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Reg. Reform
ACIR Response #1
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EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY

FYI -

- Wesley Warren

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THE WHITE HOUSE

WASHINGTON

March 5, 1996

MEMORANDUM FOR MEMBERS OF CONGRESS

FROM: JOHN HILLEY JH
ASSISTANT TO THE PRESIDENT AND
DIRECTOR OF LEGISLATIVE AFFAIRS

SUBJECT: H.R. 994, THE SMALL BUSINESS GROWTH AND
ADMINISTRATIVE ACCOUNTABILITY ACT OF 1996

Enclosed for your information are materials to assist Members during the House of Representatives's consideration of H.R. 994, the Small Business Growth and Administrative Accountability Act of 1996. Included is a briefing paper on the impacts of Title II of H.R. 994, an assessment of the Clinger/Hyde substitute to H.R. 994, and the Statement of the Administration's Policy on H.R. 994. I hope you find this information useful during the upcoming debate.

Please do not hesitate to contact the Office of Legislative Affairs if you have any questions or require further assistance.

BACKGROUND ON IMPACTS OF H.R. 994, TITLE II
THE HYDE/CLINGER SUBSTITUTE

March 5, 1996

OVERVIEW

Under Title II of the Hyde/Clinger Substitute to H.R. 994, virtually every rule in the Code of Federal Regulations (C.F.R.) would be subject to review, whether or not the rule was controversial or a review made sense. Careful and thorough reviews of existing rules would be at huge expense to the agencies, diverting increasingly scarce resources from other critical activities such as protecting health, safety, and the environment. Furthermore, the bill's petition process would force agencies to review less significant rules before major rules which may be more worthy of review.

SUMMARY OF H.R. 994, TITLE II

- Existing rules would be reviewed to determine whether they should be continued, modified, or repealed. If the detailed multi-step process for a rule is not completed by a certain deadline, the rule could be suspended.

- Covered rules include: (1) major rules having an annual effect on the economy of $100 million or more; (2) rules designated by petition or Congressional request; and (3) any group of rules that form a part of the C.F.R. Virtually all rules and related materials would meet one of these tests and qualify for review.

- Covered rules would have to be reviewed within 4-9 years. New significant rules must be reviewed within 7 years of their effective date.

- Agency decisions to continue, consolidate or modify existing rules as well as OMB decisions to deny petitions would be subject to judicial review.

EFFECTS OF THE LEGISLATION

As a consequence of the burdensome procedures in this title, several serious problems would result from enactment of this provision:

(1) Limited agency resources would be diverted to expensive and unnecessary reviews and away from higher priority activities;

(2) Burdensome procedures would waste the taxpayers' money, create a costly new bureaucracy, and spawn excessive litigation;

(3) Sensible rules that protect the public could be struck from the books.

BILL EXPENDS EFFORT ON RULES THAT DO NOT NEED REVIEW

Many existing rules are not controversial and do not need to be subjected to a formal review. However, under Title II of the Hyde/Clinger Substitute to H.R. 994, such reviews would have to be conducted anyway, squandering limited agency resources. For example:

- Phase-out of lead in gasoline.

  One of the greatest environmental successes has been the reduction of air emissions due to the phase-out of lead in gasoline. Exposure to lead in childhood can impair brain functions and perceptions. Since promulgation of the rule by EPA, lead emissions have dropped 98% since 1970 and the level of lead in the blood of children has dropped dramatically.

- Refrigerator safety latches.

  Since the 1950s, the Consumer Product Safety Commission (CPSC) has required safety latches that permit refrigerators to be opened from the inside to prevent children from becoming fatally trapped inside discarded refrigerators. As a result, there is currently little risk of children becoming trapped inside refrigerators, although prior to the adoption of this rule 30-40 children a year died in this manner.

- Seat belts.

  Lap and shoulder belts in passenger cars have been required since 1968 and in light trucks a few years later. Seat belts are widely accepted by the public and the industry and have had a great safety impact. For example, DOT estimates that 9,175 lives were saved in 1994 because of seat belt usage.

- Nutrition labeling.

  Nutrition labels now appear on most food products and have broad public support. Use of labels by consumers is expected to contribute substantially to healthier diets and lower incidence of disease.

- Guidance documents.

  H.R. 994 requires the review of agency guidance and other documents that are often intended to provide useful information to the public. Examples of guidance documents that would not make sense to put through an elaborate or costly review include: FDA documents for small business about clinical test procedures, manufacturing processes, and scientific protocols; and EPA documents showing business how they can save money through voluntary, energy efficiency measures.

THIS BILL CREATES BUREAUCRACY AND WASTES TAXPAYERS' MONEY

- <u>Numerous reviews would be required.</u>

  Because of the exhaustive language in the definition of a major rule, just about every rule that exists currently could be subject to review. In addition, H.R. 994 allows each "part" of the C.F.R. (an enumerated group of rules on a related subject) to be reviewed as a single rule, with the result that almost every "part" of the C.F.R. would qualify as a major rule under the $100 million threshold test. **Since there are approximately 9,300 parts to the C.F.R., the government could have to perform hundreds of reviews a year to meet even the bill's longest deadline (9 years).**

- <u>Special interest petitioning would drive decision-making.</u>

  In addition to the scheduled review of major rules, any interested party can petition to have a rule reviewed. Because these rules must be reviewed before major rules on the agency's review schedule, this process permits private parties to dictate agency priorities.

- <u>The potential costs of all the reviews are potentially huge.</u>.

  The CBO assumed that agencies would only have to review 50 regulations a year at $75,000 a regulation for a total cost of $4 million. However, preliminary agency projections from eight agencies (DOE, USDA, HHS, DOL, DOI, EPA, Education and the Treasury) using mid-range estimates of costs indicate that the review of rules under Title II would require **over 2,000 Federal employees with total costs exceeding $400 million a year.** If guidance documents and other agency documents are included, hundreds of additional workers and hundreds of millions of dollars in additional costs would be required.

- <u>Thorough reviews of major rules can be resource intensive</u>.

  For example, the Department of Commerce (DOC) recently concluded a re-write of the Export Administration's Regulations (EAR). The new requirements will greatly streamline the export process. **However, review of this single rule took three years and cost DOC $1.75 million.** In another case, the Department of Labor undertook a careful and comprehensive review of coal mine ventilation regulations. **The publication of the revised final rule took several years to complete and cost $5.2 million.**

- <u>H.R. 994 creates opportunities for costly and burdensome litigation</u>.

  The bill creates numerous opportunities for judicial review of agency decisions to continue, consolidate, or modify rules as well as OMB decisions to deny petitions.

THE BILL COULD ROLLBACK RULES THAT SERVE THE PUBLIC

Title II of the Hyde/Clinger Substitute to H.R. 994 would require an immense number of rules to be reviewed in a comparatively short period of time with an enormous cost relative to agency resources. If all of the deadlines are not met, it could result in suspension of the rule.

Accordingly, the bill is likely to result in a rollback of existing rules that are important to the public health and safety. Examples of some valuable rules that could be threatened follow:

- Blood supply standards.

