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# USING APPROPRIATIONS RIDERS TO CURB REGULATORY EXCESS

## INTRODUCTION

The House-passed versions of several appropriations bills include a number of spending restrictions. While controversial, these limitations, commonly known as riders, in many cases are necessary to encourage federal agencies to act more responsibly in setting and enforcing regulations. They also are needed to encourage the Clinton Administration to work more assiduously with Congress to reform some of the most seriously flawed regulatory statutes.

As the Senate prepares to consider the Labor/Health and Human Services appropriations bill, and as Congress enters into a conference on other bills, including Veterans Affairs, Housing and Urban Development and Independent Agencies, and Transportation appropriations, Members should make sure that several riders in the House-passed bills are preserved in the final legislation.

The most important deal with:

❶ **EPA (VA/HUD bill)**

- ☞ Delaney Clause;
- ☞ Wetland enforcement;
- ☞ Voluntary environmental self-audits;

❷ **Transportation**

- ☞ CAFE standards;

❸ **Labor/HHS**

- ☞ Ergonomics and fall protection;
- ☞ Striker replacement.

## AN IMPERFECT BUT NECESSARY SOLUTION

Faced with a Congress intent on reducing unnecessary and expensive laws that cannot be justified on public health or environmental grounds, the Clinton Administration has spurned invitations to craft substantive bipartisan reform of existing law. For example, the Environmental Protection Agency (EPA) and Occupational Safety and Health Administration (OSHA) have persisted in implementing new regulations that are inflexible, expensive, and largely divorced from underlying scientific and economic realities. Congress has few tools to reshape this approach to regulation.

The most promising short-term solution is to use the appropriations process to restrict the use of government funds to pursue questionable regulations until a general overhaul of the regulatory process can be achieved. Such riders not only would cool the regulatory zeal of federal agencies, but also would encourage the Administration to show more cooperation in negotiating substantive reform.

## WHAT CONGRESS SHOULD DO

As the Senate and House-Senate conference committees consider the VA/HUD, Labor/HHS, and Transportation appropriation bills, most of the House riders should be retained, both to prevent federal agencies from promulgating ineffective and expensive regulations and to force the White House to focus on much-needed environmental and labor reforms. While most of the riders in the House-passed bills address important areas, several are particularly important, and including them in the bills sent to President Clinton should be a top priority.

**Environmental Protection Agency** (VA/HUD and Independent Agencies bill)

### ❶ The Delaney Clause

The House provision would prohibit EPA from revoking or issuing regulations under Section 409 (the Delaney Clause) of the Federal Food, Drug, and Cosmetic Act whenever a tolerance has been established under Section 408, which addresses standards for raw foods. The rider also would prevent EPA from simply changing the Section 408 tolerance to comply with Section 409.

The Delaney Clause was enacted in 1958 to ban any additive in processed food that has been shown—in any amount—to cause cancer in humans or laboratory animals. This seemed reasonable in the 1950s because, depending on the chemical, scientists could test only for traces of chemicals in quantities on the order of about one in a million. Today, however, with improvements in technology, scientists can test for many of these chemicals in quantities of about one in a quadrillion (a million billion). Indeed, some can be detected almost down to the molecular level. Thus, extremely small trace quantities that were undetectable—and thus allowable—37 years ago now form the basis for a court order requiring EPA to eliminate the use of dozens of pesticides even though EPA's own findings have shown these same pesticides to be safe up to certain levels. Under Section 408 of the same Act, which relates to raw agricultural commodities, EPA has issued regulations setting the tolerance level deemed safe for consumption. Yet the strict language of the Delaney Clause

means that there must be no trace of these same additives in processed foods, despite the finding by EPA that these chemicals can be consumed safely in small quantities. This prohibition is an enormous and needless drain on America's agricultural economy.

Even EPA Administrator Carol Browner has called for a change in the law. In the early days of the Clinton Administration, recognizing that the law was a scientific anachronism, she said that "right now the law says we cannot have these chemicals concentrated in processed foods. We have to accept what the law is. But at the same time we have gotten to a point where we have to say we know a lot more about these chemicals than we did 35 years ago when the law was passed."[1] Unfortunately, the environmental lobby applied severe pressure to the new Administration, and Browner retreated from her initial position. Nevertheless, her early remarks demonstrate the reasonableness of this rider; spending billions of dollars to ban useful, safe pesticides to avoid negligible risks is bad public policy.

