

TO: Brad Campbell, CEQ

From: Eric Olsen, Office of the Secretary, USDA

**Subject: PRELIMINARY USDA COMMENTS ON S. 981, REGULATORY
IMPROVEMENT ACT OF 1998: 2/3/98 VERSION**

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Background Concerns

First, USDA strongly believes that the Administration should provide additional time for agency review and analysis. We do not believe that two days is sufficient time to fully analyze and develop USDA's position on this legislation. While there have been opportunities for review of various versions of this legislation, USDA believes that the normal process of developing formal legislative reports should be followed, giving Cabinet Secretaries full opportunity to develop their position on this legislation.

Second, USDA strongly believes that the Administration should take the position that additional hearings on this legislation are necessary. It is USDA's understanding that only one hearing has been held on this legislation. The bill has a number of problematic implications for a variety of USDA and other Executive branch agencies and the public that have not been fully examined in Congressional hearings.

Third, USDA continues to strongly believe that the Administration should not support comprehensive regulatory reform legislation and that subject or agency specific legislation is more appropriate and desirable.

Major Concerns

While USDA has a number of concerns that are briefly described below, I want to highlight USDA's major concerns.

Peer Review--USDA has a number of significant concerns about the peer review provisions of the bill. First, we believe that the peer review requirements, coupled with the requirement to seek public input before doing a risk assessment, will unnecessarily delay the issuance of major rules by at least 1 year. This seems to us to frustrate one of the fundamental goals of the Administration, which is to make the government work better for the public. We do not believe that the public is well served by delaying by at least one year, for example, a major rule to improve food safety.

In general, the bill applies the cost-benefit analysis and risk assessment requirements to both proposed and final major rules. The peer review section requires agencies to provide for peer review of the cost benefit analysis and risk assessment. There is a lack of clarity in when this peer review would occur. Either the peer review occurs once the proposal is issued, and then

again before it goes final. Or, as we read this section, peer review of the cost-benefit analysis and the risk assessment are required a proposed rule is issued and then during the comment period.

In addition, before the agency can even do the risk assessment that will be peer reviewed, section 624(d) requires the agency to notify the public of its intent to conduct a risk assessment and seek data (to the extent practicable). Some USDA agencies regularly conduct risk assessments. The agency may not know when it conducts a risk assessment whether a rule is major or not; the agency may not even know whether it will propose a rule or not. While agencies may typically have information from the public when they are conducting a risk assessment or initiating a rulemaking, why is it necessary to formalize this step in the regulatory process through legislation?

So, after notifying the public and seeking and considering data for the risk assessment, the agency must then have the risk assessment peer reviewed before it issues a proposed rule. The section requires the peer review to be “independent of the agency”. In USDA, we have multiple offices that are independent of the regulatory agency conducting the rulemaking. These offices include the Chief Economist, our Office of Risk Assessment and Cost Benefit Analysis, and our Office of Budget and Program Analysis, not too mention OMB review. We also have scientific agencies which frequently review major regulations.

USDA believes that this existing review is sufficient for a proposed rule and that an additional hurdle of outside peer review will unduly delay important rulemakings.

USDA does not, in general, object to a formal peer review during the comment period. USDA believes, however, that such review already in fact occurs when the public is given the opportunity to review and comment on cost-benefit analysis and risk assessments, an opportunity which USDA typically provides. Any entity that is concerned about a proposed rule can spend their own resources to conduct a more formal peer review.

Moreover, given that both the cost-benefit analysis and risk assessment must be peer reviewed, USDA believes this will require two separate peer review panels, since the subject matter and expertise are so different. This will further add to the cost and delay.

The FACA exemption for peer review is problematic from an open government perspective. Perhaps the meetings can nevertheless be required to be open and publicized. In addition, USDA has typically been subject to a restriction in our appropriations legislation that caps our expenditure for FACA committees, task forces etc at \$1 million annually. That cap already severely restricts our actions, and will likely apply to these peer review panels. This will place USDA in an untenable position of having to choose between public input into a wide array of Departmental programs and the peer review required by this legislation.

Finally, the judicial review section that directs a court to remand or invalidate the rule if the peer review is not conducted needs to be modified to reflect the fact that the peer review may be waived if it has already been performed.

Bottom Line: USDA believes that only one peer review should be required, if any, and that it be conducted during the comment period.