  These FDA regulations protect the nation's blood supply from infectious diseases. Examples include AIDS and hepatitis.

- Clean Water Act effluent guidelines.

  The Clean Water Act requires national minimum performance standards, or effluent standards, for over 50 industrial categories. These guideline result in the removal of over four billion pounds of pollution from industrial discharges each day, including over one billion pounds of toxics per year.

- Toxic Releases.

  Under the Emergency Planning and Community Right-to-Know Act of 1986 and the Pollution Prevention Act of 1990, manufacturing facilities are required to provide information to the public about releases of toxic chemicals into the environment. This information is gathered into EPA's Toxic Release Inventory (TRI) database. Since 1988, national toxic releases have declined by 42.7%.

- Child-resistant cigarette lighters.

  CPSC has issued a safety rule establishing requirements to make disposable cigarette lighters child-resistant. Fires started by children under the age of five cause an average of 150 deaths, 1,100 injuries, and nearly $70 million in property damage.

- "Brown lung" disease.

  In 1978 OSHA issued a standard to protect textile workers from "brown lung" -- a crippling and sometimes fatal disease. By 1985 the prevalence of the disease has declined from 40,000 cases to 900 cases, or less than 1% of textile workers.

- Mammography quality standards.

  These regulations ensure high quality mammography, currently the most effective method for detecting breast cancer. According to the most conservative estimate, 200 lives a year could be saved by these regulations.

- o <u>Mine explosions and fires</u>

  Ventilation standards issued by the Mine Safety and Health Administration for underground coal mines prevent the accumulation of methane and coal dust-fuel for explosions and fires. In the 25 years before passage of the Coal Mine Health and Safety Act of 1969, 901 miners were killed in explosions. In the 25 years after the Act was passed, explosions claimed only 133 miners.

ASSESSMENT OF THE CLINGER/HYDE SUBSTITUTE TO H.R. 994

March 5, 1995

The Substitute would force agencies to reopen virtually every rule on the books, as well as guidance, manuals, and other agency interpretive materials, and engage in elaborate and expensive review and rulemaking processes, even for rules that are non-controversial and that are effectively doing the job they were intended to do. The result will be to tie agencies in knots, drain increasingly scarce agency resources, and subject agencies and our already overburdened courts to a flurry of new lawsuits. The following assessment focuses on the provisions of the most serious concern:

- Overly Broad Scope. The Substitute defines as "covered rules" (sec. 204(a); 205(a)(3)(B)) for purposes of review: (1) major rules ($100 million annual effect, major increase in prices, or significant adverse effects); (2) rules designated in response to petitions or congressional requests; and (3) related rules ("necessary for a comprehensive review"). This definition encompasses virtually every rule on the books. Even more troubling is that to the extent that the definition of major rule is intended to have any limits, those limits are vitiated by the Substitute's extraordinarily broad definition of "rule" (sec. 214(6)), which includes guidance documents, policy statements, and other interpretive materials and which establishes that "each set of rules designated in the CFR as a part shall be treated as one rule."

- Burdensome Petition Process. The Substitute creates a petition process (sec. 203(c)) through which private parties can request that agencies review "non-major" rules. The petition process is problematic for several reasons:

  -- First, the threshold for review is too low -- the OIRA Administrator (who would have to review all petitions) must grant the petition and designate the rule for review unless "it would not be in the public interest" to do so.

  -- Second, the bill provides for extremely tight deadlines for OMB's response (30 days to tell non-compliant petitioners how to rewrite their petitions, 90 days to respond to petitions on the merits, 30 days for congressional requests). Failure to respond by the deadline as well as any denials of petitions would lead to litigation that would drain OMB resources.

-- Finally, the requirement that a rule reviewed as a result of a petition (by definition a non-major rule) must be reviewed within 4 years gives less significant rules priority over major rules that are more worthy of review.

- Burdensome and Unreasonable Review Procedures. The Substitute requires that all existing major rules must be reviewed within 5-9 years. New significant rules promulgated after enactment must be reviewed within 7 years of their effective date. Rules subject to review as a result of petitions or congressional requests must also be reviewed within 4 years (sec. 206). These deadlines may be impossible to meet considering the workload involved. It will be both exceedingly difficult and expensive for agencies to conduct the many complex and detailed assessments and to comply with the multiple procedural steps that will be required

- Arbitrary and Dangerous Suspension Procedure. Permitting courts to suspend rules (sec. 211(d)(3)) if an agency fails to complete review by the deadline is unreasonably harsh and dangerous -- important health and safety rules would be erased from the code for no other reason than a deadline was missed. This is contrary to reasoned rulemaking and the public interest.

- Arbitrary Restriction on Future Regulatory Improvements. The Substitute will make it extremely difficult for an agency to conduct "a comprehensive review and significant revision" of a rule more frequently than every 7 years (sec. 206(b)). This could seriously undermine continuing efforts to streamline and reform rules.

- Overly Burdensome and Prescriptive Review Requirements. The Substitute establishes a rigid and complex set of procedural steps that agencies and OMB must follow in conducting the reviews (sec. 205). It is a classic "one-size-fits-all" approach that would result in enormous unproductive make-work. In addition, the Substitute requires that agencies follow detailed and specific formats in issuing notices and reports as part of the review (sec. 207).

  More importantly, even for rules the agency decides to continue without change (and there are many that are non-controversial and widely accepted rules where change is unwarranted), it must still publish a notice of proposed rulemaking and complete a full rulemaking. This is an especially unproductive drain on resources.

- Loss of Agency Discretion to OIRA. The Substitute creates numerous new responsibilities and powers for the Administrator of OIRA which OIRA does not have the resources, FTEs, or, in some cases, the expertise to carry out. Of particular concern to agencies are provisions giving OIRA authority to: (1) grant petitions (sec. 204(c)); (2) determine whether particular existing rules should be reviewed in 5, 6, 7, 8, or 9 years (sec. 205(a)); and (3) veto agency decisions whether rules should be continued unchanged, modified, or consolidated with other rules (sec. 208(c)).

- Excessive Litigation. The Substitute creates numerous new opportunities for judicial review of agency decisions to continue, modify, or consolidate rules as well as OIRA's decisions to deny petitions for review or alleged delay in responding to petitions (sec. 211). This provision will subject agencies to an endless stream of costly court cases, further burdening our already overstretched court system and delaying the implementation of real regulatory reform.

- Enormous Drain on Dwindling Agency Resources. Under the Substitute, agencies would have to: (1) continuously conduct multi-step, burdensome reviews of almost all their rules; (2) regularly complete the full rulemaking process, even for those non-controversial or widely accepted rules that should be retained without change; (3) continue to handle everyday responsibilities responding to new legislation and new problems; and (4) respond to increasing litigation. All this while agency resources are not meeting current demand.

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

March 1,1996
(House)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 994 - Small Business Growth and Administrative Accountability Act of 1996
(The Clinger/Hyde Substitute)

The Administration supports judicial review of agencies' regulatory flexibility analyses. The Administration, however, has concerns about a one-year statute of limitations where a shorter period of review for the final agency action is provided by law. Moreover, the statute of limitations should begin after the publication date of the regulation, not the effective date.