### ❷ Wetland Enforcement

As passed by the House, the wetland rider would restrict EPA from enforcing the Section 404 permitting program. The EPA relies on Section 404 of the Clean Water Act to regulate landowners who wish to disturb wetlands on their property. The House rider would restrict EPA's authority to enforce Section 404; the Senate version would limit only its authority to override Army Corps of Engineers permit decisions. While the House rider may be overly broad, and thus may have unintended consequences, the Senate version does not go far enough. In addition to including the Senate provision, the final bill should be strengthened to at least restrict EPA from regulating "non-adjacent" (isolated) wetlands.

There are three principal problems with EPA's current wetland policies.[2]

**First,** the statutory authority itself is questionable. Indeed, authority for "non-adjacent" wetlands seems clearly to be lacking. Obviously, EPA should not pursue policies that neither the Constitution nor federal statute allows it to pursue, and Congress should not permit it to do so.

**Second,** the EPA definition of what constitutes a wetland is too broad. According to the 1987 *Delineation Manual*, a wetland is any land that meets each of the following criteria: inundated or saturated to 12 inches deep for at least seven consecutive days and 5 percent of the growing season, and more than 50 percent of dominant plant species are those found in marshes or swamps regardless of whether they are found elsewhere also. The language is so unnecessarily inclusive that land which is bone dry for almost the entire year can be deemed a wetland.

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1 Keith Schneider, "EPA Plans to Seek Loosening of a Law on Food Pesticides," *The New York Times*, February 2, 1993.

2 For a more detailed criticism of EPA's wetlands policies, see John Shanahan, "A Guide to Wetlands Policy and Reauthorization of the Clean Water Act," Heritage Foundation *Issue Bulletin* No. 195, June 22, 1994.

**Third,** the financial resources of many Americans are being destroyed in the name of protecting wetlands as landowners are forced to surrender, without compensation, their right to use their property. Because many affected individuals make their living or pay their mortgages from income derived from the land, their savings can be wiped out. For example, Bill Stamp's family in Exeter, Rhode Island, has been blocked from farming or developing its 70 acres of land for eleven years, yet has been assessed taxes at rates determined by the land's industrial value—up to $72,000 annually. As a result, this fifth-generation farm family may lose its life savings. The government, however, appears unmoved. As one Army Corps of Engineers enforcement officer told Stamp: "We know that this is rape, pillage, and plunder of your farm, but this is our job."[3]

The rider would give American property owners a temporary, partial reprieve from EPA's intrusive regulation while Congress enacts a new, sensible wetlands protection measure. The reform legislation currently in Congress (but under threat of presidential veto) would make wetlands protection legal, priority-based, and fair to those now forced to shoulder the financial burdens alone.

### ❸ Voluntary Environmental Self-Audits

This rider would prohibit EPA from taking legal action against states or companies for environmental violations discovered during voluntary self-audits and disclosed in compliance with state law.

Companies that conduct voluntary self-audits to identify and quickly correct any inadvertent violations are required to report their findings to the EPA, which then may fine them millions of dollars for past non-compliance. This policy obviously discourages responsible behavior by companies seeking to rectify environmental problems. If this barrier to voluntary compliance is eliminated, companies will be inclined to clean up pollution more rapidly, more thoroughly, and more cheaply. Numerous companies have indicated they would perform self-audits and correct violations if the threat of prosecution was minimized. Thus, restricting EPA from punishing past inadvertent behavior would benefit both the economy and the environment.

## Department of Transportation (DOT bill)

### ❶ CAFE (Fuel Efficiency Standards)

This rider would prohibit the National Highway Traffic Safety Administration from further tightening Corporate Average Fuel Economy standards.

CAFE rules currently require each automobile manufacturer to sell cars that average 27.5 miles per gallon (mpg) and light trucks that average 20.6 mpg. Enacted in response to the oil crisis in 1973, CAFE was designed to maintain

3 National Center for Public Policy Research, "Directory of Regulatory Victims." The Directory serves as a clearinghouse documenting verified instances of regulatory excess that have caused personal tragedy. For information, contact Bob Adams, Project Director, 300 "Eye" Street, N.E., Washington, D.C. 20002; (202) 543-1286.

stable, low oil prices by reducing demand. The primary support for continuing the program now comes from the environmental lobby, which sees CAFE as a permanent way to conserve energy.

Experience indicates that the program has serious unintended consequences. Tighter standards yield little if any benefit but impose tremendous social and economic costs. The social costs include the additional deaths and serious injuries caused by cars that, while fuel efficient, are less safe because they are of lighter construction. Terminating the CAFE program would save thousands of lives. According to economists Robert Crandall of the Brookings Institution and John Graham of the Harvard School of Public Health, 1989 model cars were about 500 pounds lighter than they would have been without the 27.5 mpg economy standard. Crandall and Graham estimate that this weight reduction is responsible for almost one-fifth of passenger fatalities and that the program results in an estimated 2,500 additional deaths and 25,000 additional serious injuries per model fleet year.[4] This is a high price to pay for a government program that yields questionable benefits.

