# NLWJC - Kagan

# Counsel - Box 029 - Folder 009

# [Takings Act Notebook] [Binder] [5]

# NEWS RELEASE
## NATIONAL CONFERENCE OF STATE LEGISLATURES

FOR IMMEDIATE RELEASE
June 27, 1995

FOR ADDITIONAL INFORMATION, CONTACT:
Susan Seladones
Liz Dechert
Rosa Wright
202-624-5400

NEW HAMPSHIRE STATE SENATOR RICHARD RUSSMAN TESTIFIES ON PRIVATE PROPERTY RIGHTS AND TAKINGS LEGISLATION

WASHINGTON, D.C. -- New Hampshire State Senator Richard Russman today testified before the U.S. Senate Environment and Public Works Committee. Senator Russman, speaking on behalf of the National Conference of State Legislatures (NCSL), discussed states' views on private property rights and takings legislation.

Senator Russman is from Kingston and represents the state's 19th district. He serves as a member of NCSL's Environment Committee.

Russman said that state legislators believe it is imperative to obtain a truly fair and sensible resolution to the problem of unfair government intrusions upon private property rights. However, NCSL believes that takings legislation that seeks to create a potentially expensive new entitlement program is not the proper approach.

"Our present system says that if you are engaged in activities that pose a threat to public health, then you are the entity who should shoulder the cost of limiting the impact of your activities," Russman said. "The legislation presently before us would require the general public, the average American taxpayer, to pay the costs of pollution control equipment. This attempt to change our present system of environmental regulation from 'polluter pays' to 'public pays' is premised upon the notion that if the public wants cleaner air, let the public pay for cleaner air, with their federal tax dollars.

"In cases where there is clearly no constitutional right to compensation, takings bills would adversely impact average citizens by increasing taxes or by diverting limited government resources for a new entitlement program," Russman continued. "Such legislation will discourage government actions that protect the community and neighboring property owners."

-more-

William T. Pound/Executive Director

Susan L. Seladones
Director of Public Affairs
444 North Capitol Street, N.W.
Washington, D.C. 20001
Phone: 202/624-5400

Russman added that it makes far more sense to pursue carefully tailored "impact assessment" or similar legislation to remedy overzealous regulatory takings. If crafted properly, "impact assessment legislation would heighten government awareness of the impact of its action on property owners without escalating the cost, size or inefficiency of government." Several states have opted for this remedy in order to avoid increased litigation and bureaucratic "red tape," he added.

Russman said that current takings legislation does not attempt to codify present constitutional protections and guarantees.

"Legislation such as S.605 radically expands the definition of a compensable government action and creates an expensive new government program," Russman said. "Most troubling of all is that there is no evidence to support the notion that our nation's institution of private property is under siege or that the judicial branch of government has abdicated its role in protecting private property owners from overreaching government regulation."

S.605 provides for cash payments for any reduction in property value of 33 percent or more due to certain restrictions on property use. Russman said that S.605 and other similar "compensation-type" legislation propose a dramatic new takings theory that would limit government's ability to respond to public demands and increase the cost and size of government.

"Under this takings legislation, the federal government would find itself in the unenviable position of paying polluters not to pollute and paying individuals not to engage in conduct that could damage the health, safety or property values of others," Russman said.

Russman said that S.605 represents a direct threat to states because many of the federal public health and safety programs that would be jeopardized by federal takings bills are actually implemented in whole or in part by state and local governments.

"This state-federal partnership is the cornerstone of our present system of environmental and public health protection. In fact, the trend is to shift more responsibility for the implementation of federal programs to the states," Russman said. "Additionally, due to the federal government's pervasive role in regulating public health hazards and the increasingly interstate and complex nature of our nation's environmental problems, states have come to rely on the federal government for leadership in this area.

"State lawmakers have an acute interest in seeing that the federal laws providing significant protections to state residents are not diluted or disabled," Russman continued. "Compensation-type takings legislation not only has the ability to weaken the federal government's resolve to apply its laws, but it also has the ability to financially cripple the federal agencies that implement such laws."

Russman illustrated several examples of ways S.605 would affect states, including the following:

- S. 605 has the potential to unduly influence state behavior and create litigation between states and the federal government. Under this legislation, the federal agency implementing a law pays compensation when there has been a taking, even if the taking was imposed by a state acting pursuant to federal authority. Federal laws allow states to impose state standards that are stricter than federal ones. The problem posed is that the federal government will be reluctant to pay awards that result from stricter state standards.

- States cannot afford to create a new entitlement program similar to the federal entitlement program that is being proposed under the current compensation-type takings legislation.

- Takings legislation will have the tendency to lock in the status quo by forcing the federal government to pay any perceived losers when there is a change in the way government conducts business.

"S.605 and similar types of legislation are expensive 'budget busters' that would impose large and unknown new costs," Russman said. "The costs that S.605 would impose go far beyond compensation awards to persons claiming property value diminution."

NCSL represents the legislators and staffs of the nation's 50 states, its commonwealths and territories.

-30-

*American Farmland Trust*

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

Before the Committee on Environment and Public Works
of the United States Senate
June 27, 1995

Mr. Chairman and members of the Committee, I thank you on behalf of American Farmland Trust for this opportunity to testify on property rights and the environment. AFT is a national, nonprofit membership organization, founded in 1980, that works cooperatively with farmers and public officials to stop the loss of the nation's best farmland and promote farming practices that lead to a healthy environment.

The AFT Board of Directors has adopted the following position on property rights and responsibilities:

> Private property rights should be recognized and protected because they are a foundation of the market economy that gives farmers an incentive to produce food and fiber. Along with these rights comes a responsibility to practice good stewardship so that land and water resources are not wasted, and their use does not harm neighbors or the environment we share. To conserve agricultural resources and protect the environment, AFT favors voluntary incentives to landowners and the elimination of government subsidies to inappropriate land uses. When land use regulation is necessary to achieve these objectives, it should be balanced by measures to protect landowners' equity.

Today, I would like to highlight and explain this statement as it concerns the issue of government subsidies.

Stripped of rhetoric and legalese, the property rights debate is not so much about Constitutional principle as about how we as a society share the cost of protecting the environment and, thus our health and quality of life. Regulation tends to impose the cost of environmental protection on landowners. The compensation they now demand would spread the cost among all consumers and taxpayers. In truth, the public will pay any way you look at it -- either in taxes, consumer costs or a degraded environment -- so the question of how much environmental protection costs and how it got that way is of utmost importance.

I am not an economist, but it doesn't take one to recognize that there's been a critical element missing from the debate: the fact that government can and does <u>increase</u> private property values -- that there are "givings" as well as "takings."

NATIONAL OFFICE
1920 N Street, NW Suite 400 Washington, D.C. 20036
Tel: (202) 659-5170 Fax: (202) 659-8339

recycled paper

"Givings" include outright subsidies, tax breaks, and even regulations that give some land uses a competitive edge over others. They cost taxpayers billions of dollars a year and their influence on land use itself is massive and pervasive, often worsening environmental harm and waste. Some examples are the taxpayer-financed erosion control and flood insurance that gave David Lucas's barrier island lot its value; agricultural support payments that have made it profitable for farmers to drain wetlands; and local zoning rules that promote suburban sprawl, making millionaires out of speculators while imposing excessive public service costs on taxpayers.

By increasing private property values, "givings" increase potential government exposure to takings claims -- particularly if takings are redefined by bills now pending in Congress. They also seem to create an entitlement mentality not unlike that being ascribed to welfare recipients -- the belief that one should be able to rely indefinitely on public largesse with no strings attached. This breeds takings litigation.

When compensation is demanded for regulations that limit subsidized land uses, the public is being asked to pay twice to protect the environment. Once when value is given, again when government in effect tries to take it back. There is a serious question raised about whether this is, indeed, "just compensation" or unjust enrichment.

One thing is for certain: double-dipping in the public treasury promises to bankrupt the nation while ruining our environment. And it is all the more worrisome because the commercial landowners who are complaining loudest about takings-- farmers, loggers, miners, oil drillers, developers and realtors -- are the biggest recipients of "givings."

Lest I be wrongly interpreted as unsympathetic to property owners, let me add that I believe there is a fundamental unfairness about this situation. But it is not that landowners are being asked to shoulder a disproportionate share of the cost of environmental protection. Rather, it is that they are caught in the middle of conflicting policies; between the push-and-pull of government spending that encourages them to do one thing and regulation that tries to get them to stop it. They are getting very mixed signals and those who are not deliberately trying to exploit the inconsistency deserve much better treatment.

In sum, our current policies amount to trying to drive a car with the brakes on. They won't get us where we want to go -- a vigorous economy in a healthy environment -- but they are causing enormous friction and needless expense. We are subsidizing the very land uses we are simultaneously trying to prevent. And we wonder why landowners protest and environmental progress is difficult.

The way to resolve this tension between property rights and environmental protection is to re-examine government taxing, spending and regulatory policies and coordinate them to give property owners a clear, consistent economic signal. We should begin with a full and honest accounting of the trillions of dollars in "givings" added to private property at government expense. With the information provided by this national audit, we should eliminate counterproductive "givings" and re-invest the savings in ways that will give landowners clear,

positive incentives to protect the environment -- things like the Wetlands Reserve, tax credits for voluntary conservation easements, and assistance to enable landowners to qualify for "safe harbor" protection under the Endangered Species Act. Instead of paying twice to achieve very little but continued controversy, we will pay only once and finally get our money's worth of clean air and water, and well-managed land.

These reforms should reduce the need for vexatious regulations. But some will still be required to compensate for the tendency of the marketplace to postpone or ignore environmental costs. These regulations should be objectively reviewed to assure they are not imposing a financial burden on landowners that is disproportionate to the environmental harm avoided. And where indeed, the burden would be too great; where landowners have done all they reasonably can and deserve help in meeting society's environmental expectations, we should fairly and gladly compensate them.

The final thought I want to leave with you is that it is time for both sides of the property rights debate to stop hurling rhetorical and legal bombs and get to the negotiating table. The program of reforms I have outlined can be the starting point of an agenda. But unless genuine dialogue replaces two sides preaching to their own choirs, no progress will be made at reconciling two things that must come together for the sake of us all: the fundamental American freedom to own property and the imperative of safeguarding the ecosystem that supports life itself.

Thank you for this opportunity to testify. I will be glad to try to answer your questions.

# AMERICAN PLANNING ASSOCIATION'S POSITION ON "TAKINGS"

**Land Use Regulations and the "Takings" Challenge**

**Adopted by a Chapter Delegate Assembly**
**Ratified by the APA Board of Directors**
**April 11, 1995 • Toronto, Canada**

## SUMMARY

APA supports private property rights as guaranteed by the U.S. Constitution and the land use regulations that protect those rights for the benefit of ALL property owners.

## APA strongly opposes "takings" compensation and assessment bills because they would:

(1) increase bureaucracy and red tape at every level of government

(2) slow the development process and result in a decrease in jobs

(3) result in significant but unpredictable costs to the public treasury

(4) add to regulatory confusion at the state and local levels. State and federal laws are inextricably linked. " De-coupling" these laws would be a **nightmare!**

(5) result in a proliferation of federal, state and local lawsuits

*Although drafted with the best of intentions, the "takings" legislation introduced to date does NOT protect private property owners from big government.* Good intentions do not necessarily make good law.

These bills would make it harder to protect the property values of ALL Americans.

**Beware of waivers:** A dangerous compromise is being discussed. Since the government does not have the funds to compensate all the takings claims that are expected, waivers are being proposed. Landowners would be waived or exempted from the law or regulation that caused the "takings." **The result would be chaos.** Regulations that protect neighborhoods would be worthless if they are waived whenever a landowner or developer balks. **Community protections would constantly be in jeopardy.** These waivers could be devastating since there is no mechanism to judge their cumulative effect.

**Please vote against legislative language that provides exemptions from regulations without considering cumulative effects of waivers.**

For more information on APA's position contact Nancy Willis or Jan Rothschild at 202-972-0611.

**American Planning Association**
1776 Massachusetts Avenue, N.W., 4th Floor
Washington, DC 20036
Phone 202.872.0611 Fax 202.872.0643

POLICY GUIDE

# APA'S POSITION ON "TAKINGS"

## Land Use Regulations and the "Takings" Challenge

**Adopted by a Chapter Delegate Assembly**
**Ratified by the APA Board of Directors**
**April 11, 1995 • Toronto, Canada**

### *Background: the "Takings" Issue*

The "takings" issue is addressed in the Fifth Amendment to the U.S. Constitution, which reads in part, "nor shall private property be taken for public use, without just compensation." In the context of the times that language was clearly directed toward the actual seizure of private property for public use. Modern methods of eminent domain embody the principles set forth in the Fifth Amendment, allowing governmental bodies to claim private property when necessary but requiring that those entities pay "just compensation" when they do so.

About seventy-five years ago, the U.S. Supreme Court extended that principle beyond the physical seizure of property, holding that "The general rule at least is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a 'taking.'" Although the case involved was complex, the concept is not. Clearly if a government uses regulation to accomplish what it should do through eminent domain, the result should be the same as if the government had used eminent domain. For example, if the government were to issue regulations requiring that a landowner permit a portion of her land to be used as part of a public road or that another landowner permit the public to enter onto his property to use it as a recreation area, the net result for the property owner is about the same as if the government had physically seized the property. Most rational citizens would support the affected landowner in a claim for compensation.

For roughly sixty years, if a court determined that a regulation amounted to an unconstitutional taking, it would simply invalidate the regulation--thus leaving the property owner free to do as he or she could have done before the new regulation was imposed. That was certainly a reasonable remedy for the local government--its unconstitutional action was simply made void, without other serious cost or penalty to the community or its citizens. The local government could then adopt a new regulation, presumably one that would respond to the court's adverse findings on the previous regulations. When that remedy was granted relatively swiftly and not appealed, it was also a reasonable result for the landowner. As delays in litigation have become more common (one "takings" case was in court for nine years before the U.S. Supreme Court more or less resolved it), the remedy of overturning the regulation became less acceptable to landowners. In that context, attorneys for landowners began asking the courts to treat an unconstitutional regulation as being equivalent to an action in eminent domain--thus requiring that the local government buy the regulated land. The Supreme Court in 1981 finally adopted a compromise

position, accepting the notion that some damages might be due to the landowner but giving the governmental entity a choice between two options: buying the land as it would under an eminent domain proceeding; or repealing the unconstitutional regulation and then compensating the landowner for the loss of use of the property while the regulation was in effect. That is the law today.

Although that is a far less burdensome rule than an absolute mandate that a local government buy property, even the mandate that governments pay for a temporary taking is a sort of unfunded mandate. When a governmental agency enters into eminent domain proceedings, it typically does so in the context of a capital project budget (such as one for the construction of a road) and it has funds available to pay for the land taken. When it adopts a new regulation, a governmental agency is unlikely to set aside funds to buy the regulated property. Thus, a sudden court order requiring that it pay for land that it thought that it was simply regulating can be an unpleasant fiscal surprise for a governmental entity and its taxpayers.

Seeking at times to redress unfair actions of government and at other times perhaps to profit from an opportunity, landowners have brought many "takings" claims against entities of government. Recognizing the implications of such cases, the courts themselves have generally been quite cautious in finding "takings."

**To date the Supreme Court has established four clear rules that identify situations that amount to a taking and one clear rule that defines situations that do not.** The court has held that regulations simply intended to prevent or eliminate a nuisance cannot be considered a taking. It has found "takings" in the following circumstances:

1. where the landowner has been denied "all economically viable use" of the land;
2. where the regulation forced the landowner to allow someone else to enter onto the property (in this case a cable company, which wanted to attach its cables to an apartment building);
3. where the regulation imposes burdens or costs on the landowner that do not bear a "reasonable relationship" to the impacts of the project on the community; and
4. where government can equally accomplish a valid public purpose through regulation or through a requirement of dedicating property, government should use the less intrusive regulation, for example, prohibiting development in a floodplain property.

The first of those principles is one of fundamental fairness. The second simply reinforces principles against trespass that have evolved from the common law and that are reinforced by the Fifth Amendment. The third simply mandates that a community engage in good planning and then adopt regulations that uses that plan to apportion fairly the burdens and benefits of land development. The last of these is simply common sense. Although some planners have had some concern about the precise language used by the Supreme Court and about some of the facts of particular cases, the American Planning Association supports these reasonable principles, as do most of its members.

The Supreme Court has also said that where a regulation is intended merely to prevent a nuisance, it should *not* be considered a taking. Although that rule is some comfort for regulations that prevent serious air and water pollution that would clearly amount to nuisances if left unchecked, the police power has for seventy years extended beyond the mere prevention of nuisances. No reasonable court would hold that the definition of nuisance would include a high-rise apartment building or even a convenience store located in the middle of a neighborhood of single family homes; under the police power, however, local governments carry out the wishes of homeowners by preventing such uses in single-family neighborhoods. Thus, this lone exception to the "takings" doctrine is logical and useful but not sufficient to protect the scope of normal activities carried out by many local governments to protect local citizens and property owners from unwanted intrusions into their neighborhoods.

## *Background: the Police Power*

During the same period that "takings" law has evolved in the courts, so has the "police power." The concept of the police power is essential to government. As generally interpreted in the U.S., the police power is the right of government to interfere with private activity (or the use

of private property) for the protection of the public health, safety and general welfare. Zoning is the most common use of the police power as it affects land, although related subdivision regulations and building codes are also important exercises of the police power. The U.S. Supreme Court upheld the principle of zoning and expressly held that zoning did not amount to a taking just a few years after determining that some regulation might go so far as to be a taking. In thousands of state and federal court cases, the courts have upheld the right of local government to intervene in private activity to protect the public health, safety and welfare.

It is the police power that allows the government to require a landowner to clean up a cesspool leaking onto a neighbor's property or to remove a junkpile that attracts vermin to a residential area. It is under the police power that a local government adopts zoning regulations that prohibit the operation of junkyards and auto repair shops in residential neighborhoods. Under the police power most local governments prohibit landowners from distracting motorists with flashing signs that look like traffic signals and that those same governments prohibit noisy or noxious businesses near residential areas.

As our society has become more populous, with more people living relatively close together, the police power has become more important. It is a sort of civilizing agreement among humans living in a community that allows them to live in peace. Communities depended upon the police power to separate heavy industry from homes and businesses during the first century of the industrial revolution. Today, other police power regulations require that industry eliminate most pollution, thus making it a better neighbor and making separation less important.

By the mid 1950s the Supreme Court recognized that government could legitimately use the police power to make a city "beautiful as well as healthy," and it is under that principle that today most communities prohibit billboards and large flashing signs in residential areas. The police power and regulatory "takings" law are not in conflict at all. They are complementary bodies of law that have evolved together. The "'takings'" decisions of the U.S. Supreme Court simply set limits on the extent of police power regulation. That is, of course, one of the important functions of courts in our three-part system of government.

## *Proposed "Takings" Legislation*

Virtually every state in the country, as well as the U.S. Congress, has considered various forms of "takings" measures within the past two years. While ten states have passed some form of "takings" legislation, most have been rejected due to the onerous financial burdens that would have been placed on states and communities, and because states have recognized the sufficiency of existing constitutional protections. Some legislation proposed within the past several years has been the result of some legitimate concerns regarding the rights of property owners, an issue discussed elsewhere in this paper. Much of this legislation, however, is really anti-regulation legislation clothed in the fabric of private property rights. Care must be taken to distinguish between the two.[1]

The most common types of proposals are these:

- **Compensation for reduction in economic value.** Under these proposals, a governmental agency would be required to compensate a landowner for any reduction in value resulting from government regulation; most establish a baseline level of impact and require compensation for a loss in value exceeding that threshold (the baseline in one proposal in Congress is 10 percent). Some proposals would actually require that government buy the property, even if the loss in value is only slightly above the baseline, such as a 12 percent reduction in value.
- **Economic assessment reviews.** Under these proposals, any government proposing new regulations would be required to develop thorough economic impact statements, identifying and valuing the impacts of the proposed regulations on private property.

These proposals have a certain amount of surface appeal. They are extremely dangerous proposals, however--proposals that could destroy the quality of life in communities in the United States and bankrupt local and state governments. If adopted, they would also contribute significantly to future federal deficits.

Why? Consider the concept of compensating a property owner for any loss in economic value resulting from government regulation. First, remember that if the regulation denies the property owner "all economically viable use" of the property, the Supreme Court has

already provided a remedy for that property owner. Thus, the extreme cases have already been resolved. -

For other cases, this approach poses many problems. From what value is the loss to be measured? Every regulation that limits the use of property in any way has some theoretical impact on the value of that property. If the city refuses to let your next door neighbor store junk cars on her property, should she then be compensated for the difference in value between a commercial junkyard and a piece of residential property? If that becomes the legal rule, the city will probably have to allow the junkyard next door in order to avert bankruptcy. Should a property owner who wants to build high-rise apartments in a single-family neighborhood be compensated because he is not allowed to do so? Assuming that he is allowed to build a house, just like everyone else in the area, has he really been hurt? What about a regulation that prevents grocery stores near residential areas from selling liquor? The sale of liquor is very profitable for grocery stores, with a much better mark-up than most of the grocery items in the store. Should the store be compensated for the theoretical loss of business, just because it cannot sell liquor? Such rules theoretically reduce the value of property and would thus be subject to the compensation requirement under "reduction in value" approaches. It is important to remember in considering such arguments that a principal purpose of zoning is to protect property values.

**Further, one needs to remember that property owners pay nothing to government for the gains that they enjoy when their property benefits from land use regulation.** If a government increases the value of a property by rezoning it from a zone allowing only farming to one permitting shopping centers and the property owner pays nothing for that, should the government have to pay that same property owner if it theoretically reduces the value of the shopping center by refusing to allow the construction of a gasoline station at the entrance corner? One way to fund efforts to compensate landowners for every reduction in value caused by regulation is also to charge landowners for every increase in value caused by government action, such as regulating the use of adjacent property or constructing a new highway. Most property owner groups, however, oppose this funding mechanism; they are unwilling to pay for their gains but they still expect to be compensated for their losses. **Planners are not enthusiastic about such a system of payments for gains and benefits because it would require a complex bureaucracy to administer.** The more conservative, easier approach is to continue the system that has been in effect for the last seventy years with some enhancements -- providing relief for those who suffer great hardships but otherwise allowing property owners and the free market to deal with ups and downs without a lot of government intervention.

The Supreme Court, which has a majority of members who are committed to the protection of property rights, has adopted a rational approach to this issue. It has held that where a property owner is denied "all economically viable use" of a property, that falls within the "takings" doctrine. It has refused, however, to accept some property owners' arguments that they should be allowed the "most profitable use" of their property, regardless of the effect on neighbors and neighboring properties. Landowners have argued that government is "taking" their property because they cannot build on land that has been under water for hundreds of years and which they acquired essentially for free as part of the purchase of a larger parcel that also included dry, useable land. Other landowners have argued that the denial of a right to build a liquor store or an apartment building in the middle of a single-family neighborhood amounts to a taking. Landowners have gone so far as to argue that requiring front yards in residential neighborhoods or requiring parking spaces for cars amounts to an unconstitutional taking. Not surprisingly, courts have rejected such frivolous claims. Now advocates for some of these property owners want Congress to do what the courts have refused to do.

Cases about percentage losses in value invariably turn into battles of "your expert against my expert." The landowners' expert quite naturally testifies that the land is very valuable commercial property if only zoning were not in the way. The city's expert equally naturally testifies that the land sits in the middle of a residential area, has always been zoned residential and should be valued only as residential property. Then a judge or jury has to decide which expert to believe. Such a system typically enriches lawyers but not landowners. **The Supreme Court's rule is better. It asks simply, "does the landowner have an economically viable use under the regulations?" That is a question that is much simpler to answer and one that judges and juries can evaluate more easily on their own. Because it is an easier question to answer, it is less likely to lead to**

litigation.