The Administration also supports the concept of legislative branch accountability for regulations and, for that reason, has endorsed a limited period of review by the Congress of rules before they take effect. The Administration, however, opposes extending this review period from the 45 days provided in the Senate-passed bill (S. 219) to 60 days in this legislation, and objects to its retroactive application.

The Administration is committed to administrative review of existing regulations and to eliminating those that are outdated, ineffective, or unduly burdensome. The substitute amendment to H.R. 994, however, does not provide an effective or workable means of achieving this goal. The Administration strongly opposes the administrative review provisions in H.R. 994 because, among other things:

- The scope is overly broad. The bill's definition of "major rule" and "covered rule" encompasses virtually every rule in the existing Code of Federal Regulations, many of which are non-controversial, insignificant, or otherwise do not warrant review, as well as guidance and other policy documents.

- The review process is overly prescriptive and burdensome. Agencies will be tied in knots while trying to comply with the bill's burdensome and elaborate review procedures. H.R. 994 prescribes detailed requirements for each step, including initial designation of rules, review and analysis, solicitation and consideration of public comments, as well as full rulemaking proceedings. These procedures would have to be followed even when the agency's analysis indicates that the rule should be continued without change. There is, in addition, a petition process that would force agencies to devote resources to reviewing less significant rules before more significant rules.

- Excessive litigation would result. The bill would create numerous new opportunities for judicial review, thus introducing additional delay, cost, and uncertainty.

- Agency resources would be drained. Administration experience with review of existing regulations has shown that such a review, when thoroughly done, is very time-consuming and expensive. Under this bill, these costs would be imposed on agencies for potentially every regulation in the Code of Federal Regulations, at a time when many agencies are experiencing large budget reductions.

- Important health and safety rules could be suspended. The bill would allow courts to suspend regulations if rulemakings are not completed by a set date. Given the tremendous number of rulemakings that agencies will have to conduct under this bill, important health and safety rules, as well as rules that provide important economic benefits, could be suspended.

On the basis of these objections, if the substitute amendment to H.R. 994 were presented to the President with the provisions regarding administrative review of existing regulations, the Director of the Office of Management and Budget and the Secretaries of Agriculture, Education, Energy, Health and Human Services, the Interior, Labor, Transportation, the Treasury, and Veterans Affairs, and the Administrator of the Environmental Protection Agency and would recommend that it be vetoed.

* * * * *

THE WALL STREET JOURNAL.

WEDNESDAY, MARCH 6, 1996

Gingrich Abandons GOP Bill to Revise Regulatory Process

By Timothy Noah
Staff Reporter of The Wall Street Journal

WASHINGTON – House Speaker Newt Gingrich, responding to protests by environmental groups, abruptly withdrew Republicans' latest attempt to forge a compromise on regulatory revision.

Mr. Gingrich's action suggests the party's hopes are rapidly dwindling for passing even a watered-down bill to overhaul the regulatory system.

The newest measure, sponsored by Rep. Henry Hyde (R., Ill.) and William Clinger (R., Pa.), was scheduled to come to the House floor yesterday. But a section in the bill requiring agencies to review every "major" rule within five to nine years, or risk having it nullified by a federal court, stirred up so much opposition from environmental groups that Mr. Gingrich cancelled the vote and asked House Republicans to produce a less controversial version later this month.

Odds are that the two principal House members now assigned the task of working out a compromise bill – Rep. Sherwood Boehlert (R., N.Y.) and Rep. David McIntosh (R., Ind.) – won't succeed. Mr. Boehlert is the House GOP's leading environmental proponent; Mr. McIntosh, a top regulatory official in the Bush White House's competitiveness council, is among his party's fiercest regulatory critics.

Rep. McIntosh, a strong proponent of the regulatory-revision bill, said yesterday that withdrawing the bill was preferable to attempting a hasty compromise. It's "better to pass nothing than to a bad bill," he said.

Letter From Monsanto

But Rep. Boehlert said he believes agreement can be reached because Reps. Hyde and Clinger, who will also be in the negotiation, have made "constructive" suggestions to revise the bill. "Business interests don't want to dismantle a quarter-century of progress in environmental legislation that brings some certainty to the process," he said, citing a letter he received yesterday from Monsanto Co. opposing the provision that requires agencies to review regulations.

The National Association of Manufacturers, however, strongly supports the regulatory-review provision, as does House Majority Whip Tom DeLay (R., Texas). If Republican negotiators reach no agreement, House leaders will extract from the bill one or both of two relatively uncontroversial sections and bring these to the floor for a vote.

Impact on Small Business

One provision lets small businesses petition agencies to calculate the impact of new rules on them; the other grants Congress 60 days to reject new regulations before they take effect. The Senate is preparing to pass both provisions, possibly as early as this week.

Separately, Sen. Carl Levin (D., Mich.) has been negotiating with the Business Roundtable on language for a regulatory-revision bill. But at a White House meeting with Sen. Levin Friday, Chief of Staff Leon Panetta showed little enthusiasm for this effort. And an aide to Sen. Levin said the two sides haven't reached agreement.

The Washington Post

WEDNESDAY, MARCH 6, 1996

Regulatory Overhaul Put Off in House

'Behind in the Debate on the Environment,' GOP Postpones Action

By John E. Yang
Washington Post Staff Writer

Mindful of their party's public image of being harsh on environmental issues, House Republican leaders postponed action yesterday on a measure intended to overhaul the federal regulatory system and ease the burden of red tape on small businesses.

Environmental Protection Agency Administrator Carol M. Browner, environmental groups and some moderate House Republicans had said the measure could restrict the government's ability to protect the environment by giving businesses new ways to challenge federal rules they do not like.

In addition, Senate Republicans began to voice concern about parts of the House bill that would have suspended challenged federal regulations if agencies did not carry out court-ordered reviews in a timely fashion.

Rather than ask House Republicans to vote for a provision that might be modified in the Senate, House leaders decided to wait until the Senate acted, which could come before the end of this week. House consideration of the bill was to have begun yesterday afternoon.

"We're behind in the debate on the environment," House Majority Whip Tom DeLay (R-Tex.) told a small group of reporters over lunch. "We don't want to put our members out there taking a vote one more time that the environmental extremists can twist, turn and misrepresent in campaign ads."

In addition, Rep. Sherwood L. Boehlert (R-N.Y.), a leading House GOP moderate, had indicated he would seek to scale back the bill's requirement for a review of all existing federal regulations. If that effort failed, he said, he would try to delete the entire provision.

DeLay said Boehlert, Government Reform Committee Chairman William F. Clinger Jr. (R-Pa.) and Rep. David McIntosh (R-Ind.), chairman of the Government Reform subcommittee on regulatory affairs, would meet to work out a compromise.

"If we can work something out that makes sense, it's better to do that than go have a fight on the floor," DeLay said.

House Speaker Newt Gingrich (R-Ga.) has taken an interest in trying to rehabilitate the House Republicans' image on environmental issues, damaged last year when they pressed legislation that would have restricted EPA's regulatory powers.

