheme with binding arbitration at the option of the property owner.

Agencies would need to hire more employees to process compensation claims, more lawyers to litigate claims, more investigators and expert witnesses to determine the validity of claims, more appraisers to assess the extent to which agency action has affected property values, and more arbiters to resolve claims. The sheer volume of entitlement requests under these schemes would be overwhelming. The result would be far more government, not less.

The Takings Impact Analysis Requirement In Title IV Would Create Massive And Costly Bureaucratic Red Tape

Section 403 (a)(1)(B) of the bill would require all agencies to complete a private property taking impact analysis (TIA) before issuing "any Policy, regulation, proposed legislation , or related agency action which is likely to result in a taking of private property ." The Administration firmly believes that government officials should evaluate the potential consequences of proposed actions affecting private property, and we currently do that pursuant to Executive Order No. 12630, issued by President Reagan.

Because S. 605 would establish such a broad definition of "taking," however, Title IV would impose an enormous, unnecessary, and untenable paperwork burden on many aspects of Corps operations. This inflexible and unnecessary bureaucratic burden would apply to all kinds of government efforts to protect public safety, human health, and other aspects of the public good. The bill would severely undermine these efforts by imposing an incalculable paperwork burden. At a time when the Administration is reinventing government to make it more streamlined and

efficient, Title IV would result in "paralysis by analysis" and generate a vast amount of unnecessary red tape.

The specific requirements of section 404 of S. 605 are also disturbing. Among other things, it would require agencies to reduce actions that are compensable under the Act to "the maximum extent possible within existing statutory requirements." By elevating property impact above all other legitimate goals and objectives, section 404 of S. 605 would inevitably lead to less effective implementation of any Federal program that affects property rights.

The bill's enforcement mechanisms are unclear, but section 406 of the bill suggests that actions could be filed in Federal courts to enforce the TIA requirement. Opponents of any government action would use legal challenges under the bill to delay or defeat the action by challenging whether an analysis must be done, whether every person with an interest received notice, and whether the analysis is adequate. Such litigation would result in an enormous additional burden on the Federal Courts' already overburdened docket.

The Administrative Appeal Provision

Section 506 and 507 of the bill would require the issuance of rules to establish administrative appeals for various regulatory actions under the Section 404 program. The Administration has already decided to provide administrative appeals for a number of these actions, including Section 404 jurisdictional determinations, permit denials, and administrative penalties. A proposed regulation that will establish this appeals process will be published within the next few weeks for public review and comment.

We believe, however, that it is ill-advised to require administrative appeals for certain actions specified in the bill. For example, "cease and desist" orders and other compliance orders under the Section 404 program may sometimes require a property owner to restore or otherwise alter property. Under current law, an administrative compliance order under the Section 404 program is not subject to judicial review unless and until the property owner refuses to comply with the order, at which point the DOJ decides whether to attempt to enforce the order in Federal court. This system often results in prompt compliance and remediation, but allows for judicial review if the owner believes that the order is improper. An administrative appeal, as required by section 506, would create an unneeded and burdensome bureaucratic review that would disrupt this streamlined process, have a chilling effect on prompt compliance, and preclude a quick enforcement response to threats to human health and the environment.

Conclusion

As currently administered, the Section 404 program respects the rights of the Nation's property owners. The vast majority of landowners are allowed to use their property and realize their development expectations -- in a manner that protects important aquatic resources. An often overlooked aspect of the "property rights" debate is the impact on other property owners of filling wetlands. We have observed first hand where the Section 404 program has protected the rights of adjacent and downstream property owners from flooding and other problems. In this regard, we must recognize that fairness to landowners extends to all landowners and that individuals do not have a right to harm their neighbors.

Our position is that not only are S. 605 and other proposed compensation bills unwarranted, but also that they would have serious adverse effects on the Corps regulatory and Civil Works programs and on the general public. For the reasons set forth in this statement, the Army strongly opposes S. 605.

As previously noted, we recognize that the Section 404 program can and should be improved to make it more fair, flexible, and effective. This Administration, like no other before it, has taken the initiative to address the legitimate concerns of all landowners. We would be happy to work with this Committee to facilitate additional improvements without disregarding the need to protect the overall public interest, including the Nation's aquatic resources. Mr. Chairman that concludes my statement. I will be happy to answer any questions you or the Committee members may have.

