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ENVIRONMENTAL JUSTICE

1. ISSUE STATEMENT

Summary of the Executive Order

On February 11, 1994, President Clinton signed the Executive Order on Environmental Justice. The order: 1) creates a federal work group on environmental justice to coordinate federal policies and projects; 2) requires federal agencies to develop an environmental justice strategy, including specific short-term projects with deadlines; 3) prohibits federal agencies from conducting federal activities that affect human health or the environment in a manner that has the effect of discriminating on the basis of race, color, national origin; and 4) requires better data collection by federal agencies on the effects of environmental burdens on minority and low-income communities.

Background

A 1983 General Accounting Office study found that three of four major landfills are located in predominantly black communities where citizens live disproportionately below the poverty line. Thereafter, the United Church of Christ (UCC) conducted a nationwide study and in 1987 issued a report which concluded that race is the most significant variable associated with the location of commercial hazardous waste facilities. Dr. Benjamin Chavis, then director of the UCC, labeled this phenomenon "environmental racism." The terms environmental justice and environmental equity are used to describe the same issues.

In 1990, academicians and civil rights leaders convened the Michigan Conference on Race and Incidence of Environmental Hazards. Subsequent developments include: 1) research, investigation, and publicity by interest groups and academicians, 2) proposed legislation, and 3) federal agency investigation.

Legislative Proposals

In 1992, then Senator Al Gore and Congressman John Lewis introduced the Environmental Justice Act of 1992. This bill provided for the listing of the total weight of toxic chemicals present in each county, the designation of the 100 counties with the highest total weight as Environmental High Impact Areas, and the prohibition of further sitings of toxic facilities in these areas. Last year, Congressman Lewis and Senator Max Baucus introduced the Environmental Justice Act of 1993, which closely tracks the previous bill. In addition, Congresswoman Cardiss Collins (D-Illinois) introduced the Environmental Equal Rights Act of 1993, which would allow "environmentally disadvantaged" communities to block in court the siting of additional waste

facilities. Another bill, the Environmental Health Equity Information Act, would require the Agency for Toxic Substances and Disease Registry to collect and maintain information on the race, age, gender, ethnic origin, income, and education of persons living near contaminated sites.

Federal Activities

The Administration has responded directly to concerns about environmental justice. In 1992, EPA issued a Report on Environmental Justice, created the Office of Environmental Equity, and appointed Dr. Clarice Gaylord to head it. Recently, EPA Administrator Browner listed "environmental justice" as one of four her priorities. EPA now has an interagency working group that considers environmental justice issues.

On Earth Day, President Clinton announced that EPA and the Department of Justice would "begin an interagency review of federal, state, and local regulations and enforcement that affect communities of color and low-income communities with the goal of formulating an aggressive investigation of the inequalities in exposure to environmental hazards." Subsequently, the President signed the Executive Order on Environmental Justice.

Most recently, Administrator Browner convened the Federal Working Group on Environmental Justice as required by the Executive Order. The Department is represented on that Working Group by Gerald Torres and Lois Schiffer. Mr. Torres is also overseeing the development of the Department's environmental justice strategy. He has created a Department Working Group which is working on the strategy. The Environment Division, under the guidance of Ms. Schiffer has also created a Division Working Group.

Criticisms

Critics of the environmental justice movement are fearful of further impediments to the siting of facilities; stigmatization of distressed communities; departure from scientific, risk-based approaches to environmental priorities; and discouragement of economic development where it is most needed.

2. STATUS

Federal agencies are reviewing their programs to meet the requirements of the Executive Order. Each federal agency must submit by June 11, 1994 to Administrator Browner a description of the process it will use to develop an environmental justice strategy. An outline of the strategy must be submitted to the Administrator by August 11, 1994.

3. DEPARTMENT POSITION

The Department participated substantially in the development of the Executive Order. Attorney General Reno's statement upon issuance of the Executive Order is attached. The Attorney General also spoke to the National Wildlife Federation Conservation Council about the issue in April. Her speech is attached.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

Senator Mosely-Braun (D-Illinois) has a strong interest in the issue. A dispute over the construction of a hazardous waste incinerator in the predominantly black South Side of Chicago (where Mosely-Braun resides) helped define the environmental justice movement. Mosely-Braun also is likely to be aware of the bill introduced by Congresswoman Collins, a fellow member of the Illinois delegation.

Several western Senators, including Alan Simpson (R-Wyoming) and Hank Brown (R-Colorado), have indicated their opposition to the Executive Order, ostensibly because the order would depart from risk-based environmental decisionmaking, stigmatize disadvantaged communities, and further discourage economic development where it is most needed.

5. REFERENCE MATERIALS

- Executive Order
- President Clinton's Memorandum To Department Heads
- Attorney General Reno's Statement
- Attorney General Reno's Speech

EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE

1. ISSUE STATEMENT 82

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- President Clinton's Memorandum To Department Heads
- Attorney General Reno's Statement

Office of the Press Secretary

For Immediate Release

February 11, 1994

EXECUTIVE ORDER

FEDERAL ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE
IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1-1. Implementation.

1-101. Agency Responsibilities. To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands.

1-102. Creation of an Interagency Working Group on Environmental Justice. (a) Within 3 months of the date of this order, the Administrator of the Environmental Protection Agency ("Administrator") or the Administrator's designee shall convene an interagency Federal Working Group on Environmental Justice ("Working Group"). The Working Group shall comprise the heads of the following executive agencies and offices, or their designees: (a) Department of Defense; (b) Department of Health and Human Services; (c) Department of Housing and Urban Development; (d) Department of Labor; (e) Department of Agriculture; (f) Department of Transportation; (g) Department of Justice; (h) Department of the Interior; (i) Department of Commerce; (j) Department of Energy; (k) Environmental Protection Agency; (l) Office of Management and Budget; (m) Office of Science and Technology Policy; (n) Office of the Deputy Assistant to the President for Environmental Policy; (o) Office of the Assistant to the President for Domestic Policy; (p) National Economic Council; (q) Council of Economic Advisers; and (r) such other Government officials as the President may designate. The Working Group shall report to the President through the Deputy Assistant to the President for Environmental Policy and the Assistant to the President for Domestic Policy.

(b) The Working Group shall: (1) provide guidance to Federal agencies on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations;

(2) coordinate with, provide guidance to, and serve as a clearinghouse for, each Federal agency as it develops an environmental justice strategy as required by section 1-103 of this order, in order to ensure that the administration, interpretation and enforcement of programs, activities and policies are undertaken in a consistent manner;

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(3) assist in coordinating research by, and stimulating cooperation among, the Environmental Protection Agency, the Department of Health and Human Services, the Department of Housing and Urban Development, and other agencies conducting research or other activities in accordance with section 3-3 of this order;

(4) assist in coordinating data collection, required by this order;

(5) examine existing data and studies on environmental justice;

(6) hold public meetings as required in section 5-502(d) of this order; and

(7) develop interagency model projects on environmental justice that evidence cooperation among Federal agencies.

1-103. Development of Agency Strategies. (a) Except as provided in section 6-605 of this order, each Federal agency shall develop an agency-wide environmental justice strategy, as set forth in subsections (b)-(e) of this section that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. The environmental justice strategy shall list programs, policies, planning and public participation processes, enforcement, and/or rulemakings related to human health or the environment that should be revised to, at a minimum:

- (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations;
- (2) ensure greater public participation;
- (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and
- (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations.

In addition, the environmental justice strategy shall include, where appropriate, a timetable for undertaking identified revisions and consideration of economic and social implications of the revisions.

(b) Within 4 months of the date of this order, each Federal agency shall identify an internal administrative process for developing its environmental justice strategy, and shall inform the Working Group of the process.

(c) Within 6 months of the date of this order, each Federal agency shall provide the Working Group with an outline of its proposed environmental justice strategy.

(d) Within 10 months of the date of this order, each Federal agency shall provide the Working Group with its proposed environmental justice strategy.

(e) Within 12 months of the date of this order, each Federal agency shall finalize its environmental justice strategy and provide a copy and written description of its strategy to the Working Group. During the 12 month period from the date of this order, each Federal agency, as part of its environmental justice strategy, shall identify several specific projects that can be promptly undertaken to address particular concerns identified during the development of the proposed environmental justice strategy, and a schedule for implementing those projects.

(f) Within 24 months of the date of this order, each Federal agency shall report to the Working Group on its progress in implementing its agency-wide environmental justice strategy.

(g) Federal agencies shall provide additional periodic reports to the Working Group as requested by the Working Group.

1-104. Reports to the President. Within 14 months of the date of this order, the Working Group shall submit to the President, through the Office of the Deputy Assistant to the President for Environmental Policy and the Office of the Assistant to the President for Domestic Policy, a report that describes the implementation of this order, and includes the final environmental justice strategies described in section 1-103(e) of this order.

Sec. 2-2. Federal Agency Responsibilities for Federal Programs. Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.

Sec. 3-3. Research, Data Collection, and Analysis.

3-301. Human Health and Environmental Research and Analysis. (a) Environmental human health research, whenever practicable and appropriate, shall include diverse segments of the population in epidemiological and clinical studies, including segments at high risk from environmental hazards, such as minority populations, low-income populations and workers who may be exposed to substantial environmental hazards.

(b) Environmental human health analyses, whenever practicable and appropriate, shall identify multiple and cumulative exposures.

(c) Federal agencies shall provide minority populations and low-income populations the opportunity to comment on the development and design of research strategies undertaken pursuant to this order.

3-302. Human Health and Environmental Data Collection and Analysis. To the extent permitted by existing law, including the Privacy Act, as amended (5 U.S.C. section 552a): (a) each Federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information assessing and comparing environmental and human health risks borne by populations identified by race, national origin, or income. To the extent practical and appropriate, Federal agencies shall use this information to determine whether their programs, policies, and activities have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations;

(b) In connection with the development and implementation of agency strategies in section 1-103 of this order, each Federal agency, whenever practicable and appropriate, shall collect, maintain and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding facilities or sites expected to have a substantial environmental, human

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health, or economic effect on the surrounding populations, when such facilities or sites become the subject of a substantial Federal environmental administrative or judicial action. Such information shall be made available to the public, unless prohibited by law; and

(c) Each Federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding Federal facilities that are: (1) subject to the reporting requirements under the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. section 11001-11050 as mandated in Executive Order No. 12856; and (2) expected to have a substantial environmental, human health, or economic effect on surrounding populations. Such information shall be made available to the public, unless prohibited by law.

(d) In carrying out the responsibilities in this section, each Federal agency, whenever practicable and appropriate, shall share information and eliminate unnecessary duplication of efforts through the use of existing data systems and cooperative agreements among Federal agencies and with States, local, and tribal governments.

Sec. 4-4. Subsistence Consumption of Fish and Wildlife.

4-401. Consumption Patterns. In order to assist in identifying the need for ensuring protection of populations with differential patterns of subsistence consumption of fish and wildlife, Federal agencies, whenever practicable and appropriate, shall collect, maintain, and analyze information on the consumption patterns of populations who principally rely on fish and/or wildlife for subsistence. Federal agencies shall communicate to the public the risks of those consumption patterns.

4-402. Guidance. Federal agencies, whenever practicable and appropriate, shall work in a coordinated manner to publish guidance reflecting the latest scientific information available concerning methods for evaluating the human health risks associated with the consumption of pollutant-bearing fish or wildlife. Agencies shall consider such guidance in developing their policies and rules.

Sec. 5-5. Public Participation and Access to Information.

(a) The public may submit recommendations to Federal agencies relating to the incorporation of environmental justice principles into Federal agency programs or policies. Each Federal agency shall convey such recommendations to the Working Group.

(b) Each Federal agency may, whenever practicable and appropriate, translate crucial public documents, notices, and hearings relating to human health or the environment for limited English speaking populations.

(c) Each Federal agency shall work to ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public.

(d) The Working Group shall hold public meetings, as appropriate, for the purpose of fact-finding, receiving public comments, and conducting inquiries concerning environmental justice. The Working Group shall prepare for public review a summary of the comments and recommendations discussed at the public meetings.

Sec. 6-6. General Provisions.

6-601. Responsibility for Agency Implementation. The head of each Federal agency shall be responsible for ensuring compliance with this order. Each Federal agency shall conduct internal reviews and take such other steps as may be necessary to monitor compliance with this order.

6-602. Executive Order No. 12250. This Executive order is intended to supplement but not supersede Executive Order No. 12250, which requires consistent and effective implementation of various laws prohibiting discriminatory practices in programs receiving Federal financial assistance. Nothing herein shall limit the effect or mandate of Executive Order No. 12250.

6-603. Executive Order No. 12875. This Executive order is not intended to limit the effect or mandate of Executive Order No. 12875.

6-604. Scope. For purposes of this order, Federal agency means any agency on the Working Group, and such other agencies as may be designated by the President, that conducts any Federal program or activity that substantially affects human health or the environment. Independent agencies are requested to comply with the provisions of this order.

6-605. Petitions for Exemptions. The head of a Federal agency may petition the President for an exemption from the requirements of this order on the grounds that all or some of the petitioning agency's programs or activities should not be subject to the requirements of this order.

6-606. Native American Programs. Each Federal agency responsibility set forth under this order shall apply equally to Native American programs. In addition, the Department of the Interior, in coordination with the Working Group, and, after consultation with tribal leaders, shall coordinate steps to be taken pursuant to this order that address Federally-recognized Indian Tribes.

6-607. Costs. Unless otherwise provided by law, Federal agencies shall assume the financial costs of complying with this order.

6-608. General. Federal agencies shall implement this order consistent with, and to the extent permitted by, existing law.

6-609. Judicial Review. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.

WILLIAM J. CLINTON

THE WHITE HOUSE,
February 11, 1994.

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THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release

February 11, 1994

February 11, 1994

MEMORANDUM FOR THE HEADS OF ALL DEPARTMENTS AND AGENCIES

SUBJECT: Executive Order on Federal Actions to Address
Environmental Justice in Minority Populations and
Low-Income Populations

Today I have issued an Executive order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. That order is designed to focus Federal attention on the environmental and human health conditions in minority communities and low-income communities with the goal of achieving environmental justice. That order is also intended to promote nondiscrimination in Federal programs substantially affecting human health and the environment, and to provide minority communities and low-income communities access to public information on, and an opportunity for public participation in, matters relating to human health or the environment.

The purpose of this separate memorandum is to underscore certain provision of existing law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment. Environmental and civil rights statutes provide many opportunities to address environmental hazards in minority communities and low-income communities. Application of these existing statutory provisions is an important part of this Administration's efforts to prevent those minority communities and low-income communities from being subject to disproportionately high and adverse environmental effects.

I am therefore today directing that all department and agency heads take appropriate and necessary steps to ensure that the following specific directives are implemented immediately:

In accordance with Title VI of the Civil Rights Act of 1964, each Federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin.

Each Federal agency shall analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. section 4321 et seq. Mitigation measures outlined or analyzed in an environmental assessment, environmental impact statement, or record of decision, whenever feasible, should address significant and adverse environmental effects of proposed Federal actions on minority communities and low-income communities.

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Each Federal agency shall provide opportunities for community input in the NEPA process, including identifying potential effects and mitigation measures in consultation with affected communities and improving the accessibility of meetings, crucial documents, and notices.

The Environmental Protection Agency, when reviewing environmental effects of proposed action of other Federal agencies under section 309 of the Clean Air Act, 42 U.S.C. section 7609, shall ensure that the involved agency has fully analyzed environmental effects on minority communities and low-income communities, including human health, social, and economic effects.

Each Federal agency shall ensure that the public, including minority communities and low-income communities, has adequate access to public information relating to human health or environmental planning, regulations, and enforcement when required under the Freedom of Information Act, 5 U.S.C. section 552, the Sunshine Act, 5 U.S.C. section 552b, and the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. section 11044.

* * *

This memorandum is intended only to improve the internal management of the Executive Branch and is not intended to, nor does it create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.

WILLIAM J. CLINTON

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Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, FEBRUARY 11, 1994

AG
(202) 514-2007
TDD (202) 514-1888

STATEMENT BY THE ATTORNEY GENERAL JANET RENO ON ENVIRONMENTAL JUSTICE

The President today has asked us to make environmental justice a priority. He has asked us to ensure that all communities in this country, including minority and low-income communities, receive adequate environmental protection.

Traditionally, this country's environmental policymakers have focused on protecting the environment by creating laws that reduce pollution to acceptable levels. But, until now, policymakers paid little attention who benefitted from those laws.

For years, researchers have collected evidence suggesting that the poor in general, and minorities in particular, are disproportionately exposed to toxic pollution and that the environmental needs of their communities are not being fairly addressed. Today's Executive Order seeks to address these environmental injustices by promising that the benefits of environmental protection will be distributed to all communities.

To ensure that the Department fulfills the President's mandate set forth today, I have asked my counsel, Gerald Torres,

(MORE)

to lead the Department's efforts to develop an environmental justice strategy.

We want to help ensure that minority and low-income communities -- from farm workers exposed to pesticides, to children living in lead-laden buildings, to subsistence fishermen eating contaminated fish -- enjoy the benefits of a clean, safe and healthy environment.

The Environment and Natural Resources Division, the Civil Rights Division, and the Civil Division will work closely with the Environmental Justice Work Group and the Environmental Protection Agency to develop joint strategies for addressing environmental injustices.

I am committed to investigating the distribution of environmental risks. As we work to protect the environment and to preserve this country's natural resources, we will make every effort to ensure that environmental regulation and enforcement are directed at the highest environmental risks, including those risks which disproportionately affect the poor and people of color.

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NATIONAL WILDLIFE FEDERATION

SYNERGY '94

THE COMMUNITY RESPONSIBILITIES
OF SUSTAINABLE DEVELOPMENT

REMARKS OF HON. JANET RENO
UNITED STATES ATTORNEY GENERAL

Mayflower Restaurant
Grand Hotel
2350 M Street, N.W.
Washington, D.C.

Wednesday, April 19, 1994

(1:15 p.m.)

INTRODUCTION OF HON. JANET RENO

UNITED STATES ATTORNEY GENERAL

VOICE: May I have your attention, please? As I mentioned to you in respect to the time constraints of our guest speaker, we would like to interrupt your meal -- I think you have all finished your salad course -- then we will serve the main course following the presentation.

I think one of the most important principles of this country and our democratic society is the rights of people to have equal protection under the law. That person most responsible in this country to ensure that all citizens have that is our Attorney General.

I think all of us who have observed Janet Reno in her capacity as the Attorney General of the Clinton administration have been very impressed and pleased with the distinguished manner in which she has been conducting that office and its importance to the American people.

We are extremely privileged and pleased today to have the Attorney General come to us to address this issue of environmental justice, because certainly that is one that is fundamental to human rights, and certainly one that is fundamental to our Nation's resolve to protect the environment.

Attorney General Reno, we are honored and happy,

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1 ma'am, for you to speak with us today. Thank you for
2 coming.

3 REMARKS OF HON. JANET RENO
4 UNITED STATES ATTORNEY GENERAL

5 GENERAL RENO: Thank you very much. It is a
6 real privilege to be here.

7 It is a little over a year ago that I was
8 minding my own business as a local prosecutor in Dade
9 County, Florida. It is amazing what happens in 1 year in
10 terms of the expertise that you need to develop. I come
11 here still not an expert in environmental enforcement, but
12 learning quickly; still not an expert in civil rights
13 enforcement, but learning quickly.

14 I now have on board a distinguished, wonderful
15 young man who I think is one of the great leaders in
16 America today, Duval Patrick, who started 2 weeks ago as
17 Assistant Attorney General for Civil Rights, and he brings
18 a strength and a vision to the Department that I think is
19 magnificent. I look forward to working with him, to
20 backing him up, to helping him lead the way to make sure
21 that we end discrimination in all forms in the United
22 States.

23 I have had the opportunity to work with Cheryl
24 Torres, who is my special assistant, in terms of the
25 environmental justice issue, and it becomes even more

1 important that we get Lois Schiffer confirmed as the
2 Assistant Attorney General for the Environment Division as
3 soon as possible so that we can move ahead without further
4 halting in this effort.

5 I give you this background to tell you that I am
6 here to seek your help. I recognize many of you from the
7 morning that the President announced the executive order,
8 but I need your help.

9 I look forward to working with you, I look
10 forward to discussing these issues, because I am committed
11 in all that I do in the Department to talking out issues,
12 letting people know where we stand, what we expect of
13 them, working with Carol Browner to try to develop an
14 understanding of what we expect, because I think most
15 people will work with us in terms of achieving compliance
16 if we know what we expect and know that we are willing to
17 follow through with enforcement that makes sense,
18 enforcement that is vigorous, enforcement that is going to
19 be carried forward. When we threaten it, we have got to
20 mean it.

21 Citizens of this country have long celebrated
22 the Nation's environment and natural resources. I come
23 from one of the most fragile aquifers in this country. I
24 have lived all my life in Dade County. I have canoed
25 through the Everglades. I have enjoyed an atmosphere and

1 an air that probably is not surpassed by many places in
2 the country, and I am dedicated to doing whatever I can to
3 protect the environment for all Americans.

4 I come with a bit of a special assistance. My
5 sister is in her nineteenth year as a County Commissioner
6 in Martin County, Florida, has been the consistent
7 environmentalist in that county for many years, and has
8 supported and assisted me when I have needed her help in
9 carrying forward on these battles.

