96-949 ENR
Updated February 10, 1998

CRS Report for Congress

Received through the CRS Web

Environmental Reauthorizations and Regulatory Reform: From the 104th Congress to the 105th

John E. Blodgett
Environment and Natural Resources Policy Division

Summary

The 104th Congress pursued efforts to reform environmental regulations on several fronts: (1) revising regulatory decisionmaking processes; (2) attaching specific reforms to funding bills; (3) establishing a House corrections day calendar of bills addressing specific regulatory problems; and (4) incorporating regulatory reforms into individual program reauthorization bills. Bills were enacted requiring regulators to assess regulatory impacts and unfunded mandates, but after extended legislative battles the most comprehensive reform proposals and many appropriations riders failed passage of both Chambers or else fell to vetoes. However, compromise bills reforming the Safe Drinking Water Act and pesticides regulation were overwhelmingly approved.

The 105th Congress has pursued regulatory reform in four primary directions: (1) proposals to establish a comprehensive cost-benefit/risk analysis framework for regulatory programs, (2) private property "takings" initiatives, (3) amendments and reforms directed at individual environmental statutes, and (4) oversight of environmental programs. While no substantive regulatory reform measure was enacted during the 1st session, legislative activities have included numerous hearings involving comprehensive regulatory reform, "takings," Superfund, and oversight of new clean air regulations. A "takings" bill, H.R. 1534, passed the House. While outcomes are uncertain, further legislative actions along the direction of these initiatives are likely.

Introduction

From the beginning of federal environmental programs, costs imposed on industry and business, state and local governments, and consumers and taxpayers have generated concern. As a result, the evolution of environmental statutes has been paralleled by developments in cost-benefit analysis and in risk assessment to help set priorities and to determine appropriate levels of regulation. But these developments have not been without controversy. Proponents of requiring risk assessment and cost-benefit analyses believe that the resulting data, even if flawed, could usefully inform regulatory decisions; opponents fear that statutorily requiring such analyses could result in EPA being compelled to conform its decisions to those data, regardless of flaws. Attention has also

focused on costs imposed on state and local governments ("unfunded mandates") and on regulatory impacts on private property rights ("takings").

In general, business interests have led support for regulatory reform measures, while environmental stakeholders have opposed such measures for fear they would diminish environmental protections. Through the 103rd Congress, most legislative initiatives to address these issues were unsuccessful, but the White House imposed administrative requirements for cost-benefit and risk analyses (Executive Order 12866, which supersedes earlier E.O.s on the subject) and for analysis by agencies of takings resulting from regulatory actions (E.O. 12630).

Regulatory Reform in the 104th Congress

With new Republican majorities in the House and Senate and numerous regulatory relief initiatives in the House Republican's "Contract with America," the 104th Congress took several approaches to reforming environmental protection regulations:

- broadly reforming administrative procedures for regulatory decisionmaking;
- adding specific reform provisions (riders) to spending bills;
- addressing specific regulatory problems, among others, under a new House procedure for a "corrections day" calendar; and
- incorporating regulatory reforms in amendments to individual programs.

Broad-based Reforms of Regulatory Decisionmaking Procedures

The 104th Congress acted on a number of bills revising regulatory decisionmaking processes.[1] An unfunded mandates bill (P.L. 100-4) provides that points of order may be raised in the House or Senate to ensure congressional consideration of unfunded mandates of more than $50 million on states and cities and requires agencies to prepare cost-benefit analyses for regulations costing $100 million or more. It was followed by initiatives for paperwork reduction (P.L. 104-13) and small business regulatory reform (Title II of P.L. 104-121). The latter requires regulatory flexibility analyses of regulations impacting small business, removed a bar to judicial review of such analyses, and provides for panels comprised of small business representatives to advise on the impact of Environmental Protection Agency (EPA) (and Occupational Safety and Health Administration) regulations (5 U.S.C. 601 et seq.). A separate provision establishes procedures by which Congress has 60 legislative days to review and disapprove new regulations, with expedited procedures for Senate action (5 U.S.C. 801-808).