Judicial Review: USDA continues to be strongly concerned that the judicial review provisions continue to create a wide range of opportunities to challenge a rulemaking based on the cost-benefit analysis and risk assessments and need to be modified.

Enhanced Role of OMB: USDA is strongly concerned about providing the Director of OMB with the statutory authority to designate a rule as major for up to 30 days after the close of the comment period. These determinations are currently made during negotiations between the agency and OMB, and we object to overriding this current approach by statutorily give OMB the power to simply designate a rule as major. In addition, USDA is concerned that, while the agency's determination that a rule is or is not major is subject to judicial review, but the Directors determination is not. This is a strange deviation that should be corrected.

Supermandate: As discussed below, USDA remains concerned that the supermandate issue is not adequately addressed by this new language.

The following are some additional concerns and comments from USDA. In addition, the document which follows are technical comments from our Office of Risk Assessment on the risk assessment provisions of the bill.

1. INCREASED DEPARTMENTAL COSTS The costs that could be incurred for peer reviews, for cost-benefit analyses, for risk assessments for certain major rules, and for the potentially broad array of nonrulemaking risk assessments for which OMB determines another risk assessment must be conducted, could impede upon the carrying out of important statutory missions, since the Department's limited monetary and personnel resources will be required to be used to have peer review conducted by persons independent of the agency.

2.DELAYS IN RULE MAKING: The Department would be delayed in carrying out its rule making activities as a result of the risk assessments required, the peer reviews required, the limited exception provided for adoption of a rule without prior compliance with the risk assessment and cost-benefit provisions (the exception doesn't cover situations where the required analyses is unnecessary or merely contrary to the public interest), the authority of OMB to designate a rule as major 30 days after the close of the comment period, and the authority given to a court to remand or invalidate a rule if an agency fails to perform a cost-benefit analysis, a cost-benefit determination, or a risk assessment. Currently the department is only statutorily required to conduct risk assessments for major rules whose primary purpose is to regulate issues of human health or safety, or the environment.

3. SUPERMANDATE Sections 623-625's mandate that cost-benefit and risk assessment criteria be considered in rule making decisions for major rules promulgated under existing statutes, regardless of whether, or how, these statutes specify that this criteria is to be taken into account, could be construed to create a supermandate regarding what criteria rule making decisions must be based upon, thus altering the criteria for rule making otherwise applicable and diminishing the range of discretion available to an agency. The provision in section 622 that nothing shall be construed to supersede any requirement for rule making does not sufficiently alleviate these adverse impacts.

4. INCREASED LITIGATION Increased litigation that could lead to increased costs and delays in rule making could result from the bill's judicial review provisions which permit judicial review of an agency's determination of whether a rule is a major rule and permit the required cost-benefit and risk assessments analyses, and cost-benefit determination to be considered in determining whether a final rule is arbitrary, capricious, an abuse of discretion, or unsupported by the evidence in certain cases.

5. INCREASED JUDICIAL INTRUSION INTO SCIENTIFIC, TECHNICAL, AND POLICY DECISIONS The judicial review provisions could permit judges to second guess scientific, technical, and policy judgements when they consider a rule's cost-benefit and risk assessment analyses as part of their determination of whether a rule is arbitrary or capricious etc. They would also permit judges to substitute their judgements for that of an agency as to whether a rule meets the statutory threshold criteria that would require a cost-benefit or risk assessment analysis be done.

6. INSUFFICIENT EXCEPTIONS FOR NONCOVERED RULES The categories of rules that are not covered by the bill's provisions needs to be expanded to include: rules that implement international treaties, trade agreements, and similar agreements; rules that grant or recognize an exemption or relieve a restriction; rules that authorize the introduction into commerce etc. of animals and plants, as well as products; rules subjected to a referendum by persons directly affected by them; and rules that address human, animal, and plant health and safety.



U.S. DEPARTMENT OF AGRICULTURE

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- ☐ JANET POTTS, COUNSEL TO THE SECRETARY

MESSAGE: More Rec Reform + Food
Safety

Tom and Mary --

Here's a letter with all of the groups that oppose S. 981 and some of the press materials on food safety. You'll notice it is basically all the major public interest groups plus the unions. I don't see AARP on the letter, but they have become involved on the food safety issues here.