10 But what I would like to talk to you today about
11 is something that has troubled me. In Miami, as a
12 prosecutor, I would walk the streets of minority
13 communities, of poor communities, reaching out to try to
14 address the problems of what we could do to prevent crime.

15 As many of you know, I early on learned that we
16 are never going to prevent crime just by building prisons
17 at the end of the line. We are not going to end crime by
18 just putting more policemen on the streets. We have got
19 to make an investment in our children and in our
20 communities.

21 I started working with doctors at our public
22 hospital, focusing on the ages of zero to 3, I started
23 working with young mothers trying to raise children in
24 difficult circumstances in public housing projects, and I
25 became convinced that unless we made an investment in

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1 community, in children and families in the community, that
2 we would never be able to build enough prisons 18 years
3 from now, we would never have a work force with the skills
4 that could fill the jobs that could maintain America as a
5 first-rate Nation.

6 But it became clear to me that Government cannot
7 just do it itself. We have got to reweave the fabric of
8 community, the fabric of neighborhood, around our children
9 and families, and as I went to these neighborhoods in Dade
10 County, when I went to neighborhoods of poor children and
11 their single mothers trying to struggle to be self-
12 sufficient and to be somebody, there would be the closest
13 dump -- down the road -- and these people would be totally
14 unempowered in how to go to the Commission, how to make a
15 difference, how to holler like people did who lived in a
16 more affluent neighborhood 15 miles away to get something
17 changed.

18 I would drive through a community, as people
19 said come visit my community and see what is happening in
20 terms of housing and the dilapidated housing, and right
21 next to the dilapidated housing would be a tire dump that
22 everybody was condoning, and it became clear to me that as
23 we focus on community and rebuild community, we have got
24 to rebuild the community as a whole.

25 I will never forget for as long as I live what

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1 community meant to these children as I went to a school,
2 heard the children make presentations for a 4th of July
3 Summer School program, had one class show something that I
4 will never forget. I could look out the window and see
5 the blocks where these children lived.

6 They had a model of the block they dreamed of.
7 It was obviously a replica of their block, but it was a
8 replica with things cleaned up, with sidewalks, with
9 trees, with the abandoned car gone, with the vacant lot
10 cleaned up, with the house fixed up. You understood what
11 sense of community meant, and then as one put it on a
12 little card as they talked about what they hoped their
13 community -- "and that we can get rid of that incinerator
14 that's down the street that smells."

15 They wanted their community free of violence,
16 free of people hollering at each other, they wanted better
17 housing, but they wanted a community that was
18 environmentally clean as well.

19 But then I would see people come into the
20 community and say, this is what we are going to do for
21 your community, rather than listening to people, listening
22 to children, listening to the people affected.

23 Or if they came into the community and everybody
24 agreed what should happen, they would say, this is going
25 to be the way we make it happen, without listening to the

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1 community as to what was needed, what should be done, what
2 strategies should be applied, and I became convinced that
3 for too long in America now we have forgotten people. We
4 have forgotten community, we have forgotten neighborhood,
5 and Government has too often said, we do it better.

6 I think this started in the Depression, as
7 people shifted their focus towards Washington thinking
8 that Washington was the place that we solve problems, and
9 then with World War II people became more convinced of
10 that.

11 With the civil rights efforts through the
12 fifties and sixties, people looked to Washington for
13 justice. In the seventies, they looked to Washington for
14 money. In the eighties, Washington started shifting
15 programs to the States without money.

16 The States started shifting programs to the
17 communities without money, and the communities with their
18 back up against the wall started involving everybody,
19 reaching through the appreciate the great differences of
20 so many different communities to come up with plans for
21 communities that affected the whole, and that focused on
22 the needs of all the community.

23 This is what we have got to do in environmental
24 justice. Environmental problems which many poor
25 communities confront are only one piece of the puzzle.

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1 They are the socioeconomic challenges, the crime, the
2 violence, the poverty, the unemployment, but it all goes
3 together if we are going to rebuild communities around our
4 children.

5 Today, with thoughts of Earth Day and of the
6 urgency of protecting this Nation's and the world's
7 dwindling resources for use and enjoyment of future
8 generations, I want us to focus on environmental justice.
9 It will not serve just to save one piece of this Nation.
10 We must save all of this Nation for all of its people.

11 Like sustainable development, environmental
12 justice focuses on the distribution of environmental
13 benefits and burdens. The executive order on
14 environmental justice, signed in February, to which I have
15 referred, requires Federal agencies to investigate the
16 distribution of environmental benefits and burdens among
17 communities of color and to consider minority and low
18 income communities in making environmental decisions.

19 And believe me, these communities are starting
20 to be heard. They are sensible and informed. They know
21 how it affects them. They know how it affects their
22 children, and it is imperative, if this Nation is to
23 continue as a strong and great Nation, that everybody be
24 heard.

25 The President's Council on Sustainable

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1 Development, created in an effort to make our community a
2 healthy and productive place, is focusing on the cross-
3 generational distribution of benefits and burdens.

4 Today, we have the opportunity to discuss the
5 ways in which Government and industry can work together
6 with citizens and environmentalists to achieve
7 environmental justice.

8 Too often, we discuss who is to blame for the
9 disproportionate share of environmental burdens on
10 minorities and the poor that they have come to bear.
11 Significantly, the executive order on environmental
12 justice takes discussion of environmental justice away
13 from recrimination and focuses instead on how we provide
14 it for everybody.

15 It is so touching to me to go to a business
16 group, have them, during the course of the dinner, talk
17 about their favorite river, their favorite lake where they
18 like to fish, the beautiful bass that they caught, and
19 then gripe about the environmental regulations. Those
20 people want to protect that beautiful lake and that
21 beautiful river as much as I want to protect a certain
22 patch of sky for a community that is living within the
23 shadow of an incinerator in Dade County, and they
24 sometimes have more voice.

25 But we can protect America if we use our

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1 resources the right way, and if everybody understands we
2 have a common commitment to protect the environment we
3 love. Significantly, the executive order on environmental
4 justice takes the discussion of environmental justice away
5 from recrimination and focuses on achieving it all.

6 Participation by affected communities in
7 decisionmaking, data collection, research, and the
8 development of strategies, are all central components of
9 the executive order's mandate.

10 The order requires Federal agencies to determine
11 how the Federal Government can help ensure that all
12 communities enjoy the benefits of environmental
13 protection. The same question, how to promote for all,
14 should be asked by local and State governments, community,
15 and industry as well, and when we ask how we can protect
16 the environment of low income and minority communities, we
17 should remember the President's words just a year ago: we
18 must move beyond the antagonisms among business,
19 Government, and individual citizens, and we must come to
20 appreciate this beautiful Nation for us all.

21 Often, the pollution we create burdens poor
22 communities of color. Poor urban children are exposed to
23 lead paint in their homes and schools. Migrant workers
24 are exposed to pesticides. Native American fishermen are
25 exposed to contaminated fish. As I have pointed out, even

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1 in the community that I love, hazardous waste facilities
2 are often located in poor minority communities.

3 How we deal with this is too often surrounded by
4 needless controversy. We all want to protect this Nation
5 for our children and our grandchildren. For example, on
6 the one hand, many suggest that no waste facilities should
7 be located in poor communities because those communities
8 have borne an unfair share of environmental burdens in the
9 past. On the other hand, others suggest that the
10 attendant economic benefits of industry, including
11 benefits to minority and low income communities, outweighs
12 the negative effects.

13 We must get away from the controversy and
14 instead focus on what we all -- environmentalists,
15 industry, Government, and citizens -- have in common and
16 what we can do in a sensible, rational way to protect
17 against the pollution.

18 You are probably saying to yourself, we agree,
19 but what is the Justice Department going to do to achieve
20 environmental justice? We can start by embracing a simple
21 set of objectives: a strong and clean environment for us
22 all, regardless of where we live, regardless of whether we
23 are rich or poor, regardless of whether we have a voice
24 before that county commission or not, an environment in
25 the future which is better than the environment we have

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1 now, a basic level of public health protection, and an
2 understanding of the needs of communities as expressed by
3 those communities.

4 These are the commitments the President, Vice
5 President Gore, and Administrator Browner have already
6 made. Now let us make these commitments together.

7 At the Justice Department, we will work to meet
8 these objectives by enforcing all environmental and civil
9 rights laws, many of which seek to ensure that each
10 generation leaves the environment in at least as good
11 shape as it found it. To that end, we are committed to
12 working closely with the EPA, with HUD, HHS, the
13 Department of Interior, and the Department of Agriculture.

14 Nothing frustrated me more in Miami than to have
15 the Federal agencies come to town, have four agencies sit
16 down at the table and start talking, and discover that
17 they had not talked to each other about what we were
18 coming to talk about. It was like you were talking to
19 four different Governments.

20 We are trying to reach out to other agencies --
21 to HUD, to EPA -- to join together in a comprehensive,
22 unified effort that can let people know that Government
23 speaks as one, speaks in a thoughtful, reasonable way, and
24 most of all, listens as well as it talks.

25 In the past year, the Department has recovered

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1 nearly \$1.2 billion in environmental enforcement
2 litigation. We work long and hard to protect wonderful
3 areas such as the Florida Everglades. We have worked to
4 resolve years of litigation over Federal timber sales in
5 the Pacific Northwest through implementation of the
6 President's forest plan, but we have so very, very much to
7 go. Much to do, and much, much further to go.

8 We are committed to doing our part as we develop
9 our environmental justice strategy, which is due
10 December 11, and we want to move forward in efforts to
11 protect the environment and natural resources. We invite
12 all of you to participate.

13 Somebody just said that they were having trouble
14 getting in touch with me because one of the members of our
15 staff is about to go on maternity leave, and Bernice, I am
16 going to follow through and make sure that we get back to
17 you. I want an open door in the Department of Justice to
18 people. I want to be able to sit around our conference
19 table and talk these issues out, and I invite that.

20 But as we talk these issues out, it is also
21 important to listen. I want to make one special mention
22 today of an initiative that we are trying to undertake. I
23 spent a lot of time in the Everglades as I grew up. It is
24 a wonderful area, and the people most at home there are
25 the Miccosukee Indians, a wonderful people who taught me

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1 that the white man oftentimes came out there and started
2 talking as if he knew best when, as they said, all they
3 taught them to do was to sometimes lie and to cheat and to
4 steal.

5 They said, Janet Reno, why don't you come out
6 here and listen, and that's what they used to tell me when
7 we talked about how we should handle joint criminal
8 justice problems of mutual concern.

9 As I became Attorney General, I started looking
10 at the myriad problems faced by Native Americans. In too
11 many instances, for too long in American history, we
12 haven't listened.

13 To this end, in May, on the 5th and 6th, the
14 Department of Justice and the Department of Interior will
15 cohost the National American Indian Listening Conference
16 in Albuquerque, New Mexico. The conference, the first of
17 its kind, will bring together representatives from several
18 hundred Indian tribes and Federal, State, and local
19 officials.

20 Both Secretary Babbitt and I will be there, and
21 I have specified again and again and again, I want to
22 listen, and I want to make sure there are enough hours in
23 the day so that I can listen to the people who want to be
24 heard. I want to understand the problems, both in terms
25 of environment and other areas.

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1 The conference will provide a forum for
2 representatives from selected tribes to discuss issues of
3 particular concern to American Indians, such as law
4 enforcement, natural resources, gaming, status of tribal
5 governments, youth intervention, and free exercise of
6 religion.

7 The environmental justice movement and the
8 process put in motion by the executive order provide us
9 all with another opportunity to listen. Government groups
10 and grassroots organizers often go unheard.

11 In these last 6 months, I have traveled around
12 this Nation, walked into minority neighborhoods, gotten
13 the best suggestions from young people as to what to do
14 about youth violence, gotten wonderful suggestions from an
15 elderly woman who had been a community activist.

16 If we go back to the people of this country and
17 listen, and then follow through and take their ideas and
18 put them into effect, we can make a difference, but we
19 have got to listen to America as a whole.

20 Truth be told, people living with poverty,
21 pollution, crime, and unemployment, are probably best
22 situated to explain their needs and offer advice to
23 Government and the private sector as to how to best meet
24 their needs.

25 I will give you an example that has nothing to

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1 do with the environment, but is to me most eloquent. When
2 I go to a community, I try to talk with young people who
3 have been in trouble or who are in trouble, in detention
4 facilities, ex-gang members, and I ask them, what could
5 have been done to prevent the problem in the first place?

6 Again and again, two poignant refrains come
7 through their language: something to do in the afternoons
8 and in the evenings when I was in elementary school,
9 something positive that could make a difference in my
10 life, and somebody to talk to who understands how
11 difficult it is to grow up, how important it is to have
12 somebody who does not put you down and demean you, who
13 punishes you when you deserve it, but gives you a pat on
14 the back when you do as well.

15 We are trying to fashion programs that meet
16 those needs because we listened, and we want to try to do
17 the same thing in environmental justice.

18 Often, leaders in the environmental justice
19 movement have criticized the Government for not being
20 attentive to the needs of communities as expressed by the
21 communities. Let us not walk down that path. Let us
22 listen, let us talk, let us work out solutions that work
23 and are reasonable.

24 Not too long ago, the President invited children
25 from across this country to discuss issues that were of

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1 concern to them. Many of those children shared concerns
2 about the environment. One of them, a young man from
3 Louisiana, shared a story about the pollution and the high
4 cancer death rates in his community. His brother died
5 from cancer, and this young man had taken it upon himself
6 to be heard. He has taken it upon himself to protect the
7 environment for his people and for future generations.

8 Now, Government and industry alike are forced to
9 be attentive to the problems that this young man faced on
10 a daily basis. The opportunity is here, and we must seize
11 it and listen to the communities surrounding your
12 facilities in the industrial complexes, listen to the
13 workers you employ, listen to the people of the United
14 States.

15 Many have said that environmental decisions are
16 too often made without the input of all of the people.
17 Today, we can make that a myth. As the Department
18 develops its environmental strategy, we will be mindful of
19 the comments and concerns of the people within industry
20 and of the effects of our decision on future generations.

21 Our goal is to take real, concrete actions to
22 create meaningful and lasting change. With your help and
23 advice, I am confident that we will succeed.

24 We are all agreed that the people's health and
25 well-being should not be placed at risk merely because

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1 they are poor, or because they are members of one of this
2 Nation's many minority communities.

3 None of us wants to see our city covered with
4 smog. None of us wants to see our rivers covered with
5 slime or oil. None of us want to see the desert
6 despoiled, or the forests destroyed. None of us want to
7 live in lead-laden homes or eat contaminated fish. None
8 of us wants to drink dirty water.

9 Now, let us work together. Let us work together
10 to achieve the 100 percent compliance with environmental
11 and civil rights laws and thereby ensure that all people
12 in this Nation enjoy a safe and healthful environment.
13 One of the blessings of democracy is that burdens
14 associated with the processes that benefit us should not
15 be borne by any one class or group. Environmental
16 processes are no exception.

17 I hope that on the day I walk out of the door as
18 Attorney General for the last time, I leave a Department
19 which has, with great commitment, fully enforced this
20 Nation's environmental and civil rights laws for all of
21 its people. I hope that I will have given communities and
22 stakeholders as much opportunity as possible to
23 participate in Government. I trust with all my heart that
24 working with you, with each one in this room, we will work
25 together to achieve environmental justice.

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1 Thank you.

2 (Applause.)

3 (Whereupon, at 1:42 p.m., the remarks of General

4 Reno ended.)

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Divider Title: _____

NATIVE AMERICAN ISSUES

1. ISSUE STATEMENT

The treaties and statutes that govern the rights of Indian tribes define what many refer to as a "trust relationship" between the United States and the tribes. As part of this unique relationship, the United States has assumed special stewardship obligations over Indian lands. This stewardship involves the Department in suits on behalf of tribes to protect the property rights of Indians, including water rights and treaty fishing rights. The Department also defends the federal government against suits brought by tribes alleging a breach of its trust obligations. The federal/tribal relationship, however, has not always evolved to meet the present needs of tribes and individual Indians.

2. STATUS/DEPARTMENT POSITION

The Administration and, in particular, the Department has made the development of a new partnership with Indian tribes a priority. On May 5-6, 1994, the Department of Justice and the Department of the Interior sponsored the National American Indian Listening Conference in Albuquerque, New Mexico. The Conference provided tribal leaders an opportunity to participate in the process of rethinking the federal-tribal relationship.

At the Conference, tribal leaders from the federally-recognized tribes discussed controversies regarding the federal-tribal relationship and proposed solutions to some of these problems. Among the issues discussed at the Conference were the following: the need for legislation to protect Indian religious sites on federal lands; the unique problems of overlapping jurisdiction by federal, state, and tribal governments on reservations; the protections of reservation water rights; and the need to amend the legislation that permits gaming on reservations.

In the coming months, the Department intends to develop action plans that will build on the suggestions of the tribal leaders. Over the next several years, the Department plans to sponsor regional conferences to work with the tribes to resolve issues of local concern.

A. Protections for Traditional Indian Religions

For centuries, certain sites have been considered essential to the practice of Native American religions as well as to the preservation of Native American cultural and tribal identity. Many of these sacred sites are now located on federal and state lands. In Lynq v. Northwest Indian Cemetery Protective Association, the Supreme Court held that the Free Exercise Clause of the First Amendment did not restrict the way in which the

federal government administers its lands, even if those uses would destroy a sacred site. In the wake of Lyng, protection of Native American religious sites remains uncertain. For this reason, tribes argue that the enactment of the Native American Free Exercise of Religion Act is necessary (NAFERA).

NAFERA would establish a process for consultation between the federal agencies and the tribes. In the event that the agency elects to continue with a project that may impact an Indian sacred site, the agency must establish that a compelling government interest underlies the action.

The Department has worked with the Senate Committee on Indian Affairs and a coalition of tribes to redraft the bill so that, if enacted, it would be both constitutional and workable.

B. Tribal Jurisdiction

One of the most important issues to tribes is the preservation of their sovereignty. Tribal governance and self-determination are often challenged by states and by non-Indians who reside on reservations.

At the turn of the century, Congress permitted non-Indians to assume ownership of lands on reservations. Therefore, there are large numbers of non-Indians in Indian Country. This raises the question of whether non-Indians are subject to the regulatory authority of tribes. In the enforcement context, the confusions and disputes over jurisdiction can have immediate impacts on the lives of Indians and non-Indians. Enforcement and emergency services are often delayed or not available because of such disputes.

C. Indian Reserved Water Rights

The western states contain millions of acres of Indian lands -- lands which require water to be productive. A large portion of those lands give rise to what are known as "reserved" water rights. These rights are implied rights that derive from the treaties, statutes and executive orders that created Indian reservations. Reserved rights are in tension with state water rights -- a tension that often leads to conflict and protracted litigation. This tension arises in the western states because water rights are accorded on the basis of a prior appropriation scheme: the priority and quantity of a water right depends on the date and amount of water put into beneficial use. In contrast to state water rights, reserved rights date back to the creation of a reservation and do not depend on whether there was prior use by individuals or tribes. Reserved rights, therefore, limit the quantity and priority of water available to non-Indians.

The Indian Resources Section of the Environment and Natural Resources Division often asserts water rights claims on behalf of

Tribes and individual Indians in state "general stream" adjudications. Although tribes may file their own water rights claims, they often lack the resources and expertise to assert the claims in these costly and time consuming proceedings. The concern of some tribes is that the Department does not file on behalf of tribes with sufficient frequency and that tribal representatives are not consulted in the Department's decisionmaking process. The Department is currently or has recently participated in adjudications involving Indian water rights in most of the western states, including Arizona, New Mexico, Montana, Idaho, Wyoming, and Washington.

D. Indian Gaming

Gaming is a major issue in Indian country. The decision of the Supreme Court in California v. Cabazon Band of Mission Indians, provided the tribes with a much needed means of economic development. In enacting the Indian Gaming Regulatory Act (IGRA) in 1988, Congress confirmed that right and attempted to set up the necessary protective regulatory system. IGRA separated games into three classes, providing different requirements for each class of game. Class I (social gaming) is solely regulated by the tribes. Class II gaming requires administrative approval of management contracts and tribal gaming ordinances by the National Indian Gaming Commission. The category of gaming that is the focus of most disagreement is Class III gaming, such as high stakes casino gaming and machine gaming. Class III gaming can only be legally operated where a state and a tribe have entered into a compact. The compact specifies the types of games that will be permitted as well as the regulation that is required.

In practice, the compacting process has proved problematic. Where tribes have sued the states for failure to negotiate in good faith, states have frequently claimed that these provisions of IGRA violate the Tenth and Eleventh Amendments. To the extent the suits are barred, the tribes cannot legally engage in Class III gaming. The Department has filed amicus curiae briefs defending the constitutionality of IGRA.

Some tribes have grown frustrated with what they view as bad faith by the states and have commenced Class III gaming operations without a compact. These operations are being engaged in without the regulation Congress contemplated. In the absence of adequate supervision, large scale gaming, with its huge cash flow, may be targeted by the organized crime families or other criminal entrepreneurs. The Department and the United States Attorneys, however, have been reluctant to move against tribal operations which, while illegal at the moment, are nevertheless susceptible of legitimation through changes in state law or execution of a compact.

There is general agreement that IGRA requires repair. Senators Inouye and McCain, the Chairman and Co-chairman of the Senate Indian Affairs Committee, initiated a dialogue between

state governors, state attorneys general, and the tribes in an attempt to reach some consensus on amendments to the IGRA. While there have been numerous meetings between tribal and state officials on possible amendments to the IGRA, the "Inouye-McCain process" has not resulted in any comprehensive agreement between the states and the tribes to date. Senators Inouye and McCain plan to introduce a bill amending IGRA in mid-June.

