POLICY BACKGROUNDER No. 141
For people with limited time and a need to know.

For Immediate Release
January 14, 1997

An Environmental Report Card on the 104th Congress

"Rhetoric reached a fever pitch; accomplishments were modest."

Because political rhetoric in the 104th Congress reached a fever pitch, assessing its environmental record is difficult. Some environmentalists portrayed congressional attempts to modify clean air, clean water and safe drinking-water laws as giving corporations license to pollute and to endanger America's children. Others saw these efforts as bringing common sense and sound science to bear on environmental policy.

Congress produced three major environmental laws: the Freedom to Farm Act, the Food Safety Act and the Safe Drinking-Water Act reauthorization. It also passed two important regulatory reform measures, providing regulatory exemptions for small businesses and congressional oversight of agency rules. Meanwhile, work on property rights protection, Superfund and Endangered Species Act reauthorization remains unfinished, as does regulatory reform.

This report card examines the good, bad and ugly in the environmental record of the 104th Congress.

Major Laws Passed

Grade: B-/C+

Freedom to Farm Act.

Since the Depression, federal intervention has skewed agricultural markets. Farm policy has alternately — sometimes simultaneously — provided federal price supports, subsidized irrigation and wetlands reclamation projects, issued rules that limited acreage and types of crops, and paid farmers either not to plant or to restore lands to "natural" conditions. Some argue that these policies have kept food prices low and the family farm viable. Yet, because of price supports, Americans have paid higher prices than the rest of the world for some foods. When farm policies *have* kept consumer food prices artificially low, taxpayers have made up the difference. Considering both taxes and artificial prices, it appears that consumers have been made worse off.[1]

ISBN #1-56808-076-X

Summary of Bills and Grades

Major Laws Passed

● **Freedom to Farm Act**	**Grade:**	**B-/C+**
● **Food Safety Act**	**Grade:**	**C-**
● **Safe Drinking-Water Act**	**Grade:**	**B**
● **Regulatory Exemptions for Small Business**	**Grade:**	**B**
● **Congressional Regulatory Oversight**	**Grade:**	**B**

Important Legislation Not Passed

● **Property Rights Protection: Senate Bill**	**Grade:**	**A-**
● **Property Rights Protection: House Bill**	**Grade:**	**B+**
● **Superfund Reform: Best Bill**	**Grade:**	**B+**
● **Endangered Species Act Reform: Best Bill**	**Grade:**	**A**

Regulatory Reform

● **Cost-Benefit Analysis**	**Grade:**	**Incomplete**
● **Regulatory Review and Sunset Legislation**	**Grade:**	**Incomplete**

"Agricultural runoff is the primary pollutant of the nation's rivers, streams and lakes."

Need for Change. In addition, more than 50 years of farm policy has yielded a bumper crop of environmental ills:[2]

- Crop subsidies and federal water projects have encouraged the conversion of valuable wetlands to marginal croplands.
- Federal policies have encouraged the overuse of pesticides and fertilizers; agricultural runoff is now the primary pollutant of the nation's rivers, streams and lakes.
- Wild rivers have been dammed to make arid lands available for farming.
- Wildlife has suffered, and soil erosion has increased.

Positive Changes. Widely touted as the most radical change in federal agriculture policy in the last 60 years, the Freedom to Farm Act temporarily caps federal crop price support payments and ends federal authority to hold land out of production. If this were all the act did, it would indeed represent a major break with past federal agricultural policy. Unfortunately, the Freedom to Farm Act continues a large (and in some ways growing) federal presence in agriculture.

Negative Change: New Bureaucracies. The farm bill creates several new bureaucracies, including the National Natural Resources Conservation Foundation, a new food safety panel in the Department of Agriculture and new boards to promote and protect domestic popcorn and kiwis. These additional programs might surprise people who thought the 104th Congress would begin to end big government.

Negative Change: Florida Land Grab. Given its stated objective to reduce the federal government's presence in agriculture, the new farm bill's most perverse component is its authorization of $300 million to acquire about 100,000 acres of the Florida Everglades. Wetlands conversion, water use and pesticide and fertilizer runoff from sugar production degrade the Everglades. The simplest way to protect that fragile ecosystem would be to eliminate the sugar subsidy that allows inefficient sugar producers to operate there. Congress missed its opportunity to simultaneously preserve the Everglades and save the taxpayers money.

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Missed Opportunity: The Vampire Effect. In typical Washington fashion, Congress and the administration took credit for major reform while leaving hard choices to the future. Under the new bill, farmers currently planting subsidized corps will receive fixed but declining payments over the next seven years. However, the old farm policies — including subsidy payments and land set-asides — will reemerge at the end of seven years unless Congress acts again.

Missed Opportunity: Limited Choice. Sponsors of the act touted the benefits of increased choice, yet farmers currently receiving subsidies have little or no incentive to switch to nonsubsidized crops with higher market prices. Instead of planting whatever crop is likely to yield the highest profit, a farmer now growing subsidized crops probably will switch to another subsidized crop — essentially another grain, cotton or rice.

Missed Opportunity: Same Old-Same Old. Many things do not change under the new farm bill. Americans will continue to pay higher prices than the rest of the world for sugar, peanuts, soybeans and most dairy items and to subsidize their production by more than $2 billion a year. Many acres of undeveloped wetlands lie on agricultural lands. Proposed reforms would have compensated farmers and ranchers when laws restricting the develop-

ment of their wetlands reduced the value of their land. However, these reforms were not included in the final bill, so farmers and ranchers will continue to bear a disproportionate financial burden to preserve wetlands.