What is the ultimate effect of a requirement that the government compensate landowners for losses in value? In all probability it will be the abandonment of police power regulations that affect property--regulations that limit flashing signs in residential areas, that ban billboards in many areas of town, that ban junk cars and open-air auto repair in residential neighborhoods, that limit the location of bars and adult businesses, and that protect residential neighborhoods and shopping districts from intrusions by heavy industry. Local governments simply cannot afford to take the risk of having to pay compensation to everyone who claims that their property values have been reduced because they cannot have their very own convenience store with gas and beer, located at the end of a quiet residential cul-de-sac. If we allow that property owner to have a convenience store, however, we adversely affect the quality of life and the property values of all the families living on that cul-de-sac.

There are important issues of social equity to consider here. The wealthiest property owners may have little to fear from an abandonment of zoning and other land use controls. Upper-income neighborhoods in unzoned Houston are well-protected by deed restrictions. It is those in the middle class, those who are affluent enough to own homes but not affluent enough to control their own neighborhoods, who depend particularly on zoning to protect the value of their homes, largest investment that most of them will ever make. Those even further down the economic ladder depend on land use regulations to provide some semblance of a safe and sanitary neighborhood in which they can rent a place to live. A system that results in a widespread reduction in the amount of regulation in reaction to the potential costs of compensation schemes will harm all property owners, but they will harm most those who have the least.

The proposed economic impact analyses appear to fall in the latter category, spending government money nonproductively. Planners should, of course, recognize the economic impacts of plans -- the economic impacts on landowners, on residents, on the public treasury and on the taxpayers who support it. That is an essential element of comprehensive planning. **Asking planners to write a separate report about the economic impacts of regulations, particularly as they affect landowners, however, goes beyond good sense and creates unnecessary bureaucracy.** That is like requiring an environmental or social impact statement on a plan. A good plan should be based on economic, social, environmental and other factors that influence the community and its future, but it is neither necessary nor useful to write a separate "impact" report on each of those issues. Producing the report accomplishes nothing to protect the landowner. All that it does is to take time and cost money. There is no point in that. Good planning dictates that planners and others involved in developing plans and regulations understand the general economic consequences of their actions. Specific relief for affected landowners should be addressed separately.

## *Conclusion*

The American Planning Association strongly opposes most of the proposed "takings" legislation that its representatives have seen. Many of the bills introduced to date have the potential to bankrupt various entities of government. Many would add to bureaucracy and slow down the development process without really protecting private property. If bills introduced at the federal level are enacted, they would encourage state legislatures to do the same; in fact, by the date of the adoption of this policy, APA was aware of as many as 41 copy-cat bills in state legislatures.

That does not mean, however, that APA believes that the government is always right or that landowners should be left without remedies. Like individuals, governments sometimes make mistakes--mistakes that may have an unfair impact on a particular property owner. Although the democratic process generally ensures that the purpose of government regulations is a valid one, those regulations sometimes go awry in the implementation. Landowners and other citizens should absolutely have adequate and fair remedies to deal with both mistakes and intentional acts that result in unfair hardship for particular individuals.

The collective political forces that have joined in support of "takings" legislation have grossly distorted both the frequency and the intensity of the occurrence of hardship caused by government regulations. There is no question that such hardship situations can occur. Groups seeking horror stories who canvas the entire country can find such stories. When confronted with a request for details, however, advocates for some of the radical "takings" legislation are unable to provide details or documentation.

The fact is that in the average community in the typical state, the system is working well. Similarly, although there are some hardship situations under some federal regulations, most property owners function quite nicely under federal regulations and most also benefit from federal regulations that prevent other property owners from generating excessive air or water pollution. Most property owners accept the regulations imposed on their property and recognize that they must accept some limitations so that their neighbors will accept some limitations and they can all live together in relative harmony. Property rights advocates use a national collection of isolated horror stories in support of their arguments for drastic remedies to the so-called "'takings' problem." They are proposing to "kill a fly on a picture window with a sledge hammer." Viewed differently, they have a long-held "solution" (the virtual elimination of government regulation of property) and they have simply been searching for a problem that they can use as an excuse for implementing that solution. The problem is that the proposed solution will do extraordinary harm to everyone who lives in communities, allegedly in order to remedy the problems of a few hardship cases.

Property rights advocates are waging a guerrilla war of sound-bites, misleading "spin-doctoring" and power politics which have characterized governments at every level as evil empires of bad intent. APA members, many of their professional colleagues and communities across the country, have been placed in a defensive mode, outflanked by advocates who wrap themselves in the flag and the distorted appearance of constitutional rights. Ultimately, a legitimate analysis will show that the vast majorities of communities and regulators take very seriously their responsibilities of protecting both the public interest and individual property rights.

The issue is as much one of remedies as of substance. Planners share with property owners concern about legitimate disagreements that may take years to resolve. Many of the cases filed in court (and sometimes even decided) as "takings" cases actually involve other Constitutional issues, such as substantive and procedural due process. "Takings" has become a sort of shorthand call for help.

At about the time that the U.S. Supreme Court first decided that a regulation might amount to a taking, a group of experts were preparing what would become model zoning laws for the entire country. Recognizing the possibility of occasional hardships and the necessity of providing prompt and effective remedies, those early legislative drafters included in the zoning legislation local variance and appeal procedures. Although those procedures are at times abused, the principle upon which they were founded remains relevant--the principle that there should be a simple and effective remedy where regulations create an unnecessary hardship. The problem is that today's regulatory environment has become much more complex, typically involving several sets of regulations besides zoning and often involving multiple entities of government. Bizarre hardship cases sometimes occur simply because someone gets caught between two different sets of regulations, adopted for two sets of good but very different reasons. Property owners are understandably frustrated when caught between conflicting government mandates or when confronted with regulations that are unreasonable as applied to them; the lack of an effective remedy increases that frustration.

**The solution is not, however, to subject every government that tries to protect neighborhoods from blight to potential financial penalties.** Placing at risk the police power regulations that make a complex and relatively compact society livable will impose incredible penalties on all who live in communities as a remedy for the unique problems of a few. Clearly less drastic remedies are needed. Although the details of such remedies are left to a related report of the American Planning Association, this Policy Guide outlines the principles that should guide the development and implementation of such remedies.

## *Adopted Policies*

1. The American Planning Association and its chapters support the evolving law in this country that clearly recognizes both the importance of the police power to the protection of the public health, safety and welfare, and the limitations imposed upon that power under the U.S. Constitution to protect property rights.

   A. The American Planning Association and its chapters support property rights as guaranteed by the U.S. Constitution and the land use regulations that protect those rights for the benefit of all property owners.

   B. The American Planning Association and its chapters generally oppose "takings" legislation that expands the "takings" doctrines established by the Supreme Court to the detriment of the ability of local, state and federal governments to protect their citizens under the police power.

   C. American Planning Association and its chapters believe that all regulation of land should be consistent with locally adopted comprehensive plans, approved state plans, and/or federal agency studies and plans (as applicable to the level of regulation). Comprehensive plans should address economic social, environmental and other issues affecting landowners, taxpayers and residents, and affecting the larger community.[2]

   D. Because economic issues should be and generally are addressed in the comprehensive planning process, along with other issues, the American Planning Association and its chapter oppose legislation requiring the preparation of separate economic (or other) impact statements on proposed new regulations or laws.[3]

2. The American Planning Association and its chapters support regulations that avoid "takings" and other unnecessary and/or unintended hardships for particular landowners; they also support provisions that offer landowners appropriate relief, or, in appropriate cases, modification of regulations to accomplish that purpose.

***At a minimum:***

   A. All entities of government imposing regulations under the police power should include in those regulations procedures for fast, inexpensive, and effective review of hardship situations by a body with the authority to grant appropriate relief, including the approval of development and the issuance of necessary permits and variances.

   B. States should review their legislation to ensure that local governments have full authority to accomplish the goals of 2.A.

   C. States should assign to existing bodies the authority to review and grant relief from hardships created for property owners by conflicts among the regulations of multiple entities; where such bodies do not exist, states should create them.[4] Such bodies should have the authority to grant relief that may include the approval of development and the issuance of necessary permits.

   D. Congress should create or assign existing bodies with the authority to review and grant relief from hardships created for property owners by conflicts among the regulations of multiple federal entities or by federal regulations when considered in combination with state and local regulations. Such bodies should have the authority to grant relief that may include the approval of development and the issuance of necessary permits.

***Optimally:***

   E. Congress should authorize and federal agencies should implement methods for quasi-judicial, consolidated appeals of matters affected by a combination of state and federal regulations.

3. The American Planning Association and its chapters recognize the need for fairness to all persons and entities of government under laws and regulations imposed by all levels of government.

***At a minimum:***

A. Laws or statutes should make reference to the state or federal constitutional principles from which they derive their authority

B. Regulations should make reference to the law or statute from which they derive their authority and should be applied and construed in accordance with those statutes.

***Additionally:***

C. Regulations affecting the use and development of land should be limited in scope to avoid unintended effects on land values except as necessary to carry out the public purpose of the regulations under the police power.[5]

D. Regulations affecting the use and development of land should permit reasonable flexibility to minimize hardship. In particular, regulations should permit alternative methods of compliance that may reduce or eliminate the economic costs of compliance while preserving the intent of the regulations.

E. Regulations affecting the use and development of land should be adopted only after a review process offering the opportunity for significant participation by affected governmental entities and persons, including property owners.

F. Regulations affecting the use and development of land should include appropriate procedural due process.

G. Economic analyses of regulations conducted in the context of the comprehensive planning process (or in any other context) should recognize the economic benefits of the regulations to other property owners and the community at large, as well as any economic burden to a particular property owner(s).

4. Although the American Planning Association believes that only a small percentage of landowners may find their land subject to a regulatory taking under existing Constitutional doctrine, the American Planning Association and its chapters support efforts to develop appropriate and effective remedies for all such landowners, with adequate consideration of the impacts of such remedies on government.

A. The first step to limiting the cost of such remedies is by alleviating as many hardship situations as possible through fast, appropriate, and effective relief provisions established in accordance with principles set out in above. (See #2)

B. Because of the dampening effect that monetary remedies may have on the legitimate exercise of the police power, the American Planning Association supports non-monetary remedies that are consistent with the purpose of the regulations.[6]

C. In that limited number of cases where monetary remedies may be necessary or appropriate, the American Planning Association supports those remedies that are least costly to taxpayers[7]

D. The American Planning Association will, as part of its effort to develop model state land use planning legislation, offer model statutes with innovative administrative mechanisms for providing landowners relief from land use regulations.

## Ways to Avoid Potential "Takings" Claims[8]

There are a number of different ways in which communities concerned about fairness and balance for all citizens in addressing the "takings" issue can protect themselves against potential "takings" claims. These include the following:

1. **Establish a sound basis for land use and environmental regulations through comprehensive planning and background studies.** A thoughtful comprehensive plan or program that sets forth overall community goals and objectives and which establishes a rational basis for land use regulations helps lay the foundation for a strong defense against any "takings" claim. Likewise, background studies of development and pollution impacts can build a strong foundation for environmental protection measures.

2. **Institute an administrative process that gives decision-makers adequate information to apply the "takings" balancing test by requiring property owners to produce evidence of undue economic impact on the subject property prior to filing a legal action.** Much of the guesswork and risk for both the public official and the private landowner can be eliminated from the "takings" arena, by establishing administrative procedures for handling "takings" claims and other landowner concerns before they go to court. These administrative procedures should require property owners to support claims by producing relevant information, including an explanation of the property owner's interest in the property, price paid or option price, terms of purchase or sale, all appraisals of the property, assessed value, tax on the property, offers to purchase, rent, income and expense statements for income-producing property, and the like.

3. **Establish an economic hardship variance and similar administrative relief provisions that allow the possibility of some legitimate economically beneficial use of the property in situations where regulations may have an extreme result.** These procedures help to avoid conflicts in the first place by allowing for early consideration of alternatives that may be satisfactory to all concerned. However, relief should be granted only upon a positive showing by the owner or applicant that there is no reasonable economic use of the property as witnessed by evidence produced as outlined in No. 2 above. Remember that the landowner has the burden of proof on hardship and "takings" issues.

4. **Take steps to prevent the subdivision of land in a way that may create economically unusable substandard or unbuildable parcels.** Subdivision controls and zoning ordinances should be carefully reviewed, and should be revised if they permit division of land into small parcels or districts that make development very difficult or impossible--for example by severing sensitive environmental areas or partial property rights (such as mineral rights) from an otherwise usable parcel. Such self-created hardships should not be permitted to develop into a "takings" claim.

5. **Make development pay its fair share, but establish a rational, equitable basis for calculating the type of any exaction, or the amount of any impact fee.** The U.S. Supreme Court has expressly approved the use of development conditions and exactions, so long as they are tied to specific needs created by a proposed development. The use of nationally accepted standards or studies of actual local government costs attributable to a project, supplemented by a determination of the actual impact of a project in certain circumstances, may help to establish the need for and appropriateness of such exactions.

6. **Avoid any government incentives, subsidies, or insurance programs that encourage development in sensitive areas such as steep slopes, floodplains, and other high-hazard areas.** Nothing in the Fifth Amendment requires a government entity to promote the maximum development of a site at the expense of the public purse or to the detriment of the public interest. Taxpayers need not subsidize unwise development. At the same time, consider complements to regulation such as incentive programs that encourage *good* development, when regulatory approaches cannot alone achieve necessary objectives without severe economic deprivation. While not a legal requirement, such programs can help take the sting out of tough, not necessary, environmental and land use controls.

[1] Of the 10 states that enacted "takings" legislation, nine enacted assessment type bills. Ariz. Rev. Stat. §§ 37-220-23 (1992); Del. Code Ann. tit § 605 (1992); Idaho Code § 67-8001 et. seq. (Supp. 1994); Ind. Code Ann. § 4-22-2-32 (Burns Supp. 1994); Missouri SB 588 & HB 10909 (1994); Tenn. Code Ann. 1-2 (1994); Utah Code Ann. § 78-34a-1 et. seq., § 63-90-1 et. seq. (1994); Wash. Rev. code § 36.70A.370 (Supp. 1993); W.Va. code § 22-1A-1 et. seq. (Supp. 1994); Miss Code Ann. § 11-46-1, 17-1-3, 17-17-1, 41-67-15, 49-2-9-, 49-2-13, 49-17-17 & 95-3-29 (1994). R. Freilich and R. Doyle, "Taking Legislation: Misguided and Dangerous," *Land Use Law & Zoning Digest*, 46, No. 10 (October 1994), pp. 3-6.

[2] APA supports active participation by professional planners in preparing data and analysis for such plans and studies and in developing the comprehensive plan and regulatory programs. APA acknowledges the important responsibility of planning professionals to conduct thorough research and analysis and to provide decision-makers with appropriate policy options supported by this data and analysis. Planners also have a responsibility to give regulatory advice based on adopted plan policies.

[3] Note that this addresses only the issue of preparation of such statements incident to the adoption of regulations or laws; the preparation of economic, environmental and social impact statements on particular projects in particular contexts is entirely appropriate.

[4] Examples include the Oregon Land Use Board of Appeals, as well as hearing examiners, mediators and other non-judicial appellate processes in several states.

[5] Where government can equally accomplish a valid public purpose through regulation or through a requirement of dedicating property, government should use the less intrusive regulation.

[6] These may include such techniques as transfers of development rights, clustering, alternative uses, and land trades.

[7] Those may include phased payments under a system of compensible regulations, fee waivers, long-term pay-outs, or other techniques that allow local governments to incur the costs of such remedies as the public benefits accrue.

[8] Christopher J. Duerksen and Richard J. Roddewig, *Takings Law Plain English*, 2nd ed. (Clarion Associates, Inc., 1994), pp. 41-43.

*The American Planning Association is a non-profit public interest and research organization representing more than 30,000 urban and rural planners, elected and appointed officials and citizens. Our members share a commitment to the use of sound planning to meet our nation's economic and community development needs, to conserve resources, and to preserve the environment.*

*For further information contact Nancy S. Willis, AICP, Director of Government Affairs, at 202-872-0611.*

1776 Massachusetts Avenue, N.W.
Washington, DC 20036
Phone: 202.872.0611
Fax: 202.872.0643

1313 E. 60th Street
Chicago, IL 60637
Phone: 312.955.9100
Fax: 312.955.8312

# American Planning Association

The American Planning Association (APA) is a non-profit public interest and research organization representing 30,000 practicing planners, elected and appointed officials, and citizens involved with urban and rural planning issues. Sixty-five percent of APA's membership are directly employed by state and local government agencies. These members are involved, on a day-to-day basis, in formulating planning policies and preparing land use regulations. APA's members share a commitment to the use of sound planning to meet our nation's economic and community development needs, to conserve resources and to preserve the environment.

APA is the result of a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials, established in 1934. The organization is composed of forty-six regional chapters and sixteen divisions of specialized planning interests. The American Institute of Certified Planners (AICP) is APA's professional and educational component. Planners wishing to belong to AICP must meet specific educational and experiential criteria and pass an examination. Certified planners may use "AICP" after their names.

## Offices/Departments

The national headquarters in Washington, DC houses AICP, government affairs, public information, advertising, and chapter, division and student service departments. The research, education, membership, publications, conference and marketing departments are located in Chicago, Illinois.

## Government Affairs

APA educates policymakers on land use planning issues. APA advocates policy changes to incorporate planning principles at all levels of government. The Government Affairs department issues *Plan/Alerts* that provide information to members on national policy and issues that affect the planning profession. Our legislative priorities include "takings," transportation, community development, affordable housing and the environment.

## Public Information

The Public Information program educates people about the importance of land use planning and the role of planners in shaping our nation's communities. It also recognizes successful planning initiatives and efforts with yearly awards to individuals and groups.

## Research

APA conducts research on a variety of topics including projects sponsored by other agencies and associations. Today, many communities rely upon outdated land use statutes that do not adequately address the problems facing our society. In response, APA is helping decision makers address these complex issues with *Growing Smart℠: A Program for Modernizing State Laws Affecting Planning and the Management of Change*. Other research projects include: Historic Preservation Plans sponsored by the National Trust for Historic Preservation; Post-Disaster Planning sponsored by the Federal Emergency Management Agency; and Standard Land Use Classification Manual sponsored by the Federal Highway Administration.

## Publications

APA publications include: Planning, a monthly magazine; Zoning News, a monthly newsletter on local land use controls; the Journal of the American Planning Association, published quarterly; Land Use Law, a monthly publication highlighting land use regulations; and Environment and Development, a monthly newsletter. Each year, APA publishes [illegible] Planning Advisory Service (PAS) reports on selected topics. All APA publications, including books from Planners [illegible] are available from the Planners' Bookstore in Chicago.

## Conferences and Seminars

Each year, APA sponsors educational conferences and seminars. The next national conference will be held April 13-17, 1996 in Orlando. Other events include the Planning & Zoning Institute's training seminars in the fall of 1995.

# Senate EPW Takings Hearing: 6/27/95

D's: Reid, Lieberman, Baucus, Graham
R's: Chafee, Faircloth, Thomas, Kempthorne
Opening Statements: Kempthorne, Lieberman, Baucus, Faircloth, Graham and a written statement from Boxer
Panel 1: John Schmidt, DOJ
Chafee questions:
JC to JS: How many states have adopted takings legislation?
JS: none, AZ considered it, but state reaction is negative and you can see this from NCSL's statement. (JS later corrected this statement, see end of his q & a period)
JC to JS: If a highway is changed from free access to off-road spots, and is made limited access to off road(gas stations), does this constitute a taking?
JS: don't know
LF: I know, this would be an exception under takings bills
Baucus questions:
MB: what about small landowners?
JS: Wetlands and ESA have adopted small landowner reforms (explains them), we are simplifying and expediting the compensation procedures at DOJ and we've instituted an alternative dispute resolution procedure at DOJ for takings claims so people don't have to go to court of claims
MB: Are the reforms you talked about reasonable reforms?
JS: yes

Kempthorne's questions:
DK: I mentioned *TEXAS* case in my opening statement where, due to ESA, the value of the landowner at issue's land was diminished in addition to him not being able to use his land. What do you think about that?
DK: There's no way to make a simple judgment without knowing the specifics.
DK: How many takings claims are in the federal government now?
JS: 160 for regulatory takings
DK: are takings assessments done?
JS: yes, by executive order, so I imagine there are a lot of them.
DK: Do you do any sort of modification of regulations to avoid a taking due to results of a tia?
JS: I don't know, but we look at financial impacts in a tia.
DK: does 5th am. require compensation?
JS: yes
DK: when does regulatory action = taking
JS: no abstract definition. The courts deal with this issue. There is no abstract answer.
DK: There isn't a role for congress to play?
JS: the courts should decide if regulatory action = a taking and Congress should look at particular statutes that may result in a taking and reform them if it wants.

Baucus: Would you include federal district courts in courts that would be well to hear takings claims?
JS: we would look at that.

Craig Thomas questions:
CT: What is the cost of all federal regualtions to the taxpayer now?
JS: don't know
CT: who pays for the regs?
JS: we all do
CT: someone is paying right now
JS: Question is when taxpayers as a whole have to pay and when individual property owners pay.
CT: Should public policy be changed because the regulatory burden has increased?
JS: the nature of regulation is such that we all have burdens imposed on us. The extent of the regulation doesn't change anything. It doesn't make it easier to say when regulatory action=taking. I didn't mean to say that there aren't any problems, what I said is that the answer is in the statutes, not in a one size fits all compensation bill.
CT: you want lawyers and judges to deal with this issue and not have Congress change public policy?
JS: Cts. Can't decide public policy, Congress can go beyond the Constitution, but where the courts say there's no taking, you all think there should be.
CT: But things aren't as they were in the time of Thomas Jefferson and we have a role to determine the change in public policy.

Chafee: things aren't like they were in the time of Jefferson, now we have toxic chemicals that we're dumping onto our neighbors' land.

Lieberman questions:
JL: I'm interested in the impact on state and locals of this issue. They're increasingly aware of these issues and seem to vote against takings compensation and call it a budget buster (NH State senator to testify later said this-sen. Russ)
I'm looking at S605 section 504 that says an agency can't enter the private property of a landowner and AG Blumenthal in CT says this may even apply to police with warrants.
JS: you're right, this bill is very broadly written so that it can be interpreted that way
JL: Section 405 says that no final rule can be promulgated if there's an uncompensated taking and Donna Shalala's letter says that this could apply to a rule requiring that mammography machines be upgraded and unless the HHS compensates someone, which could be hard for them considering their operating budget, the mammograms couldn't be updated.
JS: Those provisions seem to say that.
JS: I correct my earlier statement on how many states have adopted takings bills. A few have. I have the list.

Faircloth questions:
LF: we have lots of wetlands in NC and the CWA never mentions the word "wetlands". What is a navigable water?
JS: Water that could be navigated
Chafee: I think that in the 76 amendments we get away from navigable waters and into wetlands
LF: Do you know the case of Ocie Mills and that a federal judge said that the land in question was not even wetlands. What is fair compensation for him?
JS: I don't know the specifics of the case.
LF: How many people are litigating takings cases in the federal government?
JS: we have 20 at DOJ for ct. Claims cases, but they're not all takings and as to wetlands permits, 340 have been denied but 48,000 have been granted.
LF: Great reason to change the law (??????????????????)
JS: There are 40 cases being litigated under wetlands statute now.
LF: We should change the law so those 48,000 don't even have to ask for a permit.