Last week, Gingrich made a rare floor speech in favor of an amendment to spend $120 million to provide environmental safeguards for the Florida Everglades. The provision, offered by freshman Rep. Mark Foley (R-Fla.), was approved on a 299-to-124 vote.

On Monday, Gingrich was in New Jersey to recognize the combined private, state and federal effort to preserve a 17,000-acre woodland known as the Sterling Forest.

Staff writer Helen Dewar contributed to this report.

HE WALL STREET JOURNAL.
TUESDAY, MARCH 5, 1996

Environmental Stands Alienate Some Backers Of the GOP's Agenda

Presidential, Congressional Races May See Backlash Because of 'Wedge Issue'

One Antidote: Visit the Zoo

By DENNIS FARNEY and TIMOTHY NOAH
Staff Reporters of THE WALL STREET JOURNAL

COLORADO SPRINGS, Colo. – Andrea Oberschlake, who admires Newt Gingrich's "guts" and winces at the sound of Bill Clinton's name, is Republican to the core. But one thing deeply troubles her about her party: In her view, it's antienvironment.

"Why even have a government if you can't have a planet to practice government on?" asks the 27-year-old medical-assistant trainee.

Computer consultant Ron Stone, also 27 and just as Republican, couldn't agree more. Environmental protection is "a good function of government," he insists. Even as the GOP Congress curbs environmental spending, he argues for increased spending. "Runoff from mines is producing fish with three eyes out here!" he says with some hyperbole.

Republicans don't come more granite-solid than the party faithful who gathered here recently for a Lamar Alexander presidential-campaign rally. Colorado Springs is Republican the way Chicago is Democratic; it's instinctive, bred in the bone. But there is a fault line running through the granite over the environmental issue. The environment will be one of the concerns at the forefront of GOP primaries today in Colorado and New England as well in Florida and Oregon next Tuesday.

Tension in the GOP

To be sure, there are plenty of people here like Frances Mathews, a crusty 63-year-old retiree whose environmental philosophy is encapsulated by the bumper sticker her car once sported: "If You're Hungry and Out of Work, Eat an Environmentalist." But what is striking, says Bob Gardner, the local GOP county chairman, is "the tension in this community, even within the Republican Party" over the environmental issue.

That tension spells election-year trouble for the GOP. The environment is rapidly developing into a "wedge issue" that threatens Republican candidates.

"I think we should be honest and admit that our party hasn't done a very good job on the environment," says former Tennessee Gov. Alexander in an interview here. "We would have been better off identifying what we're *for*." Mr. Alexan- is the only GOP presidential candidate to talk much about the environment, though Sen. Robert Dole has raised it

the environmental issue for January's Democratic victory in Oregon's special Senate election. And he says the issue is popping up in states as diverse as Idaho, Michigan and Georgia. Just yesterday, congressional Democrats and Environmental Protection Agency chief Carol Browner attacked a new, watered-down regulatory-overhaul proposal that Republicans may bring to the House floor today. Within hours, House GOP leaders were considering jettisoning a provision of the bill that environmentalists most oppose–requiring federal agencies to review all "major" regulations within five to nine years or risk court challenges nullifying them.

A Holy Cause

So the question is, can the Republican elephant paint itself green? More important, do Republicans even want to paint themselves green? Many of them came to Washington determined to roll back environmental and other regulations–to them, a holy cause. Furthermore, spokesman Gordon Hensley of the National Republican Senatorial Committee argues that the "war on the West" campaign theme that the GOP used so effectively against Clinton administration environmental policies in 1994 will resonate this fall as well.

So far, a majority of congressional Republicans seem loath to go beyond symbolic gestures.

A House Republican Conference memo warned GOP members in the fall that "the environmentalist lobby and their friends in the eco-terrorist underworld" are working to portray the GOP as "hostile to the survival of every cuddly critter roaming God's green earth." As antidotes, the memo suggested Republican members of Congress do such things as participate in tree-planting ceremonies, pick up highway litter and "become active in your local zoo." And do it fast – "before your opponents can label your efforts 'craven, election year gimmicks.' "

Most Republicans insist theirs is merely a "perceptual problem," according to GOP pollster Linda DiVall. They argue that their overriding purpose is common-sense reforms in such matters as the Superfund and clean-air programs.

The GOP Contract With America didn't even contain the world "environment." But the contract did have sweeping language calling for regulatory overhaul, which inevitably meant cutting environmental regulations. As a result, the House passed bills requiring extensive cost-benefit analysis of new environmental rules, compensation when regulations lower property values and a drastic reduction in

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Environment Stand Splits GOP

Continued From First Page

lands protection, among other things. They also attached to an Environmental Protection Agency spending bill a string of legislative riders blocking enforcement of various clean-air and clean-water rules.

Cutting EPA Funds

Almost all major Republican initiatives have run aground in the more moderate GOP Senate or been vetoed by Mr. Clinton. However, the continuing budget impasse cut funds for the EPA by 14%. And the GOP majority persuaded the president to sign legislation with a rider that makes it easier for timber companies to cut trees in "old growth" areas of national forests.

Though GOP legislative results remain spotty, the entire legislative culture changed after the 1994 Republican sweep. Colorado Democratic Rep. David Skaggs, a staunch environmentalist, says he could scarcely believe his ears when one House appropriations subcommittee held its initial meeting under the GOP majority early year. Ideas bandied around that day, he reported to his constituents, included transferring great tracts of national forest land to private landowners, opening the Arctic National Wildlife Refuge to oil exploration, ending all federal energy-conservation programs and terminating all l purchases for national parks, wilder- areas and wildlife refuges for five

In entertaining such ideas, drawn from testimony that day by such conservative think tanks as the Cato Institute, the Heritage Foundation and Citizens for a Economy, the Republicans apparently frightened many voters. As Ms. DiVall summed it up in a December memo to industry: "Most disturbing is that 55% of all Republicans do not trust their y when it comes to protecting the environment."

Now some Republicans, including presi tial candidates, are scrambling to reposition themselves.

Everglades Restoration

Here in Colorado, Mr. Alexander portrays himself as "a champion of the great American outdoors" — an artfully crafted phrase that seemed designed to appeal, not y to environmentalists, but also to Na- ti l Rifle Association members and sportsmen's groups like Ducks Unlimited, which tries to preserve duck habitat. K Sen. Dole, fighting for delegate-rich Florida, has proposed a $200 million measure for Everglades restoration; it recently cleared both houses of Congress. (The Clinton administration has proposed spending more than twice that amount.)

The two other major GOP presidential contenders have shown little enthusiasm for the green agenda. Patrick Buchanan favors eliminating the Endangered Species Act and opening the Arctic National Wildlife Refuge for oil drilling. Steve Forbes backs construction of new nuclear power plants in the U.S. and questions federal measures to restrict greenhouse-gas emissions because they are based on "global-warming theory which is unproven."