3. JUDICIARY COMMITTEE INTEREST

A number of Judiciary Committee members have taken a special interest in Indian issues. Senator Simon has expressed the concern that the Department is not always responsive to tribal requests that we file water rights claims on behalf of tribes. A number of western Senators are also concerned that the assertion of Indian water rights -- which antedate the rights of other users -- are in tension with the state water rights system and that these rights have the potential to limit unfairly the rights of non-Indians.

Senator Pressler has articulated a concern, which is probably shared by several western Senators, that non-Indians that reside on reservations are subject to tribal jurisdiction yet they lack a voice in tribal decisionmaking.

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INTERNATIONAL ACTIVITIES

A. TRANSBORDER POLLUTION and RESOURCE DEPLETION

1. ISSUE STATEMENT

Passage of the North American Free Trade Agreement (NAFTA) focused attention in Congress on the problems of transboundary pollution, in which polluting activities in Mexico and Canada, sometimes conducted by subsidiaries of U.S. corporations, cause pollution to flow into the United States. While the Department has brought several successful criminal prosecutions of individuals who smuggled hazardous waste out of the United States to Mexico, we have yet to bring an action against polluters located outside the United States whose pollution affects our air, land, waters or species.

Very recently, attention has also begun to focus on the depletion of transboundary resources, in particular fisheries. While the United States already restricts sharply the ability of foreign fleets to fish within the 200-mile limit of our exclusive economic zone (EEZ), increasingly, such fleets fish on the high seas immediately adjacent to that limit, depleting the stocks that migrate between the U.S. EEZ and the high seas.

2. STATUS

With regard to transboundary pollution, a group of citizen organizations has filed a petition under the Toxic Substances Control Act (TSCA) seeking to require EPA to conduct a study of health effects resulting from such pollution along the Mexican border at the New River, which flows from Mexicali, Mexico, into California's Imperial Valley. The citizens allege that the issue is also an "environmental justice" issue. EPA must respond to this TSCA petition by May 24, 1994.

With regard to transboundary fishery resource depletion, Canada recently (5/20/94) announced that it would take enforcement action against foreign vessels fishing outside its EEZ if it believes those vessels are depleting resources within its EEZ. While the U.S. historically has taken some similar actions, pressure is likely to build for legislative approaches similar to the recent Canadian action.

3. DEPARTMENT POSITION

The Attorney General may discuss transboundary environmental issues at the Fourth Binational Prosecutors Seminar June 19-21, 1994, which will be attended by Ms. Reno and her Mexican counterpart (a new Mexican Attorney General who was named this week), and U.S. Attorneys and Mexican federal enforcers. With regard to transboundary pollution, we are working with EPA on a response to the New River TSCA petition. While EPA is likely to deny the petition, it is examining alternative methods of

addressing the transboundary pollution issue at the New River and elsewhere. ~~[[Close hold: enforcement-sensitive: EPA is likely to issue administrative subpoenas to maquiladora subsidiaries of U.S. companies, seeking to obtain information about transboundary pollution that could be used both in designing further studies and in undertaking possible enforcement actions. Any such enforcement actions are likely to be highly sensitive both in the United States and in Mexico. We are currently working with Mexican counterparts to lay the groundwork for joint enforcement actions; however, this information is highly sensitive and should not be disclosed at this time.]]~~

4. JUDICIARY COMMITTEE MEMBERS' INTEREST/POSITIONS

Any questions about transboundary pollution and resource issues would likely come from members from border states (e.g. Feinstein from California) and from states with significant fishing industries, e.g. Alabama (Heflin), California (Feinstein), Massachusetts (Kennedy), Maine (Cohen).

5. REFERENCE MATERIALS

A spate of recent articles in the Washington Post and the New York Times detail these transboundary environmental issues. The basic pollution-related environmental statutes (Clean Water Act, TSCA, Superfund, etc.) and the Magnuson Fishery Conservation and Management Act provide the legal backdrop. These articles will be provided upon request.

B. TRADE AND THE ENVIRONMENT

1. ISSUE STATEMENT

In the context of the debates over the NAFTA and the GATT Uruguay Round, trade and environment issues have taken on increasing prominence. Allegations by the environmental community that free trade agreements will have adverse environmental effects, coupled with recent and ongoing trade and environment controversies in the GATT and other fora, have focused some degree of congressional attention on these issues. Several particular issues of controversy have emerged. These include (a) the GATT Uruguay Round, both its environmental effects and the treatment of environment issues in the GATT in the post-Uruguay Round era; (b) the use of trade measures for environmental purposes, including the tuna-dolphin controversy, and possible Pelly sanctions against countries that fail to protect species such as rhinos, tigers, bears, and whales; and (c) standards-related trade and environment issues, such as the "circle of poison" proposal to ban the export of pesticides whose use is severely restricted at home, and EPA proposals governing the import of reformulated gasoline (RFG), which have become the subject of a dispute brought by Venezuela (on behalf of PDVSA,

the Venezuelan national oil company) against the United States in the GATT.

2. STATUS

(a) The GATT Uruguay Round. The Round is in the process of being prepared for transmittal to Congress by the President. We are currently defending a challenge to it brought by several environmental organizations under the National Environmental Policy Act (NEPA). Plaintiffs allege that USTR must prepare an environmental impact statement (EIS) prior to transmittal of the Round to Congress. Plaintiffs brought this lawsuit in the N.D. of California; we were recently successful in having it transferred to the District of Columbia District Court where we have obtained dismissals of previous lawsuits by some of the same plaintiffs challenging the NAFTA and the Uruguay Round.

Separately, the Clinton Administration is developing an approach to "greening" the GATT. The Administration is consulting with other governments in preparation for the first meeting of the Trade and Environment Committee that will be established in the GATT following establishment of the WTO; the consultations are being undertaken with a view to internationalizing the Administration's policy on the use of trade measures to address environmental concerns outside national jurisdiction.

(b) Trade Measures for the Environment. (i) Tuna-dolphin. A GATT Panel report was released on May 20, finding that the intermediary nation embargo imposed by the United States against tuna imports from EU member states is inconsistent with U.S. obligations under the GATT. USTR issued a press release on the matter on May 23, which is attached. The EU panel report is likely to increase calls for "greening" the GATT (see above) and may provoke reactions in Congress. **[[Close hold: The Administration is preparing a legislative strategy to address the tuna-dolphin controversy in a constructive way. Because the Marine Mammal Protection Act (MMPA), under which the mandatory tuna embargoes were imposed, was reauthorized this session, the Administration will have to wait until next session to implement its legislative strategy.]]**

(ii) Other species issues. Last month, the President announced that he would impose sanctions, under the Pelly Amendment, against Taiwan for its illegal trade in rhino horn and tiger bone. This represents the first time that any administration has ever decided to impose sanctions under the Pelly Amendment. The President announced that he would not impose such sanctions for rhino-tiger trade against China at this time, but would re-examine the situation in several months. Bills have been introduced that would require imposition of mandatory trade sanctions against countries trading in bear gall bladders and against countries that continue to engage in

commercial whaling. The whaling issue in particular is assuming greater prominence, with calls in the environmental community for trade sanctions against whaling nations such as Japan, Norway and Iceland.

(c) Standards-related issues. (i) Circle of Poison. Senator Leahy has long been concerned about the so-called "Circle of Poison" problem, in which pesticides that are banned or severely restricted in the United States are exported and find their way back to the United States in the form of residues on imported produce. The Administration prepared a proposal on this issue which was presented to Congress through testimony in the past two months. The proposal is being considered as part of the Administration's FIFRA package.

(ii) The Clean Air Act Amendments of 1990 require that the vast majority of U.S. domestic fuel consumption shift to so-called "reformulated gasoline" (RFG). The requirement aims to reduce smog in cities by reducing emissions of certain pollutants in gasoline. Venezuela, on behalf of PDVSA, sought dispute resolution in the GATT regarding EPA's proposed rule defining RFG, which treated imported RFG differently than RFG from domestic refineries. Several weeks ago, EPA announced that it was re-evaluating the rule, and Venezuela suspended its GATT case. Rep. Dingell has subsequently initiated an investigation into why EPA reversed itself. That investigation is now pending.

3. DEPARTMENT POSITION

The Environment Division has participated actively on each of the issues noted above. We are defending the Uruguay Round NEPA lawsuit. In the Administration's trade and environment policy groups on greening the GATT, we are supporting a position emphasizing greater openness and attention to environmental issues in the GATT.

On tuna-dolphin, we are defending in current litigation, and we succeeded in having previous embargo-related tuna-dolphin litigation dismissed from federal district court on the ground that it properly belongs in the Court of International Trade. The President's decision to impose trade sanctions on Taiwan and not China was based in part on recommendations arising out of the visit by ENRD staff to those countries and analysis of their wildlife enforcement programs abroad. We are continuing to evaluate those programs and to work with other agencies to establish the milestones that Taiwan must meet in order for sanctions to be lifted.

In Circle of Poison, we worked actively on the development of the Administration's legislative proposal, and, with a view to promotion of U.S. environmental technology exports, we specifically proposed inclusion of a requirement that EPA circulate information to importing countries on environmentally

preferable alternative pest control methodologies. To date, we have not been involved in the PDVSA-RFG controversy.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITION

Senator Feinstein is likely to be concerned about trade and environment issues generally, the Uruguay Round and tuna-dolphin in particular.

Senator Leahy has long been concerned, in the context of reauthorization of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), with obtaining enactment of "Circle of Poison" legislation.

5. REFERENCE MATERIALS

USTR press release on adverse Gatt panel ruling in EU tuna-dolphin dispute.

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON, D.C.
20506

FOR IMMEDIATE RELEASE
Monday, May 23, 1994

Contact: 94-34
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**USTR KANTOR TO CHALLENGE GATT PANEL'S FAILURE
TO PROVIDE OPEN HEARINGS AND DUE PROCESS
REGARDING U.S. TUNA EMBARGOES, SUBSTANTIVE MATTERS**

On May 20, 1994, a dispute settlement panel under the General Agreement on Tariffs and Trade (GATT) issued a report stating that U.S. embargoes on imports of tuna under the Marine Mammal Protection Act of 1972 (MMPA) are inconsistent with U.S. obligations under the GATT. The panel was convened to review a complaint by the European Union and the Netherlands. The United States imposed these embargoes under the MMPA in order to bar imports of yellowfin tuna harvested in a manner that does not sufficiently protect dolphins, including tuna from countries that accept yellowfin tuna imports from countries whose dolphin protection measures are inconsistent with U.S. laws.

The United States will challenge the dispute settlement panel's failure to provide a fair hearing and due process, and will ask for a full review of the report, both substantively and procedurally, by the GATT Council, or reconsideration by the panel in this case. The GATT Council or panel should hold further proceedings in public and allow non-governmental organizations (NGOs) to participate. In addition, all documents filed from any source should be immediately made public.

Consultations with regard to all aspects of this situation are underway with Congress, labor organizations, environmental organizations, and business.

In preliminary reaction to the panel's findings, Ambassador Kantor declared: "The panel's report reinforces our commitment to full transparency in this and future proceedings. There is a need to look at current GATT rules to ensure that they do not impair nations' responsibilities, collectively and individually, to protect the global environment. The United States believes that strong and openly administered international trade rules, coupled with effective environmental protection, are essential to preserve a vigorous global trading system, on which the health of the U.S. economy depends."

Ambassador Kantor announced that "I have asked that every document related to this case be made available to the public immediately. We consider it absolutely essential that arguments in this case be fully, and openly considered. We will ask that the case be reheard

before a panel before which non-governmental organizations can make presentations and hear arguments, and that all documents related to the case be made public before the hearing."

Ambassador Kantor noted that the panel report has no effect on U.S. law. "Only Congress can change U.S. law, and it will be up to Congress and other interested parties in the United States to decide what legislative action, if any, is appropriate," he said.

While acknowledging that on first review this panel appears to have made some effort to take into account environmental considerations, the Ambassador nonetheless lamented the restrictive interpretation that the GATT panel's findings represent, and pledged that The United States will work actively in the new World Trade Organization's Committee on Trade and Environment to address these important and complex issues.

"Protecting the environment is an area in which we should have common interests and we should work to achieve common goals. In this context, we are encouraged both that a Committee on Trade and Environment has been established in the WTO, and that countries fishing in the Eastern Tropical Pacific have achieved drastic reductions in the level of dolphin mortality in this fishery and we believe that the MMPA has helped to focus international attention on the problem," stated Ambassador Kantor.

Ambassador Kantor noted that the damage to EC interests from the tuna embargoes is significantly less than \$1,000,000. He also pointed out that the European Union, which has supported U.S. efforts to sensitize the GATT to environmental considerations, has its own cases where they use trade measures in pursuit of environmental objectives. "This underscores the importance of finding solutions within the new WTO Committee on Trade and Environment to the challenge of reconciling trade and environment without jeopardizing either," he concluded.

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Divider Title: _____

THE NORTHERN SPOTTED OWL LITIGATION

1. ISSUE STATEMENT

Environmental groups interested in preservation of the remaining old growth forests in the Pacific Northwest have made the northern spotted owl the focal point of their efforts to halt timber harvesting on federal lands. Over the last six years, they have sued the Interior Department's Fish and Wildlife Service (FWS) to force a listing of the spotted owl under the Endangered Species Act (ESA), and sued the Agriculture Department's Forest Service and the Interior Department's Bureau of Land Management (BLM) to force revision of timber management plans, wildlife guidelines and to halt timber sales. As a consequence, timber harvesting on Forest Service lands in Washington, Oregon and Northern California within spotted owl habitat has been enjoined for most of the last three years. Seattle Audubon Society v. Moseley (now Lyons). In 1992, the BLM was also enjoined from offering further timber sales within spotted owl habitat lands it manages in Oregon. Portland Audubon Society v. Lyons (now Babbitt). Both of these injunctions were affirmed on appeal. Industry and affected local governments have participated as intervenors and have initiated litigation.

The Clinton Administration is attempting to resolve this situation administratively. It convened the Forest Summit in Portland, Oregon, in April 1993, established an interagency group to develop an ecosystem management strategy for all federal forests within the range of the northern spotted owl, and directed the Forest Service and BLM to prepare an ecosystem management plan. A labor and community assistance group was established to explore economic development and assistance proposals. An ecosystem group developed and assessed ten alternative management strategies for the federal old-growth forests in the region. On July 1, the preferred alternative strategy was proposed as the President's Forest Plan.

The Forest Plan establishes forest management guidelines for both Forest Service and BLM lands within the range of the northern spotted owl, and is intended to satisfy the requirements of all outstanding Court orders. In order to comply with Judge Dwyer's order in Seattle Audubon Society v. Moseley (now Lyons), directing the Forest Service to produce management guidelines to maintain the viability of the spotted owl, a Supplemental Environmental Impact Statement has been published and the Forest Plan has been submitted for judicial review.

Industry groups have obtained a ruling in the D.C. District Court that the ecosystem group as constituted violated the Federal Advisory Committee Act (FACA), and are now seeking to have the Forest Plan invalidated. Northwest Forest Resource Council v. Espy (D.D.C. March 21, 1994). On May 11, 1994, a coalition of industry groups and Oregon counties filed an action against the Department of the Interior alleging violations of the

FACA, National Environmental Policy Act (NEPA), and federal land management statutes in the adoption and implementation of the Forest Plan. Northwest Forest Resource Council v. Dombeck (D.D.C.). A new environmental group, Save the West, has filed a separate challenge to the Forest Plan in the Western District of Washington. Environmental plaintiffs have filed a supplemental complaint in Seattle Audubon Society v. Lyons (W.D. Wash.) challenging the Forest Plan. These environmental plaintiffs have not sought an preliminary injunction against the entire Forest Plan, but have alleged that the Plan fails to provide for the viability of the northern spotted owl and associated old-growth forest species.

Environmental plaintiffs have also successfully sued to compel listing of the marbled murrelet, another old growth avian species, as a threatened species under the Endangered Species Act and further claimed that the viability of the murrelet is not being maintained by the Forest Service. Most recently, they have added a claim to force a designation of marbled murrelet critical habitat under the ESA. Environmental groups have also brought litigation involving salmon runs, seeking to limit roading and timber harvest activities on the federal old growth forests of the Pacific Northwest.

In Douglas County v. Babbitt, a local government challenged the FWS designation of critical habitat for the northern spotted owl based on the failure to provide any NEPA documentation. The district court ruled against us, holding that NEPA does apply to the FWS designation of critical habitat, but has delayed entering an injunctive order. On appeal to the Ninth Circuit, intervenor environmental groups intend to argue for an injunction against all activity in potential critical habitat. Finally, the D.C. Circuit has ruled that the FWS exceeded its authority under the Endangered Species Act in prohibiting harm to the spotted owl through habitat modification, such as timber sales, holding that habitat modification does not constitute harm under the ESA.

2. STATUS

In the next few weeks we will be moving to transfer industry cases in D.D.C. to Judge Dwyer in the Western District of Washington, for consolidation with Seattle Audubon Society v. Lyons, and we will establish a briefing schedule before Judge Dwyer.

3. DEPARTMENT POSITION

We are representing the interests of the Department of the Interior and the Department of Agriculture's Forest Service.

4. JUDICIARY COMMITTEE MEMBERS' INTEREST/POSITIONS

Northern California is within the area of the Forest Plan and is also affected by the listing of the Sacramento River

Chinook salmon under the ESA. Senator Feinstein has not been outspoken on these issues.

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Divider Title: _____

**FEDERAL FACILITY COMPLIANCE WITH AND LIABILITY
UNDER ENVIRONMENTAL LAWS**

1. ISSUE STATEMENT

ENVIRONMENTAL MANAGEMENT REQUIREMENTS-- Federal agencies operate thousands of facilities that generate and discharge large amounts of hazardous substances, pollutants or contaminants into the air, water, soil and other environmental media. While the bulk of these facilities are operated by the Defense and Energy Departments and their contractors, virtually every other federal agency (including the Department through BOP, DEA etc.) operates facilities for which there are ongoing compliance requirements. These facilities must meet the same local, state and federal environmental requirements as private parties.

CIVIL PENALTIES-- In recent years, the courts have examined the issue of the extent to which the government has waived its immunity to the penalty provisions of the federal environmental statutes. In United States v. Ohio, the Supreme Court held the government had not waived its immunity to state or federal civil penalties in either the Resource Conservation and Recovery Act ("RCRA") or the Clean Water Act ("CWA"). Subsequently Congress passed the Federal Facilities Compliance Act of 1992 ("FFCA") which waives federal agencies' immunity to state and federal penalties under RCRA. Pending legislation (supported by the Department) will waive immunity to civil penalties under the CWA and Safe Drinking Water Act ("SDWA"), and expand the existing penalties waiver in the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA" or "Superfund") to include state civil penalties in addition to federal civil penalties. Although the Clean Air Act was amended in 1990, there was no change to the civil penalties waiver provisions. The only litigation under the CAA has been three district court cases in the mid-1980's which held immunity was waived. While the basis for the holding in all three cases has been substantially undercut by the recent Supreme Court decisions in Ohio and Nordic Industries, the issue has not been re-litigated under the CAA.

Although their record is improving, EPA data indicates that federal facilities continue to have a much higher rate of non-compliance than the private sector. This discrepancy is the result of a combination of factors, including older facilities, unique technical difficulties (particularly radioactive contamination at DOE facilities), uncertain future use (and thus reluctance to make infrastructure investments) at DOD facilities slated for closure, insufficient management attention, and budgetary constraints. The Environment Division currently has approximately 100 open case files involving judicial compliance claims or requests for compliance counseling at federal facilities, of which the bulk involve CWA compliance (49) or hazardous waste compliance (41). The Department represents federal agencies in litigation by states or citizen groups, but does not normally represent agencies in administrative tribunals.

The Department is not involved in administrative enforcement by EPA against other agencies except in the capacity of mediator or for the purpose of providing advise regarding legal interpretations to all agencies.

2. DEPARTMENT POSITION

The Department will defend client agencies against liability in compliance litigation brought by states or citizen groups only where there is a legitimate defense that the Department agrees could be asserted by private defendants in enforcement suits brought by the United States. Therefore, much of the representation in these compliance cases involves negotiating or litigating appropriate remedy, and the goal of the Department is to obtain a compliance schedule that returns the agency to compliance as quickly as reasonably possible in light of technical and financial limitations. An increasing number of these cases also involve defense against civil penalty claims, and we strive to apply the same civil penalty policies employed in federal enforcement actions. In addition, the Department provides assistance to EPA and other agencies in training personnel in environmental compliance. The Department is also actively involved with a White House policy group reviewing federal facility cleanups, and helps staff various federal agency compliance task forces.

3. JUDICIARY COMMITTEE MEMBERS' INTEREST/POSITIONS

Hank Brown:

Rocky Flats (Golden, CO). -- This facility is listed on the Superfund National Priorities List ("NPL"), and is undergoing a multi-million dollar cleanup. In addition, the facility is subject to a district court judgment imposing a schedule to obtain a state hazardous waste management permit, and a state Administrative Order on Consent regarding hazardous waste management activities. Both the judgment and AO impose stipulated civil penalties in the event of non-compliance by DOE. Although the Colorado Attorney General's office has recently touted Rocky Flats as an example of a good working relationship with federal facilities, we can expect future tensions with the State regarding which statutory authorities control cleanup decisions--CERCLA, or state law. This facility was also the subject of an environmental crimes enforcement action against Rockwell, Inc., DOE's former contractor, and continues to generate controversy.