Graham questions:
BG: What are the principal problems with property rights and federal statutes?
JS: the 404 program and ESA have evoked the most controversy and these issues should be dealth with in the statute as well as having DOJ simplify the procedure.
BG: so rather than a compensation bill, we should look at the individual cases and statutes. What are the major problems with 404?
JS: We need to rework the statute and eliminate the problem at its source. We're doing that with the ½ acre small landowner reform.
BG: do we need to decentralize the 404 program?
JS: it's possible, but I don't know enough about the program to say and the 48,000 may even come down with the small landowner reforms.
BG: Are you doing the decentralizing and looking at particular statutes now?
JS: yes, with REGO

Reid questions:
HR: the administration opposes this legislation. Do you recommend a change in how takings cases are implemented now?
JS: yes, simplify them and expedite the cases (alternative dispute mechanism is in the works)

Chafee: what about this alternative dispute mechanism?
JS: it's an alternative to the courts. Also, we're implementing binding arbitration and we're looking at individual statutes
HR: when will you look at the statutes?
JS: we are
JC: in S605 on p. 12 under subsection (D), it says that a taking is found if the FMV is diminished by 33% of the affected portion

of the property, so if there's 100 acres of property and only 5 acres of wetlands, you consider only the 5 acres under this bill?
JS: yes
JC: any action by the federal government then, would meet this test and the cost would be astronomical
JS: yes
JC: I support your suggestions as to the alternative dispute mechanism and the small landowner fixes. Do you recommend a special court to deal with takings claims or aren't there many?
JS: you'll need a large court to deal with the claims if you pass this bill. There aren't a lot of regulatory takings claims(160), most are ordinary takings cases.
JC: This invites all the lawyers to jump on the takings claim bandwagon, doesn't it?
JS: yes

Panel 2: Joe Sax, Roger Marzulla, Frank Michelman (Harvard) and Mr. Pilon
JS: Administrative initiatives by Babbit for ESA
(For Activities concerning listings with no impact, such activities can go forward, a residential exemption for up to 5 acres (90% of residential property in America), 4D rule, property owners can use their portion of the land if they undertake acts to save species, and the safe harbor policy)

Roger Marzulla: CWA, ESA, Sweet Home Chapter

Michelman: Oversimplified view of property rights. There's no one size fits all private property legislation.

Pilon: JS was drawing his view of the Constitution from the Soviet Constitution, not the American Constitution.

JC: does zoning = a taking?
Michelman: can't determine that
JC: if a parcel was zoned commerically, and now is switched to residential, but I want to put my gas station on it, is that a taking?
Michelman: can't determine
JC: What if the value of the parcel is greater as a gas station, than as a residential parcel
Michelman: none of this private property legislation deals with local zoning
Pilon: yes, it's a taking
JC: Should I be allowed to dump toxic waste because it may be a taking to tell me not to?
Michelman: no,unless RCRA is used to define hazardous waste as something the poses really no threat, then it is a taking because the rule is arbitrary
Pilon: you should be able to dump the waste unless it's a nuisance
Michelman: I'm not confident that the nuisance exception would cover the dumping example

Marzulla: if there are regulations to address a bona fide risk, then it's not a taking
JC: who determines what the risk is?
Marzulla: we hope the regulators do, and we can look to cases like Lucas
JC: We don't have exceptions, however, such as if there's no groundwater problem, then the law is arbitrary
BG: I thought the idea was to set a higher standard for private property than the Constitutional standard, but you lead me to believe that you're changing the Constitutional standard because you think the Courts are lagging.
Pilon: the purpose of this legislation is to help the courts get it right. The baseline threshold for a taking should be 0%
Marzulla: the court hasn't given an answer, but Congress has
BG: the Supreme Court hasn't asked the other courts to adjudicate applying a general standard, and that's not micromanaging. What if there are 2 adjoining 100 acre plots (Whiteacre and Blackacre) and 10 acres on each plot is wetlands. If Whiteacre fills their 10 acres, then all of Blackacre would be useless because it would be flooded, but if Whiteacre didn't fill their wetlands, Blackacre could use the other 90 acres. Don't we need to look at it this way?
JS: the compensation bills only look at the affected portion of the land in determining whether a taking has occurred
Marzulla: What is unlawful is the discharge of pollutants into navigable waters. *(This is dead wrong, it's the discharge of dredge or fill material into navigable waters without a permit.)* Wetlands are championed as the flooding program, but it's really not.
BG: you're wrong about that, I think.
Marzulla: the compensation bills would implement Lucas because the Courts look at only the parcel affected and in Loveladies Harbor case, they ruled that only the parcel affected need to be looked at aand JS disagrees with this.
JS: S605 is NOT implementing the supreme court's jurisprudence. We wouldn't be here otherwise! These bills radically change the rules for compensation that have been hammered out over 200 years. They would allow people to be compensated without regard to any other laws unless their conduct constitutes a nuisance and hazardous waste cases are not called a nuisance.
JC: A nuisance is a tort that has caused damage but we're dealing here with regs designed to prevent damage.
Marzulla: no
JC: who interprets what a nuisance is?
Michelman: the bills refer this issue to courts of many jurisdictions and the answers aren't uniform. It depends on what state you're in.
JC: If the baseline is zero for a taking, suppose a highway makes your property more valuable, should you pay the government?
Pilon: no, but property taxation takes care of that.

Panel 3:
Jim Little representing the National Cattlemen's Association
Mr. Martin from NAHB
Ed Thompson, Public Policy Director of American Farmland Trust
State Senator Richard Russman from NH/NCSL

Russman: these bills are a solution looking for a problem. My brother is a homebuilder and is opposed to these takings legislation

JC: Mr. Little, do you have an anecdote you could tell about unfairness to a cattleman under a federal statute?
Little: my operation is uneconomical because I need a permit to graze my lands and I can't even sell my land. The cattle have to stay back from the water
Martin: the small homebuilders can't even afford to take cases on
JC: Senator Russman's point is that such entitlements will be expensive. Do you agree?
Martin: not sure
JC: Mr. Martin, before you said that any diminution in value is a taking, but now you say the threshold should be 33%
Martin: any percentage is arbitrary
JC: yes, I agree

Kempthorne:
DK: Senator Russman, you say there's no evidence to say that private property rights are under seige, but I know a property owner in NH who lost his entire property due to federal regulations.
RR: I don't know the case, but a NH timber co. said that less than 3% of them saw problems with regulation
DK: Are you aware that their FMV of their property has been diminished?
RR: Well, we had hearings on this and nobody came before the committee and said that.
DK: so, your opinion is that takings aren't a widespread problem?
RR: yes, but there are problems
DK: How can you say that S605 creates expensive new entitlement programs and is a budget buster?
RR: Look at the federal highways act. You can't use a setback because of the regulations and now those people want compensation even though their land value has been diminished dramatically. People will be coming out of the woodword to file claims and people will conjure up ideas of wanting to do things they never really wanted to do in order to file takings claims. They will have attorneys specializing in this like personal injury lawyers.
DK: You think the people would work the system?
RR: yes, depending on the percentage threshold in the final bill.
DK: Mr. Martin, do you think state and federal personnel consider the cause of their actions?
Martin: no
DK: why?
Martin: they don't care
DK: Mr. Little, although most Americans only own the land that

their house sits on, tell us what property rights mean to a farmer?
Little: it's like owning stock
DK: do you agree that a water right isn't a property right?
Little: yes it is. Water is everything for us.

Senator Boxer's statement was submitted for the record.
JC: Mr. Thompson, your wetlands reserve suggestions were good.
Thompson: we support wetlands reserve
JC: what about inheritence tax benefits where there are encumbrances due to an easement and state taxes are reduced
Little: I think it's good.
DK: What would be the most important change in government you'd like to see?
Thompson: We'd like to see reconciliation of how we're spending, taxing, and regulating. We're doing very contradictory things right now.
Martin: clearer definitions of a wetland and endangered species
JC: Mr. Thompson, what do you think these contradictory processes are?
Thompson: the government spends money on a road, bridge, and on flood insurance, and the lot wouldn't be valuable otherwise. The government made the property valuable. Thus, the SC decision (Lucas) is a bad decision. But the state opens themselves up to a takings claim in this way.

E X E C U T I V E  O F F I C E  O F  T H E  P R E S I D E N T

05-Jul-1995 12:12pm

TO: (See Below)

FROM: Thomas C. Jensen
Council on Environmental Quality

SUBJECT: EPW Hearing

This note is to remind takings team members that there will be an in-person meeting tomorrow, Thursday, July 6, at 11:00 a.m. at the CEQ conference room to prepare for the Senate EPW takings hearing scheduled for July 12.

Several news items:

Former Senator Paul Tsongas will testify.

Director Rivlin is to receive an invitation to testify.

The Administration witness list has been cut by 50%. The survivors are Gary Guzy and Mike Davis. Neither Lois Schiffer nor Dan Beard will testify.

Finally, for those of you who are receiving this message via fax, please send me your e-mail addresses via e-mail.

Thanks.

Distribution:

TO: Thomas C. Jensen
TO: Dinah Bear
TO: Michael L. Goad
TO: Carol R. Dennis
TO: Ronald K. Peterson
TO: Marvin Krislov
TO: FAX (92608046,Gary Guzy)
TO: FAX (95140557,Bess Osenbaugh)
TO: FAX (95140557,Jim Simon)
TO: FAX (95145499,Jill Gibson)
TO: FAX (97610270,Lance Wood)
TO: FAX (56853,Mike Toman)
TO: FAX (97205437,Eric Olson)
TO: FAX (92085584,Ed Cohen)

TO: FAX (97036934507,Jim VanNess)
TO: FAX (92087508,Joe Sax)
TO: FAX (97615096,Mike Davis)
TO: FAX (93953744,Tom Jensen)
TO: Sally Katzen
TO: Martha Foley
TO: Tracey E. Thornton
TO: Kathleen A. McGinty
TO: vannessj@OSDGC.OSD.MIL@INET@EOPMRX

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

# OFFICE OF CONGRESSIONAL & LEGISLATIVE AFFAIRS
# LEGISLATIVE ANALYSIS DIVISION

*THIS MESSAGE IS ELECTRONICALLY TRANSMITTED ON A 3M-9175 OR A CANON FAX-705 TELECOPIER*

*Transmission Number:* *(202) 260-0516*
*(202) 260-5185*

*Verification Number:* *(202) 260-5414*

OPTIONAL FORM 99 (7-90)

**FAX TRANSMITTAL** # of pages ▶

| | |
|---|---|
| To Ursula Doyle | From |
| Dept./Agency | Phone # |
| Fax # 456-1647 | Fax # |

NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION

TO:

FROM: Louise Cohen / Gary Guzy

SUBJECT/COMMENTS: Attached is a piece on effects of S605 that Gary has been working on. It may be helpful for tomorrow's hearing.

Number of Pages To Follow: 20 DATE: 6/26 TIME: 2:15

*MAIL CODE 1303, West Tower 811*

Printed on Recycled Paper

## S. 605 "Omnibus Property Rights Act of 1995" WILL SIGNIFICANTLY JEOPARDIZE FUNDAMENTAL PUBLIC HEALTH AND ENVIRONMENTAL PROTECTIONS

S. 605 WILL UNDERMINE:

* PUBLIC HEALTH AND ENVIRONMENTAL PROTECTIONS THROUGH A RADICAL FORMULA FOR AUTOMATIC COMPENSATION AND AN UNPRECEDENTED DEFINITION OF PROTECTED PROPERTY THAT WILL MAKE THE TAXPAYER GUARANTEE BUSINESS PROFITS;

* OUR CONSTITUTION'S BALANCE BETWEEN INDIVIDUAL RIGHTS AND RESPECT FOR COMMUNITY VALUES BY REPLACING THE CONSTITUTIONAL STANDARD WITH AN UNBALANCED AUTOMATIC 'LOSS OF VALUE' TEST;

* THE ABILITY OF STATES TO BE EFFECTIVE PARTNERS IN ENVIRONMENTAL PROTECTION BY MAKING THE FEDERAL GOVERNMENT LIABLE FOR STATE ACTIONS;

* THE CAREFUL BALANCE OF EACH ENVIRONMENTAL STATUTE AND REGULATIONS BY CREATING A PRIVATE PROPERTY "SUPERMANDATE" AND "LOOKBACK";

* THE ABILITY TO EFFECTIVELY ENFORCE AGAINST VIOLATIONS BY RESTRICTIONS ON DATA COLLECTION AND OFFERING A WETLANDS STAY UPON REQUEST;

* THE 'POLLUTER PAYS' PRINCIPLE OF ENVIRONMENTAL LAW BY LIMITING THE EXCEPTION TO COMPENSATION TO NARROW STATE NUISANCE LAWS;

* CERTAINTY FOR THE REGULATED COMMUNITY BY CREATING A POTENTIAL JUMBLE OF CONFLICTING COURT JURISDICTIONS AND STATUTES OF LIMITATIONS;

* INCENTIVES FOR INNOVATIVE SOLUTIONS HARMONIZING ECONOMIC DEVELOPMENT AND HEALTH AND ENVIRONMENTAL PROTECTION BY ENCOURAGING PERMIT DENIALS AND THE FILING OF EXTREME COMPENSATION CLAIMS;

* GOVERNMENT'S ABILITY TO ASSIST PROPERTY OWNERS BY NOT CREDITING THE SUBSTANTIAL BENEFITS GAINED BY GOVERNMENT REGULATORY ACTIVITIES; AND

* MEANINGFUL WETLANDS REFORMS THAT ENSURE PRIVATE PROPERTY OWNERS THE FAIR USE OF THEIR PROPERTY WHILE STILL PROTECTING THE ENVIRONMENT.

6/26/95

## S. 605 "Omnibus Property Rights Act of 1995" Impact of Provisions for Funding Compensation

**Summary:** The costs of providing compensation under the bill's extremely generous formula will cost taxpayers billions, drain EPA program budgets and significantly reduce EPA's ability to perform its mission of environmental protection.

**Analysis:** S. 605 mandates compensation far beyond what the Fifth Amendment provides, and further requires that such compensation be paid "out of currently available appropriations supporting the activities giving rise to the claims for compensation." Section 204(f). Because the bill identifies no source of funding for the costs of establishing and implementing a compensation program, those costs would likely come from the Agency's operating budget.

With claims payable out of the budgets of the affected programs, a large number of claims--or a few large claims--against a particular program could threaten the operation of that program. Thus if the Clean Water Act Section 404 program exhausted its appropriation paying compensation claims, it would be forced to suspend operations. This would mean that no permits could be issued under that program, which would effectively freeze all use of wetland property.

Proponents assume S. 605 will cut down regulation because regulators will feel the economic pain of paying claims. If this does occur, the Agency will effectively be compromising environmental protection for the entire public, in order to reduce regulation of the property of a few property owners.

In many cases cutting back on regulation may not be a realistic option for the Agency because the environmental consequences of such cutbacks would be intolerable and because Congressional mandates may compel the Agency to act, and leave it without the discretion to refrain from acting.

Finally, EPA attempts to cut back on regulation may be subject to judicial challenge by citizens who believe the reduced regulation does not satisfy the Agency's legal obligations.

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

# S. 605 "Omnibus Property Rights Act of 1995" Impact of Formula for Compensation

**Summary:** S. 605 compensates property owners beyond what the Fifth Amendment provides, with a radical formula that will cost taxpayers billions, with compensation going to property owners who meet a mathematical formula, without consideration of whether compensation is fair to the public or the property owner.

**Analysis:** S. 605 provides compensation when government action diminishes the fair market value of the "affected portion" of a property by 33%. Section 204(a)(1)(D). This is far more liberal than the Constitutional standard, which precludes compensation for "mere diminution in value," and assesses impact on property as a whole, not on each affected portion.

The bill's most radical departure from the Constitution is in providing compensation solely on the basis of the economic impact of the regulatory action, without allowing consideration of the fairness of compensation. When the bill's mathematical criteria are met, compensation must be paid, regardless of the price the owner paid for a property, the expectations the owner had when acquiring the property, or whether the owner is able to earn a reasonable rate of return on the property. This could require EPA to spend huge sums for compensation, regardless of whether or not compensation is fair to the property owner or the public. It could even compensate some property owners who continue using their property as they always have, for example for agriculture, while claiming compensation for regulation that prevents them from making some other use, such as commercial development.

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

This radical and unprecedented approach will have far-reaching impacts. Regulation that prohibits the use of a portion of property, for example by a setback requirement, is widely used and almost universally accepted as fair to both the public and property owners. Although this bill would generally require compensation only for federal regulation, it could serve as a model for state legislation. If similar laws were enacted on the local level, compensation could be required for much modern property regulation, including zoning and setback requirements.

## S. 605 "Omnibus Property Rights Act of 1995"
## Impact of Broad Definitions of Property and Other Terms

**Summary:** The breadth of the bill's definitions threatens to create expansive federal liability for the effects of all of EPA's regulatory programs, whether or not they affect use of land. In addition, the bill's definitions are so broad and ambiguous they will create enormous uncertainty, possibly creating virtually limitless liability and certainly encouraging property owners to advance a broad array of compensation claims, including claims for arguable losses of business profits.

**Analysis:** The bill defines property very expansively to encompass almost any imaginable type of "real property," as well as almost anything else to which anyone might assign value, including many interests the Constitution would not protect. Section 203(5). The bill would require compensation for virtually any loss in value--to land, to an enterprise or business, or to a specific product, such as a pesticide, and would extend to virtually every EPA regulatory activity, not just those addressing land use.

The bill's definition of property is virtually limitless. It extends both to "all property protected under the fifth amendment," and to other interests as well. Section 203(5). It includes virtually "any interest understood to be property" by virtually anyone, and opens the possibility that private parties can create or define property by forming "understandings," by invoking "custom" or "usage," or, in some cases, by entering "contracts." Sections 203(5)(D),(F).

This could mean that where permits are typically renewed, a property owner might invoke "custom" to claim a property interest in a renewal; where an activity has been tolerated in the past, owners might invoke "usage" to demand compensation for future restrictions on the activity; where two parties wish to preclude the government from regulating a particular use of property, they could form a contract that required engaging in that use, and then claim that any restriction on the use "takes" rights created by the contract. Even if such claims are ultimately rejected by the courts, the bill's vague and open-ended definition of property will create chaos and confusion in the meantime.

Finally, in addition to its radical and virtually unlimited definition of "property," the bill also would pay property owners for economic impacts that have never been protected by the Fifth Amendment. Specifically, the bill could provide owners with compensation when they suffer "business losses." Section 203(3). It is difficult to assess the impact or define the practical limits of the unprecedented suggestion that it is somehow the job of the government to insure against "business losses."

## S. 605 "Omnibus Property Rights Act of 1995" Impact on State/Federal Relationship

**Summary:** S. 605 will fundamentally and adversely alter the relationship between the federal and State governments in the implementation of federal and state environmental programs. Because the federal government will become liable for State "taking" actions under authorized or funded programs, these programs may be rescinded or subject to intense federal oversight. This will undermine decades of building successful partnerships between the federal and state governments in administering environmental programs.

**Analysis:** Section 204(a) of S. 605 provides compensation to owners or possessors of "property" interests (broadly defined in the Act) where there has been, among other things, government action which diminishes the value of some portion of the property by 33% or more. The government action that triggers this compensation is action by a federal agency, or by a State agency that: carries out or enforces a program required under federal law; is delegated administrative or substantive responsibility under a federal program, or receives federal funding to implement a state regulatory program. Section 204(a)(1); Section 203(6). Under Section 204(b), the State agency itself would not be required to pay compensation. As a result, the federal government will be liable to property owners or possessors not only when a federal agency takes an action which diminishes some property value, but also when a State agency diminishes such value in implementing a federal or federally-funded program.

The impact of this liability scheme will be devastating to State/federal relationships in implementing federal and state environmental programs. Currently, in large part, State agencies administer the major environmental programs, including the Clean Water Act, the Clean Air Act, and RCRA. Consistent with the express intent of Congress in enacting these laws, EPA has developed strong partnerships with State governments and has, over time, delegated much of the day-to-day permitting, enforcement, inspection, and regulatory actions under these statutes to the States. The States also receive federal grants to administer these federal environmental programs and to develop state environmental programs.

However, under S. 605, EPA could no longer leave the basic administration of federal environmental laws to the States, since these day-to-day State actions are likely to diminish "property" values, as defined by this bill, and thus could create enormous financial liability for the federal government. Nor will EPA be able to provide federal funding to States to develop state environmental programs. Rather, to avoid federal liability for state actions, EPA would need to either withdraw authorization and funding of States to implement these laws or subject each State action to intense scrutiny. Since intrusive oversight is likely to be impractical for EPA and unacceptable to State

program managers, withdrawal of funding and delegation is more likely.

Withdrawal of delegation will lead to confusion and complexity in administration of these programs---for example, regulated parties will again be subject to the requirements of both federal and State law. Withdrawal of funding may create new "unfunded mandates" for State governments and may cripple developing state environmental programs.

## S. 605 "Omnibus Property Rights Act of 1995" Impact of "Supermandate" Provision

**Summary:** The "supermandate" provision under S. 605 will, at a minimum, seriously disrupt EPA's ability to promulgate rules necessary to protect public health and the environment in the near-term. This provision may also block any future regulation.

**Analysis:** Section 404(a) of S. 605 prohibits EPA from promulgating any rule which might require an "uncompensated taking" as defined by the Act. It is unclear what this provision means since the Act itself provides for compensation for "takings" as defined under the Act. Unless the provision is meaningless, it may prohibit "takings" under the Act which exceed an agency's appropriation, or it may prohibit agency actions which might trigger compensation under the Act. There is also an unrelated "supermandate" in Section 503(a)(2) for the Clean Water Act 404 program, requiring EPA to administer the program in a manner that has the "least impact" on property owners' rights.

At a minimum, these provisions will create enormous chaos for the regulatory development process while EPA waits for the courts to resolve what they mean and how these mandates relate to existing mandates under the environmental statutes. As a result, much-needed rules to protect human health and the environment would be halted, since most nationwide environmental protection rules are likely to diminish the value of someone's "property" as defined under the Act. This would include pending rules to upgrade the requirements for hazardous waste incinerators and rules to prevent deaths and illnesses from contaminated drinking water.

Moreover, this disruption would likely affect rules that are intended to streamline the environmental programs and reduce regulatory burdens. Rules designed to reduce regulatory burdens may also diminish the value of someone's "property" as defined under the Act; for example, a rule which redefines "hazardous waste" to avoid overregulating low toxicity waste could result in less waste being sent to hazardous waste incinerators and thus would reduce their revenues. Similarly, a failure by EPA to take action under CWA Section 404 to protect wetlands, in order to avoid a "taking" of property, could result in flooding of other property and a diminishment of the property value of other landowners. As a result, the regulatory process, both to enact necessary new rules protecting the public and to revise existing rules to provide more flexibility and eliminate unnecessary regulatory burdens, would be stymied.

If these provisions are ultimately interpreted to supersede existing statutory mandates, then this bill replaces wholesale the mandates to protect public health and the environment under current environmental laws with a mandate to reduce or eliminate impacts on "property" owners.

## S. 605 "Omnibus Property Rights Act of 1995" Impact of "Lookback" Provision

**Summary:** The review of existing regulations required under S. 605 will create chaos in administering federal and state environmental programs and undermine important and longstanding environmental protections.

**Analysis:** Section 404(b)(1) of S. 605 requires that EPA review existing rules "that result in takings" as defined under the Act, and repromulgate those rules in a manner which reduces such takings to the maximum extent possible within statutory requirements. The impact of this provision is uncertain since the bill is unclear about what the baseline for measuring the property value diminishment is. For example, if the baseline is the date of enactment of the bill, there would be no "takings" as a result of existing rules, only new ones. However, as with many provisions of this bill, the ambiguity in the provision will lead to years of litigation and uncertainty in what it means.

Assuming the courts interpret the provision to require a review and repromulgation of existing rules, all of EPA's environmental programs would be thrown into disarray. There are very few nationwide environmental rulemakings which do not have impacts which both create "property" value, as defined under the Act, and diminish it. As a result, EPA would need to review and repromulgate many of its rules, including those that are longstanding and noncontroversial. EPA would also need to revise those rules to reduce "takings" as defined under the Act to the maximum extent possible, meaning that these rules would need to be altered to reduce any "property" impact, even if the resulting rule were less effective, difficult to implement, or opposed by the State and local governments that administer it.

This review and repromulgation of hundreds of existing rules would not only cause enormous disruption with respect to the federal programs but would cause similar disruption at the state level. Many state environmental programs are based on the federal rules or incorporate the federal rules by reference. Further, while the federal and state laws are changing, the permits and enforcement actions based on those laws must also be withdrawn or modified. As a result, there would be considerable confusion and uncertainty for regulators and regulated parties over environmental obligations, and a concurrent rise in transaction costs, for many years. The resulting rules and permits may be far less effective in protecting health and the environment, since the principal focus of the repromulgations will be to reduce property impacts rather than to protect health or the environment.