Grade: C-

Food Safety Act.

"One cup of coffee contains more carcinogens than all the pesticide residues an average person eats in a year."

This bill represents a substantial change in federal food safety and pesticide policy. By bipartisan agreement, the 104th Congress did what Congresses for the last 20 years have not: they killed the Delaney Clause. That clause prohibited even minute, harmless amounts of chemicals in processed foods if the chemicals caused cancer when laboratory animals ingested them in massive amounts. This was the rule even though natural carcinogens are found in fruits and vegetables, and even though one cup of coffee contains more carcinogens than the amount of potentially carcinogenic pesticide residues an average person eats in a year. The Delaney standard was enormously expensive and unsupported by sound science, but for years environmentalists had thwarted attempts to change it.[3]

Positive Changes. The new law replaces Delaney with a uniform standard. Chemicals used in raw or processed foods must pose a "reasonable certainty" of no harm. The new law also allows states to petition the Environmental Protection Agency (EPA) for permission to enact their own pesticide standards. And it allows the EPA to relax federal standards when using a particular pesticide would help maintain a constant food supply or when food grown *with* the pesticide would pose a lesser risk to consumers than the same food grown without. Farmers, industry officials and public health advocates have applauded the changes.

However, balanced against these positive changes are the following undesirable ones:

- The act adds a new layer of reporting requirements, increasing costs and regulatory paperwork for businesses and consumers.
- Rather than clarifying and limiting EPA power, the law increases it.
- Based on controversial scientific evidence, the law adds regulations concerning a new class of potential health problems.

Negative Change: Increased Bureaucracy. The law requires the EPA to collect, publish and distribute to large retail grocers information about various pesticide residues and chemical additives. Grocers must display the information or face penalties. Collecting and reporting the data will cost millions, and the costs not passed on to consumers will come from the paychecks of workers. In addition, the provision will divert scarce resources from other EPA programs but will do little if anything to protect human health, since the only chemicals involved have all been approved by the EPA or FDA.

Negative Change: Increased EPA Power. The law allows the EPA to define "reasonable," "certainty" and "no harm." None of these EPA definitions require peer review or judicial review. Congress apparently expects the

EPA to interpret the "reasonable certainty" standard as no more than a one-in-a-million lifetime chance that a residue will cause cancer. This standard, which the EPA routinely applies to other environmental risks, is controversial from both scientific and policy standpoints.[4] Other agencies with health and safety responsibilities apply a lower standard and save more lives at less cost.

"The new standard almost certainly will raise the costs of compliance to businesses and thus the costs of products to consumers."

The EPA may apply an even more stringent standard. The new law requires the agency to take into account children's special sensitivity to chemicals and to "err on the side of child safety." So the future standard could be 10 times more stringent. Children may be more sensitive to pesticide residues than adults, so a margin of safety may be justified. This is unclear. What is clear is that the new standard almost certainly will raise the costs of compliance to businesses and thus the costs of products to consumers.

Negative Omission: No Cost-Benefit Considerations. The bill does not allow the EPA to consider economic costs in writing new standards, although such costs may reduce the law's health benefits. For example, if enhanced child safety standards raise the price or reduce the availability of certain vegetables so poor children get less of them, other health hazards such as the increased cancer risks may far outweigh increased pesticide risks. The National Research Council, research arm of the National Academy of Sciences, has expressed this fear.[5] In an exhaustive study, NRC scientists found that the risk of cancer from pesticide residue was far lower than that posed by natural carcinogens in food and minuscule compared to that posed by a high fat, low fiber diet. As vegetable prices rise, the poor — who spend a higher proportion of their incomes on food — are most likely to eat more foods high in fat and cholesterol. The NRC report shows that as vegetable intake decreases and fat intake increases, the risk of cancer soars.

Negative Change: Encouraging Unsound Science. Finally, the law gives the EPA new responsibilities to study, screen and test pesticides for "endocrine disrupters." According to some scientists, a multitude of industrial chemicals may mimic, block, disrupt or enhance hormone activities, resulting in myriad human and animal ills, including birth defects, mental retardation, breast cancer and lower sperm counts. The EPA is directed to consider whether or not each pesticide exhibits hormone mimicking/disrupting characteristics when establishing, modifying or revoking a pesticide tolerance level. Testing tens of thousands of pesticides and other chemicals described as "environmental contaminants" will involve an enormous commitment of manpower and material resources by the EPA or manufacturers.[6]

The push for this legislation can be traced to a book, *Our Stolen Future: Are We Threatening Our Fertility, Intelligence and Survival?*[7] Scientists roundly condemned the book for its selective use of data and unsubstantiated conclusions.[8] According to these scientists, many of the studies the book's authors cite are problematic, either because their methodology was flawed or because their conclusions were controverted by other studies.

Overall Assessment. Lawmakers were under great pressure to vote for the Food Safety Act because failure to replace the Delaney Clause would have forced the EPA to ban 80 widely used pesticides by the end of 1996. Many legislators felt that the benefits of repealing Delaney outweighed the costs of the other provisions. Time will tell whether they were correct.

Grade: B

Safe Drinking-Water Act.

Some analysts have argued that since safe drinking water is almost exclusively a local issue, the federal government should not be involved. While this argument is correct, national consensus on the importance of safe drinking water is so great that federal intervention seems a fact of life. With this in mind, the SDWA is a step in the right direction.