Rocky Mountain Arsenal (CO.) -- This facility is also on the Superfund NPL and undergoing a multi-billion dollar cleanup. Although the state of Colorado has been actively reviewing and commenting on all aspects of the cleanup, there has been bitter litigation regarding which sovereign has the ultimate control in setting making cleanup decisions. The Supreme Court recently denied the Department's petition for certiorari in U.S. v. Colo-

rado regarding the Tenth Circuit's decision which held the State could independently enforce certain of its hazardous wastes laws at the facility despite the ongoing CERCLA cleanup. We are attempting to resolve that litigation after remand from the Tenth Circuit, but the State has already filed an action seeking to challenge a draft CERCLA Record of Decision. We expect similar challenges to each of the multiple cleanup decisions to be made at the facility. The Department also recently filed an action against the Colorado Department of Health challenging a water quality standard as being arbitrary and capricious (EPA has set a level of 600 PPB, and the State without valid scientific basis set a level of 8 PPB). Nevertheless, we are attempting to use the Supreme Court's decision as an opportunity to convince the State to take a more positive role in reviewing and participating in ongoing Arsenal cleanup decisions and to see if we can limit litigation.

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MINING LAW REFORM

1. ISSUE STATEMENT

The Mining Law of 1872 governs the management of mining on the Nation's public lands. This frontier-era law is seriously outdated. It allows the extraction of minerals from public land without royalty payments and allows valuable mineral land to be purchased for \$2.50 or \$5 per acre. (Recently, for example, the Secretary of the Interior was required by the law to sign over fee-simple title to mineral lands in Nevada worth about \$10 billion in exchange for about \$9,000.) Moreover, while mining operations must comply with some environmental laws, the federal government cannot prevent a mining claim from being developed and the 1872 Mining Law has no provisions allowing federal land managers to control environmentally destructive mining practices. Because environmental controls and standards have been inadequate, one of the largest environmental remediation costs on federal lands will be the cost of cleaning up abandoned mine sites. The General Accounting Office estimated that more than 400,000 acres of federal lands are affected by unreclaimed mine sites. The "Deep Pockets" report of the House Natural Resources Committee states a conservative estimate of the total federal clean-up liability at \$2.4 billion.

The Mineral Exploration and Development Act, H.R. 322, would repeal the current system for the location of mining claims on public lands, under the 1872 Mining Law. The House passed H.R. 322 in November by a wide margin. To move mining law reform to Conference Committee, the Senate passed an industry-drafted "ticket to conference" that is not considered to be the Senate proposal. The Senate conferees are developing a Chairman's Mark, a sparse bill for use in negotiation with the House.

The House bill and the Chairman's Mark generally agree on the broad outlines for reform, but the Chairman's Mark is less detailed and less prescriptive. On the sale of federal mineral lands, or "patent," the House bill would retroactively eliminate patents, while the Senate bill would change the patent to a mineral estate that is subject to royalty and other regulations and would revert to the United States at the conclusion of mining. Both bills would require operations permits for mining on federal land, but the House bill provides specific environmental protection standards while the Senate bill would leave those standards to be defined by regulation. The House bill would rely primarily on administrative enforcement, with the Department of Justice supporting thorough judicial enforcement of agency orders and criminal sanctions for knowing violations. The Senate bill provides for civil enforcement as an alternative to administrative enforcement, but limits criminal sanctions to "knowing and willful" violations.

2. STATUS

Conferees have been named, and the conference is expected to begin soon. The Senate conferees are Senators Johnston (the Chairman), Bradley, Bumpers, Akaka, Craig, Wallop, and Murkowski.

3. DEPARTMENT POSITION

There is no administration bill on mining law reform. Interior Secretary Bruce Babbitt has identified mining law reform as one of his highest legislative priorities, but has avoided articulating a position on any specific reform proposal.

The final House bill's regulatory regime is an improvement over the original House bill but would be difficult to enforce, and its provisions for judicial review invite extensive litigation. As with most other environmental statutes, our objectives are an enforcement structure that:

- is capable of responding quickly and effectively to violations;
- deters violations by requiring violators to pay a minimum of the economic gain of their violations (the polluter pays principle);
- provides for administrative enforcement, with a cap on administrative penalties.

We have made substantial progress working with Interior Solicitor John Leshy to address these issues and plan to work closely with the conferees.

4. JUDICIARY COMMITTEE MEMBERS' INTEREST/POSITIONS

None of the members of the Judiciary Committee is on the conference committee for mining law reform. Senators DeConcini, Brown and Simpson have signed a letter urging Chairman Johnston to ensure that the final bill developed by the conferees encourages responsible mining on the public lands.

5. REFERENCE MATERIALS

- o Senators' letter to the Chairman of the Senate Conference.
- o DOJ's draft position on the original House bill.

A. BENNETT JOHNSTON, Chairman, Senate

DALE BLANCHARD, Arkansas
MICHAEL H. FORD, Kentucky
BILL BRADLEY, New Jersey
JOHN DEDAMIAN, New Mexico
BARBARA S. ADAMS, Nevada
RICHARD S. SHELLEY, Alabama
DANA CHRISTENSEN, Minnesota
JAN MONTGOMERY DASSPALL, Colorado
NAGHAN BATHURGE, Tennessee
BYRON L. DONAH, North Dakota

DALE W. WALLACE, Wyoming
MARK D. HATFIELD, Oregon
PETER V. DOMINICK, New Mexico
FRANK R. RUDOLPH, Alaska
DON NICKLES, Oklahoma
LARRY E. CRAIG, Idaho
ROBERT F. BENNETT, Utah
ARLEN SPECTER, Pennsylvania
TERRY LOTT, Mississippi

STEPHEN E. COOPER, STAFF SECRETARY
B. MICHAEL HARTLEY, CHIEF COUNSEL
E. ROBERT WALLACE, STAFF DIRECTOR FOR THE SENATE
MARY E. BLANDFORTH, CHIEF COUNSEL FOR THE SENATE

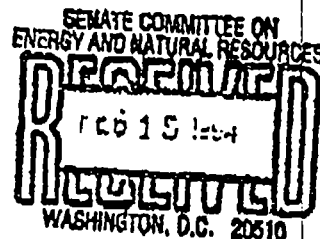
United States Senate

COMMITTEE ON
ENERGY AND NATURAL RESOURCES

WASHINGTON, DC 20510-8180

January 26, 1994

The Honorable J. Bennett Johnston
Chairman
Energy & Natural Resources Committee
United States Senate
Washington, DC 20510



Dear Mr. Chairman:

During the first session of Congress, the Senate and House passed bills to revise the 1872 Mining Law (S. 775 and H.R. 322). As you know, these bills differ greatly in their approach, impact on jobs, and the future of mining on public lands.

In your role as Chairman of the Senate Conference, we urge you to ensure that the final bill developed by the conferees, while correcting legitimate deficiencies in the current law, encourages responsible mining on the public lands. As you are aware, much of the hardrock mining in the United States occurs in remote locations on public lands in the West, where alternate means of employment and economic growth are often limited.

While there are a number of issues to be resolved in crafting a final bill, we believe the most efficient way to resolve this matter is to identify those issues which must be addressed and begin to find reasonable solutions in the conference.

The major areas of concern that deserve careful and deliberate attention include:

- o Reform that amends the existing Mining Law without unnecessary impairment of the invaluable body of judicial, administrative and regulatory precedents that provide stability and predictability to mineral titles;
- o Corrections to patenting concerns without jeopardizing security of title necessary to make long-term financial commitments to develop a mining claim;
- o A net royalty that provides a fair economic return to the government while recognizing the cyclical nature of mineral prices, associated risks, industry profitability and the need to maintain a viable domestic mining industry;

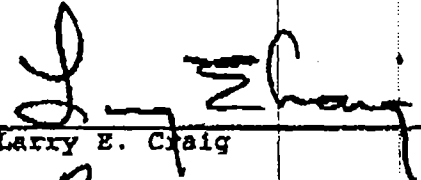
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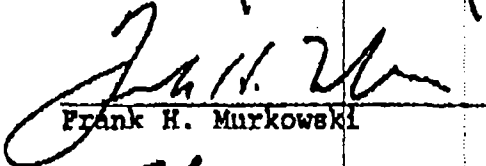
- o A regulatory regime for reclamation that recognizes the existing state/federal framework, is economically practicable, allows for site-specific flexibility, and recognizes appropriate state authority;
- o Provisions that preserve valid existing rights while allowing for an orderly transition under the new law that distinguishes between existing and new mining operations;
- o Consideration of the special needs and requirements of small miners;
- o Achievable permit procedures that do not generate unnecessary delay or duplication;
- o Provisions that reflect the specific nature of hardrock mining rather than SMCRA requirements for coal.

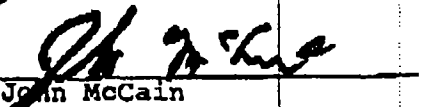
We believe a fair reform based on these principles will promote early passage without extended debate in the Senate.

We appreciate your leadership on this critical issue, and look forward to working with you to ensure balanced, fair and workable legislation. It is essential that jobs and the economic viability of the domestic mining industry be preserved in the final legislation.

Sincerely,


Larry E. Craig


Frank H. Murkowski

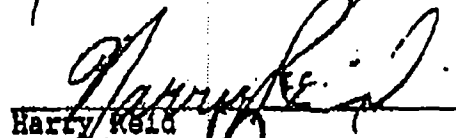

John McCain

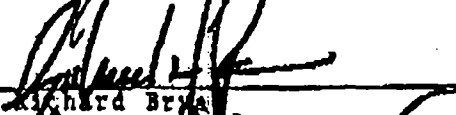

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Conrad Burns


David L. Boren

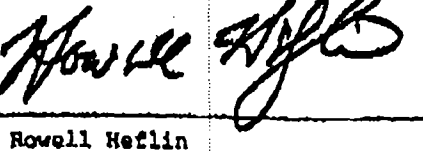

Malcolm Wallop


Harry Reid


Richard Bryan


Ben Ray Lujan


Dennis DeConcini


Howell Heflin

5/3/94

CHAIRMAN'S MARK**1. MINING CLAIMS**

- a. Located at miner's initiative on lands open to location. Each claim is no more than 40 acres in size, located in accordance with the public land survey.

2. PATENTING

- a. Patents granted to the hardrock mineral estate only.
 - i. Surface remains in Federal ownership;
 - ii. miner may apply for patent only after Secretary makes determination regarding use of land for mining;
 - iii. patent subject to royalty, as established in the Act;
 - iv. patent reverts to United States after mining and reclamation is completed.

3. SURFACE MANAGEMENT

- a. No notice required for mineral activities which cause less than a minimal disturbance to the environment. Secretary may define by regulation categories of activities not requiring notice, such as claim location.
- b. Notice of intention to operate required for activities causing a minimal disturbance to the environment.
 - i. "Minimal disturbance" is defined as minor, short-term alteration of the environment.
- c. Exploration permit shall be required for exploration activities causing more than minimal disturbance to the environment. An application for an exploration permit shall include exploration and reclamation plans for the exploration phase of mining and such information as the Secretary requires by regulation.
 - i. The Secretary shall approve a permit application and issue such exploration permit if the application is in compliance with the requirements of the Act (including the reclamation provisions or any modification of such provisions pursuant to such section), any regulations promulgated pursuant to the Act, and other applicable law. The Secretary may reasonably condition the approval of such a permit.

- d. The Secretary shall have up to 1 year from the date the exploration permit application is filed to review the lands included in such permit (as well as lands onto which mineral activity may expand). No rights in the claim as against the Federal government shall vest prior to the determination required by this section. The Secretary shall make the following determinations:

- i. whether mining activities would have a substantial adverse effect on a significant water resource that cannot be mitigated; or
- ii. whether mining activities would significantly degrade the values for which a National Conservation System unit located in close proximity to the mining activities was established.

h. "National Conservation System" means any unit of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Trails System, or a National Conservation Area, National Recreation Area, a National Forest Monument or the National Wilderness Preservation System.

- e. i. The Secretary shall publish in the Federal Register notification that a exploration permit application has been received and that the Secretary is beginning the review of the area.
- ii. The notice shall provide for a 6 month period for comments and requests for hearings. The Secretary may determine, during such comment period, that a public hearing or hearings be held, except that if at the end of such comment period no request for a hearing has been made, no hearing shall be required.
- iii. The Secretary shall publish a final determination in the Federal Register no later than one year after the filing of the exploration permit application. Any final decision by the Secretary shall be reviewable pursuant to the Administrative Procedures Act. The Secretarial review and determination shall not be subject to the requirements of the National Environmental Policy Act.
- iv. The Secretary shall prohibit mining only if the Secretary makes an affirmative determination

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within one year of the filing of the exploration permit that either of the above criteria (d.i. or ii.) are met. If an affirmative determination is made, the Secretary shall prohibit mining in the area and shall publish such prohibition in the Federal Register, subject to any review under the Administrative Procedures Act.

- f. A mining permit shall be required for mining activities. An application for a mining permit shall include mining and reclamation plans.
 - i. The Secretary shall approve a permit application and issue such mining permit if the application is in compliance with the requirements of the Act (including the reclamation provisions), any regulations promulgated pursuant to the Act, and other applicable law. The Secretary may reasonably condition such permit approval in accordance with this Act.
- g. The Secretary shall not issue a permit or approve the assignment of any permit to any person, association, corporation, or any subsidiary, affiliate, or person controlled by or under common control with such person, association or corporation, during any period in which such entity has violated in any material respect the reclamation requirements and other standards established under this title for any prior permit issued pursuant to this Act. Prior to making such determination, the Secretary shall provide notification and an opportunity to comply with such requirements and shall consider whether any administrative or judicial appeal is pending. Once the entity has complied with the requirement concerned a permit may be issued.
 - i. "control" is defined as having the ability, through any means, to determine the manner in which an entity conducts mineral activities.

4. OPERATION AND RECLAMATION STANDARDS

- a. Mineral activities shall employ the best technology currently available to minimize adverse impact to the environment.
- b. To the extent possible, and using the best technology currently available, the operator shall reclaim lands subject to mineral activities to a condition capable of supporting the uses which such lands were capable of supporting prior to surface disturbance by the operator

unless there are other beneficial uses that are consistent with the applicable land use plan.

- i. "Best technology current available" (BTCA) means equipment, devices, methods, etc., which have demonstrated engineering and economic feasibility, success and practicality. The Secretary may determine the BTCA on a case-by-case basis.
- c. The Secretary shall require all operators to develop and maintain an appropriate monitoring and evaluation system to monitor compliance with all surface management requirements.
- d. The Secretary shall, by regulation, establish operating and reclamation standards, based on the standard in subsection (b). Such operating and reclamation standards shall address the following:
 - i. segregation, protection and replacement of topsoil or best available growth medium;
 - ii. maintenance of stability of all slopes and soils;
 - iii. revegetation;
 - iv. reclamation of roads and other transportation and conveyance facilities;
 - v. protection and reclamation of surface and ground water quality and quantity;
 - vi. sealing, backfilling or other control of all drill holes and openings on the surface associated with underground mineral activities;
 - vii. safe disposal of hazardous and toxic materials;
 - viii. leach pad stabilization and neutralization;
 - ix. recontouring of dumps, heaps, and other disturbances to minimize visual impact and blend the mining area to natural topography, except that open pits shall not be required to be backfilled unless it is economically feasible and practical.
 - x. removal and disposal of all structures and equipment; and
 - xi. use of necessary erosion control structures, diversions or other measures.

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- b. The Secretary may modify by regulation the reclamation requirements of this section for exploration permits, based on the extent and impact of exploration activities, but shall still require that areas disturbed by exploration be fully reclaimed.

6. FINANCIAL ASSURANCE

- a. Prior to the commencement of any operations requiring an exploration or mining permit, the operator shall furnish evidence of a bond, surety, or other financial assurance (including the use of bonding pools) in an amount determined by the Secretary that is not less than the estimated cost to complete reclamation as required by this Act.
- b. Not later than 5 years after an assurance is provided, and at least each 5 years thereafter, the Secretary shall review the financial assurance.
- c. The Secretary may adjust the amount of the financial assurance upon a determination by the Secretary that a portion of the reclamation is completed as required by this Act. Prior to any reduction in, or final release of, a financial assurance, the Secretary shall provide for public notice and comment.

7. STATE AND FEDERAL ROLES

- a. Any state reclamation, financial guarantee, or inspection standard or requirement that meets or exceeds the requirements of the bill shall not be construed to be inconsistent with the bill.
- b. The Secretary may enter into a cooperative agreement with a state for joint administration of the following provisions:
- i. permitting, operations and bonding
 - ii. reclamation
 - iii. inspection and enforcement
 - iv. abandoned mine program
- c. All decisions and reviews regarding land use planning or the siting of mineral activities shall be made by the Secretary.
- d. A state and the Secretary may jointly permit mineral activities affecting federal lands. The state and the Secretary may decide that either the state or the Secretary shall be the lead agency, based on factors such as surface ownership. The state may, and the

Secretary shall, make an independent decision regarding permit issuance.

- e. The financial guarantee for reclamation shall be calculated based on the completion of both the federal and state reclamation requirements, and may be held as one bond, payable to both the federal and state agency. The financial guarantee requires approval of both the Secretary and the state prior to permit issuance, and cannot be released without concurrence by both agencies.
- f. The state may conduct inspections, monitoring activities and enforcement actions deemed necessary to comply with the requirements of the Act. The Secretary shall conduct 1 complete inspection each year for mineral activities on Federal land, and shall take any enforcement action required by this Act if any violations are observed during such inspection.
- g. Secretary shall provide grants to states to cover certain administrative costs.

8. ROYALTY

- a. A gross royalty, minimum 2%, indexed for increases in the realized price of gold and copper.

For gold:

2% of the first \$300/oz., plus
7% of the next increment in price up to \$375, plus
12.5% of the next increment in price up to \$475, plus
35% of any additional increment over \$475.

For copper:

2% of the first \$.70/lb., plus
7% of the next increment in price up to \$.85; plus
12.5% of the next increment up to \$1.05, plus
35% of any additional increment over \$1.05.

The royalty schedule shall apply to the range of gold and copper prices after adjustment using the GNP price deflator on January 1 of each year.

- b. For other minerals, a 2% gross royalty shall apply, unless otherwise adjusted by the Secretary.
- c. A mine operator may apply for relief from the royalty provisions of subsection (a). The Secretary shall grant royalty relief if the Secretary determines that

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the total annual royalty obligation of an operator for a mine is more than the annual gross revenue from such mine (defined as the realized price per ounce times number of units produced) minus the following costs of such mine:

- o smelting, refining and transportation costs;
- o mine operating costs;
- o allocated general and administrative costs; and
- o taxes.

If the mine qualifies, the Secretary shall limit the royalty obligation for that year to the difference of gross revenues less the above costs.

- d. The royalty shall be phased in over three years.
- e. The Secretary is authorized to provide for a reduction in the royalty rate in order to promote development and ensure maximum recovery of resources.

9. INSPECTIONS AND ENFORCEMENT

- a. Inspections: Subject to section x (state and federal roles), the Secretary shall conduct a complete inspection of all operations subject to mining plans once each calendar quarter to ensure compliance with the terms of the approved plan, the Act and regulations implementing the Act. The Secretary may conduct inspections more frequently than once each calendar quarter.
- b. Enforcement:
 - i. Provide for notice of violations for violations of permits, Act or regulations, except for de minimus violations.
 - ii. Provide for reasonable period of time to abate violation prior to penalties being assessed.
 - iii. Provide for penalties and cessation orders if violations not abated within time period.
 - iv. Provide for hearing on the record for anyone issued a notice or a cessation order.
 - v. Provide for forfeiture of financial assurance.
 - vi. Provide for civil action for failure to comply with a cessation order.

- vii. Provide for criminal penalties for knowing and willful violations.
- viii. Provide for liability of corporate officers and agents for violations by corporation.
- iv. Provide for judicial review of actions by the Secretary.

10. TRANSITION RULES

- a. New claims -- Any mining claim located after the date of enactment of this Act shall be subject to the requirements of this Act.
- b. Patents
 - i. Claims for which a patent application had been submitted and rights to a patent have vested prior to the date of enactment of this Act may receive a patent pursuant to the law in effect prior the enactment of this Act.
 - ii. All other claims may receive a patent only in accordance with the provisions of this Act.
- c. Surface management requirements
 - i. Claims without existing plans or notices -- Mining claims for which a plan of operation or a notice have not been filed prior to May 5, 1994 shall be subject to the surface management provisions of the Act upon the date of enactment of the Act.
 - ii. Existing plans or notices -- reclamation requirements
 - A. If a plan of operations or notice had been submitted or approved prior to May 5, 1994, the operator shall have up to 9 months to submit to the Secretary a description of reclamation measures being undertaken at the site together with an explanation as to whether those reclamation measures comply with the standards of this Act and regulations promulgated pursuant to this Act.
 - B. If the Secretary finds that the measures are not in compliance, the operator shall either make the necessary changes or apply for a variance as to the new reclamation requirements.

