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

SPECIAL

November 15, 1993

LEGISLATIVE REFERRAL MEMORANDUM

LRM #I-1690

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Assistant Director for Legislative Reference

OMB CONTACT: Holly FITTER (395-3233)
Secretary's line (for simple responses): 395-6194
Linda WIESMAN (395-6808)

SUBJECT: JUSTICE Proposed Report RE: S 1114, Water Pollution Prevention and Control Act of 1993

DEADLINE: 10:00 AM November 23, 1993

OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or receipts for purposes of the the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:
~~K.~~ McGinty
M. Mitchell/T. Hunt
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U. S. Department of Justice

Office of Legislative Affairs

1650

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Max S. Baucus
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This provides the views of the Department of Justice on S. 1114, the "Water Pollution Prevention and Control Act of 1993," which would amend and reauthorize the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.). Our comments are directed primarily to Title V of the bill, which addresses permitting and enforcement. Because the Department has significant responsibility for enforcement under the Act, our experience may be helpful to the Committee as it reviews this important environmental statute.

The first part of the attached analysis provides the Department's views on S. 1114. The second part contains proposals for additional provisions that would strengthen the criminal and civil authorities of the bill.

We support many of the provisions of Title V, most of which would strengthen citizen enforcement, federal administrative enforcement, federal civil judicial enforcement, and enforcement against federal facilities. The attached analysis discusses those provisions in depth and offers suggestions for revisions. In particular, Title V currently contains few provisions designed to strengthen criminal enforcement. A number of proposals to strengthen our criminal enforcement authorities are included.

We look forward to continuing to work with you on this legislation. Please call on us if we may be of further assistance.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Sheila F. Anthony
Assistant Attorney General

Comments on Title V of S. 1114

Citizen enforcement. Because citizen suits have an important role in ensuring enforcement under the Act, we support section 503(a) of the bill, which would allow citizens to obtain penalties for past violations of the Act. This change will reduce the complex jurisdictional questions that have made citizen enforcement much more difficult since the Supreme Court's decision in Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49 (1987). It will also enhance the deterrent effect of citizen enforcement, since violators will no longer be able to retain the economic benefit of noncompliance merely by complying after receiving a citizen's notice of intent to sue. Although we support section 503(a), we believe it would be even more beneficial if the requirement that the citizen enforcer allege "repeated" violations were eliminated. The number of violations is often unrelated to their seriousness. Therefore, the requirement of multiple violations does not provide a meaningful criterion for assessing when citizen enforcement is appropriate. Also, proof that a violation was repeated would often involve complicated factual showings that would make it more difficult for citizens to enforce the law.

Beneficial Use. The Department does not support the beneficial use provisions in section 503(b) as currently drafted because they would allow a court to order unilaterally a diversion of all or a portion of a civil penalty or criminal fine to a "beneficial project" of the court's own choosing over the objection of the parties. We do not believe that this is an appropriate role for the courts. Courts are competent only to adjudicate disputes. Unlike the Environmental Protection Agency (EPA), courts have no particular expertise in environmental restoration or pollution prevention. They are not, and should not become, funding organs, dispensing largess among competing social, moral, and political interests -- a quintessentially legislative function. Moreover, it would unduly complicate enforcement actions if the parties had to brief the court on the possible uses of the penalties for environmentally beneficial projects. Further, in some cases it could appear inappropriate for a court to order one party to make a payment to private individuals not involved in the lawsuit even if for an environmentally beneficial project. Competition among claimants for judicial largess could expose courts to conflict of interest charges and cast doubt on their neutrality.

When the parties agree to an environmentally beneficial project in the context of a consent judgment in a civil suit, these concerns are substantially reduced, and are outweighed by the benefits of such a project. This is especially so if the settlement also includes a payment of at least the economic benefit that accrued to the defendant. In a criminal case, it is our view that it is generally inappropriate to allow a defendant to receive a reduced criminal fine by agreeing to pay a portion of that fine for an environmental project. The payment of criminal fines carries the stigma of criminal conviction, and this stigma should not be lessened by the public perception of environmental munificence that may attach to the funding of an environmental project. Therefore, the Department believes that courts should not be allowed to order a party in either a civil or a criminal case to make a payment to an environmental project, but instead should be limited to approving civil consent judgments in which the parties have agreed to such a payment. Authorizing payments to environmental projects in lieu of penalties only in the context of consent judgments would also encourage settlement, which is always helpful in preserving enforcement resources.

Additionally, the Department supports, in all consent judgments (with the possible exception of those involving municipalities), limiting the amount of a civil penalty that can be used for an environmental project to the portion in excess of any economic benefit resulting from the violations. This limitation would further the principles of deterrence by ensuring that the defendant repays all of its economic benefit in cash.

Restoration of Damaged Natural Resources. The Department supports the language in section 503(b)(2) that would clarify that courts can order those who have been found to have violated the Act to take remedial actions, such as the restoration of damaged natural resources. However, we oppose the provision that would cap the cost of such restoration at the maximum civil penalty that could be assessed against the violator. The maximum civil penalty reflects only the number of infractions and their duration. It does not necessarily correlate with the amount of environmental harm caused by the violations, especially for chemical spills, which can result in significant environmental degradation in just one day. Further, placing such a cap on restoration efforts could result in incomplete and inadequate cleanup efforts, often exacerbating rather than abating the pollution.

Pretreatment. The Department supports section 503(b)(3), which clarifies that pretreatment requirements are federally enforceable. We have two additional suggestions with respect to ensuring the enforceability of pretreatment requirements. First, sections 309(c)(1) and 309(c)(2) of the Act should also include a reference to requirements imposed under section 402(b)(9) so that such requirements are enforceable in a criminal prosecution. We also suggest amending section 307(d) of the Act to clarify that it is unlawful for an owner or operator of a source to operate that source in violation of pretreatment requirements as well as pretreatment standards. This is important because a pretreatment program can include provisions other than discharge standards, and compliance with those provisions may be as important as compliance with the standards themselves. For example, a program may include reporting requirements designed to alert a sewage treatment authority to activities detrimental to its system. Failure to comply with those requirements may lead to damage to the system, losses of public property, or discharges of inadequately treated sewage into receiving waters.

Field citations. We support the proposal to authorize a field citation program under which EPA could issue such citations assessing limited penalties for minor violations without prior public notice. We further support the provisions of the bill that would not give such field citations any preclusive effect, but would allow them to be considered by a court in assessing any later penalty.

State administrative penalty actions. Section 503(b)(5)(B) seems unnecessary because pursuant to section 503(e)(2) state administrative penalty actions will no longer preclude later citizen suits. It therefore should be deleted so as not to cast doubt on the meaning of section 503(e)(2). We would also suggest deleting section 503(b)(6). It is unnecessary because, as just noted, pursuant to section 503(e)(2) state administrative penalty actions will no longer have any preclusive effect. Further, it could be interpreted to preclude the federal government from overfiling a state enforcement action in other circumstances, even when the state action has been insufficient to bring a defendant into compliance with the Act.

Contractor listing. The Department supports the proposed amendments to section 508(a) of the Act, which clarify the reach of the existing law prohibiting government contracting with persons convicted of criminal violations of the Act and extend this prohibition to those who have been held liable for civil penalties under the Act, or have admitted civil violations subject to such penalties, in three or more civil enforcement actions. The reach of the existing section 508(a) has been called into question in litigation, where EPA's listing of violating facilities has been challenged on various grounds, including the application of this federal contracting bar to facilities which are no longer owned, operated or supervised by the person convicted of a criminal violation of the Act. S. 1114 will clarify that the facility which gave rise to such a violation is to be listed whenever the facility was owned, leased, operated, or supervised by the convicted person at the time of the violation. The proposed amendment also extends the bar to additional specified violations of the Act, and to violations of the Rivers and Harbors Act of 1899, 33 U.S.C. 403. In the Department's view, these amendments will assist EPA in implementing the purpose of section 508(a) to assure that government contracts, grants, and loans do not flow to any facility which has given rise to such violations, until EPA has had the opportunity to determine that the conditions which gave rise to the criminal violations have been corrected. The

Department also supports the bill's extension of this principle to established civil violations.