Positive Changes. This bipartisan bill passed 392 to 30 in the House and unanimously in the Senate. It loosens the regulatory straitjacket that has hampered the 185,000 regulated water systems across the U.S., dispensing with the requirement that the EPA promulgate standards for 25 additional contaminants every three years. This rule has forced the EPA to seek out and regulate chemicals as contaminants to meet a numerical target. Recognizing the severe financial strains facing smaller water systems, the law allows states to exempt from federal regulations water systems serving fewer than 3,300 people and to exempt with EPA approval systems serving between 3,300 and 10,000 people.

"This bipartisan bill loosens the regulatory straitjacket on 185,000 regulated water systems."

In addition, the law sets up a $1 billion-a-year state revolving-loan fund (SRF) from which states can draw repayable money to improve drinking-water infrastructure. Reducing the one-size-fits-all portions of previous SDWAs, the law allows states and localities to focus on the most urgent health needs in their communities. For instance, it permits states to transfer up to 33 percent of their SRF from drinking water to activities related to the Clean Water Act or vice versa.

Flexibility in fund allocation and standard setting allows states and localities to devote resources to the most pressing local health concerns. Repayment requirements give them an incentive to undertake drinking-water solutions in a timely and cost-effective manner.

Negative Changes. The bill is not uniformly good. Endocrine disrupter provisions similar to those in the food safety bill were added at the last minute. The SDWA also includes a controversial, costly provision that the EPA enact certification requirements for drinking-water operators and withhold up to 20 percent of a state's SRF if it doesn't adopt such regulations within a certain time. This mandate is at odds with the recent trend to move power out of Washington and back to the states. The standards for drinking-water operators are primarily a local concern and there is no evidence that states have been lax in their duty to keep drinking-water safe. Finally, the new law requires the Food and Drug Administration to monitor and regulate bottled

water for chemicals the EPA considers to be tap water contaminants. These standards must be at least as stringent as current EPA tap water standards.

Overall Assessment. In spite of these provisions, the bill represents real progress towards returning power and authority over drinking-water problems to the affected states and localities.

Grade: B

Regulatory Exemptions for Small Business.

One regulatory reform law[9] allows small businesses, local governments and other small entities to sue a regulatory agency for wrongly assessing the economic impact of new regulations. Small businesses have driven economic growth and increased employment for the last decade,[10] but they often are the hardest hit by new regulations. Further, over the last 20 years local governments increasingly were forced to divert resources from public safety, education and infrastructure in order to comply with federal regulations.

Other Needed Changes. The new law does not go far enough. Large businesses also are burdened by ineffective regulations and should be at least as free to challenge agency (in)actions in court. The disparate treatment is certainly unfair and arguably unconstitutional. It represents an ugly tendency to impose — or shift — regulatory costs to those who can afford them. Regulatory costs should be proportionate to the potential risks created by particular activities.

Grade: B

Congressional Regulatory Oversight.

A second reform[11] allows Congress to review all new rules before agencies implement them and to veto those that are seriously flawed. Under this reform, Congress has 60 days to examine rules with an economic impact of more than $100 million before they become law. Congress also may rescind a rule up to 13 months after it has been published in the Federal Register. Any rule Congress vetoes ceases to be law from that very moment. In addition, the act broadens the definition of a rule to include agency guidelines and policy statements and may allow Congress to overrule some executive orders.

"Proposed bills would require Congress to review and affirm by vote all new regulations."

This reform increases accountability in two ways. First, regulatory agencies no longer can interpret congressional intent in ways that increase their budgets and staff and expand their power without improving human health or environmental conditions. Second, Congress cannot pass the buck for bad regulations. If costly and ineffective regulations become law, the voters can hold legislators accountable.

Other Needed Changes. As several legislators have argued, this law does not go far enough. Proposed bills would require Congress to review and affirm by vote *all* new regulations, including those written to carry out past legislation. Since $99 million, $75 million or even $50 million is no small drain on the nation's economy, Congress has no reason to treat such rules differently. Further, absent this revision administrative agencies may find

creative ways to break one regulation into several, each under the $100 million limit but with great cumulative impact. Finally, without this revision members of Congress can evade blame for costly new regulations by claiming, for example, that they lacked the time both to examine and vote on the rules generated by laws already passed and to write and debate new legislation.

Important Legislation Not Passed

The 104th Congress set out to change the nation's approach to environmental policy making. The new Republican majority proposed to reform oppressive bureaucracies and reduce the role of the federal government in citizens' lives. With few exceptions the reformers failed, although all parties to the debate had agreed at the outset that current laws needed substantial reform to address three fundamental environmental problems.

Grade: Incomplete
Senate Bill: A-
House Bill: B+

Property Rights Protection.

Many House and Senate freshmen, especially from the West, won their seats in part because they promised to pass legislation protecting private property from uncompensated "environmental takings." Indeed, a private property owner's protection act was part of the Contract With America. Despite support from the House and Senate leadership, no such act became law.

Misguided Criticism: Polluters Don't Benefit from Pollution. Critics decried bipartisan efforts to protect private property rights as an assault on federal health and environmental protection. Specifically, they claimed that a law protecting property would force the government to pay polluters not to pollute. How so? One provision of the Senate bill, described below, would have required the government to compensate a company when a regulation lowered the value of its affected property by a third or more. Critics argued this would force the government to pay compensation when, for instance, it shut down polluting factories or required companies to repair or recall defective products. Yet this claim was untrue. The law explicitly exempted common law claims of tort, nuisance and trespass, and statutes that reinforce common law and criminal law protections for human health. The law would not have granted anyone the right to harm another's health.

