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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

OFFICE OF LEGAL COUNSEL

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DATE: 6/19/95

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The burden is upon the respondent to demonstrate that the inability of the discriminatee to accept Nondiscriminatory Placement is unrelated to the respondent's discrimination such that the victim, rather than the respondent, should bear the loss. Similarly, the burden is also on the respondent to demonstrate a contention that postdiscrimination conduct by a discriminatee renders the discriminatee unworthy of Nondiscriminatory Placement.

In certain circumstances, the Nondiscriminatory Placement of a victim of discrimination may require the job placement of another of the respondent's employees. If displacement of an incumbent employee in order to accomplish Nondiscriminatory Placement on behalf of a discriminatee is clearly inappropriate in a particular setting or is unavailable as a remedy in a particular jurisdiction, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.

(4) Backpay.

Identified victim of discrimination is to be made whole for any loss of earnings the discriminatee may have suffered by reason of the discrimination. Each individual discriminatee must receive a sum of money equal to what would have been earned by the discriminatee in the employment lost through discrimination ("Gross Backpay") less what was actually earned from other employment during the period, after normal expenses incurred in seeking and holding the interim employment have been deducted ("Net Interim Earnings"). The difference between Gross Backpay and Net Interim Earnings is Net Backpay Due. Interest should be computed on all Net Backpay Due. Net Backpay accrues from the date of discrimination, except where the statutes limit the recovery, until the discrimination against the individual has been remedied.

Gross Backpay includes all forms of compensation such as wages, bonuses, vacation pay, and all other elements of reimbursement and fringe benefits such as pension and health insurance. Gross Backpay must also reflect fluctuations in working time, overtime rates, changing rates of pay, transfers, promotions, and other perquisites of employment that the discriminatee would have enjoyed but for the discrimination. In appropriate circumstances under the Equal Pay Act and the Age Discrimination in Employment Act liquidated damages based on backpay will also be available.

(5) Cessation Provisions.

All respondents must agree or be ordered to cease from engaging in the specific unlawful employment practices involved in the complaint. For example, a respondent should be ordered to cease discriminating on the unlawful basis and in the specific manner alleged

or a respondent might be required to cease giving effect to certain specific discriminatory policies, practices or rules. In circumstances where a particular respondent has committed or has conciliated several unlawful employment practices, consideration must be given to including broad cessation language in an agreement or order which is designed to order the cessation of any further unlawful employment practices.

The Commission does not believe that the statutory requirement of conciliation requires the agency to abdicate its principal law enforcement responsibility. Thus, conciliation should not result in inadequate remedies. The possibility of pre-litigation conciliation does not constitute cause for unwarranted or undeserved concessions by a law enforcement agency when one of the laws it enforces has been violated. Rather, the concept of settlement constitutes recognition of the fact that there may be reasonable differences as to a suitable remedy between the maximum which may be reasonably demanded by the agency and the minimum which in good faith may be fairly argued for the respondent. Within this scope, conciliation must be actively pursued by the agency. In this regard, in all cases in which the District Director believes that one of the statutes the agency enforces has been violated or in which litigation has been authorized, full remedies containing the appropriate elements as set forth in this memorandum should be sought. In conciliation efforts, reasonable compromises or counterproposals to the full range of remedies described in this policy may be considered if those compromises or counterproposals address fully the remedial concepts described in this policy. Conciliation should be pursued with the goal of obtaining substantially complete relief through the conciliation process. Any divergence from this goal must be justified by the relevant facts and the law.

[52 FR 41933, Oct. 30, 1987]

**PART 1614—FEDERAL SECTOR
EQUAL EMPLOYMENT OPPORTUNITY**

**Subpart A—Agency Program To Promote Equal
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§ 1614.101**29 CFR Ch. XIV (7-1-92 Edition)****Subpart B—Provisions Applicable to Particular Complaints**

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1968 Comp., p.133; E.O. 12106, 3 CFR, 1978 Comp., p.263; Reorg. Plan No. 1 of 1978, 3 CFR, 1978 Comp., p.321.

SOURCE: 57 FR 12646, Apr. 10, 1992, unless otherwise noted.

EFFECTIVE DATE NOTE: At 57 FR 12646, Apr. 10, 1992, part 1614 was added effective October 1, 1992.

Subpart C—Related Processes

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Subpart A—Agency Program To Promote Equal Employment Opportunity**§ 1614.101 General policy.**

(a) It is the policy of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age or handicap and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

(b) No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act (title VII) (42 U.S.C. 2000e *et seq.*), the Age Discrimination in Employment Act (ADEA) (29 U.S.C. 621 *et seq.*), the Equal Pay Act (29 U.S.C. 206(d)) or the Rehabilitation Act (29 U.S.C. 791 *et seq.*) or for participating in any stage of administrative or judicial proceedings under those statutes.

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§ 1614.102 Agency program.

(a) Each agency shall maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies. In support of this program, the agency shall:

(1) Provide sufficient resources to its equal employment opportunity program to ensure efficient and successful operation;

(2) Provide for the prompt, fair and impartial processing of complaints in accordance with this part and the instructions contained in the Commission's Management Directives;

(3) Conduct a continuing campaign to eradicate every form of prejudice or discrimination from the agency's personnel policies, practices and working conditions;

Subpart E—Remedies and Enforcement

- 1614.501 Remedies and relief.
- 1614.502 Compliance with final Commission decisions.
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- 1614.607 Delegation of authority.

AUTHORITY: 29 U.S.C. 206(d), 633a, 791 and 794a; 42 U.S.C. 2000e-16; E.O. 10577, 3 CFR, 1954-1958 Comp., p.218; E.O. 11222, 3 CFR, 1964-1965 Comp., p.306; E.O. 11478, 3 CFR,

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(4) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, national, origin, age or handicap, and solicit their recruitment assistance on a continuing basis;

(5) Review, evaluate and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(6) Take appropriate disciplinary action against employees who engage in discriminatory practices;

(7) Make reasonable accommodation of the religious needs of applicants and employees when those accommodations can be made without undue hardship on the business of the agency;

(8) Make reasonable accommodation to the known physical or mental limitations of qualified applicants and employees with handicaps unless the accommodation would impose an undue hardship on the operation of the agency's program;

(9) Reassign, in accordance with § 1614.203(g), nonprobationary employees who develop physical or mental limitations that prevent them from performing the essential functions of their positions even with reasonable accommodation;

(10) Provide recognition to employees, supervisors, managers and units demonstrating superior accomplishment in equal employment opportunity;

(11) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort;

(12) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs and other training measures so that they may perform at their highest potential and in accordance with their abilities;

(13) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation; and

(14) Participate at the community level with other employers, with schools and universities and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability.

(b) In order to implement its program, each agency shall:

(1) Develop the plans, procedures and regulations necessary to carry out its program;

(2) Appraise its personnel operations at regular intervals to assure their conformity with its program, this part 1614 and the instructions contained in the Commission's management directives;

(3) Designate a Director of Equal Employment Opportunity (EEO Director), EEO Officer(s), and such Special Emphasis Program Managers (e.g., People With Disabilities Program, Federal Women's Program and Hispanic Employment Program), clerical and administrative support as may be necessary to carry out the functions described in this part in all organizational units of the agency and at all agency installations. The EEO Director shall be under the immediate supervision of the agency head;

(4) Make written materials available to all employees and applicants informing them of the variety of equal employment opportunity programs and administrative and judicial remedial procedures available to them and prominently post such written materials in all personnel and EEO offices and throughout the workplace;

(5) Ensure that full cooperation is provided by all agency employees to EEO Counselors and agency EEO personnel in the processing and resolution of pre-complaint matters and complaints within an agency and that full cooperation is provided to the Commission in the course of appeals, including granting the Commission routine access to personnel records of the agency when required in connection with an investigation; and

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(6) Publicize to all employees and post at all times the names, business telephone numbers and business addresses of the EEO Counselors (unless the counseling function is centralized, in which case only the telephone number and address need be publicized and posted), a notice of the time limits and necessity of contacting a Counselor before filing a complaint and the telephone numbers and addresses of the EEO Director, EEO Officer(s) and Special Emphasis Program Managers.

(c) Under each agency program, the EEO Director shall be responsible for:

(1) Advising the head of the agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports and other matters pertaining to the policy in § 1614.101 and the agency program;

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting to the head of the agency with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial, supervisory or other employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and to improve the agency's program for equal employment opportunity;

(4) Providing for counseling of aggrieved individuals and for the receipt and processing of individual and class complaints of discrimination; and

(5) Assuring that individual complaints are fairly and thoroughly investigated and that final decisions are issued in a timely manner in accordance with this part.

(d) Directives, instructions, forms and other Commission materials referenced in this part may be obtained in accordance with the provisions of 29 CFR 1610.7 of this chapter.

§ 1614.103 Complaints of discrimination covered by this part.

(a) Individual and class complaints of employment discrimination and re-

taliation prohibited by title VII (discrimination on the basis of race, color, religion, sex and national origin), the ADEA (discrimination on the basis of age when the aggrieved individual is at least 40 years of age), the Rehabilitation Act (discrimination on the basis of handicap) or the Equal Pay Act (sex-based wage discrimination) shall be processed in accordance with this part. Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for purposes of this part.

(b) This part applies to:

(1) Military departments as defined in 5 U.S.C. 102;

(2) Executive agencies as defined in 5 U.S.C. 105;

(3) The United States Postal Service, Postal Rate Commission and Tennessee Valley Authority; and

(4) All units of the legislative and judicial branches of the Federal Government having positions in the competitive service, except for complaints under the Rehabilitation Act.

(c) Within the covered departments, agencies and units, this part applies to all employees and applicants for employment, and to all employment policies or practices affecting employees or applicants for employment including employees and applicants who are paid from nonappropriated funds, unless otherwise excluded.

(d) This part does not apply to:

(1) Uniformed members of the military departments referred to in paragraph (b)(1) of this section;

(2) Employees of the General Accounting Office;

(3) Employees of the Library of Congress;

(4) Allens employed in positions, or who apply for positions, located outside the limits of the United States; or

(5) Equal Pay Act complaints of employees whose services are performed within a foreign country or certain United States territories as provided in 29 U.S.C. 213(f).

§ 1614.104 Agency processing.

(a) Each agency subject to this part shall adopt procedures for processing individual and class complaints of discrimination that include the provi-

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sions contained in §§ 1614.105 through 1614.110 and in § 1614.204, and that are consistent with all other applicable provisions of this part and the instructions for complaint processing contained in the Commission's Management Directives.

(b) The Commission shall periodically review agency resources and procedures to ensure that an agency makes reasonable efforts to resolve complaints informally, to process complaints in a timely manner, to develop adequate factual records, to issue decisions that are consistent with acceptable legal standards, to explain the reasons for its decisions, and to give complainants adequate and timely notice of their rights.

§ 1614.105 Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

(b) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including the right to request a hearing after an investigation by the agency, election rights pursuant to § 1614.301 and 1614.302, the right to notice of intent to sue pursuant to § 1614.201(a) and a lawsuit under

the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the matter(s) raised in precomplaint counseling (or issues like or related to issues raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency. Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency. The notice required by paragraphs (d) or (e) of this section shall include a notice of the right to file a class complaint. If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent.

(c) Counselors shall conduct counseling activities in accordance with instructions contained in Commission Management Directives. When advised that a complaint has been filed by an aggrieved person, the Counselor shall submit a written report within 15 days to the agency office that has been designated to accept complaints and the aggrieved person concerning the issues discussed and actions taken during counseling.

(d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the agency has an established dispute resolution procedure under paragraph (f) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person brought the matter to the Counselor's attention. If the matter has not been resolved, the aggrieved person shall be informed in writing by the Counselor, not later than the thirtieth day after contacting the Counselor, of the right to file a discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the agency is informed immediately if the

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complainant retains counsel or a representative.

(e) Prior to the end of the 30-day period, the aggrieved person may agree in writing with the agency to postpone the final interview and extend the counseling period for an additional period of no more than 60 days. If the matter has not been resolved before the conclusion of the agreed extension, the notice described in paragraph (d) of this section shall be issued.

(f) Where the agency has an established dispute resolution procedure and the aggrieved individual agrees to participate in the procedure, the pre-complaint processing period shall be 90 days. If the matter has not been resolved before the 90th day, the notice described in paragraph (d) of this section shall be issued.

(g) The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint under this part from that person involving that same matter.

§ 1614.106 Individual complaints.

(a) A complaint must be filed with the agency that allegedly discriminated against the complainant.

(b) A complaint must be filed within 15 days of receipt of the notice required by § 1614.105 (d), (e) or (f).