In our view, however, it is not desirable for S. 1114 to provide that facilities must remain listed under these provisions for a period of at least one year. Unless listing were to be viewed as a punitive sanction instead of a remedial measure, EPA should be permitted to remove a facility from its list of violating facilities whenever the Agency is satisfied that the conditions which gave rise to the civil or criminal violations have been corrected. Indeed, a mandatory one-year listing would constitute a serious disincentive to voluntary reporting and prompt correction of violations. For example, corporate management might discover a violation by a supervising employee, discharge the supervisor, and cooperate in his prosecution, yet still be subject to mandatory listing of the facility at which management had corrected the reason for the violation.

In addition, given the breadth of section 508(a)'s prohibition, it is appropriate that S. 1114 appears to afford EPA's Administrator the latitude to determine exactly which facility or facilities have given rise to the criminal conviction. In some circumstances, it may be that only the facility at which the violation occurred should be listed (e.g., where an equipment failure led the violation). In others, such as violations involving management conduct that may affect several facilities, it may be appropriate that all facilities be listed even though a violation (such as illegal discharge) has been discovered and prosecuted at only one such facility.

Raising administrative penalty cap. The Department supports section 503(b)(9) of S. 1114, which would raise the cap on Class II administrative penalties from $125,000 to $200,000. Since Congress set the penalty cap in 1987, average penalties have increased because federal enforcement efforts have become more sophisticated and courts have become more aware of the importance of substantial civil penalties. As a result, cases in which EPA obtains between $125,000 and $200,000 no longer constitute major enforcement actions for which only civil judicial enforcement is appropriate.

The Department would also support a provision, like that in the Clean Air Act, allowing the Administrator and the Attorney General to determine jointly that a matter involving a larger penalty amount is appropriate for an administrative penalty action. 42 U.S.C. 7413(d). This approach is attractive because it ensures that the federal government retains authority to pursue any case either judicially or administratively, as it deems fit, but that larger cases in which the public interest is greater must be subject to review by EPA headquarters and the Department of Justice before they can be pursued administratively.

The Department would not support a total elimination of the cap on administrative penalties or a raising of the cap to an even higher level, because we view a strong civil judicial enforcement program as an essential component of Clean Water Act enforcement. Although we recognize the efficiencies in allowing smaller cases to be pursued administratively, there is an important role for civil actions when enforcement of the Act is viewed as a whole. One consideration is consistency in Clean Water Act enforcement. There is no nationwide strategy for or review of administrative penalty actions. Each EPA Region has its own approach and its own goals. In contrast, civil judicial enforcement actions are reviewed by EPA headquarters and by the Department of Justice for consistency with the policies underlying overall Clean Water Act enforcement, both civil and criminal, and with enforcement policies underlying other environmental statutes as well. Consistency is imperative for cases that receive substantial scrutiny by the Congress and the public. Moreover, consistency of enforcement is of great concern to municipal defendants that have been the subject of a large number of Clean Water Act enforcement actions.

Federal court cases receive more publicity -- both in the popular press and in legal reporters -- than administrative actions. Accordingly, judicial enforcement furthers the deterrence purposes of the Act by alerting would-be violators to the consequences of a violation. It is particularly important that cases presenting novel facts receive publicity so that the regulated community understands the Act's parameters. Similarly, the high visibility of federal court actions fosters public interest and participation in protecting our nation's waters.

Further, there is a large docket of citizens suit cases under the Clean Water Act pending in federal courts. That docket is sure to increase if the changes proposed by S. 1114, such as overruling Gwaltney and allowing citizens to seek past penalties, are enacted. Eliminating or substantially increasing the administrative penalty cap could create a situation where the overwhelming majority of federal Clean Water Act enforcement actions are citizen suits in which EPA does not participate or participates only as an amicus curiae. Maintaining a cap on administrative penalties will help ensure that EPA remains an active participant in court in the development of Clean Water Act law.

Federal facilities. We support most of the changes proposed in section 503(c) of the bill, which would waive sovereign immunity of federal facilities for punitive and coercive penalties under the Act and would specify the procedures for administrative enforcement by EPA against federal facilities. We support the expanded waiver of sovereign immunity in S. 1114 because it is awkward for the federal government to press for enforcement when its own house is not in order. Thus, federal facilities must comply with the environmental laws and should be subject to the same penalties for noncompliance as private parties.

There are, however, a few recommendations we would make concerning the procedures by which EPA takes administrative enforcement actions against federal facilities. First, federal facilities should be given explicit authority to confer with the Administrator or with the President before the order becomes final, as they are with respect to administrative orders under the Federal Facility Compliance Act. 42 U.S.C. 6961(b)(2). The ability of Executive Branch components to confer among themselves to resolve disputes is fundamental to the constitutional concept of the unitary executive. Second, the waiver of sovereign immunity should include a provision analogous to that in the Federal Facilities Compliance Act specifying that funds collected by states in actions brought pursuant to the waiver shall be used for environmental protection and environmental enforcement, to ensure that the penalty not only deters the federal facility from future violations but also furthers the broad environmental protection goals of the Act. <u>See</u> 42 U.S.C. 6961(d). We would support a provision that would limit the authority of citizens to sue for relief different from that contained in an EPA administrative compliance order or federal facility compliance agreement entered after public notice and an opportunity for comment. We also recommend that in lieu of the provision on p. 184, lines 16-19 of the bill, a provision be included that would clearly establish the right of the United States, federal agencies, and federal officers, agents, and employees sued in an official or individual capacity for any act under color of their office to remove that action to federal court.

<u>Emergency powers</u>. The Department supports section 503(d) of S. 1114, which would expand EPA's authority to address conditions that may present an imminent and substantial dange, and would bring its authority into line with that provided by other environmental statutes. We also support giving EPA authority to assess administrative penalties for violations of any orders under its emergency powers as well as for violations of its administrative compliance orders issued pursuant to section 309(a) of the Act. Those administrative penalty orders would, like all Clean Water Act administrative penalty orders, be subject to review in court. At that time, the recipient of the order could challenge its validity as well as the validity of the underlying compliance order.

<u>Other administrative amendments.</u> The Department supports section 503(e) of the bill, which contains a number of improvements to EPA's administrative enforcement authority. In particular, we support eliminating lack of consultation as a defense to an administrative penalty action, eliminating the preclusive effect of potentially inadequate state administrative

penalty actions, eliminating the preferential treatment accorded violations resulting from a single operational upset, and expanding the Administrator's authority to obtain information necessary to her regulatory and enforcement responsibilities.

Technical amendments. Finally, we support the technical amendments in section 503(f).

Proposals for other amendments

In addition to these comments on Title V of S. 1114, the Department has a number of suggestions for additional provisions that would strengthen the criminal and civil authorities available for enforcement of the Act.

Civil judicial authorities. With respect to our civil judicial enforcement authorities, we would support an amendment to require courts to impose a penalty at least sufficient to recoup the defendant's economic benefit of noncompliance. A penalty less than the economic benefit rewards those who fail to comply with the Act in a timely fashion and competitively disadvantages the law-abiding. It also reduces the deterrent effect of penalties, effectively sending a message to the regulated community that environmental noncompliance is economically advantageous. The rule could be subject to narrow exceptions for extraordinary circumstances, one of which might be for municipalities that had acted in good faith in attempting to comply with the law.

The Department would also support revising the statutory maximum penalty provision to provide that the maximum can be exceeded in cases in which the economic benefit exceeds $25,000 per day. It is relatively rare that the economic benefit of noncompliance exceeds the statutory maximum penalty, but it could occur, for example, when there is a one-day spill that could have been avoided if the defendant had installed state-of-the-art wastewater treatment equipment. In such circumstances, it would not be appropriate to allow the defendant to benefit financially (again to the disadvantage of its competitors) by keeping the amount by which its economic benefit exceeded $25,000 per violation per day.

We also suggest that a provision be included in the Act that would require a federal court, in finally deciding a case, to issue an order aimed at bringing the violator into compliance whenever it determines that a violation of the Act has occurred or will occur, but would not obligate the court to order immediate cessation of the violation. Such a provision would clarify the Supreme Court's decision in Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), and would supersede the common law test under which the decision whether to grant a compliance order was left to the equitable discretion of the court. In addition, in the absence of such a statutory mandate, before a court can grant a compliance order, it must find that there is irreparable injury -- one prerequisite to the issuance of an injunction under the traditional common law test. Proof of irreparable injury can be difficult in Clean Water Act cases in which evidence of environmental harm is often unavailable. Of course, the federal court must take all of the equities into account in formulating an appropriate compliance order.