## S. 605 "Omnibus Property Rights Act of 1995" Impact of Data Collection Restrictions

**Summary:** The property entry restrictions in S. 605 seriously undermine EPA's ability to investigate criminal activity and other violations of environmental laws that could endanger the public.

**Analysis:** Section 504 of S. 605 prohibits EPA from entering private property to collect information regarding the property without the consent of the property owner. Section 505 prohibits EPA from using this data to implement Section 404 of the Clean Water Act unless the property owner has had an opportunity to review and dispute it. These provisions are completely unnecessary since existing law protects property owners from unwarranted property entry. Moreover, since Section 504 is not limited to the Clean Water Act, these provisions will jeopardize implementation not only of the 404 program, but all agency regulatory programs.

Existing environmental laws provide EPA with authority to enter private property to collect information under certain conditions. See, e.g., Section 308 of the Clean Water Act, Section 3007 of RCRA, and Section 104(e) of CERCLA. These authorities are necessary for EPA to administer and enforce the laws. For example, Section 104(e) of CERCLA provides authority for EPA to enter property in order to assess and respond to a chemical emergency. Access to private property is also provided by warrants, issued by judicial officers upon a showing of probable cause that a violation has occurred or is occurring on the property. These laws and State trespass laws provide ample protection of private property against improper entry by federal officials, while balancing the need to protect the public.

Section 504 would seriously jeopardize EPA's ability to take necessary action to protect the public from criminal or other activity affecting the environment that takes place on private property. Property owners could withhold consent to entry, thus preventing EPA from responding to chemical spills, assessing hazards from air or water pollution, or investigating sources of groundwater contamination no matter how harmful or criminal the activity. EPA would be hampered in collecting the evidence necessary to prosecute persons for criminal activities or determine the appropriate response to a hazardous substance release. EPA would also be unable to gather information necessary to establish regulatory requirements or to issue a permit for an activity on the property. (In the latter case, the resulting permit denial may then entitle the non-consenting owner to compensation for "property" value diminution under the Act!)

Effective enforcement of Section 404 of the Clean Water Act would be further undermined by Section 505 which requires owners to have access to information collected on their property, even if that information is part of a criminal investigation.

## S. 605 "Omnibus Property Rights Act of 1995" Impact of Stay Requirement

**Summary:** S. 605 requires that EPA stay government action to protect wetlands where the owner of the affected property requests compensation, regardless of the merits of the claim, the danger to other persons or public water supplies as a result of the owner's activities, or the lack of harm to the owner.

**Analysis:** Section 508 of S. 605 provides a compensation mechanism for "property" owners who suffer a diminution in property value as a result of the implementation of the CWA Section 404 program. If an owner submits a request for compensation under Section 508, EPA must stay the 404 action and offer to purchase the property or compensate the owner. Whether the compensation offer is accepted or not, there is no provision for lifting the stay of the 404 action.

The stay requirement in Section 508 is completely unnecessary and jeopardizes administration of the 404 program. The stay is unnecessary because Section 508 provides full compensation to the property owner affected by a 404 action. Section 508 also mandates prompt agency action on a request for compensation, so there is already protection against delay.

The stay requirement seriously undermines administration of the program because it prevents EPA from acting to prevent serious harms if the property owner has requested compensation. Thus, a property owner who requests compensation because of an order requiring the owner to cease illegal dumping into a wetland would be allowed to continue illegal dumping while the request for compensation (yes, compensation for refraining from illegal dumping!) is pending. This leaves EPA powerless to prevent continued illegal, even criminal, activity, even where such activity could have serious consequences for flood control, the public water supplies of downstream users, and wildlife.

Under long-standing case law, both administrative and judicial, a "stay" is warranted only where the harm to the affected individual is severe or irreversible, the stay would advance the public interest, and there are no countervailing interests that would be harmed by the stay. The stay requirement provided under Section 508 allows none of these considerations, and thus enables property owners to obtain a stay by simply making a compensation claim, without any consideration of fairness or harm to others.

## S. 605 "Omnibus Property Rights Act of 1996" Impact of Nuisance Exemption

**Summary:** The narrow nuisance exemption in S. 605 will not allow for adequate protection of human health, public safety, the environment, and other vital concerns. Instead, in many cases it will force the federal government to pay polluters not to pollute, thereby undermining effective environmental protection.

**Analysis:** Under S. 605, compensation is required for government regulation of any property use unless that use would constitute "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." Section 204(d)(1). This sounds like a simple, straightforward way of avoiding compensating persons engaging in activity that is harmful or socially unacceptable. However, in practice a nuisance exception will not protect the government from having to pay to regulate many types of harmful conduct.

The most serious problem with a nuisance standard is that nuisance law does not address all harmful activities, but typically applies only to actions that cause demonstrable immediate harm to specific property. Thus it may not reach actions whose health and safety risks are long-term, as is often the case with discharges of pollution into air, land, or water. Similarly, it may not cover actions whose principal threats to health and safety are cumulative, as where an individual use of a pesticide or discharge of a pollutant does not, by itself, cause significant harm, but the frequent repetition of the action has serious consequences.

For example, courts have rejected state nuisance claims based on leaking landfills or underground storage tanks and on activities on one property that caused flooding on a neighboring property. Indeed one of the main reasons federal environmental laws were enacted was to address problems that could not be adequately addressed under state nuisance law.

Similarly, nuisance law may not fully protect those who might be particularly sensitive to the harmful health effects of pollution, including children and senior citizens. Finally, some critical public safety activities, such as nuclear power or interstate pollution, are governed solely by federal law, and thus would not be covered by a state nuisance law exemption.

In addition, nuisance law is notoriously uncertain; far from establishing a bright-line standard, a nuisance test will make it more difficult for both regulators and property owners to determine what actions can be regulated without compensation. Finally, since nuisance law varies from state to state, a state nuisance exemption could lead to major differences in how federal laws are implemented from one state to another.

**S. 605 "Omnibus Property Rights Act of 1995**
**Impact of Altering Court Jurisdiction over**
**Property Issues**

**Summary:** S. 605 will allow an administrative body to invalidate acts of Congress, and will require judges on that body to address questions about which they have little expertise. It has the potential to create chaos in federal litigation regarding property rights by allowing litigants to forum shop to attempt to have their claims regarding property heard in a favorable arena.

**Analysis:** Under existing law, federal courts have exclusive authority to review and invalidate agency decisions but cannot award more than $10,000 as just compensation for a taking. Conversely, the Court of Federal Claims (CFC), an administrative body established by Congress to resolve certain monetary claims against the United States, can award just compensation exceeding $10,000, but cannot review regulatory decisions. This bill would allow a plaintiff to challenge the regulatory decision or seek just compensation in either court. This ill-considered approach may create more problems than it solves.

The Court of Federal Claims is not a court established under Article III of the Constitution, which addresses judicial power, but an administrative body created under Article I. Its judges serve for limited terms, without life tenure, and have been selected and confirmed for their expertise regarding the specialized issues the court was created to address.

This bill would give the CFC, for the first time, the authority to invalidate Acts of Congress and actions by regulatory agencies, and would greatly expand what is currently its very limited authority to grant injunctive and declaratory relief. It is difficult to predict the many consequences of such a radical expansion of the authority of a legislative court.

At a minimum, this change would significantly expand the workload of the CFC and force its judges to confront questions on which they have little expertise. This could further increase the time it takes the CFC to resolve takings claims; already it sometimes takes as long as two years from the date of a trial to the date the court enters judgment on a taking claim.

Giving two different types of courts concurrent jurisdiction over the same questions could make it harder to avoid duplicative litigation. It also would allow opportunistic litigants to forum shop, electing to pursue their claims in the arena they believe most likely to render a favorable decision.

**S. 605 "Omnibus Property Rights Act of 1995**
**Impact of Litigation to Review Taking Analysis**

**Summary:** S. 605 would create a new type of complex and time-consuming litigation to challenge virtually any agency action, even actions that would otherwise be final. This would cause substantial uncertainty and disruption.

**Analysis:** S. 605 would require detailed analyses of takings impacts and then allow litigation to enforce these at any time within six years of the challenged action. Section 406. This may fundamentally alter carefully tailored established "preclusive review" provisions in many environmental statutes.

For example, under the Resource Conservation and Recovery Act, any challenge to a final rulemaking must be filed in the Court of Appeals for the D.C. Circuit within 90 days of the publication of the final rule. 42 U.S.C. Section 6976. After that time, the legality of the rule cannot be challenged. Such provisions ensure that challenges to these regulations are heard swiftly, providing certainty to both regulators and regulated entities, including the State agencies that adopt the federal regulations over time. S. 605 could be interpreted to extend to six years the time for challenging an agency action.

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

Despite its potential disruptive effects, a challenge to agency compliance with S. 605 would not even address the merits of the rule. Instead, it would focus solely on any of a broad range of issues relating to a property analysis: its legal or factual accuracy, its consideration of alternatives to the proposed action, or the agency's compliance with the bill's reporting and public notification requirements.

In addition, because takings determinations are fact-specific, a judicial determination of the adequacy of a takings analysis could require litigation nearly as complex, fact-intensive and burdensome as takings litigation. However, this complex litigation would resolve only the very narrow legal question of whether an agency had complied with the bill's procedural requirements; it would not eliminate the need for a separate action to obtain just compensation for a taking.

This new assessment litigation would entail an enormous waste of resources, crowding the courts and diverting Agency resources from protecting the environment to creating assessment and litigation bureaucracies.

# S. 605 "Omnibus Property Rights Act of 1995" Impact on Cooperative Solutions to Environmental Challenges

**Summary:** The bill will create perverse incentives that discourage cooperation between property owners and regulators to find ways of allowing development while protecting the environment. It guarantees compensation for projects that violate regulatory requirements, while doing nothing to encourage innovative projects that comply with regulations.

**Analysis:** S. 605 provides compensation when government action leads to a 33 percent reduction in any portion of a property's value. This gives owners a strong incentive to maximize the impact of regulatory restrictions (to increase compensation claims) but no incentive to reduce the effects of regulation or find ways to modify a project so that it can proceed without violating regulations.

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

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

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

**S. 605 "Omnibus Property Rights Act of 1995"**
**Impact of One-Sided View of Effects of Regulation**

**Summary:** S. 605 is unfair to taxpayers because it ignores the role of regulation in creating and protecting property value. It forces the taxpaying public to compensate property owners when regulation reduces value but does nothing to assure the public a share of the benefits when regulation increases property value.

**Analysis:** Governmental action enhances and protects property value in a wide variety of ways. By providing infrastructure and protecting public order, human health, and the quality of the environment, government makes orderly economic activity and growth possible. In order to produce these benefits, government must also impose some burdens on its citizens, in the form of taxes and regulations.

In recognition of this, Americans have traditionally accepted the fact that not all citizens receive burdens and benefits in equal measure.

Specifically, society does not impose any upper limits on the value of the benefits an individual can derive from government action. However, compensation bills limit the burdens of government action on any individual, effectively creating a "heads I win, tails you lose" situation.

Moreover, compensation bills effectively force the government, that is, the taxpayers, either to pay property owners for following the law or to refrain from enforcing the law. This will inevitably erode government's ability to use its regulatory authority to protect and enhance property values for all property owners.

**THE OMNIBUS PROPERTY RIGHTS ACT'S APPROACH TO PRIVATE PROPERTY RIGHTS AND WETLANDS IS DESTRUCTIVE AND NOT JUSTIFIED**

The private property rights legislation embodied in S. 605 would replace our carefully balanced Constitutional system -- which has worked well for 200 years -- with simplistic slogans that would be damaging and are not justified.

Wetlands Protections Are Working Fairly

One of the primary motives for this legislation appears to be anecdotal evidence of the problems facing landowners under the Clean Water Act's wetlands laws. Yet our nation's wetlands protections are ones that have worked for the vast majority of Americans. They have worked because they provide critical protections that all property owners need -- such as preventing flooding and cleansing pollution -- at the same time as the vast majority of property owners with wetlands have been able to use their property as they see fit.

The wetlands program is a good model of the economy and environmental protection working hand-in-hand. In fact, of the approximately 50,000 requests to fill in wetlands received by the federal government last year, most people heard back within days, and the answer was they could do what they desired with their property. Only 0.7% of those requests were denied.

Wetlands Reform Is Well Underway

That is not to say that the wetlands programs always works as well as it should -- it has at times frustrated small landowners, farmers, and ranchers. The Clinton Administration is reinventing the way it does its regulatory work by ensuring that what it does makes good sense, and that it is done in a fair and efficient way. It has already taken extraordinary steps to reform the wetlands program. Nearly two years ago, the Administration - after intensive consultations with landowners, industry, states, tribes, scientists, environmentalists, and several federal agencies -- instituted significant changes. Among those implemented or now actively under way are:

* creating opportunities for small landowners to be exempted from permitting requirements, through general permits for certain homebuilding and expansion;
* requiring that most permit decisions get completed within 90 days;
* developing an administrative appeals process for permit denials, to create a ready means to challenge agency decisions without having to incur the time or expense of going to court;
* applying the best science to wetlands determinations, by asking the National Academy of Sciences to study them;

* fostering non-regulatory alternatives, by expanding the wetlands Conservation Reserve Program to all 50 states;
* tailoring permitting requirements to health and environmental significance, by recognizing that not all wetlands are equal.

These reforms have produced real change ensuring that environmental protections provided by wetlands critical to all property owners can be preserved without unduly burdening any one individual.

S. 605 Sweeps Aside The Constitution

Despite there not being a real problem, the approach embodied in S. 605 would thoughtlessly and needlessly sweep aside the genius of America's Constitutional system. That system retains a careful balance between the many facts that need to be considered in determining whether compensation for the government's wetlands permitting decisions is appropriate. For example, considerations of fair expectations -- such as whether someone was aware of wetlands restrictions when they purchased property and whether they paid a diminished price as a result -- are crucial to consider. Likewise, so is whether government action imparted value to the property in the first place, as is the harm someone's proposed use may cause to others. The automatic compensation proposal in S. 605 would sweep aside these considerations and fundamentally change the long-standing constitutional standard.

The one-size-fits-all approach of this legislation could make it impossible to provide the critical protections the American people demand and deserve. Instead of preserving property values for all owners, under S. 605, the government would not be able to carry out its statutory mandates of public health and environmental protection without having to pay private property owners for claimed losses in value.

Indeed, the unintended consequences of this bill could be vast. Nearly all things the government does affect property values. S. 605 will be a budget-buster and will create a tremendous new claims bureaucracy and gridlock through unrestrained judicial review.

There Are Other Approaches That Would Create Real Reform

Just compensation must be provided where a true taking has occurred. Congress should explore changes that allow for easier claims and perfect access to the process for compensation in order to provide real and meaningful change. However, simply sweeping away the underlying long-standing Constitutional standard for compensation -- without analysis -- elevates simplistic slogans to unworkable public policy and threatens the protections all property owners need.

## EXAMPLES OF ADVERSE HEALTH AND ENVIRONMENTAL IMPACTS CREATED BY S. 605

* **Taxpayers may have to pay staggering sums to the owners of thousands of industrial sites not to emit damaging air pollutants.**

Under Title I of the Clear Air Act Amendments of 1990, major new sources of air pollution are required to obtain "offsets" -- which are reductions of pollution they can purchase from other sources -- in order to locate in areas not meeting air quality standards. Thousands of industrial site owners nationwide could argue that this restriction decreases the marketability and use of industrial property and works a compensable taking under S. 605.

This restriction would be unlikely to qualify for a traditional state law nuisance exception under S. 605, because the Clean Air Act is concerned with the collective impact of emissions from all sources -- including industrial facilities, cars, and trucks, for example -- as well as the long-term health effects of ambient pollution levels. And site owners would likely claim that they expected to site some of the most heavily polluting facilities imaginable in order to claim the most compensation.

* **EPA's accreditation, training, and notice requirements for lead and asbestos removal could lead to claims by businesses and sellers for lost profits resulting from their increased costs or affects on marketability.**

EPA requires training and accreditation of workers who remove or abate lead and asbestos hazards from homes, schools, and public buildings. Businesses could argue that the increased cost of worker training and more costly removal processes lead to reductions in their profits that should be paid for by taxpayers. EPA also is implementing statutory requirements for disclosure of lead-based paint hazards in properties offered for sale or lease. Landlords or sellers may claim that such disclosure greatly reduces the value of their property and should be paid by EPA. EPA's activities are vital to the protection of public health, especially children who are sensitive to these hazards.

* **EPA's reductions in utility sulfur dioxide allowances to control acid rain may give rise to claims from high sulfur coal owners for reduction in value of their mines.**

In order to control damaging acid rain, EPA requires "allowances" of sulfur dioxide emissions. EPA will reduce

these allowances over time. Owners of high sulfur coal mines may argue that these rules greatly decrease the value of their investments. It is uncertain whether S. 605 is narrowly enough drawn to restrict liability to those property owners who are the intended subject of regulatory actions.

* **Thousands of farmers and ranchers could argue that restrictions on pesticide, rodenticide, and fungicide use limits their property values.**

EPA imposes critical restrictions on uses of pesticides and other products through the Federal Insecticide, Fungicide, and Rodenticide Act. These restrictions either place outright bans on products -- such as for the well-known DDT -- or impose procedures on the rate or method of application. Any of EPA's actions in this regard may adversely affect property values at thousands of farms and ranches throughout the country. These restrictions may be compensable under S. 605.

* **Common-sense solutions to environmental problems may turn out to require large cash payments by taxpayers to make them stick.**

S. 605 would make EPA have to pay not only for decisions denying permits, but for reasonable conditions placed upon permits that are designed to allow activities to go forward consistent with protecting the environment. Applicants may be unwilling to accept permit conditions and would have every incentive to insist on outright permit denial -- knowing that they could be compensated for any losses they may argue they sustain as a result.

State and local governments and the federal government have successfully reached accommodations between activities such as farming or real estate development and the environment by requiring "best management practices" to prevent the runoff of soils and damaging nutrients into our valuable waterways, such as the Chesapeake Bay or the Everglades. Yet these reasonable restrictions -- incorporated via permit conditions -- may limit a landowner from extracting every last dollar of profit from its property and thus entitle already highly profitable businesses, such as gigantic corporate farms or large-scale land developers, to payment for any decreased business value. Thus, common-sense solutions that allow the economy and the environment to both win may well give way to adversarial contests because of the likelihood of compensation.

* **EPA's efforts to clean up toxic waste dumps could be hamstrung.**

EPA and private parties are actively cleaning up thousands of toxic waste dumps across the country under the Superfund (Comprehensive Environmental Response, Compensation, and Liability Act) and the Resource Conservation and Recovery Act's "corrective action" authority. Many landowners may argue that the mere presence of federal investigators attempting to ascertain whether a site is contaminated is enough to cast a pall over their property that reduces its value, thereby preventing federal site investigations without tremendous financial payouts. Without being able to conduct site investigations, EPA's ability to protect the public health and the environment would be greatly diminished. And controls on hazardous waste facilities that place limits on how and where disposal may occur could also be argued to reduce the value of such facilities.

**Oversight hearings on proposals to supplement the legal framework for private property interests to Federal environmental laws**
**DRAFT #4**

Proposed Hearing #1 -- Full EPW Committee
**Date:** June 27, 1995
**Topics:** (1) Position of Administration on private property legislation; (2) Baseline -- overview of (a) implementation of environmental laws on private property, (b) administrative initiatives to analyze and mitigate effects of laws on private property, and (c) currently available remedies, in particular Just Compensation Clause of Fifth Amendment; and (3) views from and experiences of States on private property legislation
**Senators who have requested to testify:**
Sen. Hatch

**Witnesses:**
Panel One -- Views of the Administration
John R. Schmidt -- AAG, DOJ

Panel Two -- Baseline
Joseph Sax -- Counsel to Secretary of the Interior
Roger Marzulla -- former AAG, ENRD
Frank Michelman -- Harvard Law Professor
Jonathan Adler -- Competitive Enterprise Institute

Panel Three -- Views of affected interests
Edward Thompson, Jr. -- Dir. of Public Policy, American Farmland Trust
Jim Little -- National Cattlemen's Ass'n 347-0228
or Jon Doggett -- American Farm Bureau Fed'n 484-3619
Jim Ervin -- President, National Homebuilders Ass'n
Councilwoman Janice Lowe -- Friendswood, TX/NLC
or Councilman -- Pullman, Washington/NLC
or Rep. Richard Russman -- NH/NCSL
Samuel Pryor -- Pres., Appalachian Mountain Club
or American Public Health Association 789-5600

Proposed Hearing #2 -- Full EPW Committee
**Date:** July 12, 1995
**Topic:** Proposals for new statutory compensation remedy
**Witnesses:**
Panel One -- Potential budgetary impacts
Paul Tsongas -- former Senator (D-Mass.)
Billy Tauzin -- Representative (D-La.)

Panel Two -- Effects on Federal environmental programs (fiscal, regulatory, and litigative)

Gary S. Guzy -- Deputy General Counsel, EPA
Dan Beard -- Commissioner, Bureau of Reclamation
Mike Davis -- Director, Wetlands Program, ACE
or OMB rep (if Panel One does not materialize)

Sally K or Alice R.

Panel Three -- Effects on key property relationships
(relationships between ensuring single property owner does not bear inequitable burden and maintaining government's ability to act effectively to curb harmful property uses and serve the public welfare, between rights and responsibilities of individual property owners, and between property rights of single landowner and those of adjoining landowners)

Richard Lazarus -- Washington Univ. Law Prof.
Jerold Kaden -- Harvard/MIT --Lincoln School of Design
or John Humbach -- Pace University Law Professor
or Carol Rose -- Yale Law Professor
Richard Epstein -- University of Chicago Law professor
or Gideon Kanner -- Loyola (L.A.) Law Professor
or Tom DiLorenzo -- Loyola (Balt.) Law Professor
Roger Pilon -- CATO Institute

Proposed Hearing #3 -- Full EPW Committee

**Date:** July 17-18, 1995

**Topics:** Non-compensatory proposals (statuory duty for agencies to analyze effects of actions on private property, claim procedure revisions, and preclusions against nonconsensual entry onto private property)

**Witnesses:**

Panel One -- Views of the Administration
Lois Schiffer -- AAG, ENRD

Panel Two -- Experiences of the States
Tom Udall -- Attorney General, New Mexico
or South Dakota Attorney General
Marc DelPiro -- California Resource Control Board
Speaker Mark Killian -- Arizona House of Reps
Gale Norton -- Colorado Attorney General

Panel Three -- Views of outside experts
Jerry Jackson -- Skadden Arps (371-7000)
Dick Stewart -- former AAG, Bush Administration
Fred Bosselman -- Chicago-Kent Law Professor
Robert Meltz -- Legislative Attorney, CRS

Panel Four -- Views of Affected Interests
Nancie Marzulla -- Defenders of Property Rights
George Miller, takings lawyer -- Hogan & Hartson
John Echeverria -- NAS
American Planning Association 872-0611

ELR
NEWS & ANALYSIS

# DIALOGUE

## The Environment and the Contract

by John Pendergrass, Paul Locke, and James McElfish

The 104th Congress opened with great attention to the Republican "Contract With America" (the Contract), which the House leadership promised would pass the House of Representatives within the first 100 days. The Contract was first fleshed-out on January 4, 1995, when 10 bills were introduced. [1] After a flurry of legislative activity, rushed hearings, and abbreviated floor debate, the House fulfilled its promise to act on all 10 bills, finishing more than one week ahead of schedule. [2]

This Dialogue focuses on four parts of the Contract that are particularly relevant to environmental law and policy. All four were addressed by the Job Creation and Wage Enhancement Act, introduced as H.R. 9. [3] They are: (1) limitations on congressional imposition of "unfunded mandates" on states and local governments; [4] (2) statutory requirements for risk assessment and cost-benefit analysis; (3) "regulatory reform"; and (4) federal payments to property owners affected by regulation. For each of these four parts, the Dialogue describes the bill's original provisions, discusses the legislation's development in the House, and summarizes related developments in the Senate and executive branch. [5]

Concerns about unfunded mandates, assessment of risks, costs and benefits, regulatory reform, and effects of environmental regulation on property owners are not new; legislation to address them was introduced during the 103d Congress, or even earlier. [6] Moreover, they are likely to be central to debates about any federal environmental legislation enacted in the next several years. [7] After describing the Contract legislation, this Dialogue explores these issues. In particular, it evaluates the potential for shifts in the benefits and burdens of environmental protection, creation of new rights, and alteration or elimination of old ones, changes in the relationships among the states and federal government, and shifts in the balance among executive agencies.