(c) A complaint must contain a signed statement from the person claiming to be aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint. The complaint must also contain a telephone number and address where the complainant or the representative can be contacted.

(d) The agency shall acknowledge receipt of a complaint in writing and inform the complainant of the date on which the complaint was filed. Such acknowledgement shall also advise the complainant that:

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(1) the complainant has the right to appeal the final decision or dismissal of all or a portion of a complaint; and

(2) The agency is required to conduct a complete and fair investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the period.

§ 1614.107 Dismissals of complaints.

The agency shall dismiss a complaint or a portion of a complaint:

(a) That fails to state a claim under § 1614.103 or § 1614.106(a) or states the same claim that is pending before or has been decided by the agency or Commission;

(b) That fails to comply with the applicable time limits contained in §§ 1614.105, 1614.106 and 1614.204(c), unless the agency extends the time limits in accordance with § 1614.604(c), or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor;

(c) That is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;

(d) Where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination or in an appeal to the Merit Systems Protection Board and § 1614.301 or § 1614.302 indicates that the complainant has elected to pursue the non-EEO process;

(e) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory;

(f) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address;

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(g) Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available; or

(h) If, prior to the issuance of the notice required by § 1614.108(f), the complainant refuses within 30 days of receipt of an offer of settlement to accept an agency offer of full relief containing a certification from the agency's EEO Director, Chief Legal Officer or a designee reporting directly to the EEO Director or the Chief Legal Officer that the offer constitutes full relief, provided that the offer gave notice that failure to accept would result in dismissal of the complaint. An offer of full relief under this subsection is the appropriate relief in § 1614.501.

§ 1614.108 Investigation of complaints.

(a) The investigation of complaints shall be conducted by the agency against which the complaint has been filed.

(b) In accordance with instructions contained in Commission Management Directives, the agency shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint. Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue. Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints.

(c) The procedures in paragraphs (c) (1) through (3) of this section apply to the investigation of complaints:

(1) The complainant, the agency, any employee of a federal agency shall produce such documentary and

testimonial evidence as the investigator deems necessary.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as it deems appropriate.

(d) Any investigation will be conducted by investigators with appropriate security clearances. The Commission will, upon request, supply the agency with the name of an investigator with appropriate security clearances.

(e) The agency shall complete its investigation within 180 days of the date of filing of an individual complaint or within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to § 1614.107. By written agreement within those time periods, the complainant and the respondent agency may voluntarily extend the time period for not more than an additional 90 days. The agency may unilaterally extend the time period or any period of extension for not more than 30 days where it must sanitize a complaint file that may contain informa-

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tion classified pursuant to Exec. Order No. 12356, or successor orders, as secret in the interest of national defense or foreign policy, provided the investigating agency notifies the parties of the extension.

(f) Within 180 days from the filing of the complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in paragraph (e) of this section, the agency shall notify the complainant that the investigation has been completed, shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing before an administrative judge or may receive an immediate final decision pursuant to § 1614.110 from the agency with which the complaint was filed. In the absence of the required notice, the complainant may request a hearing at any time after 180 days has elapsed from the filing of the complaint.

§ 1614.109 Hearings.

(a) When a complainant requests a hearing, the agency shall request that the Commission appoint an administrative judge to conduct a hearing in accordance with this section. Any hearing will be conducted by an administrative judge or hearing examiner with appropriate security clearances. Where the administrative judge determines that the complainant is raising or intends to pursue issues like or related to those raised in the complaint, but which the agency has not had an opportunity to address, the administrative judge shall remand any such issue for counseling in accordance with § 1614.105 for such other processing as ordered by the administrative judge.

(b) *Discovery.* The administrative judge shall notify the parties of the right to seek discovery prior to the hearing and may issue such discovery orders as are appropriate. Unless the parties agree in writing concerning the methods and scope of discovery, the party seeking discovery shall request authorization from the administrative

judge prior to commencing discovery. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint, but the administrative judge may limit the quantity, timing of discovery. Evidence may be developed through interrogatory, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(c) *Conduct of hearing.* Agencies shall provide for the attendance at a hearing of all employees approved witnesses by an administrative judge. Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public. The administrative judge shall have the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious and exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. The administrative judge shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence. The administrative judge of the Commission may refer to the Disciplinary Committee of the appropriate Bar Association any attorney or upon reasonable notice and an opportunity to be heard, suspend or disqualify from representing complainants or agencies in EEOC hearings any representative who refuses to follow the orders of an administrative judge, or who otherwise engages in improper conduct.

(d) The procedures in paragraphs (d) (1) through (3) of this section apply to hearings of complaints:

(1) The complainant, an agency, and any employee of a federal agency shall produce such documentary and testimonial evidence as the administrative judge deems necessary.

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(2) Administrative judges are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as appropriate.

(e) *Findings and conclusions without hearing.* (1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the administrative judge, file a statement with the administrative judge prior to the hearing setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to any such material fact. The party shall serve the statement on the opposing party.

(2) The opposing party may file an opposition within 15 days of receipt of the statement in paragraph (d)(1) of this section. The opposition may refer to the record in the case to rebut the statement that a fact is not in dispute. The opposing party may file an affidavit stating that the party cannot, for reasons stated, present facts to oppose the request.

After considering the submissions, the administrative judge may order that discovery be permitted on the fact or facts involved, limit the hearing to the issues remaining in dispute, issue findings and conclusions without a hearing or make such other ruling as is appropriate.

(3) If the administrative judge determines upon his or her own initiative that some or all facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue an order limiting the scope of the hearing or issue findings and conclusions without holding a hearing.

(f) *Record of hearing.* The hearing shall be recorded and the agency shall arrange and pay for verbatim transcripts. All documents submitted to, and accepted by, the administrative judge at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, the administrative judge shall make the document available to the agency representative for reproduction.

(g) *Findings and conclusions.* Unless the administrative judge makes a written determination that good cause exists for extending the time for issuing findings of fact and conclusions of law, within 180 days of a request for a hearing being received by EEOC, an administrative judge shall issue findings of fact and conclusions of law on the merits of the complaint, and shall order appropriate relief where discrimination is found with regard to the matter that gave rise to the complaint. The administrative judge shall send copies of the entire record, including the transcript, and the findings and conclusions to the parties by certified mail, return receipt requested. Within 60 days of receipt of the findings and conclusions, the agency may reject or modify the findings and conclusions or the relief ordered by the administrative judge and issue a final decision in accordance with § 1614.110. If an agency does not, within 60 days of receipt, reject or modify the findings

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and conclusions of the administrative judge, then the findings and conclusions of the administrative judge and the relief ordered shall become the final decision of the agency and the agency shall notify the complainant of the final decision in accordance with § 1614.110.

§ 1614.110 Final decisions.

Within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision, or within 60 days of receiving the findings and conclusions of an administrative judge, the agency shall issue a final decision. The final decision shall consist of findings by the agency on the merits of each issue in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with subpart E of this part. The final decision shall contain notice of the right to appeal to the Commission, the name and address of the agency official upon whom an appeal should be served, notice of the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573, Notice of Appeal/Petition, shall be attached to the decision.

Subpart B—Provisions Applicable to Particular Complaints**§ 1614.201 Age Discrimination in Employment Act.**

(a) As an alternative to filing a complaint under this part, an aggrieved individual may file a civil action in a United States district court under the ADEA against the head of an alleged discriminating agency after giving the Commission not less than 30 days' notice of the intent to file such an action. Such notice must be filed in writing with EEOC, Federal Sector Programs, 1801 L St., NW., Washington, DC 20507 within 180 days of the occurrence of the alleged unlawful practice.

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(b) The Commission may exempt a position from the provisions of the ADEA if the Commission establishes a maximum age requirement for the position on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position.

(c) When an individual has filed an administrative complaint alleging age discrimination that is not a mixed case, administrative remedies will be considered to be exhausted for purposes of filing a civil action:

(1) 180 days after the filing of an individual complaint if the agency has not issued a final decision and the individual has not filed an appeal or 180 days after the filing of a class complaint if the agency has not issued a final decision;

(2) After the issuance of a final decision on an individual or class complaint if the individual has not filed an appeal; or

(3) After the issuance of a final decision by the Commission on an appeal or 180 days after the filing of an appeal if the Commission has not issued a final decision.

§ 1614.202 Equal Pay Act.

(a) In its enforcement of the Equal Pay Act, the Commission has the authority to investigate an agency's employment practices on its own initiative at any time in order to determine compliance with the provisions of the Act. The Commission will provide notice to the agency that it will be initiating an investigation.

(b) Complaints alleging violations of the Equal Pay Act shall be processed under this part.

§ 1614.203 Rehabilitation Act.

(a) *Definitions*—(1) *Individual with handicaps* is defined for this section as one who:

(i) Has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) Has a record of such an impairment; or

(iii) Is regarded as having such an impairment.

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(2) *Physical or mental impairment* means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, cardiovascular, reproductive, digestive, respiratory, genitourinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(3) *Major life activities* means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(4) *Has a record of such an impairment* means has a history of, or has classified (or misclassified) as having, a mental or physical impairment that substantially limits one or more major life activities.

(5) *Is regarded as having such an impairment* means has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; or has none of the impairments defined in paragraph (a)(2) of this section but is treated by an employer as having such an impairment.

(6) *Qualified individual with handicaps* means with respect to employment, an individual with handicaps who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used:

(i) Meets the experience or education requirements (which may include passing a written test) of the position in question; or

(ii) Meets the criteria for appointment under one of the special appointing authorities for individuals with handicaps.

(b) The Federal Government shall become a model employer of individuals with handicaps. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with mental and physical handicaps. An agency shall not discriminate against a qualified individual with physical or mental handicaps.

(c) *Reasonable accommodation.* (1) An agency shall make reasonable accommodation to the known physical or mental limitations of an applicant or employee who is a qualified individual with handicaps unless the agency can demonstrate that the accommodation would impose an undue hardship on the operations of its program.

(2) Reasonable accommodation may include, but shall not be limited to:

(i) Making facilities readily accessible to and usable by individuals with handicaps; and

(ii) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

(3) In determining whether, pursuant to paragraph (c)(1) of this section, an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include:

(i) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget;

(ii) The type of agency operation, including the composition and structure of the agency's work force; and

(iii) The nature and the cost of the accommodation.

(d) *Employment criteria.* (1) An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified individuals with handicaps or any class of individuals with handicaps unless:

(i) The agency demonstrates that the test score or other selection criterion is job-related for the position in question and consistent with business necessity; and

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(1) OPM or other examining authority shows that job-related alternative tests, or the agency shows that job-related alternative criteria, that do not screen out or tend to screen out as many individuals with handicaps are unavailable.

(2) An agency shall select and administer tests concerning employment so as to insure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's ability to perform the position or type of positions in question rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skill (except where those skills are the factors that the test purports to measure).

(e) *Preemployment inquiries.* (1) Except as provided in paragraphs (e)(2) and (e)(3) of this section, an agency may not conduct a preemployment medical examination and may not make preemployment inquiry of an applicant as to whether the applicant is an individual with handicaps or as to the nature or severity of a handicap. An agency may, however, make preemployment inquiry into an applicant's ability to meet the essential functions of the job, or the medical qualification requirements if applicable, with or without reasonable accommodation, of the position in question, i.e., the minimum abilities necessary for safe and efficient performance of the duties of the position in question. The Office of Personnel Management may also make an inquiry as to the nature and extent of a handicap for the purpose of special testing.

(2) Nothing in this section shall prohibit an agency from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, provided that: all entering employees are subjected to such an examination regardless of handicap or when the preemployment medical questionnaire used for positions that do not routinely require medical examination indicates a condition for which further examination is required because of the job-related nature of the condition, and the results of such

an examination are used only in accordance with the requirements of this part. Nothing in this section shall be construed to prohibit the gathering of preemployment medical information for the purposes of special appointing authorities for individuals with handicaps.

(3) To enable and evaluate affirmative action to hire, place or advance individuals with handicaps, the agency may invite applicants for employment to indicate whether and to what extent they are handicapped, if:

(i) The agency states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used, that the information requested is intended for use solely in conjunction with affirmative action; and

(ii) The agency states clearly that the information is being requested on a voluntary basis, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(4) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be kept confidential except that:

(i) Managers, selecting officials, and others involved in the selection process or responsible for affirmative action may be informed that an applicant is eligible under special appointing authority for the disabled;

(ii) Supervisors and managers may be informed regarding necessary accommodations;

(iii) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment;

(iv) Government officials investigating compliance with laws, regulations, and instructions relevant to equal employment opportunity and affirmative action for individuals with handicaps shall be provided information upon request; and

(v) Statistics generated from information obtained may be used to manage, evaluate, and report on equal employment opportunity and affirmative action programs.