This amendment should not affect the established legal standards for issuance of preliminary injunctions and temporary restraining orders. We believe that until there has been proof of violation, the court should be able to balance the potential harm to each side in deciding whether to impose interim injunctive relief pending a determination on the merits. This approach is important to protect federal facilities.

We support an additional amendment that would authorize EPA to issue an administrative order or the Department to commence a civil judicial action to address anticipated violations of the Act. There are two types of situations in which this may be necessary. The first is when it is clear that a defendant will violate the Act unless it takes immediate remedial action. The second is when it is clear that the defendant will soon violate the Act and, though immediate remedial action cannot prevent the violation, it can lessen the resulting environmental harm. In these situations, the United States should have authority to take immediate action and should not be required to wait until the violations actually occur.

We would support an amendment that would allow the government to recover the costs of enforcement and administering cleanup and compliance measures as it now does pursuant to section 311 of the Clean Water Act for discharges of oil and hazardous substances. Such an amendment would place the cost of enforcing the law and cleaning up the pollution squarely on the polluter, rather than the U.S. taxpayer. It would also create a stronger incentive for settlement, rather than litigation, of enforcement actions.

<u>Criminal enforcement authorities</u>. We have some suggested revisions of the Act that we believe are appropriate to enhance criminal enforcement. The maximum imprisonment for basic felonies should be raised from three years to five years to achieve uniformity with equally serious environmental crimes under other statutes. Equivalent provisions of the Resource Conservation and Recovery Act and the Clean Air Act carry five-year maximum sentences for knowing felony violations. The deterrence goals of the Act are hindered by this discrepancy, which implies that water pollution constitutes a lesser crime than air pollution or the mishandling of hazardous waste. Similarly, the maximum sentence for second offenses should be

raised from six years to ten years as it is in the Resource Conservation and Recovery Act and the Clean Air Act, and the language of the statute should be clarified to state that any criminal violation of the Act can serve as the predicate for enhanced criminal fines and imprisonment.

Several revisions are in order for the knowing endangerment provision, 33 U.S.C. 1319(c)(3). First, it should be amended to make clear that any violation of section 309(c)(2) is a predicate offense for knowing endangerment. Thus, any person who knowingly committed any felony violation of the Act and knew at the time that he placed another person in imminent danger of death or serious bodily injury would be subject to prosecution under the knowing endangerment provision. Second, the provision as it now stands has been misconstrued by a court of appeals to the effect that knowing endangerment cannot occur until the predicate offense has been completed. For example, those who endanger others by exposing them to a toxic discharge before it is disposed of in the surface water or sewer are not subject to prosecution. United States v. Borowski, 977 F.2d 27 (1st Cir. 1992). Section 309(c)(3)(A) should be amended to clarify that an endangerment knowingly caused at any point during the commission of the predicate offense triggers this felony. Third, the consent affirmative defense should be removed from section 309(c)(3)(B)(ii). Fourth, a definition of "imminent danger" should be added to section 309(c)(3)(B). The statute does not now include a definition of that critical term. The one that should be inserted is drawn from jury instructions that have been fashioned in knowing endangerment cases.

Two significant changes should be made to section 309(c)(4), which criminalizes false statements. First, a knowing omission of material information and a failure to install, operate, or use required monitor devices should be added as crimes. In a regulatory scheme so heavily dependent on the regulators being furnished truthful and complete information, knowing failures to provide such information are as significant as knowing falsifications of information. Therefore, they are equally appropriate targets for the deterrent and penal effects of criminal provisions. Second, because complete and accurate information is critical to this regulatory statute, the maximum fine for violations under section 309(c)(4) should be raised from $10,000 to $50,000 and the maximum imprisonment should be raised from two to five years (an incarceration maximum equal to that under the general federal false statement statute, 18 U.S.C. § 1001).

The Department would support adding a new provision to section 309(c) authorizing a court to order fines obtained as a result of criminal convictions to be used in two ways to benefit the criminal enforcement program. First, up to a specific maximum figure, a portion of any fine should be available as an award to any citizen providing information leading to a conviction. This would provide an incentive to citizen reporting of possible environmental crimes. Second, a portion of any fine should be available to award to any state or local government body that gives material assistance to a federal prosecution of a criminal environmental case. The United States has received invaluable assistance from state and local agencies in a number of its prosecutions, but providing such assistance can be very expensive to state and local governments given their resource limitations. State and local governments would be more inclined to support federal efforts if those resource expenditures were more likely to be returned to them.

Marine Sanitation Devices. We believe that section 312 of the Act should be amended to prohibit expressly the discharge of sewage from any vessel subject to the standards and regulations of that section unless the vessel is equipped with an operable marine sanitation device used in compliance with the Act. Violations of this provision should, in our view, be subject to civil as well as criminal penalties under section 309(c) of the Act. We see no principled reason why the discharge of sewage in violation of section 312 should not be subject to criminal penalties. We note that discharges of pollutants under other provisions of the Act are subject to such penalties.

Shipowner's Limitation of Liability Act. The Department of Justice has been forced to litigate the question whether Clean Water Act defendants' liability to comply with injunctive relief based on discharges of pollutants other than oil or hazardous substances is limited by the Shipowner's Limitation of Liability Act, 46 U.S.C. §§ 183 et seq. To avoid onerous litigation over this issue, we believe that section 309 of the Act should be amended to provide expressly that the Shipowner's Limitation of Liability Act does not limit liability for civil penalties or injunctive relief under the Clean Water Act.

Definitions. It would be useful to clarify the definitions of "pollutant" and of "point source" in 33 U.S.C. 1362. First, the definition of "pollutant" should be modified to make it clear that the materials identified are only examples and not an exclusive list of all "pollutants". We note that section 5(a)(2) of S. 1304 (the Wetlands Conservation and Regulatory Improvements Act) would add "fill" and "dirt" to the list of contaminants constituting a "pollutant" under the Act. We suggest adding "fill", "dirt", and "petroleum products" to the list in section 502(6) of the Act and making the list expressly illustrative to avoid onerous disputes over whether a particular contaminant is a "pollutant."

Second, the definition of "point source" may require amendment. In overturning a criminal conviction, a recent appellate court decision held that a human hand that had thrown medical waste into a waterbody was not a "point source." United States v. Villegas, Nos. 92-1090, 92-1091 (2d Cir. Sept. 1, 1993). However, a human hand meets the definition of "point source" and is clearly capable of being the instrument by which dangerous pollutants are conveyed into the water. A clarification that a person causing pollution can constitute a "point source" would be helpful.

We also propose adding to section 311(a) of the Act a definition of the term "adjoining shoreline." The definition should make clear that the term includes all land areas on which oil or hazardous substances have been discharged if the discharge threatens navigable waters.

Citizen enforcement. In addition to those provisions in S. 1114 that would address citizen enforcement, we suggest adding a provision that would make it easier for citizen plaintiffs to show that they have standing to seek enforcement of the Act. This could be accomplished, consistent with constitutional limits, by allowing a court to find injury in fact based on proof that the defendant discharged pollutants in violation of or without a permit required by the Act into receiving waters used by the plaintiff. This would enable a plaintiff to demonstrate standing to sue without demonstrating that the defendant's violations resulted in a particular type of environmental harm that caused or contributed to the type of injuries sustained by plaintiff.

The Department would support providing citizens with authority to abate imminent and substantial endangerments similar to that of the Administrator pursuant to section 504 of the Act. Citizen suits to abate these threats should give prior notice, but should not be subject to the sixty-day notice requirement of section 505(b)(1)(A). This approach parallels that of the Resource Conservation and Recovery Act.

