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Takings - Materials [4]

TAKINGS TALKING POINTS

- Five Fatal Flaws
- Nuisance Exception

Talking Points on Property Rights

The House has passed a bill that would require compensation whenever an action under the wetlands programs, the Endangered Species Act, or (for water) federal reclamation or land use laws, diminishes the value of a portion of a property by 20%. An even broader bill is pending in the Senate which would require compensation for an agency action under any federal law where the value of a portion of a property falls 33%.

These proposals are a bad idea because -

- They ignore the interests of other property owners and of the public.
- They force a choice between imposing enormous costs on the taxpayer or foregoing protection of the community and the environment.
- They require payment for losses that are speculative.
- They ignore 200 years of Constitutional tradition.
- They will create a claims industry that will enrich lawyers and appraisers and generate huge new bureaucracies.
- They are a budget buster.

A property owner never has had an absolute right to use property without regard to the impact of that use on other landowners or the community. Over a hundred years ago, the Supreme Court said, "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

- The fundamental flaw in these bills is that in general, the only factor which triggers the compensation requirement is whether the value of property is decreased.
- This "one-size-fits-all" prescription for takings cases ignores the array of other considerations to which the courts have looked for over 200 years, including the merits of the government's action, whether limitations were in place or could have been

anticipated at the time of purchase, and the impact of the activity which the claimant wants to undertake on other property owners.

These bills will result in huge claims being made where the Constitution does not require compensation, where the losses are highly speculative or where payment is totally unwarranted.

- The bills are drafted in such a way that a property owner will be able to show a 20% or 33% reduction in the value of a "portion" of a property for countless types of government actions.
 - * If an owner of a 1,000 acre parcel of land is denied a permit to fill a wetland comprising only 1 acre of his property, he may file a claim under these bills with respect to only the 1 acre of land, thereby making the payment for a 20% or 33% loss in value thresholds almost irrelevant.
 - * This is contrary to decades of Supreme Court cases which have looked to the impact on the property as a whole to evaluate whether there has been a taking.
- Neither bill requires a claimant to show actual losses. Rather, simply showing that a government action prevented the claimant from undertaking some hypothetical activity at some time in the future could be sufficient to collect from the government.
- The government could be required to pay compensation under the Senate bill if a claimant loses a government subsidy as might occur if water deliveries are reduced to stop wasteful irrigation practices that cause excessive runoff resulting in water pollution.
- Exceptions to compensation requirements in the bills would not be sufficient to prevent unwarranted claims.
 - * The "nuisance" exceptions provided in the bills are technical and very limited, and ordinarily do not cover cumulative or long-term health and safety risks, civil rights protection or other vital protections.

- Other exceptions in the House bill are vague, full of potential loopholes and would be subject to endless litigation.

If government is faced with the Hobson's choice of paying questionable claims or foregoing important health, safety and environmental regulations, neighboring property owners could be severely harmed. For example, prohibitively costly claims could be filed where -

- Government requires controls on a strip-mining operation to prevent toxic waste flowing in to adjacent rivers.
- Restrictions are imposed on the movement of animals and plants necessary to prevent the spread of dangerous disease.
- Government prohibits the siting of a toxic waste dump adjacent to a school.

Indeed, these bills are so poorly conceived that a property owner could claim that the value of his/her property interests has been reduced where government -

- Bans assault weapons (potential claimants include manufacturers of weapons or ammunition)
- Requires that a restaurant expand bathroom facilities to accommodate persons in wheelchairs (claims for lost table space)
- Re-routes aircraft to reduce noise in residential areas (or refusing to re-route traffic)
- Establishes acreage allotments and marketing quotas for tobacco crops

These bills are budget busters.

- The House bill alone would cost taxpayers over \$28 billion over the next 5 years.
- The Senate bill is much broader in scope and will cost many times that amount.

Contrary to popular belief, it is not the "little guy" that would be helped by these bills. The bills impose very sophisticated and complex legal questions that will create a business boom for lawyers and appraisers and provide large landowners and land speculators new opportunities to file claims against the government.

- Huge bureaucracies would be created to process claims.

While these proposals apply primarily to the federal government, it would only be a matter of time before they also spread to state and local government activity as well.

- Advocates will argue that if a 20% reduction in value standard is OK at the federal level, why not the state and local level as well?
- Basic zoning and other local land use planning functions of local government -- which represent more than 90% of governmental land use planning activity -- will become things of the past.
- Citizens will lose the ability to control the growth and development of their communities.

There is a better way.

- We need to examine federal laws to change those that unnecessarily burden landowners.
 - * The Administration already is taking steps to give relief to most homeowners from the requirements of the Endangered Species Act and wetlands regulation.
- We need to improve access to the courts for landowners who have suffered a "taking" as defined under the Constitution.
- The Administration has been working closely with the courts on approaches to ensure that takings claims may be resolved quickly and efficiently, including the use of alternative dispute techniques where appropriate.

June 13, 1995

FIVE FATAL FLAWS IN ALL COMPENSATION BILLS

I. THEY SUBVERT THE APPROPRIATIONS PROCESS AND THREATEN BUDGETARY LIMITS

By making claims payable out of agency budgets, the bills require the agencies to reprogram (to an unlimited and unpredictable extent) monies appropriated by Congress for specific purposes. Proponents assume the bills will cut down regulation because the regulators will feel the economic pain of paying claims. In many cases, however, agencies do not have authority not to act. Congress, by statute, requires certain actions. As a result, claims will be paid at the expense of other programs the agencies are able to cut back in order to meet regulatory obligations. Appropriators lose control. On the other hand, if Congress appropriates money to pay claims, it will open a budget-draining money spigot.

II. THEIR DIMINUTION-OF-VALUE PERCENTAGES ARE AN ILLUSION

How can you vote against a bill that compensates people who have lost a third or a half of their land's value? Because that's not the way it will really work. Through the miracle of what lawyers call "segmentation," the bills would end up generating claims by owners who have lost as little as 1% or even one-tenth of 1% of their land's value. Here's what really happens:

Some bills--like H.R. 925 passed by the House--provide for compensation when the value of "any portion" of a property has been reduced by some specified percentage, such as 20%. Senate bill S. 605 has a similar 33% "affected portion" provision. But that does not mean one must sustain a 20% or 33% loss of value in order to be compensated. For example, if one owns 100 acres and there is one acre of wetland that is denied development authority (a 1% loss), under this bill the owner could claim a total loss to that one-acre "portion" and be compensated. Under such bills, owners will be able to claim for any and every loss of value, however small in total, by pointing to some small "portion" that is affected.

Even where the whole property is considered, segmentation operates to let the owner collect even for loss of a small fragment of the property in question. Let's say a bill provides that an owner can claim compensation for loss of 50% or more in value of its property. A company owns 250 acres, of which 12.5 acres is wetland that it is not allowed to develop. Has the company lost at least 50% of its land value? It seems not. But if the 12.5 acres is "the" property against which loss is measured, the company has lost 100% of that property's value and it gets compensation, even though it has made millions on the other 237.5 acres.

Sound unlikely? It is a real case (*Loveladies Harbor*). Segmentation is exactly the tactic the owner employed successfully in its Federal claims court case (a tactic the U.S. Supreme Court has not reviewed or approved), and that would be repeated under any of the compensation bills. The same opportunity would arise if a corporation owns 1,000 acres, of which only 1 acre is regulated wetland.

Percentage-based laws encourage strategic behavior such as separating out the wetlands (or other likely to-be-regulated portions of tracts) so as to ensure a big percentage loss on a small piece of property. Any compensation bill that passes will keep segmentation-generating lawyers busy inventing big percentage losses on made-to-order small properties.

III. THEY OPEN THE DOOR TO PAYMENT FOR PHANTOM LOSSES

Compensating losses an owner has actually incurred is one thing, but these bills all contain a loophole as big as all outdoors. Here's how it works:

Under standard property rules, you can only claim a loss when you actually realize it--for example, when you actually want to build and are denied a permit. Under these bills, however, you can claim up front, as soon as a regulation kicks in, though it may not presently impact you at all.

For example, under bills that cover mining, an owner of unmined coal could claim compensation, because the regulatory burden would presumably reduce the value of their coal in the ground. Yet much of that coal won't be mined for decades (and some will never be mined). Any actual loss is far in the future. Moreover, by the time the coal is mined, reclamation technology may have advanced (it usually does) so that the cost of compliance is reduced and sometimes even eliminated. The same problem is raised by potential development of wetlands for which no present development plans were being contemplated.

Another phantom loss arises with recipients of government subsidies. For example, if the government orders farmers receiving water from a Federal reclamation project to stop wasteful irrigation practices that cause excessive runoff and resulting water pollution, the compensation bills would likely require it to pay the farmer the fair market value of the water rather than the farmer's actual cost. The difference is huge, because farmers commonly receive Federal reclamation water at highly subsidized rates. In California's Central Valley, for example, prices generally range from \$3.50 to \$7.50 per acre/foot, while the market value ranges from \$100.00-\$250.00!

Under these bills the public will have to shell out billions up front to corporations that haven't actually incurred any present

loss. Whether it is mining companies or owners of wetlands who claim for loss of future, hypothetical development possibilities, companies who own such lands would be able to sit back and collect interest on this taxpayer-provided annuity.

IV. THEY WILL GENERATE A BUREAUCRATIC TANGLE THAT ONLY BIG COMPANIES AND THEIR LAWYERS WILL BE ABLE TO NAVIGATE

Proponents say they are providing a cheaper, simpler, "bright-line" standard that will help small landowners. In fact they will create a claims industry whose principal product will be litigation. Claims speculators and lawyers will be the big winners, profiting off uncertainty, novelty, and ambiguity. Taxpayers and other property owners will be the big losers.

The segmentation mess has already been mentioned. Small landowners will be left in the dust as lawyers battle over what is a nuisance in various states, the interpretation of the laws of 50 states and thousands of local governments, and the meaning of mind-boggling definitions like "identifiable damage to specific property" or "a particular legal right to use [a] property [which] no longer exists" because of agency action.

V. COMMUNITIES WILL LOSE THE ABILITY TO CONTROL THEIR OWN GROWTH AND DEVELOPMENT

A perverse consequence of these bills will be to undermine local zoning laws. The bills undoubtedly will create an expectation at the State and local level that landowners are entitled to compensation whenever any governmental action--federal, State or local--results in a diminution of property values of some specified percentage. Legislatures at every level of government will be pressured to respond with proposals as open-ended as those pending in Congress. Zoning imposes far greater restrictions on the use of property than anything the Federal Government does. If the public has to pay each time a local zoning ordinance limits the use of property, it will be the end of local zoning as we know it.

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The Nuisance Exception in S. 605

"We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to common law, or whether they may be so declared by statute. For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process." Miller v. Schoene (1928) (Justice Stone).

The Just Compensation Clause generally does not require compensation where the government "reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land * * *." Penn Central Transportation Co. v. City of New York (1978) (Justice Brennan).

In upholding a zoning ordinance under the Fifth Amendment, the Supreme Court made clear that nuisance law is not "controlling", and it emphasized the importance of accommodating new government protections to address new threats to the American people: "[P]roblems have developed, and are constantly developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. * * * Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable." Village of Euclid v. Ambler Realty Co. (1926) (Justice Sutherland).

S. 605 WOULD UNDERMINE ALL MANNER OF PROTECTIONS

S. 605's confusing provisions make it difficult to predict how the courts would apply it, but plaintiffs' lawyers will undoubtedly seek the broadest possible application. Its impact would range far beyond environmental protection. The bill's broad and inflexible terms would allow lawyers to claim:

--compensation where 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 small affected portion of the restaurant;

--compensation for food-safety rules necessary to protect the health of consumers which could diminish the value of food processing plants or their products;

--compensation for federal actions that might affect the complex water rights controversies in the West. For example, a marina owner might seek compensation where the government adjusts reservoir storage targets to reduce the risk of flooding;

--compensation where the Army Corps of Engineers denies a section 404 permit to build a tower where the tower would interfere with flight patterns at a military base. Although the process requirements in Title IV contain an exception for military functions, and although there is an extremely narrow national security exception for compensation claims based on contract rights, there is no blanket exception to the compensation mandate for national security concerns.