PRIVATE PROPERTY RIGHTS LEGISLATION

STATEMENT OF GARY S. GUZY

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BEFORE THE SENATE ENVIRONMENT & PUBLIC WORKS COMMITTEE

JULY 12, 1995



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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Statement of

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on Private Property Rights Legislation

Before the Senate Environment and Public Works Committee

July 12, 1995

Mr. Chairman and Members of the Committee. Thank you for the opportunity to testify today on proposals to automatically compensate property owners far beyond what the Constitution provides. In my testimony, I will examine in some detail the effects of various legislative proposals, to demonstrate how such proposals are a misguided response to concerns about environmental and other regulation on property owners and sweep so broadly they will seriously undermine critical health and safety protections. Pending legislation would undermine our many successes in health and environmental protection of the past 25 years and render our future challenges perhaps impossible to meet. The American people neither can afford nor desire any of these results, and, for these reasons, EPA would recommend that, in its current form, the President veto S.605 or similar legislation. I will also focus on the Administration's efforts to address such concerns using a more carefully targeted approach to achieve the goal I know we all share, of ensuring effective public health and environmental protection while respecting and enhancing the property rights of all Americans.

Let me begin by stating the obvious yet important predicate for our approach, which is that the Administration is strongly committed to private property rights, both because the Constitution protects them and because we believe they are a cornerstone of a free society. Those who have suggested that the Administration, because it opposes compensation bills, is somehow hostile to the Fifth Amendment either do not understand the Fifth Amendment or do not, or are unwilling to, understand the Administration's position.

I. Environmental Regulation Today

For more than a quarter of a century, the Environmental Protection Agency (EPA) has been implementing environmental laws that provide protections for all Americans--protection of health from crippling air pollution, disease-causing drinking water, dangerous toxic emissions and hazardous waste disposal. These efforts have been effective. We no longer have rivers catching on fire. Water bodies that used to be virtual sewage dumps are now vital, thriving places where people swim and fish--Boston Harbor, Santa Monica Bay, Puget Sound.

Our skies are also cleaner. In virtually every city in this country, the air is cleaner than it was 25 years ago. Smog and carbon monoxide are down. By banning lead in gasoline, we reduced the level of lead in the air by 98% and protected millions of children from permanent mental damage. In just the last two years, we have reduced toxic air pollution from chemical plants by 90%. We've protected the public and the environment from toxics, such as DDT. Industrial emissions of toxic chemicals have decreased, hundreds of toxic dumpsites have been cleaned up, and the creation of new hazardous sites has all but halted. Today's new cars use only a third as much gas and emit 90% less pollution. All across the country, big industries and small, now recognize that pollution control and prevention is part of doing business responsibly and critical to our nation's health and economic success.

Nevertheless, we need to protect these gains, and to recognize that many environmental problems still remain to be solved. With

all the progress we've made, 40 per cent of our rivers and lakes are still not suitable for fishing or swimming; more than 1000 warnings are in place, telling people not to eat the fish they catch in their local streams. Thirty million people in the U.S. get their drinking water from systems that do not meet public health standards. In Milwaukee, hundreds of thousands fell ill from contaminated drinking water, and 100 died. Asthma is on the rise, and 40% of the population still lives in areas where the air is dangerous to breathe. One in four Americans lives within a few miles of a toxic dump.

So much work remains to be done. Compensation bills would cripple EPA's efforts to address remaining problems, and threaten to undo the successes we have had. While not outwardly admitting this result, this legislation would fundamentally reexamine the most basic premises for tough and protective national environmental standards.

II. Problems with Automatic Compensation Bills

Our difference with proponents of compensation bills is not over the end, protecting private property rights and ensuring that the guarantees of the Fifth Amendment against uncompensated takings of private property are fully implemented, but with the means for doing so. I believe compensation bills do not allow us to strike the balance the Constitution provides between the needs to protect our nation's environment and to protect private property; instead, they force the false choice of doing one or the other as if the two

were mutually exclusive. In reality, a healthy environment is critical to protection of property values, which depend in large measure on clean air, safe water, and the like. In the long run, compensation bills will seriously undermine environmental protection, and thus reduce protection for all private property, particularly for America's homeowners, nearly 95% of whom live on lots of five acres or less. Moreover, it is the genius of our constitutional system that we can protect both private property and vital public interests.

There are two principal compensation bills now under consideration. HR 925, passed by the House, has a purported compensation threshold of 20%, defines property to include land and water rights, and applies to federal action to protect wetlands and endangered species (and to certain federal water programs). S. 605, which is now before the Senate Judiciary Committee, has a purported 33% compensation threshold, and applies to any federal action (and some state actions) affecting any type of property.

Despite their differences, the bills are based on common, flawed assumptions that mean they will adversely affect property owners and the public. I will emphasize in particular four principal problems with compensation bills. First, they reject the Fifth Amendment effort to provide fairness to the property owner and the public, in favor of a one-size-fits-all mechanical formula that effectively creates an entitlement for property owners whenever certain conditions are met. Second, because they provide only narrow, nuisance-based exceptions to the compensation

requirement, in many cases, they will force the government to choose between paying polluters not to pollute and tolerating activities that harm or threaten public health, safety or welfare. Third, they will undermine the careful balance Congress has struck in individual environmental statutes and needlessly complicate the regulatory process. Finally, they will create perverse incentives that will discourage cooperation between government and property owners to find constructive ways of protecting the environment while meeting the needs of property owners.