Finally, this Dialogue raises the question of whether, and to what extent, the environment may benefit from the changes set forth in the Contract. This fundamental question should be asked of all federal environmental legislation—will it make the environment better? Rather than

John Pendergrass, Paul Locke, and James McElfish are senior attorneys with the Environmental Law Institute. The authors thank Meghan Clancy-Hepburn for her research assistance. The authors wish to thank the W. Alton Jones Foundation and the George Gund Foundation for supporting, in part, the work that underlies this Dialogue.

1. H.R. 1 through 10, 104th Cong., 1st Sess. (1995). The House Republican Conference had previously published a draft of the 10 bills on September 27, 1994. *Contract With America*, HOUSE REPUBLICAN CONF. LEGIS. DIG., Sept. 27, 1994, at 1.

2. The House completed action within 93 days, finishing on April 5, 1995. *See* Kenneth J. Cooper & Helen Dewar, *100 Days Down, But Senate to Go for Most "Contract" Items*, WASH. POST, Apr. 9, 1995, at A6; Eric Pianin, *Tax Cut Bill Passed by House, 246-188*, WASH. POST, Apr. 6, 1995, at A1. The House defeated only a proposed amendment to the U.S. Constitution to limit congressional terms.

3. After its introduction on January 4, 1995, the titles of H.R. 9, 104 Cong., 1st Sess. (1995), were split up for various House committees to consider. These committees divided H.R. 9 into H.R. 1022, 104th Cong., 1st Sess. (1995) (risk-assessment and cost-benefit provisions), H.R. 830, 104th Cong., 1st Sess. (1995) and H.R. 926, 104th Cong., 1st Sess. (1995) (regulatory revision provisions and paperwork reduction), and H.R. 925, 104th Cong., 1st Sess. (1995) (provisions for federal payments to property owners). The House passed each bill separately. On March 3, 1995, the House consolidated them into a reconstituted H.R. 9 that was sent on for the Senate to consider. *See* 141 CONG. REC. H2607-H2639 (daily ed. Mar. 3, 1995) (containing a concise compendium of H.R. 9 as originally introduced, and as the House reconstituted and passed the bill). The Republican leadership in the House reconstituted these bills into H.R. 9 so that Republican legislators could show that they had passed one of the numbered bills of the Contract, and to improve prospects for negotiating with the Senate and the President.

4. Unfunded mandates were also the subject of H.R. 5, 104th Cong., 1st Sess. (1995), which was the unfunded mandates bill the House passed and sent to conference with the Senate. S. 1, 104th Cong., 1st Sess. (1995). The President signed the legislation on March 22, 1995. Unfunded Mandates Reform Act (UMRA), Pub. L. No. 104-4 (1995).

5. Because the Contract was largely a creature of the House Republican leadership, this Dialogue will focus on House actions, with reference to the Senate's actions when appropriate. This Dialogue will, to the extent feasible, analyze Contract legislation that the Senate is either considering or has already passed. Additionally, on March 16, 1995, the Clinton Administration unveiled its program for improving environmental regulation. President Bill Clinton & Vice President Al Gore, Reinventing Environmental Regulation, *reprinted in* DAILY ENV'T REP. (BNA), Mar. 17, 1995, at E-1.

6. *See, e.g.*, The Risk Communication Act of 1993, H.R. 2910, 103d Cong., 1st Sess. (1993); 139 CONG. REC. H6377 (daily ed. Aug. 6, 1993) (introduction of bill).

7. For example, proposed reauthorizing legislation for the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607, and the Safe Drinking Water Act, 42 U.S.C. §§300f-300j-26, ELR STAT. SDWA §§1401-1465, contain risk-assessment requirements as well as provisions requiring federal government payments to property owners. H.R. 961, 104th Cong., 1st Sess. (1995). Also, state legislatures are considering and enacting laws dealing with these issues. For example, Washington State passed legislation in April 1995 requiring payments to property owners for the effects of state regulation on property rights and values. Initiative 164 (approved Apr. 18, 1995) (to become effective July 22 unless opponents can collect enough signatures to suspend its operation and force a referendum).

any ideological touchstone, this is the issue that deserves our greatest attention.

## Unfunded Mandates

*Legislation as Enacted*

President Clinton signed the Unfunded Mandates Reform Act of 1995 (UMRA) on March 22, 1995, making it the first element of the Contract to become law. UMRA was introduced in the Senate (as S. 1) and in the House (as H.R. 5) in response to widely publicized complaints by states and cities. The essence of these complaints was that "federal action increasingly has relied on states to carry out policy initiatives without providing necessary funding to pay for these programs, thereby robbing states of their right and responsibility to set priorities and develop policies that best meet local needs."[8] The National Governors Association recommended that "Congress should act to guarantee that costs to state and local governments associated with all new mandates are reimbursed by the federal government."[9]

In UMRA, Congress paid lip service to these concerns without taking much concrete action. In the Act's preamble, Congress stated its intent "[t]o curb the practice of imposing unfunded Federal mandates on States and local governments . . . and to *ensure* that the Federal Government pays the costs incurred by those governments in complying with certain requirements under Federal statutes and regulations . . . ."[10] But UMRA does not ensure federal payment of state and local costs attributable to federal mandates, although it might "curb the practice of imposing" such mandates. A more accurate description of the Act's purpose would be "to end the imposition, *in the absence of full consideration by Congress*," of federal mandates without "adequate funding."[11] UMRA's real effect should be to force Congress to think about what it is about to do before doing it.

Most of this legislation is, in fact, merely an "exercise of the rulemaking power of the Senate and the House of Representatives,"[12] and each house retains the right to change these rules with respect to its own operations "at any time, in the same manner, and to the same extent as any other rule."[13] The Act does not provide funding for unfunded mandates. Rather, it creates procedural hurdles for any bill that would impose new mandates exceeding certain thresholds on state, local, tribal governments, or on the private sector.[14] It allows Congress to pass bills containing unfunded mandates, so long as it overcomes those procedural hurdles.[15]

UMRA's primary procedural mechanism for forcing Congress to consider the implications of new unfunded mandates is the point of order. Under the Act, it is not "in order" for the House or Senate to consider any bill a committee reports unless the committee has published a statement from the Congressional Budget Office (CBO) on the costs of any federal mandates in the bill.[16] Nor is it in order for either house to consider a bill that would increase federal mandates to state, local, and tribal governments by more than $50 million annually unless the bill provides federal funding to cover the increased costs.[17]

The most significant change UMRA made to existing law governing relations between federal agencies, states, and localities is a relatively minor change to the Federal Advisory Committee Act (FACA),[18] which applies to the formation, use, and meetings of groups used to advise federal agencies that include any person who is not a full-time employee of the federal government.[19] The Act creates an exception to FACA for meetings held exclusively between federal officials and elected state, local, or tribal government representatives, or designated employees authorized to act on behalf of the elected representatives.[20] Meetings are exempt only if held solely to exchange views, information, or advice about implementing federal programs that share responsibilities among the different governments.[21] Exempting meetings among officials from federal, state, local, and tribal governments may be seen as a move away from the fundamental concept that democracy works best when government is open. On the other hand, the exemption,

8. NAT'L GOVERNORS ASS'N, PRINCIPLES FOR STATE-FEDERAL RELATIONS 3 (1994).

9. *Id.* The National Governors Association's policy statement also recommended, inter alia, that Congress enact provisions to: require the Congressional Budget Office (CBO) to report on the costs unfunded mandates impose on state and local governments before action by a full committee and the full House or Senate; apply to new state or local mandates the pay-as-you-go, revenue-neutral principle used for federal entitlement programs; provide for a point of order against any state or local mandate for which no report or funding is provided; exempt state and local governments and their national organizations from the Federal Advisory Committee Act, 5 U.S.C. app. 2; and reduce burdensome and costly reporting requirements.

10. Pub. L. No. 104-4, pmbl. (1995) (emphasis added).

11. *Id.* §2 (emphasis added).

12. *Id.* §108(1).

13. Because UMRA, in Title II, also applies to administrative action by the executive branch, it must follow the constitutional process for legislation of general applicability, which requires the President's signature. *See infra* notes 28-36 and accompanying text (discussing UMRA tit. II, which relates to regulatory impact and cost-benefit analysis for regulations).

14. *See, e.g.*, UMRA §101(a)(2) (amending the Congressional Budget and Impoundment Control Act (CBICA) of 1974, tit. IV, §424(a), 2 U.S.C. §§601-688). The amended CBICA provision reads:

> For each bill or joint resolution of a public character reported by any committee of authorization of the Senate or House of Representatives, the Director of the Congressional Budget Office shall prepare and submit to the committee a statement as follows: (1) Contents: If the Director estimates that the direct cost of all Federal intergovernmental mandates in the bill will equal or exceed $50,000,000 (adjusted annually for inflation) in the fiscal year in which any [such mandate or necessary implementing regulation] would first be effective or in any of the 4 fiscal years following such fiscal year, the Director shall so state, specify the estimate, and briefly explain the basis of the estimate.

UMRA requires a similar statement for bills that would impose mandates on the private sector costing $100 million or more per year. *Id.* §101(a)(2) (adding §424(b) to the CBICA).

15. UMRA's procedural provisions are arcane. They are laid on top of two centuries' worth of rules in each house, which are complex because they attempt to balance the shifting interests of majorities and minorities in making it easier or more difficult to pass legislation.

16. *Id.* §101(a)(2) (adding §425(a)(1) to the CBICA).

17. *Id.* (adding §425(a)(2) to the CBICA).

18. 5 U.S.C. app. 2.

19. In general, federal agencies may only form advisory committees after public notice, a committee's membership must be balanced in terms of views represented, and all meetings must be open to the public to observe. *Id.* §§5(b), 9(a)(2), 10(a).

20. UMRA §204(b)(1).

21. *Id.* §204(b)(2).

aimed at allowing governments to carry out their shared responsibilities effectively, is narrow. Experience with federal environmental laws has demonstrated that citizens and regulated parties can reap substantial benefits when different governments coordinate their implementation efforts. There is a legitimate need for officials from different levels of government to meet in private to discuss shared responsibilities and UMRA's FACA exemption seems to meet that need without unreasonably weakening the policy in favor of open government.[22]

*Ramifications*

Despite UMRA's enactment, Congress has not resolved the underlying issue of unfunded mandates, at least as it applies to most environmental legislation. UMRA defines a mandate as an enforceable, nonvoluntary duty on a state, local, or tribal government.[23] A key question in most environmental legislation is: Are a state's duties voluntary? Most federally delegated environmental programs allow states to elect to operate their own programs in lieu of federal programs.[24] If a state elects not to promulgate a program, however, the only consequence is direct federal permitting and regulation of facilities.[25] Thus, state implementation of most federal environmental laws is voluntary; provisions of federal law that impose conditions on states' abilities to exercise implementation authority should not qualify as mandates under UMRA.

To a large extent, passing UMRA was easy because Congress made none of the hard choices. Those choices will come when Congress favors substantive legislation that directly regulates state and local facilities but the CBO tells it that costs to states would exceed the Act's threshold. Congress will then have three choices: pass legislation that provides funding to cover state and local compliance costs (perhaps imposing new taxes or cutting other programs to cover this extra federal expense); pass the legislation without funding and "pass the buck" to the states; or drop the legislation and lose the benefits it would have provided. Clarifying that these are essentially the only options available to Congress is laudable, but UMRA seems an unduly complicated way of making a rather simple point. The effort devoted to the unfunded-mandates issue might better serve the country if concentrated on finding ways of achieving the substantive goals of the "mandating" federal programs more efficiently and effectively.

22. Abuse of the exemption is possible, and should be dealt with if it arises.

23. *Id.* §101(a)(2) (adding §421(5) to the CBICA, which creates exceptions for duties that are a condition of federal assistance or that arise from participating in a voluntary federal program).

24. *See, e.g.*, Resource Conservation and Recovery Act, 42 U.S.C. §§6926(b), ELR STAT. RCRA §3006(b).

25. *See generally* James M. McElfish Jr., *State Environmental Law and Programs*, *in* 1 LAW OF ENVIRONMENTAL PROTECTION (Clark Boardman Callaghan) (Sheldon M. Novick, Environmental Law Institute, eds.) §6.02. UMRA does, however, cover application of federal standards to state or local government-operated facilities, at least for newly legislated mandates.

## Regulatory Impact, Risk Assessment, and Cost-Benefit Analyses

The Contract legislation builds on an existing legacy of procedural and quantitative approaches to rationalizing regulatory choices. Rather than streamlining such processes, however, the legislation would erect new and elaborate additions to the existing edifice.

President Reagan introduced the term "regulatory impact analysis" in Executive Order 12291, which required cost-benefit analyses of proposed regulations.[26] President Clinton replaced that order with a similar one, requiring the same type of cost-benefit analyses but setting slightly different thresholds.[27] Both executive orders provide for Office of Management and Budget (OMB) oversight of federal rulemaking. Legislation introduced under the Contract, including UMRA, provides (or would provide) for additional cost-benefit analyses of certain types of proposed regulations.

*Cost-Benefit Analysis Under UMRA*

UMRA Title II requires federal agencies to do a "qualitative and quantitative assessment of the anticipated costs and benefits" of any proposed rule that includes a federal mandate[28] that may cause state, local, and tribal governments to spend, in the aggregate, $100 million or more annually, or that may cause the private sector to spend $100 million or more annually.[29] This version of cost-benefit analysis must include the costs and benefits to state, local, and tribal governments, and the private sector, and the mandate's effect on health, safety, and the natural environment.[30] The

26. 3 C.F.R. 127 (1982), ELR ADMIN. MAT. II 45025.

27. Exec. Order No. 12866, 3 C.F.R. 638 (1994), ELR ADMIN. MAT. II 45070. *See* Ellen Siegler, *Executive Order 12866: An Analysis of the New Executive Order on Regulatory Planning and Review*, 24 ELR 10070 (Feb. 1994) (discussing Exec. Order No. 12866 and comparing it to President Reagan's executive order).

28. A "federal mandate" is any statutory or regulatory provision that would impose an enforceable duty on state, local, or tribal governments, or the private sector; however, the definition does not apply to a condition of federal assistance or a duty arising from participating in a voluntary federal program (there is an exception to this voluntary-program exception for governmental entities with existing federal programs that provide $500 million or more under entitlement authority). UMRA §101(a)(2) (adding §421(5), (7) to the CBICA). The term "federal mandate" includes provisions that would reduce or eliminate federal financial assistance to state, local, or tribal governments, or the private sector for complying with the mandate. *Id.* §101(a)(2) (adding §421(5)(A)(ii), (7)(B) to the CBICA).

29. *Id.* §202(a)(2). Section 202 is titled "Statements to Accompany Significant Regulatory Actions," but the phrase "significant regulatory actions" does not appear in the section and its only other use is in the heading for the section on judicial review. This may cause confusion because Exec. Order No. 12866 defines "significant regulatory actions" to mean rules that have an annual effect on the economy of $100 million or more or other effects—while UMRA defines it as public- or private-sector spending of $100 million or more annually.

30. UMRA §202(a)(2). The requirement to assess the effects of the mandate on health, safety, and the environment contrasts with the rest of the statute, which otherwise addresses the costs of complying with mandates, the budgetary impacts of mandates, and the effects that mandates may have on the economy or specific aspects of the economy, such as international competitiveness and full employment. *See, e.g., id.* §§202(a)(2)(A), (3)(A) & (B) & (4). Because UMRA applies to federal agency actions generally, the requirement to assess a mandate's effect on health, safety, and the environment should apply to mandates that agencies would not otherwise analyze for their health or environmental effects.

assessment must also include estimates of compliance costs, effects on the economy, and the extent to which federal financial assistance would defray costs to state, local, and tribal governments.[31]

After preparing the cost-benefit assessment, the agency must "identify and consider a reasonable number of regulatory alternatives and . . . select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule,"[32] *unless* doing so would be inconsistent with law, or the agency publishes with the final rule an explanation of why it chose not to adopt the least costly, most cost-effective, or least burdensome alternative.[33]

UMRA Title IV governs judicial review of agency compliance with the Act's cost-benefit requirements. The courts' authority is limited to compelling agencies to prepare the cost-benefit statements required by UMRA §202.[34] In reviewing rules under other federal laws, courts may not invalidate or otherwise affect regulations on the basis of the inadequacy, or absence, of statements required by §202.[35] Congress clearly intended review of regulatory action to be governed by other provisions of federal law.[36]

*Regulatory Impact Analysis*

☐ *Legislation Introduced in the House.* Title VII (entitled "Regulatory Impact Analyses") of the original H.R. 9, labelled the Administrative Procedure Reform Act of 1995, would have amended the Administrative Procedure Act (APA) to add several procedural and analytical steps to the process agencies use to make policy and promulgate rules.[37] First, this title would have added a new step at the beginning of the rulemaking process, requiring an agency to publish a notice of intent at least 90 days before publication of a proposed major rule.[38] The notice of intent was to include, to the extent possible: an explanation of the necessity, appropriateness, and reasonableness of the rule; a description of the current condition that the rule would address and how the rule would affect that condition; and a discussion of alternative approaches that the agency considered or that interested persons suggested and the reasons for the rejection of those alternatives.[39] The bill would have defined a major rule as one affecting more than 100 people or causing any single person or entity to spend more than $1 million annually in compliance costs.[40]

The title would also have added additional procedures concerning public comments, requiring agencies to: (1) hold public hearings on rules that more than 100 persons, acting individually, submit comments on;[41] (2) publish responses to comments received on proposed rules;[42] and (3) extend comment periods for 30 days when, during the first 30 days after publication of the Notice of Intent for a major rule or publication of a proposed rule, more than 100 persons individually ask for extensions.[43]

The original bill's most significant provision was §7004, which would have required agencies to comply with Executive Order 12291 as it existed on September 29, 1993—the day before President Clinton's version replaced it. The bill would have supplemented Executive Order 12291's provisions governing the content of a regulatory impact analysis, adding 13 items not included in the order.[44] In addition to reviewing regulatory impact analyses, the OMB would have been responsible for reviewing the quality of the writing for major rules. Under the original bill an agency was, to the extent practicable, not to publish a proposed major rule or regulatory impact analysis unless the OMB certified that the rule: (1) was easily readable; (2) was written to provide adequate notice of its content to people with some expertise in the subject matter; (3) was grammatically acceptable; (4) used sentences that were as short as practicable and sensibly organized; and (5) did not contain double negatives, convoluted phrasing, confusing cross-references, unreasonably complex language, or undefined terms of art with multiple meanings.[45]

☐ *As Passed by the House.* The House passed H.R. 926, Title II of which covers regulatory impact analyses.[46] H.R. 926 was then re-passed as part of a revised H.R. 9. The final House version would codify Executive Order 12291, with modifications. The bill would codify the order's definition of major rule except that it would lower the threshold for effect on the economy to $50 million.[47] As in the original bill, an

31. *Id.* §202(a)(2)-(5).
32. *Id.* §205(a).
33. *Id.* §205(b).
34. *Id.* §401(a)(2) (review available only under 5 U.S.C. §706(1), ELR STAT. ADMIN. PROC., which authorizes courts to compel agency action unlawfully withheld).
35. *Id.* §401(a)(3).
36. *See id.* §401(a)(4), (5), (b)(1)-(2).
37. Some of these procedures and analyses have been in general use by agencies for years, but were not statutorily required. *See, e.g.*, Exec. Order No. 12291, 3 C.F.R. 127 (1982), ELR ADMIN. MAT. II 45025 (requiring regulatory impact analysis, including cost-benefit analysis).
38. H.R. 9, 104 Cong., 1st Sess. §7002 (1995) (which would have amended 5 U.S.C. §553, ELR STAT. ADMIN. PROC. §553).
39. *Id.* §7002 (which would have added 5 U.S.C. §553(f)(1)(B)).
40. *Id.* §7004(b). This would have been a change from the definition of major rule under Exec. Order No. 12291 and of "significant regulatory action" under Exec. Order No. 12866. Both executive orders required cost-benefit analyses for regulations that would have an annual effect on the economy of $100 million or more, or that would adversely affect specified components or sectors of the economy. Exec. Order No. 12291, 3 C.F.R. 127, §1(b) (1982), ELR ADMIN. MAT. II 45025; Exec. Order No. 12866 §3(f)(1), 3 C.F.R. 638 (1994), ELR ADMIN. MAT. II 45070, 45071. Exec. Order No. 12866, §3(f)(2)-(4), also requires analysis of noneconomic criteria, involving the extent to which rules would interfere or be inconsistent with actions by other agencies, change entitlements, grants, loans, or users fees, or raise novel legal or policy issues. 3 C.F.R. at 641, ELR ADMIN. MAT. II at 45071.
41. *Id.* §7003(a)(2) (which would have added 5 U.S.C. §553(g)). The bill would have required the agency to hold a hearing even if none of the commentators requested one. The bill would have established an absolute requirement for a hearing based simply on the number of comments submitted.
42. *Id.* §7003(c) (which would have amended 5 U.S.C. §553(c), ELR STAT. ADMIN. PROC. §553(c), to codify what is generally the practice at federal agencies).
43. *Id.* §7003(b) (which would have added 5 U.S.C. §553(h)). The bill would also have prohibited the agency from adopting the rule until after the additional comment period.
44. *Id.* §7004(c).
45. H.R. 9, §7006.
46. H.R. 926, 104th Cong., 1st Sess. (1995)
47. H.R. 9, §201(15) (which would add 5 U.S.C. §551(15)). The provisions of paragraph (15) are identical to Exec. Order No. 12291 §1(b) except that the bill would substitute $50 million for $100 million. Exec. Order No. 12291, 3 C.F.R. 127, §1(b) (1982), ELR ADMIN. MAT. II 45025.

agency planning to propose a major rule would be required to publish a notice of intent to engage in rulemaking at least 90 days before publishing the proposed major rule.[48] The notice's contents, however, would differ in several respects from those specified by the original bill. As revised, H.R. 9 would replace the vague requirement of a description of the rule's "appropriateness" with a requirement to describe the legal authority for the rule, consistent with existing requirements for proposed and final rules.[49] While the original bill required a description of alternatives considered by the agency or suggested by interested persons, the version passed by the House is more action-forcing. It would require the agency to analyze alternative approaches, including market mechanisms, and to explain its reasons for not selecting the least cost alternative that would achieve the rulemaking's goal.[50] Both the original bill and the version that the House passed, however, would require agencies to demonstrate that proposed and final rules adopt the least costly approach.

In the final bill the House substantially reduced the number of required items the original bill would have added to the regulatory impact analysis.[51] Significantly, the final bill added a requirement to describe the potential benefits of the rule, including unquantifiable benefits. This provision was taken directly from the Reagan Executive Order.[52] Common sense triumphed in the final House bill in at least one instance. The attempt in the original bill to legislate proper grammar and to make the Director of the OMB the Chief Grammarian for the executive branch was abandoned in the bill passed by the House.[53]

*Risk Assessment and Additional Cost-Benefit Requirements*

The House passed additional risk-assessment and cost-benefit provisions as H.R. 1022,[54] focusing on the costs associated with health, safety, and environmental regulations. The bill would force federal agencies to base such regulations on "realistic risk" measurements.