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(f) *Physical access to buildings.* (1) An employer shall not discriminate against applicants or employees who are qualified individuals with handicaps due to the inaccessibility of its facility.

(2) For the purpose of this subpart, a facility shall be deemed accessible if it is in compliance with the Architectural Barriers Act of 1968 (42 U.S.C. 151 *et seq.*) and the Americans with Disabilities Act of 1990 (42 U.S.C. 11933 and 12204).

(g) *Reassignment.* When a nonprobationary employee becomes unable to perform the essential functions of his or her position even with reasonable accommodation due to a handicap, an agency shall offer to reassign the individual to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation if necessary unless the agency can demonstrate that the reassignment would impose an undue hardship on the operation of its program. In the absence of a position at the same grade or level, an offer of reassignment to a vacant position at the highest available grade or level below the employee's current grade or level shall be required. The availability of such a vacancy shall not affect the employee's entitlement, if any, to disability retirement pursuant to 5 U.S.C. 8337 or 5 U.S.C. 8451. If the agency has already posted a notice or announcement seeking applications for a specific vacant position at the time the agency has determined that the nonprobationary employee is unable to perform the essential functions of his or her position even with reasonable accommodation, then the agency does not have an obligation under this section to offer to reassign the individual to that position, but the agency must consider the individual on an equal basis with those who applied for the position. For the purpose of this paragraph, an employee of the United States Postal Service shall not be considered qualified for any offer of reassignment that would be inconsistent with the terms of any

applicable collective bargaining agreement.

(h) *Exclusion from definition of "individual(s) with handicap(s)".* (1) The term "individual with handicap(s)" shall not include an individual who is currently engaging in the illegal use of drugs, when an agency acts on the basis of such use. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812). The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, but does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of federal law. This exclusion, however, does not exclude an individual with handicaps who:

(i) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(ii) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(iii) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(2) Except that it shall not violate this section for an agency to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (h)(1) (i) and (ii) of this section is no longer engaging in the illegal use of drugs.

§ 1614.204 Class complaints.

(a) *Definitions.* (1) A class is a group of employees, former employees or applicants for employment who, it is alleged, have been or are being adversely affected by an agency personnel management policy or practice that discriminates against the group on the basis of their race, color, religion, sex, national origin, age or handicap.

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(2) A class complaint is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that:

(i) The class is so numerous that a consolidated complaint of the members of the class is impractical;

(ii) There are questions of fact common to the class;

(iii) The claims of the agent of the class are typical of the claims of the class;

(iv) The agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class.

(3) An agent of the class is a class member who acts for the class during the processing of the class complaint.

(b) *Pre-complaint processing.* An employee or applicant who wishes to file a class complaint must seek counseling and be counseled in accordance with § 1614.105.

(c) *Filing and presentation of a class complaint.* (1) A class complaint must be signed by the agent or representative and must identify the policy or practice adversely affecting the class as well as the specific action or matter affecting the class agent.

(2) The complaint must be filed with the agency that allegedly discriminated not later than 15 days after the agent's receipt of the notice of right to file a class complaint.

(3) The complaint shall be processed promptly; the parties shall cooperate and shall proceed at all times without undue delay.

(d) *Acceptance or dismissal.* (1) Within 30 days of an agency's receipt of a complaint, the agency shall: Designate an agency representative who shall be any of the individuals referenced in § 1614.102(b)(3), and forward the complaint, along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the Commission. The Commission shall assign the complaint to an administrative judge or complaints examiner with a proper security clearance when necessary. The administrative judge may require the complainant or agency to submit additional information relevant to the complaint.

(2) The administrative judge may recommend that the agency dismiss the complaint, or any portion, for any of the reasons listed in § 1614.107 c because it does not meet the prerequisites of a class complaint under § 1614.204(a)(2).

(3) If the allegation is not included in the Counselor's report, the administrative judge shall afford the agent 15 days to state whether the matter was discussed with the Counselor and, if not, explain why it was not discussed. If the explanation is not satisfactory, the administrative judge shall recommend that the agency dismiss the allegation. If the explanation is satisfactory, the administrative judge shall refer the allegation to the agency for further counseling of the agent. After counseling, the allegation shall be consolidated with the class complaint.

(4) If an allegation lacks specificity and detail, the administrative judge shall afford the agent 15 days to provide specific and detailed information. The administrative judge shall recommend that the agency dismiss the complaint if the agent fails to provide such information within the specified time period. If the information provided contains new allegations outside the scope of the complaint, the administrative judge shall advise the agent how to proceed on an individual or class basis concerning these allegations.

(5) The administrative judge shall recommend that the agency extend the time limits for filing a complaint and for consulting with a Counselor in accordance with the time limit extension provisions contained in §§ 1614.105(a)(2) and 1614.604.

(6) When appropriate, the administrative judge may recommend that a class be divided into subclasses and that each subclass be treated as a class, and the provisions of this section then shall be construed and applied accordingly.

(7) The administrative judge's written recommendation to the agency on whether to accept or dismiss a complaint and the complaint file shall be transmitted to the agency and notification of that transmittal shall be sent to the agent. The administrative judge's recommendation to accept or

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Dismissal shall become the agency decision unless the agency accepts, rejects or modifies the recommended decision within 30 days of the receipt of the recommended decision and complaint file. The agency shall notify the agent by certified mail, return receipt requested, and the administrative judge of its decision to accept or dismiss a complaint. At the same time, the agency shall forward to the agent copies of the administrative judge's recommendation and the complaint file. The dismissal of a class complaint shall inform the agent either that the complaint is being filed on that date as an individual complaint of discrimination and will be processed under subpart A or that the complaint is also dismissed as an individual complaint in accordance with § 1614.107. In addition, it shall inform the agent of the right to appeal the dismissal of the class complaint to the Office of Federal Operations or to file a civil action and include EEOC Form 573, Notice of Appeal/Petition.

(e) *Notification.* (1) Within 15 days of accepting a class complaint, the agency shall use reasonable means, such as delivery, mailing to last known address or distribution, to notify all class members of the acceptance of the class complaint.

(2) Such notice shall contain:

(i) The name of the agency or organizational segment, its location, and the date of acceptance of the complaint;

(ii) A description of the issues accepted as part of the class complaint;

(iii) An explanation of the binding nature of the final decision or resolution of the complaint on class members; and

(iv) The name, address and telephone number of the class representative.

(f) *Obtaining evidence concerning the complaint.* (1) The administrative judge notify the agent and the agency representative of the time period that will be allowed both parties to prepare their cases. This time period will include at least 60 days and may be extended by the administrative judge upon request of either party. Both parties are entitled to reasonable development of evidence on matters relevant

to the issues raised in the complaint. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(2) If mutual cooperation fails, either party may request the administrative judge to rule on a request to develop evidence. If a party fails without good cause shown to respond fully and in timely fashion to a request made or approved by the administrative judge for documents, records, comparative data, statistics or affidavits, and the information is solely in the control of one party, such failure may, in appropriate circumstances, caused the administrative judge:

(i) To draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;

(ii) To consider the matters to which the requested information pertains to be established in favor of the opposing party;

(iii) To exclude other evidence offered by the party failing to produce the requested information;

(iv) To recommend that a decision be entered in favor of the opposing party; or

(v) To take such other actions as the administrative judge deems appropriate.

(3) During the period for development of evidence, the administrative judge may, in his or her discretion, direct that an investigation of facts relevant to the complaint or any portion be conducted by an agency certified by the Commission.

(4) Both parties shall furnish to the administrative judge copies of all materials that they wish to be examined and such other material as may be requested.

(g) *Opportunity for resolution of the complaint.* (1) The administrative judge shall furnish the agent and the representative of the agency a copy of all materials obtained concerning the complaint and provide opportunity for

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the agent to discuss materials with the agency representative and attempt resolution of the complaint.

(2) The complaint may be resolved by agreement of the agency and the agent at any time as long as the agreement is fair and reasonable.

(3) If the complaint is resolved, the terms of the resolution shall be reduced to writing and signed by the agent and the agency.

(4) Notice of the resolution shall be given to all class members in the same manner as notification of the acceptance of the class complaint and shall state the relief, if any, to be granted by the agency. A resolution shall bind all members of the class. Within 30 days of the date of the notice of resolution, any member of the class may petition the EEO Director to vacate the resolution because it benefits only the class agent or is otherwise not fair and reasonable. Such a petition will be processed in accordance with § 1614.204(d) and if the administrative judge finds that the resolution is not fair and reasonable, he or she shall recommend that the resolution be vacated and that the original class agent be replaced by the petitioner or some other class member who is eligible to be the class agent during further processing of the class complaint. An agency's decision that the resolution is not fair and reasonable vacates any agreement between the former class agent and the agency. An agency decision on such a petition shall inform the former class agent or the petitioner of the right to appeal the decision to the Office of Federal Operations and include EEOC Form 573, Notice of Appeal/Petition.

(h) *Hearing.* On expiration of the period allowed for preparation of the case, the administrative judge shall set a date for hearing. The hearing shall be conducted in accordance with 29 CFR 1614.109 (a) through (f).

(i) *Report of findings and recommendations.* (1) The administrative judge shall transmit to the agency a report of findings and recommendations on the complaint, including a recommended decision, systemic relief for the class and any individual relief, where appropriate, with regard to the

personnel action or matter that gave rise to the complaint.

(2) If the administrative judge finds no class relief appropriate, he or she shall determine if a finding of individual discrimination is warranted and, if so, shall recommend appropriate relief.

(3) The administrative judge shall notify the agency of the date on which the report of findings and recommendations was forwarded to the agency.

(j) *Agency decision.* (1) Within 60 days of receipt of the report of findings and recommendations issued under § 1614.204(i), the agency shall issue a final decision, which shall accept, reject, or modify the findings and recommendations of the administrative judge.

(2) The final decision of the agency shall be in writing and shall be transmitted to the agent by certified mail, return receipt requested, along with a copy of the report of findings and recommendations of the administrative judge.

(3) When the agency's final decision is to reject or modify the findings and recommendations of the administrative judge, the decision shall contain specific reasons for the agency's action.

(4) If the agency has not issued a final decision with 60 days of its receipt of the administrative judge's report of findings and recommendations, those findings and recommendations shall become the final decision. The agency shall transmit the final decision to the agent within five days of the expiration of the 60-day period.

(5) The final decision of the agency shall require any relief authorized by law and determined to be necessary or desirable to resolve the issue of discrimination.

(6) A final decision on a class complaint shall, subject to subpart D of this part, be binding on all members of the class and the agency.

(7) The final decision shall inform the agency of the right to appeal or to file a civil action in accordance with subpart D of this part and of the applicable time limits.

(k) *Notification of decision.* The agency shall notify class members of the final decision and relief awarded.

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if any, through the same media employed to give notice of the existence of the class complaint. The notice, where appropriate, shall include information concerning the rights of class members to seek individual relief, and of the procedures to be followed. Notice shall be given by the agency within 10 days of the transmittal of its final decision to the agent.

(1) *Relief for individual class members.* (1) When discrimination is found, an agency must eliminate or modify the employment policy or practice out of which the complaint arose and provide individual relief, including an award of attorney's fees and costs, to the agent in accordance with § 1614.501.

(2) When class-wide discrimination is not found, but it is found that the class agent is a victim of discrimination, § 1614.501 shall apply. The agent shall also, within 60 days of the issuance of the final decision finding no class-wide discrimination, issue the acknowledgement of receipt of an individual complaint as required by § 1614.108(d) and process in accordance with the provisions of subpart A of this part, each individual complaint that was subsumed into the class complaint.

(3) When discrimination is found in the final decision and a class member believes that he or she is entitled to individual relief, the class member may file a written claim with the head of the agency or its EEO Director within 30 days of receipt of notification by the agency of its final decision. The claim must include a specific, detailed showing that the claimant is a class member who was affected by a personnel action or matter resulting from the discriminatory policy or practice, and that this discriminatory action took place within the period of time for which the agency found class-wide discrimination in its final decision. The period of time for which the agency finds class-wide discrimination shall begin not more than 45 days prior to the agent's initial contact with the Counselor and shall end not later than the date when the agency eliminated the policy or practice found to be discriminatory in the final agency decision. The agency shall issue a final

decision on each such claim within 90 days of filing. Such decision must include a notice of the right to file an appeal or a civil action in accordance with subpart D of this part and the applicable time limits.

Subpart C—Related Processes

§ 1614.301 Relationship to negotiated grievance procedure.