1. No Attempt at Fairness

The Fifth Amendment standard for compensation is fairness: whether, in light of all the circumstances, it is fair that a particular property owner should bear the cost of regulation, or whether that cost should be borne by the public as a whole.

Compensation bills, however, reject this standard in favor of an extreme formula that would pay out billions of taxpayer dollars without regard for whether compensation is fair to the public or the property owner.

The bills' most radical departure from the Constitution is in providing compensation solely on the basis of a mechanical formula purportedly assessing the economic impact of the regulatory action on the regulated property. This formula does not explicitly consider, among other important factors, the price the owner paid for a property, the expectations the owner had when acquiring the property, whether the use the owner proposes is reasonable under the circumstances, or whether the owner is able to earn a

reasonable rate of return on the property. This could force EPA to spend huge sums for compensation, regardless of whether or not compensation is fair to the property owner or the public. It could even compensate property owners who continue using their property as they always have, for example for agriculture, while claiming compensation for regulation that prevents them from making some other more lucrative use, such as commercial development.

The focus on an "affected portion" of property also rejects any consideration of fairness. It would require compensating the owner of a 1000 acre parcel for regulation affecting a single acre wetland on that parcel if the wetland is claimed as the "affected portion." In many cases, owners who have suffered a minor loss will be able to "segment" their property, to establish a loss of 20%, 33% --or even 100%--to a specific "portion," and the bills identify no limits to how small a portion can be considered. In practice, this will mean that virtually any federal regulation can trigger compensation.

A focus on the whole parcel, rather than just an affected portion, is necessary to ensure fairness. Thus, the owner of a large tract, some fraction of which has been subject to restrictions, is still likely to be able to make productive and profitable use of the land. Indeed, with adaptive and innovative modern techniques stimulated by local land use regulation, such as clustering of housing units to preserve open space, owners often end up with developments that are highly profitable and attractive to buyers, even though not every acre can be developed. Such

owners should not be compensated.

Compensation bills are also unfair to taxpayers because they ignore the role of regulation in creating and protecting property value. They force the taxpaying public to compensate property owners when regulation limits changes in use that enhance value, but do nothing to assure the public a share of the benefits when government action -- as it so often does in our complex society -- increases property value by providing infrastructure and protecting public order, human health, and the quality of the environment. In addition, compensation bills effectively force the government, that is, the taxpayers, either to pay property owners for following the law or to refrain from enforcing the law. This will inevitably erode government's ability to use its regulatory authority to protect and enhance property values for all property owners.

S. 605, with its exceedingly broad reach, ignores other aspects of fairness as well. The bill's broad language opens the possibility that private parties can create or define property by forming "understandings," by invoking "custom" or "usage." This could mean, for example, that where permits are typically renewed, a property owner might invoke "custom" to claim a property interest in a renewal or where an activity has been tolerated in the past, owners might invoke "usage" to demand compensation for future restrictions on the activity. Even if such claims are ultimately rejected by the courts, the bill's vague and open-ended definition of property will create chaos and confusion in the meantime.

Equally radically, S. 605 also would pay property owners for

economic impacts that have never been protected by the Fifth Amendment. Specifically, the bill could provide owners with compensation for "business losses." It is difficult to assess the impact or define the practical limits of the unprecedented suggestion that it is somehow the job of the government to insure against all "business losses."

2. Nuisance

A. A Narrow Exemption

The compensation bills include specific exemptions that, because of their narrowness, ambiguity, or both, will not allow for adequate protection of human health, public safety, the environment, and other vital concerns. As a result, in many cases they would force the federal government to pay property owners to refrain from activity that is harmful to society, in some cases paying polluters not to pollute; this would seriously undermine effective environmental protection.

Both bills relieve government of the obligation to provide compensation when it regulates activities that constitute nuisances under state common law principles. While this exemption sounds like a simple, straightforward way of avoiding compensation to persons engaging in activity that is harmful or socially unacceptable, it is anything but. In practice, the nuisance exception may not reach many such activities. This exemption goes to the heart of Congress' long-standing rationale for enacting federal health and environmental protections in the first instance -- to address problems that could not be adequately or uniformly

addressed under state nuisance law.