☐ *Legislation Introduced in the House.* Title III of H.R. 9 was entitled "Risk Assessment and Cost/Benefit Analysis for New Regulations."[55] It was broadly written, and its findings indicate that it was intended to have wide reach.[56] If enacted, Title III would have initiated policy changes on two levels. First, it would have forced federal agencies, including the U.S. Environmental Protection Agency (EPA), to follow certain risk-assessment, characterization, and communication principles, and to develop "guidelines" and "guidance" to implement them.[57] Second, it would have required that federal agencies prepare risk assessments and cost-benefit analyses for every "major rule" associated with human health, safety, and the environment. The bill's definition of major rule set a fairly low threshold[58] and would have applied to a considerable number of proposed and final regulations.[59] Agency heads would have been required to certify that the data and methodology used to carry out the risk assessments and cost-benefit analyses contained in final rules met certain specified stand-

48. H.R. 9 (as passed Mar. 3, 1995, incorporating H.R. 926, §202, which would add 5 U.S.C. §551(f)(1)).

49. *Compare* 5 U.S.C.§553(b)(2), (c) *with* H.R. 926, §§202, 204 (which would add 5 U.S.C. §553(f)(2), (i)(4)(B)).

50. *Compare* H.R. 9, §7004(c)(8) *with* H.R. 926, §204 (which would add 5 U.S.C. §553(i)(4)(D)).

51. H.R. 926, §204 (which would add 5 U.S.C. §553 (i)(4)). The bill would require the agency to (1) describe the potential benefits, including benefits that cannot be quantified in monetary terms, and to identify those likely to receive the benefits; (2) explain the rule's necessity, legal authority, and reasonableness; (3) describe the rule's potential costs, including adverse effects that the agency cannot quantify, and to identify those would likely bear the costs; (4) analyze alternative approaches, including market-based mechanisms that could substantially achieve the same regulatory goal at lower cost, and explain why the agency did not adopt such alternative approaches, as well as demonstrate that the rule is the least costly approach; (5) provide a statement that the rule does not conflict with or duplicate any other rule, of reasons why it does conflict or duplicate another rule; (6) provide a statement on whether the rule will require on-site inspections or recordkeeping, and a statement on whether it will require licenses, permits, or other certificates, along with applicable fees or fines; and (7) estimate the agency's costs for implementing and enforcing the rule and whether the agency can reasonably expect to implement the rule with the current level of appropriations.

52. Exec. Order No. 12291, 3 C.F.R. 127, §3(d)(1) (1982), ELR ADMIN. MAT. II 45025.

53. *Compare* H.R. 9, §7006 *with* H.R. 926, §204 (which would add 5 U.S.C. §553(j)).

54. H.R. 1022, 104th Cong., 1st Sess. (1995).

55. Based on comments from industry groups, this bill had been substantially revised from a September 1994 draft its Republican drafters circulated. In particular, the drafters narrowed the applicability of the risk-assessment and communication provisions to apply only to federal regulatory programs designed to protect human health, safety, and the environment. The drafters changed the definition of "major rule" by raising the threshold of annual effect on the economy from $1 million to $25 million. Also, the drafters narrowed and streamlined the peer review provisions and dropped a citizen suit provision. *See New Risk Language Introduced With Four Key Changes From Draft*, INSIDE EPA'S RISK POLICY REP., Jan. 10, 1995, at 1.

56. H.R. 9, §3001.

57. As introduced, Title III stated:

> [W]ithin 15 months after the date of enactment of this subtitle, the President shall issue guidelines consistent with the risk assessment and risk characterization principles stated in sections 3104 and 3105 and shall provide a format for summarizing risk assessment results. In addition, such guidelines shall include guidance on at least the following subjects: criteria for scaling animal studies to assess risks to human health; uses of different types of dose-response models; thresholds; definitions, use, and interpretations of the maximum tolerated dose; weighing of evidence with respect to extrapolating human health risks from sensitive subspecies; evaluation of benign tumors, and evaluation of different human health endpoints. The guidelines shall be developed after notice and comment.

*Id.* §3106(a), (d).

It is not clear whether the guidance and the guidelines would need to be promulgated as regulations. But the process by which these guidelines and guidance were to be developed, and their purpose, could be interpreted to imply that Congress intended the agency to engage in a rulemaking process.

58. *Id.* §3201(c)(2). The bill defines a "major rule" as any regulation that is likely to result in one or more of the following: (1) an annual effect on the economy of $25 million or more; (2) a major increase in costs or prices for consumers, industries, local governmental agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. companies to compete in the global marketplace.

59. According to EPA, passage of this requirement and the peer review mandate could result in $220 million annually in additional costs to the agency. *See $200 Million in Added Annual Costs Likely if House Risk Bill Adopted, Browner Says*, DAILY ENV'T REP. (BNA), Feb. 3, 1995, at AA-1.

ards.[60] In addition, a significant subset of these analyses would have required peer review by an external panel of experts.[61]

☐ *House Committee Markup.* Title III was referred to three committees—Commerce, Government Reform and Oversight, and Science[62]—which worked rapidly to mark up the bill. Several rushed hearings were held at which witnesses from industry and the government testified. On February 2, two House subcommittees held a hearing that featured speakers from the Clinton Administration. These Administration spokespeople had four general criticisms of the legislation. First, they maintained that the bill embodied a "rigid cookbook" approach that would generate excessive bureaucracy and red tape. Second, they noted that it would result in excessive litigation, allowing for challenges about whether all of the steps specified in the risk legislation had been met. Third, they argued that it applied too broadly to all agency decisionmaking, instead of focusing on those decisions that risk assessment has traditionally guided. Fourth, they characterized the bill as too prescriptive, arguing that it would freeze science and reduce needed flexibility.[63]

At this hearing Representative Waxman (D-Cal.) raised concerns that ample time was not being devoted to a thorough analysis of the legislation, given the complexity of the bill. Other witnesses pointed out that other provisions of the Contract, specifically Title V (strengthening the Paperwork Reduction Act) and Title VII (regulatory impact analysis) had significant overlap and implications for Title III. These provisions were being marked up by other committees, and there was no indication that anyone was coordinating legislative efforts or comparing the bills for possible inconsistencies.

On February 8, the Science and Commerce Committees reported out slightly different versions of the bill. These differences were reconciled and H.R. 1022 was brought to the House floor on February 27, 1995. Although H.R. 1022 is similar to Title III of the original H.R. 9 in its tone, style, purposes, and objectives, changes made during the Committee markups altered it in several important ways. First, the Committee broadened the scope and breadth of decisions the bill covers. H.R. 1022 defines "significant risk assessment document" and "significant risk characterization document" to encompass:

- all Superfund cleanup and the Resource Conservation and Recovery Act (RCRA) corrective action risk assessments;[64]
- all proposed and final permit conditions for facility siting or operation imposed pursuant to EPA or Department of the Interior administered laws;
- any regulatory action to place a substance on an official list such as the integrated risk information system database;
- all risk-assessment guidelines issued by agencies; and
- all Department of Defense nonmunicipal waste cleanup and restoration plans.

Second, H.R. 1022 would vest the OMB with significant authority to affect the way other executive agencies carry out their responsibilities. Section 103(b)(2)(E) would require the OMB to determine which other federal agencies should be "covered agencies" subject to the bill's requirements. In addition, §203 would give the OMB authority to issue guidance for cost-benefit analyses that other agencies must follow. Also, the OMB could trigger peer review if it determined that any risk assessment or cost assessment was likely to have a "significant impact on public policy decisions."[65]

Third, the bill contains a set of "decision criteria" that would create a "supermandate" that "notwithstanding any other provision of federal law . . . [would] supplement and, to the extent there is a conflict, supersede the decision criteria for rulemaking otherwise applicable under the statute pursuant to which the rule is promulgated."[66] Although the exact effects of such a supermandate are not clear, at minimum a supermandate would impose the health and cost-based decision criteria on regulatory actions that had not previously been subject to them, such as technology-based standards promulgated pursuant to the Clean Air Act[67] and Clean Water Act.[68]

Fourth, a judicial review provision was added.[69] Although its language is not completely clear, it appears to provide for review of regulatory action under as many as three statutes, including H.R. 1022. The standard for review under H.R. 1022 is "substantial compliance," which could be interpreted as a standard that invites courts to exercise relatively close scrutiny of risk assessments and cost-benefit analyses.

Fifth, the bill defines "covered agencies" to include the U.S. Army Corps of Engineers, the Consumer Product Safety Commission, the Department of Energy, the Department of the Interior, the Department of Transportation (including the National Transportation Safety Board), EPA, the Food and Drug Administration, the Mine Safety and Health Administration, the National Oceanic and Atmospheric Administration, the Nuclear Regulatory Commis-

60. H.R. 9, §3201(a)(5).

61. *See id.* §§3104, 3105, 3201, 3301.

62. In addition to the joint hearings described above, the Science Committee and the Commerce Committee also held hearings. *Administration, Blasting Risk Bill, Pledges to Work On Changes*, INSIDE EPA's RISK POLICY REP., Feb. 3, 1995, at 2.

63. *Id.*

64. *See* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405; RCRA, 42 U.S.C. §§6928-6992k, ELR STAT. RCRA §§1001-110012.

65. H.R. 1022, §301(b) (as introduced Feb. 23, 1995).

66. *Id.* §202(b)(1).

67. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

68. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

69. H.R. 1022, §401. This provision states:

> compliance or noncompliance by a Federal agency with the requirements of this Act shall be reviewable pursuant to the statute granting the agency authority to act or, as applicable, that statute and the Administrative Procedure Act . . . . When a significant risk assessment document or risk characterization document . . . is part of the administrative record in a final agency action . . . the court may consider the agency action unlawful if such significant risk assessment document or significant risk characterization document does not substantially comply with the requirements of sections 104 and 105 [the principles of risk assessment and risk characterization].

sion, and the Occupational Safety and Health Administration.[70] If the OMB determined that an additional agency should be added to the list, that agency would be required to promulgate a rule to establish categories of risk-assessment and risk-characterization documents.[71]

Sixth, the bill would require agency risk-assessors to follow specific risk-assessment and risk-characterization principles.[72] The bill would dictate the contours of the assessment and how it should be communicated. Federal agencies would then have the responsibility of preparing "guidelines" and "guidance" that implements Congress' will.[73]

☐ *House Floor Action.* H.R. 1022 passed the House by a huge margin on February 28, 1995.[74] Discussion regarding the bill was limited; while several floor amendments were offered, most failed.[75]

☐ *Senate Consideration.* At least six risk-assessment/cost-benefit bills have been introduced in the Senate.[76] Two have emerged as clear front runners. At presstime, S. 291 had undergone hearings and been reported out of the Governmental Affairs Committee, passed by unanimous vote.[77] S. 343, sponsored by Majority Leader Dole (a Republican from Kansas) among others, was ordered out of the Judiciary Committee without a formal vote.[78]

S. 291, which would amend the APA,[79] takes an approach similar to H.R. 1022.[80] Nevertheless, S. 291 diverges from the House legislation in several important ways. First, the "major rule" economic trigger is set at $100 million, which is four times the House threshold.[81] Second, judicial review under S. 291 would be much more limited and the bill sets a clear-and-convincing-evidence standard for reviewable decisions.[82] Third, the bill omits the supermandate provision included in H.R. 1022, opting instead for a statute-by-statute review of rules.[83] Fourth, the risk-assessment and risk-characterization principles are more general and descriptive, and lack much of the prescriptive flavor of the House bill's provisions.[84]

One noteworthy feature of S. 291 is its section on congressional review of agency rulemaking. The bill would require agencies to submit all major rules to Congress for review. Congress could then pass a joint resolution of disapproval. If the President did not veto that resolution, the major rule would not take effect.[85]

Although S. 343 contains risk-assessment and cost-benefit provisions, it is a comprehensive regulatory reform bill that would apply to all rulemaking.[86] The parts of S. 343 relating to risk-assessment and cost-benefit analysis more closely resemble H.R. 1022 than S. 291. The bill defines a major rule as a regulation that is likely to have a gross annual effect on the economy of $50 million or more.[87] This bill also provides for executive oversight of regulation by the OMB or another designee of the President.[88] Unlike H.R. 1022, S. 343 does not contain far-reaching judicial review provisions or a supermandate.[89]

☐ *Administration Position.* The Clinton Administration has indicated that it supports regulatory reform, but will not support the risk legislation passed by the House (H.R. 1022) or working

70. *Id.* §110(5).

71. *Id.* §103(b)(2)(E).

72. Nowhere in H.R. 1022, however, do the drafters define cost-benefit principles.

73. *See supra* note 57 (discussing the terms "guidance" and "guidelines").

74. The final vote was 286 to 141. Sixty Democrats voted with the Republican majority to pass the bill. Two Republicans voted against the bill. *House Passes Risk Bill by Huge Margin, Setting Stage for Senate*, INSIDE EPA'S RISK POLICY REP., Mar. 6, 1995, at 1.

75. One amendment that the House passed by a floor vote imposed the bill's analytical requirements on contaminated site cleanups that cost more than $5 million. *Id.*

76. These bills are S. 100, 104th Cong., 1st Sess. (1995), S. 123, 104th Cong., 1st Sess. (1995), S. 229, 104th Cong., 1st Sess. (1995), S. 291, 104th Cong., 1st Sess. (1995), S. 333, 104th Cong., 1st Sess. (1995), and S. 343, 104th Cong., 1st Sess. (1995). *See Risk Bills Shift to Senate Following House Committee Markups*, INSIDE EPA'S RISK POLICY REP., Feb. 21, 1995, at 3.

77. *Senate Governmental Affairs Panel Passes Risk Bill: Two More to Go*, INSIDE EPA'S RISK POLICY REP., Mar. 24, 1995, at 1.

78. *See* John H. Cushman Jr., *Senator, in Fury, Advances Regulatory Bill*, N.Y. TIMES, Apr. 28, 1995, at A17 (reporting Sen. Orrin Hatch's (R-Utah) decision to advance bill).

79. 5 U.S.C. §§500-596, ELR STAT. ADMIN PROC. §§500-596.

80. It seeks both to reform risk-assessment practice and to apply risk-assessment and cost-benefit analyses to major rules. It contains principles of risk assessment and risk characterization and defines covered agencies in a similar fashion.

81. In addition to this monetary trigger, the definition of major rule would allow an agency head or the OMB to classify a rule or group of rules as a major rule if it is likely to result in (1) a substantial increase in prices or costs; (2) significant adverse effects on wages, or the ability of U.S.-based enterprises to compete; (3) a serious interagency inconsistency or interference; (4) a material alteration of the budgetary impact of entitlements, grants, user fees or loan programs; or (5) a significant impact on a sector of the economy. S. 291, §621(2)(A)(ii) (Apr. 6, 1995 committee draft). The OMB would be authorized to overrule an agency head regarding his or her determination of a major rule. *Id.* §622(b)(i).

82. *See, e.g., id.* §§623, 646. But the bill does allow "affected small entities" to petition for judicial review. *Id.* §611.

83. *Id.* §625.

84. *Id.* §§624, 625.

85. *Id.* §801.

86. This Dialogue describes the April 6, 1995, version of S. 343, because at presstime the authors deemed it to be the most likely floor vehicle. Senator Dole's bill (S. 343) seems to have emerged as the most likely basis for any regulatory reform that the Senate passes. It contains more process and analytical requirements than Senator Roth's bill (S. 291) and would probably make it considerably more difficult to promulgate rules. *See Mr. Dole's Assault on Regulations*, N.Y. TIMES, May 1, 1995, at A16 (stating that "[a]ny hope that the Senate would act as a restraint on House efforts to destroy the regulatory apparatus are diminishing as Mr. Dole presses his presidential campaign").

87. S. 343, §621(4). A regulation can also be defined as a major rule if it meets certain other criteria listed in this section.

88. *Id.*

89. Sen. Johnston (D-La.) one of the leading proponents of risk assessment in the 103d Congress, had announced that he would not support any risk legislation that contains judicial review or supermandate language. Accordingly, such language was dropped (although some judicial review provisions remained in S. 343). *See Johnston Warns Dole Bill Goes "Overboard,"* INSIDE EPA'S RISK POLICY REP., Mar. 17, 1995, at 5; *Senate Panel Abandons Bipartisan Markup, Floor Fight Looms*, INSIDE EPA'S RISK POLICY REP., Apr. 28, 1995, at 2. S. 343, reported out of the Judiciary Committee, would provide that a federal agency cannot adopt any major rule without a finding that the benefits justify the costs and that the rule is the most cost-effective alternative. These criteria would apply regardless of other statutory language, unless the agency could show that the decisional criteria of the substantive statute require a different outcome. In that case, the agency would still be required to select the alternative that has a lower cost than reasonable alternatives or the lowest costs that the agency has the discretion to accept under the decisional criteria.

its way through the Senate.[90] The Administration's regulatory reform plan instead calls for using risk assessment to target agency resources and enforcement toward higher risk environmental problems. The plan also advocates the use of "sound science" in environmental decisionmaking.[91] One of its "10 Principles for Reinventing Environmental Protection" declares that "[e]nvironmental regulation should be based on the best science and economics, subject to expert and public scrutiny, and grounded in values Americans share."[92] Although it is difficult to compare the Administration's relatively short action plan to the House and Senate bills, the Clinton proposal appears to be more flexible and less process-oriented than congressional efforts.

*Ramifications*

If enacted in its present form, H.R. 1022 would likely substantially alter the practice of risk-assessment and cost-benefit analysis, increase analytical burdens on agencies, and change the ways in which agencies allocate resources. The resulting long, complex assessment documents may do little to improve the public's understanding or agencies' use of risk assessment and cost-benefit analysis. Significant delay in making public policy decisions may also result in the many instances where the bill requires technically demanding analyses of alternatives and assumptions.[93]

The specificity of the risk-assessment, characterization, and communication principles would incorporate into the law certain scientific principles. Such legislation could suspend the development of risk-assessment science because it would be extremely difficult to deviate from or alter the principles contained in the law, even if new scientific evidence indicates that they are inadequate or wrong. Ironically, the bill could diminish the flexibility necessary to advance risk techniques, and risk assessment's effectiveness as a policy tool could be decreased.

## Regulatory Reform

*Paperwork Reduction*

☐ *Legislation Introduced in the House.* Title V of the original H.R. 9 was entitled "Strengthening of Paperwork Reduction Act" and would have given the Director of the OMB greater authority over federal agencies' collection of information and imposition of paperwork on those outside the government. The bill would have amended the Paperwork Reduction Act of 1980 by adding substantial detail to the definition of what constitutes a paperwork or information response burden on the public.[94] The original bill also would have updated government-wide goals for reducing the overall burden of federal information collection.[95] It would have prescribed a 5 percent reduction by September 30, 1995,[96] and an additional 5 percent for each of the next four fiscal years.[97]

The bill would have added one potentially far-reaching grant of authority to the Director of the OMB. The OMB's authority under the Paperwork Reduction Act is set out in 44 U.S.C. §3504, which includes the general limitation that "[t]he authority of the Director under this section shall be exercised consistent with applicable law."[98] The original H.R. 9 would have added authority for the OMB to initiate and conduct,

> with selected agencies . . . on a voluntary basis, pilot projects to test or demonstrate the feasibility and benefit of changes or innovations in Federal policies, rules, regulations, and agency procedures to improve information management practices and related management activities (including authority *for the Director to waive the applicability of designated agency regulations* or administrative directives after giving timely notice to the public and Congress regarding the need for the waiver).[99]

The original bill also would have created a new procedure allowing any person to request that the OMB review the collection of any information by or for an agency to determine if the Act had been followed.[100] This essentially would have created a method for private enforcement of the procedures for internal federal review and approval of information collection by federal agencies.

☐ *As Passed by the House.* H.R. 9 as passed by the House on March 3, 1995, includes H.R.830. Entitled "Paperwork Reduction Act of 1995," it would replace the Paperwork Reduction Act of 1980. This new version would largely retain the original 1980 Act, amending and adding to many

90. In his speech on Earth Day, April 22, 1995, President Clinton indicated that he would veto the risk legislation pending in Congress. *Senate Panel Abandons Bipartisan Markup, Floor Fight Looms*, INSIDE EPA'S RISK POLICY REP., Apr. 28, 1995, at 2.

91. President Bill Clinton & Vice President Al Gore, Reinventing Environmental Regulation, *reprinted in* DAILY ENV'T REP. (BNA), Mar. 17, 1995, at E-1, -4, -16, -22.

92. *Id.* at E-6.

93. For example, H.R. 1022, §104(b)(2), demands that if a risk assessment involves selection of "any significant assumption, inference, or model," the covered agency shall: (1) prepare a representative list and explanation of plausible and alternative assumptions, inferences, or models; (2) explain the basis for any choices; (3) identify any policy or value judgments; (4) fully describe any model used in the risk assessment and make explicit the assumptions used in the model; and (5) indicate the extent to which any significant model has been validated.

94. H.R. 9, §5201 (which would have amended 44 U.S.C. §3502(3)).

95. *Id.* §5202 (which would have amended 44 U.S.C. §3505(1)). The existing statute specifies a reduction of 15 percent by October 1, 1982, and an additional 10 percent by October 1, 1983.

96. The reduction in the information collection burden was to be measured compared to the burden existing on September 30, 1994. *Id.* §5202 (which would have amended 44 U.S.C. §3505(1)).

97. *Id.* §5202 (which would have amended 44 U.S.C. §3505(2)).

98. 44 U.S.C. §3504(a).

99. H.R. 9, §5301 (which would have amended 44 U.S.C. §3504(c)(9)) (emphasis added). This paragraph could have been interpreted as giving the Director sole authority to waive any regulations as part of a pilot project to test the feasibility or benefits of improvements to federal information management practices or related management activities. Although the first parenthetical phrase in the provision might seem to indicate that a federal agency would be a volunteer to the pilot project of which the regulation waiver would be a part, this is not the only possible reading of the language. Nowhere does the provision limit the pilot projects to agencies that have volunteered or specify that the agency concur or otherwise be involved in the decision to waive the applicability of its regulations. Furthermore, the parenthetical phrase includes nonfederal entities as potential volunteers, raising the possibility that the Director could waive the applicability of an agency's regulations as part of a pilot project for which the agency had not volunteered and with the agency's only notice of the waiver being the notice required to be given to Congress and the public.

100. *Id.* §5306(2) (which would have added a new 44 U.S.C. §3517(b)).

of its sections without changing the basic intent or structure of the Act.

Among the substantive differences between the original bill and the House-passed version is an increase from 5 to 10 percent in the annual goal for reductions in the government-wide information collection burden. Furthermore, where the original bill would have required the OMB to set annual goals for reducing the paperwork burden only for five years, the bill passed by the House would make this goal-setting an annual process for the OMB.

The provision authorizing the Director of the OMB to initiate and conduct pilot projects was modified by replacing the phrase "demonstrate the feasibility and benefit of changes or innovations" with a reference to testing "alternative" policies, practices, regulations, and procedures to "fulfill the purposes of this chapter." In addition, two changes were made in the provision authorizing the OMB to waive applicability of regulations, one clarifying and one substantively significant. First, language was added to clarify that the waiver applies only to the regulations or directives issued by an agency that has volunteered for a pilot project. The authority to waive the application of a regulation, however, would remain solely with the OMB. The more significant substantive change is that the waiver would now apply to "any regulation . . . including any regulation or directive requiring a collection of information."[101] This language invites the interpretation that the waiver may extend beyond regulations requiring information collection.

☐ *Ramifications.* Passage of the Contract's paperwork reduction provisions could reduce the ability of the federal environmental agencies to perform their statutory functions. If the OMB enforces the bill's goals, and requires agencies to reduce their information collection burdens by 10 percent per year, the ability of federal agencies to collect needed information could be severely compromised. For example, the Emergency Planning and Community Right-to-Know Act[102] requires EPA to collect extensive information from manufacturers about the hazardous chemicals they store, use, transfer, and release. The public availability of this information has substantially improved the understanding of the nature and scope of potential problems associated with the industrial use of such chemicals. This information has also led to substantial reductions in the amounts of such chemicals released into the environment. These real reductions in risks to public health and the environment could be jeopardized under the Contract if, once the duplicative and other inefficient paperwork burdens are eliminated, Congress pressures the OMB, through oversight hearings or other informal means, to seek the further reductions in paperwork burdens required by this bill.