But the GOP Senate appropriations committee is preparing to restore as much as $5 billion to environmental and other high-priority domestic programs. And New York Republican Rep. Sherwood Boehlert, a strong supporter of the environment, says the number of GOP votes for legislation rolling back environmental laws is dwindling. He has hosted a series of "Green Eggs and Ham" breakfasts during the past year, bringing environmental lobbyists and moderate Republicans together in his office to munch bagels and plot ways to block antienvironmental measures.

House Speaker Gingrich, leader of the Republican revolution, himself displays streaks of green at times. A member of the Sierra Club from 1984 to 1990, he has been a supporter of the Endangered Species Act in the past. After a House committee passed a bill significantly narrowing that law, the speaker informed Chairman Don Young, an Alaska Republican, that he wouldn't permit the measure to go to the floor. Mr. Gingrich is now trying to broker a compromise. Just yesterday, he held a news conference with GOP lawmakers at Sterling Forest, a large tract in New Jersey and New York, touting efforts to protect this "environmentally sensitive watershed."

But Mr. Gingrich remains a scourge of the EPA and has called federal environmental policies in general "absurdly expensive" and likely to allocate money on "emotional and public-relations grounds."

Despite some GOP moderation, the dominant mood among Republican legislators remains strongly antienvironmentalist, particularly in the House. Recently Rep. Helen Chenoweth, a Republican firebrand from Idaho, attacked Clinton administration environmental policy as "a government-sponsored religion" based upon "New Age mysticism, Native American folklore and primitive Earth worship."

Low Marks on Scorecard

When the League of Conservation Voters, the environmental movement's political arm, issued its scorecard for the past congressional session, it gave a record 135 legislators "zero" rankings. All but one were Republicans. The League of Conservation Voters hopes to raise and spend nearly $2 million in House and Senate campaigns this fall. "The environment hadn't been a partisan issue, but the Republican leadership has made it one," League President Deb Callahan ...

the side of Democrat Ron Wyden in Oregon's special Senate election. Mr. Wyden won by less than 20,000 votes; environmental groups claimed to have turned out as many as 50,000 votes for him. The Sierra Club also will pour money into fall races.

Oregon will again be an environmental battleground when its voters pick a successor to GOP Sen. Mark Hatfield, who is retiring. So will Colorado, where Republicans must defend the open seat of GOP Sen. Hank Brown, also retiring.

Here in Colorado, the environment—particularly the issue of urban sprawl—promises to be a top election issue. The battle lines between the two parties could scarcely be more sharply drawn.

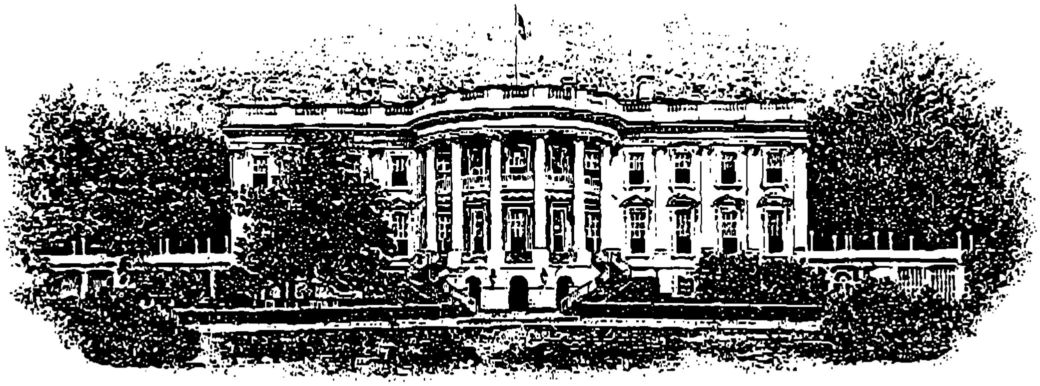
One leading contender for the Colorado GOP Senate nomination is Rep. Wayne Allard, whose 1995 House votes drew a score of eight of a possible 100 from the League of Conservation Voters. Among other things, Mr. Allard supports a proposal that could turn about 270 million acres of Federal Bureau of Land Management land — an acreage more than two times the size of California — back to the states, at state option. Colorado Sen. Ben Nighthorse Campbell, a Democrat-turned-Republican, vows the proposal will pass "over my dead body."

The other leading GOP contender is state Attorney General Gale Norton, who worked under the controversial James Watt—later to become President Reagan's Interior Secretary — at Denver's Mountain States Legal Foundation. The foundation, the legal spearhead of the "wise use" movement, challenges environmental regulations and champions the rights of Western landowners.

The two leading Democratic candidates, according to a recent poll, are attorney Tom Strickland, a former Sierra Club volunteer, and Denver Councilwoman Ramona Martinez. Mr. Strickland says he is running against "the most environmentally hostile Congress in a quarter-century." Ms. Martinez argued in a recent debate that "you can never go too far . . . to protect our environment."

Here in Colorado Springs, there is no doubt how Mr. Gardner, the El Paso County GOP chairman, will vote. But even he worries about uncontrolled development beyond the city limits. And he apologizes to a visitor for a still-healing open pit that scars the foothills below Pikes Peak. The pit is a leftover from gravel mining.

"Here I am, the leader of one of the most conservative Republican Party organizations in the country," he muses. "But I want to see that pit remediated."



THE WHITE HOUSE
OFFICE OF CABINET AFFAIRS

Room 160 OEOB
Washington, D.C. 20500
Telephone: (202) 456-2572
Faxsimile: (202) 456-6704

FAX COVER SHEET

DATE: 2/27

TO: Chiefs of Staff

PHONE:

FAX:

FROM: David Beaubaire

NO. OF PAGES: 10
(Including Cover Sheet)

PRIORITY: Y N

MESSAGE:

THE WHITE HOUSE

WASHINGTON

February 27, 1996

MEMORANDUM FOR CHIEFS OF STAFF

FROM: DAVID S. BEAUBAIRE David

RE: 8:30 A.M. CONFERENCE CALL

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1. There will be a Regulatory Reform Conference Call today, February 27, at 5:00 p.m. Code: 6280.

2. Tomorrow, February 28, there is an Environmental Message Strategy Conference Call at 11:00 a.m. The code is 6280. Interested agencies should contact Kris Balderston at the Office of Cabinet Affairs (456-2572).

THE WHITE HOUSE

WASHINGTON

February 27, 1996

MEMORANDUM

TO: **ALL CHIEFS**

FROM: **KITTY HIGGINS**
KRIS BALDERSTON

RE: **REGULATORY REFORM CONFERENCE CALL TODAY AT 5 PM**

There will be a conference call with all chiefs interested in the regulatory reform issue today at 5 pm on code 6280. Attached are some materials that will be helpful to our discussion.

ISSUES OF CONCERN

- Decisional Criteria/Supermandate -- ensure no supermandate and sufficient flexibility where scientific or other uncertainties exist.

- Judicial Review -- possibility that minor procedural misstep with cost or risk analysis could be ground for remand; any review should be restricted to final agency action based on the whole rulemaking record under existing standards.

- Petitions/Look-Back Review -- burdensome and overlapping processes would tie agencies in knots and waste increasingly scarce resources.