We would also suggest that section 505(f) of the Act be amended to ensure that citizens are authorized to sue for violations of conditions in permits issued pursuant to Section 404 as well as those in National Pollutant Discharge Elimination System (NPDES) permits. Subject to enactment of section 503(a) of the bill allowing citizens to obtain penalties for past violations of the Act, the Department would also support an amendment providing that citizens may amend their complaints to add allegations of violations occurring after the filing of the initial complaint, to the extent otherwise permitted by the Federal Rules of Civil Procedure, without having to issue a new 60-day notice. Additionally, we support giving citizens explicit authority (like that we are seeking for EPA) to obtain injunctive relief to remedye the adverse effects of violations, but we would condition a court's authority to order such broad relief on first allowing EPA to comment on the proposed relief. The purpose of obtaining EPA's views would be to ensure that the proposed remedy is technically appropriate and that it does not conflict with any other remediation efforts of the federal government in the same waterbody.

We also suggest that certain aspects of section 505(c)(3), which ensures the protection of the interests of the United States in citizen suits, be modified. First, the statute should provide some guidance to the courts as to what standard to apply in deciding whether to approve a proposed consent judgment in a citizen suit. We suggest that the statute provide that a court shall not approve any proposed consent judgment that is inappropriate, improper, inadequate, or inconsistent with the purposes and requirements of the Act. We also suggest the addition of language instructing the court to consider the penalty factors contained in section 309(d) of the Act as well as any views expressed by the United States in deciding whether to approve a consent decree. We would support provisions that would clarify that the United States may intervene as of right in a citizen suit at any time and that the United States is not bound by the judgment in a citizen suit.

<u>Minor or technical amendments</u>. We have a number of suggestions for other minor or technical changes to the Act. First, the Department would support an amendment to section 309(e), which now requires the state to be joined as a party in any case against a municipality. Mandatory joinder of the state complicates enforcement actions against municipalities. Such joinder is unnecessary in any circumstance except when state law precludes the municipality from raising the revenue necessary to pay. We would suggest that section 309(e) be modified to give the United States discretion to join states in actions against municipalities when state law could interfere with a municipality's ability to satisfy a judgment.

Second, the Department would support an amendment to clarify that there is no statute of limitations applicable to enforcement actions seeking injunctive relief, and that the five-year statute of limitations set forth in 28 U.S.C. § 2462 applies to suits for civil penalties, but does not begin to run until the United States knows about the violation. For example, the statute of limitations would not begin to run on a violation concealed by a false discharge monitoring report until EPA learned that the violation had occurred.

Third, the Department suggests amending section 509(b), which now precludes judicial review in an enforcement action of EPA decisions, such as promulgation of regulations or issuance of an NPDES or section 404 permit, which could have been challenged in a separate judicial proceeding. This provision should be extended to preclude judicial review in an enforcement action of state decisions, such as state issuance of NPDES or section 404 permits, which could have been challenged in state court.

The Department would also suggest a number of additional changes to and clarifications of existing law, including that: (1) narrative end-of-pipe limits and receiving water limitations, both narrative and numeric, contained in NPDES permits are enforceable; (2) a discharge to the ground or to groundwater that has a direct hydrological connection to surface water is subject to NPDES regulation; (3) persons seeking review in a United States District Court of a Class I administrative penalty order must file a complaint as well as a notice of appeal; (4) suits challenging certain final agency actions (to be listed in the statute) which affect individuals or are of local, statewide or regional applicability (such as approval of state water quality standards under section 303 and issuance of permits under sections 402 and 404) are to be brought in the United States Courts of Appeals for the federal judicial district in which the affected waters are located (the Department is considering whether plaintiff should also be given the option of filing such challenges in the United States Court of Appeals for the District of Columbia Circuit); (5) challenges to an EPA final action which has national application, such as the promulgation of regulations applicable nationwide, must be brought in the United States Court of Appeals for the District of Columbia Circuit; and (6) any other reviewable agency action which does not have national application and which is not listed in the statute as we propose in (4), above, will be reviewable in the district court.

Finally, the Department has a number of proposals for amending section 311 of the Act. The most important of these is to clarify that the government has enforcement authority against discharges occurring anywhere in the U.S. exclusive economic zone with the proviso that this jurisdiction will be exercised consistent with international law. Several steps are necessary to accomplish this change. First, a definition of the "exclusive economic zone" consistent with other statutes should be added to section 502. Second, "exclusive economic zone" should be substituted for the term "contiguous zone" in section 311 (b)(3)(ii) and (m)(1)(a), while specifically preserving Coast Guard authority under 14 U.S.C. § 89(a). A savings clause similar to that in the Act to Prevent Pollution from Ships should be added to avoid any international law conflicts. Third, section 502(8) should be amended to redefine the "territorial seas" as extending to 12 nautical miles, thereby making it consistent with Presidential Proclamation 5928 and the United Nations Convention on the Law of the Sea. The Department has a number of suggestions for other helpful amendments to improve our enforcement capabilities under section 311 of the Act if the Senate is considering such amendments at this time.

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

SPECIAL

May 20, 1993

LEGISLATIVE REFERRAL MEMORANDUM

LRM #I-488

TO: Legislative Liaison Officer -

ENERGY - Bob Rabben - (202)586-6718 - 209
INTERIOR - Ralph Hill - (202)208-6706 - 329
EPA - Thomas C. Roberts - (202)260-5414 - 326
AGRIC-CR - Robin Rorapaugh (all testimony) - (202)720-7095 - 230

FROM: RONALD K. PETERSON (for) Ronald K Peterson
Assistant Director for Legislative Reference

OMB CONTACT: Craig CRUTCHFIELD (395-3857)
Secretary's line (for simple responses): 395-6194
Ruth Dyk SAUNDERS (395-3446)

SUBJECT: JUSTICE Proposed Report RE: S 206, Colorado Wilderness Act of 1993

DEADLINE: May 27, 1993

COMMENTS: The Senate Energy Committee will likely order S. 206 reported before Justice's report is cleared. However, the report could still be sent to the Senate prior to a floor vote or to the House. Please provide comments by the deadline.

OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or receipts for purposes of the the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:
J. McDivitt
B. Damus
K. McGinty
V. Foster

RESPONSE TO LEGISLATIVE REFERRAL MEMORANDUM

If your response to this request for views is **simple** (e.g., concur/no comment) we prefer that you respond by **faxing** us this response sheet. If the response is **simple** and you prefer to call, please **call the branch-wide line** shown below (NOT the analyst's line) to leave a message with a secretary.

You may **also respond** by (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); (2) sending us a memo or letter; or (3) if you are an OASIS user in the Executive Office of the President, sending an E-mail message. Please **include** the LRM number shown above, and the **subject** shown below.

TO: Craig CRUTCHFIELD
Office of Management and Budget
Fax Number: (202) 395-5691
Analyst/Attorney's Direct Number: (202) 395-3857
Branch-Wide Line (to reach secretary): (202) 395-6194

FROM: ______________________ (Date)

______________________ (Name)

______________________ (Agency)

______________________ (Telephone)

SUBJECT: JUSTICE Proposed Report RE: S 206, Colorado Wilderness Act of 1993

The following is the response of our agency to your request for views on the above-captioned subject:

_______ Concur

_______ No objection

_______ No comment

_______ See proposed edits on pages ______________

_______ Other: ______________________

_______ FAX RETURN of _____ pages, attached to this response sheet

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable J. Bennett Johnston
Chairman
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This presents the views of the Department of Justice on S. 206, the "Colorado Wilderness Act of 1993." The following recommendations are offered to further refine the bill's approach in addressing water rights issues. The Department defers to the Departments of Agriculture and the Interior regarding the advisability of this bill's limited provisions for the protection of wilderness values.

Section 8 of the bill is intended to protect the wilderness values of the lands designated as wilderness by means other than those based on a Federal reserved water right. In section 8(a) Congress specifically finds that these areas are located at the headwaters with few, if any, actual or proposed water resource facilities upstream of these areas and few, if any, opportunities for development of water resources. This language implies that actual or proposed water resource facilities could adversely affect the wilderness values of the designated areas. Therefore, the federal government's ability to protect wilderness attributes should be carefully defined.

Two provisions in section 8 raise possible constitutional problems. Section 8(b)(1) would foreclose any claims for water rights in Colorado which are "based on any construction of any portion of this Act, or the designation of lands as wilderness by this Act, as constituting an express or implied reservation of water or water rights." The bill seeks to achieve this end by (1) prohibiting any person, including any official acting on behalf of the United States, from <u>asserting</u> (emphasis added) such claims "in any court or agency"; and (2) prohibiting "any court or agency" from considering such a claim. Section 8(g)(2) would impose similar prohibitions with respect to claims based on certain water rights in the North Platte River. Both of these restrictions are of doubtful constitutionality.