Congress apparently fails to recognize the connection between information collection and paperwork burdens and the statutory responsibilities it imposed on federal agencies. Certainly federal agencies have created unnecessarily complex and time-consuming forms, and certainly they can be more efficient in collecting information, but Congress has just as certainly drafted laws that require complex and detailed paperwork. Moreover, some of the latter statutes, such as EPCRA, are effective precisely due to the information they require the federal government to collect.

101. H.R. 830, 104th Cong., 1st Sess. §2 (1995) (which would amend §3505(b)).

102. 42 U.S.C. §11001-11050, ELR STAT. EPCRA §§301-330.

*Regulatory Flexibility*

☐ *Legislation as Introduced in the House.* Title VI of H.R. 9, as introduced in January 1995, was entitled "Strengthening Regulatory Flexibility" and would have amended the Regulatory Flexibility Act[103] in several respects. First, it would have repealed the provision that decisions and analyses under the Act are not subject to judicial review but that any analysis of a proposed rule prepared under the Act would be part of the whole record of the rule for purposes of judicial review of that rule.[104] Second, it would have added a requirement that agency determinations of whether a proposed rule would have a significant impact on a substantial number of small entities must consider indirect as well as direct effects of the rule.[105] It also would have required agencies to send to the Chief Counsel for Advocacy of the Small Business Administration (SBA) a copy of any proposed rule—and a copy of any regulatory flexibility analysis or determination that the rule would not have a significant impact on a substantial number of small entities—30 days before publication of the proposal in the *Federal Register.*[106] If, within 15 days of receipt of a proposed rule, the Chief Counsel for Advocacy sent to the agency a statement of opposition to the rule then the agency would have been required to publish the statement along with its response. Finally, the original bill would have stated that it was the "sense of Congress" that the Chief Counsel for Advocacy should be allowed to appear as amicus curiae in any action for judicial review of a rule.[107]

☐ *As Passed by the House.* On March 3, 1995, the House substituted H.R. 926 for the original Titles VI and VII of H.R. 9.[108] Entitled "the Regulatory Reform and Relief Act of 1995," H.R. 926 contains Title I ("Strengthening Regulatory Flexibility"), which is similar to the original bill in the role it would give the SBA's Chief Counsel for Advocacy but which differs in that it would create a new right to judicial review of rules on behalf of small entities.

Under the existing Regulatory Flexibility Act there is no right to separate judicial review of any of the determinations, decisions, or analyses made under the Act.[109] Rather, the analysis of a rule done under the Act is required to be included in the record of the rule for purposes of judicial review of the rule under other authority.[110] As enacted, H.R. 926 would reverse this and create a special right to judicial review by small entities adversely affected by a final rule.[111]

103. 5 U.S.C. §§601-612.

104. *Id.* §6001 (which would have repealed 5 U.S.C. §611).

105. *Id.* §6002 (which would have added 5 U.S.C. §611).

106. *Id.* §6003 (which would have amended 5 U.S.C. §612(d)).

107. *Id.* §6004.

108. H.R. 926, 104th Cong., 1st Sess. (1995). The Title VII provisions are discussed *supra* notes 37-53 and accompanying text.

109. 5 U.S.C. §611.

110. *Id.* §611(b).

111. H.R. 926, §101(a) (which would amend 5 U.S.C. §611(a)(1)).

Small entities would be allowed to bring an action for review of the agency's regulatory flexibility analysis or its certification that the rule would not have a significant economic impact on a substantial number of small entities within one year after the effective date of a final rule.[112]

The bill as passed does not include the provision in the original bill that would have required agencies to consider indirect effects of a rule in making a determination that a rule would not have a significant economic impact on a substantial number of small entities.[113]

☐ *Ramifications.* The bill's judicial review provision would increase the uncertainty surrounding the applicability of federal regulations and would make judicial review of regulations more complicated. The bill probably would also increase the caseload for the federal courts by creating a special right to review of a preliminary and subsidiary part of the rulemaking process[114] and by lengthening the period for seeking such judicial review to one year for one class of affected persons. This could result in one federal court beginning to review the regulatory flexibility determination and analysis of a rule after another federal court had made substantial progress in reviewing the entire rule, including the regulatory flexibility determination and analysis. It appears unlikely that these changes to the Regulatory Flexibility Act will substantially advance the purpose of the Act to provide more flexibility for small businesses and governments in complying with federal regulations. It is also unlikely that the changes would cause observable effects on the environment.

## Payments to Property Owners

The Contract promises to pay property owners for federal limitations on use of their property. The backdrop to this pledge is, of course, the Fifth Amendment to the U.S. Constitution, which provides that private property shall not be taken by the federal government for public use without just compensation. The Fourteenth Amendment extends the same guarantee to owners affected by state and local governmental actions. The Contract legislation would enlarge these guarantees by expanding federal payment obligations beyond those required in the U.S. Constitution.

In 1922, the Supreme Court said, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every . . . change in the general law. . . . [But] while property may be regulated to a certain extent, if a regulation goes too far, it will be recognized as a taking."[115] The Court has repeatedly ruled that "too far" must be determined on a case-by-case basis, and that—except in the case of physical invasion of property—all or virtually all economic use must be destroyed for a right to payment to arise under the Fifth and Fourteenth Amendments.[116] In framing legislation to create additional rights to payment, the 104th Congress sought to determine how low to set the trigger for determining that "regulation goes too far." This determination has the potential to serve as an implicit decision that some governmental programs will "hardly go on."

### *Legislation as Introduced in the House*

Title IX of H.R. 9 as introduced on January 4 called for "compensation from the United States" for "any agency infringement or deprivation of rights to property." The bill defined property as "land" or "the right to use or receive water."[117] Payment would have been required for any federal agency action that "results in a reduction in the value of the property equal to ten percent or more."[118] Federal agencies would also have been required to pay owners for state and local actions affecting property values if the actions were taken pursuant to federal programs binding on state or local governments.[119]

The bill would have allowed qualifying property owners to request compensation from federal agencies. Within 180 days after receiving the request, the agency would have been required to determine whether the private property owner had demonstrated entitlement to compensation, and if so, to offer compensation. If no offer was made, or if it was rejected, the owner could then have compelled binding arbitration. Compensation would have been paid by the agency not later than 60 days after the owner's acceptance of the agency's offer or the arbitrator's decision. Funds for the payment would have been drawn from the existing annual appropriation of the agency responsible for the action. In the absence of sufficient funds the Comptroller General would have been required to identify "the most

112. *Id.* §101(a) (which would amend 5 U.S.C. §611(a)(1)(A) & (B)). The one-year period for judicial review is substantially longer than the review period provided for substantive agency action under other statutes. *See, e.g.*, 42 U.S.C. §1369(a)(1), ELR STAT. FWPCA 509(a)(1) (120 days); 42 U.S.C. §6976(a)(1), ELR STAT. RCRA §7006(a)(1) (90 days); and 42 U.S.C. §7607(a)(1), ELR STAT. CAA §307(a)(1) (60 days).

113. H.R. 926, §101(a).

114. The drafters limited the right to judicial review of federal regulations under H.R. 926, §611(a)(1) to the regulatory flexibility analysis or the determination that no such analysis is required. These analyses are merely one part of the extensive rulemaking process under the Administrative Procedure Act (APA), which includes other analyses (such as that required by the National Environmental Policy Act, 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209, §§4361-4370d) and which provides for comprehensive judicial review of federal regulations, including the aspects this bill singles out. 5 U.S.C. §702, ELR STAT. ADMIN PROC.

115. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 415 (1922).

116. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 22 ELR 21104 (1992); Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 17 ELR 20440 (1987); Pennell v. City of San Jose, 485 U.S. 1 (1985); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). *Lucas* held that even a 100 percent diminution in value is not compensable if the limitation reflects "the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." 112 S. Ct. at 2900, 22 ELR at 21111. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (physical invasion compensable regardless of extent of diminution); *cf.* Nollan v. California Coastal Comm'n, 483 U.S. 825, 17 ELR 20918 (1987), Dolan v. City of Tigard, 114 S. Ct. 2309, 24 ELR 21083 (1994) (requirement for dedication of property must bear sufficient relationship to regulatory approval of landowner's activity).

117. H.R. 9, §9004(6).

118. *Id.* §9002(a)(2).

119. *Id.* §9002(a)(5). The bill identified three instances in which payments would not be made: (1) when the use limited by final agency action would otherwise violate state or local law (including zoning and nuisance law), (2) where the limitation was imposed to prevent a serious and imminent threat to health and safety, or (3) where the limitation implemented the federal navigation servitude. *Id.* §9002.

appropriate Federal source of funds" and payment would have been made from that source.[120]

☐ *Committee and Floor Action.* The House Judiciary Committee held a hearing on Title IX of H.R. 9 on February 10, bypassing any subcommittee consideration. The following week, the leadership set markup for February 16 with one day's notice. The markup vehicle was not H.R. 9. Instead, Congressman Canady (R-Fla.) introduced H.R. 925,[121] a substitute bill, to serve as a markup vehicle. The Canady Bill was shorter than Title IX. Significantly, it would have raised the trigger for payment from 10 percent to 33 1/3 percent, and it limited the bill's coverage to government actions concerning endangered species and wetlands. This new approach was prompted in part by a February 14 letter from 15 Republican moderates to Committee Chairman Henry Hyde (R-Ill.) expressing concern about the direction taken by H.R. 9.[122]

At markup, however, the Judiciary Committee amended the Canady Bill to return to the proposed 10 percent trigger and to require payments for *all* federal agency actions affecting property values. The bill provided for binding arbitration or civil action at the property owner's option, but without setting forth a specific arbitration procedure. Unlike the original H.R. 9, H.R. 925 did not provide for federal payments for the actions of state and local agencies.

As reported by the Committee, H.R. 925 retained or created several exceptions. For example, the federal government would not have been required to pay for federal actions limiting property uses otherwise prohibited by state law—except for state laws required by federal programs,[123] uses prohibited as nuisances, or uses prohibited by local zoning. Also, no payment would have been required for action taken "to prevent an identifiable hazard to public health or safety; or damage to specific property other than the property whose use is limited"[124] or to implement the federal navigation servitude. The Committee approved the bill with 12 dissenting votes, and its report stated that H.R. 925 was intended "to ensure that private property owners are compensated when the use of their property is limited by overreaching Federal regulations."[125]

Floor action on H.R. 925 was set for March 2-3. Debate was limited to 12 hours under the rule reported by the Rules Committee. The rule, moreover, provided for consideration of a leadership-backed substitute bill introduced by Representative Canady with an amendment by Rep. Tauzin (D-La.) as the basis for debate and amendment, *rather* than the bill reported by the Committee. Rep. Frank (D-Mass.), an opponent of the bill, stated during the debate: "[T]he bill on which we had hearings disappeared when we went to markup [and] the language that is before us now, the Canady substitute as amended by the gentleman from Louisiana [Mr. Tauzin], has never been before a committee."[126]

The most significant change brought about by the Canady substitute was that rather than requiring payment for any agency action that diminished the fair market value of "property by 10 percent or more" as in the Committee bill, it would have required payment for any agency action diminishing the value of "*any portion*" of property by 10 percent or more.[127] The significance of the shift to "any portion" became clear in the debate:

> Mr. DeFazio (D-Or.): "[I]f I had a 100-acre tree farm and the restrictions apply to 1 acre . . . if it took more than 10 percent of that 1 acre, that would be mandatorily compensable?"
> Mr. Canady: ". . . that is correct, assuming that . . . that particular circumstance was not subject to any of the other exceptions under the bill."[128]

The substitute bill also added a new section to declare a federal policy "that no law or agency action should limit the use of privately owned property so as to diminish its value" and to direct all federal agencies to "ensure" that agency action will not "limit the use of private property so as to diminish its value."[129] Finally, the Canady substitute, which retained the exceptions to payment approved by the Committee, altered the exception for the federal navigation servitude to provide that the servitude exception could not be used "to the extent such servitude is interpreted to apply to wetlands."[130]

The Tauzin Amendment, which the Republican leadership supported, limited the payments portion of the bill—but not the policy statement—to federal agency actions involving wetlands,[131] endangered species,[132] and, in a provision making an unexplained first appearance, agency actions "with respect to an owner's right to use or receive water" from federal reclamation projects, or under the Federal Land Policy Management Act, or the Forest and Rangeland Renewable Resources Planning Act.[133] The amendment also

120. *Id.*

121. H.R. 925, 104th Cong., 1st Sess. (1995).

122. Letter from Rep. John E. Porter et al. to Rep. Henry Hyde (Feb. 14, 1995).

123. This exception to the exception was probably intended to prevent federal agencies from avoiding payments based on state-law provisions that were driven by federal requirements such as state laws implementing federal environmental programs.

124. The Committee removed the words "imminent and" preceding the word "identifiable."

125. H.R. REP. No. 46, 104th Cong., 1st Sess. 1 (1995).

126. 141 CONG. REC. H2539 (daily ed. Mar. 2, 1995) (statement of Rep. Frank).

127. 141 CONG. REC. H2502-2503 (daily ed. Mar. 2, 1995) (amendment in the nature of a substitute).

128. 141 CONG. REC. H2509 (daily ed. Mar. 2, 1995) (statements of Reps. Canady and DeFazio).

129. 141 CONG. REC. H2502 (daily ed. Mar. 2, 1995) (amendment in the nature of a substitute). These provisions would apply to all federal agencies, and were not affected by the subsequent Tauzin Amendment, which limited the payment provision's reach to specific laws. The Canady substitute also resolved a potential conflict with federal budgeting rules and added a savings clause to preserve other bases for property owner compensation, such as claims under the U.S. Constitution. *Id.* at H2503.

130. *Id.* This provision could adversely affect the U.S. Army Corps of Engineers' (the Corps') ability to maintain navigability with respect to wetlands appurtenant to navigable waters or in areas diked off from such waters. *See, e.g.*, Leslie Salt Co. v. Froehlke, 578 F.2d 742, 8 ELR 20480 (9th Cir. 1978) (the Corps has jurisdiction over behind-the-dike ponds); *but cf.* Kaiser Aetna v. United States, 444 U.S. 164, 10 ELR 20042 (1979) (enforcing public access to pond connected by constructed channel to navigable bay requires payment of compensation).

131. *See* 33 U.S.C. §1344, ELR STAT. FWPCA §404; Food Security Act, 16 U.S.C. §§3821-3823.

132. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

133. Reclamation Act, 43 U.S.C. §371 et seq.; Federal Land Policy and Management Act, 43 U.S.C. §§1701-1784, ELR STAT. FLPMA §§102-603; Forest and Rangeland Renewable Resources Research

changed the exception to the payment requirement for federal limitations on uses that otherwise violated state law, limiting the exception to those uses that are "a nuisance as defined by the law of a State or . . . already prohibited under a local zoning ordinance."[134] The Tauzin Amendment passed easily.[135]

The House then quickly defeated an amendment offered by Rep. Porter (R-Ill.) that would have excused the government from payment if a property rights impact analysis had been done with respect to the governmental activity at issue.[136] An amendment by Rep. Schroeder (D-Colo.) providing for an offset in any compensation award to reflect the amount of *increase* in value occasioned by any agency action—the so-called givings counterpart to governmental "takings"[137]—was defeated on a voice vote.[138]

The most serious challenge to the bill came on its most radical point—the notion that diminution should be calculated on any portion of an affected property rather than on the parcel as a whole or case-by-case, as the Supreme Court has ruled in applying the constitutional standard.[139] Rep. Goss (R-Fla.) offered an amendment to strike the "any portion" language and to raise the trigger amount to 30 percent of the value of the property. This was narrowly defeated.[140] Rep. Mineta (D-Cal.) and Rep. Davis (R-Va.) immediately offered the same amendment with a 20 percent trigger. When it appeared that this amendment was likely to pass, the House leadership refused to permit a vote until the following day.

On March 3, the Mineta-Davis amendment was defeated, the leadership having committed in the meantime to support an amendment to set the trigger at 20 percent, but calculating it on the affected portion. This amendment passed, as did the bill.[141] The bill was combined with several others and renumbered H.R. 9 in order to serve the symbolic purpose of passing the Contract legislation.

As passed by the House, the property rights title of H.R. 9 would create rights to receive federal payment for governmental actions concerning wetlands, endangered species, or western water contracts where those actions affect the value of any portion of real property or a right to use or receive water, subject to narrow exceptions. The agency is liable if its action diminishes the fair market value of "any portion" of property by 20 percent or more. Payments must come out of the agency's existing appropriation, "notwithstanding any other provision of law." An owner must request payment in writing within 180 days after the agency action. If the parties cannot agree on compensation, the owner may take the matter to binding arbitration or file a civil action against the agency in court. If the owner prevails, the owner must be awarded reasonable attorneys fees, arbitration/litigation costs, appraisal fees, and (for civil actions only) interest on the compensation award from the date of the limitation.

☐ *Senate Consideration.* While the Contract is a commitment by House Republicans, the Senate began as boldly as the House. On March 23, Senator Dole and 31 co-sponsors introduced S. 605, the Omnibus Property Rights Act.[142] S. 605 is essentially three different bills: a general compensation bill for all government activities affecting property use and value; a takings impact assessment bill; and a wetland and endangered species compensation bill.[143]

The general compensation title would require payment

Act of 1974, 16 U.S.C. §1645, ELR STAT. NFMA [FRRRA §6]. These are nonregulatory statutes that govern the provision of subsidized water in the western United States by contract, and the conveyance or allocation of water in the context of National Forest planning and public land management decisions. The referenced laws do not regulate water rights, which are private-property interests determined under state law, but rather relate to provision of public resources under contracts and permits. Neither Representative Canady nor Representative Tauzin—who are not from western states—was initially able to explain these provisions' purposes. *See generally* 141 CONG. REC. H2511-2516 (daily ed. Mar. 2, 1995) (debate). Representative Canady subsequently opined that these provisions would not require compensation for changes in the delivery of water from reclamation projects if the contract provided authority for such changes. *Id.* at H2566. The provisions' true import is highly uncertain, but such uncertainty may provide leverage to water users in negotiations with federal government authorities on a host of matters.

134. 141 CONG. REC. H2504 (daily ed. Mar. 2, 1995) (Tauzin amendment).

135. 141 CONG. REC. H2529 (daily ed. March 2, 1995) (vote). The Tauzin amendment also required the federal government to purchase any portion of property reduced in value by greater than 50 percent at the election of the landowner.

136. 141 CONG. REC. H2530-2548 (daily ed. Mar. 2, 1995). Such an analysis, also called a "takings impact assessment," is the approach President Reagan pioneered in Exec. Order No. 12630, 58 Fed. Reg. 8859, ELR ADMIN. MAT. II 45037 (Mar. 8, 1988). Versions have been offered in previous Congresses by Senator Symms (R-Idaho), Senator Dole, and others. Such assessments require federal agencies to assess the likelihood that a particular governmental regulation or other action will take property without just compensation. Representative Porter's amendment was structured as an exception to the compensation requirement because the Rules Committee had barred him from offering a straight takings impact assessment bill as a substitute for the payment bill the Judiciary Committee reported.

137. *See, e.g.*, Edward Thompson Jr., *The Government Giveth*, 11 ENVTL. F., Mar./Apr. 1994, at 22.

138. 141 CONG. REC. H2549-2551 (daily ed. Mar. 2, 1995). A move by Rep. Wyden (D-Or.) and Rep. Gilchrest (R-Md.) to restrict the bill's applicability by limiting it to private homeowners was likewise defeated. *Id.* at H2556-2561.

139. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 8 ELR 20528 (1978):

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular government action has effected a taking, the Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole.

*Id.* at 130-31, 8 ELR at 20534; *accord* Concrete Pipe and Prod., Inc. v. Construction Laborers Pension Trust for S. California, 113 S. Ct. 2264, 2291 (1993). *Contra* Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 24 ELR 21036 (Fed. Cir. 1994) (dicta supporting the "partial takings" approach).

140. 141 CONG. REC. H2551-2555 (daily ed. Mar. 2, 1995). The vote was 210 to 211.

141. 141 CONG. REC. H2596-2607 (daily ed. Mar. 3, 1995).

142. S. 605, 104th Cong., 1st Sess. (1995). The bill is an amalgamation of property rights bills various sponsors had offered previously, including S. 22, 104th Cong., 1st Sess. (1995) (a takings impact assessment bill Sen. Dole sponsored), S. 135, 104th Cong., 1st Sess. (1995) (a bill Sen. Hatch (R-Utah) sponsored that provided for payment if an affected portion of property were reduced in value by 20 percent or $10,000), S. 145, 104th Cong., 1st Sess. (1995) (a bill Sen. Gramm (R-Tex.) sponsored which would set the affected portion threshold at 25 percent or $10,000), and S. 239, 104th Cong., 1st Sess. (1995) (a similar bill Sen. Shelby (R-Ala.) sponsored but limited to endangered species and wetland regulation).

143. Title 2 is the generalized compensation bill, Title 4 is the takings impact assessment bill, and Title 5 is the wetland and endangered-species payment bill. Title 3 provides for arbitration of disputes.

for any action or decision by a federal agency (including government corporations and government-controlled corporations) that "takes a property right" *or* "unreasonably impedes the use of property or the exercise of property interests."[144] Federal agencies would also pay property owners for any state agency actions that take property rights or unreasonably impede property uses or interests in order to administer a federally delegated or supported program.[145]

Government action would be deemed to take property rights or unreasonably impede property uses or interests if an action affecting property did not substantially advance the governmental purpose; exacted a right to use the property as a condition for a permit without "rough proportionality" to the impact of the proposed use;[146] resulted in temporary or permanent deprivation of all or substantially all economically beneficial or productive use of the affected portion of the property without showing that the deprivation inheres in the title itself; diminished the fair market value of the affected portion by 33 percent or more; or "under any other circumstance" constituted a taking under the Fifth Amendment. No compensation would be required if the use or proposed use was "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."[147] Like H.R. 9, this title of S. 605 would provide that awards be promptly paid out of agency appropriations; if insufficient funds were available, the agency would pay the award from funds available in the next fiscal year or seek additional appropriations.[148]

This title of the bill would confer jurisdiction on the Court of Federal Claims to invalidate laws and regulations.[149] Since 1855, that court and its predecessors have had "jurisdiction only to award damages, not specific relief."[150] The bill also would give concurrent jurisdiction to the Court of Federal Claims and the federal district courts and eliminate the prohibition against pursuing the same claim in both courts.[151]

The takings impact analysis title of the bill resembles the amendment to the Safe Drinking Water Act passed by the Senate during the 103d Congress.[152] New or significant features of this title include a requirement that each takings impact analysis be made publicly available, and "to the greatest extent practicable" be transmitted to "the owner or any other person with a property right or interest in the affected property.[153] In yet another version of regulatory reform, it would have all agencies "review, and where appropriate, re-promulgate all regulations that result in takings of private property under this Act" and reduce such takings "to the maximum extent possible within existing statutory requirements."[154]

The wetlands and endangered species title of S. 605 is aimed at providing special rights to private-property owners affected by §404 of the Clean Water Act or the Endangered Species Act.[155] The payment trigger would be diminution of 33 percent or more of the value of *any affected portion* of property. This title also includes a mandatory offer procedure like that in the original H.R. 9.[156]

144. S. 605, §203. It defines "owner" as "the owner *or possessor* of property or rights in property," and thus would extend compensation to nonowner tenants, users, squatters, and others without a legal interest. *Id.* (emphasis added). The bill also provides a broad definition of property, including personal property. (H.R. 9, in contrast, is limited to real property and water rights.) The S. 605 definition includes "property rights provided by, or memorialized in, a contract"—a provision that would supersede Supreme Court precedent. Concrete Pipe and Prod., Inc. v. Construction Laborers Pension Trust for S. California, 113 S. Ct. 2264 (1993); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) (no taking where regulatory scheme changed contractual pension provisions); Omnia Co. v. United States, 261 U.S. 502 (1922) (frustration of contract not a compensable taking).