- C. The Secretary shall grant the variance if the operator demonstrates that the changes necessary for compliance are economically or physically impracticable, unless the Secretary determines that the variance will pose a significant threat to public health and safety.
- D. The Secretary shall determine whether any existing financial assurance is in substantial compliance with this Act. If the Secretary finds that it is not in substantial compliance, the Secretary shall require that the operator provide financial assurance in substantial compliance with this Act.
- E. Claims for which a right to patent under law existing prior to the date of enactment of this Act has vested shall not be subject to the surface management requirements of this Act.

iii. Review of lands

- A. If a notice OR plan of operations (as provided for under Bureau of Land Management or Forest Service regulations in effect prior to enactment of this Act) has not been filed prior to May 1, 1994, the claim is subject to the review of lands triggered by the filing of the exploration permit.
- B. If such notice OR plan of operations has been filed prior to May 1, 1994, or if substantial legal and financial commitments have been made by such date, the review of lands provisions shall not apply to such claims.

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Divider Title: _____

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

1. ISSUE STATEMENT

CERCLA was due for reauthorization in 1991, and another major revision of the statute was anticipated. Congress unexpectedly extended authorization and funding through fiscal year 1994 in the Budget Reconciliation Act of 1990. This reauthorization did not change any provisions of the statute. Congressional committees with Superfund oversight jurisdiction held a series of hearings in the latter half of 1993, in anticipation of an Administration reauthorization bill. In August, 1993, the Administration established an Interagency Policy Committee to develop the bill, and EPA Administrator Browner convened a Superfund Evaluation subcommittee, chaired by Nature Conservancy President John Sawhill, under the auspices of the National Advisory Commission on Environmental Policy and Technology (NACEPT). The recommendations of these groups were then further revised in light of recommendations by the National Commission on Superfund, which had been convened by the Keystone Center and the University of Vermont Law School. The National Commission released its report in early January.

These efforts culminated in the introduction of the Administration's bill on February 3, 1994, by Rep. Al Swift (D-Wash.) in the House and Frank Lautenberg (D-N.J.) in the Senate. The Environment Division participated extensively with EPA (and with the assistance of OLA) in drafting the bill and in briefing committee staff on its merits. In broad outline, the purposes of the major reforms are as follows:

- o to speed the pace of cleanup through the use of generic remedies and formulaic cleanup levels, and through elimination of the statutory preference for permanence and treatment.
- o to reduce the cost of cleanup by increased consideration of future land use in setting cleanup levels.
- o to make the liability scheme fairer by exempting certain parties, providing orphan share funding to settlers, and establishing an allocation scheme preceded by expedited settlements with de minimis parties, ability to pay parties, and others.
- o to enhance state roles by providing for delegation of cleanup responsibility for selected NPL sites or the entire program to states.
- o to increase community participation through the creation of community working groups at each site.

o to facilitate economic redevelopment and the use of innovative technology.

2. STATUS

After initial support for the bill waned amidst controversy between industrial and environmental groups, the Administration convened representatives from a broad array of groups concerned about Superfund (including industrial, environmental, community, and state organizations), and on the basis of this process developed a revised Administration bill with broad political support. This bill was then introduced by Al Swift (D-Wash.), chairman of the subcommittee on Transportation and Hazardous Materials of the House Energy and Commerce Committee, who proceeded immediately to a markup of the Administration's revised Superfund Reform proposal. After minor amendments that generally are not in conflict with the Administration's position, the subcommittee reported out the bill to the full committee by a vote of 21-0. The full Energy and Commerce Committee, on May 18, 1994, reported out the bill with further (but also minor) amendments by a vote of 44-0. We are now awaiting action by the subcommittee on Superfund, Ocean, and Water Protection of the Senate Committee on Environment and Public Works, as well as by other committees to which the bill has been referred.

3. DEPARTMENT POSITION

The Department, which handles all judicial enforcement of CERCLA's liability scheme, has primarily been concerned with ensuring the retention of the principles of joint-and-several liability that make the liability scheme administrable. While the Department took the lead in crafting the major proposals in the bill on liability and allocation, we remain concerned that major changes may threaten our ability to conduct an effective enforcement program under the statute. In addition, in our alternate role of defending federal agencies named as defendants in CERCLA actions, we have been striving to make sure that these agencies are not treated less fairly than other responsible parties under the statute.

4. JUDICIARY COMMITTEE MEMBERS' INTEREST/POSITIONS

Senator Mosely-Braun has been under considerable pressure to endorse a proposal, which is supported by NAACP President Benjamin Chavis, to eliminate Superfund's liability scheme in favor of a massive new public works program to clean up abandoned hazardous waste sites. This proposal, known as the ASAP proposal (Alliance for a Superfund Action Partnership), would place greater emphasis on sites in minority and disadvantaged communities. Thus far, the Administration has successfully prevailed on the Senator not to make the endorsement, and has tried to persuade her that the Administration's compromise proposal contains adequate provisions to address the issues she

has raised and to work with the Senator to make any needed improvements.

Senator Simpson has expressed considerable unhappiness with efforts to push through a Superfund package in this Congress, a reluctance attributable to 1) his opposition to CERCLA's retroactive liability scheme; 2) his solicitude for mining interests that may be adversely affected by the legislation; and 3) partisan efforts to embarrass Superfund subcommittee chairman Senator Lautenberg, who faces a close re-election fight in New Jersey. In addition, Simpson specifically has complained about provisions in the compromise bill that expand EPA's authority to address pollutants and contaminants (CERCLA generally is limited to listed hazardous substances), and about excessively conservative risk decisions in the Superfund program.

Several Senators on the committee have taken an interest in specific Superfund sites within their states. For example, Senator Simon was concerned about the effect of South East Rockford Superfund site on the economy of Rockford, Illinois. Senator Brown has expressed concern about the site at Smuggler Mountain in northeast Aspen, Colorado.

In addition, two Senators have interests that bear indirectly on Superfund. Senator Heflin has introduced bankruptcy reform legislation that might affect both Superfund liability cases and requirements of ongoing compliance with environmental laws. Senator Kohl has a particular interest in tort reform, and periodically asks nominees their views on joint and several liability. As a joint and several liability scheme, CERCLA may give rise to such questions.

4. REFERENCE MATERIALS

o Administration Summary of the Revised Superfund Reauthorization Reforms (May 4, 1994).

SUMMARY OF SUPERFUND REAUTHORIZATION REFORMS

In February 1994, H.R.3800/S.1834 (the "Bill") was introduced to reform the Superfund program. Titles I and V of the Bill have been revised to capture the Administration's understanding of the agreements reached during the remedy selection negotiations convened by Congressman Swift as well as the Administration's interpretation of the existing common ground on issues not resolved during the negotiations; Titles IV and VIII have been revised based on discussions between the Administration and various stakeholders (the "Revision" or the "Revised Title"). This summary describes the major features of Titles I, IV, V and VIII of the Bill and compares them to their respective revisions.

TITLE I -- COMMUNITY PARTICIPATION AND HUMAN HEALTH CONCERNS

A. COMMUNITY INVOLVEMENT

1. Issue

Many communities near Superfund sites, including low income, minority and Indian communities, feel that they are not provided the opportunity to fully participate in the Superfund process. These and other communities believe that the program does not address local concerns adequately when addressing risk or determining the method and level of cleanup, particularly with respect to future use of land. Affected stakeholders sometimes voice concern **that** opportunities for their involvement in site activities come too late in the process and **that** their input has little impact on cleanup decisions. There is a general consensus **that** opportunities for earlier, direct and regular community involvement would enhance community participation throughout the cleanup process.

2. General Overview of the Proposal

The Bill and the Revised Title are based on the principle that communities must be involved in the cleanup process from early on in the process until a site is completely remediated. The Bill sets out several innovative methods for getting communities involved in the cleanup process. Community Work Groups (CWG) would be formed to promote early,

direct and meaningful public participation throughout the Superfund process. In addition, communities' access to information would be facilitated through the establishment of Citizen Information and Access Offices (CIAOs) in each state and tribal land affected by a Superfund site. The Revised Title enhances these approaches.

Soliciting and evaluating community views would occur as early in the Superfund process, under both the Bill and the Revised Title. The Community's views and preferences on remedies would also be solicited earlier (i.e., prior to the feasibility study), providing an up-front opportunity to participate in and influence the remedy selection process. Their views could then be considered in the development of remedial alternatives for the site. Consideration of the public's recommendations once a preferred remedial action is proposed would continue to occur. The revised title also provides opportunities for the public to participate in technical meetings between the government and potentially responsible parties (PRPs).

a. COMMUNITY WORK GROUPS

Under the Bill and the Revised Title, the CWG would assist in distributing information to the affected community, assist in establishing land use expectations more reliably, and obtain greater community support for remedial decisions affecting future land use. As a result, the community's preference with respect to land use would be considered in the development of remedial alternatives for the site. A hierarchy is established for considering future land use recommendations. When the CWG reaches consensus on future land use, their recommendations would be given substantial weight in remedy selection. If there is substantive disagreement within the CWG, then the government would attempt to reconcile the differences. If disagreement continues, then substantial weight would be given to the views of residents of the affected community.

The remedy selection process has also been modified to account for the community's acceptance of a remedial alternative, during the evaluation of alternatives, including the alternative's ability to achieve the community's preferred future land use. Accordingly, the opportunity for community input is more meaningful in that it occurs prior to the proposal of a preferred remedial action plan by the government.

The Bill contains guidelines for establishing CWGs, including that membership should generally not **exceed** twenty people who serve on the board without pay. The Administrator would solicit **nominations** and make the ultimate selection of CWG members. Notice and opportunity to **participate** would be given to people who potentially are affected by site contamination in the community. Special efforts would also be made to ensure that the composition of the CWG reflects the racial, ethnic and economic makeup of the community. The government would attend and participate in CWG meetings in a technical advisory capacity as appropriate, but would not serve on the board. This would allow the CWG to function independently of the government, while providing access to government officials when needed. The Revised Title modifies the Bill by requiring that at least fifty percent of

the members on the CWG are local residents. The revision also facilitates CWG meetings by providing administrative and technical support through EPA and State participation and exempts CWG from the Federal Advisory Committee Act, but requires the development of guidelines for meeting requirements.

b. CITIZENS INFORMATION AND ACCESS OFFICES

Under both the Bill and the Revised Title, a CIAO is established in each State to provide citizens and elected officials with information about sites and the Superfund program as well as ensure wide distribution of information that is easily understood by citizens. The CIAO would also assist in notifying, nominating and selecting potential CWG members. The CIAO is not to be a government agency, but rather an independent, tax exempt organization supported by federal monies. CIAO program funding could not exceed \$50 million per year. Funds would be distributed among the States based on a formula using such factors as the number and complexity of sites. If a CIAO has not been established within 18 months, EPA would set up an office to perform its functions until a CIAO is established.

The Revised Title expands the role of CIAOs to serve as a broker to facilitate agreement between EPA and the CWG when there are conflicting views on risk posed by a site. When agreement is not reached the CIAO provides both views to the public. The procedures for establishing the CIAO also differ from the Bill. The Revised Title requires the CIAO to be an independent, nongovernmental office with a Governing Board of 7-15 people appointed by the Governor. The Board would be responsible for the management of the CIAO, with half of its appointees from communities affected by non-National Priorities List sites and the other half affected by National Priorities List (NPL) sites. Performance of the CIAO would be monitored through annual reporting by the Governor, or EPA Regional Administrator where a CIAO is not established, to the Administrator and periodic audits by EPA's Inspector General. Two successive negative audits would result in termination of the CIAO.

These changes to the current Superfund law would enhance and increase community input into the decision-making process by providing opportunities for earlier, direct and regular community involvement. Establishing CWGs and CIAOs plays a critical role in accomplishing this objective. Changes in the remedy selection process have also been made which increase the significance of community acceptance in determining an appropriate remedy for a site.

c. TECHNICAL ASSISTANCE GRANTS

The Revised Title establishes a funding ceiling of approximately \$60M with up to approximately \$7.5M of the funds used for non-NPL sites. The revision also increases accessibility of TAGs by eliminating matching fund requirements and authorizing forward funding of expenditures in \$5000 increments.

B. ENVIRONMENTAL JUSTICE PROPOSAL

1. Issue

Environmental Justice focuses on the needs of disadvantaged communities. These communities face not only risks from uncontrolled toxic waste sites, but also from multiple sources of pollution (e.g., air emissions from nearby manufacturing plants). EPA, however, has not traditionally taken into account multiple environmental stresses from sources other than the site when setting priorities and evaluating risk under the Superfund program.

2. General Overview of the Proposal

The Bill and the Revised Title seek to respond to evidence that disadvantaged communities, whether urban, rural or tribal, bear a disproportionate share of environmental risk. Priority setting would be changed to account for the presence of disproportionate risk.

a. ENVIRONMENTAL JUSTICE CONCERNS IN PRIORITY SETTING

Similar to the Bill, the Revised Title would amend priority setting to take into account the potential for disproportionate risk. The revision simplifies the procedure for considering the history of exposure and the presence of multiple sites affecting the same population in placing sites on the NPL. Sites that are placed on the NPL qualify for additional funding to address long-term risks.

b. ENVIRONMENTAL JUSTICE STUDY

The Environmental Justice Study in the Bill was modified from requiring performance of demonstration projects to requiring the conduct of a comparative analysis of priority setting, response actions and public participation activities along population, race, ethnicity, and income characteristics. The study would be performed every two years and would be used to determine if such activities were conducted in a fair and equitable manner. Corrective action would be mandated based on the results of the study.

By taking into account the history of exposure and multiple sources of contamination to the same population when setting priorities, the Revised Title places increased emphasis on responding to environmental issues of disadvantaged communities that bear a disproportionate share of environmental risk.

TITLE IV – THE LIABILITY SCHEME

A. PROPOSALS TO INCREASE FAIRNESS AND REDUCE TRANSACTION COSTS IN IMPLEMENTING THE LIABILITY SCHEME

1. Issues

CERCLA currently makes those who caused or were associated with contamination liable to finance or conduct cleanup. Liability is strict, joint and several, and retroactive. EPA has used the statute to obtain a large proportion of current cleanups. The liability scheme has resulted in 72% of new Remedial Actions being undertaken by responsible parties in the 1992 fiscal year. EPA has obtained over \$8 billion in responsible party commitments to do response work since 1980. Many claim that the Superfund liability scheme has positively modified behavior respecting waste disposal.

On the other hand, the Superfund liability scheme has provoked considerable criticism. These criticisms fall roughly into three categories. First, liable parties commonly complain that the strict, joint and several, retroactive liability scheme is unfair, principally on grounds that it imposes costs on a liable party which may exceed its proportional "share" of the costs of clean up, and that it imposes liability for acts which may have been legal when taken. The impact on small waste contributors may be most acute, because often they are least able to bear the costs of cleanup.

Second, parties often complain that implementation of the statute imposes heavy transaction costs on them. These costs primarily arise from disputes between and among liable parties over their allocation of cost shares, often by way of contribution litigation, and secondarily from coverage disputes between liable parties and their insurers.

Finally, many complain about the broad scope of the liability scheme, and about its unintended effects. For example, one of the unintended effects of the Superfund liability scheme is that many truly small waste contributors, who are technically liable but rarely the subject of EPA enforcement, are drawn into litigation through contribution suits brought by larger liable parties. Municipalities which are generators and transporters of Municipal Solid Waste ("MSW") also claim that they are unintended victims of the liability scheme. Concern is also expressed that Superfund may discourage economic redevelopment of contaminated properties. Finally, prior to promulgation of EPA's lender rule, lenders claimed their normal lending practices could be chilled in some cases because of potential Superfund liability exposure, and trustees complain about potential liability exposure in their activities.

2. Overview of the Proposal

In addition to the government's proposed allocation scheme set forth in IV.B. below, the Bill and the Revised Title make adjustments to the Superfund liability provisions to

increase overall fairness and efficiency and to reduce transaction costs for all, especially those least able to bear them.

To increase the liability scheme's fairness and efficiency, and to reduce transaction costs, the Bill and Revised Title make substantial improvements in the manner in which the current liability scheme is implemented. Such improvements include exemptions for "de micromis" parties, expedited settlements for de minimis parties, limits on the liability of MSW generators and transporters, protection for lenders and trustees, a mandatory cost allocation process (including assignment to the government of a major portion of the "orphan share"), opportunities for finality in settlement and protection for prospective purchasers of property.

3. SPECIFIC PROPOSALS

a. Truly Tiny Parties ("De Micromis" Parties)

i. Issue

EPA as a matter of practice generally does not pursue truly small volume waste contributors, but other potentially liable parties sometime do. To date, this problem has arisen primarily in municipal/industrial "co-disposal" landfill cases where generators of chemical or industrial wastes have brought contribution actions against large numbers of small parties who contributed only modest amounts of trash or other MSW. These contribution actions are premised on generic studies which show that MSW contains small quantities of hazardous substances. In such cases, the resulting litigation and other transaction costs can overwhelm the truly small volume parties, and are likely to far exceed the allocable share of each such party, even if liability can be established. The Administration therefore believes that truly small volume waste contributors should receive protection against such actions both as a matter of equity, and as a means of reducing transaction costs.

ii. Proposal

Both the Bill and the Revised Title provide exemptions from liability to "de micromis" parties, but distinguish between contributors of MSW on the one hand, and contributors of hazardous substances on the other. The Bill established cutoffs of five hundred (500) pounds of MSW, and ~~ten~~ (10) pounds or liters of hazardous substances, respectively. "De micromis" MSW contributors whose contributions fell below the MSW cutoff would have an absolute exemption from CERCLA liability. "De micromis" non-MSW contributors whose contributions fell below the non-MSW cutoff would be wholly exempt from third-party contribution actions and would be exempt from actions by EPA unless their contribution significantly contributed to response costs. Under the Revised Title, the hazardous waste de micromis exemption threshold is changed to less than 55 gallons of liquid materials containing hazardous substances or pollutants or contaminants or 100 pounds of solid materials containing hazardous substances or pollutants or contaminants. For MSW, all contributors of only MSW who are either (i) an owner, operator, or lessee of residential property, (ii) a small business, or (iii) a small non-profit

organization would be exempt under the Revised Title. "Small business" is defined as a business that employs less than 100 employees and is a small business "concern" as defined by the Small Business Act (i.e., independently owned and operated).

b. De Minimis Parties

i. Issue

CERCLA currently authorizes expedited settlements with de minimis parties. In adding this provision to CERCLA in 1986, Congress recognized the need to provide small volume waste contributors an early opportunity to fully resolve their liability for a site to avoid both the full impact of CERCLA's joint and several liability scheme and the transaction costs incurred in monitoring site activities and defending against contribution claims.

However, a number of factors have resulted in an under-utilization of these authorities. As a result, many de minimis waste contributors have had to incur costs in monitoring developments at Superfund sites and have been subjected to third party contribution actions with their attendant high transaction costs. In addition, under-utilization of the de minimis settlement authority has been an impediment to reaching an expeditious overall settlement with the larger waste contributors.

ii. Proposal

Both the Bill and the Revised Title make it substantially easier for EPA to settle with de minimis waste contributors earlier in the site remediation process. Among other things, the amendments would require that the government need only show that the individual PRP's contribution, not the collective contribution of the entire de minimis contributor class, is minimal in comparison to the total waste contributions; and that the contributor's waste is not significantly more toxic than other wastes.

Moreover, to ensure greater use of this authority, EPA would be required, when it rejects a written request for a de minimis settlement, to explain in writing why use of this authority is inappropriate.

The de minimis provisions have been further expanded in the Revised Title to link the early settlement provisions with the allocations process. EPA will provide settlement offers to known de minimis parties at three specified points in time, prior to the full commencement of the allocation process. EPA is required to offer settlement to all such notified de minimis parties within a set period of time, and with respect to the third opportunity for settlement, if EPA fails to meet this deadline, and the de minimis party is a small business, EPA may not collect a premium in any settlement with that party after the deadline has passed.

c. Lenders and Trustees

i. Issue

While CERCLA §101(20)(A) exempts persons who, without participating in the management of a facility, hold indicia of ownership in the facility primarily to protect a security interest, questions regarding the judicial interpretation of this "security interest" exemption have generated uncertainty within the financial and lending communities. In particular, uncertainty exists with regard to the extent to which a secured creditor may undertake activities to oversee the affairs of a person whose facility is encumbered by a security interest without incurring CERCLA liability. Specifically, there is concern over whether actions commonly taken by a secured creditor ("lender") -- such as monitoring facility operations; requiring compliance with legal requirements and compliance-related activities; refinancing or undertaking loan workouts; providing financial advice; and undertaking other similar actions that may affect the financial, management, and operational aspects of a business -- may constitute evidence that the lender is "participating in the management of a facility" and thus avoid exemption.

In April 1992, EPA promulgated its Final Rule on Lender Liability. The Final Rule defined and amplified the meaning of the key terms of the statutory exemption. In addition to clarifying the meaning of the terms and providing a "bright line" liability standard, the overall goals of the final rule were: (1) to allow lenders to work with their borrowers, without necessarily incurring liability; (2) to preserve a lender's traditional remedy -- foreclosure; and (3) to ensure that the benefits of a taxpayer-financed cleanup inure to the benefit of the public, and not to the private lender. The Rule was well received by the lending community, but has been challenged in the D.C. Circuit Court by the Chemical Manufacturers Association and the State of Michigan. In a recent decision a panel of the Court ruled that EPA lacks authority to issue the Rule.

Lending institutions and others who act as trustees also have expressed concern about the potential CERCLA liability of trustees. In particular, concern has been expressed about the potential liability of "passive trustees," i.e., those who perform ministerial tasks pursuant to trust instruments but exercise little or no control over the management of trust property. Since these trustees often hold legal title to the trust property, there is a fear that they will be found liable as "owners" under §107(a)(1) of property held in trust for response cost beyond the trust's assets.

ii. Proposal

The ~~Bill~~ and Revised Title would clarify EPA's authority to issue regulations interpreting the limitations on liability of lenders, and would specifically ratify the Lender Liability Rule.