CAFE standards also reduce the affordability of new cars and encourage consumers to keep less fuel efficient cars for a longer time. A 1995 study by Charles Rivers Associates has found that increasing standards by 30 percent would raise the average price of cars by $1,500 and trucks by $2,100. This sticker price increase would lead consumers to keep their older, less fuel efficient autos longer, which in turn would increase pollution by an estimated 4 percent by 2010.[5]

Tighter CAFE standards could be devastating to average families. The reason the traditional full-size family station wagon no longer is widely sold is that car manufacturers found it difficult to meet the 27.5 mpg standard for cars with these "gas guzzlers" in their fleets. Consequently, the market for even less fuel efficient minivans exploded because minivans had to meet only the light truck standard of 20.6 mpg.[6] But if standards for light trucks are raised, manufacturers will be forced to raise prices dramatically to cut sales of the minivan so that their fleet average is in compliance. Most families no longer could afford the only vehicle designed specifically for families.

## Department of Labor (LABOR/HHS bill)

### ❶ Ergonomics and Fall Protection

These riders prohibit OSHA from developing or issuing any proposed or final ergonomics standard during fiscal 1996, and requires OSHA to revise its fall protection standard to adjust the height threshold for required fall protec-

4 Robert W. Crandall and John D. Graham, "New Fuel-Economy Standards: The Politics of Energy," *The American Enterprise*, March/April 1991, p. 68.

5 Charles Rivers Associates, Inc., "The Impact of Raising Corporate Average Fuel Economy (CAFE) Standards," July 1995. The price increase figures are based on manufacturers meeting standards by 2005.

6 The 20.6 mpg standard for light trucks is effective for model year 1995. Model year 1996 light trucks must meet a 20.7 mpg standard.

tion equipment (e.g., railings) from 6 feet to 16 feet before it can begin enforcing the rule.

OSHA's proposed ergonomics and latest fall protection rulemakings are classic examples of how OSHA puts the search for completely risk-free workplaces above common sense. Although Congress intended that OSHA assure workers safe and healthy working conditions, overly burdensome regulations like ergonomics and fall protection present a significant barrier to job creation and increased real wages. OSHA estimates its proposed ergonomics standard will cost $4 billion per year, and the National Association of Homebuilders estimates the fall protection standard will increase the cost of a home by $1,000 to $5,000. The ergonomics standard alone is the equivalent of almost 285,000 entry-level, minimum wage jobs or 115,000 full-time jobs paying $12.14 per hour with complete benefits. Further, OSHA's draft ergonomics standard requires employers to alter work practices continuously to keep up with developments in ergonomics. It is difficult to imagine how employers can ensure compliance with a regulatory moving target without incurring substantial additional costs.

OSHA should be looking at less costly alternatives, but it is not. A broad-based standard like OSHA's draft regulation would impose large and unnecessary costs on small business without necessarily reducing ergonomic injury and illness. OSHA's mandate to formulate an ergonomics standard is based on a subjective and unclear definition. The evidence of causation is unclear, and risk factor threshold levels are unsubstantiated. There has been too little scientific research on ergonomic disorders for anyone to know whether such research can provide adequate guidance for the development of a broad standard.

### ❷ Striker Replacement

This rider prohibits any executive order or rule that penalizes a contractor because it permanently replaced lawfully striking workers during fiscal 1996.

Executive Order 12954, issued March 8, 1995, requires that any federal contractor who hires permanent striker replacement workers be subject to termination of the contract or debarment. The $100,000 annual threshold effectively extends coverage to contractors receiving 90 percent of federal contracts and will raise the cost of federal contracts as employers are forced to take into account the potential cost of settling labor disputes. The Employment Policy Foundation estimates the annual economic cost of implementing the order at-between $520 million and $2 billion.[7] Further, the order will increase the likelihood of strike activity, hurting both union workers and employers through lost wages and output, and may discourage unionized employers from even bidding on federal contracts. It also will increase the incentive for businesses to set up nonunion subsidiaries and encourage the use of nonunion subcontrac-

7 Kenneth. L. Deavers, "The Economic Costs of Executive Order 12954: Barring Federal Contractors from Hiring Permanent Striker Replacements," Employment Policy Foundation, 1995.

tors, two moves that ultimately hurt union workers' income and job opportunities.

## CONCLUSION

While permanent labor and environmental policy reform should be pursued, many of the problems addressed by the House appropriations riders are so egregious that immediate relief should be granted. While these riders are an imperfect solution, Americans should view them as necessary to encourage recalcitrant federal agencies to work with Congress to reform some of the nation's most burdensome regulatory statutes.

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