For example, some courts have rejected state nuisance claims seeking to remedy the problems created by leaking landfills or underground storage tanks or activities on one property that caused flooding on a neighboring property -- even where these might be plainly covered by federal environmental legislation. The nuisance exception in these bills would typically apply only to actions that cause demonstrable immediate harm to specific property. Thus it may not reach actions whose health and safety risks are long-term, as is often the case with discharges of pollution into air, land, or water. Similarly, it may not cover actions whose principal threats to health and safety are cumulative, as where an individual use of a pesticide or discharge of a pollutant does not, by itself, cause significant harm, but the frequent repetition of the action has serious consequences.

Similarly, nuisance law may not fully protect those who might be particularly sensitive to the harmful health effects of pollution, including children, pregnant women, and the elderly. Further, it may not apply to actions whose harms are suspected but have not been conclusively documented, forcing the public, rather than the property owner, to bear the risk of any uncertainty. Finally, some critical public safety activities, such as interstate pollution, are governed solely by federal law, and thus would not be covered by a state nuisance law exemption. In addition, nuisance law is notoriously uncertain; far from establishing a bright-line standard, a nuisance test will make it more difficult for both

regulators and property owners to determine what actions can be regulated without compensation. Finally, since nuisance law varies from state to state, a state nuisance exemption could lead to major differences in the level of environmental protection from one state to another -- and an intrusive look by federal assessors and federal courts at how state nuisance provisions should be interpreted for purposes of this legislation.

HR 925 also exempts regulation whose "primary purpose ... is to prevent an identifiable" "hazard to public health or safety; or ... damage to specific property." The "hazard" exemption is apparently meant to cover activities that would not come within the definition of nuisance. However, the exemption is worded in novel language whose meaning is unclear. Thus it may not apply to activities that will reduce or control a hazard but cannot "prevent" it entirely. It is also unclear at what point a long-term or cumulative risk constitutes an "identifiable" "hazard" or what constitutes "identifiable .. damage to specific property." Ultimately, the "hazard" exemption raises many of the same issues concerning cumulative and long-term impacts as nuisance law, and it seems more likely to create confusion and uncertainty than to remedy the limitations of nuisance law.

B. Compensation to Prevent Harmful Activities

Particularly with S. 605, the limitations of the nuisance exemption could require EPA to compensate a wide variety of restrictions imposed to protect public health, safety, and the environment by controlling pollution.

For example, under S. 605, taxpayers could be forced to pay staggering sums to the owners of industrial sites to refrain from emitting damaging air pollutants. Title I of the Clean Air Act requires that major new sources of air pollutants wishing to locate in areas that are already in violation of air quality standards must obtain "offsets" of pollutants from other sources so that the total quantity of pollutants in the area does not rise. This increases the costs of operating facilities, and thus could give rise to claims under S. 605. Moreover, this restriction would be unlikely to fall within the nuisance exception because the effects of these pollutants are cumulative, long-term, and widely dispersed, and because their emission is tolerated under certain circumstances. Similarly, in order to control damaging acid rain, EPA requires "allowances" of sulfur dioxide emissions; EPA will reduce these allowances over time. Such pollution may be transported over large distances, cumulate the effects from many sources, and be influenced by complex weather patterns -- so any one activity may not alone be immediately damaging, or any one state's nuisance provisions may not suffice to be protective. Under similar reasoning, this program could give rise to compensation claims.

To protect the public, EPA also imposes requirements for accreditation, training, and notice for lead and asbestos removal. Businesses could seek compensation for the increased costs of worker training and more costly removal processes and any resulting reduction in profits, and home and apartment owners could claim

that the notice requirement affects the marketability of their property. Because these programs address hazards that are primarily long-term, they might not come within the nuisance laws of some states. However, they provide protections vital to public health, especially for children, who are particularly vulnerable to the hazards posed by lead and asbestos.

EPA also imposes critical restrictions on uses of pesticides and similar products, in some cases with outright bans, such as for DDT, and sometimes by restricting use. Such restrictions arguably may reduce property value and trigger compensation claims. Moreover, because the principal effects of some of the regulated products are cumulative, such restrictions might not fall within an exemption based on state nuisance law.

Further, EPA sometimes imposes uniform national regulations to ensure an adequate margin of safety for the public. For example, to protect drinking water supplies, EPA requires the monitoring of groundwater near waste disposal facilities. If the monitors at a particular site established that no contamination had occurred, the operator of the facility could seek compensation for monitoring costs, using the evidence obtained from monitoring to demonstrate that, in fact, no nuisance existed.

Finally, to ensure full protection to the public and a margin of safety, some statutes and regulations require use of the best available pollution control technology. However, even though achieving such standards is feasible, if it reduces the profitability of a property, the owner could claim compensation and

defeat a nuisance exemption if some other, less costly and effective standard would be adequate to avoid creating a common law nuisance.