Misguided Criticism: Economic Impact Would Be Negligible. Critics also claimed that the law would virtually preclude government from protecting endangered species or halting wetland losses because government would not be able to afford to reimburse those whose actions might have caused environmental harm. This claim is at best mistaken and at worst disingenuous. For instance, current policy equally restricts the development of low-quality, nonvital, statutory "wetlands" and high-quality, traditionally recognized wetlands such as swamps, bogs and fens. However, fewer than 15,000 acres of high-quality wetlands are converted to other uses each year.[12] The government or environmental nonprofit conservation trusts could easily protect this amount of acreage yearly through outright purchase, land swaps or

"Fewer than 15,000 acres of high-quality wetlands are converted to other uses each year."

tax credits. The Congressional Budget Office analyzed the potential economic impact of the law and found it negligible. While the costs to government might rise in the short term, overall costs would be about the same due to lower litigation and transaction costs and better allocation of scarce government funds.

Even if the critics are right and the government would have faced enormous costs under the new law, this only highlights the burden property owners now bear. That property owners alone must support the general public's desire for environmental quality is unfair and may be unconstitutional.[13]

Problems with the Current Law: Judicial Catch-22. Under current law, if regulators deny a property owner the right to build his dream home because it would fill in a wetland, he can sue in federal district court to get the denial overturned or sue in federal claims court for the value he has lost. He cannot do both in the same court.

Often, the property owner gets neither relief nor compensation as the government urges the district court to dismiss a claim for equitable relief on the ground that the plaintiff should seek compensation in the claims court — and urges the claims court to dismiss the plaintiff's claim for compensation on the ground that he should seek relief in the district court.

Senate Bill. The Omnibus Property Rights Act of 1995 (S.605) would have allowed certain federal courts to hear both types of suit. Assignment to one court would have stopped the government from making separate and contradictory arguments. The act also would have required that agencies conduct a "Takings Impact Analysis" before listing a species as endangered or creating a habitat conservation plan. The analysis would assess the probability that the action would take private property, estimate the owner compensation potentially required and examine alternatives that might achieve the same goal with less impact on property owners. If the U.S. Fish and Wildlife Service (USFWS) found a suitable, less burdensome conservation plan and still chose to pursue the more burdensome action, it would have to justify this choice in court.

"More than 75 percent of endangered species depend on private land for habitats."

The most contentious section of the bill required the government to compensate the property owner when its action reduced his property's value by 33 percent or more. This section clarified several court rulings. As the Supreme Court ruled in 1960, "[The purpose of the Fifth Amendment to the Constitution] is to bar Government from forcing some people alone to bear public burdens, which in all fairness and justice should be borne by the public as a whole...."

Clarifying compensation requirements also would have removed the negative incentives in many environmental laws. Numerous wetlands are on private land, and more than 75 percent of endangered species depend on private land for all or part of their habitats.[14] Yet current laws discourage people from creating, enhancing or preserving wetlands or species habitat

because the property of anyone who provides an endangered species habitat is subject to severe regulation or confiscation. There is mounting evidence[15] that landowners are destroying potential habitat to avoid attracting endangered species. The property rights bill would have relieved the landowners of a painful choice between their own welfare and that of the environment.

House Bill. The House property rights protection bill (H.R.925) was much more narrowly focused. It did not address judicial jurisdiction or require a "Takings Impact Analysis." The protections afforded to property owners under H.R.925 extended only to the two most contentious federal laws facing property owners: the Endangered Species Act and Section 404 of the Clean Water Act. The one advantage of the House bill was its lower threshold for a loss requiring compensation: 20 percent instead of 33 percent.

Grade: Incomplete
Best Bill: B+

Superfund Reform.

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) created a trust fund administered by the EPA and funded by taxes levied on corporations. This "Superfund" was intended to provide temporary emergency federal funding for chemical waste cleanups if the responsible parties could not be found or could not pay.

Need for Change. Superfund is the largest single project of the EPA. Yet despite cumulative federal expenditures of more than $30 billion over 15 years, Superfund successes are few. More than 1,300 sites are on the National Priorities List, but only 97 sites have been cleaned up and removed from the list. The average cost of cleaning up a Superfund site has been $32 million, with between 36 cents and 60 cents of every dollar going to lawyers' fees and other transaction costs.[16]

"Despite federal expenditures of more than $30 billion over 15 years, Superfund successes are few."

Everyone recognizes that Superfund has been a colossal failure. The president has said so. House Speaker Newt Gingrich singled out Superfund as the one environmental program that both parties agreed could be substantially reformed. But during the 104th Congress, no Superfund reform bill made it to the floor of either house. Superfund reform was slain by the election cycle.

Superfund has three major flaws:

- Superfund often imposes cleanup penalties on parties who were not at fault.
- Superfund is designed to avert largely nonexistent health risks.
- Superfund gives federal authorities the power to decide local issues.[17]

Superfund's Toxic Liability Scheme. In theory, Superfund is supposed to enforce a "polluter pays" policy. That is, if culpable parties can be linked to a polluted site, these "potentially responsible parties" (PRPs) must pay for cleanup efforts. In practice, Superfund's rule of "retroactive, joint and several and strict liability" has been used to force numerous parties to pay for cleanups — even when they were not at fault.