--compensation where the Coast Guard establishes a phase-out of single hull tankers; or where the Federal Aviation Administration orders airlines to suspend use of commercial aircraft that raise safety concerns; or where the Federal Highway Administration directs motor carriers to cease using vehicles or drivers that pose an imminent hazard to safety.

--compensation where the federal government restricts the importation of assault rifles or explosives;

--compensation for a bank where federal regulators determine that the bank is no longer solvent and appoints a receiver;

--compensation for corporations where Congress adjusts federal legislation designed to stabilize and protect pension plans;

--compensation to manufacturers subject to prohibitions on the sale of dangerous medical devices;

--compensation for farmers subject to acreage allotments and marketing quotas for tobacco.

QUOTES THAT DEMONSTRATE THE FLAWS IN S.605

The One-Size-Fits-All Loss-in-Value Trigger

In the very case that established the concept of a regulatory taking, 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." Pennsylvania Coal Co. v. Mahon (1922) (Justice Holmes).

In 1993, every Member of the U.S. Supreme Court joined an opinion stating that "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California (1993) (Justice Souter).

As staunch an advocate of property rights as Justice Scalia has recognized that the "understandings of our citizens" are such that "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." Lucas v. South Carolina Coastal Council (1992).

The "Affected Portion" Standard in S.605

In 1993, every Member of the Supreme Court joined an opinion stating: "[A] claimant's parcel of property could not first 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." Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California (1993) (Justice Souter).

"'Taking' jurisprudence does not divide a single parcel into discreet segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole * * *." Penn Central Transportation Co. v. City of New York (1978) (Justice Brennan).

S. 605 is a Radical Departure from the Constitution.

The Constitution nowhere suggests that a property owner has an absolute right to use property without regard to the effect of the property use on others. Nor does the Constitution suggest that reasonable government efforts to protect the American people from harmful property use constitute a compensable taking. None of the Founders ever proposed such a radical and destructive theory. Yet S. 605 would effectively establish these extreme principles as the law of the land. Virtually every major concept in the bill is a radical departure from the Constitution.

The Inflexible Loss-in-Value Trigger

S. 605 contains a rigid, 33 percent loss-in-value compensation trigger. Under the Constitution, a partial loss in value by itself has never been sufficient to demonstrate a taking. Instead, the Constitution requires consideration of other factors as well -- such as the owner's reasonable expectations and the public interest -- to determine whether compensation would be fair. Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California (U.S. 1993). For example, reasonable zoning restrictions have long been upheld under the Just Compensation Clause even where they might reduce the value of certain property. Village of Euclid v. Ambler Realty Co. (U.S. 1926).

The "Affected Portion" Standard

S.605 uses an "affected portion" standard to determine whether the loss-in-value threshold is met. This directly conflicts with the Just Compensation Clause, which requires analysis of the affect of the challenged regulation on the parcel as a whole. See Concrete Pipe, supra; Penn Central Transportation Co. v. New York City (U.S. 1978).

The "Nuisance" Exception

The only exception to the compensation mandate in S. 605 applies where agency action prohibits land use that is already prohibited by state nuisance law. Under the Constitution, however, nuisance law is not controlling. Miller v. Schoene (U.S. 1928). The Constitution allows for many reasonable protections against non-nuisance activities without requiring compensation, such as the destruction of diseased trees (Miller v. Schoene), regulation of breweries (Mugler v. Kansas (U.S. 1887)), and urban zoning (Village of Euclid v. Ambler Realty Co. (U.S. 1926)).

Proportionality

Under the Constitution, a permit condition that requires a physical dedication of real property should be roughly proportional to the anticipated impact of the proposed land use. Dolan v. City of Tigard (U.S. 1994). Section 204(a)(2)(B) of the bill radically expands the "rough proportionality" standard far beyond dedications of real property by applying it to any type of condition on agency action that affects any type of property.

COSTS OF S. 605

- OMB letter
- CBO Estimates
- OMB Estimates



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

December 5, 1995

Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Congressional Budget Office (CBO) recently released a cost estimate for S. 605, the "Omnibus Property Rights Act of 1995." Because CBO's estimate differs significantly from OMB's, which I addressed in my July 12 testimony to the Senate Environment and Public Works Committee, I am writing to clarify the distinctions.

Put simply, CBO scored estimated administrative costs of this bill -- in fact, the administrative costs of just one title of it. By contrast, OMB believes that we must consider the much larger question of what U.S. taxpayers may have to pay in compensation claims under this bill.

With respect to administrative costs of Title V, OMB and CBO scoring are not far apart. Specifically, with regard to Title V, under which agencies would settle claims under the Endangered Species Act and Section 404 of the Clean Water Act (wetlands), CBO estimated the administrative costs of processing appeals and claims at \$30-\$40 million a year over five years. OMB does not greatly dispute that estimate; we believe comparable administrative costs would be about \$30 million a year.

Those costs, however, are just a small portion of those that taxpayers could bear under this bill. What CBO did not estimate, and what we must focus on, is the much larger question of compensation.

As I noted in my testimony, these costs are highly uncertain. OMB has estimated the compensation costs of the House bill -- Title IX of H.R. 9 -- at potentially \$28 billion over seven years (fiscal 1996-2002). That bill, however, restricted compensation to claims under six laws, and it only applied to land and the right to use and receive water. S. 605 is written more broadly, and applies to real and personal property and to *all* laws. Thus, the compensation costs of S. 605 could be several times higher than the \$28 billion for Title IX of H.R. 9.

CBO did not score compensation costs under S. 605 in large part because it concludes that the 33 percent threshold (of diminished value) for determining whether a takings has occurred would mean that the government would have to compensate very few claims. We,

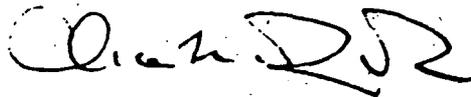
however, think that the threshold will permit many claims because the threshold can be applied to specific portions of property, at the discretion of the owner.

Finally, OMB disagrees with CBO's argument that Federal agencies could avoid paying compensation simply by modifying their regulatory activities. Many of these activities are required by statute or are mandated by court order.

As for how S. 605 would affect the budget process, we believe the bill authorizes direct spending, thus triggering pay-as-you-go (PAYGO) requirements. While CBO disagrees, OMB makes the final determination under the Budget Enforcement Act whether an across-the-board cut, or "sequester," of mandatory accounts is required. With that in mind, please note that S. 605 has no provisions to offset the costs of this bill. Thus, if enacted, this bill could potentially lead to an across-the-board sequester of mandatory programs.

I hope this explanation will be helpful as the debate on S. 605 continues.

Sincerely,

A handwritten signature in black ink, appearing to read "Alice Rivlin", with a stylized flourish at the end.

Alice M. Rivlin
Director

cc:

Honorable Joseph R. Biden
Ranking Minority Member
Committee on the Judiciary

Honorable Robert Dole
Majority Leader
United States Senate

Honorable Thomas A. Daschle
Minority Leader
United States Senate

- The CBO estimate focuses almost exclusively on title V of the bill, which applies to only two federal programs. It expressly assumes that "the vast majority of new claims resulting from this bill would be brought under the administrative process prescribed by Title V." (p.3) In fact, the compensation mandate in Title II is far broader, applies to virtually every federal program, and would cost taxpayers billions of dollars in compensation.
- A 1992 study by the Congressional Budget Office estimated that application of one takings proposal to just "high value" wetlands would cost taxpayers \$10-45 billion.
- The CBO estimate assumes that the bill would "codify the constitutional prohibition" against uncompensated takings (p.1), but in fact the bill imposes a radical compensation mandate far broader and far more expensive than the Constitution.
- The CBO estimate assumes that many compensation claims would be screened out by the bill's 33 percent loss-in-value compensation trigger (p.4 and n.1), but it fails to consider the fact that the trigger applies to the affected portion of the property and thus would have little limiting affect.
- The CBO estimate nowhere accounts for the fact that claimants could recover "business losses" under the bill.
- The CBO estimate nowhere accounts for the sweeping definition of "property" that would govern claims under the bill.
- The CBO estimate appears to assume that only permit denials would be compensable (p.4, n.2), and fails to account for the fact that permit conditions could also give rise to liability.
- The CBO estimate assumes that agencies could easily avoid paying compensation by modifying their regulatory activities (pp.2,3). Many potentially compensable agency actions are, however, required by statute or court order and could not be so avoided. Many others are essential to protect human health, public safety, and the environment and could not be modified without sacrificing basic protections.
- The CBO estimate fails to recognize that S. 605 would generate a flood of requests for permit and other regulatory rulings by property owners who have no intention of developing their property, but rather seek to elicit a compensable permit denial or other action by the agency. For example, a wetlands owner with no intention of

developing the property would have every incentive to seek a permit simply to convert an expected permit denial into a cash claim. Because obtaining such compensation would require no capital and eliminate the risk inherent in development, there could be a greater economic incentive to claim a purported loss of value than to create value through development and use of property.

- The CBO estimate fails to consider that the bill would require 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.
- The CBO estimate fails to account for the fact that many landowners could exact fair market value compensation for subsidized water rights. For example, agribusiness in California's arid Central Valley now gets large amounts of public water at subsidized rates. Some of the state's historic salmon streams are drying up. Under S. 605 corporate farmers would have to be compensated for diversion of their allotments needed to protect the salmon, and they could claim reimbursement at market rates (up to 10 times the subsidized rate they now pay).
- The CBO estimate fails to consider the imprecise nature of property appraising, and the tendency of arbiters to "split the difference," particularly when dealing with a perceived deep-pocket party like the federal government. These two factors, coupled with the bill's single-factor loss-in-value compensation mandate, would lead to liability under Title V far greater than that imposed by the Constitution.
- The CBO estimate incorrectly assumes that the bill would "make it easier and less expensive" for property owners to seek compensation (p.1). Litigation costs to landowners and to the United States would increase dramatically.
 - The bill's heavy reliance on state nuisance law -- described as the "most impenetrable jungle in the law" -- ensures that litigation under title II of the bill would be protracted and expensive.
 - The bill is riddled with vague and amorphous terms that will also ensure that litigation under the bill would be costly.
- The CBO estimate fails to account for the compensation claims that would result from inadequate protection of human health, public safety, and the environment. For example, if

wetlands protection is curtailed due to liability under the bill, the bill could require taxpayers to compensate the fishing industry and related economic interests whose profits are reduced by the government's failure to protect wetland habitats.

• The CBO estimate itself shows that it cannot be used to predict the taxpayers' compensation liability under the bill. The estimate contains the following critical concessions and qualifications:

- "CBO has no basis for estimating the additional amounts of compensation that the government might have to pay for cases where the property owners choose to pursue larger claims in court." (p.2)
- "The cost of compensating property owners in the longer run is very uncertain and would depend on a number of unknown factors, including how property owners and federal agencies would react to the legislation and how the legislation would be interpreted by the Administration and the courts." (p.2)
- "The effect of Title II on federal compensation costs in later years [after the year 2000] is very difficult to predict." (p.5)

OMB ESTIMATE OF CONGRESSIONAL COMPENSATION BILLS
(S. 605 AND TITLE IX OF H.R. 9)

OMB estimated that the cost of Title IX of HR 9 would approximate \$ 28 billion dollars over a seven year period (FY 1996-2002) to compensate claimants for alleged diminution in value of "affected portions" of property:

- o Title IX of HR 9 would allow claimants to receive compensation if land, or the right to use and receive water, was reduced in value by more than 20 percent, pursuant to agency action under six listed statutes.
- o The OMB estimate is conservative, focusing only on compensation, but not including costs for:
 - administrative expenses,
 - expenses to manage lands that the U.S. had to buy,
 - interest on valid claims, and
 - non- Federal actions for which the Federal government has fiscal liability under this legislation.
- o The OMB estimate assumed that agencies would continue their programs, i.e., statutory requirements and court ordered mandates would not be changed and agencies would be required to perform their duties.
- o The OMB estimate assumed an average time of 24 months between a claim being received and payment made. This was based on averaging time frames for agency adjudication, arbitration procedures, or judicial resolution.