While Congress may freely legislate the rules which govern the disposition of federal water rights, it may not constitutionally prohibit persons from asserting whatever claims they choose in courts or agencies. U.S. Const. amend. I, V. As the Supreme Court has recognized, "[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 741 (1983). Nor is Congress free to prohibit officials of the Executive Branch from asserting, on behalf of the United States, such claims as the President deems necessary under his constitutional power to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

The provisions purporting to bar "any court" from even considering specified categories of claims raise additional constitutional difficulties. Federal reserved water rights may be at issue in an interstate stream adjudication before the Supreme Court. Arizona v. California, 373 U.S. 546, 564 (1963). Congress has the power to reserve water rights under its powers to regulate navigable waters under the Commerce Clause and to regulate government lands under Article IV, § 3, of the Constitution. Id. at 597-598. However, Congress cannot withdraw the Supreme Court's original jurisdiction over disputes between the States, which is provided by the Constitution. U.S. Const. art. III, § 2, cl. 2.

These issues could be avoided by substituting provisions that would either foreclose federal statutory jurisdiction over the water claims at issue or by expressly disclaiming the reservation of wilderness water rights. If a jurisdictional solution is desired, section 8(b)(1) could be amended to read as follows:

> Notwithstanding any other provision of law, including the McCarran Amendment, 43 U.S.C. § 666, no jurisdiction provided by any Act of Congress shall extend to any claim to or for water or water rights in the State of Colorado which involves the construction of an express or implied reservation of water or water rights by this Act, or the designation of any lands as wilderness by this Act.

While this amendment will not assure that arguments regarding reserved water rights will not be made, it should dispose of those arguments and ensure that wilderness values will be protected by other means.

Section 8(c) protects the designated wilderness and other management areas by removing federal authority to fund, assist, authorize, or issue a license or permit for a new water resource facility within these areas or for the enlargement of an existing facility within these areas. Section 8(d) further protects these areas by limiting access to existing water resource facilities to existing routes and by limiting the operation and maintenance of these facilities to the extent necessary for the continued exercise of vested water rights adjudicated prior to the bill's enactment. The impact of an existing facility on the water resources and values of these areas cannot be increased and the facilities and their access routes must be maintained to prevent increased adverse impacts.

These provisions should also make clear that they do not supersede existing agency authority to control the impacts of water resource facilities. We recommend addition of the following proviso to the end of section 8(d)(3):

> Provided, further, that under the laws and regulations generally applicable to the National Forest System the Secretary may administer the areas described in sections 2, 5, 6 and 9 of this Act to prevent an increased impact of an existing facility on these areas by reason of a change effected in its operation, maintenance, repair, or replacement.

In the absence of this proposed clarifying language, issues may arise regarding the authority of the Forest Service to regulate existing projects with vested water rights within the newly designated areas to avoid increased impacts on wilderness values resulting from changes in the operation, maintenance, repair or replacement of the projects.

Section 8(g) governs the effect of this bill on interstate compacts and the North Platte River. Section 8(g)(2) includes language similar to that found in 8(b)(1) to ensure that no water right will be asserted or considered for the Platte River Wilderness Area, to the extent such rights would limit the use or development of water within Colorado by present and future holders of water rights in the North Platte River and its tributaries. This provision appears to be intended to operate as a substantive limit on the quantity of water available for the Platte River Wilderness Area. If that is the intent, the constitutional issues described above could be avoided by simply limiting the quantity of water available to this area as follows:

> Any rights to waters of the North Platte River for purposes of the Platte River Wilderness Area established by Public Law 98-550 are hereby limited to the extent that such rights do not conflict with the use or development of water within Colorado by present and future holders of vested water rights in the North Platte River and its tributaries, to the full extent allowed under interstate compact or United States Supreme Court equitable decree.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

M. Faith Burton
Acting Assistant Attorney General

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

SPECIAL

May 20, 1993

LEGISLATIVE REFERRAL MEMORANDUM

LRM #I-487

TO: Legislative Liaison Officer -

AGRIC-CR - Robin Rorapaugh (all testimony) - (202)720-7095 - 230
DEFENSE - Samuel T. Brick, Jr. - (703)697-1305 - 325
ENERGY - Bob Rabben - (202)586-6718 - 209
TRANSPORTATION - Tom Herlihy - (202)366-4687 - 226
TREASURY - Richard S. Carro - (202)622-1146 - 228
CEA - Francine Obermiller - (202)395-5036 - 242
EPA - Thomas C. Roberts - (202)260-5414 - 326
NEC - Sonia Mathews - (202)456-6722 - 429
USTR - Fred Montgomery - (202)395-3475 - 223
INTERIOR - Ralph Hill - (202)208-6706 - 329

FROM: RONALD K. PETERSON (for) Ronald K Peterson
Assistant Director for Legislative Reference

OMB CONTACT: Craig CRUTCHFIELD (395-3857)
Secretary's line (for simple responses): 395-6194
Jim McDIVITT (395-3715)

SUBJECT: JUSTICE Proposed Report RE: S 257, Mineral Exploration and Development Act of 1993

DEADLINE: May 27, 1993

COMMENTS: The Senate will likely pass an alternative bill, S. 775, before this report on S. 257 is cleared. However, the issues raised by Justice also apply to a House companion bill, H.R. 322, so the report could be revised to address the House Natural Resources Committee.

OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or receipts for purposes of the the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:
D. Arbuckle
B. Damus
J. Palmieri
K. McGinty
G. Simon
K. Way
V. Foster

LRM #I-487

RESPONSE TO LEGISLATIVE REFERRAL MEMORANDUM

If your response to this request for views is **simple** (e.g., concur/no comment) we prefer that you respond by **faxing** us this response sheet. If the response is **simple** and you prefer to call, please **call the branch-wide line** shown below (NOT the analyst's line) to leave a message with a secretary.

You may **also respond** by (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); (2) sending us a memo or letter; or (3) if you are an OASIS user in the Executive Office of the President, sending an E-mail message. Please **include** the LRM number shown above, and the **subject** shown below.

TO: Craig CRUTCHFIELD
Office of Management and Budget
Fax Number: (202) 395-5691
Analyst/Attorney's Direct Number: (202) 395-3857
Branch-Wide Line (to reach secretary): (202) 395-6194

FROM: ______________________ (Date)

______________________ (Name)

______________________ (Agency)

______________________ (Telephone)

SUBJECT: JUSTICE Proposed Report RE: S 257, Mineral Exploration and Development Act of 1993

The following is the response of our agency to your request for views on the above-captioned subject:

________ Concur

________ No objection

________ No comment

________ See proposed edits on pages ______________

________ Other: ______________________

________ FAX RETURN of _____ pages, attached to this response sheet

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable J. Bennett Johnston
Chairman
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 2051

Dear Mr. Chairman:

This presents the views of the Department of Justice on S. 257, the "Mineral Exploration and Development Act of 1993." The bill would replace provisions for the location of mining claims on the public lands under the 1872 mining law, 30 U.S.C. § 21 et seq., with a new scheme for obtaining the right to mine minerals. Though we endorse the basic goal of this bill, as currently drafted it would give rise to extensive litigation and create substantial liabilities for the United States. Given the current disposition of the federal judiciary and the fact that the consensus in favor of mining law reform is based, in part, on budgetary concerns, the risk of takings liability should be a substantial consideration in evaluating alternatives to the current law. We have identified possible improvements to the approach of the Mineral Exploration and Development Act, herein, and look forward to working with you on this legislation.

We understand that there are approximately 1,000,000 unpatented mining claims on the public lands of the United States. We are not aware of any estimate of the number of valid mining claims included in the total number of outstanding claims, but there are undoubtedly many. Also, we have been informed that there are about 450 patent applications outstanding. These facts require us to address, first, the takings implications of the bill. We suggest provisions that should limit, if not completely, at least substantially, the Government's possible exposure to liability. The bill creates a cumbersome regulatory regime that would be difficult to enforce and easy to challenge. We suggest provisions to rationalize the provisions for judicial review and suggest that the bill's environmental protection measures be redrafted to take maximum advantage of existing State and Federal requirements and programs.