145. This provision would produce a reverse unfunded mandate—required payments imposed upon the *federal* government by *state* governmental action. The House rejected a similar provision found in the original H.R. 9 because it would open the federal government to unlimited liability for actions over which it lacks control. For example, a state pollution control agency might deny a permit to a proposed waste incinerator, claiming to apply federal standards. Even though the federal government could not compel the state to issue the permit, the disappointed permit applicant could obtain a cash payment from federal taxpayers.

146. S. 605 would apply the rough proportionality test to any "condition" on an agency action, although the Supreme Court has limited use of this test—at least as a constitutional matter—to a required dedication of a property interest. Dolan v. City of Tigard, 114 S. Ct. 2309, 24 ELR 21083 (1994). The bill is ambiguous on this point because it switches terms from "condition" in the first half of the relevant clause, to "required dedication" at the end.

147. S. 605, §204.

148. *Id.* tit. 2. The bill would prescribe a six-year statute of limitations and also require the government to pay compound interest from the date of the taking.

149. The Court of Federal Claims has become popular with some advocates of private-property rights, largely on the basis of Judge Loren Smith's decisions awarding large sums to owners of wetlands and other regulated lands. *See, e.g.*, Florida Rock Indus. v. United States, 21 Ct. Cl. 161, 20 ELR 21201 (1990), *judgment entered*, 23 Ct. Cl. 653, 24 ELR 20591 (1991), *vacated*, 18 F.3d 1560, 24 ELR 21036 (Fed Cir. 1994); Loveladies Harbor, Inc. v. United States, 15 Ct. Cl. 381, 19 ELR 20092 (1988), 21 Cl. Ct. 153, 20 ELR 21207 (1990), *aff'd*, 28 F.3d 1171, 24 ELR 21072 (Fed. Cir. 1994).

150. Glidden Co. v. Zdanok, 370 U.S. 530 (1962). The Court of Federal Claims is currently an Article I court under the U.S. Constitution. 28 U.S.C. §171. The ability of a non-Article III court to strike down acts of Congress and federal regulations is highly questionable on separation of powers grounds, as it would allow an institution other than the third branch of government to trump the Congress and the President.

151. 28 U.S.C. §1500. The bill also would allow litigants to challenge federal regulations in the Court of Federal Claims under the APA, thus creating a choice of forum other than the U.S. Courts of Appeals which generally have been vested with jurisdiction under Title 28 and substantive statutes. S. 605, §205(c).

152. S. 2019, 103d Cong., 2d Sess. (1994). Although the Senate passed it, the bill did not become law.

153. S. 605, §403. This provision would reverse the approach taken in Exec. Order No. 12630 and the usual practice with regard to assessments, which attempts to treat them as confidential deliberative documents. 58 Fed. Reg. 8859, ELR ADMIN. MAT. II 45037 (Mar. 8, 1988). It also may require substantial efforts at identification, property title record searches, and mass mailings in the case of regulations of general applicability.

154. S. 605, §404.

155. Section 502(4) and (3) together define "private-property owner" for purposes of S. 605, tit. 5. A private-property owner must be a "non-Federal person" and cannot be a state or local official "acting in an official capacity." A nonfederal person is someone "other than an officer, employee, agent, department, or instrumentality of the Federal Government or a foreign government." The definition plainly excludes federal employees, even in their nonofficial capacities (as landowners), from Title 5's benefits.

156. *Id.* §508 would provide that within 90 days of a final decision by an agency, the owner could submit a written request for compensation. The agency head would be required to stay the action and within 180 days make two offers—to purchase the property, or to compensate for the diminution in value. The owner could accept one of the offers or reject both. If the owner rejected both, the owner could request binding arbitration under the rules of the American Arbitration Association. Agencies would be required to pay offers or awards promptly out of their appropriations.

The wetlands and endangered species title of S. 605 would make important changes to existing procedural rules. But although procedural in character, these changes would significantly modify the application of the substantive programs. For one thing, upon the claim of any owner that an action was a taking of property, the applicable agency would be required to stay the action at issue pending resolution of the claim.[157] Additionally, the bill would require implementing agencies to "comply with applicable state and tribal government laws, including laws relating to private property rights and privacy."[158] This provision, which is not limited to trespass or other state and tribal common law, is evidently intended to allow state and tribal governments to regulate federal conduct. It would apparently have the effect of ratifying the "Catron County ordinances" now popular in parts of the west, that declare state control over federal land management or attempt to prohibit federal agents from carrying out functions required by federal law.[159]

The bill would also require that the Acts be administered and implemented "in a manner that has the least impact on private property owners' constitutional and other legal rights."[160] Moreover, it would require that federal officials obtain *written* consent of property owners to enter property, provide notice of such entry, and provide copies of any data collected to the owners. The written-consent provision contains no exception for law enforcement activities, even where officials obtain search warrants. Thus, a landowner could illegally fill wetlands or shoot bald eagles and federal agencies would evidently be unable to enter the property, even with probable cause.[161]

It is unlikely that S. 605 will be passed by the Senate without substantial modifications. Nevertheless, its approach is similar to that in the House and suggests that, absent a filibuster, the President may be presented with a payment bill sometime this year.

*Ramifications*

The Contract's threshold for federal payments would overthrow the constitutional standard, replacing it with a subsidy. For example, suppose that a speculator were to acquire 100 acres of farmland hoping to build 200 condominiums, but because of two acres of wetlands on the site, the federal government issued a permit that authorized those condominiums only if the wetlands were avoided or if mitigation were provided. Under Fifth Amendment jurisprudence, no payment would be due the landowner. Under the Contract legislation, the owner would be paid with taxpayer funds for the loss in fair market value of each of the two acres, regardless of the impact on the project or the parcel as a whole.[162]

The Contract legislation would essentially eliminate the government's ability to impose reasonable conditions or mitigation requirements on environmentally damaging uses of property without paying compensation. Thus, it would provide a powerful incentive for developers to propose the most highly damaging uses for their property, in order to receive payments in exchange for a more responsible use. Responsible land users, in contrast, would receive no reward for beginning with reasonable proposals. Thus, the legislation would encourage subsidy seeking. Even if legislators ultimately enact a payment bill, some of this adverse effect could be alleviated if they included savings language to provide: "Notwithstanding any other provision in this Act, no compensation shall be due for agency action that requires reasonable mitigation of a proposed use of property." This would still allow payments to owners denied the use of their property, but would not eliminate the government's ability to require responsible use.

The Contract legislation also would subvert the appropriations process. H.R. 9, for example, would direct the heads of federal agencies to "transfer" or "reprogram" funds "notwithstanding any other law," to pay property rights claims out of annual agency appropriations. By placing property rights claimants ahead of all other government interests, the bill would allow unelected federal bureaucrats to cancel or cut back federal programs or projects voted on by Congress.

The Contract's reliance on nuisance and zoning as the key exceptions to statutory payment requirements would cause key federal decisions to turn on interpretations of state statutory and common law.[163] Thus, the role of federal

157. *Id.* §508.

158. *Id.* §503(a)(1).

159. Anita P. Miller, *All Is Not Quiet on the Western Front*, 25 THE URBAN LAW. 834 (1993); Keith Schneider, *Bold Plan Seeks to Wrest Control of Federal Lands*, N.Y. TIMES, Apr. 8, 1995, at 6; Florence Williams, *Land Owners Turned the 5th Into Sharp Pointed Sword*, HIGH COUNTRY NEWS, Feb. 8, 1993, at 1; Ernie Thompson, *They're Fed Up, and Aren't Going to Take It Anymore*, HIGH COUNTRY NEWS, Feb. 21, 1994, at 7; Florence Williams, *Sage Brush Rebellion II*, HIGH COUNTRY NEWS, Feb. 24, 1992, at 1; Paul Larmer, *Wise Use Ordinance Challenged in Idaho*, HIGH COUNTRY NEWS, Mar. 22, 1993, at 3 (describing the county ordinance movement); *see also* CATRON COUNTY, N.M., RESOLUTION 002-91 (1991); CATRON COUNTY, N.M., RESOLUTION 003-91 (1991); CATRON COUNTY, N.M., RESOLUTION 005-92 (1992) (over 100 other western counties have based their ordinances on Catron County's ordinances). Catron County's resolutions purport to define "private property rights" in federal lands and grazing permits, and impose civil and criminal liability on federal employees. *See also* Boundary Backpackers v. Boundary County, 24 ELR 20522 (Dist. Ct. Boundary County, Idaho 1994) (striking down Boundary County's version of the ordinances); United States v. Nye County, No. CVS-95-002322 (D. Nev. complaint filed Mar. 6, 1995), ELR PEND. LIT. 66385 (federal government's challenge to Nye County's ordinances declaring that county is responsible for managing all public lands located within it); David B. Edelstein, Local Attempts to Gain Control Over Public Lands in the Western United States (1995) (unpublished manuscript on file with the authors).

160. S. 605, §503(a)(2). It does not address balancing of burdens and benefits or consider reciprocity of advantage, even with respect to the "other legal rights" which may be of nonconstitutional dimension. Thus, even nonconstitutional rights of property owners apparently would trump rights of nonproperty owners.

161. *Id.*

162. The Contract legislation focuses on diminution in fair market value, thereby treating existing uses and potential uses equally. But potential uses have never been entitled to as much deference under any set of laws, ranging from zoning (where prior nonconforming uses are allowed to continue), to takings law. *See generally* James M. McElfish Jr., *Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environment*, 24 ELR 10231, 10247-49 (May 1994); *see also* DeFeo v. Sill, 810 F. Supp. 648, 657 (E.D. Pa. 1993) ("That regulatory action deprives property of its most beneficial use does not render it unconstitutional.").

163. Several years ago, EPA restricted the discharge of pollution from gold mines into streams. Most mines rapidly complied with the limitation, but one Alaska mine filed suit claiming that if it complied it would become unprofitable; the mine owners sought payment for the "regulatory taking" of their gold. Rybachek v. United States, 23 Cl. Ct. 222 (1991) (denying government motion to dismiss gold miners' claim that FWPCA's effluent limitations had rendered their gold mine economically valueless). The case eventually settled out

judges and arbitrators in interpreting state laws would increase dramatically. States, however, have been relatively unhappy with past federal interpretations of their laws, for example, in the context of EPA decisions about the applicable or relevant and appropriate state requirements that apply to Superfund cleanups.[164] Similar discontent may arise if the law of nuisance or the interpretation of state statutes is driven by determinations in other federal forums.

Moreover, because federal payments will be keyed on the stringency of state laws, the Contract legislation may give states an incentive to reduce the stringency of their laws to equalize opportunities for businesses to receive federal dollars. Conversely, federal agency litigants would probably argue for broad interpretations of state nuisance law as they sought to avoid liability.

There is, interestingly, some ambivalence among federal legislators about how far states should be trusted. Representative Tauzin's leadership-backed amendment to H.R. 9 made it clear that states would not be allowed to defeat federal payments by enacting just any laws, but only laws that implement the background principles of nuisance. In contrast, Congress appears willing to grant local governments greater flexibility. None of the Contract legislation would significantly disturb local zoning laws.[165] Consequently, if the Contract legislation becomes law, it may well be local zoning ordinances that will carry the burden of protecting wetlands or requiring mitigation for environmentally degrading activities. It may, as well, be local zoning ordinances that will become the new front lines of environmental health and safety.[166]

In sum, these payment bills, if enacted, would likely result in a proliferation of claims, the diversion of federal officials from implementation of substantive laws to the handling of claims, a diversion of funds from agency missions, a drain on the federal treasury, and a devolution of some federal power to state and local officials. Moreover, if it really became the policy of the United States "that no law or agency action should limit the use of privately owned property so as to diminish its value,"[167] it is not clear what actions the federal government could lawfully take.

## Themes of the Contract

The extraordinary speed with which H.R. 9 and the other Contract bills were handled makes a considered evaluation of potential effects on the environment particularly important. The usual hearings, subcommittee markups, committee markups, and floor action were abbreviated, making legislative history a thinner than usual guide to very broad legislation. Nevertheless, at least three common themes emerge: Reliance on quantitative analyses, reliance on complex administrative processes, and shifting benefits and burdens.

### *Requiring Quantitative Analyses*

Quantitative analysis refers to the use of highly technical and data-intensive techniques to estimate, assess, or rank environmental values. Quantitative analysis has great appeal. Its proponents argue that more analysis will allow a better targeting of resources and lead to more reasoned decisionmaking.[168] As embodied in the Contract bills, however, quantification also has the potential to divert federal agencies from the substantive work that Congress has charged them with accomplishing.[169] Moreover, the bills' requirements for quantitative analyses are inconsistent. For example, the cost-benefit analysis that would be required by H.R. 926 is not the same as that which H.R. 1022 would require.[170] And the two provisions—both now part of H.R. 9—do not cross-reference one another. Congress used yet a different threshold, and required yet a different version of cost-benefit analysis in UMRA.[171] Unless these many quantitative mandates are integrated and harmonized, confusion is certain.

Even the legislation providing for payments to property owners takes a quantitative approach. In awarding compensation under the Constitution, the courts have historically used a case-by-case analysis of expectations, fairness, and

of court with no government payment. The result would have been different, however, under the Contract legislation. Indeed, the legislation's nuisance exception would have been unavailable in that case because the discharges were not a nuisance under Alaska law.

When it comes to environmental protection, nuisance law is a weak reed. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §86, at 616 (5th ed. 1984) (the law of nuisance is an "impenetrable jungle"). Moreover, because of the rise of the police power and regulatory law, the law of nuisance is in a state of arrested development in many states—the most definitive cases may date back to the 1880s and 1890s. This means that although nuisance law may evolve to meet the challenge—*see, e.g.*, Philip Warburg & James M. McElfish Jr., *Property Rights and Responsibilities: Nuisance, Land-Use Regulation, and Sustainable Use*, 24 ELR 10520 (Sept. 1994)—its path to modernity may be littered with issues to be litigated.

164. 42 U.S.C. §9621, ELR STAT. CERCLA §121. *See, e.g.*, Donald Brown, *What Is Wrong With the 1990 National Contingency Plan?*, 20 ELR 10371 (Sept. 1990).

165. Indeed, zoning is a cherished American tradition that (at least in the urban and suburban jurisdictions where most voters now live) may be as important as property rights.

166. If this is the case, the convergence of land use law with environmental law—which is already occurring—may be hastened. Local communities will need to take responsibility for their own environments. "Think globally, act locally" will evolve from slogan to legal necessity.

167. H.R. 925, §2 (as the House passed it and folded it into H.R. 9), 141 CONG. REC. H2629 (daily ed. Mar. 3, 1995).

168. In general, quantitative analyses provide valuable information to government decisionmakers, and their use has increased in federal agencies like EPA.

169. Each new "major rule" would require a set of analyses for cost and risk. Each regulatory decision (even actions simply carrying out legislative mandates) would require the review and evaluation of myriad claims for payment. Since it is unlikely that federal agencies will be receiving increases in appropriations, they would be required to divert personnel and contract funds toward support of these activities.

170. The House-passed H.R. 1022 would require that health, safety, or environmental "major rules" with annual effects on the economy greater than $25 million undergo both cost-benefit analyses and risk assessments. A similar approach was taken in H.R. 926, which would require that "major rules" of all types with annual effects on the economy greater than $50 million be subject to regulatory-impact analysis, including cost-benefit analysis. Moreover, the bills use different definitional language to describe costs and benefits.

171. UMRA, Pub. L. No. 104-4, §202(a)(2) (1995). Under Title II of UMRA, an agency that proposes to impose an enforceable duty on state, local or tribal governments, or on the private sector, that would cause either group to spend $100 million or more in the aggregate in one year, must make a "qualitative and quantitative assessment of the anticipated costs and benefits" of its action.

the public good.[172] In contrast, the proposed legislation aims at greater certainty by supplying a specific percentage trigger for payment. Thus, what has until now been an equitable, multivariable analysis including important nonquantitative considerations—the nature of the governmental action, the character of the use, and the existence of reasonable, investment-backed expectations[173]—would turn primarily on the expert opinions of property appraisers.

In general, an increased reliance on quantification will shift the focus of policy debates to considerations that are the province of "experts" at federal agencies and in the private sector, rather than the public at large.[174] A supermandate may also elevate quantifiable measures over all other environmental policy goals. Increased reliance on quantitative analyses may cause policymakers to emphasize measurable factors over qualitative worth. For example, for a regulation that restricted discharges to a body of water such as the Chesapeake Bay, it is relatively easy to measure compliance costs. It is much more difficult and controversial to quantify the benefits.[175] Reliance on measures of risk can have similar effects. Environmental policy is normally based on considerations of justice, fairness, functioning ecosystems, and other factors in addition to quantitative goals.[176]

*Requiring Complex Procedures*

Most of the measures under consideration contain extensive procedural requirements that federal agencies must follow to issue regulations or take other action to protect human health, safety, or the environment. These procedures may make it more difficult for the federal government to accomplish the tasks and meet the goals set by Congress in substantive legislation.

New York attorney Philip K. Howard recently published a best-selling book called *The Death of Common Sense: How Law Is Suffocating America.*[177] In it, he argues that the real problem with U.S. bureaucracy and regulation is that not enough discretion is given to regulators. The result is endless process, absence of accountability, and substantial red tape surrounding most interactions with the government.[178] The 104th Congress, many of whose members have spoken approvingly of the book, seems determined to provide more of the same. Much of the Contract legislation would fetter the discretion of government agencies to respond flexibly, insist on prescriptive risk analyses subject to detailed procedural steps and judicial review, require multiple levels and types of cost-benefit analyses, and add new steps to the regulatory and deregulatory process. H.R. 9 and the regulatory reform bills under consideration by the Senate would create less flexibility and more process.

*Shifting Benefits and Burdens*

Law allocates benefits and burdens within society, and establishes procedures for future allocations. The Contract includes several strategies involving shifting benefits and burdens between the general public and individual entities, and shifting burdens and responsibilities among federal agencies, the courts, and the states.

The property payment legislation is a clear example. In many situations, it would shift the burden of using property responsibly from owners of property to the taxpayer at large. The bills are not aimed solely at resolving the egregious cases of intrusion on private-property values, by, for example, simplifying review procedures or providing for appropriate variances.[179] The paperwork reduction and the risk and cost-benefit bills also alter assignment of benefits and burdens. Fixed annual reductions in government information collection have the potential to reduce the paperwork burden on the regulated community by increasing the risk to the public that information needed to avoid or reduce risks will be unavailable.

Shifts of responsibility to the states, within the executive branch, and to the judiciary also will produce changes in policy. Congress, however, appears ambivalent about shifting responsibilities to the states. On the one hand, the call of the Contract is for devolution of funding and discretion to the states. On the other hand, portions of the Contract legislation not discussed in this Dialogue would preempt

172. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 8 ELR 20528 (1978) (holding that courts must determine "when 'justice and fairness' require that economic injuries caused by public action be compensated by the government").

173. Connolly v. Pension Benefit Guar. Corp., 475 U.S. 225 (1986) (listing factors); *accord* Concrete Pipe and Prod., Inc. v. Construction Laborers Pension Trust for S. California, 113 S. Ct. 2264 (1993).

174. Another example of this desire for "expert" solutions to public policy problems is Congress' decision several years ago to refer the wetlands delineation question to the National Academy of Sciences (NAS). But while the NAS opinion, NAT'L RES. COUNCIL, WETLANDS: CHARACTERISTICS AND BOUNDARIES (1995), is influential, no one really expects it to be determinative—unlike the current expectations for risk assessment, cost-benefit analysis, and other features of the new legislation.

175. One example of the methodological issues involved in assessing benefits is the controversy surrounding the use of the contingent valuation method to assess the value of damages to natural resources like the Chesapeake Bay. *See* Natural Resource Damages Assessments Under the Oil Pollution Act of 1990, 58 Fed. Reg. 4601, 4602, 4610 (Jan. 15, 1993) (report of Contingent Valuation Panel); Natural Resource Damage Assessments, 59 Fed. Reg. 1062, 1142-1148 (to be codified at 15 C.F.R. pt. 990) (Proposed on Jan. 7, 1994) (discussion of contingent valuation method of valuing natural resources).

176. *See, e.g.*, SUSTAINABLE ENVIRONMENTAL LAW: INTEGRATING NATURAL RESOURCE AND POLLUTION ABATEMENT LAW FROM RESOURCES TO RECOVERY §4.1 (Celia Campbell-Mohn et al., eds., 1993) (identifying nine goals embodied in U.S. environmental laws: protection of human health, efficiency, national security, preservation for aesthetics or recreation, sustainability, intergenerational equity, community stability, biocentrism, and pursuit of scientific knowledge and technology).

177. PHILIP HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994).

178. Howard writes:

> The utopian urge that prompted us in recent decades to write the world's thickest instruction manual, naming it the law of the land, has led us to invent a device that, like detailed rules, also avoids the untidiness of human judgment. It goes by an ancient name, *process*, but its purpose is new. It once existed to help humans make responsible decisions. Process has now become an end in itself.

*Id.* at 60 (emphasis added).

179. For example, the government denies fewer than .04 percent of wetland permits and general permits, but the Contract bills require payment not only for denials, but also for mitigation and avoidance requirements that affect any portion of any property. *See* Lajuana S. Wilcher, *Wetlands and the Constitutional Balance*, NAT'L WETLANDS NEWSL., Mar./Apr. 1995, at 17.

portions of state tort law.[180] The Contract legislation also shifts responsibilities within the executive branch, shifting power from other agencies to the OMB, continuing a trend in both the legislative and executive branches to give that agency more responsibilities and greater power.

The bills also create new substantive bases for litigation—risk assessment, cost-benefit analysis, paperwork reduction, and property rights. This will necessarily shift more decisionmaking power to the U.S. Department of Justice and the courts. Although environmental protection has benefitted over the last 25 years from the availability of judicial review, the creation of several whole new species of judicial challenges may produce more of the over-legalization that the Contract's proponents have decried.

## Conclusion

The fundamental question to be asked of any environmental policy is whether it protects human health and the environment better than what has gone before. The Contract does not deal directly with this question. Nevertheless, some predictions are possible.

If legislation requiring payments to property owners becomes law, both regulatory and enforcement activity in the affected programs is likely to slow, at least for several years. If it covers wetlands, most projects requiring permits are likely to proceed without significant avoidance or mitigation. Thus, the rate of wetland loss—which is now declining[181]—is likely to rise. If the legislation's scope is broader, it may become quite difficult to issue effluent guidelines, rules on air toxics, and other rules designed to achieve a higher level of environmental protection. The need to handle claims and to pay judgments out of agency operating budgets will divert personnel and resources away from operations, research, and monitoring.

The proposed risk-assessment and cost-benefit legislation is primarily likely to delay new rulemaking. The effect on the environment will depend on what rules are delayed. Rules designed to encourage flexibility and experimentation may be as hard to promulgate as those pursuing classic command-and-control solutions. Environmental groups may find the new legislation as useful in litigation as the business groups hope to. The result may well be stalemate, with uncertain effects on the environment.

The environment is reasonably resilient; so is law. But experiments should be undertaken with care and attention to consequences. The legislative discussion so far has paid far too little attention to the consequences of the Contract. Haste in lawmaking may produce waste in terms of desired results.

180. *See* Anthony Lewis, *Back to the Future?*, N.Y. TIMES, Apr. 28, 1995, at A33 (noting that "[f]ederalization of tort law is an example" of conservative demands for "Federal action in all kinds of areas traditionally left to the states"); *see also* Philip H. Corboy, *Steamrolling Tort Reform*, LEGAL TIMES, Mar. 27, 1995, at 22 (arguing that "H.R. 956, the so-called Common Sense Product Liability and Legal Reform Act of 1995, is notable for its complete disregard for principles of federalism").

181. Ralph Heimlich, Jeanne Melanson, *Wetlands Lost, Wetlands Gained*, NAT'L WETLANDS NEWSL., May/June 1995, at 1.