Similarly, HR 925, even with its "hazard" exemption, will require compensation to prevent activities that interfere with the important functions wetlands perform in protecting the public. Specifically, in their natural state, wetlands enhance the ability of watersheds to absorb water without harmful flooding, and filter a wide range of pollutants, including pesticides and chemical fertilizers, from entering groundwater used for drinking. They also protect aquatic life, including fisheries on which many jobs may depend. It is ordinarily not possible to document with specificity the connection between a single wetland development activity and a specific instance of unusually severe flooding, degradation of drinking water, or lost productivity of a fishery (with resulting job losses). Thus, wetlands development often would not constitute a common law nuisance or a "hazard."

Nevertheless, wetland development activities have real consequences, not only for ecosystems in a general sense, but for very specific people whose safety and livelihoods depend on the ability of wetlands to continue performing their natural functions. At bottom, government does not engage in wetlands regulation to arbitrate between abstractions ("property rights" versus the "environment") but among the differing needs and rights of various people, many of them property owners, who will be affected in a host of ways by wetlands activities. The problem with compensation

bills, which their exemptions do not solve, is that they fail to recognize this arbitration function. Instead, they use a rigid formula that mechanically tilts the balance in favor of one type of citizen, property owners seeking to develop their property, with only the most narrow consideration of the needs of others whose health, safety, economic security, and well-being may depend on restraints on development. In reality, the only way to find the proper balance, to protect the rights of all Americans, is by looking at each proposal on its merits, as sound regulatory programs do, as the courts do in takings actions, but as automatic compensation formulas most emphatically fail to do.

3. Disruption of Critical Protections

Despite the care and balance Congress has struck with each of its pieces of environmental legislation, automatic compensation bills will disrupt existing regulatory programs by creating uncertainty, confusion, and instability. Ultimately, this will cause regulatory gridlock, creating problems not just for federal and state regulators, but for the regulated community as well.

S. 605 appropriates the language of regulatory reform legislation to impose "decisional criteria" that would create a "supermandate" elevating private property concerns above all others. The legislation would prohibit EPA from enforcing any legislation which might require an "uncompensated taking" as defined by the act. This vague provision, coupled with a required "lookback" at all existing regulations to redress any private property impacts, could serve as a bar to critical protections

despite Congress' considered judgment that EPA is required to impose necessary and appropriate limitations on property use affecting others.

Providing automatic compensation under the bills, in addition to costing taxpayers billions, will drain EPA program budgets and significantly reduce EPA's ability to perform its mission of health and environmental protection, as mandated by Congress. Both bills direct, with varying degrees of specificity, that compensation payments be made out of funds appropriated for agency operations.

As a result, a large number of claims--or a few large claims--against a particular program could threaten the operation of that program. Thus, if, for example, the Clean Water Act Section 404 program or the pesticide licensing program exhausted appropriations by paying compensation claims, they could be forced to suspend operations. This may mean that no permits could be issued for use of wetland property or no licenses could be granted for use of new pesticides. More generally, to the extent an agency diverts resources from implementing a program to compensating property owners, it will have fewer resources to assist property owners, by providing them with information or processing permit applications.

Proponents assume compensation bills will cut down regulation because regulators will feel the economic pain of paying claims. If this does occur, the Agency will effectively be compromising environmental protection for the entire public, in order to reduce regulation of the property of a few property owners. However, in many cases cutting back on regulation may not be a realistic option

for the Agency because the environmental consequences of such cutbacks would be intolerable and because Congressional mandates may compel the Agency to act, and leave it without the discretion to refrain from acting. Finally, attempts to cut back on regulation may be subject to judicial challenge by citizens who believe the reduced regulation does not satisfy the Agency's legal obligations. The net result will be to create regulatory instability and uncertainty.

In addition, a vast compensation bureaucracy of appraisers, negotiators, arbitrators, and litigators will be needed to establish and administer a compensation and detailed assessment program. The costs of creating this new bureaucracy would also be borne by the Agency, presumably coming out of its operating budget, which would further reduce money available to discharge its responsibilities for protecting health and the environment, including issuing permits.

In addition, the bill would also allow litigation to enforce its assessment and other prescriptive requirements at any time within six years of the challenged action. This will create enormous disruption and uncertainty, by fundamentally altering longstanding and carefully tailored "preclusive review" provisions in many environmental statutes.

For example, under the Resource Conservation and Recovery Act, any challenge to a final rulemaking must be filed in the Court of Appeals for the D.C. Circuit within 90 days of the publication of the final rule. 42 U.S.C. Section 6976. After that time, the

legality of the rule cannot be challenged. Such provisions ensure that challenges to these regulations are heard swiftly, providing certainty to both regulators and regulated entities, including the State agencies that adopt the federal regulations over time. S.605 arguably would extend to six years the time for challenging an agency action.