Since S. 605 is substantially broader in scope than Title IX of HR 9, OMB believes that S. 605 will cost "several times" more than the \$ 28 billion estimated for Title IX of HR 9 because:

- o S. 605 covers all laws, not just six listed laws.
- o S. 605 applies to real and personal property, not just real property as does HR 9.

The OMB estimate is not the only cost estimate to assume that compensation bills will cost billions:

- o In 1992, CBO estimated that the value of wetlands subject to a compensation bill was between \$ 10 and \$ 15 billion.
- o In 1995, the University of Washington estimated costs, associated with a Washington State referendum on private property, at between \$ 2.8 and \$ 11.0 billion for the compensation provisions of the bill.

ENDANGERED SPECIES ACT

MAKING THE ESA WORK BETTER



Too often in the past, the ESA has been administered in a manner which invited train wrecks by delaying listing decisions and critical habitat designations to the point that a species would reach the brink of extinction where the options were few and the costs of recovery greater. Too often, as well, the flexibility in the ESA to engage in early planning and involvement of stakeholders was not used, leading to a great deal of uncertainty and confusion for private landowners and a sense of being ignored in the process. This Administration found inefficiencies in the listing and recovery processes which were creating economic burdens on affected parties and failing to properly protect and recover threatened and endangered species. Accordingly, last July the Departments of Interior and Commerce began making a number of policy changes, as well as other administrative actions, that are designed to improve the implementation of the ESA. These actions include the following:

Fairness and flexibility for private landowners

- ⇒ To reduce uncertainty regarding the impact of a listing of a species on private property, a new policy was announced in July 1994 which requires the FWS and NMFS, at the time of listing, to promptly identify activities that would be permissible or prohibited under the law as a means of addressing this uncertainty. Many conventional activities, especially those involving agricultural operations, should be given a go-ahead through this directive, and adverse affects on property values can be avoided.
- ⇒ To ease the burden of the ESA for homeowners and to provide relief to all landowners for activities having a negligible impact on the conservation of listed species, a proposed rule will soon be issued which will exempt from the prohibitions of the ESA with respect to threatened species activities by landowners who use their property as a residence, or want to develop less than five acres of land, or who undertake develop activities that have a minimal impact on the species overall. The exemption would pertain to "threatened" species, but would not apply where cumulative impacts to habitat from many adjacent small landowners might be severe.
- ⇒ To address larger areas and large property owners, the Department has been using flexible tools in the ESA which have been little used. One of these is section 4(d) of the ESA which allows the FWS to adopt a special rule specifying the protection to be provided a threatened species. The creative use of this section earlier this year has allowed the FWS to propose by rule to release about 80 percent of all the privately-held forest land in the State of Washington and northern California from virtually all logging restrictions that would otherwise apply on account of the northern spotted owl. Included, for the first time in any special rule, is a small landowner exemption, exempting from logging restrictions owners of 80 acres of forest land or less in either State.
- ⇒ Another little used tool is a provision allowing incidental take of listed species where the landowner has developed a habitat conservation plan (HCP). From 1983 to 1992,

only 15 HCP were completed. In the past two years, more than 60 additional HCPs have been approved and more than 170 are currently being negotiated. The FWS has completed HCPs with timber companies in the Pacific Northwest and in the Southeast has entered into numerous Memoranda of Understanding which provide for logging operations to go forward without taking listed species.

⇒ Also in July 1994, the Departments of Interior and Commerce announced a new "no surprises" policy for HCP's whereby landowners with approved plans will be exempted from any additional requirements for species covered by the plans (both listed and not listed) for the life of the plan—in some cases as long as 50 years. Thus landowners receive a significant degree of certainty and protection against future regulation. In exchange, far more protection for species is guaranteed than could ordinarily be obtained strictly by regulation, even for already-listed species and especially for species that are declining and not yet listed.

⇒ Responding to criticism that the ESA fails to provide an incentive to landowners to conserve species, the FWS recently promulgated a "safe harbor" rule. Under a recently proposed HCP in North Carolina, landowners who attract threatened red-cockaded woodpeckers to their property will not be limited in future development even if the woodpeckers are later jeopardized. A similar rule has been proposed for the Pacific Northwest to encourage timberland owners with emerging owl habitat not to "panic cut" their lands before owls may be found there—guaranteeing future logging of these lands will not be blocked by owls attracted to the improving habitat in the meantime.

Improve recovery planning

In addition to announcing a policy that recovery plans should minimize social and economic costs, both the FWS and NMFS are developing multispecies recovery plans whenever possible. A goal was also established to develop recovery plans within 2 1/2 years of the listing of a species as a means of easing the likelihood of economic disruption by recovery efforts.

Increased cooperation with States

Biologists in FWS and NMFS are working more closely with State fish and wildlife agencies in an effort to conserve candidate species before listing is needed, determine which species need ESA protection, and recover listed species.

Ensure peer review of ESA activities

To ensure that biological information used to list and recover species is as comprehensive as possible, a new policy was announced in July 1994 to supplement existing public review and comment procedures with the use of independent scientific peer review of listing and recovery decisions.

Improve efficiency

The July 1994 policy announcement also included the requirement that, whenever possible, FWS and NMFS will group their listing and recovery efforts on a geographic, taxonomic, or ecosystem basis.

RECOMMENDED LEGISLATIVE CHANGES



Enhanced relief for private landowners

The FWS should be given the authority to provide exemptions to homeowners and landowners for activities that would have negligible impact on endangered species similar to the proposed rule for threatened species.

Landowners who participate in a multispecies HCP or one that protects a particular habitat should receive assurances that their land use activities will not be disrupted by any subsequent listing of other species dependent on the same habitat.

Increased role for State and local government

Where a State develops its own conservation plan that would promote the recovery of species, the FWS should be authorized to suspend the effects of listing a species covered by the plan in that State. This would allow the State to implement its plan through State regulation and other means.

Any State or local government should be allowed to develop a conservation plan to manage multiple species or Statewide distinct habitat types, which may include listed or non-listed species. Upon approval of the plan by the Secretary, all activities undertaken under the plan would be exempt from the take provisions of the ESA. Then, if any candidate species or unlisted species dependent on the same distinct habitat type or otherwise covered by the plan is subsequently listed as threatened or endangered, no new prohibitions would apply. Funds should be made available for grants to States and local governments to develop and implement these habitat conservation plans.

States should be provided the opportunity to assume the lead for developing recovery plans and implementation agreements.

States should be authorized to enter into voluntary prelisting agreements with landowners that provide assurances that further conservation measures will not be required if a species is subsequently listed where they have adequately protected candidate species or significant habitat types covered by the agreement.

States should be authorized to assume responsibility for issuing incidental take permits under section 10(a)(2) of the ESA for areas in the State that have been identified for State assumption under a recovery plan or an approved State program.

Improvements in recovery process

Recovery plans should be made more meaningful by requiring the involvement of all affected parties in developing and implementing recovery plans.

All appropriate Federal and State agencies should develop implementation agreements to implement a recovery plan. Activities in furtherance of an implementation agreement should receive expedited review during any interagency consultation under section 7.

Critical habitat designations should be incorporated into the recovery planning process so that there will be only one decision, not two, about the measures needed to recover a species. This will also allow all affected parties who participate in the recovery planning process to have input on the designation of critical habitat.

Recovery plans should be required to establish criteria for delisting the species or for changing its status from endangered to threatened. Delisting and downlisting should be triggered when those criteria are met.

Improved science

Independent scientific peer review should be required of all decisions related to the listing, delisting and recovery of species.

Listing petitions should be sent to State wildlife agencies and the Secretary of the Interior should only overrule a State recommendation not to list the species after conducting independent scientific peer review.

Minimize social and economic impacts

The distinction between a threatened and endangered species should be restored by providing the flexibility to use a wide range of administrative or regulatory incentives, prohibitions and protections for threatened species.

**HIGHLIGHTS AND ACCOMPLISHMENTS OF THE
HABITAT CONSERVATION PLANNING PROGRAM
ESA's SECTION 10(a)(1)(B)**

- As of November 22, 1995, the FWS has issued 131 section 10 permits and 15 permit amendments. Of these, 75 have been issued to individuals in Florida and central Texas, typically for home construction covering 5 acres or less. The remainder have been issued to government agencies, businesses, or corporations. The total planning areas for these HCPs range in size from a few acres to several hundred thousand acres.
- There are approximately 200 HCPs currently in development, which also range vastly in size (from a few acres to several million acres). The majority of these are for government, business, or corporate activities. The number of HCPs being developed by individuals are relatively few and generally are for small land areas.
- The Service is evaluating categorically excluding low impact HCPs from the requirements of incidental take permits under section 10(a)(1)(B) for the preparation of NEPA documentation. This will increase the flexibility for these almost non-consequential activities.
- The Service's Candidate Species Guidance and Habitat Conservation Planning Guidance incorporate the "no surprises" policy relative to candidate species. Including candidate species in an HCP is strictly voluntary on the part of permit applicants. However, these two guidance policies provide that if an HCP addresses candidate species as if they were listed, and the species subsequently become listed, they may be readily covered under the permit. Consequently, permittees avoid project delays and enjoy long-term certainty.
- At least, 26 multi-species HCPs are final or in the process of being finalized, and 28 HCPs have included one or more partners besides the applicant.

WETLANDS

- Why Wetlands Are Important
- CORPS FY95 Statistics
- Administration Plan

WHY WETLANDS ARE IMPORTANT

* Wetlands protect private property from flooding and buffer land from storm surges resulting from hurricanes and tropical storms.

* Wetlands improve and maintain water quality, serving as a "natural treatment plant by improving the quality of waters that pass through them. For example, forested wetlands around the Chesapeake Bay remove over 80% of nutrient pollution from runoff - naturally.

* These valuable natural resources are also critical areas for recharge of drinking water aquifers for towns around the country.

* Wetlands are primary habitat for wildlife, fish, and waterfowl and also provide the basis for many economic activities. Hunters spend over \$600 million annually in the pursuit of wetland-dependent birds (see Sports Illustrated article).

* Fish and shellfish harvests in the Southeastern U.S. depend on coastal wetland systems. Over 90% of the commercial catch depends on valuable wetlands systems found in each state.

* Wetlands contribute over \$15 billion annually from fisheries.

* Only recently have we begun to understand the full function and value of wetlands in our society. 50% of the wetlands in the lower 48 states have already been lost. President Bush mandated the "no net loss" of wetlands pledge, and has been carried on by President Clinton.

* In Florida, the loss of wetlands has caused salt water contamination of underground drinking water supplies and increased pollution of lakes and rivers. It has contributed to drought in some areas, flooding in others.

Clearly, wetlands are an important natural resource. How to balance their clear value to society versus the rights of individual property owners is an important endeavor. The Administration is pursuing policies that allow for flexibility, reduced burdens on landowners and incentives to maintain the quality and integrity of the wetlands program as codified in the Clean Water Act. S. 605, a sweeping private property rights bill, would allow development of private property above any other interest or societal benefit. Increased pollution, flooding, lack of clean drinking water, and downstream negative effects to innocent landowners would be just some of the problems envisioned under S. 605.