- **Retroactive liability** makes PRPs liable for wastes legally deposited years or decades ago and holds present owners responsible for wastes produced by former owners.
- **Joint and several liability** means that costs are not divided according to the percentage of waste a PRP contributed to a given site; any PRP can be held responsible for all cleanup costs.
- **Strict liability** means PRPs have to pay regardless of fault — even if they used the best, latest, even legally mandated disposal technologies.

Superfund's liability rules generate endless litigation.

"Cleanup of many Superfund sites is unnecessary because humans are not at risk."

Superfund Relies on Faulty Science and Exaggerated Risk Analysis. Cleanup of many sites is unnecessary because humans are not at risk. A recent study by Duke University economist Kip Viscusi found that more than 72 percent of the total exposure risk (according to the EPA's own calculations) would occur only if highly unlikely changes in land use took place.[18]

To establish risk at one abandoned site, the EPA relied on the following scenario: A child was assumed to eat 200 milligrams of dirt per day, 350 days a year for 70 years, while playing in the soil. More than 90 percent of all estimated cancer risks at Superfund sites are dependent upon such outlandish scenarios or highly speculative land use changes.

Superfund Tramples on Federalism. If a locality has a Superfund site, why should people living elsewhere care whether it is cleaned up or not? The primary health concern is groundwater contamination. Yet a 1984 General Accounting Office survey of 15 states failed to find any interstate aquifer problems. Since even the worst Superfund sites do not have national environmental impacts, Superfund imposes federal control on what are essentially state and local problems. Even J. Winston Porter, who headed the Superfund program from 1985 to 1989, admits, "The major problem with Superfund is ... that the federal government is ill-equipped to make local, one-of-a-kind site cleanup decisions."[19]

Democratic Proposals. President Clinton has set a goal of cleaning up two-thirds of the remaining sites by 2000. In light of the EPA's past record the goal is unrealistic, and the president has proposed no actions that would accelerate cleanups. The administration's most recent proposal is to spend more money on Superfund. But money is not the problem. The "fund" contains over $2 billion — more than President Clinton proposes to add and far less than has been spent to clean up fewer than 10 percent of the sites. The problem is in how the money is spent.

Congressional Democrats have attempted only modest reforms. The Democrats' primary objective has been carving out exceptions from the current law for "brownfields."

"An estimated 450,000 brownfield sites, many in inner cities, sit idle across the U.S."

Brownfields are once-productive commercial and industrial sites that are now abandoned, in part out of fear that they may contain toxic waste and thus carry Superfund liability. An estimated 450,000 brownfield sites, many in inner cities, sit idle across the U.S. Ironically, Superfund, created to protect human health and promote environmental cleanup, has exacerbated use-and-dispose property ownership in inner cities and increased urban sprawl as greenfields (pastures, forests and farmlands) are cleared for industrial growth.[20]

Republican Proposals. Congressional Republicans have resisted pressure to deal with Superfund reform in a piecemeal fashion. Early reform proposals supported by Michael Oxley (R-OH), chairman of the House Subcommittee on Commerce, Trade and Hazardous Materials, and Thomas Bliley (R-VA), chairman of the House Commerce Committee, addressed each of the three major problems with Superfund. Their proposals would have:

- Established a true "polluter pays" principle. If linked to a Superfund site, PRPs would have paid for the cleanup.
- Required the EPA to make realistic risk assumptions based on estimates of reasonably anticipated land use.
- Restored a degree of state control by allowing states, not the federal government, to select Superfund sites and set cleanup standards for sites with purely intrastate impacts. (The bill did not extend state authority to preexisting Superfund sites.)

More Modest Proposals. When it became evident that the substantial reforms were not politically feasible, the Republicans presented more modest proposals. These second-best measures would have exempted from liability all PRPs except owner/operators of current waste sites and limited their liability to wastes deposited after 1980, when retroactivity was imposed. Exempting from Superfund liability those who generate or transport waste, as well as past, present and future creditors, would eliminate 90 percent of the current PRPs. Many are small businesses and individuals that cannot contribute significantly to cleanup costs but can be devastated economically by PRP designation. This reform would substantially reduce litigation and encourage faster, less acrimonious cleanups.

Unfortunately, politics derailed even these modest measures.

Grade: Incomplete
H.R.2275: A-
H.R.2364: A

Endangered Species Act Reform.

The Endangered Species Act (ESA), administered by the USFWS in the Department of the Interior, is widely considered the most powerful environmental law in the nation. As written, it takes precedence over all other laws. For instance, the ESA could prevent a Polaris submarine from leaving its berth or launching its missiles to protect U.S. shores if certain endangered marine species were migrating nearby. The existing act requires that the Secretary of the Interior protect each listed endangered species regardless of the cost. The ESA was up for renewal in the 104th Congress.

Two bills, H.R.2275, authored by Reps. Don Young (R-AK) and Richard Pombo (R-CA), and H.R.2364, authored by Rep. John Shadegg (R-AZ), provided the best opportunities for reform.

"The Endangered Species Act has not worked well.... Although 12 species have recovered, not one can be definitely traced to the ESA."