(a) When a person is employed by an agency subject to 5 U.S.C. 7121(d) and is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both. An election to proceed under this part is indicated only by the filing of a written complaint; use of the pre-complaint process as described in § 1614.105 does not constitute an election for purposes of this section. An aggrieved employee who files a complaint under this part may not thereafter file a grievance on the same matter. An election to proceed under a negotiated grievance procedure is indicated by the filing of a timely written grievance. An aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same matter under this part 1614 irrespective of whether the agency has informed the individual of the need to elect or of whether the grievance has raised an issue of discrimination. Any such complaint filed after a grievance has been filed on the same matter shall be dismissed without prejudice to the complainant's right to proceed through the negotiated grievance procedure including the right to appeal to the Commission from a final decision as provided in subpart D of this part. The dismissal of such a complaint shall advise the complainant of the obligation to raise discrimination in the grievance process and of the right to

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appeal the final grievance decision to the Commission.

(b) When a person is not covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part.

(c) When a person is employed by an agency not subject to 5 U.S.C 7121(d) and is covered by a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part, except that the time limits for processing the complaint contained in § 1614.106 and for appeal to the Commission contained in § 1614.402 may be held in abeyance during processing of a grievance covering the same matter as the complaint if the agency notifies the complainant in writing that the complaint will be held in abeyance pursuant to this section.

§ 1614.302 Mixed case complaints.

(a) *Definitions*—(1) *Mixed case complaint*. A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

(2) *Mixed case appeals*. A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age.

(b) *Election*. An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either

a mixed case complaint with the agency or to file a mixed case appeal with the MSPB. The person shall be advised that he or she may not initially file both a mixed case complaint and an appeal on the same matter and that whichever is filed first shall be considered an election to proceed in that forum. If a person files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of this notice and to file an EEO complaint, subject to § 1614.107. The date on which the person filed his or her appeal with MSPB shall be deemed to be the date of initial contact with the counselor. If a person files a timely appeal with MSPB from the agency's processing of a mixed case complaint and the MSPB dismisses it for jurisdictional reasons, the agency shall reissue a notice under § 1614.108(f) giving the individual the right to elect between a hearing before an administrative judge and an immediate final decision.

(c) *Dismissal*. (1) An agency may dismiss a mixed case complaint for the reasons contained in, and under the conditions prescribed in, § 1614.107.

(2) An agency decision to dismiss a mixed case complaint on the basis of the complainant's prior election of the MSPB procedures shall be made as follows:

(i) Where neither the agency nor the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, it shall dismiss the mixed case complaint pursuant to § 1614.107(d) and shall advise the complainant that he or she must bring the allegations of discrimination contained in the rejected complaint to the attention of the MSPB, pursuant to 5 CFR 1201.155. The dismissal of such a complaint shall advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. A dismissal of a mixed case complaint is not appealable to the Commission except where it is alleged that § 1614.107(d) has been applied to a non-mixed case matter.

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(ii) Where the agency or the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, the agency shall hold the mixed case complaint in abeyance until the MSPB's administrative judge rules on the jurisdictional issue, notify the complainant that it is doing so, and instruct him or her to bring the allegation of discrimination to the attention of the MSPB. During this period of time, all time limitations for processing or filing under this part will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC. If the MSPB's administrative judge finds that MSPB has jurisdiction over the matter, the agency shall dismiss the mixed case complaint pursuant to § 1614.107(d), and advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. If the MSPB's administrative judge finds that MSPB does not have jurisdiction over the matter, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint.

(d) *Procedures for agency processing of mixed case complaints.* When a complainant elects to proceed initially under this part rather than with the MSPB, the procedures set forth in subpart A shall govern the processing of the mixed case complaint with the following exceptions:

(1) At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:

(i) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 CFR 1201.154(a) or may file a civil action as specified at § 1614.310(g), but not both; and

(ii) If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the EEOC (not EEOC) within 20 days of the agency's final decision;

(2) Upon completion of the investigation, the notice provided the complainant in accordance with

§ 1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing; and

(3) At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 20 days of receipt and of the right to file a civil action as provided at § 1614.310(a).

§ 1614.303 Petitions to the EEOC from MSPB decisions on mixed case appeals and complaints.

(a) *Who may file.* Individuals who have received a final decision from the MSPB on a mixed case appeal or on the appeal of a final decision on a mixed case complaint under 5 CFR part 1201, subpart E and 5 U.S.C. 7702 may petition EEOC to consider that decision. The EEOC will not accept appeals from MSPB dismissals without prejudice.

(b) *Method of filing.* Filing shall be made by certified mail, return receipt requested, to the Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, DC 20036.

(c) *Time to file.* A petition must be filed with the Commission either within 30 days of receipt of the final decision of the MSPB or within 30 days of when the decision of a MSPB field office becomes final.

(d) *Service.* The petition for review must be served upon all individuals and parties on the MSPB's service list by certified mail on or before the filing with the Commission, and the Clerk of the MSPB, 1120 Vermont Ave., NW., Washington, DC 20419, and the petitioner must certify as to the date and method of service.

§ 1614.304 Contents of petition.

(a) *Form.* Petitions must be written or typed, but may use any format including a simple letter format. Petitioners are encouraged to use EEOC Form 573, Notice Of Appeal/Petition.

(b) *Contents.* Petitions must contain the following:

(1) The name and address of the petitioner;

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(2) The name and address of the petitioner's representative, if any;

(3) A statement of the reasons why the decision of the MSPB is alleged to be incorrect, in whole or in part, only with regard to issues of discrimination based on race, color, religion, sex, national origin, age or handicap;

(4) A copy of the decision issued by the MSPB; and

(5) The signature of the petitioner or representative, if any.

§ 1614.305 Consideration procedures.

(a) Once a petition is filed, the Commission will examine it and determine whether the Commission will consider the decision of the MSPB. An agency may oppose the petition, either on the basis that the Commission should not consider the MSPB's decision or that the Commission should concur in the MSPB's decision, by filing any such argument with the Office of Federal Operations and serving a copy on the petitioner within 15 days of receipt by the Commission.

(b) The Commission shall determine whether to consider the decision of the MSPB within 30 days of receipt of the petition by the Commission's Office of Federal Operations. A determination of the Commission not to consider the decision shall not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(c) If the Commission makes a determination to consider the decision, the Commission shall within 60 days of the date of its determination, consider the entire record of the proceedings of the MSPB and on the basis of the evidentiary record before the Board as supplemented in accordance with paragraph (d) of this section, either:

(1) Concur in the decision of the MSPB; or

(2) Issue in writing a decision that differs from the decision of the MSPB to the extent that the Commission finds that, as a matter of law:

(i) The decision of the MSPB constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in 5 U.S.C. 7702(a)(1)(B); or

(ii) The decision involving such provision is not supported by the evidence in the record as a whole.

(d) In considering any decision of the MSPB, the Commission, pursuant to 5 U.S.C. 7702(b)(4), may refer the case to the MSPB for the taking of additional evidence within such period as permits the Commission to make a decision within the 60-day period prescribed or provide on its own for the taking of additional evidence to the extent the Commission considers it necessary to supplement the record.

(e) Where the EEOC has differed with the decision of the MSPB under § 1614.305(c)(2), the Commission shall refer the matter to the MSPB.

§ 1614.306 Referral of case to Special Panel.

If the MSPB reaffirms its decision under 5 CFR 1201.162(a)(2) with or without modification, the matter shall be immediately certified to the Special Panel established pursuant to 5 U.S.C. 7702(d). Upon certification, the Board shall, within five days (excluding Saturdays, Sundays, and Federal holidays), transmit to the Chairman of the Special Panel and to the Chairman of the EEOC the administrative record in the proceeding including—

(a) The factual record compiled under this section, which shall include a transcript of any hearing(s);

(b) The decisions issued by the Board and the Commission under 5 U.S.C. 7702; and

(c) A transcript of oral arguments made, or legal brief(s) filed, before the Board and the Commission.

§ 1614.307 Organization of Special Panel.

(a) The Special Panel is composed of:

(1) A Chairman appointed by the President with the advice and consent of the Senate, and whose term is 6 years;

(2) One member of the MSPB designated by the Chairman of the Board each time a panel is convened; and

(3) One member of the EEOC designated by the Chairman of the Commission each time a panel is convened.

(b) *Designation of Special Panel member—(1) Time of designation.*

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Within five days of certification of the case to the Special Panel, the Chairman of the MSPB and the Chairman of the EEOC shall each designate one member from their respective agencies to serve on the Special Panel.

(2) *Manner of designation.* Letters of designation shall be served on the Chairman of the Special Panel and the parties to the appeal.

§ 1614.308 Practices and procedures of the Special Panel.

(a) *Scope.* The rules in this subpart apply to proceedings before the Special Panel.

(b) *Suspension of rules in this subpart.* In the interest of expediting a decision, or for good cause shown, the Chairman of the Special Panel may, except where the rule in this subpart is required by statute, suspend the rules in this subpart on application of a party or on his or her own motion, and may order proceedings in accordance with his or her direction.

(c) *Time limit for proceedings.* Pursuant to 5 U.S.C. 7702(d)(2)(A), the Special Panel shall issue a decision within 45 days of the matter being certified to it.

(d) *Administrative assistance to Special Panel.* (1) The MSPB and the EEOC shall provide the Panel with such reasonable and necessary administrative resources as determined by the Chairman of the Special Panel.

(2) Assistance shall include, but is not limited to, processing vouchers for pay and travel expenses.

(3) The Board and the EEOC shall be responsible for all administrative costs incurred by the Special Panel and, to the extent practicable, shall equally divide the costs of providing such administrative assistance. The Chairman of the Special Panel shall resolve the manner in which costs are divided in the event of a disagreement between the Board and the EEOC.

(e) *Maintenance of the official record.* The Board shall maintain the official record. The Board shall transmit two copies of each submission filed to each member of the Special Panel in an expeditious manner.

(f) *Filing and service of pleadings.* The parties shall file the original and two copies of all submissions with

the Clerk, Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419. One copy of each submission shall be served on the other parties.

(2) A certificate of service specifying how and when service was made must accompany all submissions of the parties.

(3) Service may be by mail or by personal delivery during normal business hours (8:15 a.m.-4:45 p.m.). Due to the short statutory time limit, parties are required to file their submissions by overnight delivery service should they file by mail.

(4) The date of filing shall be determined by the date of mailing as indicated by the order date for the overnight delivery service. If the filing is by personal delivery, it shall be considered filed on that date it is received in the office of the Clerk, MSPB.

(g) *Briefs and responsive pleadings.* If the parties wish to submit written argument, briefs shall be filed with the Special Panel within 15 days of the date of the Board's certification order. Due to the short statutory time limit responsive pleadings will not ordinarily be permitted.

(h) *Oral argument.* The parties have the right to oral argument if desired. Parties wishing to exercise this right shall so indicate at the time of filing their brief, or if no brief is filed, within 15 days of the date of the Board's certification order. Upon receipt of a request for argument, the Chairman of the Special Panel shall determine the time and place for argument and the time to be allowed each side, and shall so notify the parties.

(i) *Post-argument submissions.* Due to the short statutory time limit, no post-argument submissions will be permitted except by order of the Chairman of the Special Panel.

(j) *Procedural matters.* Any procedural matters not addressed in this subpart shall be resolved by written order of the Chairman of the Special Panel.

§ 1614.309 Enforcement of Special Panel decision.

The Board shall, upon receipt of the decision of the Special Panel, order

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the agency concerned to take any action appropriate to carry out the decision of the Panel. The Board's regulations regarding enforcement of a final order of the Board shall apply. These regulations are set out at 5 CFR part 1201, subpart E.

§ 1614.310 Right to file a civil action.

An individual who has a complaint processed pursuant to 5 CFR part 1201, subpart E or this subpart is authorized by 5 U.S.C. 7702 to file a civil action in an appropriate United States District Court:

(a) Within 30 days of receipt of a final decision issued by an agency on a complaint unless an appeal is filed with the MSPB; or

(b) Within 30 days of receipt of notice of the final decision or action taken by the MSPB if the individual does not file a petition for consideration with the EEOC; or

(c) Within 30 days of receipt of notice that the Commission has determined not to consider the decision of the MSPB; or

(d) Within 30 days of receipt of notice that the Commission concurs with the decision of the MSPB; or

(e) If the Commission issues a decision different from the decision of the MSPB, within 30 days of receipt of notice that the MSPB concurs in and adopts in whole the decision of the Commission; or

(f) If the MSPB does not concur with the decision of the Commission and reaffirms its initial decision or reaffirms its initial decision with a revision, within 30 days of the receipt of notice of the decision of the Special Panel; or

(g) After 120 days from the date of filing a formal complaint if there is no final action or appeal to the MSPB; or

(h) After 120 days from the date of filing an appeal with the MSPB if the MSPB has not yet made a decision; or

(i) After 180 days from the date of filing a petition for consideration with Commission if there is no decision by the Commission, reconsideration decision by the MSPB or decision by the Special Panel.