2 Values and Functions of Wetlands

Wetlands provide many benefits, including food and habitat for fish and wildlife; flood protection; shoreline erosion control; natural products for human use; water quality improvement; and opportunities for recreation, education, and research.

Ecological Benefits

Wetlands are among the most biologically productive natural ecosystems in the world. They can be compared to tropical rain forests and coral reefs in the diversity of species they support.

Wetlands are vital to the survival of various animals and plants, including threatened and endangered species like the wood stork, Florida panther, and whooping crane. The U.S. Fish and Wildlife Service estimates that up to 43% of the threatened and endangered species rely directly or indirectly on wetlands for their survival. For many other species, such as the wood duck, muskrat, and swamp rose, wetlands are primary habitats. For others, wetlands provide important seasonal habitats where food, water, and cover are plentiful.

Wetlands and People

Because wetlands are so productive and because they greatly influence the flow and quality of water, they are valuable to us.

Wetlands furnish a wealth of natural products, including fish, timber, wild rice, and furs. For example, in the Southeast, 96% of the commercial catch and over 50% of the recreational harvest are fish and shellfish that depend on the estuary-coastal wetlands system. Waterfowl hunters spend over \$600 million annually in pursuit of wetlands-dependent birds.

Wetlands often function like natural tubs or sponges, storing water (floodwater, or surface water that collects in isolated depressions) and slowly releasing it. Trees and other wetland

vegetation help slow floodwaters.

This combined action, storage and slowing, can lower flood heights and reduce the water's erosive potential.

Wetlands thus —

- reduce the likelihood of flood damage to crops in agricultural areas
- help control increases in the rate and volume of runoff in urban areas
- buffer shorelines against erosion.

Wetlands help improve water quality, including that of drinking water, by intercepting surface runoff and removing or retaining its nutrients, processing organic wastes, and reducing sediment before it reaches open water.

Wetlands provide opportunities for popular activities such as hiking, fishing, and boating. For example, an estimated 50 million people spend approximately \$10 billion each year observing and photographing wetlands-dependent birds.

Wetlands Support Many Species

Wetlands produce great volumes of food as leaves and stems break down in the water; this enriched material is called *detritus*.

Detritus is food for insects, shellfish, and forage fish, and it provides nutrients for wetlands plants and algae.

Recreational fish such as bluefish and striped bass, as well as mammals, reptiles, and amphibians, eat aquatic invertebrates and forage fish. Wetlands plants provide shelter and food to diverse species.





3 Consequences of Losing or Degrading Wetlands

Losing or degrading wetlands can lead to serious consequences, such as increased flooding, extinction of species, and decline in water quality. We can avoid these consequences by maintaining the valuable wetlands we have and restoring wetlands where possible.

Increased Flooding

If wetlands are lost or degraded, we lose their ability to control flooding. (See Fact Sheet #2.)

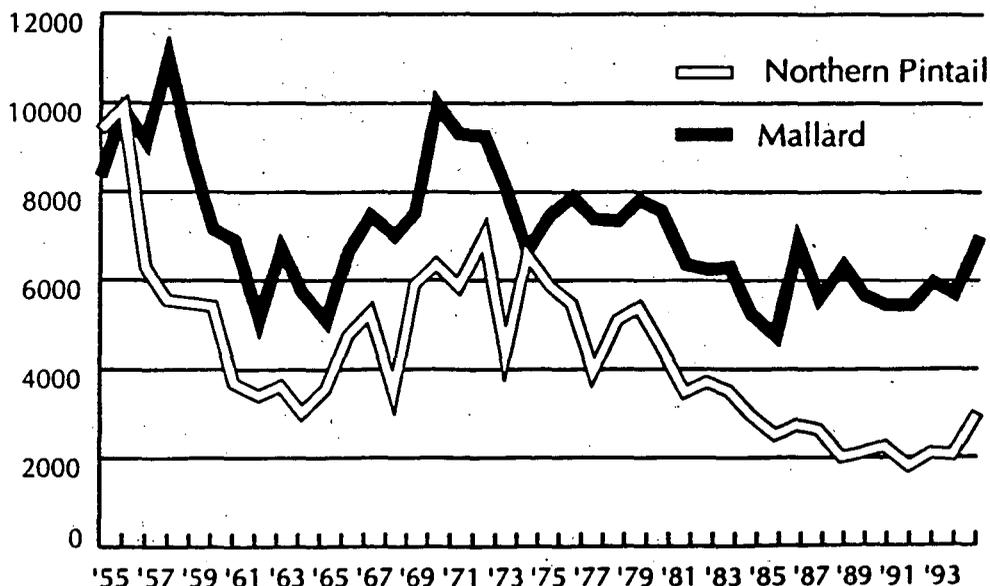
For example, based on a 1972 study comparing parts of the Charles River in Massachusetts, the U.S. Army Corps of Engineers determined that the loss of 8,422 acres of wetlands near Boston within the Charles River Basin would have resulted in annual flood damage of over \$17 million. For this reason, the Corps of Engineers elected to preserve the wetlands instead of constructing extensive flood control facilities. (Source: Army Corps of Engineers. 1976. *Water Resources Development Plan, Charles River Watershed, Massachusetts*. Corps, New England Division, Waltham, MA.)

Damage to Species

Because many species depend on wetlands, whatever harms wetlands harms these species. For example, the well-being of waterfowl populations is tied directly to the status and abundance of wetland habitats.

Populations of mallard and northern pintail ducks in North America have declined since 1955 (see graph). The loss and degradation of wetlands is one of the major causes for the decline. In 1994 duck populations had increased by 24% over the 1993 estimate and were the highest since 1980. Scientists believe that improved wetland conditions and increased cover on Conservation Reserve Program lands may be major factors in this increase. (Source: U.S. Fish and Wildlife)

Decline in Duck Population: 1955-1994



Service, Office of Migratory Bird Management. 1994. *Waterfowl Population Status 1994*. U.S. Government Printing Office, Washington, DC.)

Degraded wetlands may not be able to support species that make their homes there. Wetlands in the Kesterson National Wildlife Refuge were continuously flooded with irrigation return flow that had high concentrations of selenium. As a result, largemouth and striped bass and catfish disappeared from the refuge in 1982. In the spring of 1983, eggs from water birds at the site hatched less frequently and had more deformities in the embryos. (Source: Harris, T. 1991. *Death in the Marsh*. Island Press, Washington DC.)

Overlogging of mature U.S. bottomland hardwood forests is believed to have caused the extinction of the Ivory-Billed Woodpecker, North America's largest woodpecker.

(Source: Gosselink et al., eds. 1990. *Ecological Processes and Cumulative Impacts*. Lewis Publishing, Chelsea, MI.)

Loss in Water Quality

Destroying or degrading wetlands results in lower water quality. For example, forested wetlands reduce nutrient loading into water bodies such as the Chesapeake Bay. Forested riparian (streamside) wetlands in predominantly agricultural watersheds have been shown to remove approximately 80% of the phosphorous and 90% of the nitrogen from the water. If wetlands, however, do not perform this function, results will include an increase in undesirable weed growth and algae blooms. When the algal blooms decompose, large amounts of oxygen are used up, depriving fish and other aquatic organisms. Algal blooms are a major cause of fish kills.





4 Economic Benefits of Wetlands

Wetlands contribute to the national economy by producing resources and commodities and providing other benefits. Because of the diversity of wetland types and locations, measuring all their benefits is difficult, even for a specific type of wetland. This fact sheet discusses some site-specific studies, but remember that each study measures only one or a few of the benefits.

Wetlands Yield Fish for the Nation

Wetlands are important spawning and nursery areas and provide plant food for commercial and recreational fish and shellfish industries.

In 1991, the dockside value of fish landed in the United States was \$3.3 billion, which served as the basis of a \$26.8 billion fishery processing and sales industry, which in turn employs hundreds of thousands of people. An estimated 71% of this value is derived from fish species that during their life cycles depend directly or indirectly on coastal wetlands. For example, Louisiana's marshes alone produce an annual commercial fish and shellfish harvest of 1.2 billion pounds worth \$244 million in 1991.

Wetlands Provide Recreational Opportunities

More than half of all U.S. adults (98 million people) hunt, fish, birdwatch, or photograph wildlife. These activities, which rely on healthy wetlands, added an estimated \$59.5 million to the national economy in 1991. Individual States likewise gain economic benefits from recreational opportunities in wetlands that attract visitors from other States.

Source: U.S. Congress, Office of Technology Assessment. 1993. *Preparing for an Uncertain Climate*. Vol. II, OTA-O-568, U.S. Government Printing Office, Washington, DC.

Wetlands Improve Water Quality

Wetlands help stop pollutants from entering receiving waters. For example, the wetlands of the Congaree Bottomland Hardwood Swamp in South Carolina remove sediment and toxic substances and remove or filter excess nutrients. The least cost substitute for these wetlands benefits would be a water treatment plant costing \$5 million (in 1991 dollars) to construct, and additional money would be needed to operate and maintain the plant.

Wetlands Help Control Floods

The Minnesota Department of Natural Resources has computed a cost of \$300 to replace, on average, each acre-foot of flood water storage. In other words, if development eliminates a one-acre wetland that naturally holds 12 inches of water during a storm, the replacement cost would be \$300. The cost to replace the 5,000 acres of wetlands lost annually in Minnesota would be \$1.5 million (in 1991 dollars).



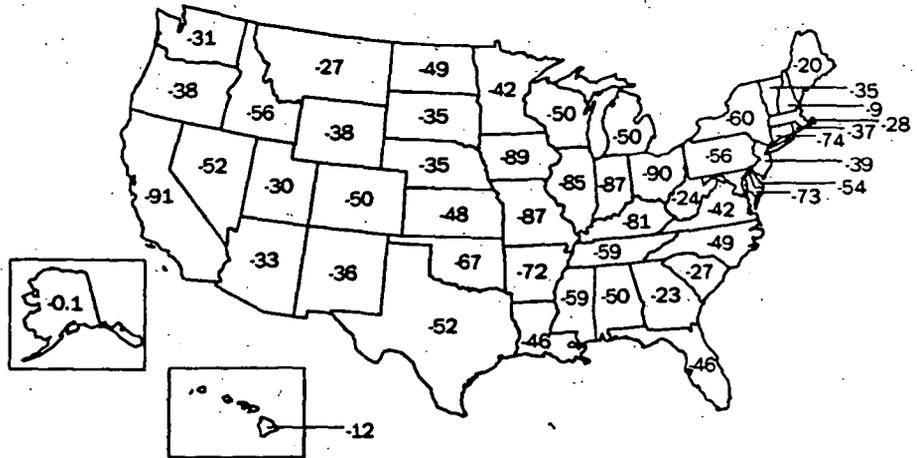


5 Facts about Wetlands

Over half (53%) of the wetlands in the lower 48 States were lost between the late 1700s and the mid-1980s. About 100 million acres of wetlands remain today in the lower 48 States, representing less than 5% of the land mass in the continental United States. (See map.)

Source: Dahl and Johnson. *Status and Trends of Wetlands in the Conterminous United States*. USFWS, 1989.

Percentage of Wetlands Acreage Lost, 1780s-1980s



Twenty-two States have lost at least 50% of their original wetlands. Seven of those twenty-two States — California, Illinois, Indiana, Iowa, Missouri, Kentucky, and Ohio — have lost more than 80% of their original wetlands. Source: Mitch and Gosselink. *Wetlands*. 2nd edition. Van Nostrand Reinhold, 1993.