- Effective Date -- backdoor regulatory moratorium if applicable retroactively or Congressional review period extended.

* * * * *

- Nunn-Coverdell Amendment's Definition of "Major Rule" -- expands rules subject to the bill's requirements to include up to 150 rules that affect small businesses.

- Risk Assessments -- applies to all agencies rather than just those that routinely regulate risk; micromanages peer review; requires extensive consideration of substitute risk; and pushes agencies toward single-point estimates rather than ranges.

- Repeal of Delaney/TRI Restrictions -- significant substantive issues should not be resolved in what is a "process" bill.

- Consent Decrees -- prohibits court enforcement of settlement agreements that restrict agency discretion; but *any* settlement agreement restricts the signers' discretion.

- Affirmative Defenses -- bars penalties where a party "reasonably" relies on rule inconsistent with rule being enforced or party's "good faith" interpretation of rule.

- Changes to APA -- changes 50-year old law in lots of minor ways that will engender much uncertainty and/or litigation.

- Regulatory Accounting -- burdensome and costly "make-work" requirement to calculate annually the costs and benefits of *all* major rules for 5-year period.

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

July 10, 1995
(Senate)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

S. 343 - Comprehensive Regulatory Reform Act of 1995

(Dole (R) KS and 29 cosponsors)

The Administration strongly supports the enactment of cost-benefit analysis and risk assessment legislation that would improve the regulatory system. S. 343, however, is not such a bill. Because the cumulative effect of its provisions would burden the regulatory system with additional paperwork, unnecessary costs, significant delay, and excessive litigation, the Secretaries of Labor, Agriculture, Health and Human Services, Housing and Urban Development, Transportation, the Treasury, and the Interior, the Administrator of the Environmental Protection Agency, and the Director of the Office of Management and Budget would recommend that the President veto S. 343 in its present form.

The Administration is particularly concerned that S. 343 could lead to:

- Unsound Regulatory Decisions. A regulatory reform bill should promote the development of more sensible regulations. S. 343, however, could require agencies to issue unsound regulations. It would force agencies to choose the least costly regulatory alternative available to them, even if spending a few more dollars would yield substantially greater benefits. It would also prevent agencies responsible for protecting public health, safety, or the environment from issuing regulations unless they can demonstrate a "significant" reduction in risk -- even if the benefits from a small reduction in risk exceed the costs. Both of these features would hinder, rather than promote, the development of cost-beneficial, cost-effective regulations. In addition, S. 343 could be construed to constitute a supermandate that would override existing statutory requirements indiscriminately.

- Excessive Litigation. While it is appropriate for courts to review final agency action to determine whether, taken as a whole, the action meets the requisite standards, S. 343 would increase opportunities for lawsuits and allow challenges to agency action that is not yet final. Further, by needlessly altering numerous features of the Administrative Procedure Act, S. 343 could engender a substantial number of lawsuits concerning the meaning of changes to well-established law.

- A Backdoor Regulatory Moratorium. S. 343 would take effect immediately upon enactment, consequently leading to an unnecessary and time-consuming disruption of the rulemaking process. It would require proposed regulations that have already been through notice and comment, and are based on cost-benefit analysis, to begin the process all over again because of an agency's unknowing failure to follow one of the many new procedures in the bill.

- The Unproductive Use of Analytic Resources in Issuing New Rules. Since the mid-1970s, Presidents of both parties have selected $100 million as the line of demarcation between that which warrants full-blown regulatory analysis and that which does not. Because cost-benefit and risk analyses can be costly and time-consuming, the Administration believes that $100 million continues to be the appropriate threshold. S. 343, however, has as its threshold $50 million --a decision that would require agencies to use their resources unproductively and that therefore cannot itself withstand cost-benefit scrutiny.

- Agencies Overwhelmed with Petitions and the Lapsing of Effective Regulations. S. 343 creates numerous, often highly-convoluted petition processes that, taken together, could create opportunities for special interests to tie up an agency in additional paperwork and, in the process, waste valuable resources. Several of these processes allow agencies inadequate time to conduct the required analyses and prepare the required responses to petitions; contain inadequate standards against which the adequacy of petitions can be judged; contain inadequate limitations on who may properly file petitions; and contain inadequate safeguards against an agency becoming overwhelmed by large numbers of petitions. These problems are exacerbated by provisions providing for the sunsetting of regulations according to arbitrary deadlines, which could cause effective regulations to lapse without going through the notice and comment process.

- Inappropriate Use of Risk Assessment and Peer Review. S. 343's risk assessment and peer review provisions are overly broad in scope and would introduce unnecessary delays into the regulatory process. They would inappropriately subject all health, safety, and environmental regulations to risk assessment and peer review, regardless of whether such regulations are designed to reduce risk or whether a risk assessment and a peer review would, from a scientific perspective, be useful or appropriate.

- Slowed Environmental Cleanups. S. 343 could needlessly slow ongoing and planned environmental cleanup activities, including those at military installations necessary to make the installations being made available for productive non-military use. It would also invite attempts to renegotiate cleanup agreements, thereby hampering enforcement efforts and increasing public and private transaction costs.

- A Less Accountable and Less Transparent Regulatory Process. Any regulatory reform bill should bring "sunshine" to the regulatory review process. Executive Order No. 12866, "Regulatory Planning and Review," provides both for centralized Executive branch review of proposed regulations and for the disclosure of communications concerning pending rulemakings between persons outside the Executive branch and centralized reviewers. S. 343, however, contains no such sunshine provision and could consequently remove accountability and transparency from the regulatory process.

- An Unduly Lengthy Congressional Layover. S. 343 includes a provision for a congressional layover of 60 days that goes beyond the provisions of S. 219, which provided for a 45-day layover. S. 219 passed the Senate by a vote of 100-0, with Administration support.

- Unrealistic, Unmanageable Studies. S. 343 would require a comprehensive study of and report on all risks to health, safety, and the environment addressed by all federal agencies. It would also require the President to produce annually a highly detailed estimate of and report on the costs, benefits, and effects of virtually all existing regulatory programs. Such studies would not only be unmanageable to conduct and costly to produce, but would require scientific and economic analytical techniques that go beyond the state of the art.

- Unnecessarily Hindered Enforcement of Regulations and Out of Court Settlements. S. 343 could create disincentives for regulated entities to bring potentially conflicting regulations to the appropriate agencies' attention. It could also make it unnecessarily difficult for agencies to settle litigation out of court.

- <u>Significant Changes in Substantive Law Without Proper Consideration</u>. S. 343 goes beyond attempting to reform the regulatory process by making changes in substantive law -- altering, for example, the Delaney Clause and the Community Right-to-Know Act. Whether such changes are appropriate should be decided only after full hearings in the committees of jurisdiction and full debate on the merits.

The Administration is as concerned with the cumulative effect of S. 343 as with its particular features. The Administration remains committed, however, to improving the regulatory process, both administratively and through legislation.