Takings Implications

Given that one of the principal goals of mining law reform is to ensure a fair return to the public from the development of public resources, we are particularly concerned about the takings implications of the bill, and, in particular, the provisions in section 404.

It has long been established that a valid mining claim is property in the full sense, unaffected by the fact that the paramount title to the land is in the United States. Such a claim is capable of transfer by conveyance, inheritance, or devise, and enjoys the protection of the Fifth Amendment to the United States Constitution. See Union Oil Company of California v. Smith, 249 U.S. 337, 349 (1919) ("the possessory right of a qualified locator after discovery of minerals upon the claim is a property right in the full sense, unaffected by the fact that the paramount title to the land is in the United States, and it is capable of transfer by conveyance, inheritance, or devise"); Cole v. Ralph, 252 U.S. 286, 295 (1920) ("A location based upon discovery gives an exclusive right of possession and enjoyment, is property in the fullest sense, is subject to sale and other forms of disposal, and so long as it is kept alive by performance of the required annual assessment work prevents any adverse location of the land"); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963) (Unpatented mining claims are "valid against the United States if there has been a discovery of mineral within the limits of the claim, if the lands are still mineral, and if other statutory requirements have been met"). The owner of such a claim, upon proper application, may obtain the legal title as well(i.e., a patent to the land embraced in his claim, including both surface and minerals). Alternatively, such owner may, without ever applying for a patent, work the claim to the exhaustion of the mineral resources found thereon. An invalid mining claim, of course, creates no rights in the locator. However, under present law, a costly and time-consuming hearing, often followed by litigation, is required in order to determine whether a claim is valid.

The subject bill would have two major effects on the owners of unpatented mining claims. First, section 107 would eliminate (retroactively, if the language remains unchanged) the right to patent, and would prohibit the issuance of a patent to a mining claim except where application for patent was filed, and all requirements of the law were satisfied, prior to January 5, 1993. Second, section 404 would terminate mining claims located under the general mining laws after a period of three years from the date of enactment unless, within that three-year period, the claimants should convert their claims to the new system, with its reduced rights and increased obligations.

We note that section 404 provides that the holder of an unpatented mining claim "may elect to convert the claim" into a mining claim subject to the new law. In fact, there is no real "election." Under the terms of the bill, the holder of an existing claim <u>must</u> <u>convert</u> his claim or have the claim terminated upon the expiration of three years. Our chief concern is the likelihood that the provisions of sections 107 and 404, operating in combination, would be found to take private property. If they would, the United States could be liable for countless millions of dollars in damages for the taking of private property, and it could face a volume of litigation requiring years to resolve.

Considering individually the termination of the right to patent, it has been held, in the case of an Act of Congress expressly terminating the ability of existing claimholders to proceed to patent upon mining claims located within a national recreation area, that such termination did not constitute the taking of private property. <u>Freese</u> v. <u>United States</u>, 639 F.2d 754 (Ct. Cl. 1981), <u>cert</u>. <u>denied</u>, 454 U.S. 827 (1981). In reaching that conclusion, the United States Court of Claims reasoned that, at most, the mining claimant had suffered a denial of the opportunity to obtain greater property than that which he owned on the effective date of the Act, which denial, the court held, did not constitute the divestment of a property interest.

There is much force in the logic employed by the court in reaching this conclusion, and we do not question the soundness of the court's conclusion. However, we do not find total assurance, in the ruling of a court looking at the termination of the right to patent in one limited area, that, upon consideration of the pervasive consequences of the subject bill, the courts will reach the same conclusion. Under the provision of the present law, 30 U.S.C. § 29, a mining claimant is entitled to patent upon meeting prescribed requirements. Arguably, where a mining claimant has met the prescribed requirements, a deprivation of a patent may support a taking claim.

Moreover, the ruling in <u>Freese</u> is explicitly limited by the facts that the Act at issue preserved "valid existing rights" and that plaintiff's rights of use, enjoyment and disposition in his unpatented mining claims were undiminished. <u>Id.</u> at 758. The Act at issue in <u>Freese</u> contrasts sharply with the Mineral Exploration and Development Act, which would impose significant new constraints on the exploitation of existing unpatented mining claims. The Federal Circuit has made it clear that a taking may occur when regulations deprive claim holders of any economically viable use of their mining claims. <u>Skaw v. United States</u>, 740 F.2d 932, 939 (Fed. Cir. 1984). If the Mineral Exploration and Development Act were enacted as currently drafted, we could expect to be embroiled in extensive litigation regarding such fact-intensive issues as the validity of mining claims that were converted to this new system and the economic impact of new requirements, such as the bills' reclamation requirements. It would be difficult to predict the outcome of this litigation because the law of regulatory takings is extremely fluid. However, given the fact that many mining interests claim to be only marginally profitable even without significant government regulation, the imposition of extensive new requirements without an escape route for valid existing rights would risk substantial liabilities.

Thus, our greater concern lies with the provisions of section 404, which effectively mandate the conversion of claims to this new system, particularly when viewed in conjunction with the elimination of the right to patent under section 107. Presumably, it is the intent of the drafters of the bill, by providing for the conversion of existing claims to the new system, to avoid a taking on the premise that the existing claims have not been taken, but that the conditions for their continued maintenance have simply been changed. If so, we believe the proposed provisions fail to accomplish that purpose.

We note that the term "valid existing rights" is defined to mean a mining claim that was properly located and maintained under the general mining laws and which was supported by a discovery of a valuable mineral deposit within the meaning of the general mining laws. There is currently no finite and universally applicable definition of a property interest, and the distinction between ownership of property and the right to receive title to property upon satisfying specified requirements is a rather narrow one. However, this definition effectively codifies case law that considers a valid mining claim to be a property right.

The likelihood of finding a taking, we believe, could be minimized by doing the following:

(1) Preserve the right to patent to the limited number of existing claimants who satisfy prescribed requirements;

(2) Grant existing claimants a reasonable time (we do not suggest what that should be) in which to (a) apply for patent, (b) elect to convert their mining claims to the new system, thereby relinquishing any claim of entitlement to patent, or (c) have their claims conclusively deemed abandoned upon failure to elect either of the first two courses;

(3) Provide that the validity of any claim for which patent application is filed shall be determined as of the date of enactment of the new law; and

(4) Limit the right to apply for patent to the owners of mining claims at the time of enactment of the new law, and provide that the conveyance of a claim thereafter should be deemed the equivalent of an election to convert to the new system.

These suggested provisions, of course, could invite the nearly simultaneous filing of hundreds of thousands of patent applications, thereby creating a monumental administrative task. We suspect that many, perhaps most, mining claimants would not undertake the expense and other burdens of applying for patent under the scheme we have envisioned. Even so, the administrative task could require years for completion. (We understand that, in recent years, the Bureau of Land Management has conducted between 150 and 175 mining claim validity determinations per year.) Notwithstanding the magnitude of the task we have suggested, the cost to the government of such a course would pale when compared to the cost of the present provisions of the bill if they should be found to constitute a taking.

While we cannot predict with total certitude the outcome in the courts, we see a strong risk that the proposed legislation, with its termination of the right to perfect title to valid mining claims and its imposition of new requirements for, and restrictions on, the maintenance of existing claims, would be perceived as the taking of a property interest of some magnitude.

Administration and Judicial Review of Mining Requirements

A. Enforcement: Notices of Violation

Section 202(b)(1) requires the Secretary to issue a notice of violation to "the operator or person [sic] describing the violation and the corrective measures to be taken." If the violation is not abated within a prescribed period of time, the Secretary is required to immediately order a cessation of all mineral activities or the portion relevant to the violation. We have several objections to this section. First, the proposed section appears to make the issuance of notices of violation mandatory without distinguishing between minor and/or accidental violations and major violations, or violations caused by conditions beyond the control of the operator, such as an unanticipated weather event. The Government's experience under similar mandatory enforcement provisions in the Surface Mining Control and Reclamation Act (SMCRA) demonstrates that, in the absence of adequate resources and in cases of industry intransigence, mandatory enforcement does not have the expected deterrent effect. We are unaware of any enforcement program which attains 100% enforcement in light of the resources allotted to the agency by Congress. Accordingly, we recommend that the term "shall" in section 202(b)(1) be changed to "may." We do not recommend that the mandatory enforcement provisions set forth in section 202(b)(2) be changed. In order to protect the environment from imminent harm, mandatory action by the Secretary is probably appropriate.