From the mid-1970s to the mid-1980s, wetlands were lost at an annual rate of 290,000 acres per year. Source: Dahl and Johnson. *Status and Trends of Wetlands in the Conterminous United States, Mid-1970's to Mid-1980's*. USFWS, 1991.

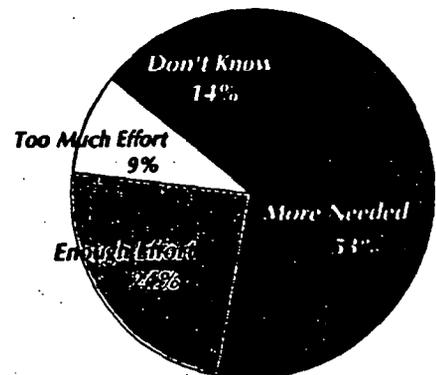
In Fiscal Year 1994, over 48,000 people applied to the Army Corps of Engineers (Corps) for a Section 404 permit. Eighty-two percent of these applications were covered by general permits in an average time of 16 days. Less than ten percent of the applications were subject to the more detailed individual evaluation — which took an average of 127 days. Only 358, or 0.7 percent, of the permits were denied. In the 22-year history of the Section 404 program, EPA has vetoed only 11 permits.

In short, almost all individuals who applied for a Section 404 permit in 1994 got their permits, and the average time for a decision was 27 days.

In addition, general permits cover an estimated 50,000 activities that do not require the public to notify the Corps at all. Source: U.S. Army Corps of Engineers, U.S. Environmental Protection Agency.

Is Current Wetlands Protection Adequate?

In a 1994 survey, 53% of the respondent said they felt that more wetlands protection efforts were needed, 24% said current efforts struck the right balance, 9% said these efforts had gone too far, and 14% said they didn't know. Source: "Times Mirror Magazines National Environmental Forum Survey." 1994. Times Mirror Magazines/Roper Starch.



ARMY CORPS OF ENGINEERS

Fiscal Year 1995 Regulatory Program

Statistics

**Prepared By the Regulatory Branch
HQUSACE**



DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECW-OR

November 8, 1995

MEMORANDUM TO ALL DISTRICT AND DIVISION REGULATORY CHIEFS

SUBJECT: Fiscal Year 1995 National Regulatory Program Statistics

1. Enclosed for your information are graphs which capture the overall performance of the Regulatory Program during FY 1995. These are intended to supplement and update the information in the July 1995 statistical report ("Blue Book").
2. As you can see from the graphics, our performance continues to improve. This is a direct result of increased staff, the President's Wetlands Plan, and the hard work and dedication of our field team.

In Fiscal Year 1995, approximately 62,000 people applied to the Corps for a Section 404 permit. Over 83 percent of these applications were covered by general permits in an average time of 17 days. Less than eight percent of the applications were subject to the more detailed individual evaluation -- which took an average of 123 days. Only 274, or 0.5 percent, of the permits were denied.

In short, when you look at all individuals who had to deal with the Federal government for a Section 404 permit in 1995, the average time for a decision was 26 days.

Over the four year period since 1992, the Corps has reduced its evaluation time for all permits by 21 percent in spite of a 60 percent increase in permit applications.

While the Corps performance has improved, we continue to provide protection to the Nation's aquatic resources, including wetlands. This is accomplished through permit conditions, impact avoidance and minimization, and the compensation for the loss of aquatic functions.

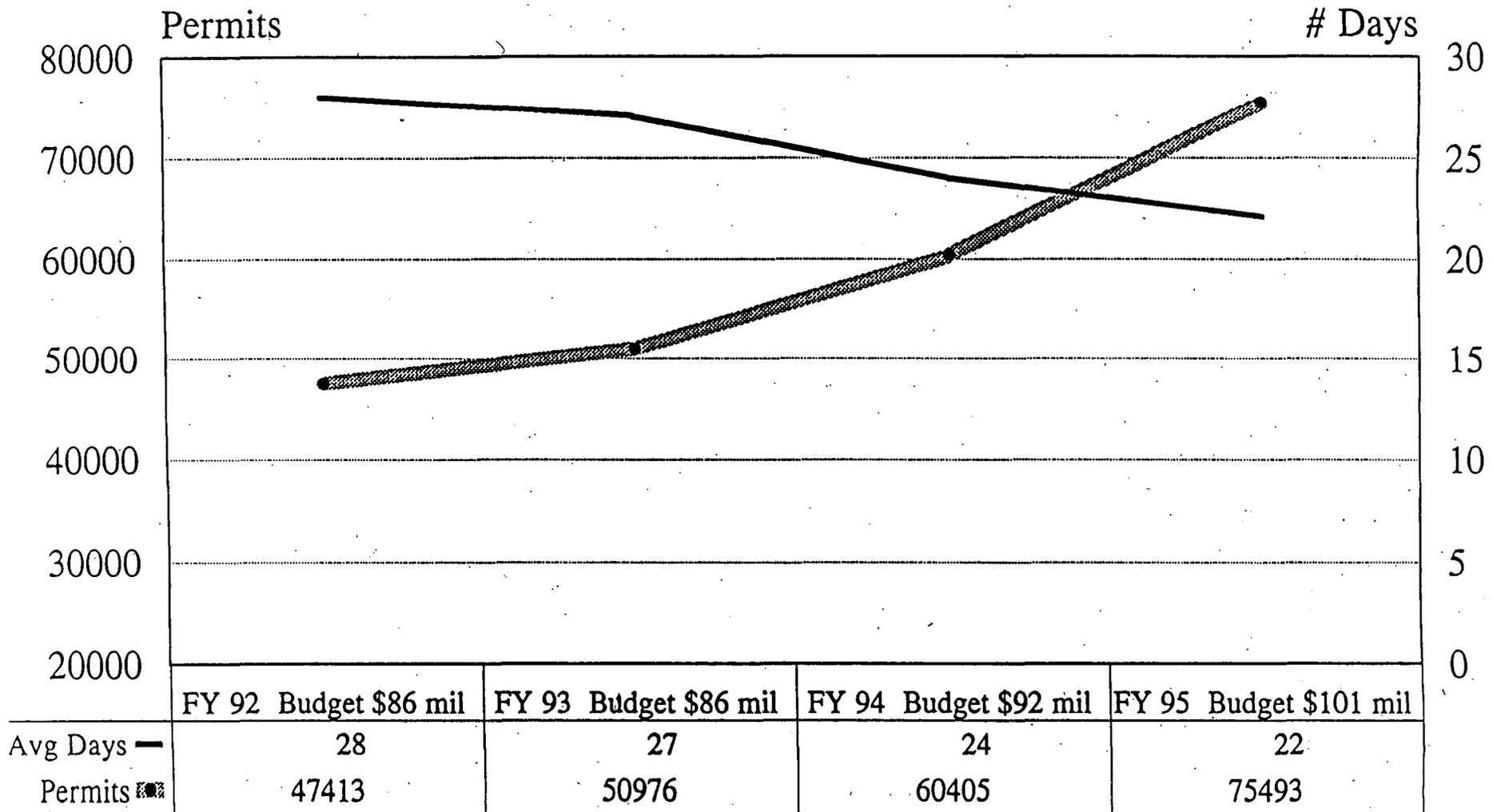
3. Please review this data and provide each member of your staff a copy. Take advantage of this positive story and let people know how the program really works. Remember, many people's perception of the program is based solely on what they have read in the newspaper or seen on the television -- stories that are typically based on the anecdote and not the facts.

Michael L. Davis

Michael L. Davis
Chief, Regulatory Branch
Operations, Construction, and Readiness Division