Need for Change: Failure to Protect Species. For all of its power, the ESA has not worked well. Of the 1,524 species listed as either endangered or threatened during the ESA's more than 20 years of existence, only 27 had been delisted by the end of 1995. Seven of the 27 had become extinct, eight others had been wrongly listed and the remaining 12 recovered with no help from the ESA. In fact, no species recovery can be definitively traced to the ESA.[21]

That the ESA has failed to protect species should surprise no one. More than 75 percent of the listed species depend on private land for all or part of their habitat, yet the ESA discourages people from fostering species recovery. If a person provides suitable habitat for an endangered species, his or her land becomes subject to severe regulation or outright confiscation.

Need for Change: Burdensome Costs. While the ESA has failed to help species recover, it has succeeded in spending many taxpayer dollars. In 1992 alone, federal and state government spending for endangered species topped $290 million. The Inspector General of the Department of the Interior estimated in 1990 that it would cost $4.6 billion to recover all currently known endangered species. But this estimate obviously is far too low, since recent estimates for recovering the Northern spotted owl alone range from $21 billion to $46 billion. And for every dollar it spends on recovery, the government spends more than $2.26 on the consulting and listing process. Individuals and firms fighting government efforts in court or developing and implementing habitat conservation plans spend still more. Further, the indirect costs in lost jobs and wages, delayed and halted development, increased construction costs and community disruption are greater still.

In one instance, massive brush fires in California destroyed 29 homes and caused millions of dollars in damage.[22] Several of the homes were lost because the USFWS had not allowed the homeowners to destroy brush and weeds by plowing in firebreaks. The USFWS threatened the homeowners with imprisonment and huge fines in order to protect the endangered Stephens kangaroo rat. Some homeowners ignored USFWS threats; their homes are still standing. Ironically, the fires destroyed kangaroo rat burrows and habitat.

Proposed Reform: Compensation for Takings. H.R.2275 would, among other things, require the government to compensate property owners when endangered species restrictions diminished the property's value by 20 percent or more. H.R.2364 would make species protection on private land completely voluntary.

Proposed Reform: Legal Rights for Property Owners. Both bills would nullify two recent federal court rulings. In *Bennet v. Plenert,* the court ruled that parties had no standing to sue the USFWS over a proposed endangered species listing or critical habitat designation unless they were suing on

behalf of an endangered or threatened species. Under the proposed law, property owners whose interests were harmed could sue the USFWS to demonstrate that their property was listed in error or that the EPA did not follow federal guidelines or laws when designating the habitat.

In *Sweet Home v. Babbitt,* the Supreme Court ruled that actions which indirectly had a negative impact on a particular species counted as taking, harming or harassing the species and thus were prohibited. The court's decision made it illegal to use private property if doing so could even *potentially* lessen the mating success of a resident endangered species. No actual harm needed to occur for a property owner to be found in violation of the act. Both H.R.2275 and H.R.2364 would narrow the definitions of "take" and "harm" so that only direct action that physically injured an endangered animal would be illegal. Modifying one's property in a way that encouraged species to leave or that indirectly caused their death would not be illegal.

"The revised ESA would no longer preempt or override other federal laws."

Proposed Reform: Building Economic Incentives into the Act. Both proposals also would encourage owners to protect, promote and conserve endangered species by establishing tax incentives and using existing revenue sources to create a conservation fund. The fund would pay for cooperative management agreements, conservation easement grants and habitat management.

Proposed Reform: Sound Science. Both bills require that decisions about which species to list be based on sound science and thorough, peer-reviewed data. The bills limit the listing of "distinct population segments" to those of national interest as determined by Congress. Captively bred and privately owned populations of animals would be counted toward species numbers, and the ESA would not limit the use of members of an endangered species that were privately owned before the species was listed. For example, zoo-owned and -bred grizzly bears could be transferred to other owners or destroyed without USFWS permission.

Proposed Reform: Decentralization. Both bills require the Secretary of the Interior to consult the affected state(s) before listing a species or developing a conservation plan. A state can challenge the secretary's decision and he must justify it. Finally, the bills encourage the states to assume the primary role in intrastate species protection and direct the secretary to support state primacy. Both bills require the secretary to ensure that each conservation plan imposes the least possible negative socioeconomic strain while meeting its recovery goal.

Proposed Reform: Common Sense. Two other provisions in the bills merit notice. First, the revised ESA would no longer preempt or override other federal laws or other federal agencies' missions. Agencies would only be required to protect species when protection activities did not conflict with their primary statutory mission.

Second, only actual habitat could be protected under a conservation plan, and even then private property could be incorporated into the plan only

with the explicit consent of the owner (H.R.2364) or payment of compensation to the owner (H.R.2275).

Overall Evaluation. H.R. 2364 is a slightly better bill than H.R.2275 because it directs the Secretary of Interior to actively encourage and support private for-profit and nonprofit conservation efforts through commercialization, utilization and privatization of endangered species.

"An estimated $1.3 trillion in U.S. economic activity is lost each year due to federal regulations."

Either bill would have been better than the present act. Both would have given states more influence and authority over ESA decisions. Both would have gone a long way towards removing the negative incentives inherent in the current ESA. Both required some consideration of the best use of limited funds to save species critical to the continued health, safety and welfare of individuals and ecosystems. And both would have allowed more flexibility in management options, reduced the costs of managing endangered species and aligned more closely with the Constitution's division of federal and state powers.

Regulatory Reform

Almost everyone agrees that the federal regulatory regime is cumbersome and that it produces top-down, one-size-fits-all regulations — regulations that impose enormous costs on businesses, increase the cost of goods and services, reduce economic growth, are unfair to property owners and fail to achieve their goals. For example: [23]

- The private sector annually spends more than $668 billion, or more than $6,000 per household, to comply with federal regulations.
- The government spends billions more to study, produce and enforce regulations.
- An estimated $1.3 trillion in U.S. economic activity is lost each year due to federal regulations.