A step toward a national accounting of regulatory costs and benefits was added to the FY1997 omnibus appropriations bill (P.L. 104-208). This provision directs the Office of Management and Budget to submit annual reports estimating total annual costs and benefits of federal regulations. OMB published the first report, *Report to Congress on the Costs and Benefits of Federal Regulations,* on September 30, 1997.

Other comprehensive regulatory reform bills received congressional action but were not enacted. The House passed H.R. 9, derived from the "Contract with America," which

[1]Rogelio Garcia, *Federal Regulatory Reform: An Overview*, CRS Issue Brief IB95035.

addressed risk assessment, cost-benefit analysis, and regulatory "takings." The Senate extensively debated a similar bill, S. 343. A regulatory reform package was attached to a bill raising the debt ceiling, H.R. 2586, but the President vetoed it. These efforts to change regulatory decisionmaking procedures foundered for several reasons, some with partisan elements. Among the disagreements were whether to make cost-benefit analysis just one factor informing regulatory decisions (as under the unfunded mandates law and E.O. 12866), or to impose a net-benefit test (benefits must exceed costs) before a regulation could go forward (as required by H.R. 9 and S. 343); whether to apply new criteria only to new regulations, or also existing ones; the costs and impacts of "takings" compensation; and the extent of judicial review.

Appropriations Riders

Regulatory reform efforts resulted in a number of riders being attached to FY1996 appropriations bills for EPA and other agencies. The effort to accomplish regulatory reforms through riders peaked in House passage of H.R. 2099, the FY1996 VA-HUD-Independent Agencies appropriations bill. The House approved 17 major riders that would have prohibited EPA from spending FY1996 funds on a number of regulatory and enforcement activities. While such riders are not unusual, the number attached to H.R. 2099, and their content and perceived breadth of impact generated much controversy. After a series of legislative battles, many riders were dropped or softened; in the end, the White House vetoed the bill primarily because of objections to funding amounts, but also cited "legislative riders that were tacked onto the bill without any hearings or adequate public input...." The battles over the riders were finally resolved by enactment of an Omnibus FY1996 Appropriations Act (P.L. 104-134), which included only minor riders. Few efforts to achieve regulatory reforms via riders on funding bills occurred in FY1997.

Corrections Day Calendar

Corrections day, an innovation of the 104th Congress, established a special procedure in the House for taking up bills to correct or repeal particularly troublesome or obsolete regulatory provisions. A number of bills directed at environmental regulations appeared on the corrections day calendar and several passed.

Program-Specific Reforms: Amendments and Reauthorizations

Congress typically authorizes funding in environmental statutes for only a few years. Reauthorizations allow legislators to update programs in light of new knowledge and capabilities, to resolve problems, and to respond to new issues and evolving expectations. As authorizations for funding of most environmental statutes expired by the end of the 104th Congress, regulatory reformers anticipated the opportunity to amend them. (A House rule requires a current authorization before an appropriation bill can be considered, although this requirement is often waived. Permanent program authorities do not expire.)

The first environmental reauthorization bill considered by the 104th Congress was H.R. 961, amendments to the Clean Water Act (CWA). Environmental stakeholders charged that provisions designed to make the Act more flexible and to address regulatory relief issues raised by various industries, states, and cities went too far and diminished health and environmental protections. After a disputatious debate brooking little compro-

mise, H.R. 961 passed the House 240-185. The Senate took no action on the bill. With H.R. 961 (and H.R. 9 and S. 343) stalled in the Senate (and vetoes having blocked many regulatory relief riders), legislative momentum seemed to shift to negotiated reforms directed at individual programs.