A court action that invalidates a rule after many years can throw a whole program into chaos--the rule could already have been adopted by dozens of states, applied in numerous administrative and enforcement actions, incorporated in hundreds of permits throughout the nation, and used as the basis for additional, later regulations.

In addition, S. 605 includes a provision that could fundamentally and adversely reorder the carefully crafted relationship between the federal and State governments Congress has directed in the implementation of environmental programs. This provision would require the federal government to provide compensation for action by a State agency that: carries out or enforces a program required under federal law; is delegated administrative or substantive responsibility under a federal program; or receives federal funding to implement a state regulatory program.

The impact of this liability scheme will be devastating to State/federal relationships in implementing federal and state environmental programs. Currently, in large part, State agencies administer the major environmental programs, including the Clean

Water Act, the Clean Air Act, and RCRA. Consistent with the express intent of Congress in enacting these laws, EPA has developed strong partnerships with State governments and has, over time, delegated much of the day-to-day permitting, enforcement, inspection, and regulatory actions under these statutes to the States. The States also receive federal grants to administer these federal environmental programs and to develop state environmental programs.

Whether it be all of the state planning and pollution control requirements under the Clean Air Act's State Implementation Plans (SIPs) or the issuing of RCRA hazardous waste permits, EPA could no longer -- under S. 605 -- leave the basic administration of federal environmental laws to the States. These day-to-day State actions are likely to diminish "property" values, as defined by this bill, and thus could create enormous financial liability for the federal government. Nor, for the same reason, will EPA be able to provide federal funding to States to develop state environmental programs. Rather, to avoid federal liability for state actions, EPA would need to either withdraw authorization and funding of States to implement these laws or subject each State action to intense scrutiny. Since intrusive oversight is likely to be impractical for EPA and unacceptable to State program managers, withdrawal of funding and delegation seems more likely.

Withdrawal of delegation will lead to confusion and complexity in administration of these programs---for example, regulated parties will again be subject to the requirements of both federal

and State law. Withdrawal of funding may create new "unfunded mandates" for State governments and may cripple developing State environmental programs.

S. 605 also contains a provision that could be read to impose broad restrictions on EPA entry onto private property, seriously undermining EPA's ability to investigate criminal activity and other violations of environmental laws that could endanger the public. One provision (§ 504) prohibits EPA from entering private property to collect information regarding the property without the consent of the property owner, while another (§ 505), restricting use of data obtained on property, applies only to Section 404 of the Clean Water Act. Because Section 504 is not, by its terms, limited to the Clean Water Act, it could be construed to prohibit entry for purposes of implementing any agency regulatory program. Property owners who withhold consent to entry could thus prevent EPA from protecting public health by responding to chemical spills, assessing hazards from air or water pollution, or investigating sources of groundwater contamination, no matter how serious the environmental problem. Moreover, limitations on EPA's entry authority are unnecessary since existing law protects property owners from unwarranted property entry. Further, the requirement under Section 505 to provide owners with access to information collected on their property before using that information to implement Section 404 of the Clean Water Act would further undermine Section 404, particularly where the information at issue is part of a criminal investigation.

4. Disruption of Positive Innovations in Environmental Management

The bill will create perverse incentives that discourage cooperation between property owners and regulators to find ways of allowing development while protecting the environment. It guarantees compensation for projects that violate regulatory requirements, and creates strong incentives to maximize the impact of regulatory restrictions (to increase compensation claims), while doing nothing to encourage projects that comply with regulations.

Now, when a proposal will lead to environmental problems, the Agency and the property owner often can work to find ways to modify the project so that it proceeds without undue environmental impact. For example, a wetlands development proposal might be modified by changes that reduce its impact on the wetland or that create wetland values elsewhere to "mitigate" the impact of a particular development. Ideally, this can produce co-operative "win-win" solutions that allow the owner to achieve all or most of the objectives of the project while minimizing harm to the environment. Creating such solutions is a key element of this Administration's efforts to reinvent government.

The bill's perverse incentives would stifle efforts to find such solutions. Owners who refuse to cooperate are rewarded by being fully compensated for the value their property would have if it were completely unregulated. By contrast, cooperative owners may find themselves worse off for accepting and accommodating themselves to the costs of regulation, particularly if their cooperation causes the impact of regulation to drop below the

compensation threshold.

Even more perversely, the bill rewards proposals that are not realistic or feasible. Ordinarily, an owner who proposes to make a particular use of a property must finance the project, risking capital, with the possibility that the project will lose money. Sound projects often succeed, and their developers profit, while imprudent ones likely fail. Under this bill, however, a property owner can avoid financial risk entirely by proposing a project that would violate government regulation and then claiming compensation.