29 CFR Ch. XIV (7-1-92 Edition)**Subpart D—Appeals and Civil Actions****§ 1614.401 Appeals to the Commission.**

(a) A complainant may appeal an agency's final decision, or the agency's dismissal of all or a portion of a complaint.

(b) An agent may appeal the agency decision accepting or dismissing all or a portion of a class complaint, or a final decision on a class complaint; a class member may appeal a final decision on a claim for individual relief under a class complaint; and both may appeal a final decision on a petition pursuant to § 1614.204(g)(4).

(c) A grievant may appeal the final decision of the agency, the arbitrator or the Federal Labor Relations Authority (FLRA) on the grievance when an issue of employment discrimination was raised in a negotiated grievance procedure that permits such issues to be raised. A grievant may not appeal under this part, however, when the matter initially raised in the negotiated grievance procedure is still ongoing in that process, is in arbitration, is before the FLRA, is appealable to the MSPB or if 5 U.S.C. 7121(d) is inapplicable to the involved agency.

(d) A complainant, agent or individual class claimant may appeal to the Commission an agency's alleged non-compliance with a settlement agreement or final decision in accordance with § 1614.504.

§ 1614.402 Time for appeals to the Commission.

(a) Except for mixed case complaints, any dismissal of a complaint or a portion of a complaint or any final decision may be appealed to the Commission within 30 days of the complainant's receipt of the dismissal or final decision. Any grievance decision may be appealed within 30 days of receipt of a decision referred to in § 1614.401(c). In the case of class complaints, any final decision received by an agent, petitioner or an individual claimant may be appealed to the Commission within 30 days of its receipt. Where a complainant has notified the EEO Director of alleged noncompliance with a settlement agreement in

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accordance with § 1614.504, the complainant may file an appeal 35 days after service of the allegations of non-compliance, but must file an appeal within 30 days of receipt of an agency's determination.

(b) If the complainant is represented by an attorney of record, then the 30-day time period provided in paragraph (a) of this section within which to appeal shall be calculated from the receipt of the required document by the attorney. In all other instances, the time within which to appeal shall be calculated from the receipt of the required document by the complainant.

§ 1614.403 How to appeal.

(a) The complainant, agent, grievant or individual class claimant (hereinafter complainant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at P.O. Box 19848, Washington, DC 20036, or by personal delivery or facsimile. The complainant should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what he or she is appealing.

(b) The complainant shall furnish a copy of the appeal to the agency's EEO Director (or whomever is designated by the agency in the dismissal or decision) at the same time that he or she files the appeal with the Commission. In or attached to the appeal to the Commission, the complainant must certify the date and method by which service was made on the agency.

(c) If a complainant does not file an appeal within the time limits of this subpart, the appeal will be untimely and shall be dismissed by the Commission.

(d) Any statement or brief in support of the appeal must be submitted to the Director, Office of Federal Operations, and to the agency within 30 days of filing the appeal. Following receipt of the appeal and any brief in support of the appeal, the Director, Office of Federal Operations, will request the complaint file from the agency. The agency must submit the complaint file and any agency statement or brief in opposition to the appeal to the Director, Office of Federal Operations, within 30 days of re-

ceipt of the Commission's request for the complaint file, which has been made by certified mail. A copy of the agency's statement or brief must be served on the complainant at the same time.

§ 1614.404 Appellate procedure.

(a) On behalf of the Commission, the Office of Federal Operations shall review the complaint file and all written statements and briefs from either party. The Commission may supplement the record by an exchange of letters or memoranda, investigation, remand to the agency or other procedures.

(b) If the Office of Federal Operations requests information from one or both of the parties to supplement the record, each party providing information shall send a copy of the information to the other party.

§ 1614.405 Decisions on appeals.

(a) The Office of Federal Operations, on behalf of the Commission, shall issue a written decision setting forth its reasons for the decision. The Commission shall dismiss appeals in accordance with §§ 1614.107, 1614.403(c) and 1614.410. The decision shall be based on the preponderance of the evidence. If the decision contains a finding of discrimination, appropriate remedy(ies) shall be included and, where appropriate, the entitlement to interest, attorney's fees or costs shall be indicated. The decision shall reflect the date of its issuance, inform the complainant of his or her or her civil action rights, and be transmitted to the complainant and the agency by certified mail, return receipt requested.

(b) A decision issued under paragraph (a) of this section is final within the meaning of § 1614.408 unless:

(1) Either party files a timely request for reconsideration pursuant to § 1614.407; or

(2) The Commission on its own motion reconsiders the case.

§ 1614.407**§ 1614.406 Time limits. [Reserved]****§ 1614.407 Reconsideration.**

(a) Within a reasonable period of time, the Commission may, in its discretion, reconsider any decision of the Commission issued under § 1614.405(a) notwithstanding any other provisions of this part.

(b) A party may request reconsideration of any decision issued under § 1614.405(a) provided that such request is made within 30 days of receipt of a decision of the Commission or within 20 days of receipt of another party's timely request for reconsideration. Such request, along with any supporting statement or brief, shall be submitted to the Office of Review and Appeals and to all parties with proof of such submission. All other parties shall have 20 days from the date of service in which to submit all other parties, with proof of submission, any statement or brief in opposition to the request.

(c) The request or the statement or brief in support of the request shall contain arguments or evidence which tend to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued; or

(2) The previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy; or

(3) The decision is of such exceptional nature as to have substantial precedential implications.

(d) A decision on a request for reconsideration by either party is final and there is no further right by either party to request reconsideration of the decision for which reconsideration was sought.

§ 1614.408 Civil action: Title VII, Age Discrimination in Employment Act and Rehabilitation Act.

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under title VII, the ADEA and the Rehabilitation Act to file a

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civil action in an appropriate United States District Court:

(a) Within 90 days of receipt of the final decision on an individual or class complaint if no appeal has been filed;

(b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and a final decision has not been issued;

(c) Within 90 days of receipt of the Commission's final decision on an appeal; or

(d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

§ 1614.409 Civil action: Equal Pay Act.

A complainant is authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. 216(b)) to file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, three years of the date of the alleged violation of the Equal Pay Act regardless of whether he or she pursued any administrative complaint processing. Recovery of back wages is limited to two years prior to the date of filing suit, or to three years if the violation is deemed willful; liquidated damages in an equal amount may also be awarded. The filing of a complaint or appeal under this part shall not toll the time for filing a civil action.

§ 1614.410 Effect of filing a civil action.

Filing a civil action under § 1614.408 or § 1614.409 shall terminate Commission processing of the appeal. If private suit is filed subsequent to the filing of an appeal, the parties are requested to notify the Commission in writing.

Subpart E—Remedies and Enforcement**§ 1614.501 Remedies and relief.**

(a) When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief, as explained in appendix A of part 1613 of this chapter, which shall

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include the following elements in appropriate circumstances:

(1) Notification to all employees of the agency in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur;

(2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur;

(3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;

(4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and

Commitment that the agency cease from engaging in the specific unlawful employment practice found in the case.

(b) *Relief for an applicant.* (1) (i) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant the position that the applicant would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position unless clear and convincing evidence indicates that the applicant would not have been selected even absent the discrimination. The offer shall be made in writing. The individual shall have 15 days from receipt of the offer within which to accept or decline the offer. Failure to accept the offer within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his or her control prevented a response within the time limit.

(ii) If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired. Back pay, computed in the manner prescribed by 5 CFR 550.805, shall be awarded from the date the individual would have entered on duty until the date the individual actually enters on

duty unless clear and convincing evidence indicates that the applicant would not have been selected even absent discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The individual shall be deemed to have performed service for the agency during this period for all purposes except for meeting service requirements for completion of a required probationary or trial period.

(iii) If the offer of employment is declined, the agency shall award the individual a sum equal to the back pay he or she would have received, computed in the manner prescribed by 5 CFR 550.805, from the date he or she would have been appointed until the date the offer was declined, subject to the limitation of paragraph (b)(3) of this section. Interest on back pay shall be included in the back pay computation. The agency shall inform the applicant, in its offer of employment, of the right to this award in the event the offer is declined.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but also finds by clear and convincing evidence that the applicant would not have been hired even absent discrimination, the agency shall nevertheless take all steps necessary to eliminate the discriminatory practice and ensure it does not recur.

(3) Back pay under this paragraph (b) for complaints under title VII or the Rehabilitation Act may not extend from a date earlier than two years prior to the date on which the complaint was initially filed by the applicant.

(c) *Relief for an employee.* When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall provide relief, which shall include, but need not be limited to, one or more of the following actions:

(1) Nondiscriminatory placement, with back pay computed in the manner prescribed by 5 CFR 550.805, unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimina-

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tion. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The back pay liability under title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

(2) If clear and convincing evidence indicates that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the agency shall nevertheless eliminate any discriminatory practice and ensure it does not recur.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any adverse materials relating to the discriminatory employment practice.

(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

(d) The agency has the burden of proving by a preponderance of the evidence that the complainant has failed to mitigate his or her damages.

(e) *Attorney's fees or costs*—(1) *Awards of attorney's fees or costs.* The provisions of this paragraph relating to the award of attorney's fees or costs shall apply to allegations of discrimination prohibited by title VII and the Rehabilitation Act. In a notice of final action or a decision, the agency or Commission may award the applicant or employee reasonable attorney's fees or costs (including expert witness fees) incurred in the processing of the complaint.

(i) A finding of discrimination raises a presumption of entitlement to an award of attorney's fees.

(ii) Any award of attorney's fees or costs shall be paid by the agency.

(iii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government.

(iv) Attorney's fees shall be paid only for services performed after the filing of a written complaint and after

the complainant has notified the agency that he or she is represented by an attorney, except that fees allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. Written submissions to the agency that are signed by the representative shall be deemed to constitute notice of representation.

(2) *Amount of awards.* (i) When the agency or the Commission awards attorney's fees or costs, the complainant's attorney shall submit a verified statement of costs and attorney's fees (including expert witness fees), as appropriate, to the agency within 30 days of receipt of the decision unless a request for reconsideration is filed. A statement of attorney's fees shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services and both the verified statement and the accompanying affidavit shall be made a part of the complaint file. The amount of attorney's fees or costs to be awarded the complainant shall be determined by agreement between the complainant, the complainant's representative and the agency. Such agreement shall immediately be reduced to writing.

(ii) (A) If the complainant, the representative and the agency cannot reach an agreement on the amount of attorney's fees or costs within 20 days of the agency's receipt of the verified statement and accompanying affidavit, the agency shall issue a decision determining the amount of attorney's fees or costs due within 30 days of receipt of the statement and affidavit. The decision shall include a notice of right to appeal to the EEOC along with EEOC Form 573, Notice of Appeal/Petition and shall include the specific reasons for determining the amount of the award.

(B) The amount of attorney's fees shall be calculated in accordance with existing case law using the following standards: The starting point shall be the number of hours reasonably expended multiplied by a reasonable hourly rate. This amount may be reduced or increased in consideration of the following factors, although ordi-

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narly many of these factors are subsumed within the calculation set forth in this paragraph (e)(2)(i)(B): The time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the attorney's preclusion from other employment due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation, and ability of the attorney, the undesirability of the case, the nature and length of the professional relationship with the client, and the awards in similar cases. Only in cases of exceptional success should any of these factors be used to enhance an award computed by the formula set forth in this paragraph (e)(2)(i)(B).

The costs that may be awarded are authorized by 28 U.S.C. 1920 to include: Fees of the reporter for all or any of the stenographic transcript necessarily obtained for use in the case; fees and disbursements for printing and witnesses; and fees for exemplification and copies necessarily obtained for use in the case.

(iii) Witness fees shall be awarded in accordance with the provisions of 28 U.S.C. 1821, except that no award shall be made for a federal employee who is in a duty status when made available as a witness.

§ 1614.502 Compliance with final Commission decisions.

(a) Relief ordered in a final decision on appeal to the Commission is mandatory and binding on the agency except as provided in § 1614.405(b). Failure to implement ordered relief shall be subject to judicial enforcement as specified in § 1614.503(g).

(b) Notwithstanding paragraph (a) of this section, when the agency requests reconsideration, when the case involves removal, separation, or suspension continuing beyond the date of the request for reconsideration, and when the decision recommends retroactive restoration, the agency shall comply with the decision only to the extent of the temporary or conditional restoration of the employee to duty

status in the position recommended by the Commission, pending the outcome of the agency request for reconsideration.