CORPS OF ENGINEERS REGULATORY PROGRAM

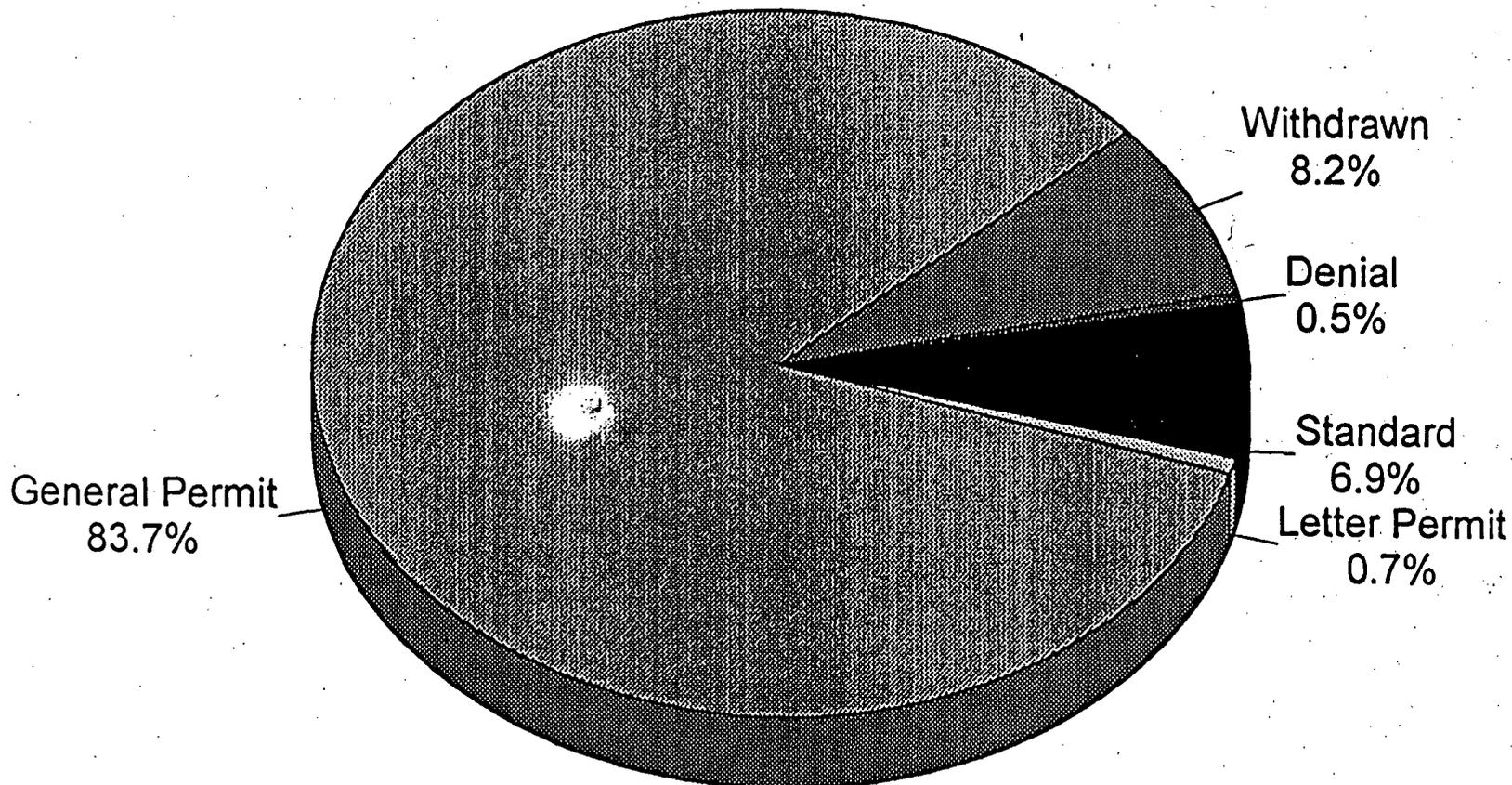
PERMIT TRENDS



Averages from combining general and standard permit actions

CORPS OF ENGINEERS REGULATORY PROGRAM

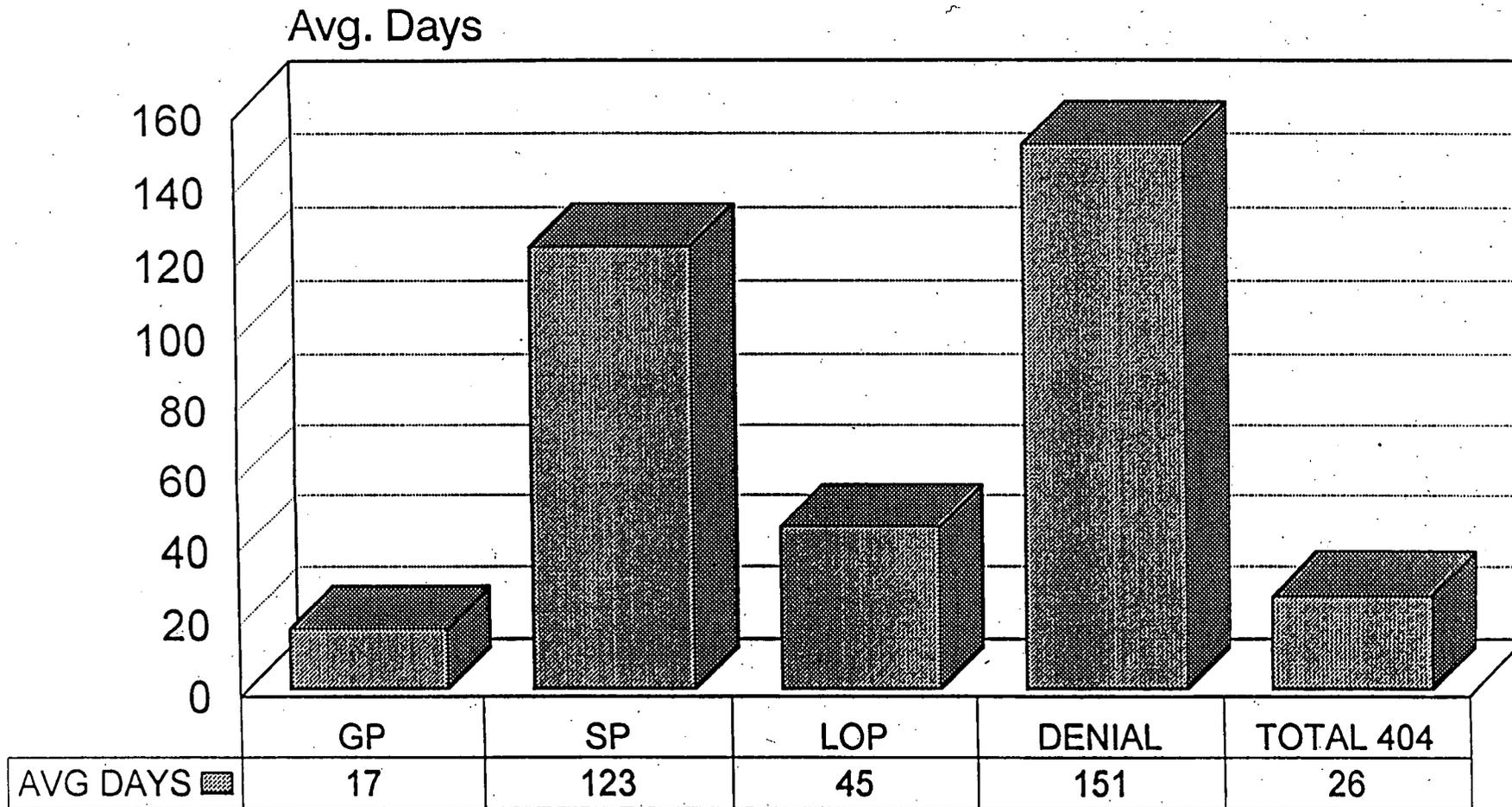
FY 1995 - 404 APPLICATIONS - TYPE OF DECISION



TOTAL NUMBER EVALUATED: GENERAL PERMIT 51672, STANDARD PERMIT 4251, LETTER OF PERMISSION 442, WITHDRAWN 5093, DENIAL 274

CORPS OF ENGINEERS REGULATORY PROGRAM

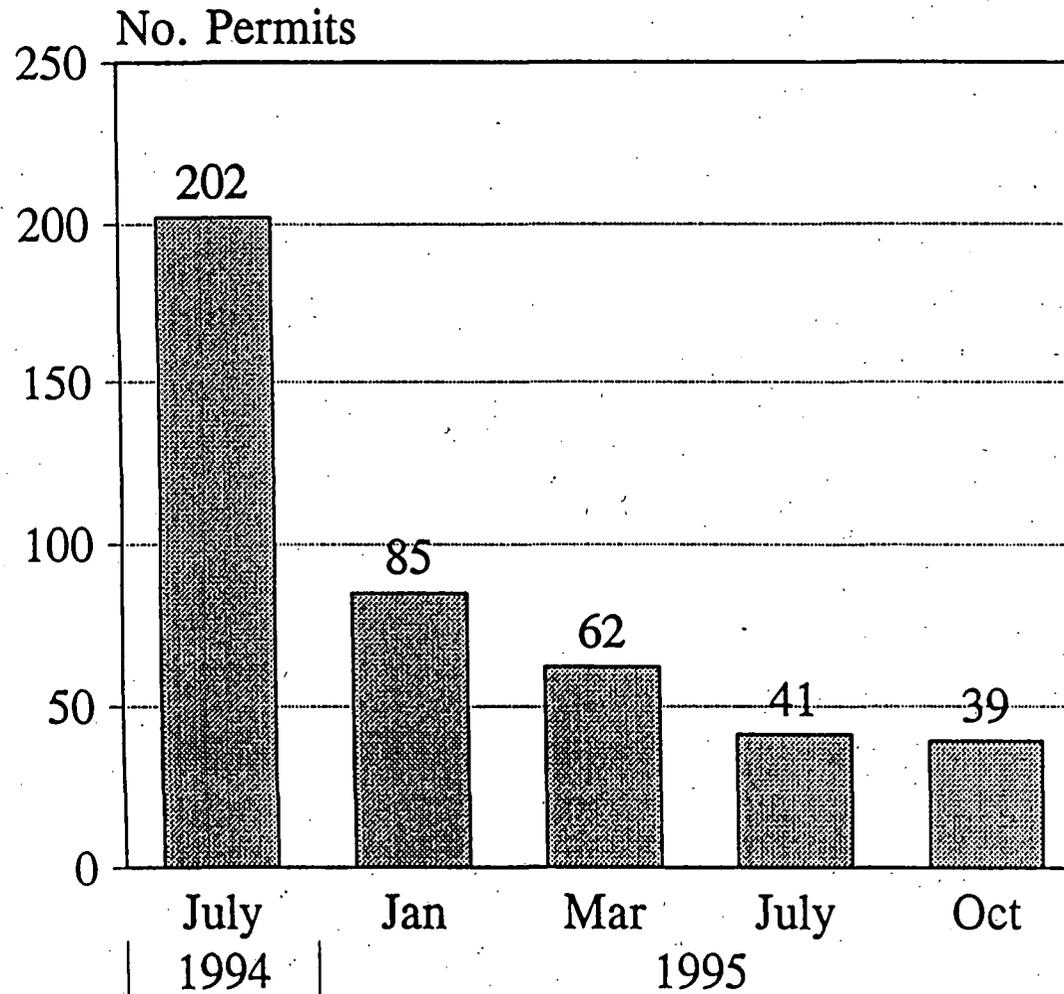
FY 1995 - 404 APPLICATIONS - AVERAGE EVALUATION DAYS



TOTAL NUMBER EVALUATED: GENERAL PERMIT (GP) 51672, STANDARD PERMIT (SP) 4251, LETTER OF PERMISSION (LOP) 442, WITHDRAWN 5093 (NO DATA AVAILABLE FOR AVG DAYS EVALUATED), DENIAL 274