III. Regulatory and Wetlands Reform

Compensation bills are offered as a "solution" to "problems" whose existence is supposedly demonstrated by widely circulated anecdotes of property owners frustrated by government regulators. These anecdotes almost invariably describe government actions in the past, during previous Administrations. In addition, the anecdotes, which are often incomplete or misleading, are offered in place of sound data documenting the adverse economic impact of regulation. In fact, the available data do not support the claim that government regulation is having a widespread, devastating effect on property values. However, the Administration recognizes that regulation could be more efficient and has created difficulties for some small businesses, farmers, and homeowners. We are strongly committed to reducing those difficulties by achieving our nation's health and environmental goals through cheaper, smarter, more flexible, and less intrusive means.

We believe that the best approach to legitimate concerns of property owners is to create meaningful regulatory reform -- in this way avoiding excessive and unfair burdens on property owners in the first instance. We at EPA have undertaken important efforts to reduce the burdens on small businesses and other property owners by focusing on ultimate environmental goals and enhancing the flexibility of those who are regulated in achieving those goals and reporting on their activities. Our recent Superfund policies for prospective purchasers concerning contaminated aquifers -- issued just last week and designed to tailor EPA's actions to truly liable parties while freeing other property owners to put their land to productive use -- are perfect examples of this approach.

The hallmark of this Administration has been our efforts to bring together all affected parties to find comprehensive common sense solutions to environmental problems -- such as with our Common Sense Initiative. Unfortunately, S.605 and similar legislation threatens to adversarialize the process and accomplish just the opposite -- by creating perverse incentives for property owners to either use their property in conflict with their communities, or to be compensated for their inability to do so.

On March 16, 1995, President Clinton announced the Administration's program to reinvent environmental regulation. Under this program, EPA is working on a set of 25 high priority actions designed to address problems with existing regulations and develop innovative alternatives to the current regulatory system. Many of these actions are specifically designed to aid small

businesses' and property owners' compliance with environmental regulations.

Among the priority items are policies which will rely on market-based incentives to enhance efficiency in environmental protection--such as air emissions and water discharge trading; reforming basic programs to correspond to good science--such as refocusing RCRA and the drinking water program on the highest risks; building partnerships with states, tribal governments and local communities through more flexible funding mechanisms and grants; cutting red tape by reducing paperwork requirements in all programs; encouraging compliance with environmental laws by providing incentives for self-policing and assistance to small businesses and communities; and providing greater public access to EPA information.

EPA is also developing alternative regulatory compliance strategies to help small businesses and property owners. EPA is sponsoring demonstration projects that encourage technological innovation and develop new, more flexible management tools for compliance, such as third-party audits and multi-media permitting.

As for wetlands, I believe our nation's wetlands protections are working for the vast majority of Americans, particularly our nation's 64 million homeowners, nearly 95% of whom live on parcels of five acres or less. They are working because they provide critical protections that all property owners need--such as preventing flooding and cleansing pollution--at the same time the vast majority of property owners with wetlands are able to use

their property as they see fit.

The wetlands program is a good model of the economy and environmental protection working hand in hand. Of the estimated 100,000 activities that occur in wetlands areas annually, half are covered by general permits that do not require the property owner to notify the federal government at all. Of the 48,000 who do apply for permits, most hear back within days, and can do as they desire with their property. Indeed, only 0.7% of requested permits were denied.

That is not to say that the wetlands program always works as well as it should--it has at times frustrated small landowners, farmers, and ranchers. As noted above, the Clinton Administration is reinventing the way it does its regulatory work by ensuring that its actions make good sense and are done fairly and efficiently. As part of this reinvention effort, the Administration has already taken extraordinary steps to reform the wetlands program. Nearly two years ago, the Administration--after intensive consultations with landowners, industry, states, tribes, scientists, environmentalists, and several federal agencies--instituted significant changes to the program. The Administration Wetlands Plan is a common sense, workable set of administrative initiatives designed to better coordinate Federal wetlands policy with State and local efforts, be more flexible for the landowner, and be more effective in targeting protection at valuable wetlands.

As a reflection of President Clinton's understanding that projects on private property with minor impacts should not be

subject to the same detailed permit review as more complex proposals that affect larger areas, the Administration has acted to reduce the regulatory burden on small landowners. In particular, two new approaches directly ease the regulatory burden on small landowners attempting to carry out routine projects on their property by eliminating or reducing permit review.

First, the Corps, in consultation with EPA, will soon issue a new nationwide permit that allows landowners to affect up to one-half acre of non-tidal wetlands for construction of single family homes without applying for an individual permit. This general permit applies to actions to build or add on to a home, and also covers such features as garages, driveways, and septic tanks.