(1) Service under the temporary or conditional restoration provisions of this paragraph (b) shall be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, if the Commission upholds its decision after reconsideration.

(2) The agency shall notify the Commission and the employee in writing, at the same time it requests reconsideration, that the relief it provides is temporary or conditional.

(c) When no request for reconsideration is filed or when a request for reconsideration is denied, the agency shall provide the relief ordered and there is no further right to delay implementation of the ordered relief. The relief shall be provided in full not later than 60 days after receipt of the final decision unless otherwise ordered in the decision.

§ 1614.503 Enforcement of final Commission decisions.

(a) *Petition for enforcement.* A complainant may petition the Commission for enforcement of a decision issued under the Commission's appellate jurisdiction. The petition shall be submitted to the Office of Federal Operations. The petition shall specifically set forth the reasons that lead the complainant to believe that the agency is not complying with the decision.

(b) *Compliance.* On behalf of the Commission, the Office of Federal Operations shall take all necessary action to ascertain whether the agency is implementing the decision of the Commission. If the agency is found not to be in compliance with the decision, efforts shall be undertaken to obtain compliance.

(c) *Clarification.* On behalf of the Commission, the Office of Federal Operations may, on its own motion or in response to a petition for enforcement or in connection with a timely request for reconsideration, issue a clarifica-

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tion of a prior decision. A clarification cannot change the result of a prior decision or enlarge or diminish the relief ordered but may further explain the meaning or intent of the prior decision.

(d) *Referral to the Commission.* Where the Director, Office of Federal Operations, is unable to obtain satisfactory compliance with the final decision, the Director shall submit appropriate findings and recommendations for enforcement to the Commission, or, as directed by the Commission, refer the matter to another appropriate agency.

(e) *Commission notice to show cause.* The Commission may issue a notice to the head of any federal agency that has failed to comply with a decision to show cause why there is noncompliance. Such notice may request the head of the agency or a representative to appear before the Commission or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons for non-compliance.

(f) *Certification to the Office of Special Counsel.* Where appropriate and pursuant to the terms of a memorandum of understanding, the Commission may refer the matter to the Office of Special Counsel for enforcement action.

(g) *Notification to complainant of completion of administrative efforts.* Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit any required report of compliance, the Commission shall notify the complainant of the right to file a civil action for enforcement of the decision pursuant to Title VII, the ADEA, the Equal Pay Act or the Rehabilitation Act and to seek judicial review of the agency's refusal to implement the ordered relief pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the mandamus statute, 28 U.S.C. 1361, or to commence *de novo* proceedings pursuant to the appropriate statutes.

§ 1614.504 Compliance with settlement agreements and final decisions.

(a) Any settlement agreement knowingly and voluntarily agreed to by the

parties, reached at any stage of the complaint process, shall be binding on both parties. A final decision that has not been the subject of an appeal or civil action shall be binding on the agency. If the complainant believes that the agency has failed to comply with the terms of a settlement agreement or final decision, the complainant shall notify the EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

(b) The agency shall resolve the matter and respond to the complainant, in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement or final decision. The complainant may file such an appeal 35 days after he or she has served the agency with the allegations of non-compliance, but must file an appeal within 30 days of his or her receipt of an agency's determination. The complainant must serve a copy of the appeal on the agency and the agency may submit a response to the Commission within 30 days of receiving notice of the appeal.

(c) Prior to rendering its determination, the Commission may request that parties submit whatever additional information or documentation it deems necessary or may direct that an investigation or hearing on the matter be conducted. If the Commission determines that the agency is not in compliance and the noncompliance is not attributable to acts or conduct of the complainant, it may order such compliance or it may order that the complaint be reinstated for further processing from the point processing ceased. Allegations that subsequent acts of discrimination violate a settlement agreement shall be processed as

Equal Employment Opportunity Comm.**§ 1614.602**

separate complaints under § 1614.106 or § 1614.204, as appropriate, rather than under this section.

Subpart F—Matters of General Applicability**§ 1614.601 EEO group statistics.**

(a) Each agency shall establish a system to collect and maintain accurate employment information on the race, national origin, sex and handicap(s) of its employees.

(b) Data on race, national origin and sex shall be collected by voluntary self-identification. If an employee does not voluntarily provide the requested information, the agency shall advise the employee of the importance of the data and of the agency's obligation to report it. If the employee still refuses to provide the information, the agency shall make visual identification and inform the employee of the data it will report. If an agency believes that information provided by an employee is inaccurate, the agency shall advise the employee about the solely statistical purpose for which the data is being collected, the need for accuracy, the agency's recognition of the sensitivity of the information and the existence of procedures to prevent its unauthorized disclosure. If, thereafter, the employee declines to change the apparently inaccurate self-identification, the agency must accept it.

(c) The information collected under paragraph (b) of this section shall be disclosed only in the form of gross statistics. An agency shall not collect or maintain any information on the race, national origin or sex of individual employees except when an automated data processing system is used in accordance with standards and requirements prescribed by the Commission to insure individual privacy and the separation of that information from personnel record.

(d) Each system is subject to the following controls:

(1) Only those categories of race and national origin prescribed by the Commission may be used;

(2) Only the specific procedures for collection and maintenance of data that are prescribed or approved by the Commission may be used;

(3) The Commission shall review the operation of the agency system to insure adherence to Commission procedures and requirements. An agency may make an exception to the prescribed procedures and requirements only with the advance written approval of the Commission.

(e) The agency may use the data only in studies and analyses which contribute affirmatively to achieving the objectives of the equal employment opportunity program. An agency shall not establish a quota for the employment of persons on the basis of race, color, religion, sex, or national origin.

(f) Data on handicaps shall also be collected by voluntary self-identification. If an employee does not voluntarily provide the requested information, the agency shall advise the employee of the importance of the data and of the agency's obligation to report it. If an employee who has been appointed pursuant to special appointment authority for hiring individuals with handicaps still refuses to provide the requested information, the agency must identify the employee's handicap based upon the records supporting the appointment. If any other employee still refuses to provide the requested information or provides information which the agency believes to be inaccurate, the agency should report the employee's handicap status as unknown.

(g) An agency shall report to the Commission on employment by race, national origin, sex and handicap in the form and at such times as the Commission may require.

§ 1614.602 Reports to the Commission.

(a) Each agency shall report to the Commission information concerning pre-complaint counseling and the status, processing and disposition of complaints under this part at such times and in such manner as the Commission prescribes.

(b) Each agency shall advise the Commission whenever it is served with a federal court complaint based upon a complaint that is pending on appeal at the Commission.

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shall be computed from the time of receipt by the attorney. The complainant must serve all official correspondence on the designated representative of the agency.

(e) The Complainant shall at all times be responsible for proceeding with the complaint whether or not he or she has designated a representative.

(f) Witnesses who are federal employees, regardless of their tour of duty and regardless of whether they are employed by the respondent agency or some other federal agency, shall be in a duty status when their presence is authorized or required by Commission or agency officials in connection with a complaint.

§ 1614.606 Joint processing and consolidation of complaints.

Complaints of discrimination filed by two or more complainants consisting of substantially similar allegations of discrimination or relating to the same matter, or two or more complaints of discrimination from the same complainant, may be consolidated by the agency or the Commission for joint processing after appropriate notification to the parties. The date of the first filed complaint controls the applicable timeframes under subpart A of this part.

§ 1614.607 Delegation of authority.

An agency head may delegate authority under this part, to one or more designees.

**PART 1615—ENFORCEMENT OF
NONDISCRIMINATION ON THE
BASIS OF HANDICAP IN PRO-
GRAMS OR ACTIVITIES CONDUCT-
ED BY THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION**

Sec.

- 1615.101 Purpose.
- 1615.102 Application.
- 1615.103 Definitions.
- 1615.104—1615.109 [Reserved]
- 1615.110 Self-evaluation.
- 1615.111 Notice.
- 1615.112—1615.120 [Reserved]

Sec.

- 1615.130 General prohibitions against discrimination.
- 1615.131—1615.139 [Reserved]
- 1615.140 Employment.
- 1615.141—1615.148 [Reserved]
- 1615.149 Program accessibility: Discrimination prohibited.
- 1615.150 Program accessibility: Existing facilities.
- 1615.151 Program accessibility: New construction and alterations.
- 1615.152—1615.159 [Reserved]
- 1615.160 Communications.
- 1615.161—1615.169 [Reserved]
- 1615.170 Compliance procedures.
- 1615.171—1615.999 [Reserved]

AUTHORITY: 29 U.S.C. 794.

SOURCE: 54 FR 22749, May 26, 1989, unless otherwise noted.

§ 1615.101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 1615.102 Application.

This part applies to all programs or activities conducted by the Commission.

§ 1615.103 Definitions.

For purposes of this part, the term—
Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the Commission. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication de-

§ 1615.103

29 CFR Ch. XIV (7-1-92 Edition)

VICES for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices. Auxiliary aids useful for persons with impaired ability to reach or grasp include goose neck telephone headsets, mechanical page turners, and raised or lowered furniture. These examples are not intended to be exclusive either as to the persons who are entitled to such aids or as to the type of aids that may be required. Although auxiliary aids are required explicitly only by § 1615.160(a)(1), they may also be necessary to meet other requirements of this part.

Commission means the Equal Employment Opportunity Commission.

Complete complaint means written statement that contains the complainant's name and address and describes the Commission's actions in sufficient detail to inform the Commission of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Individual with handicaps means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning

disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having such an impairment* means—(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having an impairment.

Qualified individual with handicaps means—

(1) With respect to any Commission program or activity (except employment), an individual with handicaps who, with or without modifications or aids required by this part, meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(2) With respect to employment, an individual with handicaps as defined in 39 CFR 1613.702(f), which is made applicable to this part by § 1615.140.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617), the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955)

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 -

House avoids
- gov. banker's utility?
- takings presumption

- 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. *through compensating landowners*
- They require payment for losses that are speculative. *Neither will require IT to show actual losses - How so? - 5th Am.*
- 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. *- limitless compensation*

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.

What is the portion of land in question? (the 1000 acre parcel or the 1 acre?)

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.

Examples of actual losses

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.

What steps?

When is ADR appropriate?

June 13, 1995

MEMORANDUM

TO: Marvin Krislov

FROM: Ursula Doyle

RE: EPW "takings meeting"--6/21/95

DATE: 6/21/95

MEETING COVERAGE

I. Hearing #1--June 27, 1995

A. Joe Schmidt, Assistant Attorney General, will give his Judiciary Committee testimony redux. Schmidt will underscore that the House bill:

- 1) is a fundamental departure from the constitution and related case law;
- 2) will increase the bureaucracy; and
- 3) bust the budget.

B. Hatch will testify (and possibly Dole and Biden).

C. This hearing should deal with the takings issue overall and not just the House bill (not just the wetlands issue and the ESA).

II. Hearing #2--July 12, 1995

A. Budget Issues

B. Specific Federal Programs

- 1) EPA
- 2) "Water Rights" Bureau
- 3) CORE

C. Property Rights Questions--Profs. Lazarus and Epstein

III. Hearing #3--July 17-18, 1995

A. Panel #1--Conceptual; Legalistic; Detailed Views of the Administration--Lois Schiffer

B. Panel #2--Pros and Cons of Bills; Emotional Stories

GENERAL REMARKS

House bill:

--will create a new generation of "takings" cases.

--will lead to "speculation." Ex: Someone buys property and develops a wild investment scheme. The agency to whom the landowner applies for a permit denies the application. The landowner files a "takings" suit. Both the House and the Dole bills would require that the landowner show only a diminution in property value.

Dole bill:

--makes the threshold (percentage of taking) irrelevant. Any kind of property limitation becomes compensable.

--makes permit conditions "takings".

--allows for an increase in compensation.

--redefines "property" to include business profits.

Ex: Any mandated toxic controls under the 1990 CAA will fall within possible claims.

Ex: If landowner applies for a permit for an incinerator and the permit is denied, resulting in land value depreciation, then the landowner has a takings claim (because the permit denial limits the landowner's range of options).

BIG QUESTIONS

Where do these bills actually lead? If they have federal implications, then why not state and local? In other words, where does this end? 95% of land use planning is at the state and local level.

How will this legislation affect zoning (Consider the Washington state statutory example.)?

What is the relationship between compensable takings and unfunded mandates?

POLICY

Administration's goal is to balance the interests of all property owners, not just the landowner at issue.