If social and environmental regulations were protecting human health or preventing environmental degradation, the enormous costs might be justified. But critics on both the left and the right recognize that many regulations are inefficient and inffective.

With the change in the makeup of Congress, many expected fairly radical regulatory change, but it did not occur. Except for the two previously cited provisions contained in the debt limit bill, the 104th Congress was unable to agree on how best to achieve reform and approved only modest steps.

Grade: Incomplete

Cost-Benefit Analysis.

Most regulatory reform bills included cost-benefit analysis components. Almost without exception these provisions were stripped away before final consideration of the bills. The reason was simple: talking about costs in

relation to quality of life strikes many as vulgar. Moreover, many people associate "cost" considerations with arguments on behalf of greater corporate profits. In fact, cost simply refers to the forgone opportunities that accompany the pursuit of any activity. That all human endeavors have costs in this broad sense does not mean they are not worthwhile. What an activity costs is simply what is given up to undertake that activity.

"Effective regulatory reform requires careful cost-benefit analysis."

Cost-benefit analysis produces information by comparing various options that may all be beneficial but that cannot all be undertaken simultaneously. Such analysis does not curtail or eliminate the decision-making authority of elected officials or agency bureaucrats; it does produce information that should be incorporated into all public-sector decisions. Effective regulatory reform requires careful cost-benefit analyses before agencies take action or Congress renews programs.

Grade: Incomplete
Bill: B-

Regulatory Review and Sunset Legislation.

Businesses consider it a sound practice to periodically review their activities and goals. Administrative agencies also should periodically review regulations and eliminate or "sunset" outdated or ineffective rules. This would help ensure that as states begin assuming more reponsibility for environmental programs their efforts will not be hampered by outdated federal regulations and programs.

A regulation review provision was part of the debt limit bill discussed above. The House Senate Conference Committee stripped the provision from the debt bill to avoid a threatened presidental veto. The Clinton administration maintained that requiring periodic agency reviews would tie up scarce resources and encourage endless litigation.

While reviews every five to seven years would require agency resources, they likely would save time, effort and other resources now spent complying with archaic rules. Whether the reviews spurred litigation would depend upon whether bureaucrats were willing to scrap outdated rules. Lawsuits probably would notify the defendants that inertia, obstinacy and bureaucratic self-interest had become punishable. More flexible, more carefully tailored regulations would result.

"Fundamental reform is long overdue."

Conclusion. Environmental policy reform is long overdue. The rising mistrust of government corresponds to an increase in both the number and nature of federal regulations, including environmental regulations. It is unfortunate that successful environmental reforms in the 104th Congress were not significant enough to mitigate this distrust.

H. Sterling Burnett
Environmental Policy Analyst

Notes

[1] James Bovard, *The Farm Fiasco* (San Francisco: ICS Press, 1989).

[2] Jonathan Tolman, "Federal Agricultural Policy, A Harvest of Environmental Abuse," Competitive Enterprise Institute, 1995.

[3] For discussions of both the science and politics surrounding the Delaney Clause, see, for instance, Elizabeth M. Whelan, "Ensuring a Bountiful Harvest and a Plentiful Food Supply " in Bonner R. Cohen, Steven J. Milloy and Steven J. Zrake, eds., *American Values, An Environmental Vision* (Washington: Environmental Policy Analysis Network, 1996); or Edith Efron, *The Apocalyptics* (New York: Simon and Schuster, 1984).

[4] See, for example, John D. Graham, "Comparing Opportunities to Reduce Health Risks: Toxin Control, Medicine and Injury Prevention," National Center for Policy Analysis, NCPA Policy Report No. 192, June 1995; and Tammy O. Tengs, "Dying Too Soon: How Cost-Effectiveness Analysis Can Save Lives," National Center for Policy Analysis, forthcoming study.

[5] National Research Council, *Carcinogens and Anticarcinogens in the Human Diet* (Washington: U.S. Government Printing Office, 1996).

[6] The Safe Drinking Water Act revisions, discussed below, contain similar provisions.

[7] Theo Colborn, Dianne Dumanoski and John Peterson Myers, *Our Stolen Future: Are We Threatening Our Fertility, Intelligence and Survival?* (New York: Dutton Publishing, 1996).

[8] See, for example, Anne N. Hirshfield, Michael F. Hirshfield and Jodia A. Flaws, "Problems Beyond Pesticides," *Science* , June 7, 1996, pp. 1444-45; or statement by the Advancement of Sound Science Coalition in their May 1996 newsletter, pp. 4-6.

[9] Enacted as part of the bill that increased the debt limit.

[10] *The Facts about Small Business* (Washington: Small Business Administration, 1996).

[11] Also included in the debt limit package.

[12] See Jonathan Tolman, "Gaining More Ground," Competitive Enterprise Institute, 1994. Tolman points out that tens of thousands more acres are now restored than are converted to other uses each year.

[13] See the 1960 U.S. Supreme Court decision *Armstrong v. U.S.* See also James Huffman, "Avoiding the Takings Clause through the Myth of Public Rights: The Public Trust Doctrine and Reserved Rights Doctrine at Work," *Journal of Land Use and Environmental Law,* Fall 1987.

[14] Thomas Lambert and Robert J. Smith, "The Endangered Species Act: Time for a Change," Center for the Study of American Business, Policy Study No. 119, March 1994.