* * *

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

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

JUN 23 1995

The Honorable Robert Dole
Majority Leader
United States Senate
Washington, D.C. 20510

Dear Mr. Leader:

We wish to provide the Administration's views on the June 21st discussion draft of S. 343, the "Comprehensive Regulatory Reform Act of 1995." The Administration is committed to seeing enacted into law a regulatory reform bill that will help produce more sensible regulations when they are needed. We recognize that improvements have been made to the draft bill since it was reported by the Judiciary Committee. Nonetheless, we continue to have serious concerns with S. 343, and I would recommend that the President veto it if it were presented to him in its current form. Some of our more important concerns include:

- Threshold. Because cost-benefit and risk analyses can be costly and time-consuming, the Administration believes that $100 million is the appropriate threshold. S. 343, however, has as its threshold $50 million -- a requirement that would cause agencies to use their resources unproductively and that therefore cannot itself withstand cost-benefit scrutiny.

- Risk Assessment/Peer Review. The Administration has concerns about the extent to which S. 343's risk assessment and peer review provisions are overly broad in scope and attempt to micromanage the process of assessing risks.

- Supermandate. We believe that Section 624, "Decisional Criteria," could be construed both to constitute a supermandate that would override existing statutory requirements indiscriminately and to require agencies to make unsound regulatory decisions.

- Judicial Review. We believe that the bill could invite substantial amounts of litigation that would neither improve the agency decisionmaking process nor lead to the production of more sensible regulations.

- Petition/Lookback Process. We remain concerned that these provisions could provide an opportunity for special interests to tie up an agency in additional paperwork and drain valuable resources in the process. We are also concerned that they contain an arbitrary deadline as a trigger for sunsetting regulations.

- Effective Date. S. 343 contains provisions that provide little, if any, time for transition. The Administration is concerned that an immediate effective date could result in unnecessary and time-consuming disruption of the rulemaking process, requiring regulations that have already been through notice and comment and subject to Executive Order No. 12866 review to begin the process all over again because of an unknowing failure to follow a particular procedure in the bill.

- Environmental Cleanups. The Administration is concerned that Section 628 of the bill could halt in their tracks hazardous waste cleanups now underway and postpone for substantial periods of time those about to begin.

- Regulatory Flexibility. S. 343 as originally introduced contained provisions for judicial review of Regulatory Flexibility Act certifications that the Administration could support. The provisions of the June 21st draft, however, do not include the appropriate safeguards. These provisions could consequently generate substantial amounts of new and unproductive litigation.

This list of concerns is not exhaustive, and our evaluation of regulatory reform legislation will depend as much on its cumulative effect as on its individual features. We remain committed to working with the Congress in order to produce a regulatory reform bill that the President can sign. We remain opposed, however, to any regulatory reform legislation that will impair rather than improve the regulatory process and, specifically, to any bill that would generate additional costs, additional paperwork, additional litigation, and additional delay instead of producing common sense, cost-effective regulations that will continue to protect our health, our safety, and our environment.

Sincerely,

Sally Katzen

Sally Katzen
Administrator

An Identical Letter Has Been Sent to the Hon. Thomas Daschle

2/9/96

DECISIONAL CRITERIA

(a) (1) In promulgating a final major rule subject to this subchapter, an agency shall, unless otherwise required by law and except for the provisions of paragraph (b), select the reasonable alternative that it determines is likely to--

> (A) employ to the extent practicable flexible regulatory options;
>
> (B) either maximize net benefits or achieve benefits in a more cost-effective manner than other reasonable alternatives that achieve the same [or "a substantially similar"] level of benefits; and
>
> (C) provide benefits which justify the costs of the rule.

(2) The agency shall publish in the Federal Register at the time of promulgation of the final rule an explanation of the determinations made with respect to this subsection.

(b) If the agency is unable to make the determinations required by subparagraph (a)(1)(B) or (a)(1)(C) with respect to the alternative it selected because either

(1) the law upon which the rule is based requires the selection of that alternative, or

(2) significant economic, scientific or technical uncertainties make such a determination infeasible and the agency reasonably determines it is clearly in the public interest to issue a rule, this would be eliminated

the agency may promulgate such alternative as a final rule and, at the time the final rule is published in the Federal Register, place in the Federal Register and forward to Congress an explanation of the reason why such a determination cannot be made.

(c) If the agency promulgates a final major rule pursuant to subparagraph (b)(1), the agency shall include in the explanation required by subparagraph (b), a statement of the agency's views on the statutory provisions that require the agency to pick an alternative that does not meet the requirements of subparagraph (a)(1)(C), including any recommendation for amendments to the statutory provisions and identification of other possible regulatory options which could have benefits that justify the costs and meet the objectives of the statute.

(d) (Congressional review procedures that provide for 180 day review period for rules to which (b)(1) applies.)

(e) Nothing in this chapter shall be construed to override any statutory requirement, including health, safety, and environmental requirements.

REASONABLE ALTERNATIVE DEFINITION:

> An appropriate number of regulatory options reasonably reflecting the range of options that would achieve the objective of the rulemaking and that the agency has authority to adopt under the statute granting rulemaking authority, including flexible regulatory options unless such flexible regulatory options are precluded by the statute granting the rulemaking authority.

NPR MUST INCLUDE:

A succinct explanation of the specific statutory basis for the proposed rule, including--

(A) whether the statutory interpretation upon which the rule is based is clearly required by the statute; or

(B) if the statutory interpretation upon which the rule is based is not clearly required by the statute, an explanation of how the agency's interpretation of what is required by the statute is within the range of permissible interpretations of the statute and the basis upon which the agency selected such interpretation.

JUDICIAL REVIEW

(a) Compliance or noncompliance by an agency with the provisions of this subchapter and subchapter III shall be subject to judicial review only in accordance with this section.

(b) No determination by the Director regarding a major rule shall be subject to judicial review in any manner.

(c) The determination by an agency that a rule is, or is not, a major rule shall be set aside by a reviewing court only upon a clear and convincing showing that the determination is erroneous in light of the information available to the agency at the time the agency made the determination.

(d) No claim of noncompliance with this subchapter or subchapter II shall be reviewed separate or apart from judicial review of the final agency to which it relates.

(e) A major rule may be set aside or remanded for failure to comply with section 623(a) only if the court finds the agency's determination/action, based on the rulemaking file as a whole, was arbitrary or capricious or an abuse of discretion (or unsupported by substantial evidence where that standard is otherwise provided by law).

(f) Except as otherwise provided in this section, failure of an agency to comply with the procedures required by this subchapter or subchapter III may not be considered by the court except for the purpose of determining whether the final agency action, based on the rulemaking file as a whole, is arbitrary, capricious, or an abused of discretion (or unsupported by substantial evidence where that standard is otherwise provided by law); however, the court may set aside or remand the rule under review only if the court finds that there is a substantial likelihood that the agency's failure to comply with such procedures materially affected the outcome of the agency's decision. If the cost-benefit analysis or risk assessment required under this chapter has been wholly omitted, the final rule shall be presumed to be arbitrary or capricious.

Uncertainties

1. Add to the definitions of "benefits":

--the term benefit means the reasonably identifiable significant favorable effects, quantifiable and nonquantifiable, including reduction in risk and social, health, environmental, and economic effects....