CURRENT TASKS

1. Determine how legislation affects other federal programs.
2. Draft supplemental information to link bills with relevant regulations.
3. Lay out in bullet-form the Administration's history on property rights.
4. Determine costs to the treasury.
5. Determine benefits to other landowners.
6. Explore "access issues"--attorney's fees; ADR; costs of claims

DATE: June 28, 1995
MEMORANDUM TO: Members of the Takings Team
FROM: Greg Corbett, Assistant to Tom Jenson
RE: Prepared Testimony from the *Takings* Hearings

Enclosed you will find the witness roster and prepared testimony from the Takings Hearings at the Senate Committee on Environment and Public Works of Tuesday, June 27, 1995. I encourage you to read the testimony.

SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

Oversight hearing on proposals to supplement
the legal framework for private property interests,
with primary emphasis on the operation
of Federal environmental laws

Tuesday, June 27, 1995

9:30 a.m.

406 Dirksen Senate Office Building

Witness List

Panel I

The Honorable John R. Schmidt
Associate Attorney General
Department of Justice

Panel II

Joseph L. Sax
Counselor to the Secretary of the Interior
Department of the Interior

Roger J. Marzulla, Esq.
Partner
Akin, Gump, Strauss, Hauer & Feld, L.L.P.

Frank I. Michelman
Robert Walmsley University Professor
Harvard Law School

Roger Pilon
Director of Constitutional Studies
CATO Institute

Panel III

Jim Little
Chairman, Private Lands and Environmental Management Committee
National Cattlemen's Association

Don Martin
Vice President/Secretary
National Homebuilders Association

The Honorable Richard Russman
New Hampshire State Senator
National Conference of State Legislatures

Edward M. Thompson, Jr.
Director of Public Policy
American Farmland Trust



Department of Justice

STATEMENT

OF

JOHN R. SCHMIDT

ASSOCIATE ATTORNEY GENERAL

CRIMINAL DIVISION

BEFORE

THE

COMMITTEE ON THE ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

CONCERNING

TAKINGS LEGISLATION

PRESENTED ON

JUNE 27, 1995

I. INTRODUCTION

Mr. Chairman and Members of the Committee: Thank you for the opportunity to provide the Administration's views regarding so-called "takings" bills, particularly those bills that would replace the constitutional standard for compensation with what is, in our view, a radical and dangerous statutory compensation mandate. Although my testimony today will address compensation bills generally, to illustrate specific points I will occasionally refer to two pending compensation bills that have been at the focal point of the debate: (1) the "Private Property Protection Act of 1995," passed by the House of Representatives as H.R. 925, re-passed as part of a comprehensive regulatory reform bill, H.R. 9, and then referred to this Committee for consideration; and (2) S. 605, the "Omnibus Property Rights Act of 1995," which is being considered by the Senate Judiciary Committee.

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 constitutional 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 Administration.

To the extent government regulations impose 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 briefly describe some of these reforms later in this testimony. Other Administration witnesses will discuss these reforms in greater detail in subsequent testimony before this Committee.

Mr. Chairman, no one could disagree with the concerns that underlie S. 605, H.R. 925, and other compensation bills. All citizens should be protected from unreasonable regulatory restrictions on their property. But these bills would do little or nothing to protect property owners or to ensure a fairer and more effective regulatory system. Rather, we are convinced that compensation bills are a direct threat to the vast majority of American citizens.

The truth is that these bills 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

radical compensation schemes into law would 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. We would be forced to consider this option because the cost of these protections and programs after passage of this radical compensation legislation would be vastly increased. Ironically, if we choose 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 our neighborhoods, pay restaurants and other public facilities to comply with the civil rights laws, and so on. In other words, American citizens would be forced to pay property owners to follow the law. In the process, we would virtually eliminate 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 under programs that mandate 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, H.R. 925, and similar bills. The Attorney General would strongly recommend that the President veto such legislation.

Although compensation bills vary in their particulars, I would like to make four general points today relevant to all these bills: (1) they are a radical departure from our constitutional traditions; (2) they are budget-busters that would result in untenable costs to American taxpayers; (3) they would create huge new bureaucracies and a litigation explosion; and (4) they would undermine our ability to provide vital protections to the American people.

II. A RADICAL DEPARTURE FROM THE CONSTITUTION

To understand the radical nature of these bills, it is necessary to understand the traditional constitutional protections afforded to property owners throughout our nation's history.

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 effects a compensable taking, our constitutional traditions require 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 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, just compensation must be paid.

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."

Thus, 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 noted by Justice Scalia in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992), 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." Much the same could be said of protective measures enacted by the federal government in the legitimate exercise of its constitutional powers.

This constitutional tradition has been carefully developed by the Founders and 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.

The pending compensation bills disregard our constitutional tradition and our civic responsibilities. 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 adequate 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. H.R. 925 requires compensation where covered federal action reduces the value of any portion of property by 20 percent. S. 605 uses a 33 percent loss-in-value threshold.

It is important to recognize just how radical these bills are. In 1993, every Member of the U.S. Supreme Court 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. It is 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 compensation bills preclude consideration of these factors, their single-factor test would necessarily result in myriad unjustified windfalls at the taxpayers' expense.

The compensation bills are further flawed because the loss-in-value trigger focuses solely on the affected portion of the property. The courts have made clear that under the Constitution, 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. City of New York, 438 U.S. 104, 130-31 (1978). By establishing the affected portion of the property as the touchstone, these bills ignore 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.

Further, because these bills focus on the affected portion of the property, they are easy targets for manipulation and

abuse. 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. Suppose the civil rights laws require a restaurant to make its restrooms accessible to wheelchair users. Under bills like S. 605, the restaurant owner would not need to show the requisite loss in value for the entire restaurant, but only for the affected portion of the restaurant. In other words, the owner 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, the owner could seek compensation. Proponents of these bills have acknowledged that the "affected portion" provisions would operate in this fashion, conceding, for example, that a restriction applying to only one acre of a 100-acre parcel could be compensable under these bills. See 141 Cong. Rec. H2509, col. 2 (March 2, 1995) (Rep. Canady).

Other provisions in these bills similarly go beyond constitutional standards for compensation. Although some provisions appear to be loosely based on certain Supreme Court cases interpreting the Just Compensation Clause, the bills distort these cases by wrenching those standards from their appropriate setting and by disregarding important limitations.

For example, section 204(a)(2)(B) in S. 605 would require compensation where a condition of a permit or other agency action lacks "a rough proportionality between the stated need for the required dedication and the impact of the proposed use of the

property." This standard appears to be derived from Dolan v. City of Tigard (U.S. 1994) decided last Term. That case focuses, however, on situations where the government requires a permit applicant to make a dedication of property that eviscerates the applicant's right to exclude others. The Dolan Court expressly distinguished such dedication requirements, which involve the loss of fundamental property rights, from regulation that merely restricts the ability to use property in a particular way. The bill's revision of the Dolan test could inappropriately extend the "rough proportionality" standard far beyond public dedications of real property and apply it to any type of condition on agency action that might affect any type of property.

Even if a bill were to articulate accurately the holdings of Supreme Court cases under the Just Compensation Clause, any effort to freeze such holdings into law by statute would contravene the critical teaching of constitutional takings jurisprudence: that takings analysis best proceeds on a case-by-case basis through a balancing of all factors relevant to the ultimate constitutional standards of fairness and justice.

Surprisingly, proponents of pending compensation bills sometimes suggest that opposition to these bills is tantamount to opposition to the Just Compensation Clause of the Constitution. It should be clear by now, however, that these bills have nothing to do with the Just Compensation Clause. The Constitution nowhere provides 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 provide that reasonable efforts to protect the American people from harmful property use constitute a compensable taking.

None of the Founders ever proposed the radical and destructive "loss-in-value" compensation theory embodied in these bills, and no court has ever read the Constitution in this way. Nor has the Executive Branch. Nor have any of the previous 103 Congresses. This concept is simply nowhere to be found in our constitutional or political traditions. Yet the pending compensation bills would establish this extreme principle as the law of the land. It is simply false to state that these bills would vindicate constitutional principles, or that opposition to them constitutes opposition to the Constitution. To the contrary, this effort to supplant our constitutional tradition with extreme statutory compensation requirements reflects an unfortunate distrust of the genius of our Founders and the wisdom of the Constitution.

III. AN UNTENABLE FISCAL IMPACT

Because these bills are so broad and inflexible, and because they often mandate compensation where none is warranted, the potential budgetary impacts are extremely high, and for some bills virtually unlimited. Even if these bills forced a reduction in new regulatory protections, they would still have a

huge fiscal impact by requiring compensation for statutorily compelled regulation and other essential protections.

As you may know, the Office of Management and Budget (OMB) has developed a preliminary estimate of the cost of the compensation title of H.R. 9. OMB estimates that direct spending for the compensation title of H.R. 9 would be \$28 billion through the year 2002. This direct spending estimate does not include the substantial discretionary costs of administering a compensation claims program, or the costs of managing the patchwork quilt of property parcels that the Federal government would be forced to acquire.

The compensation scheme in S. 605 is far broader in scope, and OMB therefore expects the cost of S. 605 to be several times the \$28 billion cost of the House-passed legislation. One proponent of S. 605 testified, with respect to the Americans With Disabilities Act alone, that potential liability would make administration of the Act prohibitively expensive. Because S. 605 goes beyond 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.

Some federal bills, such as S. 605, would also 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. To avoid this liability, federal agencies would likely feel compelled to monitor State and local actions under federal programs more closely, or to withdraw delegated authority altogether, clearly a step backward in the effort to devolve more authority to State and local governments.

Although the pending federal bills would not impose a direct compensation requirement on State and local governments themselves, certain cost information is available from State and local governments that is illuminating by way of comparison. RKG Associates recently conducted a case study of State compensation bills in New Hampshire. Using conservative assumptions, the researchers concluded that these bills would impose "unmanageable" costs, costs that for one town would exceed its annual budget. One could reasonably expect this experience to be replicated in affected federal programs if a comparable federal compensation bill were enacted.

Proponents of these bills sometimes argue that these costs are already being absorbed by the individual landowners. However, the potential costs of these bills are so high because the bills would require compensation in many cases where compensation would be unfair, unjust, and economically inefficient -- for example, where the landowner had no reasonable expectation to use the land in the manner proposed, where land-use regulation benefits the property as a whole, or where other

uses would yield a reasonable return on investment without harming neighboring landowners or the public. In short, the bills would result in a tremendous and unwarranted transfer of public wealth to a small number of landowners.

These bills also 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 these radical compensation schemes render the protection of wetlands prohibitively expensive, the commercial fishing industry would suffer devastating financial losses. Note too that some of these bills might require compensation to the fishery and related economic interests whose profits are reduced by the failure to protect wetland habitats. There is seemingly no end to the chain of compensation claims created by these bills.

Some have suggested that the costs of a compensation bill might be limited by raising the loss-in-value compensation threshold. But because these bills apply the loss-in-value threshold to the affected portion of the property, it is unlikely that a higher threshold would result in a meaningful limitation on the scope and cost of the bills. A landowner could often segment the parcel or otherwise manipulate the loss-in-value calculation in a manner that demonstrates a very high (and thus compensable) loss in value.

Even if a compensation statute applied the loss-in-value threshold to the entire parcel, landowners would still be able to engage in strategic behavior to generate compensation claims, such as selling off unaffected portions to family members in order to demonstrate a high loss in the value of the remaining portion. These are far from hypothetical concerns, given the relative ease with which owners could identify and segregate ownership of those portions of their property subject to important protections. Although a court could consider the fairness of such activity in addressing a claim for compensation under the Constitution, the pending compensation bills might well preclude a court from taking these ploys into account.

Another reason why the costs of these bills would be so high is that they would remove any incentive on the part of developers and other property owners to devise plans that accommodate public values, or to reach a compromise on the appropriate balance between property use and the public good. Rather, these bills would encourage property owners to structure their land use proposals in a way that maximizes compensation under the bills, which would inevitably exacerbate controversies while driving up compensation costs.

Some proponents of these bills argue that the costs will depend on how regulators respond. But let us 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. As we continue to explore ways to balance the federal budget, these bills are heading in exactly the wrong direction.

IV. HUGE NEW BUREAUCRACIES AND COUNTLESS LAWSUITS

Compensation bills would also require the creation of huge and costly bureaucracies to address compensation requests. Some bills would greatly expand the grounds for filing judicial claims for compensation where regulation affects private property. Others would establish extensive administrative compensation schemes with binding arbitration at the option of the property owner. Still others, like S. 605, would do both.

These bills would pose very sophisticated and complex legal questions that would create a business boom for lawyers and appraisers. 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.