Daschle's office suggested to me that the Administration send a letter outlining a set of maybe 6 concerns that need to be addressed, before the markup. Daschle's office also told me that Levin wants a meeting with Bowles to discuss this issue. That might be how the concerns get expressed.

The problem is, I have no idea what the process is over there for determining the Administration's position and strategy. The agencies would certainly want to review such a letter.

The public interest community wants the Administration to affirm their reading of the bill. But it is possible that if we make too strong criticism of it, it could make Lott more likely to want to move the bill.

The other idea I have been playing with is using this bill, if it starts moving, as a vehicle for other items, like our Food Safety Enforcement legislation. This is worth considering as an approach, should a meeting occur-- the Administration wants these changes plus these other items. We need to do a little work on this approach, but it very well may be feasible.

Please let me know if you hear anything. Thanks.

Eric

Also, NY Times is working on a story on the bill as it relates to pesticides. The peer review etc. ^{provisions} that cause delays does not apply to putting new products on the market, but the provisions do apply to taking a product off the market.

CITIZENS FOR SENSIBLE SAFEGUARDS

February 24, 1998

Dear Senator:

As a broad-based coalition of organizations representing working men and women, the environment, consumer concerns, public health, human needs, education, civil rights and other public interest issues, we write to urge you to oppose S. 981, the "Regulatory Improvement Act," and the proposed substitute vehicle for that legislation, released by Senator Thompson on February 4, 1998.

As you may know, many citizens as well as health, safety, and environmental organizations have vigorously objected to S. 981 because it would make it much harder for government agencies to protect the public. While the bill's sponsors assert the new substitute corrects the major flaws in the bill, we do not agree. Indeed, in a number of specific respects discussed in the attached analysis, the substitute bill increases the difficulties that agencies would face in attempting to safeguard the public. The bill, if enacted, would severely damage the government's ability to protect us all from serious harm to our health, safety, and the environment. For these reasons we urge you to oppose its passage.

The substitute would hamstring health, safety, and environmental agencies and threaten the public in five major ways. The bill would:

- Delay agency decision-making with new red tape that creates a thicket of complex procedures for adopting new protective rules;
- Create major new opportunities for regulated interests to attack protective rules in the courts;
- Establish a sweeping, time-consuming program allowing industry scientists to suppress new protections in a secret "peer review" process;
- Hamper agency efforts to address current threats by diverting scarce resources to unnecessary mandatory reviews of thousands of existing safeguards, without regard to the need for such review (a newly added provision that did not appear in the bill as introduced); and
- Place a priority on reducing compliance costs for regulated industries rather than achieving needed protections.

These provisions of the substitute bill, separately and in combination, would harm the public's interest in safe food, safe water, safe workplaces and a healthy environment. They would create tests that emphasize costs rather than safety, procedures that delay action, new tools for industry lawyers to attack rules in court, unfair review panels, and impossible demands to review existing rules that have been critical to progress we have made in improving the quality of life over the last 25 years. We therefore respectfully urge you to oppose this legislation.

Sincerely,

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Action On Smoking and Health
AFSCME
AFL-CIO
Alliance to End Childhood Lead Poisoning
Alaska Clean Air Coalition
Alaska Center for the Environment
Alaska Conservation Voice
Amalgamated Transit Union
American Federation of Government Employees
American Federation of Nurses Local 535, SEIU, AFL-CIO (CA)
American Lung Association
American Lung Association of Metropolitan Chicago
American Lung Association of Michigan
Americans for Democratic Action
Americans for Nonsmokers' Rights
American Nurses Association
American Oceans Campaign
American Public Health Association
Amigos Bravos (NM)
Arizona Toxics Information
Arkansas Fairness Council
Atlantic States Legal Foundation
Boulder-White Clouds Council (ID)
Buckingham Citizens Action League (VA)
CALPIRG
Center for Advancement of Public Policy
Center for Science in the Public Interest
Chesapeake Bay Foundation
Citizens Aware & United for a Safe Environment (TX)
Citizens Commission for Clean Air in the Lake Michigan Basin
Citizens for a Better Environment (WI)
Clean Water Action
Coalition of Washington Communities
Communications Workers of America
Community & Environmental Defense Services (MD)
Community Nutrition Institute
CONNPIRG
COPIRG
Conservation Council of NC
Consumer Federation of America
Consumers Union
Cook Inlet Keeper (AK)
Defenders of Wildlife
Downwinders At Risk (TX)
Earth Island Institute
Earth Justice Legal Defense Fund
Earthlaw