2. Add to the definitions of "costs":

--the term cost means the reasonably identifiable significant adverse effects, quantifiable and nonquantifiable, including substitution risks and social, health, environmental, and economic effects....

3. In 1/17/96 draft (just for reference purposes) add at end of line 12..

"Where a risk assessment has been prepared pursuant to Subchapter III, the analysis of costs and benefits shall rely on the results of that risk assessment."

4. In decisional criteria make a new (a)(1)(D):

"(D) Any determination under subsections (a)(1)(B) or (a)(1)(C) of this section shall be based on the regulatory analysis required by Section 622 including the uncertainties therein."

2/20/96

Section 623. Decisional Criteria.

(a)(1) In promulgating a final major rule subject to this subchapter, and agency shall, unless otherwise required by law and subject to the provisions of paragraph (b), select the reasonable alternative that it determines is likely to--

(A) employ to the extent practicable flexible regulatory options;

(B) either maximize net benefits or achieve benefits in a more cost-effective manner than other reasonable alternatives evaluated by the agency that achieve the same or a substantially similar level of benefits; and

(C) provide benefits which justify the costs of the rule.

Any determination under this subsection shall be based upon the regulatory analysis required by section 622.

(2) The agency shall publish in the Federal Register at the time of promulgation of the final rule an explanation of the determinations made with respect to this subsection.

(b) If the agency is unable to make the determination required by subparagraph (a)(1)(C) with respect to the reasonable alternative it selected because either

(1) the law upon which the rule is based requires the agency to select an alternative that does not meet the requirement of subparagraph (a)(1)(C), or

(2) exceptional scientific, technical, or economic uncertainties identified by the agency in the rulemaking record make such a determination infeasible and the President determines it is clearly appropriate and in the public interest to issue the rule, req. Pres.? determination?

the agency may promulgate such reasonable alternative as a final rule and, at the time the final rule is published in the Federal Register, place in the Federal Register and forward to Congress an explanation of the reason why such a determination cannot be made along with any required Presidential determination.

(c) If the agency promulgates a final major rule pursuant to subparagraph (b)(1), the agency shall include in the explanation required by subparagraph (b) a statement regarding the statutory provisions that required the agency to pick an alternative that does not meet the requirements of subparagraph (a)(1)(C), including any recommendation for amendments to the statutory provisions and identification of other possible regulatory including any recommendation for amendments to the statutory provisions and identification of other possible regulatory options which could have benefits that justify the costs and meet the objectives of the statute.

(d) Congressional review procedures that provide for 180 day review period for rules to which (b)(1) applies.)

(e) Nothing in this chapter shall be construed to override any statutory requirement, including health, safety and the environmental requirements.

REASONABLE ALTERNATIVE DEFINITION:

(8) the term 'reasonable alternatives' means an appropriate number of regulatory options reasonably reflecting the range of options that would achieve the objective of the rulemaking and that the agency has authority to adopt under the statute granting rulemaking authority, including flexible regulatory options unless such flexible regulatory options are precluded by the statute granting the rulemaking authority.

NPR MUST INCLUDE:

A succinct explanation of the specific statutory basis for the proposed rule, including--

(A) whether the statutory interpretation upon which the rule is based is clearly required by the statute; or

(B) if the statutory interpretation upon which the rule is based is not clearly required by the statute, an explanation of how the agency's interpretation of what is required by the statute is within the range of permissible interpretations of the statute and the basis upon which the agency selected such interpretation.

JUDICIAL REVIEW

(a) Compliance or noncompliance by an agency with the provisions of this subchapter and subchapter III shall be subject to judicial review only in accordance with this section.

(b) No determination by the Director that a rule is, or is not, a major rule shall be subject to judicial review in any manner.

(c) The determination by an agency that a rule is, or is not, a major rule shall be set aside by a reviewing court only upon a clear and convincing showing that the determination is erroneous in light of the information available to the agency at the time the agency made the determination.

(d) No claim of noncompliance with this subchapter or subchapter II shall be reviewed separate or apart from judicial review of the final agency action to which it relates.

(e) A major rule may be set aside or remanded for failure to comply with subsections 623(a) or (b) only if the court finds the agency determination, based on the rulemaking file as a whole, was arbitrary or capricious or an abuse of discretion (or unsupported by substantial evidence where that standard is otherwise provided by law).

(f) If the cost-benefit analysis or risk assessment required under this chapter has been omitted in its entirety, the rule shall be treated as arbitrary or capricious by a reviewing court.

(g) Except as otherwise provided in this section, failure of an agency to comply with the requirements of this subchapter or subchapter III may not be considered by the court except for the purpose of determining whether the final agency action, based on the rulemaking file as a whole, is arbitrary, capricious, or an abused of discretion (or unsupported by substantial evidence where that standard is otherwise provided by law); however, the court may set aside or remand the rule under review only if the court finds that there is a substantial likelihood that the agency's failure to comply with such requirements materially affected the agency's decision.

(h) Nothing in this chapter is intended to modify the rules of statutory construction applied by the courts.

UNITED STATES SENATE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT
AND THE DISTRICT OF COLUMBIA

(A Subcommittee of the Committee on Governmental Affairs)

WILLIAM S. COHEN, MAINE
CHAIRMAN

CARL LEVIN, MICHIGAN
RANKING MEMBER

Please deliver to: SALLY KATZEN/MIKE FITZPATRICK

Date: 2/20 Time: 12:20 P.M. Fax: 395-3047

From: Linda Gustitus

Total number of pages including this page: 4

If you don't receive all pages, please call (202) 224-3682 (Senator Cohen) or (202) 224-5538 (Senator Levin)

Additional Comments:

Sally & Mike —

This is very close to the final product. I need to know whether or not you can live with this. Changes since the last time are:

1— "evaluated by the agency" added to reasonable alternatives in the cost-effective paragraph.

2— There is no "out" for "maximize net benfits" or "cost effective" with respect to uncertainties or other factors. Once the agency gets to set the level of benefits, can't it pick the most cost-effective in every case?

3- largely my language on uncertainties except with the President signing off. Agreement on delegation, but not to the agency head — only to OMB

4— on judicial review, (g) — changed "procedures" to "requirements"; added (h), which is neutral saving of CHEVRON.

Can you get back to me sometime today? Love and kisses.......

— Conf. call on Reg Reform. — 2/22/96

- Justice — John Dwyer
- Interior
- ~~USDA~~
- HHS
- ~~EP~~ Sally OMB

Sally's input —

— Trading drafts w/Levin's people on decisional criteria, Jud. Rev.

— Justice / EPA / Levin mtg — seemed pace has ↑

— Jerry Jasinowski - NAM — briefed Sally today — working closely w/Levin on Dec Criteria / Jud. Review. Talked about sense of urgency — think Senate is productive — have accomodated our concerns

Sally - conveyed we have ~~maj~~ problems still —

~ Johnston ?

House - Title I Reg Flex
" ~~Europe~~

- 45 Day Layover
- Reg Flex
- Heart of HR. 9.

Examples of where we've needed escape hatch given uncertainties,

- Sally not recovery