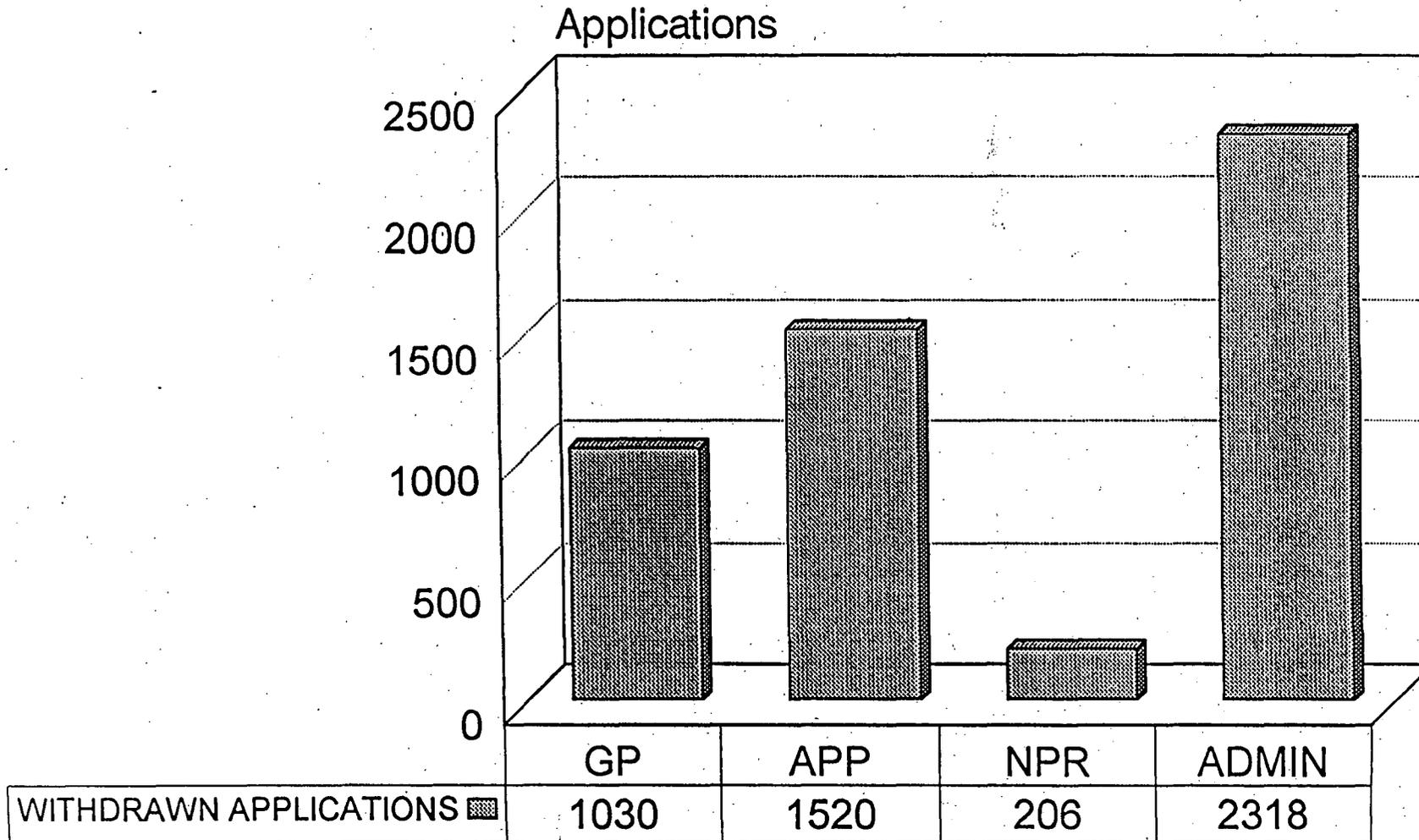
Corps of Engineers Regulatory Program

Permit Applications Over 2 Years Old

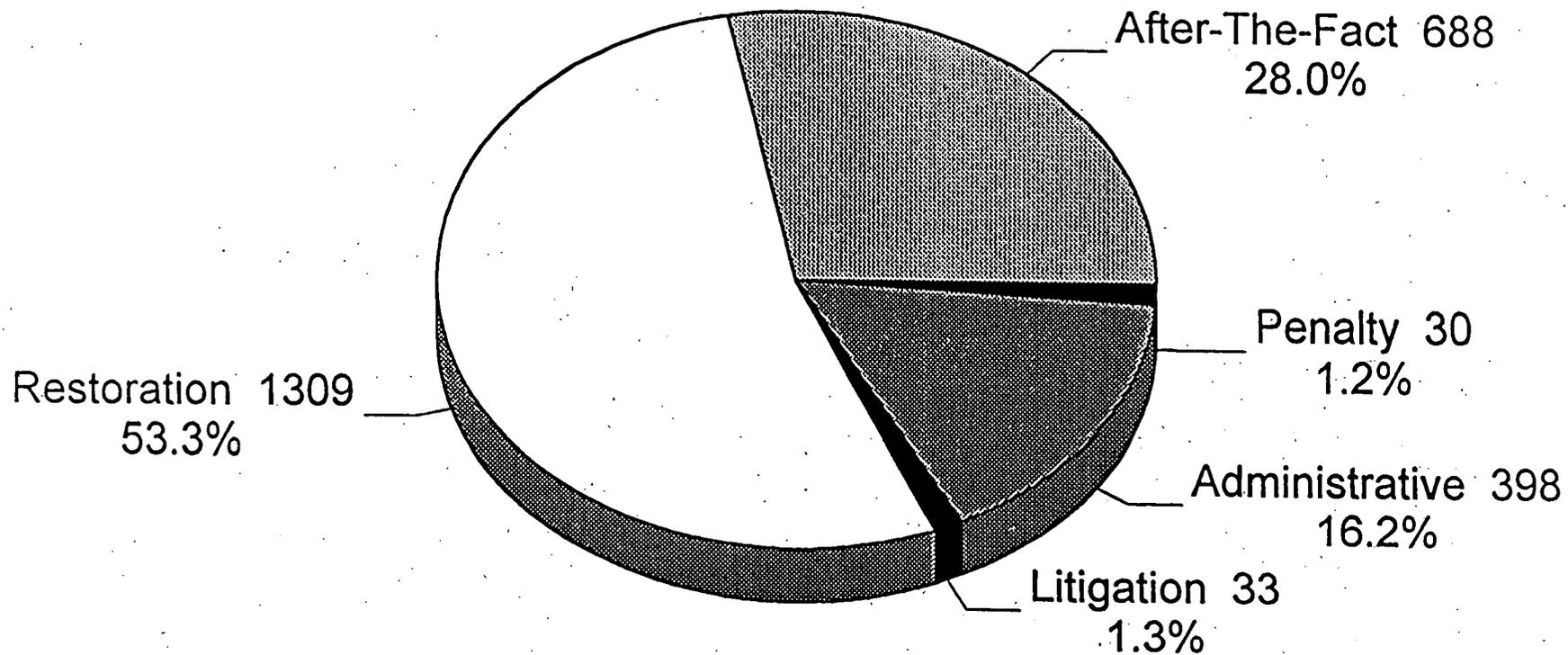


CORPS OF ENGINEERS REGULATORY PROGRAM

FY 1995 - WITHDRAWN 404 APPLICATIONS

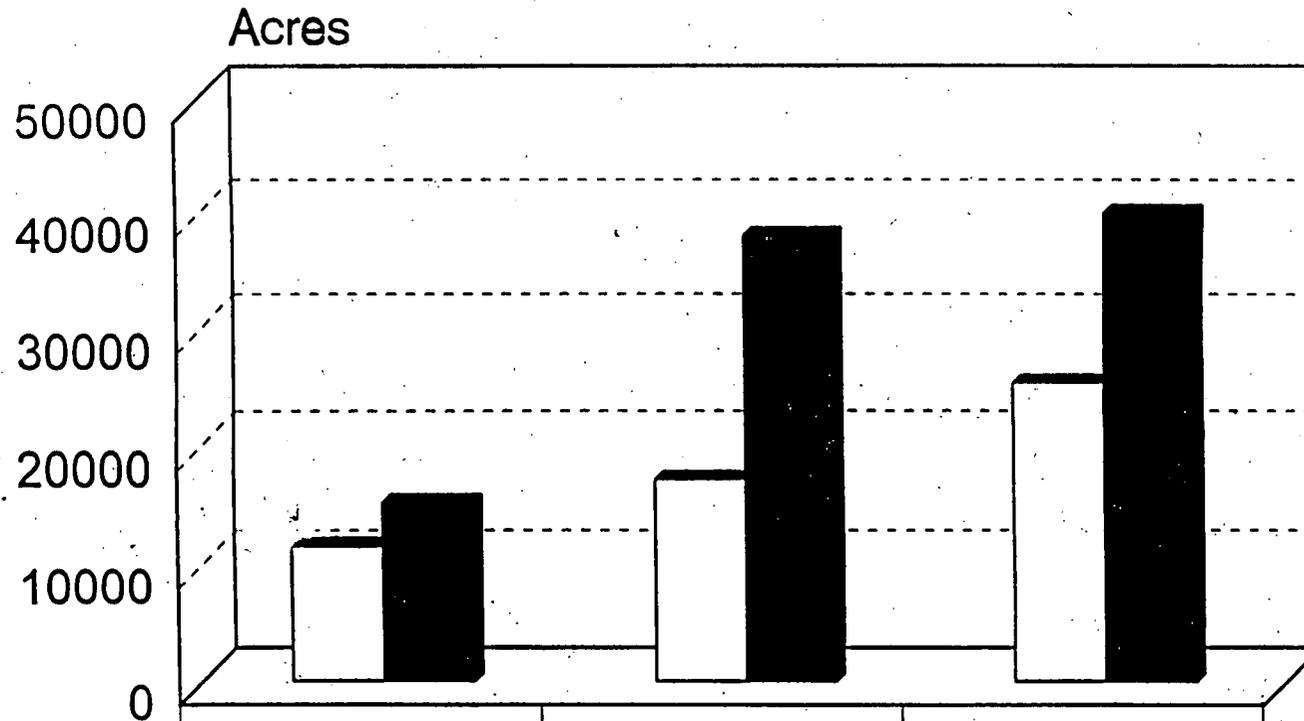


CORPS OF ENGINEERS REGULATORY PROGRAM FY 1995 - ENFORCEMENT CASES



CORPS OF ENGINEERS REGULATORY PROGRAM

WETLAND ACREAGE IMPACTS



Wetland Acres Permitted

FY 93

11600

FY 94

17200

FY 95

25300

Wetland Acres Mitigated

15200

38000

40000

□ Wetland Acres Permitted ■ Wetland Acres Mitigated

**ADDRESSING THE WETLANDS ISSUE – THE CLINTON ADMINISTRATION'S
WETLAND PLAN**

December 4, 1995 Update

- ✓ The Administration has developed a solid roadmap for reforming the Nation's wetlands protection program. We set a goal of "no net loss" of wetlands in the short-term. Over time we expect to see increases in the wetlands base through the restoration of wetlands that have been previously destroyed.
- ✓ The August 1993 Wetlands Plan reflects the need for effective protection of the Nation's wetlands, and includes much needed reforms to increase the fairness and flexibility of federal regulatory programs for landowners.
- ✓ Many initiatives in the President's 40-point plan have been completed, including:
 - ◆ the issuance of guidance that makes it clear to regulators that "all wetlands are not the same" in terms of functions and values – that is our regulatory approaches must be commensurate with the nature of the resource and the impacts of a project;
 - ◆ the issuance of a new general permit (July 19, 1995) that will allow landowners to build single-family homes without an individual permit – impact up to 1/2 acre of non-tidal wetlands;
 - ◆ the issuance of a proposed regulation that will establish a process by which a landowner can appeal a Corps of Engineers permit decision or wetlands jurisdiction determination – avoiding expensive litigation;
 - ◆ the adoption of one Federal wetlands delineation manual for all the Federal government -- the 1987 Corps Manual;
 - ◆ the issuance (November 28, 1995) of final guidance on wetlands mitigation banking – this will help the environment and give landowners more flexibility in meeting mitigation requirements;
 - ◆ the issuance (March 14, 1995) of a proposed regulation that will allow the Corps to rely more on private sector wetland delineations;
 - ◆ issuance of guidance (July 27, 1995) that eliminates the need to do an off-site alternatives analysis for projects up to 2 acres associated with the construction or expansion of a home or farm building and the expansion of a small business;
 - ◆ an interagency agreement (January 6, 1994) that puts the USDA in the lead for making wetlands determination on agriculture land.
- ✓ While much work has been completed, and the performance of the program has improved, we are working hard to implement other key elements of the President's plan. For example, we are working with state agencies to encourage them to take more of the day-to-day responsibilities of wetlands regulation – reducing duplication and delays for landowners.

✓ These are just a few of the over 40 wetlands reform initiatives we have either completed or have underway. The wetlands plan ensures necessary environmental protection and reduces regulatory burdens.

✓ The results of our efforts have been improved regulatory performance:

- ◆ In Fiscal Year 1995, approximately 62,000 people applied to the Corps for a Section 404 permit. Over 83 percent of these applications were covered by general permits in an average time of 17 days. Less than eight percent of the applications were subject to the more detailed individual evaluation – which took an average of 123 days. Only 274, or 0.5 percent, of the permits were denied.

In short, when you look at all individuals who had to deal with the Federal government for a Section 404 permit in 1995, the average time for a decision was 26 days.

Over the four year period since 1992, the Corps has reduced its evaluation time for all permits by 21 percent in spite of a 60 percent increase in permit applications.

✓ We will continue to work to reduce unnecessary regulatory burdens, address legitimate concerns, and improve wetlands protection – we will not, however, support a roll back of the progress that we have made in reducing the losses of these valuable resources.

Questions concerning the President's Wetlands Plan may be directed to Mr. Michael Davis, Chief, White House Wetlands Working Group, at (202) 761-0199.

BILL SUMMARY

12/1/95

SUMMARY OF S. 605

"THE OMNIBUS PROPERTY RIGHTS ACT OF 1995"
[Showing changes made by Chairman's mark]

TITLE I -- PURPOSES

- private property is an essential component of our free society and constitutional tradition
- the Federal Government has unfairly burdened property owners in violation of the Fifth Amendment
- the fact-specific approach to takings issues used by the courts is ineffective and costly
- the bill is designed to establish new takings claims and procedures to protect property rights, clarify jurisdiction, and minimize, "to the greatest extent possible," the taking of private property

TITLE II -- "PROPERTY RIGHTS LITIGATION RELIEF" (MODELLED AFTER SEN. HATCH BILL -- S. 135)

33% Loss-in-Value Compensation Trigger

- requires compensation where agency action reduces the value of the affected portion of property subject to the action by 33 percent or more

Other Grounds for Compensation

- greatly expands Supreme Court takings cases to require compensation where:
 - agency action does not "substantially advance" the stated government interest; govt has burden of proof (expansion of Nollan)
 - agency action exacts a right to use property as a condition of a permit, license, or other action without a "rough proportionality" between the need for the dedication and the impact of the proposed use of property; govt has burden of proof (derived from Dolan which addressed only forced dedications of property) [Chairman's mark expands this to encompass all permit conditions which "affect" property.]
 - agency action deprives the owner, temporarily or permanently, of substantially all productive use of the property, unless the limitation inheres in the property title itself; govt has burden of proof to show limit inheres in title (expansion of Lucas)

Definition of "taking"

The Act uses the term "taking" to encompass any agency action "whereby private property is the object of that action and is taken so as to require compensation" either under the Constitution or this Act. [Added language from Chairman's mark may be intended to limit scope to preclude compensation for property indirectly affected by agency action; yet scope of "agency action" was expanded to expressly encompass inaction. "Agency action" is now defined to require adverse effect at the time of the action.]