This enforcement regime may also prove extremely burdensome where the Secretary does undertake enforcement. Section 202(b) requires the Secretary to issue a notice of violation describing the corrective measures to be taken and to allow a reasonable period of time for abatement. Thus, before a notice of violation may be issued, the Secretary must determine what corrective measures would be appropriate and effective and how much time would be needed to implement them. The Secretary may prefer to issue an administrative order penalizing the violation and requiring the mine operator to find the best way to correct the situation. However, there are no provisions for administrative penalties, which are common to environmental laws. See, e.g., the Clean Air Act, 42 U.S.C. § 7413(a)(3) and (d). The Secretary can order an immediate shutdown of mining activities in case of imminent danger to public health, safety or significant environmental harm, but that order must be made on the basis of an inspection. This inspection requirement could cause significant delay in situations where the Secretary knows of an imminent danger through other means.

Finally, section 202(b)(1) and (b)(2) should be modified to require that all notices of violation and cessation orders be issued to and served upon all operators and owners/controllers as set forth on the permit. This latter suggestion would provide actual notice to all owners/controllers of the operator of the violation and avoid the extensive and wasteful litigation of that issue that has arisen under SMCRA.

B. Civil Enforcement and Injunctive Relief

Under section 202(c), administrative orders form a prerequisite for civil enforcement. The Secretary is authorized to request that a civil action be brought only if an operator or person conducting mining activities violates or fails or refuses to comply with an order or interferes with an inspection. The bill provides for civil penalties, but no civil penalties may be assessed until the administrative appeal process has resolved itself. See, section 202(d). The maximum penalty of $5000 per violation is low by comparison to the revenues of some large mining operations, and by comparison to other statutes. See, e.g., Clean Water Act section 309(d), 33 U.S.C. § 1319(d) ($25,000 per day). Unlike other statutes, which authorize this penalty for each day of violation, section 202(d) states that each day of "continuing violation may be deemed a separate violation for purposes of penalty assessments." (Emphasis added.) This language appears to require separate charging of intermittent violations, and does not assure that the cumulative effect of violations will be penalized. The $1000 minimum penalty for violation of a cessation order, capped at $30,000 for 30 days of violation, may also prove ineffective. Section 202(c) also authorizes the Secretary to request the Attorney General to file suit for injunctive relief.

The bill provides that suit may be filed in the district where the mineral activities are located. It would be preferable to provide that suit be filed where minerals are located or where the defendant(s) can be located.

C. Citizen Suits

Section 202(e) provides for suits against the Secretary and other persons alleged to be in violation of the Act, regulations promulgated thereunder, or a plan of operations. Section 202(e)(1)(A), which provides that the Secretary may be sued whenever an operator violates a plan of operations, has the effect of making the Secretary vicariously liable and, therefore, the insurer of any plan of operations. In effect, the Secretary and the taxpayers of the United States would be liable for all reclamation under any plan of operations where the operator fails to reclaim and the bond is insufficient. This provision would provide a great incentive for operators and owners/controllers to structure their operations so that they may walk away from their operations whenever they lose their profitability. Accordingly, we recommend that section 202(e)(1)(A) be written to provide for citizen suits against the Secretary only where he has failed to promulgate a rule or regulation required by the Act.

In view of the foregoing comment, section 202(e)(1)(C), which would authorize suits against the Secretary for failing to perform any mandatory duty under the Act, should be deleted as redundant.

Section 202(e)(1)(B) should be clarified to show that it is intended to authorize only suits against operators and their owners/controllers for violations of the plan of operations or any regulation promulgated pursuant to the Act.

We recommend that section 202(e)(1)(D) be deleted in its entirety. This provision authorizes suits against the Secretary where it is alleged that he acted arbitrarily or capriciously. This is an open invitation to sue the Secretary at any time. For example, as noted above, there are 450 patent applications pending. All 450 applicants could sue the Secretary alleging that he has acted arbitrarily and capriciously in not processing or granting their patents.

Moreover, section 202(e)(1) provides that "any person having an interest which is or may be adversely affected may commence a civil action on his or her own behalf to compel compliance [with various enumerated provisions of the legislation]." (Emphasis added.) The underscored phrase in this provision must be construed in light of the "case or controversy" and standing requirements embodied in Article III of the Constitution. An Article III case or controversy exists only when a litigant has established a concrete "injury in fact," a standard that is not satisfied by allegations of injury that are merely "abstract," "conjectural," or "hypothetical." See, e.g., Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

The provision in section 202(e)(4) concerning attorney fees should be amended to authorize the payment of fees to the prevailing party rather than, as drafted, "as appropriate." Fee awards against the Secretary should be paid from funds appropriated to the Secretary rather than from the general judgment fund. We also suggest that fees be limited as per the Equal Access to Justice Act, 28 U.S.C. § 2412, which provides that a judgment for costs against the Government shall be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation.

D. Judicial Review

The bill contains five different, often conflicting, provisions concerning judicial review and remedies. Section 202(e)(1)(D) of the citizen suit provisions would provide for judicial review in any district court wherever it is alleged that the Secretary has acted arbitrarily and capriciously. Section 202(e)(5) would provide that section 202(e)(1)(D) does not restrict any right which any person may have under any statute or common law to sue the Secretary. Section 202(g) would provide for judicial review of rulemaking by the Secretary in the United States District Court for the District of Columbia. However, section 202(g)(3) would provide that the provisions of section 202(g)(1) do not limit the rights established under section 202(e).

These provisions cannot be harmonized. If retained, they will result in needless and wasteful litigation with respect to the proper court for review of final agency decisions. Accordingly, we recommend the following changes: (1) section 202(e)(1)(D) should be deleted because it will subject the Secretary to suits in multiple districts with respect to the same action; (2) for the same reason, section 202(e)(5) should be limited to suits against operators and/or owners/controllers for violations of the Act, regulations promulgated thereunder, or the plan of operations. Section 202(g), which would provide for review of rules and regulations promulgated to implement the Act, should be retained with modifications. First, the term "only" should be inserted after the phrase "judicial review" to make it clear that regulatory challenges may be initiated only in the

United States District Court for the District of Columbia. Second, section 202(g)(3), which would provide that the judicial review provisions in section 202(g) do not limit the rights established under section 202(e), should be deleted as unnecessary. Moreover, section 202(g)(3), when read in conjunction with section 202(e), could be interpreted to override section 202(g)(1).

E. False statements

Under section 105, any claim holder who "knowingly or willfully" submits false or misleading information to the Secretary in locating a mining claim or submitting information on diligent development expenditures is liable for a civil penalty of $5000 per violation. Under this standard a claim holder could also be charged criminally and fined up to $10,000 and imprisoned for up to five years. 18 U.S.C. § 1001. All the constitutional and judicial safeguards, particularly the privilege against self-incrimination, are available to defendants in criminal proceedings. Administrative enforcement is subject to appeal under section 202(f) and judicial review under the Administrative Procedure Act. We seriously question the utility of administrative procedures under these circumstances. We recommend that the mens rea requirement for violations of section 105 be lowered.

Permitting and Reclamation Standards

Section 201 would require all persons engaging in "mineral activities that may cause a disturbance of surface resources" to obtain approval of a plan of operations. The term "mineral activities" is broadly defined to include any activity related to or incidental to mineral exploration, mining, beneficiation and processing activities, including smelting and electrolytic refining. Section 101(a)(6). The terms "disturbance" and "surface resources" are not defined, but appear to require plan approval for any mining activities that may affect surface resources such as water, air, soil and biota. The Congress should consider whether mineral activities that impair groundwater are excluded from this bill's requirements and, if they are excluded, whether such exclusion is advisable in light of the serious problems associated with groundwater contamination.