Amendments to the Safe Drinking Water Act (SDWA) were enacted as P.L. 104-182.[2] Reforms supported by state and local governments included provisions requiring EPA to analyze costs and benefits of proposals and to consider overall risk reduction when setting most new standards; and provisions increasing compliance and monitoring flexibility for states and public water systems. Congress also established a state revolving fund to help communities finance projects needed to comply with federal mandates and expanded provisions for technical assistance. At the same time, the amendments also added protections desired by environmentalists, for example by requiring information on potential risks to be communicated to customers and by authorizing EPA to test for estrogenic substances in drinking water. With broad agreement that the amendments increased future cost-effectiveness and gave EPA flexibility to address high-priority risks, the conference agreement passed the Senate unanimously and the House 392-30.

Similarly, a compromise to reform the pesticide regulatory program was enacted as the Food Quality Protection Act (FQPA), P.L. 104-170.[3] It, too, comprised a series of tradeoffs. For example, as desired by food industry stakeholders, it removes pesticide food tolerances from the zero tolerance requirement of the Delaney Clause of the Federal Food, Drug and Cosmetic Act, and prohibits states from regulating food pesticide residues differently from federal tolerances; conversely, as desired by environmentalists, it requires EPA to set all new pesticide residue tolerances at a "safe" level without regard to cost, provides for improved data collection on exposure of children to pesticide residues, and preserves state and local regulatory authority over pesticide use. Once negotiations among legislators yielded a compromise, the amendments quickly passed the House by unanimous vote, 417-0, and the Senate by unanimous consent.

In a related area, Congress passed the Accountable Pipeline Safety and Partnership Act of 1966 (P.L. 104-304), which requires the Secretary of Transportation to issue pipeline safety regulations "only upon a reasoned determination that the benefits of the intended standard justify its costs." Environmental groups opposed the bill, saying this language set a precedent for imposing a net-benefit test on environmental regulations.

Regulatory Reform in the 105th Congress

During the 1st session of the 105th Congress, regulatory reform efforts developed in four primary directions:

- proposals to establish a comprehensive cost-benefit/risk analysis framework for regulatory programs— redrafting proposals that failed to be enacted in the 104th Congress;

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[2] Mary Tiemann, *Safe Drinking Water Act Amendments of 1996: Overview of P.L. 104-182*, CRS Report 96-722.

[3] Linda-Jo Schierow, *Pesticide Policy Issues*, CRS Issue Brief IB95016.

- private property "takings" reforms—continuing efforts that fell short in the 104th;
- amendments and reforms directed at individual statutes—moving from the successful revisions to the SDWA and pesticide program to other environmental programs; and
- oversight of environmental programs—particularly of a November 1996 EPA proposal to tighten air quality standards for ozone and particulates.

Comprehensive Regulatory Reform.[4] Efforts to accomplish comprehensive regulatory reform have centered on a Senate bill, S. 981, the Regulatory Improvement Act of 1997, introduced by Senators Thompson and Levin. Key features of the bill would require regulatory agencies to perform cost-benefit analyses and risk assessments on major new rules—those having an economic impact of more than $100 million per year. The Senate Governmental Affairs Committee held hearings on the bill on September 12, 1997. The Administration gave qualified support. Business and industry groups supported the bill, claiming that it would reduce the cost of regulation without endangering the environment or the public's health or safety. Labor, environmental, and other groups opposed the bill, claiming that it would undermine existing health, safety, and environmental regulations. A substitute amendment for S. 981 was released February 4, 1998. The substitute contained revised language addressing various Administration and public interest group concerns with the original bill.

Continuing the concern for total regulatory costs, a provision of the FY1998 Treasury and General Government Appropriations law (P.L. 105-61) requires OMB to submit to Congress by September 30, 1998, a report estimating the annual costs and benefits of federal regulatory programs and of major rules, as well as of public criticisms of them.