Environmental Advocates
Environmental Defense Fund
Environmental League of Massachusetts
Environmental Working Group
Florida Consumer Action Network
FLORIDA PIRG
Forest Guardians
Friends of the Earth
Galveston-Houston Association for Smog Prevention
Georgia Wildlife Federation
Government Purchasing Project
Greater Boston Physicians for Social Responsibility
Great Lakes United
Greenpeace
Green Valleys Association
Gulf Restoration Network
Hudson River Sloop — Clearwater
Illinois Paddling Council
ILLINOIS PIRG
INPIRG
International Association of Firefighters
International Association of Machinists and Aerospace
International Brotherhood of Teamsters
Iowa Environmental Council
Kansas Sierra Club
Kentucky Resources Council, Inc.
Kentucky Waterways Alliance
Laborer's International Union of North America
League of Conservation Voters
League of Women Voters of the U.S.
Lone Star Chapter of the Sierra Club
MARYPIRG
MASSPIRG
Michigan Environmental Council
Michigan United Conservation Clubs
Migrant Legal Action Program
Military Toxics 20 Project
Mineral Policy Center
Mining Impact Coalition of Wisconsin, Inc.
Mississippi Corridor Neighborhood Coalition
Montana Environmental Information Center
Montana River Action Network
MOPIRG
MPIRG (MN)
Mothers Organized to Stop Environmental Sins (TX)
National Association for Visually Handicapped
National Consumers League

National Education Association
National Environmental Trust
National Environmental Trust of Michigan
National Parks & Conservation Association
National Organization of Women
National Wildlife Federation
National Citizens' Coalition for Nursing Home Reform
Natural Resources Defense Council
NETWORK: A Catholic Social Justice Lobby
New Hampshire Sierra Club
New Jersey Chapter Sierra Club
New Jersey Environmental Lobby
New Transportation Alliance (WI)
New York City Environmental Justice Alliance
NMPiRG
NJPIRG
North Santiam Watershed Council of Salem, Oregon
NO WASTE of Michigan
Ohio Environmental Council
Ohio PIRG
OMB Watch
OSPIRG (TOR)
Oregon Clearing House for Pollution Reduction
Oregon League of Conservation Voters
Oregon Trout
Ozark Watch League
PENNPiRG
People Against Contaminated Environments (TX)
Physicians for Social Responsibility
PIRGM (MI)
Planning and Conservation League
Potomac Headwaters Resource Alliance (WV)
Protect All Children's Environment (NC)
Public Citizen
Regional Environmental Action League (MN)
REP AMERICA (Republicans for Environmental Protection)
Rocky Mountain Chapter of the Sierra Club
Safe Tables Our Priority
Safe Schools (LA)
Salem Audubon Society (OR)
San Diego County Chapter of the Surfrider Foundation
Save Endangered Wilderness
Save the Dunes Conservation Fund (IN)
Save The River, Inc. (NY)
Sierra Club
Sierra Club, John Muir Chapter, Wisconsin
Siskiyou Regional Education Project (OR)

Society for Animal Protection Legislation
Southern Ecumenical Council
Southern Environmental Law Center
Stakeholder Alliance
St. John's Church (Elizabeth, NJ)
Surface Transportation Policy Project
Sustain-The Environmental Information Group
Tennessee Environmental Council
Tennessee Valley Energy Reform Coalition
The Arc of America
Tip of the Mitt Watershed Council (MI)
Transportation Trades Dept., AFL-CIO
UAW
UNITE
United Mine Workers of America
United Steelworkers of America
United Church of Christ, Office for Church in Society
United Church of Christ Network for Environmental and Economic Responsibility
United Food and Commercial Workers International Union
U.S. PIRG
Utah Chapter of the Sierra Club
VPIRG
WASHPIRG
Western Organization of Resource Councils
Western NY Council on Occupational Safety and Health
West Virginia River Coalition
Wildlands Center for Preventing Roads (MT)
Wisconsin's Environmental Decade
WISPIRG
World Institute on Disability
Wyoming Outdoor Council