The Bill and Revised Title contain an amendment to §101 of CERCLA to address the trustee issue. The Bill states that the term "owner or operator" does not include persons who hold title to a site solely as a trustee, custodian, or fiduciary as required by law, provided that they do not contribute to the release or threatened release of hazardous substances and are not affiliated with a liable party, other than through a custodian or fiduciary role, provided that they

comply with any requirements that EPA establishes for such parties through regulation. The Revised Title uses alternative language to limit liability. Specifically, a fiduciary's personal liability is limited to the extent to which the assets of the trust are sufficient to indemnify the fiduciary. The limit on liability is provided unless the trustee or fiduciary's liability was incurred outside of the fiduciary relationship, the fiduciary was responsible for the contamination at issue, or if the trustee or fiduciary relationship is a sham.

d. Prospective Purchaser

i. Issue

At contaminated sites, uncertainty about future tort, third party, and CERCLA liability, as well as uncertainty about cost, cleanup standards, and the length of time needed for cleanup often create barriers to the redevelopment of these sites, regardless of whether the site is of federal or state concern. This situation deters investment in such sites. As a result, at times, affected communities may suffer such adverse economic effects as declining property values and increasing unemployment rates. Furthermore, since the poor and many minority groups tend to be concentrated in older urban centers or rural areas where polluted real estate is usually found, they may bear disproportionately greater health and environmental risks.

ii. Proposal

The Administration's proposal is designed to reduce the current Superfund-related obstacles to the redevelopment of contaminated sites. It changes provisions of the current law that discourage prospective purchasers from investing in contaminated property and banks from lending money for such purposes. The Administration's proposal contains a conditional exemption from liability for bona fide prospective purchasers of contaminated property. Since CERCLA liability is often noted as a key factor in freezing the market for industrial and commercial properties, this exemption would provide certainty for these parties, thereby providing an incentive to bring contaminated property back into productive use.

Prospective purchasers' liability would be limited if a person: acquired the property subsequent to disposal of hazardous substances; conducted an inquiry, according to good and generally accepted commercial and customary practices, into the prior uses of the site; and in the case of property for residential or noncommercial use, a site inspection and title search revealed no basis for further investigation; provided proper notification of releases of hazardous substances; exercised appropriate care and took reasonable steps to stop on-going releases of hazardous substances, prevent threatened future releases of hazardous substances, and prevent or limit exposure by humans and natural resources to previously-released hazardous substances; and provides cooperation, assistance and site access to those responsible for response actions. To prevent against sham transactions, a bona fide prospective purchaser cannot be affiliated with any other person liable for response costs.

To protect against unjust enrichment the government could place a lien on the property. The lien would be based on the fair market value that response action increases the value of the property, (e.g., the net difference between the value of the property prior to and following the response action). The lien would continue until it is satisfied or all response costs are recovered, whichever is sooner.

e. Municipal Solid Waste ("MSW") Contributors

i. Issue

The question is whether generators and transporters of MSW (including municipal sewage sludge) should be treated differently than other potentially liable parties at Superfund sites. Superfund does not specifically address generators or transporters of MSW and accordingly does not exempt them from potential liability for cleanup costs. The law imposes liability on, among others, a person who arranged for the disposal or treatment of hazardous substances. Studies indicate that ordinary household waste may contain a small percentage of a variety of hazardous substances. In December 1989, EPA issued the Interim Municipal Settlement Policy ("Policy"), which stated that EPA would not pursue generators or transporters of MSW under Superfund absent site-specific information that there were hazardous substances present from industrial, commercial, or institutional processes. This statement was an exercise of enforcement discretion and not an interpretation of the statute.

Although EPA generally has not pursued MSW generators or transporters, the Policy did not prevent other responsible parties from pursuing them for contribution. Municipalities and private generators and transporters of MSW have been sued or threatened with third-party litigation by private parties who believe that MSW contains hazardous substances and also contributes significantly to the costs of Superfund remedies due to the large volume disposed of at sites. Such actions have caused or have the potential to cause substantial transaction and remediation costs that exceed what the Administration believes to be the MSW generators' or transporters' fair contribution to site cleanup.

ii. Proposal

"De Micromis" MSW Contributors. See Part IV. A. 3. a. "De Micromis" Parties above.

Non-"De Micromis" MSW Contributors. The Bill and Revised Title provide settlement opportunities to MSW generators and transporters through the expedited settlement process (See Allocating Cost Shares, Part B below), with the MSW liability limited in aggregate to not more than 10% of the total cost of cleanup at the site. If the allocable share attributable to MSW exceeds the share assumed by such parties in any settlement with the federal government, the difference would be assumed by the Fund.

The Bill and Revised Title provide contribution protection to an MSW contributor that settles with the United States. Parties that do not elect to settle in this manner will be placed in the general cost allocations process.

f. Municipal Owners and Operators

i. Issue

The question is whether municipal owners and/or operators of Superfund sites should be treated differently than private owners/operators because they provided a public service in owning/operating landfills and because they may experience ability to pay problems.

ii. Proposal

While neither the Bill nor the Revised Title proposes adjustments to the liability of municipal owners and operators, the Administration recognizes the unique circumstances of municipal owner/operators and is committed to provide relief to those parties through expedited settlements based on ability to pay. The Bill and Revised Title also contain an explanation of the factors which may be relevant in determining such parties' ability to pay. A municipal party's provision of "in-kind" services may also be taken into account (considered at fair market value).

The Revised Title also provides authority for ability to pay settlements where the party is a very small business (i.e., 20 or fewer employees and either less than \$1.8 million in gross annual receipts or less than 2 percent net profit margin) and the business may have a limited ability to pay. EPA is required to perform the ability to pay analysis for these parties. EPA may perform the analysis for other parties as well, at its discretion.

g. Authority to ensure finality of settlements

i. Issue

Existing CERCLA settlement authorities do not permit immediately effective releases from liability in most cases, which is contrary to most parties' expectations in settling litigation. Conditioning **this aspect** of settlement on success of the chosen remedy protects the Fund but can leave parties **open** to future claims many years later. Responsible parties contend that since EPA selects the **remedy**, it should bear the risk that the remedy will not work.

The current statute also restricts EPA's settlement authority by requiring EPA to include in all but "extraordinary circumstance" settlements a reopener provision for future liability based on unknown site conditions. Responsible parties claim that this "statutory reopener", in effect, imposes perpetual liability and serves as a disincentive to settlement.

ii. Proposal

Both the Bill and Revised Title would amend CERCLA in a manner that will strike an appropriate balance between the competing interests of providing finality to settling parties while protecting the Fund against the need to fund future remedial actions. The government's covenant not to sue for future liability would become effective upon entry of the consent decree, but would remain in effect only so long as the settling parties are in compliance with the decree. EPA would also be empowered to enter into settlements with complete and final covenants not to sue for future liability -- without statutory reopeners -- where, among other things, such covenants are in the public interest and where the settlors pay a premium for the risks of remedy failure and unknown conditions. However, due to the uncertainties presented by leaving contamination on site, such complete and final covenants will not be available if hazardous substances will remain at the facility at concentrations above protective levels.

B. REDUCING TRANSACTION COST AND INCREASING FAIRNESS IN THE ALLOCATION OF COST SHARES

1. Issue

Many complain of the unfairness of CERCLA's liability scheme, which permits parties to be held liable for more than what they regard as their "share." In addition, government-initiated litigation often commences a second round of private party litigation seeking contribution from other PRPs at the site. Due to the limited information on which allocation can be based and the magnitude of the liability, negotiation and litigation among PRPs on issues relating to allocating costs often is protracted and can generate considerable transaction costs. There is strong federal interest in reducing the transaction costs that CERCLA occasions.

2. Proposal

The Bill and Revised Title contain an early, expeditious and obligatory cost allocation process, for NPL sites with more than two parties, reinforced by appropriate incentives to settle and disincentives to litigate. The Administration regards this as the best approach to the problem of transaction costs and increasing fairness, because the proposal should substantially curtail current contribution litigation and wrangling over allocation of costs without creating a new and potentially expensive and time-consuming formal administrative or judicial process. The proposal places a moratorium on the commencement of cost recovery and contribution suits until the allocation process is concluded. The allocation process must start no later than eighteen (18) months after the commencement of the remedial investigation/feasibility study. To initiate the allocation process, EPA would notify potentially responsible parties that may be assigned shares and provide such parties with a list of neutral allocators. The allocation will be governed by the Gore factors and such other factors as EPA shall establish after notice and comment. PRPs may elect to include natural resource damages in the allocation process. The allocator would issue an allocation report assigning percentage shares of responsibility, including orphan shares. The

federal government would accept any settlement offer based on the allocation scheme, unless it determined that such settlement was not based on a rational interpretation of the facts or was affected by bias, fraud, unlaw conduct or substantial procedural errors.

The Bill and Revised Title create incentives to settle on the basis of the allocation, and disincentives to litigate. Parties who accept the allocation receive the benefits of expedited resolution of liability and Fund payment of much of the orphan share. Those who do not, retain full joint and several liability for all unrecovered costs incurred. Settling parties must waive their right to seek contribution, thus limiting transaction costs associated with such litigation.

The Administration proposes to fund shares of non-viable, limited ability to pay and MSW parties up to \$300-\$500 million a year.

The Revised Title also contains numerous procedural safeguards for the allocation process, including: revised procedures for selecting the allocator and determining the identity of allocation parties; strengthened authority for the allocator to request information relevant to the allocation process; a method for calculating a site-specific litigation risk premium; and the conditions under which a new allocation can be sought by a settling party following the discovery of new information.

TITLE V -- REMEDY SELECTION

Issue

The Administration's proposal in H.R.3800/S.1834 addressed a variety of concerns relating to the speed and cost of cleanups, the degree of cleanup to be required, and the process used in selecting remedies. It was designed to streamline the process, avoid unnecessarily expensive remedies, set clear goals for cleanups, and increase the use of more expeditious "removal" procedures. The revisions to the Bill still seek to achieve those goals. They retain most of the major elements of the original legislation, while addressing questions that were raised regarding the intent and scope of certain provisions, the balancing of uniformity against the need for site specific conditions, and the kinds of federal and state laws that should apply to cleanups.

A. CLEANUP STANDARDS

1. Issue

Setting the proper degree of cleanup at each site has been a source of ongoing controversy. The approach set up under the current statute, which relies heavily on requirements of other federal and state laws, and on site specific risk assessments, has been variously criticized for resulting in inconsistent cleanup levels from one site to another, leading to unnecessarily expensive cleanups, and overestimating the level of risk at sites.

2. General overview of proposal

a. National cleanup goals and risk protocol

The revisions continue to reflect the principle that all communities are entitled to receive the same protection from carcinogenic and non-carcinogenic health risks. This is clarified by requiring that the national risk goal be expressed as a single numerical level rather than through a range as under current regulations. To convert these national goals into site specific cleanup levels, formulas will be developed for the most common contaminants which are simpler (and thus faster) than the current risk assessment process, while allowing local conditions to be taken into account. Uniform national cleanup levels, without adjustment for local conditions, as contemplated in the original legislation, would not be used. The development of the formulas would be part of a broader "national risk protocol" which would also develop procedures governing the assessment of risk in all aspects of the Superfund program. Stakeholder groups will be actively and extensively involved in the development of the risk protocol through a consensus-based rule-making process.

For groundwater and radionuclides, new cleanup standards would not have to be developed. Instead, standards already in existence or currently being developed under the Safe

Drinking Water Act and Atomic Energy Act would be utilized. This clarified the original Bill's intent as to how these aspects of cleanups would be addressed.

b. Compliance with other federal and state laws

The Bill proposed significant changes regarding the federal and state requirements with which Superfund remedies must comply, addressing concerns that the use of "applicable or relevant and appropriate requirements" ("ARARs") causes delay in cleanups (because of disputes between regulators over interpretation) and can impose excessive costs in some cases. Moreover, mandatory compliance with "relevant and appropriate" requirements imposes conditions on Superfund remedies that are not applied in similar cases outside the CERCLA context.

The Revised Title also modifies the current law significantly, but in a different way. It distinguishes between requirements relating to the "conduct or operation" of remedies, and those relating to cleanup levels. All federal and state laws that govern the operation of remedial actions would have to be complied with. Thus, for example, if a CERCLA remedy generated a new discharge into surface or groundwater, existing federal and state laws that regulate such discharges would have to be complied with. (As under current law, however, procedural aspects of such laws would not apply to onsite actions, to avoid causing unnecessary delay.)

Cleanup levels, on the other hand, would be determined for federal purposes through the process developed under the risk protocol (except for groundwater and radionuclides for which standards would be taken from other statutes as described above). The federal cleanup levels would be supplemented by cleanup levels applicable under state law, if they were more stringent than the federal levels. Finally, any state requirements that were not applicable (either to the conduct or operation of the remedy, or to the cleanup levels required) could be made applicable if the state showed that they were consistently used in remediation under state law and determined through a special promulgation process that they should apply to federal cleanups as well.

B. SPEEDING CLEANUPS, CUTTING COST

1. Issue

There is a widely held perception that Superfund remedies are excessively costly. Many believe that ~~remedies~~ incur substantial costs without achieving a commensurate degree of risk reduction, and ~~that~~ some remedies are based on unnecessarily stringent land uses. There also is general agreement that the existing remedy selection process needs to be streamlined to simplify and expedite the selection of remedies to achieve in faster risk reduction at sites.

2. General overview of proposal

a. Modification of preference for permanence and treatment

The Bill retains the current mandate that all remedies must be protective of human health and the environment; this remains unchanged in the Revised Title as well. In addition, both the Bill and Revised Title would repeal the current mandate for permanence to the maximum extent practicable (replacing it with a focus on long-term reliability), and the general preference for treatment, while retaining a preference for treatment at "hot spots." Finally, both the Bill and the Revised Title provide a clear expectation that anticipated land uses will be taken into account in selecting remedies, and establish a statutory "reasonableness" standard for cost in selecting remedies.

Under the Bill, the appropriate remedial approach was to be determined on a site-specific basis by applying modified remedy selection criteria. The nine remedy selection criteria would be changed and reduced to five, to streamline the remedy selection process. An appropriate remedy that is protective of human health and the environment would be determined by considering the remedy's: (1) effectiveness; (2) long-term reliability, that is, its capability to achieve long-term protectiveness of human health and the environment; (3) implementation risk; (4) acceptability to the affected community; and (5) cost in relation to the preceding factors. Under this approach, both cost and community acceptance would play a greater role than they presently do. These changes are all maintained in the Revised Title.

b. Considering land use and the full range of technologies

The Revised Title makes clearer, however, that under these changes, permanent treatment remedies, containment remedies, and other methods would be evaluated on a level playing field. It also clarifies that cost would receive equal weight in this process with other criteria such as long-term and short-term reliability. It also clarifies that the protective levels described earlier can be achieved either through treatment, or containment, or other means, or a mix of means as is most appropriate for the site. Which approach to use in a particular case would be decided by balancing reliability, cost and other pertinent factors; the full range of options could be considered so long as they were ultimately protective.

The Revised Title expands considerably the provision relating to consideration of land use, setting out a variety of criteria by which to assess the land uses that are likely to occur at a site. As under the Bill, recommendations of community work groups regarding land use would be given substantial weight in selecting the remedy. While achievement of the anticipated land use could not be guaranteed in all cases, such land use would be the reference point to determine whether the remedy was protective.

c. Treatment of hot spots

The Revised Title also clarifies the provision requiring a preference for treatment of hot spots. Hot spots are now defined as areas in which hazardous substances are present in high concentrations, or are highly mobile, or cannot be reliably contained, and would present a significant risk to human health or the environment should exposure occur. When a treatment remedy is not available or its cost is unreasonable, interim containment would have to be used with a duty to revisit the decision at least every five years to determine if treatment allowing for a permanent remedy had become available. As under the Bill, any interim containment remedy would include adequate monitoring to ensure the continued integrity of the containment system. A new provision, however, would allow permanent containment remedies to be adopted at landfills, mining sites, and very similar sites where certain conditions occur. This change addresses concerns that the hot spots provision could have resulted in interim containment where even under current law containment is considered acceptable as a final remedy. The Revised Title also makes clear that the preference for treatment is taken into account in the usual process of evaluating alternatives, and not as a separate process.

d. Other changes

To further streamline remedy selection and facilitate rapid voluntary action, the Bill provided for development of generic remedies for categories of sites, taking into account the factors enumerated above. Expedited procedures that include community involvement would also be developed for selecting generic remedies at individual sites. This concept is retained in the Revised Title as well.

A number of other changes are proposed to allow for early, direct and meaningful community involvement as described above. These changes include the opportunity to establish Community Work Groups (CWG) and Community Information Access Offices (CIAO). Through the CWG, communities would play a larger role in making land use recommendations at sites. (A more detailed description of the issues and proposed changes to address community involvement is presented in Title I.)

C. REMOVAL ACTIONS

1. Issue

While the streamlined remedy selection process described above would accelerate risk reduction activities, a need to use removal actions to achieve immediate risk reduction would remain.

2. General overview of proposal

Both in the Bill and in the Revised Title, certain statutory constraints would be changed to enhance the effectiveness of employing removal actions to accomplish rapid risk reduction.

To facilitate the effective use of removal authority the dollar limit on Fund-financed removals would be increased from \$2 million to \$6 million; and the time for completion would be expanded from one year to three years. Additionally, the waiver from these limitations is modified to clarify that a waiver could be used where the nature of the long-term remedial action was uncertain or where it was expected that the removal would make remedial action unnecessary.

The statutory definition of removal would be clarified to remove the ambiguity of whether removal authority is limited to emergency situations or short term actions. Finally, to address concerns that increased use of removal authority may reduce public participation, a public comment period of thirty (30) days would be required whenever the planning period for a removal action exceeds six months.

TITLE VIII-- ENVIRONMENTAL INSURANCE RESOLUTION FUND

A. INSURANCE TRANSACTION COST

1. Issue

Under the current law, high transaction costs result from disputes between insurers and insureds arising out of the liability imposed by CERCLA. These disputes between insurance companies and insureds concern the applicability of contracts of insurance to liability under CERCLA which often result in protracted litigation.

The Administration's Bill was designed to greatly reduce the incidents and costs of coverage litigation related to the Superfund program. By providing greater certainty for both PRPs and insurers, and by providing greater incentives not to litigate, the Revised Title will provide even greater reductions in ancillary litigation and will thus allow costs that would otherwise be spent in adversarial proceedings to be used for cleanup.

2. Proposal

The Bill and the Revised Title establish the Environmental Insurance Resolution and Equity Act of 1994 ("Act"). The Act creates an Environmental Insurance Resolution Fund ("Fund"). The Fund will be administered by a Board of Trustees comprised of public and governmental members, including the Administrator of the EPA, the Attorney General, and the Secretary of the Treasury.

a. Creation of Fund to resolve insurance disputes

The Fund's primary obligation is to resolve disputes between insureds and insurers for claims arising from the disposal of hazardous substances on or before December 31, 1985 at sites listed on the National Priority List, or in connection with removal actions at any non-NPL sites. The Revised Title also precludes coverage for a specific facility if the eligible person has been convicted of a felony under any Federal or State statute which has a material effect on the response costs or natural resource damage incurred at the facility. Although the Bill authorized recovery of only those costs associated with hazardous substances disposed of before December 31, 1985, the Revised Title expands the scope of coverage to costs associated with wastes disposed of at a facility that had pre-1986 disposal. Generally, the Revised Title further establishes that only those persons that have been actively pursuing claims against insurers are eligible to recover against the Fund.

In efforts to avoid disputes concerning the adequacy of proof of insurance, the Revised Title now specifies the type of documentary evidence required to establish proof of insurance, and continues to provide that eligible costs include costs of response, natural resource damages,

and duty-to-defend costs at NPL sites, and removal and duty-to-defend costs at non-NPL sites.

Eligible persons may submit complete requests for resolution offers at any time after the Fund issues interim regulations regarding documentation and procedural issues. Within 180 days of receipt of a complete application, the Fund is required to make one comprehensive offer to each eligible person in the form of a percentage of all eligible costs incurred by that person at all eligible sites. Judicial review of offers made by the Fund is strictly prohibited.

b. Fund offers

Fund offers (also known as resolutions) will vary based on state. Although the Bill provided that the Fund would issue regulations categorizing all states into percentage groupings, to provide greater certainty, the Revised Title specifically designates each state into either: (1) a 20 percent category comprised of the eight states most favorable to insurers; (2) a 60 percent category for the eight states most favorable to the insureds; or (3) a 40 percent category for all other states.

The percentage offer will be based on the States in which eligible sites are located if no litigation venue was established by an eligible person before January 1, 1994. If litigation venue was established prior to January 1, 1994, the percentage will be equally based on the States where litigation venue has been established and the States in which eligible facilities are located. The percentage will be weighted in instances where an eligible person has more than one site in a particular State. In either case, the percentage determination will not include non-NPL sites if the eligible person has been named as a PRP at an NPL site. All sites used to calculate the percentage are accorded equal weight, except "large sites" (generally those at which response costs are expected to exceed \$50 million), which will be counted twice.