Section 201(c) would require each proposal for a plan of operations to include a mining permit application, a reclamation plan, and "such documentation as necessary to ensure compliance with applicable Federal and State environmental laws and regulations." To approve a plan of operations, the Secretary must determine that the permit application and reclamation plan are complete and accurate, that reclamation would have a high probability of success, that the mineral activities would be consistent with the area's land use plan and land suitability determinations, and that the plan of operations will be in compliance with other Federal and State requirements. These provisions raise issues as to the extent to which the Secretary must ensure that mining activities comply with environmental laws commonly applicable to the mining industry, such as the Clean Water Act, 33 U.S.C. § 1251 et seq., the Clean Air Act, 42 U.S.C. § 7401 et seq., and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq. For example, certain process mining waste is now regulated as hazardous waste under Subtitle C of RCRA, pursuant to 42 U.S.C. § 6921(b)(3)(A). The Environmental Protection Agency (EPA) has determined that extraction and beneficiation mining wastes and certain process mining wastes should not be regulated under Subtitle C. Instead, they will be regulated under a separate program, which is currently being developed, and under standards applicable to nonhazardous solid waste (Subtitle D of RCRA). See 56 Fed. Reg. 27,300 (June 13, 1991); 51 Fed. Reg. 24,496 (July 3, 1986). Under section 105(g) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), mining waste sites are subject to special study of the potential for exposure and degree of hazard created.

As currently drafted, the provisions in section 201 for environmental protection operate largely in isolation. If these provisions were amended to incorporate existing regulatory regimes as part of the operating and restoration plans, these plans could be used to supplement and assist enforcement of related environmental protection statutes. The operating plan and reclamation provisions should be drafted to ensure meaningful consultation with EPA and other regulatory authorities, effective enforcement of applicable State and Federal requirements, and consistency with programs designed to address environmental impacts related to mining.

The decision to approve, deny,or modify a plan of operations may constitute a major federal action requiring an environmental impact statement under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332. However, the Secretary's NEPA duties are not described in the bill and it is unclear whether the documentation referred to in section 201(c) is intended to delegate some part of the Secretary's duties under NEPA.

The bill's reclamation provisions mandate that "lands subject to mineral activities shall be restored to a condition capable of supporting the uses to (sic) which such lands were capable of supporting prior to surface disturbance, or other beneficial uses" not inconsistent with applicable land use plans. Section 201(m). Many of the bill's reclamation requirements cite restoration of conditions prior to the mineral activities as reclamation standards. See, section 201(n)(10). These provisions set too low a standard where mining activities are proposed in an area that has been environmentally degraded by mining and other activities. Allowing a reclamation loophole to exist for degraded areas would squander an opportunity to use remining to clean some of the sites left by the former mining law. Such a loophole could also place an undue burden on the Abandoned Minerals Mine Reclamation Fund.

The bill's reclamation requirements may also permit a site to be left in violation of other standards. For example, section 201(n)(4)(B) requires mineral activities to prevent the generation of acid or toxic drainage during mineral activities and reclamation, "to the extent possible using the best available demonstrated control technology ..." The term "best available demonstrated control technology" is used in the Clean Water Act to define standards of performance for new sources. 33 U.S.C. § 1316. However, the Clean Water Act requires treatment of toxic effluent with the "best available technology economically achievable," a standard that may include prohibition of certain toxic discharges. 33 U.S.C. § 1317. Thus, the partial incorporation of a chosen Clean Water Act standard, rather than a general incorporation of the requirements of the Clean Water Act, may create conflicts between the Clean Water Act and the Mineral Exploration and Development Act.

Unsuitability

Section 204 of S. 257 would establish procedures for identifying lands which may be unsuitable for mineral activities. The bill would require the Secretaries of the Interior and Agriculture to identify lands which may be unsuitable for certain types of mineral activities within 90 days of enactment. These lands will be subject to a reclamability review. Section 204(e)(1). Also, any lands which are covered by a proposed plan of operations and which have not been reviewed are subject to the reclamability review of section 204(e)(1). Section 204(g) provides that any person having an interest that may be adversely affected by potential mineral activities shall have the right to petition the Secretary to determine whether the lands are unsuitable for mineral activities. These provisions raise substantial policy questions. For example, these provisions, when read together, have the potential for precluding any future mining on all public lands until the land in question has been determined to be reclaimable within the meaning of this Act. This constitutes a radical departure from the unsuitability scheme enacted under SMCRA, where the reclamability criteria for unsuitability review purposes apply at the permitting stage. The implications for the economies of the western states are obvious. Moreover, the burden is placed upon the Secretary to demonstrate that the public lands are reclaimable. The resource implications are equally obvious. Since section 205 would designate sensitive lands (such as those recommended for wilderness areas and those identified as of critical environmental concern) as unsuitable to the location of mining claims, subject to valid existing rights, the rationale for enacting a scheme that could have the effect of establishing a moratorium on future mining on public lands may be lacking.

Miscellaneous Provisions

A. Withdrawal Authority

Section 102(a) provides that mining claims may be located on lands and interests in lands owned by the United States to the extent that:

(1) such lands and interests were open to the location of mining claims under the general mining laws on the date of enactment of this Act;

(2) such lands and interests are opened to the location of mining claims by reason of section 204(f) or section 205 of this Act; and

(3) such lands and interests are opened to the location of mining claims after the date of enactment of this Act by reason of any administrative action or statute.

The bill contains no provision for the closing of lands currently open to the location of mining claims. It may be understood that the authority to close lands to such location already exists under other statutes and that it is not necessary, therefore, to reiterate that fact here. Nevertheless, to avoid any supposition that lands which "were open to the location of mining claims under the general mining laws on the date of enactment of this Act" are not permanently and irrevocably open to mining location, we suggest a further proviso substantially as follows:

(4) such lands and interests are not closed to mining location by reason of any administrative action or statute.

B. Fees

Section 104 requires holders of mining claims to pay an annual rental fee. The description of this fee as for "rental" on mining claims, which have been held by right under existing law, would probably invite challenge. Such problems might be avoided by describing the fee as a "claim maintenance charge" or the like, with a credible supporting rationale. This fee structure may be defended as necessary to defray the costs of recording and maintaining records on the claims, the assessment of their implications for land management, and the externalities associated with private occupation of federal land. These fees are assessed on a sliding scale, from $5 per acre to $25 per acre depending on the age of the claim. As a practical matter, a $25 per acre fee may discourage mining interests from holding vast claims, but probably would not discourage non-mining interests.

C. Audits

Section 410(d) of S. 257 would authorize audits of claim holders as necessary. Recently, the Government has defended several suits, arising in the context of audits of federal oil and gas leases, alleging that the Secretary lacks the authority to audit records after the six-year statute of limitations has expired. To avoid needless and expensive litigation on this issue, we recommend that this section be amended to provide that the statute of limitations begins to run six years from the date the audit is completed.

D. Enforcement Discretion

Section 108(b) provides that the Secretary of the Interior, or the Secretary of Agriculture, as the case may be, "shall take such actions as may be necessary to ensure the compliance by claim holders with section 4 of the Act of July 23, 1955 (30 U.S.C. § 612)." (Emphasis added.) We suggest that the phrase "shall take such actions as he deems necessary" be substituted for the present language of the bill in order to place the responsibility for determining when, and what, action "may be necessary to ensure the compliance by claim holders" with the Secretary of the Interior and the Secretary of Agriculture, where it appears intended to reside, and to avoid costly litigation whenever a citizen decides to second-guess the responsible Secretary as to what actions "may be necessary."

E. Owners/Controllers of the Applicant

Section 201(d) would provide that the mining permit and application include the identity of "any subsidiary, affiliate or person controlled by or under common control with the applicant . . .". A similar concept under SMCRA, 30 U.S.C. § 1260(c), has given rise to extensive and costly litigation. Moreover, any mining permit issued to a corporation should include the office and name of the individual responsible for environmental compliance at the mine site.

F. Inspection Frequency

Section 202(a) would require the Secretary of the Interior to conduct at least one complete inspection per calendar quarter or two complete inspections annually for approved mining operations. The use of the word "shall" in section 202(a) suggests that the inspection frequency is mandatory. In an era of declining resources and personnel and in view of the great distances between mining operations, we suggest that the section be amended to provide the Secretary with the discretion to establish, by regulation, a reasonable inspection frequency.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

M. Faith Burton
Acting Assistant Attorney General