We would be left with the worst of both worlds: a compensation test that ignores critical factors, but that contains terms and provisions that are vague and ambiguous in the extreme. Far from creating an easily administered "bright-line"

for claimants, these bills would be a "lawyers' full employment act" that would ensure much more litigation, bureaucracy, and controversy.

V. A THREAT TO VITAL PROTECTIONS

Passage of a compensation bill would unquestionably undermine the programs and protections covered by the bill. This legislation thus poses 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 a compensation bill were to become law, these vital protections -- which Congress itself has established -- would simply become too costly to pursue. Compensation bills that apply to specific environmental protections for wetlands, endangered species, and the like are in their practical effect a frontal assault on these basic protections. Compensation bills that apply to federal programs across the board are, in our view, an attack on our ability to provide basic protections for the American people.

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 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.

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 strides in protecting middle-class landowners and others from unreasonable and unfair burdens,

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 a compensation bill.
- Suppose flight patterns at a military airfield require flights over urban areas. Existing case law under the Constitution might require compensation for overflights only where there are regular and frequent overflights at altitudes of 500 feet or less above ground level. Flight patterns at many military airfields, especially those near cities, have been designed with the well-established 500-foot standard in mind to ensure that operations occur in freely navigable airspace. Compensation bills would supplant established standards and subject the Defense

Department to compensation claims irrespective of the altitude of the overflight.

- 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 these bills.
- Suppose a group of landowners challenge the implementation of the National Flood Insurance Program, which includes eligibility criteria that restrict land use to decrease the risk of flooding. The landowners could argue that such restrictions diminish the value of their land and claim 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 permit denial comes within the nuisance exception or some other exception contemplated by these bills, compensation could be required. On the other hand, if the permit were granted, neighboring landowners might claim compensation by arguing that the increased flood risk devalued their land.
- 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 that pose an imminent hazard to safety.

These bills raise the possibility that the taxpayers would have to compensate affected corporations for lost profits or other economic losses where they have been directed to cease operating unsafe equipment to protect the public.

These are just a few examples of the problems with the "one-size-fits-all" approach of these compensation proposals. It is worth noting that most of these examples reflect actual situations in which property owners challenged government conduct as constituting a compensable taking under the Constitution. In each case, the court, often after noting the public benefit derived from the protection at issue, concluded that there had been no taking of property. If a compensation bill becomes law, a different outcome in those cases may well be the result.

VI. THE INADEQUACY OF THE NUISANCE EXCEPTION AND OTHER EXCEPTIONS TO THE COMPENSATION REQUIREMENT

Both S. 605 and H.R. 925 purport to address health and safety concerns by providing an exception to the compensation requirement where the property use at issue would constitute a nuisance under applicable State law. It is entirely inaccurate to suggest, however, that this exception would allow for adequate

protection of human health, public safety, the environment, and other vital protections important to the American people.

It goes without saying that where State law sufficiently addresses an issue, Congress has no reason to address the issue through federal legislation. Congress generally provides for federal protection of human health, public safety, the environment, and other important interests only where State law is inadequate to the task. State nuisance law was never intended, and has never served, as comprehensive protection from human health risks and other threats to our welfare.

The legislative histories of the major environmental statutes demonstrate the inability of State nuisance law to provide comprehensive protection. 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 emissions from the plant endangered the health and welfare of the residents of Shelbyville and adjacent areas. 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." Other adverse effects included "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 health and welfare dangers:

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.

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

There are several factors that might, in given circumstances, render nuisance law inadequate to provide comprehensive protection from widespread pollution, including the difficulty of proving a causal link between the harm and the unreasonable conduct of the defendant, and the difficulty in establishing a nuisance where serious cumulative harm is caused by pollutants from several sources, none of which by itself would cause significant damage. Moreover, the landowner's conduct might have to be substantial and continuing in order to come within the nuisance exception, which would render the exception inapplicable to single or intermittent discharges of toxic pollutants. Nor would the bills' nuisance exception cover many protections designed to address long-term health and safety risks.

Due to the limitations inherent in State nuisance law, property owners and others have failed to obtain relief in nuisance actions for a variety of harms and injuries, including

flooding caused by filling of adjacent property, Johnson v. Whitten, 384 A.2d 698, 701-702 (Me. 1978), groundwater contamination, Cereghino v. Boeing Co., 826 F. Supp. 1243, 1247 (D. Or. 1993), hazardous waste contamination of property, American Glue & Resin, Inc. v. Air Products & Chemicals, Inc., 835 F. Supp. 36, 48-49 (D. Mass. 1993), and contamination of a creek by a leaking landfill, O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 657-58 (E.D. Penn. 1981). Although some of these examples might constitute a nuisance in other jurisdictions or in different factual settings, these cases amply demonstrate that State nuisance law does not provide comprehensive protection to all Americans from threats to human health, public safety, the environment, our homes, and our property. A nuisance exception to a debilitating compensation requirement would undermine our commitment to nationwide minimum standards of protection.

The nuisance exception also fails to recognize that there are other important public interests unrelated to health and safety and not addressed by State nuisance law, such as national defense, foreign relations, civil rights protection, worker safety rules, airline safety, food and drug safety, and many other vital protections. By requiring compensation for many protections that Congress has deemed necessary to advance the public interest, except where such protections fall within State nuisance law, many compensation bills would undermine Congress's authority to decide what conduct or activity needs to be regulated to protect the public.

H.R. 925 contains an additional public safety exception to the compensation requirement where agency action has "the primary purpose" of preventing an "identifiable" hazard to public health or safety or damage to "specific property." These provisions are extremely vague. It is not at all clear whether they would allow for adequate protection of the public against cumulative threats or long-term health and safety risks, and they would appear to require the American people to bear the risk of scientific uncertainty. This provision would not only spawn countless lawsuits over the meaning of its amorphous terms, but also preclude basic protections for the American people where an agency is unable to demonstrate that its action falls within the provision's narrow scope. This provision points up the danger of replacing the proven, time-honored constitutional standards for compensation -- which allow for full consideration of all relevant factors on a case-by-case basis -- with an inflexible statutory formula that holds vital protections hostage to an ambiguous and prohibitively expensive compensation requirement.

VII. OTHER CONCERNS

The overall breadth of the compensation bills is staggering. In S. 605, the definitions of "agency action," "property," "taking," and other key terms are so open-ended that they impose no meaningful limitation on the reach of the bill. For example, "agency action" is not limited to regulations, permit denials, and the like, but seems defined in a circular fashion to include

everything an agency does that "takes" property as that term is used in the bill. The term "taking of private property" is similarly defined in a circular fashion to include anything that requires compensation under the bill. These open-ended definitions are combined with the exceedingly broad compensation standards discussed above.

Think of the consequences of these bills 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.

S. 605's 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 where military training temporarily disrupts neighboring property owners; compensation for a bank where federal regulators determine that the bank is no longer solvent and appoints a receiver; compensation for corporations based on changes designed to stabilize and protect pension plans; compensation for agricultural interests that must comply with

restrictions which are imposed to control the spread of animal and plant pests and diseases; compensation based on restrictions on the sale of explosives; 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 crops; and so forth.

Although more limited than S. 605, H.R. 925 is also broadly worded and would likely have many unintended consequences. In addition to countless claims arising out of protections for wetlands and endangered species, potential claims will likely result from annual water allocation decisions, water contract renewals, water contract enforcement actions, denial of change-of-use or water transfer requests, and flood control activities. For example, claims could arise where the Forest Service places restrictions on the renewal of special-use authorizations for water diversions to enhance stream inflows to meet the requirements of Forest Plans. Claims might also be asserted based on decisions affecting rights of way and easements across federal land that affect water delivery. The examples are virtually endless.

VIII. OPPOSITION TO COMPENSATION BILLS

It is because of these far-reaching 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 have written the Congress to oppose takings legislation that goes beyond what the Constitution requires.

In a referendum vote last November, 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. And, as I noted earlier, certain federal compensation bills would apply directly to various State and local actions.

Moreover, any federal compensation bill would be served up as a model for compensation requirements at other levels of government. Many of the groups that are lobbying for a federal compensation bill are pushing for comparable State and local legislation as well. If enacted at the local level, compensation bills could render local zoning and everyday local land-use planning obsolete. Citizens would lose the ability to control

the growth and development of their neighborhoods and communities.

IX. 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.

As we consider the potential effects of compensation bills, it is important to keep the takings issue in perspective. Certain advocates of compensation bills suggest that the government routinely disregards constitutional protections for private property. This is simply incorrect. 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 40 takings claims involving the 404 permit program.

As part of our efforts to reinvent government, the Administration is continuing to look for ways to reform specific federal programs to reduce burdens on small landowners and others. Other Administration witnesses will describe these reforms more fully, but let me mention just a few.

Under the wetlands protection program, many individuals and small businesses are already allowed to fill portions of certain wetlands without needing to get an individual permit. Three new initiatives 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 more efficient. These reforms will substantially reduce or eliminate the burden for small landowners in many cases.

At the Interior Department, Secretary Babbitt is pursuing 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. The same would be true for one-time activities that affect five acres or less of

contiguous property if the property was acquired prior to listing. Thus, under most circumstances, these tracts would be exempted from regulation under the Endangered Species Act (ESA) 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. The Interior Department's "Safe Harbor" policy also protects landowners from additional ESA land use restrictions where they voluntarily enhance wildlife habitat on their lands. 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 designed to protect the 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. You will hear them say it takes fifteen years and \$500,000 to litigate these claims. On balance, however, the cases they cite to support this assertion generally involve multimillion dollar claims brought by large corporations. Although lengthy litigation is to be avoided where possible,

complex business litigation is often hard fought and protracted.

We are keenly aware of the need to assure that all Americans can seek redress through the courts for meritorious claims. A property owner who successfully litigates a takings claim is currently 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 committed to working with the courts to devise additional ways to ensure that takings claims may be resolved quickly and efficiently, including the use of alternative dispute resolution techniques where appropriate. Again, we believe that solutions that focus on the specific issues of concern are preferable to rigid, one-size-fits-all compensation schemes.

X. RADICAL CHANGES TO THE COURT OF FEDERAL CLAIMS

Certain takings bills would expand the jurisdiction of the U.S. Court of Federal Claims (CFC) by giving it the authority to invalidate acts of Congress that adversely affect private property rights, and to review agency action even where other statutes confer jurisdiction elsewhere.

We are greatly troubled by these provisions, which discard the important distinctions between the CFC, an Article I court created by statute, and the district courts, Article III courts whose judges are life-tenured. We believe this radical expansion of the CFC's authority raises serious constitutional concerns.

Briefly put, these provisions plainly implicate Article III of the Constitution, which provides that "[t]he judicial Power of

the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish." These provisions would grant the CFC the power to invalidate acts of Congress that adversely affect property rights in violation of the Constitution. The CFC would be authorized to strike statutes from the books at the request of private parties, thereby affecting the rights of third parties protected by the statutes but not before the court. We believe that grant of power probably violates Article III.

The expansion of the CFC's injunctive and declaratory powers also raises separation of powers concerns. Under these proposals, the CFC could hear constitutional challenges to any statute or regulation, enacted under any of Congress's powers, involving any department or agency of the federal government, as long as the challenge involves the claim that the government action adversely affects private property. That would give the court government-wide as well as nation-wide jurisdiction over an important class of constitutional cases. By adding to the CFC's existing power to award damages the power to issue injunctions and declaratory relief, the CFC would become indistinguishable from an Article III court in its remedial powers.

We are also opposed to the repeal of 28 U.S.C. §1500, which bars the CFC 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. Advocates of repeal argue that repeal is necessary because current law forces a property owner

to elect between equitable relief in federal district court and monetary relief in the CFC. That view of the law is, however, outdated and mistaken. Loveladies Harbor v. United States, 27 F.3d 1545 (Fed. Cir. 1994) (the CFC may entertain a claim for monetary relief where the plaintiff has another claim for equitable relief arising out of the same facts pending in federal district court).

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 CFC 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 Department's litigation resources. While the United States presumably would have the right to transfer the cases and consolidate them in one forum, the United States 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 CFC due to the minimal requirements of notice pleading. Our ability to identify related actions would be further limited by the sheer volume of civil litigation involving the United States.

XI. CONCLUSION

The Administration strongly supports private property rights. Compensation bills, however, represent a radical departure from our constitutional traditions and our civic responsibilities. They 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, they 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. Compensation bills, however, are a ham-fisted, scattershot approach that would impair our ability to carry out essential functions and would impose a tremendous and unwarranted cost on the pocketbooks of middle-class Americans. Accordingly, the Attorney General would strongly recommend that the President veto compensation legislation.

Statement of

Joseph L. Sax
Counselor to the Secretary
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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.

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