Private Property "Takings" Reform.[5] Private property "takings" concerns arise primarily from actions under the Endangered Species Act and the wetlands protection provisions (§404) of the Clean Water Act. In the 105th Congress, initiatives to address private property "takings" have split off from more comprehensive reform proposals. On September 25, 1997, the House Judiciary Committee held hearings on H.R. 922, which addresses the division of jurisdiction between the federal courts and the U.S. Court of Federal Claims regarding "property takings" and compensation; and on H.R. 1534, which would simplify and expedite access to the Federal courts for parties alleging private property "takings." On October 20, 1997, the House passed H.R. 1534, as amended. The Senate Judiciary Committee held hearings on October 7, 1997, on S. 1204, which is identical to H.R. 922 as introduced; and on S. 781, which establishes procedures to ensure private property is not taken except for public use and with just compensation.

Reforming Environmental Programs. Because of new information and existing implementation problems in environmental programs, virtually all stakeholders have an interest in amending environmental statutes, ranging from making current requirements more flexible to adding new protections. Thus opportunities for tradeoffs and compromise to achieve reform seem available.

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[4] See Rogelio Garcia, *Federal Regulatory Reform: An Overview* CRS Issue Brief IB95035.

[5] See Robert Meltz, *The Property Rights Issues,* CRS Report 95-200, and *"Property Rights" Bills Take a Process Approach: H.R. 992 and H.R.1534,* CRS Report 97-877; also Issue Brief 95035.

A noteworthy tradeoff in both the SDWA amendments and the FQPA exchanged more flexibility in a few specific high-cost requirements (desired by states and localities, industry and business) for procedures to inform the public of remaining risks (desired by environmental stakeholders). This information-for-flexibility tradeoff may be attractive in other contexts as well.[6] Another approach to compromises might be to bring down regulatory costs by exploiting opportunities for market-based management incentives and disincentives, which may achieve specified environmental goals more cost-effectively than command-and-control regulation, e.g., amendments reauthorizing the Magnuson Fishery Conservation and Management Act (P.L. 104-297) required the National Academy of Sciences to study tradable quotas for managing fishery resources.

While such compromises in the 104th led to the SDWA and pesticide program reforms, a breakdown in achieving compromise stymied action on Superfund reforms. In the 105th Congress, Superfund continues as a focal point of efforts to achieve another compromise reform of an environmental protection program.[7]

Oversight of Implementation. In November 1996, EPA proposed tightening ozone and particulate standards under the Clean Air Act, which requires EPA to set National Air Quality Standards on the basis of health, without regard to costs. The proposals generated much controversy, particularly from those who would bear greater costs than under the previous standards. Opponents charged that EPA's decision was not supported by adequate scientific evidence, that the standards would be excessively costly, and that EPA did not follow proper procedures in proposing them—in particular, in failing to comply with consultative and regulatory flexibility assessment requirements of the Small Business Regulatory Enforcement Fairness Act (SBREFA), the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act. During the first session of the 105th Congress, some 28 days of oversight hearings addressed these issues.

On July 18, 1997 EPA published its final decision on the standards, to become effective in September. This triggered the new SBREFA review authority by which Congress could consider a joint resolution of disapproval, with special procedures in the Senate to ensure floor consideration within 60 legislative days--but no such action has yet been taken. Bills to delay the new standards have been introduced, however, including H.R. 1984 and S. 1084, with a hearing held on the latter. None of these bills has been reported from committee.[8]

Thus, through the beginning of the second session of the 105th Congress, the oversight function had resulted in much hearing testimony but no legislated changes to specific environmental programs.

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[6] Notably absent from the compromise SDWA amendments and FQPA is any requirement that EPA subject its regulations on a net-benefits test, as proposed by many regulatory reformers but opposed by environmental groups.

[7] Mark Reisch, *Superfund Reauthorization Issues in the 105th Congress*, Issue Brief IB97025.

[8] See James E. McCarthy, *Clean Air Act Issues*, Issue Brief IB97007.