Second, EPA and the Corps have directed their field staffs to streamline the regulatory process for projects that do require individual permits. The agencies have made clear that those seeking to build or expand homes, farm buildings, or small businesses that affect less than two acres of nontidal wetlands will generally be required to look only on their own property for less damaging alternative sites for small projects; off-site alternatives need not be considered.

Along with these changes, EPA and the Corps have directed their field staff to be more flexible in wetland permitting, emphasizing that all wetlands are not the same, to reduce the regulatory burden on landowners who wish to accomplish projects with minor impacts. Also, the Administration is developing a Section 404 administrative appeals process so that individuals can

seek review of jurisdictional determinations, administrative penalties, and permit denials without having to go to court. In addition, the Administration's 1995 Farm bill guidance included proposals to use the programs of USDA in support of creating and using mitigation banks in agriculture.

The Administration Plan also endorses the expanded use of mitigation banks for compensatory mitigation under the Section 404 and Swampbuster programs within an environmentally sound management framework. The Clinton Administration is encouraging mitigation banking, especially when developed within the context of a watershed planning effort, because it is an extremely cost-effective tool to reduce permit delays and provide greater certainty to permit applicants, while ensuring more environmentally-effective compensation for adverse project impacts. Draft national guidance was published in the Federal Register several months ago for public review and comment, with final guidance due out shortly.

Another key aspect of the Administration Plan is to reduce the regulatory burden on the nation's farmers. At the heart of this effort is a commitment across all Federal agencies to ensure that the Section 404 and Swampbuster programs operate consistently and without duplication. The Administration has already taken key steps toward fulfilling this commitment by developing an agreement among EPA, and the Departments of the Army, the Interior, and Agriculture to ensure that the nation's farmers can rely on the USDA Natural Resources Conservation Service's wetlands

jurisdictional determinations on agricultural lands for purposes of both programs. Secretary Glickman recently announced that all wetland determinations completed since the 1985 Farm Bill, including those determinations that agricultural lands are not wetlands, will remain valid for purposes of both Section 404 and Swampbuster. The Secretary's announcement also clarified that, until completion of the 1995 Farm Bill, new determinations will only be carried out at the request of the landowner.

In addition, the Administration's 1995 Farm Bill guidance proposed major changes to the Swampbuster provisions of the Food Security Act. These proposals include changing Swampbuster's emphasis from protection of individual wetlands in agriculture to protection of significant wetland functions and values using a set of flexible policies focused on making the program work for farmers.

Also, the Administration issued a final rule that affirms the exclusion of an estimated 53 million acres of prior converted croplands, as defined by the Food Security Act, from Clean Water Act jurisdiction. These are areas that, prior to December 23, 1985, were hydrologically manipulated and cropped to the extent that they no longer perform the wetlands functions they did in their natural condition. In addition, the Corps is developing a nationwide permit that will allow farmers to convert wetlands on their farms without being subject to regulation under either Section 404 or Swampbuster if the conversion has no more than minimal environmental effects.

The Administration Plan recognizes the critical need to increase state and local roles in wetlands protection. This will move regulatory decision-making closer to the people regulated and the resource to be protected, reduce duplication among wetlands protection programs at different levels of government, and streamline the permit decision process. Last year, New Jersey joined Michigan in assuming responsibility for implementing the Section 404 program, and EPA is currently assisting other states as they work toward program assumption; as I indicated earlier, provisions in S. 605 would effectively discourage approval of state operation of federal programs. The Administration also believes that wetlands management decisions need to be made within a broader watershed context that gives State and local governments more responsibility to anticipate, rather than react to, wetlands issues and to tailor solutions to local conditions.

The Plan also addresses concerns that the Section 404 program is not responsive to the unique circumstances in the State of Alaska. EPA and the Corps have responded by adding flexibility to implementation of the program in Alaska, for example by instituting a process to issue Section 404 permits for sanitation and wastewater projects in Native communities within 15 days. Over fifteen projects were permitted through this expedited process during the first year it was in place.

IV. Conclusion

I believe the Administration's reforms, if given a chance,

will significantly alleviate the concerns of property owners over excessive health and environmental regulation. I also believe our reforms follow the right approach to addressing the needs of property owners, identifying specific regulatory problems and developing appropriate ways to fix them.

To the extent Congress believes there are larger problems that cannot be addressed administratively, the solution is to make meaningful reforms to the substantive provisions of the statutes that govern the programs at issue. Such reforms should not take the form of providing automatic compensation -- with its own set of severe problems -- but of establishing ways to avoid takings concerns in the first place. Our Constitution and our statutory framework for public health and environmental protection have served our nation well, and we should be reluctant to substitute across-the-board simplistic solutions that will elevate rhetoric to unworkable public policy.

I would be pleased to answer any questions the Committee may have.