Nuisance Exception

- no compensation required where proposed land use is a nuisance under state law; govt has burden of proof

Federal Liability for State and Local Actions

- Federal agencies are vicariously liable for actions by state and local agencies that receive federal funds or implement federal programs, where the state action or federal funding is "directly related" to the statutory taking. [Chairman's mark expands liability to include state agency "inaction."]

Source of Payments

- paid from available appropriations supporting the program giving rise to the claim

Very Broad Definitions

- "Property" is broadly defined to include all property protected under the fifth amendment; all real property, whether vested or unvested; contracts or other security interests related to real property; the right to use or receive water; rents, issues, and profits of land; all interests defined as property under state law; all interests "understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest"
- Under section 204(d)(2), "compensation" would be either (1) business losses ["where appropriate" in the calculation of fair market value, under the mark] or (2) the difference between fair market value of the property before it became subject to the "agency action" and its value at the time of the action. "Just compensation" shall include compounded interest under section 203(3).

Jurisdiction

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Supermandate

- Title IV contains a "super-mandate" that applies to past as well as future rules:
 - prohibits the promulgation of a final rule if enforcement of the rule could reasonably be construed to require an uncompensated taking of private property "as defined by this Act."
 - requires agencies to review, and "where appropriate," re-promulgate all regulations that "result in takings of private property under this Act, and reduce such takings of private property to the maximum extent possible within existing statutory requirements..."
 - requires agencies to submit budget requests consistent with the purposes of the Act.
 - requires agencies to submit to Congress within 120 days a list of statutory changes necessary to meet the purposes of the title

Takings Impact Analysis (TIA)

- The TIA requirements for new agency actions are similar to, but much more onerous than, the takings amendment to the Safe Drinking Water Act bill passed by the Senate in the 103rd Congress.
 - requires agencies to draft a "private property taking impact analysis" before issuing any policy, regulation, proposed legislation, or related agency action which is likely to result in a taking under the bill or the Constitution
 - provides for exceptions similar to those in the Reagan Takings Executive Order (e.g., law enforcement activities, emergencies, military actions, etc.), but does not include exceptions in the E.O. for actions which reduce federal restrictions on property, policies and actions taken in furtherance of pending or imminent litigation, judicial or administrative; enforcement actions seeking penalties, the collection of debts authorized by statute; and Inspector General activities.
 - The TIA must analyze: the purpose of the agency action, the likelihood of a taking, whether it is likely to require compensation, alternatives that would achieve the intended

purpose and reduce the likelihood of a taking, and an estimate of potential liability if the action is found to constitute a taking.

Public Availability

- TIAs are available to the public; copies provided to affected property owners

Annual Reports

- Agencies must annually report to OMB and the Attorney General identifying each agency action for which a TIA report is prepared, as well as all takings claims and awards. A compilation of these reports would be published annually.

Judicial Review

- This title contemplates judicial review. It provides a six-year statute of limitations for actions "to enforce the provisions of this title," and it retains (from Dole's earlier S. 22) the confusing provision that there is a rebuttable presumption in any agency action or administrative or judicial proceeding that a TIA more than 5 years old is outdated and inaccurate.

TITLE V -- PRIVATE PROPERTY OWNERS ADMINISTRATIVE BILL OF RIGHTS (MODELLED AFTER SEN. SHELBY/REP. TAUZIN BILLS -- S.239/HR790)

Endangered Species / Wetlands Focus

- primarily addresses regulatory actions under the Endangered Species Act (ESA) and section 404 of the Clean Water Act.
- bill asserts that while traditional pollution laws protect public health and physical welfare, current habitat protection laws protect the welfare of plant and animal species

Compliance with State and local law

- in implementing the ESA and the 404 program, "each agency head shall comply with applicable State and tribal government laws, including laws relating to private property rights and privacy * * *."

"Least impact" Standard

- the ESA and the 404 program shall be administered "in a manner that has the least impact on private property owners' constitutional and other legal rights."

Consent for Entry / Data Collection

- Section 504 prohibits specified agency heads from entering privately-owned property to collect information about the property unless the owner has consented to the entry in writing, has been provided notice of the entry after consent, and has been notified that any raw data collected from the property must be made available to the owner upon request at no cost.

Unlike most provisions of this title, which focus on the ESA and the 404 program, section 504 applies to any "agency head," a term defined as the Secretary or Administrator with jurisdiction or authority to take a final action under the ESA or the 404 program. These "agency heads" include the Secretary of the Army and the EPA Administrator (for the 404 program), as well as the Secretaries of the Interior, Commerce, and Agriculture (for the ESA). Section 504 would apparently apply to the entry of property under any program administered by these agency heads, not just ESA and the 404 program. For example, CERCLA authorizes EPA to enter property to conduct remedial actions when EPA determines that "there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant." EPA is not required to obtain the owner's permission before entering the property under this provision. This bill would undercut this and similar authorities.

- Section 505 prohibits the use of data collected on privately owned property to implement or enforce the ESA or the 404 program unless the appropriate agency head has given the owner access to the information, a detailed description of the manner in which it was collected, and an opportunity to dispute the accuracy of the information.
- If the owner disputes the accuracy, the bill would require the agency head to specifically determine that the information is accurate prior to using it to implement or enforce the ESA or the 404 program.

Administrative Appeals

- Under the 404 program, an opportunity for an administrative appeal would be required for: (a) a determination of regulatory jurisdiction over a particular parcel of property; (b) the denial of a permit; (c) the imposition of terms and conditions in a permit; (d) the imposition of an

administrative penalty; and (e) the imposition of an order requiring a private property owner to restore or otherwise alter property. (In the comprehensive wetlands policy announced in August 1993, the Administration agreed to provide administrative appeals for (a), (b), and (d).)

- The bill would amend the ESA to require an opportunity for an administrative appeal of: (a) a determination that a particular parcel of property is a critical habitat of a listed species; (b) the denial of a permit for an incidental take; (c) the terms and conditions of an incidental take permit; (d) jeopardy findings on consultations; (e) incidental take statements issued in consultations affecting a particular parcel; (f) the imposition of an administrative penalty; and (g) the imposition of an order under the ESA limiting the use of property. The Interior Department has already provided for administrative review of (b), (c) and (f).)

Compensation

- requires compensation whenever a final agency action under the ESA or the 404 program deprives a private property owner of 33 percent or more of the fair market value of the affected portion of the property, as determined by a qualified appraisal expert.
- provides that such agency action "is deemed, at the option of the private property owner to be a taking under the Constitution of the United States" if the property owner either accepts the agency head's offer of compensation or submits to the arbitration process [deleted from Chairman's mark]

[Chairman's mark provides that property owner has the option to elect fair market value of the property before the date of "the final qualified agency action with respect to which the property or interest is acquired" or compensation under the standard in section 204(d)(2).]

- requires the relevant agency head to stay the action and offer compensation to the owner upon the request of the property owner. [Requirement for stay deleted from Chairman's mark.] The agency would be required ["where appropriate, under the standards of this Act"] (1) to offer to purchase the property at fair market value, assuming no use restrictions under the ESA and the 404 program; and (2) to offer to compensate the owner for the difference between the fair market value of the property with and without such restrictions.

- denies the agency the flexibility to tailor the challenged regulatory action in a manner that would alleviate its impact on private property. If a property owner requests compensation, the bill would require the agency head to make the requisite offers, thereby precluding less drastic responses that would reduce the impact of the regulation on property while simultaneously protecting the public fisc.

Arbitration

- the owner could reject both agency offers and submit the matter to binding arbitration

ESA Management Agreements

- requires Interior, when entering management agreements, to notify all owners and lessees of property subject to the agreement and to provide an opportunity for owners and lessees to participate

TITLE VI -- MISCELLANEOUS

- The bill contains a severability clause
- The bill is effective on date of enactment and applies to any agency action of the U.S. government after that date

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TOM JENSEN

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U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
POLICY, LEGISLATION AND SPECIAL LITIGATION SECTION
WASHINGTON, D.C. 20530
FAX NUMBER 202/514-4231

DATE: December 1, 1995
FROM: Elizabeth M. Osenbaugh
PHONE NUMBER: 514-2744
NUMBER OF PAGES TO BE TRANSMITTED (including cover):

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Carol Dennis	395-5836	395-4822
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MESSAGE:

Attached is a summary of S.605, showing changes made by the Chairman's mark.

You should have received the following last night: 1) Gary Guzy's testimony on sec. 5(a), HR 925, exception; 2) a quick expansion on earlier talking points re HR 925 exceptions; 3) quick talking points on Washington state vote.

~~Also have revision of summary of S.605 to reflect Chairman's mark in process -- will FAX later~~

12/1/95

SUMMARY OF S. 605

"THE OMNIBUS PROPERTY RIGHTS ACT OF 1995"
[Showing changes made by Chairman's mark]

TITLE I -- PURPOSES

- private property is an essential component of our free society and constitutional tradition
- the Federal Government has unfairly burdened property owners in violation of the Fifth Amendment
- the fact-specific approach to takings issues used by the courts is ineffective and costly
- the bill is designed to establish new takings claims and procedures to protect property rights, clarify jurisdiction, and minimize, "to the greatest extent possible," the taking of private property

TITLE II -- "PROPERTY RIGHTS LITIGATION RELIEF" (MODELLED AFTER SEN. HATCH BILL -- S. 135)

33% Loss-in-Value Compensation Trigger

- requires compensation where agency action reduces the value of the affected portion of property subject to the action by 33 percent or more

Other Grounds for Compensation

- greatly expands Supreme Court takings cases to require compensation where:
 - agency action does not "substantially advance" the stated government interest; govt has burden of proof (expansion of Nollan)
 - agency action exacts a right to use property as a condition of a permit, license, or other action without a "rough proportionality" between the need for the dedication and the impact of the proposed use of property; govt has burden of proof (derived from Dolan which addressed only forced dedications of property) [Chairman's mark expands this to encompass all permit conditions which "affect" property.]
 - agency action deprives the owner, temporarily or permanently, of substantially all productive use of the property, unless the limitation inheres in the property title itself; govt has burden of proof to show limit inheres in title (expansion of Lucas)

Definition of "taking"

The Act uses the term "taking" to encompass any agency action "whereby private property is the object of that action and is taken so as to require compensation" either under the Constitution or this Act. [Added language from Chairman's mark may be intended to limit scope to preclude compensation for property indirectly affected by agency action; yet scope of "agency action" was expanded to expressly encompass inaction. "Agency action" is now defined to require adverse effect at the time of the action.]

Nuisance Exception

- no compensation required where proposed land use is a nuisance under state law; govt has burden of proof

Federal Liability for State and Local Actions

- Federal agencies are vicariously liable for actions by state and local agencies that receive federal funds or implement federal programs, where the state action or federal funding is "directly related" to the statutory taking. [Chairman's mark expands liability to include state agency "inaction."]

Source of Payments

- paid from available appropriations supporting the program giving rise to the claim

Very Broad Definitions

- "Property" is broadly defined to include all property protected under the fifth amendment; all real property, whether vested or unvested; contracts or other security interests related to real property; the right to use or receive water; rents, issues, and profits of land; all interests defined as property under state law; all interests "understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest"
- Under section 204(d)(2), "compensation" would be either (1) business losses ["where appropriate" in the calculation of fair market value, under the mark] or (2) the difference between fair market value of the property before it became subject to the "agency action" and its value at the time of the action. "Just compensation" shall include compounded interest under section 203(3).

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