To more closely parallel restrictions found in insurance contracts, the Revised Title now adds a limitation of 70% of eligible costs to "owned property sites." Owned properties include those an eligible person owned or leased at the time of initial disposal and where the disposal involved wastes generated by such eligible person. The owned property must represent all or a portion of an NPL facility or one which was subject to a removal action.

An eligible person must accept or reject a resolution within 60 days or be deemed to have automatically rejected the offer. An eligible person who accepts a resolution must waive any future claims against an insurer for eligible costs, and must stay or dismiss each claim pending against an insurer for eligible costs. These claims may be reinstated if the Fund fails to fulfill its obligations in a timely manner.

The Fund will make payments for eligible costs incurred both before and after a resolution offer is accepted by an eligible person. Under the Revised Title, costs incurred prior to acceptance will be paid over a period of ten years, with interest accruing after five years. Costs incurred after acceptance will be paid as they are incurred, except that the Fund may

amortize these costs over five years (with interest) if necessary for cash management purposes.

c. Increased litigation disincentives

If an eligible person rejects a resolution and successfully litigates against or settles with an insurer, the Fund will reimburse the insurer for the lesser of the resolution offer, the final settlement, or the final judgment against the insurer. The Fund may reimburse the insurer for unrecovered litigation expenses if the final judgment is less favorable to the eligible person than the resolution offered by the Fund, but the total reimbursement to an insurer may not exceed the resolution offered by the Fund.

In addition, the Revised Title adds increased incentive for PRPs to accept resolution offers and similarly creates additional disincentives to litigate. Although the Bill originally established a cause of action for 20% of the insurer's litigation costs, the Revised Title now provides that in those circumstances where the eligible person obtains a less favorable judgment than offered by the Fund, the insurer retains a cause of action against the eligible person for 50 % of the reasonable costs and legal fees incurred by the insurer in connection with the litigation.

In no case, however, will an eligible person be liable for more than 200 % of such fees and costs reasonably incurred by an eligible person in the pursuit of its coverage litigation.

An automatic stay of the commencement or continuation of all actions for eligible costs under an insurance contract becomes effective upon enactment of this Title. This stay shall terminate on the earlier of: (1) the rejection of a resolution offer; (2) a determination by the Fund that an offer will not be made; (3) a determination by the Fund that the minimum participation level has not been achieved; (4) failure by the Fund after ten years after enactment of this Act to timely issue a payment equal to the total amount of eligible costs required to be paid that person in any year after that date. Applicable statutes of limitation are tolled during the litigation stay established by this Title.

Regulations, procedures or resolution offers issued by the Fund are not judicially reviewable. Resolution offers are not admissible in judicial proceedings, actions taken by eligible persons pursuant to this Title do not constitute admissions of liability, and obligations of the Fund do not constitute obligations of the United States.

d. Miscellaneous provisions

The Revised Title imposes a variety of new reporting obligations on the President concerning revenue cost projections and whether non-NPL facilities could be included in Title VIII.

Certain jurisdictional and litigation requirements are also established, and the Fund is classified as an agency of the United States for purposes of certain criminal and civil claims relating to false statements.

The Fund is required to prepare annual financial reports in accordance with generally accepted accounting principles setting forth the Fund's ability to satisfy its anticipated obligations. The EPA Inspector General is required to conduct audits and investigations as necessary.

The revised Title also requires that within 150 days of enactment the Fund shall determine whether more than 15 % of the eligible persons who had filed suit against their insurers at the time of enactment have rejected their Fund offers. The provisions of this Title and the insurance fee provisions of Title IX shall cease to be effective if more than 15% of the offers are rejected.

The authority of the Fund to accept requests for resolution and to offer resolutions shall terminate ten years after enactment of this Act. However, the Fund will continue to make payments on resolution offers accepted before termination. The Fund shall terminate if during any two year period after the date ten years after enactment no eligible person makes a claim to the Fund; amounts remaining in the Fund shall be deposited in the General Fund of the Treasury.

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CLEAN WATER ACT REAUTHORIZATION

1. ISSUE STATEMENT

The Clean Water Act, originally adopted in 1972, was designed to restore and maintain our Nation's waters through controlling "point source" pollution. A "point source" is any discrete conveyance, such as a pipe, from which pollutants may be discharged. The Act prohibits the discharge of pollutants from a point source into the Nation's waters except as authorized by a National Pollutant Discharge Elimination System ("NPDES") permit. The Act authorizes EPA to administer the NPDES permit program and to issue a permit for the discharge of a pollutant provided that the permit contains conditions implementing various requirements of the Act. Congress gave states a central role in the permit program, providing that states with NPDES programs approved by EPA may issue NPDES permits for discharges within their jurisdiction. In addition to regulating discharges pursuant to the NPDES program, the Clean Water Act protects the Nation's wetlands by prohibiting discharges of dredged and fill material from point sources into wetlands except pursuant to a permit (known as a Section 404 permit).

In contrast to point source pollution, nonpoint source pollution consists of diffuse runoff from sources such as agricultural and forest lands, and mining and construction sites. In 1987 Congress included in the Act a program providing incentives for states to impose requirements curbing nonpoint source pollution. Many states failed to do so, and nonpoint remains the last significant source of pollution not currently subject to mandatory requirements under the Act.

The Environment Division has been working with EPA and other federal agencies for approximately one year to develop and implement an Administration proposal for revisions to the Clean Water Act. On February 1, 1994, the Administration announced its package of proposed changes to the current Clean Water Act. That package, called the President's Clean Water Initiative, contains recommendations which, among other things, would cure many of the deficiencies in the current Act's enforcement provisions. The President's package would also require states to adopt enforceable requirements for the management of activities that contribute nonpoint pollution.

The principal issue of interest to the Department is a possible "takings" amendment. See issue paper on "takings." Opponents of wetlands regulation argue that such regulation often constitutes a "taking" of private property for which compensation is required under the Fifth Amendment. In addition to the "takings" issue, the imposition of nonpoint source controls and strengthening of the Act's enforcement provisions have generated some controversy.

2. STATUS

In the Senate, the primary vehicle for reauthorization is S. 2093, a bill introduced by Senator Baucus and reported out by a bipartisan majority of the Senate Environment and Public Works Committee. Senator Baucus is expected to bring the bill to the floor in the next couple of months, and we anticipate that in that process the bill's enforcement provisions may be weakened. In the House, Public Works and Transportation Chairman Mineta has introduced a reauthorization bill, H. 3948, but has failed to win the support of a sizeable bipartisan coalition of committee members who have vowed to introduce an alternative bill. In response, Mineta has scheduled hearings on his bill that are expected to occur the week of May 23.

3. DEPARTMENT POSITION

The Baucus bill contains many of the changes advocated by the Administration, and the Administration generally supports it. The bill contains most of the Administration's proposals for wetlands reform, institutes a program for nonpoint source pollution control, and strengthens the Act's enforcement provisions. The Administration has not formally taken a position on the Mineta bill. Administrator Browner is scheduled to testify before Rep. Mineta's Committee on May 24, where she is expected to state that the Administration is dissatisfied with some aspects of the bill and would like to help the Committee improve the bill. One significant problem with the Mineta bill is that it would weaken the requirements of the federal wetlands permitting program.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

Sen. Alan Simpson, has stated that he opposes the Baucus bill's enforcement amendments because he believes the Act's enforcement provisions are currently adequate.

5. REFERENCE MATERIALS

None provided.

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Divider Title: _____

SAFE DRINKING WATER ACT REAUTHORIZATION

The Safe Drinking Water Act requires EPA to determine allowable levels of contaminants in the Nation's drinking water supplies and to establish requirements for reducing pollutants in water systems. Several bills have recently been introduced in the Senate and House to amend the Act. On May 19, the Senate passed S. 2019, a bill introduced in April by Senator Baucus, with amendments. The bill's most significant provisions would: create a \$600 million revolving fund to provide financial assistance to states to develop and upgrade water treatment facilities; replace the requirement that EPA periodically establish standards for a specified number of contaminants with a requirement to focus on the most dangerous contaminants; allow EPA to take cost into consideration when setting standards; repeal a requirement that "best available technology" must be used in all treatment facilities; and provide for control of lead and radon in drinking water.

The bill also contains provisions, not directly related to drinking water, that would: require federal agencies to do takings impact analysis for regulations, guidances, policies, etc. (see **Takings Issue Paper**); require federal agencies to do cost-benefit analysis for major regulations (see **Cost-Benefit Issue Paper**); elevate EPA to cabinet status.

1. STATUS

As noted above, the Senate approved S. 2019 on May 19. The House is now likely to begin to move its bills. Like the Senate bill, the House bills are generally technical or financial in nature, providing for state revolving loan funds to help build needed infrastructure and upgrade water programs, and establishing new procedures by which EPA should set standards for contaminants, among other things. It is likely, though not certain, that the House will pass a bill this year.

2. DEPARTMENT POSITION

The major respect in which the Department has concerns about the Senate bill and the proposed House bills deals with enforcement provisions. We believe they are generally too lax with respect to civil and criminal penalties. For example, the bill allows public water systems to exempt themselves from civil penalty actions by submitting an application for a variance. The same penalty moratorium also attaches if a public water system seeks State assistance for restructuring, if the system otherwise meets the terms and conditions of a State restructuring order. Consistent with most other environmental statutes, moreover, we also propose that citizens be allowed to commence actions for civil penalties for present or wholly past violations, as well as injunctive relief. Citizen suits are a powerful tool in the enforcement arsenal. With respect to criminal penalties, the

Senate bill provides no enhancement of the minimal criminal provision contained in the current Act. We have urged that additional, comprehensive criminal sanctions be included, since violations of drinking water standards are no less severe a threat to public health and welfare, and no less deserving of high penalties, than violations affecting other media under other statutes. A key element, in this regard, would be enactment of a five-year felony provision for knowing violations of the Act, just as the Clean Air Act and Resources Conservation and Recovery Act already contain. These views were reflected in a May 23 letter from OLA/AAG Anthony to OMB Director Panetta, which is attached. They have not been formally transmitted to the Congress.

The President, in an April 20, 1994 letter to Sen. Baucus, said that he "support[s] this legislation and encourage[s] prompt action on it by the Senate." Administrator Browner has also written in general support of the legislation.

3. JUDICIARY COMMITTEE MEMBERS INTERESTS'/POSITIONS

No Committee members have a major interest in the legislation, although Senators Hatch, Metzenbaum, Simpson and Leahy all participated in the recent debate.

4. REFERENCE MATERIALS

MAY 23, 1994 Letter from Sheila Anthony to OMB Director Panetta



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 23, 1994

Honorable Leon E. Panetta
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Panetta:

This responds to your request for the views of the Department of Justice on the Senate Environment and Public Works Committee markup of S. 1547, the "Safe Drinking Water Act Amendments of 1994." We have several concerns with respect to this legislation.

National Drinking Water Regulations (Section 1412)

(f)(2) [p. 44]: To address the problem raised in American Waterworks Association v. EPA, D.C. Cir. No. 91-1338 (awaiting decision), (that is, the impossibility of implementing some treatment techniques in the timeframes mandated by the statute), we suggest adding, after line 25: "Nothing in this paragraph is intended to limit the discretion of the Administrator to require that a treatment technique be implemented in stages over a period longer than five years, if the Administrator determines that implementation of such a technique within five years is not feasible."

Small Systems Programs (Section 1415)

In general, we are concerned that while the enforcement provisions of the bill strengthen those of the current Safe Drinking Water Act, the deterrent effect of those provisions is significantly undermined by the inclusion of penalty moratoriums.

(e)(5)(B) [p. 54]: This provides that a public water system that submits a timely application for a variance shall not be subject to a penalty for violation of a maximum contaminant level or treatment technique. The only trigger for the penalty moratorium is submission of an application, regardless of whether the system is eligible for a variance or whether a variance is appropriate in that case. Further, under the manager's amendment, whether the variance submission is granted or denied, the system may have up to five years (a three year extension that

may be lengthened to five years by the State) to come into compliance with the conditions of the variance if the submission is granted, or with the applicable maximum contaminant level or treatment technique if the variance is denied. The Administrator has no role in determining whether the initial extension of three years should be lengthened to five years. Section 1415 (e) (6). Thus, section 1415 could result in a six-year period during which none of the civil enforcement tools set forth in the Act may be used.

This approach raises questions about whether the bill includes sufficient incentives for achieving the minimum public health benefits mandated by the prescribed contaminant levels and treatment technologies. The provision also raises concerns about whether systems across the country will be treated fairly with respect to each other. This is particularly true when variances may be granted based upon ill-defined criteria such as "affordability" -- a criterion to be defined solely by the State, with no role for the Administrator. Also of concern is the most recent amendment deleting citizens' ability to petition the Administrator to object to a variance decision. We urge that this penalty moratorium provision be deleted. We also recommend that the Administrator's and citizens' roles in the process be restored.

(d) [p. 65]: This provides for a three-year penalty moratorium in the event a public water system seeks State assistance for restructuring, including physical consolidation, if the system is meeting the terms and conditions of a State restructuring order. Apart from the disincentive for earliest possible compliance provided by penalty moratoriums, the drafting of the provision is ambiguous. The provision could be read to mean that the only requirement for the moratorium is a request for assistance, whether or not such a request had been granted, or whether or not the system is under a State restructuring order. Given this reading, a system could extinguish its liability for any ongoing violation simply by seeking State assistance. We suggest that this penalty moratorium provision be deleted.

Enforcement of Drinking Water Regulations (Section 1414)

(a) [p. 69]: We have two concerns. First, in the Administration's proposal for Clean Water Act reauthorization, compliance authority should be allowed against anticipated violations. Accordingly, we suggest adding, after "has violated" and before "any applicable requirement..." in line 9, the words "or will violate..." Second, to indicate clearly that the statute intends that the decision to bring a civil action be discretionary, we suggest, after line 6, changing "shall" to "may."

(c)(2) and (e) [pp. 69 and 75]: These sections do not mandate the imposition of any minimum penalty, and thus allow a court or administrative law judge to award penalties which do not recoup the violator's economic benefit. Such provisions potentially undermine the deterrent value of penalties under the Act, and may send the message that it is economically advantageous to violate the Act. We therefore recommend that (c)(2) [p. 69] be amended to require the recoupment of economic benefit up to the administrative penalty cap. We also recommend that (e) [p. 75] be amended to recoup the economic benefit derived from the violation, regardless of whether that amount exceeds the statutory maximum. This rule could be subject to an exemption for systems that are determined to be "small systems."

(c)(4) [p. 71]: To leave no ambiguity as to the nature of the intended penalty, add, in line 11, the word "civil" before "penalty."

(c)(5)(B) [p. 72]: It should be clear what we presume is the intent here -- that the usual Administrative Procedure Act remedy is appropriate for judicial review of administrative penalty orders. Accordingly, we suggest omitting this final sentence and substituting: ", in which case, the court shall set aside the penalty and remand for a new penalty determination."

(d)(3) [p. 74]: As in the Administration's Clean Water Act reauthorization position, (although we have some reservations about it), this provision should be modified to provide an opportunity for interested persons to have notice and to participate in proceedings regarding civil penalty orders against federal agencies. In addition, interested persons who have participated in those proceedings should be permitted to challenge such orders in accordance with the procedures provided under subsection (c)(5). The Act should also provide that, where such an order has been issued to a federal agency, a citizen suit regarding the same violation is limited to enforcing the order. Civil penalties paid as a result of a citizen suit, moreover, should be paid out of the federal agency's own appropriations. Otherwise, there is no deterrent effect from paying the penalties, because the money is taken from the judgment fund. We have suggested similar provisions (with reservations) in connection with Clean Water Act reauthorization, and similar provisions appear in the current markup of S. 1114. Therefore, we suggest the following new language:

■ (3) PUBLIC REVIEW.

(A) PUBLIC NOTICE. - Before issuing an order under this subsection (d), the Administrator shall provide public notice of, and reasonable opportunity to comment on, the proposed issuance of the order.

(B) RIGHTS OF INTERESTED PERSONS TO A HEARING.- If no hearing is held under paragraph (2), any person who commented on a proposed order may, not later than 30 days after the issuance of the order, petition the Administrator to set aside the order and to provide a hearing on the order. If the evidence presented by the petitioner in support of the petition is material and was not considered before the issuance of the order, the Administrator shall immediately set aside the order and provide a hearing in accordance with paragraph (2). If the Administrator denies a hearing under this subparagraph, the Administrator shall provide to the petitioner, and publish in the Federal Register, notice of and reasons for the denial.

(C) CITIZEN CIVIL ACTION.- Any person may commence a civil action against any Federal agency that fails, within one year after the civil penalty order becomes final, to pay a penalty assessed by the Administrator pursuant to this subsection. Any penalty to be paid as a result of such civil action shall be paid from the federal agency appropriations for the year in which the judgment in the civil action becomes final. Any violation with respect to which the Administrator has commenced and is diligently prosecuting an action under this subsection, or for which the Administrator has issued a final order and the violator has paid a penalty assessed under this subsection within the time allowed for payment of such penalty, shall not be the subject of a citizen civil action except for the purpose of enforcing a penalty order under this subsection."

(e) [p. 75]: Current Supreme Court law interprets the analogous provision of the Clean Water Act (Section 309) to require that the traditional common law test for issuance of an injunction be met before a federal court may enjoin violations of the Clean Water Act. This test is: (a) failure to issue the injunction would result in irreparable injury; (b) legal remedies are inadequate; (c) issuance of the injunction is in the public interest; and (d) the benefits of enjoining the defendant outweigh the injuries that will result. This test can be difficult to meet in the environmental arena, where establishing cause and effect relationships between violations and environmental harm is often very difficult. As with our recommended changes to the Clean Water Act, we propose that the Act be modified to require a district court to issue a permanent injunction fashioning appropriate equitable relief upon a finding of liability in every Safe Drinking Water Act case.

(e) (1) [p. 75]: As suggested for subsection (a) above, add "or will violate" in line 5 after "has violated."

(e) (3) [p. 75]: As we propose in Clean Water Act reauthorization, recovery should also be allowed for enforcement costs as well as civil penalties so that violators, not taxpayers, pay these costs. Accordingly, after "each violation"

in line 25 add: "as well as enforcement and post-judgment monitoring costs."

(j)(2) [p. 78]: This provides that "no enforcement action" (line 13) shall be taken with respect to any violation identified by a system in its proposed consolidation plan if the plan is ultimately approved. Though the drafting is less than clear, the provision apparently forgives any identified violation through the earlier of the date that consolidation is completed or two years after approval of the consolidation plan. Therefore, the amendments do not deter violations of important public health requirements by any system planning to consolidate. Further, since the provision broadly refers to "no enforcement action," it would apparently preclude criminal action as well. We suggest that this provision not be included, or be substantially modified to advance deterrence objectives. At a minimum, the provision should be clarified to allow enforcement in the case of criminal violations, or in the case of imminent and substantial endangerment of health or the environment between approval of the proposed plan and the earlier of consolidation completion or two years after plan approval.

Emergency Powers (Section 1431)

(2) [p. 103]: The Administrator's emergency powers are of critical importance to any enforcement scheme. To the extent that the bill intends to revoke the Administrator's ability to institute a penalty action for violation of a compliance order, we strongly urge that subsection (b) be restored.

Federal Agencies (Section 1447)

(a) [p. 124]: This "federal facilities" waiver of immunity should contain the following provision, a variation of which is found in the Federal Facilities Compliance Act, and which the Administration has proposed for Clean Water Act reauthorization:

Insert on p. 125, after line 7:

(5) "All funds collected by a State from the Federal Government from penalties and fines imposed for violation of any substantive or procedural requirement referred to in subsection ____ shall be used by the State only for projects designed to improve or protect the environment (or public health, as it relates to drinking water), or to defray the costs of environmental protection or enforcement."

(b) [p. 126]: The current Act should be modified to require that, as with citizen suit provisions in other statutes, 60-day notice be given to the Attorney General as well as the Administrator. This provision is needed to ensure that one

requirement of the notice provision is served: advance notice to the Department of Justice of impending litigation.

(j-8) [p. 126]: Citizen Enforcement: Consistent with the Administration's recommendations for modifications to the Clean Water Act, we propose that citizens be allowed to commence actions for civil penalties for present or for wholly past violations, as well as for injunctive relief. In addition, we recommend that the final sentence of current section 300j-8(b) (2) that limits the circumstances under which a citizen may commence an action to require a schedule for a variance or exemption be deleted.

Criminal Enforcement (Section 1473)

The bill contains no provisions for enhancing the minimal criminal enforcement provisions contained in the current Act. We urge the addition of a comprehensive set of criminal sanctions to punish and deter egregious drinking water violations. Doing so would make it clear that violations of the Safe Drinking Water Act are no less severe a threat to public health and welfare, and are no less deserving of high penalties, than violations affecting other media under other statutes. A key element, in this regard, would be the enactment of a five-year felony provision for knowing violations of the Act. Placing these crimes on a par with those under the Clean Air Act and the Resource Conservation and Recovery Act would send the unmistakable message that drinking water crimes are as serious as air pollution or hazardous waste crimes. A five-year felony provision also tracks our recommendation that the basic felony for violations of the Clean Water Act be raised from its current three-year level to five years. In this regard, we also urge the reinsertion of a knowing endangerment provision of the type included in the earlier draft of the bill but deleted from the current version.

We also suggest including a provision that false statements made under the Act be punishable criminally in the same manner as such statements currently are punishable under many other environmental statutes. Although 18 U.S.C. § 1001 already punishes false statements, it is important, as with other environmental statutes, that the particular statute make clear the range of criminal sanctions to which violators are subject.