[15] Several instances are cited in Lambert and Smith, "The Endangered Species Act: Time for a Change," pp. 34-38. In addition, several advocates of a strong ESA, including former officials of the Texas Parks and Wildlife Department and the USFWS, have noted the threat to endangered species posed by the incentives inherent in the act. On this point see Jonathan Adler, "Property Rights, Regulatory Takings and Environmental Protection," Competitive Enterprise Institute, 1996, pp. 19-22.

[16] See James M. Strock, "Wizards of Ooze," *Policy Review,* Winter 1994, pp. 42-45; Wayne T. Brough, "Superfund Unplugged," Citizens for a Sound Economy, August 11, 1996; and Michael G. Oxley, "Superfund Getting It Right," *Common Sense,* Spring 1995.

[17] Each of these problems is detailed in H. Sterling Burnett, "Superfund: History of Failure," National Center for Policy Analysis, NCPA Brief Analysis No. 198, March 1996. See also Richard L. Stroup, "Superfund: The Shortcut That Failed," Political Economy Research Center, 1996.

[18] W. Kip Viscusi and James Hamilton, "Superfund and Real Risks," *American Enterprise,* March/April 1994.

[19] As quoted in Kent Jeffreys, "Reinventing Superfund," Competitive Enterprise Institute, 1994, p. 17.

[20] Michael Harold, "Brownfields: Superfund's Economic Toxic Shock," Citizens for a Sound Economy, December 18, 1995; and Sean Cavanagh, "Brownfields Dilemma," *State Legislatures,* September 1995, pp. 30-33.

[21] Lambert and Smith, "The Endangered Species Act: Time for a Change"; and Ike C. Sugg, "Endangered Species Act (ESA)" in *Environmental Briefing Book* (Washington: Competitive Enterprise Institute, 1996).

[22] Richard L. Stroup, "The Endangered Species Act: Making Innocent Species the Enemy," Political Economy Research Center, 1995.

[23] Thomas D. Hopkins, "A Guide to the Regulatory Landscape," *Jobs & Capital*, Fall 1995, pp. 28-31; Thomas D. Hopkins, "Regulatory Costs in Profile," Center for the Study of American Business, Policy Study No. 132, August 1996; and Richard K. Vedder, "Federal Regulation's Impact on the Productivity Slowdown: A Trillion-Dollar Drag," Center for the Study of American Business, Policy Study No. 131, July 1996.

Appendix:

Criteria for Laws Analyzed and Grades Assigned

A large number of environmental laws were slated for renewal, proposed for revision, taken up in committee or merely introduced during the 104th Congress. Analyzing all of these laws would require a book, not this short study. Therefore, the author established some criteria for choosing which laws and bills to analyze. First, all of the laws chosen for analysis had broad-reaching national implications. Each bill and law chosen either directly and substantially, actually or potentially, affects the lives of most Americans. Laws such as amendments to the Magnuson Fisheries Act that only indirectly affect the general population and laws with largely local implications such as that granting federal funding to purchase New York-New Jersey's Sterling Forest were excluded. Second, the laws and bills chosen were cited by the new congressional leadership as environmental policy reform priorities. Third, at the outset of the 104th Congress, there was broad bipartisan agreement that all of the laws and bills chosen for analysis needed revision, renewal or repeal.

The grades were based on several criteria. First, is human health and environmental quality likely to improve under the new law or bill? Second, would the legislation improve the use of science in environmental policy? Third, did new legislation expand individuals' liberty and their opportunities to increase their wealth and satisfy their desires? Finally, would the new laws better respect citizens' rights and the U.S. Constitution?

These criteria are based on the assumption that the goal of environmental laws should be to protect human health and the environment. For example, expanding individual liberty and increasing economic opportunities is important to promoting environmental values because citizens in wealthier societies are generally healthier and better able to protect and improve the environment. On the other hand, critics have argued persuasively that many environmental laws are unfair and unconstitutional. These laws violate citizens' fundamental rights to private property and fair trial while they allow the federal government to undertake policies beyond its constitutionally limited powers.

Among the keys to meeting these criteria are reducing the role of the federal government in environmental policy, creating more flexible environmental laws and improving the incentives and information of decision makers. The first criterion can be met by handling problems with largely local effects at the local level. For environmental problems that have multistate or national implications, creating flexibility means limiting the federal role to establishing the standards to be met. Affected parties should be allowed to meet these standards in the least intrusive, most efficient ways. Finally, to improve the incentives and information driving environmental decisions, laws should protect and/or extend private property rights. Property rights are fundamental to a market economy. Prices established through free market exchange demonstrate the relative value that individuals place upon scarce environmental resources. Ultimately, prices regulate the use of environmental resources.

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The National Center for Policy Analysis is a nonprofit, nonpartisan research institute, funded exclusively by private contributions. The NCPA developed the concept of Medical Savings Accounts, which are included in the 1996 health care bill passed by Congress and have been adopted by a growing number of states. Many credit NCPA studies of the Medicare surtax as the main factor leading to the 1989 repeal of the Medicare Catastrophic Coverage Act.

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- Special taxes on the elderly have destroyed the value of tax-deferred savings (IRAs, employee pensions, etc.) for a large portion of young workers; and
- Man-made food additives, pesticides and airborne pollutants are much less of a health risk than carcinogens that exist naturally in our environment.

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ISBN #1-56808-076-X