We further suggest doubling the penalty for any subsequent offense following a first conviction under the Act. Plainly, if the crime is repeated, those once convicted have not heeded the deterrent message of that conviction. We suggest that, as a drafting matter and to conform with several other environmental statutes, the "doubling" language be integrated into all appropriate substantive provisions, and not stand as a separate

subsection. Finally, we recommend that Congress explore ways of compensating those who assist in criminal prosecutions.

Our specific suggestions in this area are set forth below.

As indicated above, we suggest adding the following comprehensive criminal enforcement provision to the bill:

(a) Any person who negligently -

(1) violates any of the applicable requirements of Section 1414(h); or

(2) fails to comply with any order issued pursuant to section 1431,

shall, upon conviction, be punished by a fine of not more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction under this subsection, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(b) Any person who knowingly -

(1) violates any of the applicable requirements of section 1414(h); or

(2) fails to comply with any order issued pursuant to section 1431,

shall, upon conviction, be punished by a fine of not more than \$50,000 per day of violation, or by imprisonment for not more than 5 years, or by both. If a conviction of a person is for a violation committed after a first conviction under this subsection, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(c) Any person who knowingly -

(1) makes any false material statement, representation, or certification in, or omits material information from, or knowingly alters, conceals, or fails to file or maintain any notice, application, record, report, plan, or other document filed or required to be either filed or maintained under this chapter; or

(2) falsifies, tampers with, or renders inaccurate or fails to install any monitoring device or method required to be maintained under this chapter,

shall, upon conviction, be punished by a fine of not more than \$50,000 per day of violation, or by imprisonment for not more than 5 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this subsection, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(d) (1) Any person who commits any violation under subsection (b) or (c) of this section and in the course of or in connection with committing such violation knows at the time that he places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be punished by a fine of not more than \$250,000 or by imprisonment for not more than 15 years, or by both. A person which is an organization shall, upon conviction of violating this subparagraph, be punished by a fine of not more than \$1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this subsection, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(2) The term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(3) The term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss of impairment of the function of a bodily member, organ, or mental faculty.

(4) The term "imminent danger" means the existence of a condition of set of conditions that reasonably could be expected to cause death or serious bodily injury unless the condition is remedied.

Finally, to prevent confusion, we suggest changing section 1414(c)(4) [p. 71] by inserting the underlined language as follows:

(4) ELECTION OF CIVIL PENALTY REMEDY. - If a civil penalty is assessed by the Administrator for a violation pursuant to this subsection, an additional civil or administrative penalty may not be assessed by the Administrator or a Federal court pursuant to this section for the same violation.

- 9 -

Please call us if you have any questions about our position on this legislation.

Sincerely,

Sheila Anthony
Sheila F. Anthony
Assistant Attorney General

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COST-BENEFIT ANALYSIS

1. ISSUE STATEMENT

There is increasing concern among certain Members of Congress and the regulated community that the cost of environmental regulation exceeds its benefits to human health and the environment. It has been estimated that the annual cost of complying with EPA regulations is approaching \$100 billion. Proponents of cost-benefit analysis contend that environmental policy has too often evolved in episodic response to perceived risks and media-generated public pressure without consideration of whether a more limited response would be appropriate. EPA's Science Advisory Board has likewise concluded that the Agency should set its priorities so that EPA's resources are focused on the greatest risks.

Legislation has been proposed that would require EPA to conduct extensive cost-benefit analyses on a more systematic and comprehensive basis. For example, an amendment offered by Senator J. Bennett Johnston (D-LA) would require EPA to perform a detailed risk assessment/cost-benefit analysis of proposed environmental regulations and then set priorities in accordance with the identified risks. For each rule, EPA would be required to certify that the benefits justify the costs.

Proponents of these measures -- such as the National Governors Association, chemical manufacturers, and farmers -- argue that they are not trying to discourage environmental regulation, but to ensure that such regulation is properly targeted. Environmental groups and other opponents argue that EPA already conducts extensive cost-benefit studies, and that new analytical requirements would result in a wasteful diversion of agency resources. They refer to cost-benefit proposals as part of an "unholy trinity" (together with takings bills and unfunded mandate proposals) that would hamstring legitimate environmental regulation.

2. STATUS

Proponents of cost-benefit bills have attempted to attach them to the EPA Cabinet bill and to other environmental legislation. The Senate overwhelmingly adopted (90-8) a modified version of the Johnston Amendment as part of the Senate bill to reauthorize the Safe Drinking Water Act. Last Fall, the Johnston Amendment was attached to the Senate's bill to elevate EPA to Cabinet status. Earlier this year, the House defeated a rule (227 to 191) that would have prohibited floor amendments like the Johnston Amendment to the House EPA Cabinet bill. The Clinton Administration lobbied hard on behalf of the rule, which would have eased passage of the bill, and its defeat suggests that there is considerable support in the House for cost-benefit proposals. We should expect continued efforts on the Hill by

proponents of cost-benefit legislation to attach amendments to environmental legislation.

3. DEPARTMENT POSITION

The President has made clear his belief that "[t]he American people deserve * * * a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society * * *." Executive Order 12866, Regulatory Planning and Review (Sept. 30, 1993). This EO states that "[i]n deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating." The EO recognizes, however, that some costs and benefits are difficult to quantify.

The EO reflects the President's belief that a strong environment and a strong economy go hand-in-hand. Cost-benefit analysis plays an important role in appropriate cases, particularly where there are not intractable disputes over valuation. It is important to bear in mind, however, as many courts have made clear, that the terms of many environmental statutes preclude the outright use of cost-benefit analysis in making regulatory decisions.

As to the EPA Cabinet legislation, this Administration has a strong preference for a clean bill. OMB Associate Administrator Sally Katzen expressed opposition to the Johnston Amendment, saying that it would deprive EPA of needed flexibility, and that the EO already provides for sufficiently rigorous cost-benefit/risk-assessment analysis.

If a Judiciary Committee member asks about cost-benefit issues, it might be advisable to decline to comment on any particular bill or proposal, but instead to emphasize the President's commitment to ensuring that effective cost-benefit analysis is conducted under the EO, and that legislative supplementation appears to be unnecessary at this time.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

Any questions about cost-benefit proposals would likely come from Republican members. Every member of the Committee except Metzenbaum voted for the Johnston cost-benefit amendment to the Safe Drinking Water Act reauthorization bill.

REFERENCE MATERIALS

-- Executive Order 12866, Regulatory Planning and Review
(Sept. 30, 1993)

-- The Cost-benefit Amendment attached to the Senate bill to
reauthorize the Safe Drinking Water Act

Title 3—

Executive Order 12866 of September 30, 1993

The President

Regulatory Planning and Review

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Statement of Regulatory Philosophy and Principles. (a) *The Regulatory Philosophy.* Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

(b) *The Principles of Regulation.* To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

(1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

(2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation

is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

(6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

(12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

Sec. 2. Organization. An efficient regulatory planning and review process is vital to ensure that the Federal Government's regulatory system best serves the American people.

(a) *The Agencies.* Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and assuring that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order.

(b) *The Office of Management and Budget.* Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function. Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory policies. To the extent permitted by law, OMB shall provide guidance to agencies and assist the President, the Vice President, and other regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations, as provided by this Executive order.

(c) *The Vice President.* The Vice President is the principal advisor to the President on, and shall coordinate the development and presentation of recommendations concerning, regulatory policy, planning, and review, as set forth in this Executive order. In fulfilling their responsibilities under this Executive order, the President and the Vice President shall be assisted by the regulatory policy advisors within the Executive Office of the President and by such agency officials and personnel as the President and the Vice President may, from time to time, consult.

Sec. 3. *Definitions.* For purposes of this Executive order: (a) "Advisors" refers to such regulatory policy advisors to the President as the President and Vice President may from time to time consult, including, among others: (1) the Director of OMB; (2) the Chair (or another member) of the Council of Economic Advisers; (3) the Assistant to the President for Economic Policy; (4) the Assistant to the President for Domestic Policy; (5) the Assistant to the President for National Security Affairs; (6) the Assistant to the President for Science and Technology; (7) the Assistant to the President for Intergovernmental Affairs; (8) the Assistant to the President and Staff Secretary; (9) the Assistant to the President and Chief of Staff to the Vice President; (10) the Assistant to the President and Counsel to the President; (11) the Deputy Assistant to the President and Director of the White House Office on Environmental Policy; and (12) the Administrator of OIRA, who also shall coordinate communications relating to this Executive order among the agencies, OMB, the other Advisors, and the Office of the Vice President.

(b) "Agency," unless otherwise indicated, means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(c) "Director" means the Director of OMB.

(d) "Regulation" or "rule" means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. It does not, however, include:

(1) Regulations or rules issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;

(2) Regulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;

(3) Regulations or rules that are limited to agency organization, management, or personnel matters; or

(4) Any other category of regulations exempted by the Administrator of OIRA.

(e) "Regulatory action" means any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected

to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

(f) "Significant regulatory action" means any regulatory action that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Sec. 4. Planning Mechanism. In order to have an effective regulatory program, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President's priorities and the principles set forth in this Executive order, these procedures shall be followed, to the extent permitted by law: (a) *Agencies' Policy Meeting.* Early in each year's planning cycle, the Vice President shall convene a meeting of the Advisors and the heads of agencies to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.

(b) *Unified Regulatory Agenda.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official. Agencies may incorporate the information required under 5 U.S.C. 602 and 41 U.S.C. 402 into these agendas.

(c) *The Regulatory Plan.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). (1) As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan (Plan) of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. The Plan shall be approved personally by the agency head and shall contain at a minimum:

(A) A statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities;

(B) A summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits;

(C) A summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order;

(D) A statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency;

(E) The agency's schedule for action, including a statement of any applicable statutory or judicial deadlines; and

(F) The name, address, and telephone number of a person the public may contact for additional information about the planned regulatory action.

(2) Each agency shall forward its Plan to OIRA by June 1st of each year.

(3) Within 10 calendar days after OIRA has received an agency's Plan, OIRA shall circulate it to other affected agencies, the Advisors, and the Vice President.

(4) An agency head who believes that a planned regulatory action of another agency may conflict with its own policy or action taken or planned shall promptly notify, in writing, the Administrator of OIRA, who shall forward that communication to the issuing agency, the Advisors, and the Vice President.

(5) If the Administrator of OIRA believes that a planned regulatory action of an agency may be inconsistent with the President's priorities or the principles set forth in this Executive order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies, the Advisors, and the Vice President.

(6) The Vice President, with the Advisors' assistance, may consult with the heads of agencies with respect to their Plans and, in appropriate instances, request further consideration or inter-agency coordination.

(7) The Plans developed by the issuing agency shall be published annually in the October publication of the Unified Regulatory Agenda. This publication shall be made available to the Congress; State, local, and tribal governments; and the public. Any views on any aspect of any agency Plan, including whether any planned regulatory action might conflict with any other planned or existing regulation, impose any unintended consequences on the public, or confer any unclaimed benefits on the public, should be directed to the issuing agency, with a copy to OIRA.

(d) *Regulatory Working Group.* Within 30 days of the date of this Executive order, the Administrator of OIRA shall convene a Regulatory Working Group ("Working Group"), which shall consist of representatives of the heads of each agency that the Administrator determines to have significant domestic regulatory responsibility, the Advisors, and the Vice President. The Administrator of OIRA shall chair the Working Group and shall periodically advise the Vice President on the activities of the Working Group. The Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues (including, among others (1) the development of innovative regulatory techniques, (2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making, and (3) the development of short forms and other streamlined regulatory approaches for small businesses and other entities). The Working Group shall meet at least quarterly and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas. To inform its discussions, the Working Group may commission analytical studies and reports by OIRA, the Administrative Conference of the United States, or any other agency.

(e) *Conferences.* The Administrator of OIRA shall meet quarterly with representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those governmental entities. The Administrator of OIRA shall also convene, from time to time, conferences with representatives of businesses, nongovernmental organizations, and the public to discuss regulatory issues of common concern.

Sec. 5. Existing Regulations. In order to reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regula-

tions promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not duplicative or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive order, within applicable law; and to otherwise improve the effectiveness of existing regulations: (a) Within 90 days of the date of this Executive order, each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order. Any significant regulations selected for review shall be included in the agency's annual Plan. The agency shall also identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances.

(b) The Administrator of OIRA shall work with the Regulatory Working Group and other interested entities to pursue the objectives of this section. State, local, and tribal governments are specifically encouraged to assist in the identification of regulations that impose significant or unique burdens on those governmental entities and that appear to have outlived their justification or be otherwise inconsistent with the public interest.

(c) The Vice President, in consultation with the Advisors, may identify for review by the appropriate agency or agencies other existing regulations of an agency or groups of regulations of more than one agency that affect a particular group, industry, or sector of the economy, or may identify legislative mandates that may be appropriate for reconsideration by the Congress.

Sec. 6. Centralized Review of Regulations. The guidelines set forth below shall apply to all regulatory actions, for both new and existing regulations, by agencies other than those agencies specifically exempted by the Administrator of OIRA:

(a) *Agency Responsibilities.* (1) Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

(2) Within 60 days of the date of this Executive order, each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

(3) In addition to adhering to its own rules and procedures and to the requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and other applicable law, each agency shall develop its regulatory actions in a timely fashion and adhere to the following procedures with respect to a regulatory action:

(A) Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory

actions within the meaning of this Executive order. Absent a material change in the development of the planned regulatory action, those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subsection (a)(3)(B) or subsection (a)(3)(C) of this section.

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:

(i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and

(ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

(C) For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law):

(i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;

(ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and

(iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

(D) In emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of this section. For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rulemaking proceedings so as to permit sufficient time for OIRA to conduct its review, as set forth below in subsection (b)(2) through (4) of this section.

(E) After the regulatory action has been published in the Federal Register or otherwise issued to the public, the agency shall:

(i) Make available to the public the information set forth in subsections (a)(3)(B) and (C);

(ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and

(iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

(F) All information provided to the public by the agency shall be in plain, understandable language.

(b) *OIRA Responsibilities.* The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency. OIRA shall, to the extent permitted by law, adhere to the following guidelines:

(1) OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section.

(2) OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods:

(A) For any notices of inquiry, advance notices of proposed rulemaking, or other preliminary regulatory actions prior to a Notice of Proposed Rulemaking, within 10 working days after the date of submission of the draft action to OIRA;

(B) For all other regulatory actions, within 90 calendar days after the date of submission of the information set forth in subsections (a)(3)(B) and (C) of this section, unless OIRA has previously reviewed this information and, since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based, in which case, OIRA shall complete its review within 45 days; and

(C) The review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.

(3) For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing.

(4) Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements:

(A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review;

(B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines: (i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s);

(ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did

not attend, and telephone conversations between OIRA personnel and any such persons); and

(iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section.

(C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review:

(i) The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested;

(ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and

(iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

(D) After the regulatory action has been published in the Federal Register or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

(5) All information provided to the public by OIRA shall be in plain, understandable language.

Sec. 7. Resolution of Conflicts. To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Vice Presidential and Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.

Resolution of such conflicts shall be informed by recommendations developed by the Vice President, after consultation with the Advisors (and other executive branch officials or personnel whose responsibilities to the President include the subject matter at issue). The development of these recommendations shall be concluded within 60 days after review has been requested.

During the Vice Presidential and Presidential review period, communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review and directed to the Advisors or their staffs or to the staff of the Vice President shall be in writing and shall be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket(s). When the communication is not in writing, such Advisors or staff members shall inform the outside party that the matter is under review and that any comments should be submitted in writing.

At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter.

Sec. 8. Publication. Except to the extent required by law, an agency shall not publish in the Federal Register or otherwise issue to the public any regulatory action that is subject to review under section 6 of this Executive order until (1) the Administrator of OIRA notifies the agency that OIRA has waived its review of the action or has completed its review without

any requests for further consideration; or (2) the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration under section 6(b)(3), whichever occurs first. If the terms of the preceding sentence have not been satisfied and an agency wants to publish or otherwise issue a regulatory action, the head of that agency may request Presidential consideration through the Vice President, as provided under section 7 of this order. Upon receipt of this request, the Vice President shall notify OIRA and the Advisors. The guidelines and time period set forth in section 7 shall apply to the publication of regulatory actions for which Presidential consideration has been sought.

Sec. 9. Agency Authority. Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.

Sec. 10. Judicial Review. Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 11. Revocations. Executive Orders Nos. 12291 and 12498; all amendments to those Executive orders; all guidelines issued under those orders; and any exemptions from those orders heretofore granted for any category of rule are revoked.

William Clinton

THE WHITE HOUSE,
September 30, 1993.

[PR Doc. 93-24523]

Filed 10-1-93; 12:12 pm.

Billing code 3195-01-M

Editorial note: For the President's remarks on signing this Executive order, see issue 39 of the *Weekly Compilation of Presidential Documents*.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the appropriate place in the bill, add a new section as follows:

Sec. (a) REQUIREMENT.—Except as provided in subsection (b), in promulgating any proposed for final major regulation relating to human health or the environment, the Administrator of the Environmental Protection Agency shall publish in the Federal Register along with the regulation a clear and concise statement that—

(1) describes and, to the extent practicable, quantifies the risks to human health or the environment to be addressed by the regulation (including, where applicable and practicable, the human health risks to significant subpopulations who are disproportionately exposed or particularly sensitive);

(2) compares the human health or environmental risks to be addressed by the regulation to other risks chosen by the Administrator, including—

(A) at least three other risks regulated by the Environmental Protection Agency or another federal agency; and

(B) at least three other risks that are not directly regulated by the federal government;

(3) estimates—

(A) the costs to the United States Government, state and local governments, and the private sector of implementing and complying with the regulation; and

(B) the benefits of the regulation; including both quantifiable measures of costs and benefits, to the fullest extent that they can be estimated, and qualitative measures that are difficult to quantify; and

(4) contains a certification by the Administrator that:

(A) the analyses performed under subsection (a)(1) through (a)(3) are based on the best reasonably obtainable scientific information;

(B) the regulation is likely to significantly reduce the human health or environmental risks to be addressed;

(C) there is no regulatory alternative that is allowed by the statute under which the regulation is promulgated and that would achieve an equivalent reduction in risk in a more cost-effective manner, along with a brief explanation of why other such regulatory alternatives that were considered by the Administrator were found to be less cost-effective; and

(D) the regulation is likely to produce benefits to human health or the environment that will justify the costs to the United States Government, state and local governments, and the private sector of implementing and complying with the regulation.

(b) SUBSTANTIALLY SIMILAR FINAL REGULATIONS.—If the Administrator determines that a final major regulation is substantially similar to the proposed version of the regulation with respect to each of the matters referred to in subsection (a), the Administrator may publish in the Federal Register a reference to the statement published under subsection (a) for the proposed regulation in lieu of publishing a new statement for the final regulation.

(c) REPORTING.—If the Administrator cannot certify with respect to one or more of the matters addressed in subsection (a)(4), the Administrator shall identify those matters for which certification cannot be made, and shall include a statement of the reasons therefore in the Federal Register along with the regulation. Not later than March 1 of each year, the Administrator shall submit a report to Congress identifying those major regulations promulgated during the previous calendar year for which complete certifi-

cation was not made, and summarizing the reasons therefor.

(d) OTHER REQUIREMENTS.—Nothing in this section affects any other provision of federal law, or changes the factors that the Administrator is authorized to consider in promulgating a regulation pursuant to any statute, or shall delay any action required to meet a deadline imposed by statute or a court.

(e) JUDICIAL REVIEW.—Nothing in this section creates any right to judicial or administrative review, nor creates any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person. If a major regulation is subject to judicial or administrative review under any other provision of law, the adequacy of the certification prepared pursuant to this section, and any alleged failure to comply with this section, may not be used as grounds for affecting or invalidating such major regulation, although the statements and information prepared pursuant to this section, including statements contained in the certification, may be considered as part of the record for judicial or administrative review conducted under such other provision of law.

(f) DEFINITION OF MAJOR REGULATION.—For purposes of this section, "major regulation" means a regulation that the Administrator determines may have an effect on the economy of \$100,000,000 or more in any one year.

(g) EFFECTIVE DATE.—This section shall take effect 180 days after the date of enactment of this Act.

Mr. JOHNSTON. Mr. President, this is an amendment on risk assessment. It will be agreed to later.

But I ask unanimous consent that it be temporarily laid aside. I see Senator BAUCUS is here. But I think Senator CHAFEE wanted time to prepare a statement.

I ask unanimous consent that amendment be temporarily laid aside.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LIEBERMAN addressed the Chair.

The PRESIDING OFFICER. Does the Senator from Louisiana yield the floor?

Mr. JOHNSTON. Yes, Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut [Mr. LIEBERMAN], is recognized.

Mr. LIEBERMAN. I thank the Chair.

ORDER OF PROCEDURE

Mr. LIEBERMAN. Mr. President, I ask unanimous consent that I be allowed to proceed for up to 5 minutes as I in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LIEBERMAN. Mr. President, I thank the Chair.

SAFE DRINKING WATER ACT AMENDMENTS OF 1994

The Senate continued with the consideration of the bill.

AMENDMENT NO. 1720

(Purpose: To require risk assessment and cost-benefit analysis regarding major human health or environmental regulations promulgated by the Environmental Protection Agency)

Mr. JOHNSTON. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Louisiana [Mr. JOHNSTON] proposes an amendment numbered 1720.

Mr. JOHNSTON. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.